

Nos. 24-1820 & 24-1821

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

BRISTOL MYERS SQUIBB CO,
Plaintiff-Appellant,

v.

XAVIER BECERRA, *et al.*
Defendants-Appellees,

JANSSEN PHARMACEUTICALS INC,
Plaintiff-Appellant,

v.

XAVIER BECERRA, *et al.*
Defendants-Appellees.

On Appeal from the United States District Court for the District of New Jersey,
Nos. 3-23-cv-03335, 3-23-cv-03818 (Hon. Zahid N. Quraishi)

**BRIEF OF AMICI CURIAE AARP, AARP FOUNDATION, JUSTICE IN
AGING, THE CENTER FOR MEDICARE ADVOCACY, AND THE
MEDICARE RIGHTS CENTER IN SUPPORT OF DEFENDANTS-
APPELLEES AND URGING AFFIRMANCE**

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September 16, 2024

CORPORATE DISCLOSURE STATEMENT

AARP and AARP Foundation

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax.

AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

Justice In Aging

Justice in Aging is a non-profit, tax-exempt organization incorporated in the District of Columbia. The organization has no parent corporation, and no publicly held company has 10% or greater ownership. It has no affiliated entities and has not issued shares or securities.

The Center for Medicare Advocacy

The Internal Revenue Service has determined that the Center for Medicare Advocacy is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. The Center is organized as a non-profit corporation under Connecticut law and also operates as a registered non-profit in Washington, D.C. The Center is not a subsidiary of any other corporation, has no affiliated entities, and has not issued shares or securities.

The Medicare Rights Center

The Internal Revenue Service has determined that Medicare Rights Center Inc. is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. The Center is organized as a non-profit corporation under New York law. The Center is not a subsidiary of any other corporation, has no affiliated entities, and has not issued shares or securities.

Dated: September 16, 2024

s/ Maame Gyamfi
Maame Gyamfi

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE¹

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans ages 50 and older to choose how they live as they age. With a nationwide presence, AARP strengthens communities and advocates for what matters most to the more than 100 million Americans 50-plus and their families: health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults building economic opportunity and social connectedness.

A major priority for AARP and AARP Foundation is advocating for access to affordable prescription drugs and health care, including participating as amici curiae in federal and state courts.

The Center for Medicare Advocacy is a national, nonprofit law organization that works to advance access to comprehensive Medicare coverage, health equity, and quality health care for older adults and people with disabilities. Founded in 1986, the Center advocates on behalf of beneficiaries in administrative and legislative forums and serves as legal counsel in litigation of importance to

¹ Amici curiae certify that no party or party's counsel authored this brief in whole or in part, or contributed money intended to fund its preparation or submission. Amici curiae also certify that no person, other than themselves, their respective members, and their undersigned counsel, contributed money intended to prepare or submit this brief. All parties have consented to the filing of this brief. FED. R. APP. P. 29(a)(2).

Medicare beneficiaries and others seeking healthcare coverage. The Center has addressed prescription drug affordability issues on behalf of beneficiaries for decades. It advocates for Medicare coverage of necessary medications and other health care, with a particular focus on the needs of beneficiaries with longer-term and chronic conditions. The Center provides training regarding Medicare and healthcare rights throughout the country. Its systemic advocacy is based on the experiences of the real people who contact the Center every day.

Justice in Aging is a national non-profit legal advocacy organization that fights senior poverty through law. Justice in Aging was founded in 1972 (originally under the name “National Senior Citizens Law Center”) and maintains offices in Washington, D.C. and Los Angeles, California. Justice in Aging advocates for affordable health care and economic security for older adults with limited resources, focusing especially on populations that have traditionally lacked legal protection. Justice in Aging’s work includes substantial advocacy on behalf of nursing facility residents, including federal administrative and legislative advocacy.

The Medicare Rights Center is a national, nonprofit organization that works to ensure access to affordable and equitable health care for older adults and people with disabilities through counseling and casework, educational programs, and legislative and administrative advocacy. Medicare Rights was founded in 1989 to

provide information and support to beneficiaries, caregivers, advocates, and professionals. Its National Helpline receives thousands of calls each year from people struggling to afford their care, including the prescription medications they need to maintain their health and well-being.

Amici are organizations that represent the interests of older adults. We file this brief because a ruling in favor of the Plaintiffs-Appellants reversing the lower court's decision would prevent millions of older adults from accessing affordable prescription drugs, threaten the financial integrity of the Medicare program ("Medicare"), and cost taxpayers billions of dollars.

SUMMARY OF ARGUMENT

The Inflation Reduction Act of 2022 ("IRA") is a landmark law that for the first time authorizes the Secretary of the U.S. Department of Health and Human Services ("HHS") to negotiate directly with drug companies to determine the price that Medicare will pay for a select number of the most expensive brand-name drugs. This historic provision is already fulfilling its promise to lower drug prices as the recently announced negotiated prices for the first 10 drugs are 38% to 79% cheaper than the drugs' 2023 list prices. The negotiated prices are also lower than the prices that Medicare prescription drug plans pay. Overall, if the new negotiated prices had been in effect during 2023, Medicare would have saved an estimated \$6 billion and Medicare beneficiaries would have saved \$1.5 billion. Simply put, this

new law will allow millions of older people to access affordable prescription drugs, protect the financial integrity of Medicare, and save American taxpayers billions of dollars.

Ever-escalating drug prices have hit older people particularly hard, forcing millions to make devastating decisions because they cannot afford the medications they need. Nearly 56 million people are enrolled in Medicare Part D, the federal government's voluntary prescription drug benefit program for Medicare beneficiaries. On average, they take between four and five prescription medications per month and have a median annual income of \$36,000. The vast majority have chronic conditions requiring lifelong treatment.

