24-2092-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, XAVIER BECERRA, In His Official Capacity as Secretary of Health and Human Services, CENTERS FOR MEDICARE AND MEDICAID SERVICES, CHIQUITA BROOKS-LASURE, In Her Official Capacity as Administrator of Centers for Medicare and Medicaid Services,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Connecticut, No. 23-cv-01103
Before the Honorable Michael P. Shea

BRIEF FOR *AMICUS CURIAE* INSTITUTE FOR FREE SPEECH IN SUPPORT OF APPELLANT AND REVERSAL

FELICIA H. ELLSWORTH
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Counsel for Amicus Institute for Free Speech

November 12, 2024

CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Fed. R. App. P. 26.1, the undersigned counsel for *amicus curiae* Institute for Free Speech states that *amicus* has no parent company, subsidiary, or affiliate, and issues no stock.

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The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, petition, and press. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties. Challenging the government's attempt to compel speech is a core aspect of the Institute's mission.

This case matters to the Institute because it implicates the government's ability to compel private actors to speak a certain message or otherwise adopt the government's narrative to serve the government's purposes. The government's threat of economic devastation to private companies who refuse to carry or adopt its message is a clear constitutional violation. The District Court's decision blessing this coercion, left undisturbed, not only infringes the companies' First Amendment rights, but threatens to erode critical doctrinal guardrails that protect us all. The decision below fails to enforce the First Amendment in this case and works as a roadmap for similar violations in others. It should not be left to stand.

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[1] No counsel for a party authored this brief in whole or in part, and no one other than *amicus* or its counsel made any monetary contribution toward the brief's preparation or submission. All parties have consented to the filing of this brief.

INTRODUCTION

Imagine the following. A large construction company moved into a small logging town known for producing the world's best lumber. It began purchasing ever larger segments of the town's local timber production. And the loggers happily sold their product to this company: the company offered them a fair market price. Eventually the loggers dedicated over half their sales to this single construction company. As a result, the town's logging industry fundamentally changed: the company entrenched a dominant position in the market.

Then, one day, the construction company decided it did not want to pay market prices anymore. It first considered simply demanding a lower price and drawing a hard line in an arms-length business negotiation. After all, it had the economic power to drive a hard bargain. But the company realized that directly strongarming the loggers may be unpopular in town, and the consequent public relations fallout was unappealing.

So, the company came up with a different plan. Rather than announce that *they* were demanding the new below-market prices, they would instead force the *loggers* to sign a confession that they've been overcharging their neighbors for decades—and that this new below-market price had been the fair one all along. Of course, the company knew that the loggers would balk at publicly saying any such thing—it would be false. But the company then reminded the loggers that it

controls over half their market and the only port in town: if the loggers refused to go along and sign the confession, it would simply stop buying and refuse to put their logs on any ship until they went out of business.

The loggers reluctantly agreed: they signed the company documents admitting to years of price-gouging, and the company posted the confession to the bulletin board in the town square to prove it was now merely requesting a "fair" price. The loggers tried to later explain to their community why they made the public confessions, but their neighbors no longer knew what to believe. Ultimately, the plan worked: the company extracted lower prices in violation of its promise, but without negative public relations consequences.

The question before this Court is whether the First Amendment allows the federal government to solve its public relations problem in the same way the construction company solved theirs. Rather than loggers, here it is drugmakers; rather than world-renowned lumber, here it is world-renowned medicine. And rather than a company's threat to blockade their supplier, here it is the government's economic equivalent: devastating taxes, or fifty-percent market foreclosure. The compelled message, however, is the same: a forced concession by producers that the new below-market prices are "fair" and "voluntary," that they've been newly "negotiated"—and that the producers have been overcharging their customers for years.

The First Amendment allows no such thing. To be clear, the Institute for Free Speech takes no position on the merits of the Inflation Reduction Act, Medicare/Medicaid policy, or specifically whether the government can or should control drug prices. But if the government decides to regulate, it must do so consistent with the First Amendment. It cannot compel the companies or anyone else to bless and sell government programs on its behalf. The District Court's contrary decision below must be reversed.

