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April 11, 2025

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

RE: *Janssen Pharmaceuticals, Inc. v. Secretary of Dept. of Health & Human Services*, No. 24-1821 (argued Oct. 30, 2024)

Dear Ms. Dodszuweit:

We respond to plaintiff's letter regarding *Novo Nordisk Inc. v. HHS*, No. 24-2510. In asserting that it is being made to convey the government's message about the negotiation program in violation of the First Amendment, plaintiff emphasizes that a template Agreement is publicly available on CMS's website. But the template Agreement published by CMS plainly does not run afoul of the First Amendment as it is solely government speech. The manufacturers' only action is to sign the Agreement, and CMS does not make the signed copies public. No precedent supports plaintiff's view that the words in a form contract prepared by the government become compelled speech when a contractor adds its signature. (*O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996), and plaintiff's other "contractor" cases held that independent contractors, like public employees, may not be penalized for political association and did not address the expressive scope of government contracts.)

"In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play," courts ask "whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1984) (cleaned up). The Agreement states that, "[i]n signing this Agreement, the Manufacturer does not make any statement regarding or endorsement of CMS' views, and makes no representation or promise beyond its intention to comply with its obligations under the terms of this Agreement with respect to the Selected Drug." JA302. A non-public signature on a contract that disavows any expression of views by the signer is not intended or likely to convey endorsement of a government message.

Under the First Amendment, the government—through its own speech—is free to characterize this program as it sees fit. And anyone who disagrees with that characterization is free to say so. No manufacturer is required to participate in the program. And a manufacturer that chooses to participate is not made to convey any government message by privately memorializing its agreement to follow the process established by Congress.

Sincerely,

/s/ Catherine Padhi
Catherine Padhi

cc: All counsel by ECF

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2025, I electronically filed the foregoing letter with the Clerk of the Court by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Catherine Padhi
Catherine Padhi