Many older people lack the resources to pay exorbitant and continuously increasing drug prices. As a result, they are forced to make drastic choices such as choosing between paying for their medication or paying for basic life essentials such as food, housing, or heat. Some people skip doses, split doses, or forego filling their prescriptions altogether to make ends meet. Others sell everything they own and drain their resources because the price of their medication is beyond their reach.

Not only do high drug prices take a terrible toll on older people's finances, but they also adversely impact their health. Millions of older people do not consistently adhere to their prescribed drug treatment because they cannot afford

their medication. Consequently, they suffer from worsening health conditions, higher healthcare expenses, hospitalizations, and even death.

It is not just older people who suffer under ever-escalating drug prices. Spiraling drug prices also endanger the financial sustainability of Medicare and cost taxpayers billions of dollars in unnecessary spending. Every year, Medicare pays more than \$130 billion for prescription drugs. Before the IRA, there was no predictable limit to how high drug prices could go. Medicare was powerless to address the out-of-control drug prices because the law prohibited the program from negotiating for better prices. As a result, Medicare had to pay what drug manufacturers charged even when prices continued to increase as much as ten times faster than the rate of inflation. *See Leigh Purvis & Stephen W. Schondelmeyer, AARP Pub. Pol’y Inst., Trends in Retail Prices of Brand Name Prescription Drugs Widely Used by Older Americans, 2006 to 2020, 5 fig. 1 (June 2021).*² These increases have often occurred without any justification and with no foreseeable endpoint. *Id.* at 5.

Recognizing the growing crisis, Congress included the prescription drug provisions in the IRA to reduce drug prices and bring essential relief to older people, Medicare, and American taxpayers. The Medicare drug price negotiation

² <https://www.aarp.org/content/dam/aarp/ppi/2021/06/trends-in-retail-prices-of-brand-name-prescription-drugs-widely-used-by-older-americans.10.26419-2Fppi.00143.001.pdf>.

program (“Negotiation Program”) is the cornerstone of the IRA’s prescription drug provisions because it addresses the primary barrier to accessing prescription drugs – the drug companies’ charging unjustifiable and out-of-control prices. Allowing HHS to negotiate what Medicare will pay for certain drugs is imperative because, without it, drug companies will continue to set prices at exorbitant levels and many older people would be denied access to critical medications.

While it is no surprise that the pharmaceutical industry is attempting to stop the Negotiation Program, the needs of the American people must be paramount in this Court’s consideration of these appeals. Skyrocketing drug prices are wreaking havoc on millions of older people and federal spending. The Negotiation Program addresses this crisis by allowing HHS to negotiate the Medicare prices of drugs. Consequently, the lower court’s decision must be affirmed.

ARGUMENT

The IRA’s Negotiation Program is a monumental step forward that will help millions of older people access affordable medications and protect the financial security of Medicare. Any effort to end or weaken the Negotiation Program will only compound the harm the law is meant to prevent.

As the lower court and its sister courts have consistently ruled, the Medicare drug price negotiation provisions of the IRA are constitutional. *See, e.g., Bristol Myers Squibb v. Becerra*, Civ. No. 23-3335, 2024 WL 1855054 (D.N.J. Apr. 29,

2024) (concluding that the Negotiation Program did not violate the First and Fifth Amendments and the unconstitutional conditions doctrine); *Novo Nordisk v. Becerra*, Civ. No. 23-20814, 2024 WL 3594413 (D.N.J. July 31, 2024) (finding that the IRA negotiation provisions do not violate the First and Fifth Amendments and separation of powers doctrine, among other claims.) The program should remain and proceed as mandated.

I. The Negotiation Program Will Help Millions Of Older People Finally Be Able To Afford Life-Sustaining Prescription Drugs.

Stopping the IRA’s Negotiation Program will prevent millions of older adults from being able to afford the medications they need. In fact, the program is already proving that it will provide them with substantial savings. On August 15, 2024, the Center for Medicare & Medicaid Services (“CMS”) announced the negotiated prices for the first 10 drugs that were selected by the program. CMS, *Medicare Drug Price Negotiation Program: Negotiated Prices for Initial Price Applicability Year 2026* (Aug. 14, 2024) [hereinafter “*CMS Negotiated Prices Fact Sheet*”].³ These drugs treat chronic conditions, such as cardiovascular disease, diabetes, and cancer. *Id.*

The negotiated prices for these 10 drugs are 38% to 79% cheaper than their 2023 list prices. *Id.* The new prices are expected to save Medicare beneficiaries

³ <https://www.cms.gov/newsroom/fact-sheets/medicare-drug-price-negotiation-program-negotiated-prices-initial-price-applicability-year-2026>.

\$1.5 billion in out-of-pocket costs in the first year of the program alone. *Id.* For example, the negotiated price for Appellant Bristol Myers Squibb’s Eliquis is 56% cheaper, taking a 30-day supply of Eliquis from a list price of \$521 to a negotiated price of \$231. *Id.* The negotiated price for Appellant Janssen Pharmaceutical’s Xarelto is 62% cheaper, taking it from a list price of \$517 to a negotiated price of \$197. *Id.* Thus, ending the Negotiation Program would deny Medicare beneficiaries critical savings and reinforce the drug unaffordability crisis.

The Negotiation Program results from decades of Congressional investigations, hearings, and testimonies about the devastating effect escalating prescription drug prices have on the people who need them. *See, e.g.,* H. Comm. on Oversight & Reform, 117th Cong., *Drug Pricing Investigation, Majority Staff Report*, 162-63 (Dec. 10, 2021) (summarizing Congressional drug price investigations and recommendations for Medicare drug price negotiation).