ARGUMENT

I. THE GOVERNMENT'S "DRUG PRICE NEGOTIATION PROGRAM" VIOLATES THE FIRST AMENDMENT

It is no secret that allowing Medicare to "negotiate with the drug companies" to bring down the cost of prescription drugs is a common and popular campaign slogan. It is also no secret that the actual policy prescription necessary to achieve the generally laudable goal—lower drug prices—has proved harder than a campaign promise: whereas the public generally wants lower drug prices, they do not want government-controlled healthcare, direct price controls, or central planning that could undermine the country's leading role in innovating and developing cutting edge treatments. That is why, as Boehringer Ingelheim Pharmaceuticals ("BI") has explained, Congress has long struck a balance: it will provide coverage for medicines via Medicare and Medicaid, but it will also peg reimbursement rates to market-based methodologies. BI Br. at 7-9. Indeed, almost

20 years ago, Congress explicitly forbade "price fixing" by the Centers for Medicare and Medicaid Services, the federal agency responsible for administering the Medicare Program. *Id.* Thus a promise was made: the government will enter this marketplace, but not fundamentally redesign its market-based architecture.

The 2020 election cycle, like those before (and after) it, again featured calls to "negotiate" with the "drug companies" for lower prices. But public opinion, as before, remained against central government planning or direct price fixing. And so, in 2022, Congress happened upon the solution challenged here. It decided it will indeed fix prices for certain drugs. But rather than contravene public opinion by *admitting* it is directly fixing those prices, it would instead compel faux negotiations and then further compel the *drug companies* to tell the public they have "negotiated" an "agreement" to a new "maximum fair price" for their leading medications. And if the companies refuse to sign, fine: Congress will tax them into compliance, or force them out of half the national marketplace. This, from the government's view, is a win-win: it gets to claim it "negotiated" lower drug prices without paying any political price for in fact fixing those prices at below-market rates.

While politically convenient, this solution runs headlong into the First Amendment. The government cannot compel the companies or anyone else to speak its message, let alone a false one: that they "agreed" to the new "maximum

fair price," and accordingly, that they have overcharged their customers for years. The District Court's contrary decision blessing this coercive tactic erodes the First Amendment in three fundamental ways.

First, the decision adopts a radically formalistic and artificial definition of "voluntary" for purposes of the compelled speech doctrine. Everyone agrees that the government cannot *directly* compel speech. But according to the District Court, compelled speech is "voluntary" so long as, in a technical sense, the private party can still "choose" not to speak by exiting its market and accepting the consequent economic devastation. The prohibition against compelled speech is not so easily dispensed with. In the real world, economic compulsion is compulsion like any other.

Second, the decision relies on an unjustifiable expansion of what constitutes merely a regulation of "conduct" with only an "incidental" burden on speech. In the District Court's view, so long as the government's compelled message appears within a contract or within the ambit of a commercial transaction, it sheds all constitutional protections as being merely "incidental" to the regulation of commercial conduct. The First Amendment is not so circumscribed, and the Court should not open the door to all manner of coercive regulation of speech under the aegis of merely conduct-based regulations.

Finally, even if the companies "voluntarily" adopted the government's message in a technical sense, the decision below pays alarmingly scant attention to the unconstitutional conditions doctrine as it applies to the First Amendment. Again, it is undisputed—and undisputable—that the government could not pass a law mandating the companies or anyone else to publicly announce they think the Drug Price Negotiation Program is "fair" and "voluntary." The government cannot evade that self-evident reality by recharacterizing the mandate as merely a "condition" of participating in Medicare and Medicaid—the largest segment of the drug market by far. The government cannot coerce private parties into giving up their First Amendment rights any more than it can take those rights away directly. That principle applies in this case like any other.

A. Speech Uttered Under Economic Threat Is Not "Voluntary"

Freedom of speech axiomatically includes freedom from compelled speech. "Government action that … requires the utterance of a particular message favored by the Government, contravenes this essential right." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994); *see 303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023) ("[T]he government may not compel a person to speak its own preferred messages. … Nor does it matter whether the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech he would prefer not to

include." (citations omitted)); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005) ("[T]he First Amendment does not 'leave it open to public authorities to compel [a person] to utter a message with which he does not agree.'" (quoting *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943) (cleaned up))). This constitutional right exists because "[t]he First Amendment creates 'an open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." *Knox v. Service Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012) (quoting *New York State Bd. of Elections v. Lopez Torrez*, 552 U.S. 196, 208 (2008)). As "between compelled silence and compelled speech, compelled speech is the more serious incursion on the First Amendment. … In our view, compelled speech presents a unique affront to personal dignity." *Burns v. Martuscello*, 890 F.3d 77, 85 (2d Cir. 2018). And this right extends to corporations as well as individuals. *See Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 17 (1986) (plurality op.) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say.").

Accordingly, the first inquiry in a compelled speech challenge is to determine whether the speech is, in fact, compelled. *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (First Amendment implicated by "government power" that is "regulatory, proscriptive, or compulsory in nature"). But rare is the case where the

government will starkly and directly compel speech just to be met with swift judicial reproach. That is why the Supreme Court has long made clear that "indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions, or taxes." *American Commc'ns Ass'n v. Douds*, 339 U.S. 382, 402 (1950). In other words: "Compulsion need not take the form of a direct threat or a gun to the head." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004). Rather, so long as a party is *functionally* compelled to speak a message, such is "compulsion" like any other. *See, e.g.*, *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 175 (3d Cir. 2005) (finding "myriad" evidence to support the "reasonable inference" that a school survey, "as actually administered," was functionally involuntary—even though the administrator "instructed students that the survey was voluntary"); *cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (in pre-enforcement challenges, "the threat-eliminating behavior [is] effectively coerced.").

This functional approach is necessary. It is the only way to give effect to the natural and ordinary definitions of "voluntary" and "compelled"—the former meaning "proceeding from the will or from one's own choice or consent," the latter meaning to have been "driven or urged forcefully or irresistibly," or to have been caused "by overwhelming pressure." *Merriam-Webster Dictionary*. And it is

the only way to avoid giving the government an easy way to evade the compelled speech doctrine by creating a technical "choice" that is in practice economically infeasible. *See, e.g.*, *Miller v. Mitchell*, 598 F.3d 139, 152 (3d Cir. 2010) ("compulsion need not be a *direct threat*" (emphasis added)).

Here, there can be no question that the companies' endorsement of the government's unilateral and mandated language in the Agreement is *functionally* compelled. As BI persuasively explains, and the Government cannot meaningfully dispute, once the government (unilaterally) selects a medication for a price "negotiation," the company that makes that medication is soon presented a government form. JA296-307. The company did not draft that form: the government did. Nor is the form an ordinary contract: it requires a concession about a "negotiation" that was anything but, an attestation to a "maximum fair price" that is in fact a government-dictated price that is definitionally below market (implying that market-based prices are actually excessive), and an "agreement" with a process with which the manufacturers vehemently disagree. JA296-307; 42 U.S.C. §§ 1320a(a)-(b), 1320a(d)(2)(A), 1320f-2.

And like the loggers imagined above, the drugmakers have no choice but to sign. If they don't, they incur a staggering excise tax penalty on every domestic sale of the medication, regardless of whether the medication is sold through Medicare, ranging from 65% to 95%. 26 U.S.C. § 5000D. Or, if the

manufacturers want to evade the Program's penalties, they must withdraw their products—*all their products*, not just the medication at issue—from Medicare and Medicaid altogether. *See id.*; 42 U.S.C. §§ 1395w-153(a)(1), 1396r-8(c). Withdrawal from Medicare and Medicaid is clearly designed to be far too steep a price for any company to possibly pay. Medicare covers "nearly 60 million aged or disabled Americans," *Azar v. Allina Health Services*, 587 U.S. 566, 569 (2019), and Medicare and Medicaid account for almost half the annual nationwide spending on prescription drugs. Put simply, the only choice the companies have in refusing to participate—and, accordingly, to adopt the language in the Agreement—is to determine their method of execution: be taxed into oblivion or to be excluded from half of the pharmaceutical marketplace.

The District Court downplayed this reality in favor of a radical formalism: so long as, in a technical sense, manufacturers have a "choice" to withdraw from Medicare and Medicaid rather than adopt the government's messaging within the Agreement, the First Amendment is of no moment. It reached this conclusion in two sentences of analysis in which it imported, wholesale, its prior conclusion that there was no taking under the Fifth Amendment because drug companies can "choose" to forego sales to half the drug market. SPA 31. And that analysis, in turn, depended upon the indefensible understatement that threatening a company

with a loss of half its market share merely supplies "considerable economic incentive." SPA 29.

That is a disturbingly glib holding with far reaching ramifications. Most fundamentally, it simply disregards the economic reality of the government's purported "offer." BI persuasively explains the actual and impossible ramifications of declining to adopt the government's message. Threatened economic disaster is "compulsion" by any definition, and this Court should not adopt the District Court's formalistic avoidance of that reality in disregard of the necessary functional analysis required by Supreme Court precedent and common sense.