A primary objective of the program is to make prescription drugs more affordable. Inflation Reduction Act, Pub. L. No. 117-169, §§ 11001-11003 (2022). This objective is essential because, for decades, people in the U.S. have paid among the highest prices in the world for prescription drugs – often two to three times higher than people in other countries for the same medicines. *See* Andrew W. Mulcahy et al., Rand Corp., *International Prescription Drug Price Comparisons: Current Empirical Estimates and Comparisons with Previous Studies*, at xii fig.

S.1. (July 2022)⁴ (finding U.S. prices 256% higher than 32 comparison countries combined).

Despite this fact, before the IRA, pharmaceutical companies continued to raise drug prices at alarming rates. For example, in August 2023, AARP’s Public Policy Institute released a report showing pharmaceutical companies increased the prices of the most expensive 25 drugs that Medicare Part D pays for by an average of 226% from the time the drugs first entered the market. Leigh Purvis, AARP Pub. Pol’y Inst., *Prices for Top Medicare Part D Drugs Have More Than Tripled Since Entering the Market*, 1 (Aug. 10, 2023) [hereinafter, *2023 AARP Medicare Part D Drug Prices Report*].⁵ Some of these products’ prices were more than eight times higher in 2023 than when the company launched the drug. *See id.* All but one of the top 25 drugs’ lifetime price increases greatly exceeded the corresponding annual rate of general inflation since each product has been on the market. *Id.*

What is more, in 2022, amid a pandemic and a financial crisis, the pharmaceutical industry raised prices on over 800 prescription medications—including 75 of the top brand name drugs with the highest total Medicare Part D spending. Anna Wells, *Over 800 Prescription Medications Got More Expensive in*

⁴ https://www.rand.org/pubs/research_reports/RR2956.html.

⁵ <https://www.aarp.org/content/dam/aarp/ppi/topics/health/prescription-drugs/prices-top-medicare-part-d-drugs-tripled-entering-market.doi.10.26419-2fppi.00202.001.pdf>.

January 2022, Good Rx Health (Feb. 22, 2022)⁶ (analyzing prescription drug list price increases from 2021 to 2022); Leigh Purvis, AARP Pub. Pol’y Inst., *Prices for Most Top Medicare Part D Drugs Have Already Increased in 2022* (Mar. 3, 2022)⁷ (analyzing list price changes for the 100 brand name drugs with the highest total Medicare Part D spending).

Not only were drug prices increasing, but manufacturers were also launching new drugs at higher prices. Deena Beasley, *U.S. New Drug Price Exceeds 200,000 Median in 2022*, Reuters (Jan. 5, 2023).⁸ The median price of a new brand-name prescription drug is about \$200,000 per year, meaning even a nominal price hike equates to thousands of dollars. *Id.*

The prices of the first ten drugs selected for the Negotiation Program show the effect of high prescription drug prices on Medicare spending. AARP’s Public Policy Institute, which has examined drug prices since 2004, examined total Medicare Part D spending between 2017 and May 2023 for the first ten drugs selected for negotiation. Leigh Purvis, AARP Pub. Pol’y Inst., *Medicare Part D Spending on Drugs Selected for Price Negotiation Exceeded \$180 Billion between*

⁶ <https://www.goodrx.com/healthcare-access/research/january-2022-drug-increases-recap>.

⁷ <https://blog.aarp.org/thinking-policy/prices-for-most-top-medicare-part-d-drugs-have-already-increased-in-2022>.

⁸ <https://www.reuters.com/business/healthcare-pharmaceuticals/us-new-drug-price-exceeds-200000-median-2022-2023-01-05/>.

2017 and 2023, Thinking Policy (Aug. 29, 2023).⁹ It found the ten selected drugs alone represented more than \$180 billion in total Medicare Part D spending between 2017 and May 2023. *Id.* Eliquis accounted for \$54.4 billion. *Id.* Xarelto accounted for \$26 billion. *Id.*

These astronomical numbers do not represent the full amount that Appellants Janssen and BMS gained from Part D sales because both Eliquis and Xarelto entered the market years earlier. *2023 AARP Medicare Part D Drug Prices Report, supra* p.9, at 3 fig. 3 (showing Eliquis entered the market in 2012 and Xarelto entered the market in 2011).

The high price of prescription drugs is particularly crushing for older people because they generally live on fixed incomes, have higher rates of chronic health conditions, and have higher rates of prescription drug use. In fact, the median annual income of Medicare beneficiaries is \$36,000. Alex Cotrill et al., Kaiser Fam. Found., *Income and Assets of Medicare Beneficiaries in 2023* (Feb. 5, 2024).¹⁰ More than one in ten Medicare beneficiaries (10%) has no savings or is in debt. *Id.* For this population, any financial setback can lead to financial ruin. They

⁹ <https://blog.aarp.org/thinking-policy/medicare-part-d-spending-on-drugs-selected-for-price-negotiation-exceeded-180-billion-between-2017-and-2023#:~:text=On%20average%2C%20total%20Part%20D,between%202017%20and%20May%202023.>

¹⁰ [https://www.kff.org/medicare/issue-brief/income-and-assets-of-medicare-beneficiaries-in-2023/.](https://www.kff.org/medicare/issue-brief/income-and-assets-of-medicare-beneficiaries-in-2023/)

not only have few resources, but they also have less time to recover from financial losses. *See, e.g.,* Erika Beras, *Seniors are still struggling to recover after the financial crisis*, Marketplace (Dec. 19, 2018)¹¹ (explaining that people close to retirement during the Great Recession still had trouble recovering their financial losses a decade later).