B. The Government's Proffered "Commercial Activity" Exception Would Swallow The Rule Against Compelled Speech

The second inquiry in a compelled speech challenge is to determine whether the alleged speech is, in fact, "speech." *See, e.g.*, *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc. ("FAIR")*, 547 U.S. 47, 61 (2006) ("[F]reedom of speech prohibits the government from telling people *what they must say*."). There can be no doubt that the compelled endorsement of the Drug Price Negotiation Program is speech: forcing private parties, against their sincere convictions, to publicly opine that a price forced upon them for their product is the "maximum fair price" and that their participation is "voluntary" is, *by design*, expressive. These phrases serve no other utility than to telegraph to the public that the companies have

entered into this Agreement of their own will and that they have negotiated, in good faith, with the government to reach what both parties believe is the maximum fair price for the drug. That the words happen to appear in a contract is of no moment: it is settled law that transactions, such as the Agreement at issue here, can certainly be expressive for purposes of First Amendment scrutiny. *See, e.g.*, *303 Creative LLC*, 600 U.S. at 596 (quoting *FAIR*, 547 U.S. at 63-64) (forcing individual to create a website would alter "expressive content" of her message). Indeed, the *only* purpose of these statements is expression of the government's "preferred message[]." *Id.* at 586. The government would undoubtedly argue that the Agreements would be enforceable *without* the expressive language foisted upon the companies. But it necessarily follows that the superfluous language at issue serves a non-commercial purpose: to tell the government's story, not to effectuate the underlying transaction.

To avoid this inescapable reality, the District Court apparently adopted the position that so long as compelled speech appears within a contract, this only constitutes regulation of "conduct" and thus evades any First Amendment scrutiny. *See* SPA 31 ("[T]he Manufacturer Agreement regulates BI's conduct, and any effects it may have on speech are 'plainly incidental.'").

That holding misses the First Amendment point. The question is not whether the government can compel drug companies to sell a drug at a certain

price: as far as the First Amendment is concerned, it can. The relevant question is whether the government can *also* compel the drug companies to *say* something about that price. It cannot, and the District Court erred in stating that "no … precedent" says otherwise. SPA 32. In *Doe v. Reed*, the Supreme Court ruled that "the compelled disclosure of signatory information on referendum petitions is subject to review under the First Amendment," because "[a]n individual expresses a view on a political matter when he signs a petition." 561 U.S. 186, 194-195 (2010). There, as here, the expression is the *only* value the public disclosure of this language has for the government. And so there, as here, the First Amendment is directly implicated by the words the drug companies must speak, whether they appear in a contract or otherwise.

More broadly, the Court should guard against First Amendment erosions on the premise of regulating conduct. There is a disturbing but unmistakable trend for governments to evade First Amendment guardrails by artificially re-conceptualizing a speech-focused regulation as something other than what it is. In an analogous context, the Supreme Court recently warned against "regulation of speech" that tries to "escape classification as facially content based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 74 (2022). Here, that trend continues: there is no meaningful

difference between artificially labeling content-based distinctions as *function*-based distinctions, on one hand, and artificially labeling forced expressive language as mere regulation of conduct, on the other. Yet the District Court blessed that precise maneuver. This Court should not.

Consider the ramifications of a rule that allowed the government to secure public proclamations of approval so long as it could fit the mandate within a supposed "commercial" transaction. For example, Congress enacted the Coronavirus Aid, Relief, and Economic Security ("CARES") Act of 2020, Pub. L. No. 116-136, 134 Stat. 281, to "provide[] fast and direct economic assistance for American workers, families, small businesses, and industries" in the midst of the COVID-19 pandemic.[2] The CARES Act provided an "employee retention tax credit (Employee Retention Credit) that [was] designed to encourage" small businesses "to keep employees on their payroll despite experiencing an economic hardship related to COVID-19."[3] Congress later passed the American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4, which "extend[ed] the availability of the Employee Retention Credit for small businesses through December 2021 and

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[2] *About the CARES Act and the Consolidated Appropriations Act*, U.S. Dep't of Treasury, https://tinyurl.com/bdhfnahn (visited Nov. 11, 2024).

[3] *COVID-19-Related Employee Retention Credits: Overview*, IRS, https://tinyurl.com/3butuwvy (visited Nov. 11, 2024).

allow[ed] businesses to offset their current payroll tax liabilities by up to $7,000 per employee per quarter."[4]

Imagine if the 2021 American Rescue Plan had predicated the extension of the Employee Retention Credit on the signing of an "agreement" that the CARES act was "fair"—*i.e.*, in order to continue receiving the benefits of the Credit, the thousands of small businesses already financially dependent on government assistance during a once-in-a-lifetime pandemic (and resulting economic shock) would have to sign a contract with the government stating that the government's COVID-19 vaccine administration program was "orderly and effective." Noncompliant small businesses would have two options: they could either (1) be subject to penalties of up to $7,000 per employee per quarter until they signed the agreement; or (2) withdraw from the Credit program. Despite the obvious coercion and curtailment of these small businesses' free speech rights, the District Court would find no constitutional violation because that language appeared in a contract, and government contracts at most only "regulate[] … conduct." SPA 31.