In addition, nearly 56 million Medicare beneficiaries depend on Medicare Part D for prescription drug coverage. MedPAC, *July 2024 Databook: Health Care Spending and the Medicare Program*, 151 (July 2024).¹² On average, they take four to five medications per month. *Id.* at 163, Chart 10-18. Many of these prescribed drugs are used to treat chronic conditions. Eighty percent of older adults have at least two chronic conditions, such as diabetes, heart disease, and chronic kidney disease. Jane L. Tavares et al., Nat'l Council On Aging, *Chronic Inequities: Measuring Disease Cost Burden Among Older Adults in the U.S. A Health and Retirement Study Analysis*, 5 fig. 2 (April 2022).¹³ They often need to take prescription drugs for the rest of their lives to survive.

The prices Medicare pays for prescription drugs directly impact these beneficiaries because what they pay in cost sharing is often directly linked to their

¹¹ <https://www.marketplace.org/2018/12/19/seniors-still-affected-financial-crash/>.

¹² https://www.medpac.gov/wpcontent/uploads/2024/07/July2024_MedPAC_DataBook_SEC.pdf.

¹³ <https://www.ncoa.org/article/the-inequities-in-the-cost-of-chronic-disease-why-it-matters-for-older-adults>.

drug’s price. Medicare Part D beneficiaries enroll in private stand-alone drug plans or Medicare Advantage drug plans. AARP, *What are the costs of Medicare Part D?* (Jan. 5, 2023).¹⁴ Depending on their plan, Medicare beneficiaries incur out-of-pocket costs from premiums, copayments, deductibles, and coinsurance. *Id.* Medicare Part D plans are increasingly reliant on beneficiaries paying coinsurance, which is a percentage of the drug’s price. Juliette Cubanski & Anthony Damico, Kaiser Fam. Found, *Key Facts About Medicare Part D Enrollment and Costs in 2023*, (July 26, 2023).¹⁵

In addition, beneficiaries share the financial burden of high-priced prescription drugs even if they are not taking one themselves because Medicare Part D premiums are calculated to cover a set share of costs for standard coverage. *See, e.g.,* Cong. Budget Off., *How CBO Estimated the Budgetary Impact of Key Prescription Drug Provisions in the 2022 Reconciliation Act*, 25 (Feb. 2023)¹⁶ [hereinafter *CBO Estimated Budgetary Effects*] (stating “Part D premiums are determined in part by a policy benchmark known as the base beneficiary premium, which is based on expected average benefit costs for all Part D enrollees”). Thus,

¹⁴ <https://www.aarp.org/health/medicare-qa-tool/what-are-costs-for-part-d/>.

¹⁵ <https://www.kff.org/medicare/issue-brief/key-facts-about-medicare-part-d-enrollment-and-costs-in-2023/>.

¹⁶ <https://www.cbo.gov/system/files/2023-02/58850-IRA-Drug-Provs.pdf>.

to some degree, high drug prices impose financial strain on *all* Medicare Part D beneficiaries.

Medicare Part B beneficiaries are also adversely affected by ever-increasing drug prices. Part B beneficiaries are responsible for 20% of their prescription drug costs with no annual out-of-pocket limit. Juliette Cubanski et al., Kaiser Fam. Found., *Medicare Part B Drugs: Cost Implications for Beneficiaries in Traditional Medicare and Medicare Advantage*, (Mar. 15, 2022).¹⁷ Like for Medicare Part D, this cost-sharing can represent a significant financial burden for people who are prescribed expensive prescription drugs. *Id.* In 2019, one in four traditional Medicare beneficiaries who used Part B drugs faced an average annual cost-sharing liability of at least \$1,000. *Id.* About 400,000—or about 1 in 10 of those who had Part B drug costs—incurred at least \$5,000 in cost-sharing. *Id.* In another parallel to Medicare Part D, Part B premiums cover a specific share of overall expected costs, meaning *everyone* in the program is paying more due to high-priced prescription drugs.

The first 10 drugs selected for negotiation underscore the financial toll high drug prices have on older adults. In 2022, about 9 million Medicare Part D beneficiaries took at least one of the 10 drugs selected for negotiation. Ass't Sec'y

¹⁷ <https://www.kff.org/medicare/issue-brief/medicare-part-b-drugs-cost-implications-for-beneficiaries-in-traditional-medicare-and-medicare-advantage/>.

for Plan. & Evaluation, *Medicare Enrollees' Use and Out-of-Pocket Expenditures for Drugs Selected for Negotiation under the Medicare Drug Price Negotiation Program*, 2, 5 table 1 (Aug. 9, 2023).¹⁸ In that year alone, they paid more than \$3.4 billion in out-of-pocket costs for just these 10 drugs. *Id.* at 6. For beneficiaries without additional financial assistance, average annual out-of-pocket costs for these drugs were as high as \$6,497 per beneficiary. *Id.* at 6 table 2 (for the drug Imbruvica).

The prices of prescription drugs are so high that millions of beneficiaries cannot afford their medication. Many are forced to make impossible choices, including forgoing their prescribed medication altogether or rationing its use. A 2024 AARP Research survey found that four in ten (38%) Medicare-eligible adults either personally skipped filling a prescription due to its cost or knew someone who did not fill a prescription due to its cost. Teresa A. Keenan, AARP Research, *Affording Prescription Medications Continues to be a Challenge for Adults Ages 50 and Older*, (Aug. 28, 2024).¹⁹

Similarly, a 2022 JAMA Network national panel study found 20% of Medicare beneficiaries surveyed did not adhere to their drugs as prescribed

¹⁸ <https://aspe.hhs.gov/sites/default/files/documents/9a34d00483a47ae03703bfc565ffee9/ASPE-IRA-Drug-Negotiation-Fact-Sheet-9-13-2023.pdf>.

¹⁹ <https://www.aarp.org/pri/topics/health/prescription-drugs/prescription-medication-costs-medicare/>.

because they were too expensive. Stacie B. Dusetzina et al., JAMA Network, *Cost-Related Medication Nonadherence and Desire for Medication Cost Information Among Adults Aged 65 Years and Older in the US in 2022*, (May 18, 2023).²⁰

About 8.5% went without basic life essentials, such as food and heat, to pay for their medication. *Id.* 12.9% of respondents delayed filling prescriptions, 11.1% did not fill a prescription, and 7.9% took less medication or skipped doses. *Id.*

Older people not adhering to their prescribed treatment can worsen their health, resulting in expensive hospitalizations, higher future healthcare costs, and even death. The Centers for Disease Control and Prevention (“CDC”) estimates medication non-adherence causes 30% to 50% of chronic disease treatment failures and 125,000 deaths per year. U.S. Food & Drug Admin., *Why You Need to Take Your Medications as Prescribed or Instructed* (Feb. 16, 2016)²¹ (citing CDC study). Similarly, a 2020 study released by the Council for Informed Drug Spending Analysis estimated unaffordable prescription drug prices would cause 1.1 million people to die prematurely over the next 10 years. Council for Informed

²⁰ <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2805012#:~:text=Conclusion,In%202022%2C%20approximately%201%20in%205%20older%20adults%20reported%20cost,are%20enthusiastic%20about%20their%20use.>

²¹ [https://www.fda.gov/drugs/special-features/why-you-need-to-take-your-medications-prescribed-or-instructed.](https://www.fda.gov/drugs/special-features/why-you-need-to-take-your-medications-prescribed-or-instructed)

Drug Spending Analysis, *Modeling the Population Outcomes of Cost-Related Nonadherence: Model Report*, 3 (Sept. 21, 2020).²²

Given the dire consequences of exorbitant drug costs, it is no wonder the American public has consistently called for HHS to directly negotiate Medicare drug prices with manufacturers. Poll after poll shows overwhelming bipartisan public support for allowing Medicare to negotiate prices. For instance, in August 2023, almost exactly a year after the IRA was enacted, a West Health-Gallup poll showed 83% of the U.S. population favors Medicare being allowed to negotiate with drug companies. West Health-Gallup, *Regardless of Political Party, Americans Overwhelmingly Support Medicare Drug Price Negotiations*, (Aug. 28, 2023).²³

Skyrocketing drug prices are forcing older adults to make life-altering choices that risk their health and financial well-being. The reduced prices and estimated savings from the Negotiation Program will provide them with much needed relief. The program should not be ripped away from them when they are on the cusp of receiving its benefits.

²² https://globaluploads.webflow.com/5e5972d438ab930a0612707f/5fa9bf4419f4da03a7daf190_WHPCXcenda_NonAdherence%20Population%20Model_Report_22Oct2020r.pdf.

²³ <https://www.westhealth.org/press-release/regardless-of-political-party-americans-overwhelmingly-support-medicare-drug-price-negotiations/>.

II. The Negotiation Program Will Protect The Financial Integrity Of Medicare And Save Taxpayers Billions Of Dollars.

Together with harming older adults, ending the Negotiation Program will also harm the financial sustainability of Medicare and cost American taxpayers billions of dollars.

A. Skyrocketing Drug Prices Hurt Medicare.

Medicare is a bedrock of health and financial security for 65 million people who are either at least 65 years old or have disabilities. Juliette Cubanski & Tricia Neuman, Kaiser Fam. Found., *What to Know About Medicare Spending and Financing*, (Jan. 19, 2023).²⁴ It also accounts for 21% of national health spending and 10% of the federal budget. *Id.* at fig. 1, 2 (citing figures from 2021).

Prior to the IRA, a non-interference clause in the Social Security Act prohibited HHS from negotiating the price Medicare pays for drugs directly with manufacturers. 42 U.S.C. § 1395w-111(i). As a result, HHS could not use Medicare's considerable buying power to negotiate lower drug prices even though Medicare accounted for almost one-quarter of all U.S. prescription drug spending. Nguyen X. Nguyen et al., Ass't Sec'y for Plan. & Evaluation, U.S. Dep't of Health & Human Servs., *Medicare Part B Drugs: Trends in Spending and Utilization*,

²⁴ <https://www.kff.org/medicare/issue-brief/what-to-know-about-medicare-spending-and-financing/>.

2008-2021, 2 (June 2023).²⁵ Before the IRA, HHS had no way of assessing whether pharmaceutical companies could justify the prices they were demanding Medicare pay.

Medicare's inability to negotiate drug prices provided drug companies with a special exemption that other Medicare healthcare providers do not have. For decades, hospitals, nursing facilities, and physicians participating in Medicare all have faced limits on payments for their services to ensure the program is affordable for beneficiaries and taxpayers. *See, e.g.*, 42 C.F.R. § 412.1(a) (describing prospective payment systems for inpatient hospital systems). Drug companies, in contrast, received a special carve-out from payment negotiation with Medicare.

The drug companies' special exemption and lack of transparency have led to unsustainable and unjustifiable increases in Medicare drug spending. For example, Medicare currently spends more than \$135 billion on drugs every year. Nguyen, *supra* p.18, at 2 (explaining in 2021, spending by Medicare Part D was \$105 billion and Medicare Fee-for-Service Part B was \$33 billion). It pays higher net prices for top-selling brand-name drugs than the Department of Veterans Affairs, the Department of Defense, and Medicaid. Cong. Budget Off., *A Comparison of Brand-Name Drug Prices Among Selected Federal Programs*, 1-3 (Feb. 2021).²⁶

²⁵ <https://aspe.hhs.gov/sites/default/files/documents/fb7f647e32d57ce4672320b61a0a1443/aspe-medicare-part-b-drug-pricing.pdf>.

²⁶ <https://www.cbo.gov/system/files/2021-02/56978-Drug-Prices.pdf>.

Medicare spending is higher because the other federal health care programs have had the statutory authority to negotiate with drug companies or otherwise obtain lower drug prices. The Commonwealth Fund, *Allowing Medicare to Negotiate Drug Prices* (May 5, 2021)²⁷; see also Gov't Acct. Off., *GAO-21-111, Prescription Drugs: Department of Veterans Affairs Paid About Half as Much as Medicare Part D for Selected Drugs in 2017*, 5 (Dec. 15, 2020)²⁸ (finding the Department of Veterans Affairs paid an average of 54% less per unit of medication than Medicare in 2017, even after considering rebates and discounts.) Prior to the IRA, Medicare did not.

Spiraling drug prices also increase Medicare spending by contributing to the healthcare costs the program must absorb when Medicare beneficiaries suffer bad outcomes when they cannot afford to take their medications as prescribed. Council for Informed Drug Spending Analysis, *supra* p.16, at 3. A 2020 study released by the Council for Informed Drug Spending Analysis found medication nonadherence leads to an additional \$177.4 billion in avoidable Medicare medical costs. *Id.* Conversely, a study published in 2022 found that eliminating cost-related medication nonadherence improved both medication uptake and overall health, and decreased patient deaths and overall medical spending. Zhang et al., *Chronic*

²⁷ <https://www.commonwealthfund.org/publications/explainer/2021/may/allowing-medicare-negotiate-drug-prices>.

²⁸ <https://www.gao.gov/assets/gao-21-111.pdf>.

Medication Nonadherence and Potentially Preventable Healthcare Utilization and Spending Among Medicare Patients, J. Gen. Intern. Med., 3647-48 (Nov. 2022).²⁹

B. The Negotiation Program Protects The Financial Health Of Medicare And Generates Savings For Taxpayers.

The IRA will help reverse the harm caused by skyrocketing drug prices, protect the financial integrity of Medicare, and save money for taxpayers.

In 2023, HHS announced the first ten Medicare Part D drugs subject to the Negotiation Program. Press Release, U.S. Dep't of Health & Human Servs., *HHS Selects the First Drugs for Medicare Drug Price Negotiation* (Aug. 29, 2023)³⁰ (listing the ten Medicare Part D drugs selected for negotiation). The number of drugs subject to negotiation will increase every year to include up to 60 negotiated drugs by 2029. 42 U.S.C. §§ 1320f-1(a)-(b).

As noted above, CMS recently announced the negotiated prices for the first 10 drugs which will go into effect in 2026. *CMS Negotiated Prices Fact Sheet*. Medicare stands to save an estimated \$6 billion in 2026 based on the negotiated prices of those drugs alone. *Id.*

So while HHS is only negotiating prices for a subset of the costliest drugs, the benefits of the Negotiation Program are far reaching. First, it will save

²⁹ https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9585123/pdf/11606_2021_Article_7334.pdf.

³⁰ <https://www.hhs.gov/about/news/2023/08/29/hhs-selects-the-first-drugs-for-medicare-drug-price-negotiation.html>.

Medicare and taxpayers billions of dollars. Second, it will bring program payments for prescription drugs in line with how HHS pays for other Medicare items and services and how other federal healthcare programs pay for prescription drugs. Finally, it will support continued innovation while lowering drug prices.

1. The Negotiation Program Will Save Medicare And Taxpayers Billions Of Dollars.

Medicare will save billions of dollars as a result of the Negotiation Program because the drugs that are subject to negotiation are by definition the ones that result in the highest Medicare spending. For example, between June 2022 and May 2023, Medicare Part D spent more than \$50 billion on the first 10 drugs selected for negotiation alone. CMS, *Medicare Drug Price Negotiation Program: Selected Drugs for Initial Price Applicability Year 2026*, 1 (Aug. 2023).³¹ That number represents nearly 20% of all Medicare Part D spending during that period. *Id.* If the newly announced negotiated prices had been in effect during 2023, the negotiated prices would have saved Medicare an estimated \$6 billion in net covered prescription drug costs. *CMS Negotiated Prices Fact Sheet*. This amount represents 22% lower net spending in the aggregate. *Id.*

In fact, the Congressional Budget Office (CBO) estimates the Negotiation Program will save Medicare and the American taxpayers nearly \$98.5 billion over

³¹ <https://www.cms.gov/files/document/fact-sheet-medicare-selected-drug-negotiation-list-ipay-2026.pdf>.

10 years. Cong. Budget Off., *Estimated Budgetary Effects of Public Law 117-169, to Provide for Reconciliation Pursuant to Title II of S. Con. Res. 14, 5* (Sept. 2022)³² [hereinafter *Estimated Budgetary Effects of Public Law 117-169*].

Permitting HHS to negotiate drug prices will also reduce the federal deficit. The CBO estimates the program will reduce the budget deficit by \$25 billion in 2031 alone. *CBO Estimated Budgetary Effects, supra* p.13, at 4. This reduction will result from reduced Medicare Part D and Part B spending of \$14 billion and \$9 billion, respectively, as well as \$1 billion in other federal spending. *Id.*

Taxpayers will also benefit from the program since they assume the burden of skyrocketing drug prices because Medicare is a public program funded by taxes. Each taxpayer dollar spent for prescription drugs with unjustifiably high prices is money that cannot be invested elsewhere. The savings obtained from the Negotiation Program will help fund other changes in the IRA designed to help reduce Medicare beneficiaries' costs. *Id.* at 2. These benefits include a \$35 monthly insulin copayment cap, no co-payments for recommended adult vaccines, and a new \$2,000 annual out-of-pocket cap for Medicare Part D enrollees starting in 2025. Juliette Cubanski et al., Kaiser Fam. Found., *How Will the Prescription Drug Provisions in the Inflation Reduction Act Affect Medicare Beneficiaries?*

³² https://www.cbo.gov/system/files/2022-09/PL117-169_9-7-22.pdf.

(Jan. 24, 2023).³³ Indeed, the \$2,000 annual cap would not be feasible without price limitations on drug manufacturers because higher price drugs would balloon taxpayers’ costs, which in turn would increase Medicare Part D premiums. *See* Mike McCaughan, *Medicare Part D*, Health Affairs (Aug. 10, 2017)³⁴ (“Beneficiaries’ costs for stand-alone Part D plans are directly related to the expected prescription drug spending in the population, so annual premiums and cost sharing generally increase in line with drug spending trends[.]”).

The Negotiation Program also protects the financial integrity of Medicare because it allows HHS to ensure it is paying more reasonable prices for prescription drugs. The IRA requires drug companies to provide information about their products that HHS would otherwise be unable to access easily. 42 U.S.C. § 1320f-3(e). Using this information, HHS can decide on the appropriate drug price and negotiate accordingly. Thus, this program finally allows HHS to save billions for Medicare and its beneficiaries by giving HHS the tools and transparency needed to push back on indiscriminately escalating drug prices and ensure taxpayer funds are paying for value.

³³ <https://www.kff.org/medicare/issue-brief/how-will-the-prescription-drug-provisions-in-the-inflation-reduction-act-affect-medicare-beneficiaries/>.

³⁴ <https://www.healthaffairs.org/doi/10.1377/hpb20171008.000172/>.

2. The Negotiation Program Will Align Medicare Payments For The Selected Prescription Drugs With Medicare Payments For Other Medicare Items And Services And How Other Federal Programs Pay For Prescription Drugs.

The Negotiation Program finally places drug companies on more equal footing with other healthcare providers by ending their special exemption. *See* 42 U.S.C. § 1320f(a). It also allows Medicare to be on similar footing with other federal health care programs like the Veterans’ Administration, the Department of Defense, and Medicaid and use its bargaining power to obtain lower prices. By allowing HHS to negotiate the prices of certain drugs, the IRA rebalances the bargaining power of Medicare and its beneficiaries with the power of drug manufacturers—affirming what has long been true for other federal programs—that “[t]he Constitution does not guarantee the unrestricted privilege to engage in business or to conduct it as one pleases.” *Dayton Area Chamber of Com. v. Becerra*, No. 3:23-cv-156, --- F. Supp. 3d ---, 2023 WL 6378423 (S.D. Ohio Sept. 29, 2023) (denying plaintiffs’ request for a preliminary injunction in a similar case and explaining “participation in Medicare, no matter how vital it may be to a business model, is a completely voluntary choice.”).

3. The Negotiation Program Supports Innovation While Lowering Drug Prices.

Finally, the Negotiation Program will allow for continued innovation while lowering drug prices. Appellants argue that allowing the government to negotiate

Medicare drug prices would come at the cost of impeding innovation. BMS. Br. 1, 30; Janssen Br. 10-17. But this argument sets up a false binary choice.

For starters, American taxpayers fund nearly all the initial research that leads to new drugs. Virtually all of today’s new drugs have roots in government-funded research at the HHS National Institutes of Health (“NIH”) or leading academic centers across the country. Ekaterina Galkina Cleary et al., JAMA Health Forum, *Comparison of Research Spending on New Drug Approvals by the National Institutes of Health vs the Pharmaceutical Industry, 2010-2019*, 2, 5, 14-15 (Apr. 28, 2023).³⁵ A study comparing research spending by the NIH and the pharmaceutical industry reveals funding from the NIH—totaling \$187 billion—contributed to 354 of 356 drugs (99.4%) approved from 2010 to 2019. *Id.* at 4. As HHS and taxpayers are funding the initial research, they should not be priced out of the benefits of the resulting drugs when they enter the market.

In addition, the CBO found Medicare drug price negotiation will have little to no adverse impact on innovation. The CBO has estimated 13 out of 1,300 drugs, or a mere 1%, would not come to market over the next 30 years as a result of the drug provisions in the reconciliation legislation. *Estimated Budgetary Effects of Public Law 117-169, supra* p.23, at 15. This minimal number contradicts the

³⁵ [https://jamanetwork.com/journals/jama-health-forum/fullarticle/2804378#:~:text=Spending %20and%20approval%20by%20NIH,003](https://jamanetwork.com/journals/jama-health-forum/fullarticle/2804378#:~:text=Spending%20and%20approval%20by%20NIH,003)).

pharmaceutical industry’s claims. Moreover, as the negotiations have continued, members of the pharmaceutical industry have realized that the program is not destroying their business. For example, in July 2024, during a quarterly conference call, Appellant Bristol Myers Squibb Chief Executive Officer Chris Boerner mentioned that, “Now that we’ve seen the final price, we’re increasingly confident in our ability to navigate the impact of IRA on Eliquis.” Kevin Dunleavy, *Bristol Myers CEO 'increasingly confident' company can handle IRA pricing on Eliquis*, Fierce Pharma (July 26, 2024).³⁶

The bottom line is that the Negotiation Program protects the integrity of Medicare and ensures that its taxpayer-funded spending on the costliest prescription drugs is justified. The negotiations have already shown that they will yield billions of dollars in savings. For the good of the country, the Negotiation Program should remain.

III. The Negotiation Program Combats A Primary Driver of Escalating Drug Prices.

The Negotiation Program is essential to achieve what Congress intended – making prescription drugs more affordable and therefore more accessible to Medicare beneficiaries. *See, e.g.,* Juliette Cubanski et al., Kaiser Fam. Found, *Explaining the Prescription Drug Provisions in the Inflation Reduction Act* (Jan.

³⁶ <https://www.fiercepharma.com/pharma/bristol-myers-ceo-increasingly-confident-company-can-handle-ira-pricing-eliquis>.

24, 2023)³⁷ [hereinafter *Explaining the Prescription Drug Provisions*]. As noted above, aside from the negotiation provisions, the IRA has several other provisions that reduce prescription drug-related cost-sharing for Medicare beneficiaries and require drug companies to pay rebates when they increase their prices faster than inflation. *Id.*; see 42 U.S.C. § 1395w-3a(i) (rebates); 42 U.S.C.

§ 1395w-102 (vaccines, insulin copay caps, and out-of-pocket spending caps).

While each of these provisions is critical and targets a specific problem, they are designed to work together with the Negotiation Program to collectively reduce high out-of-pocket costs and high prescription drug prices. The rest of the IRA prescription drug provisions cannot meaningfully bring down prescription drug prices without the Negotiation Program. Thus, without the program, drug prices will continue to rise, escalating the affordability crisis. Three examples illustrate this point.

First, the IRA includes a provision capping annual out-of-pocket costs for Medicare Part D enrollees beginning in 2025. 42 U.S.C. § 1395w-102; Bisma Sayed et al., Ass't Sec'y for Plan. & Evaluation, U.S. Dep't of Health & Human Servs., *Medicare Part D Enrollee Out-Of-Pocket Spending: Recent Trends and Projected Impacts of the Inflation Reduction Act*, 1 (July 7, 2023).³⁸ It also includes

³⁷ <https://www.kff.org/medicare/issue-brief/explaining-the-prescription-drug-provisions-in-the-inflation-reduction-act/>.

³⁸ <https://aspe.hhs.gov/sites/default/files/documents/93a68f3c5ca949dcf331aa>

critical provisions that reduce Medicare beneficiaries' out-of-pocket costs for insulin and vaccines and allow beneficiaries to spread their cost-sharing over the full plan year. *Id*; *Explaining the Prescription Drug Provisions*, *supra* p.27. But without the Negotiation Program, Medicare will still pay high and ever-escalating prices that will ultimately be passed back to the beneficiary in the form of higher premiums and cost-sharing. The prices will also be passed on to taxpayers to cover higher costs in Medicare Part D. *See* McCaughan, *supra* p.24, at 3. In other words, reducing out-of-pocket costs is not a sustainable solution unless the unjustified high drug prices are also addressed.

Similarly, the expansion of the Medicare Part D Low-Income Subsidy (“LIS”) benefit will help qualifying beneficiaries cover their prescription drug costs. *Explaining the Prescription Drug Provisions*, *supra* p.27. Estimates indicate roughly 400,000 people would qualify for improved benefits based on the program’s income and asset threshold. *Id*. Yet while this improvement is critical, many beneficiaries with lower incomes will still be unable to qualify for this benefit and will continue to struggle to afford their prescription drugs. *See* Jerry Mulcahy, U.S. Dep’t of Health & Human Servs., *2024 Medicare Part D Low-Income Subsidy (LIS) Income and Resource Standards*, 2-7 (Feb. 9, 2023)³⁹ (listing

0ec24dd046/aspect-part-d-oop.pdf.

³⁹ https://medicareadvocacy.org/wp-content/uploads/2024/02/2024-Medicare-Part-D-Low-Income-Subsidy-LIS-Income-and-Resource_5082.pdf.

the income and asset standards to qualify for LIS). Thus, the Medicare Part D low-income subsidy expansion will not independently solve the problem of prescription drug affordability.

Requiring drug companies to pay rebates when they increase their prices faster than inflation is an important step that will help discourage drug companies from engaging in relentless price hikes each year. *Explaining the Prescription Drug Provisions, supra* p.27. But unlike the Medicare drug price negotiation program, the rebates do not address whether the underlying drug prices are justified, leaving beneficiaries and taxpayers exposed to overcharging for prescription drugs.

Taken together, the IRA's prescription drug provisions are designed to address high out-of-pocket costs, high taxpayer costs, and high drug prices. The Negotiation Program uniquely addresses unreasonably high prescription drug prices by empowering HHS to directly negotiate Medicare prices for the costliest drugs. The other IRA provisions cannot accomplish the goal of stopping unjustified escalation of drug prices without the Negotiation Program. Thus, the Negotiation Program should proceed as mandated to relieve Medicare and its beneficiaries of the perils of out-of-control prices.

CONCLUSION

Striking down or otherwise restricting the Negotiation Program will harm the health and finances of millions of older Americans, undermine the integrity of Medicare, and defy the interests of American taxpayers. The recently announced negotiated prices show that the program is delivering on its promise of financial relief. The lower court's decision should be affirmed.

September 16, 2024

Respectfully Submitted,

/s/ Maame Gyamfi

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Local Rule 28.3(d), I hereby certify that I am a member of the bar of this Court.

2. This brief complies with the type-volume requirements of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,225 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

3. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) and 3d Cir. L.A.R. 32.1(c) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point.

4. Pursuant to Local Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the paper copies, and that it has been scanned for viruses using CrowdStrike Falcon Sensor, and no virus was detected.

Dated: September 16, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2024, the foregoing Brief of Amici Curiae AARP, AARP Foundation, Justice in Aging, the Center For Medicare Advocacy, and the Medicare Rights Center in Support of Defendants-Appellees was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system which will send notice of such filing to all registered CM/ECF users.

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