Take another example. In FY 2022, the federal Supplemental Nutrition Assistance Program ("SNAP") provided food assistance to an average of 41.2

[4] *Small Business Tax Credit Programs*, U.S. Dep't of Treasury, https://tinyurl.com/3wkxpvd8 (visited Nov. 11, 2024).

million individuals each month.[5] Imagine that the government (citing the "voluntary" nature of participation in SNAP) passed a law forcing those individuals to sign an agreement with the government that included provisions stating that the government's economic policies, including its administration of SNAP, was "fair and appropriate." Individuals who did not want to sign would have two options; they could either (1) be subjected to a penalty in the amount of up to 95% of their monthly SNAP benefits each month until they signed the agreement, or (2) withdraw from the SNAP program altogether. Again, in the District Court's estimation, this would be a permissible use of government power because it would regulate only conduct—the receipt of funds—and not expressive speech. SPA 31.

The point is simple: the government's choice to mandate expressive language within the four corners of a contract or "agreement" does not solve the First Amendment problem of forcing individuals to carry a particular message about an issue of public importance.

Further, the Agreement's so-called disclaimer does not remedy the government's First Amendment problem. *Circle Schools v. Pappert*, 381 F.3d 172, 182 (3d Cir. 2004) (a "general disclaimer … does not erase the First

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[5] *Supplemental Nutrition Assistance Program (SNAP) Key Statistics and Research*, USDA, Econ. Res. Serv. (Feb. 23, 2024), https://tinyurl.com/y4rvdze7.

Amendment infringement," because the injured party is still "compelled to speak the [government's] message). Were that not true, the government would be free to "infringe on anyone's First Amendment interest at will, so long as the mechanism of such infringement allows the speaker to issue a general disclaimer." *Id.*

Finally, it does not matter that the drug companies can publicly criticize the government. It is no answer to a First Amendment violation that the government allows the private parties to publicly contradict themselves: by first adopting the government's message, then criticizing that same message. *See, e.g.*, *Pacific Gas*, 475 U.S. at 16 (right to be free from compelled speech "would be empty" it the government "could require speakers to affirm in one breath that which they deny in the next"). Permission to be incoherent does not cure a First Amendment violation. And the government's argument that the private parties may still criticize the program they are forced to endorse only highlights the government's unconstitutional intrusion into the expressed views of these parties.

C. The Government Cannot Cloak Its Compulsory Actions As A "Condition" Of Participation

The decision below disregards the unconstitutional conditions doctrine on the basis that BI had no "First Amendment right to refuse to sign the Manufacturer Agreement" containing the government's message. SPA 35. That holding merely reflects the errors above, *i.e.*, that economically-compelled speech is "voluntary,"

and that speech within "agreements" is actually just conduct and falls outside of First Amendment protections. It also cannot be squared with binding caselaw.

The unconstitutional conditions doctrine "recognize[s] a limit on Congress' ability to place conditions on the receipt of funds." *FAIR*, 547 U.S. at 59. As the Supreme Court explained in *Board of County Commissioners, Waubaunsee County v. Umbeh*:

> Recognizing that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights," our modern "unconstitutional conditions" doctrine holds that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech" even if he has no entitlement to that benefit.

518 U.S. 668, 674 (1996) (quoting *Laird v. Tatum*, 408 U.S. 1, 11 (1972); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (alterations in original)). This doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). Put differently, even if the companies' participation in the Program were voluntary (it is not), the Program would still run afoul of the unconstitutional conditions doctrine because it "coerc[es]" the companies into "giving … up" their First Amendment freedom of speech rights. *Id.*

For the reasons explained above, there is nothing "voluntary" about the Program's forced message: the private parties must speak the government's words verbatim or forsake economic viability. This is true even though the government has cloaked its coercive scheme under the pretense of a mutual agreement. Again, everyone would agree that if the government passed a law outright demanding "the parties say the Drug Price Negotiation Program is fair," that would be unconstitutional. Everyone would also agree that if the government passed a law outright saying that "unless the parties say the Drug Price Negotiation Program is fair, we will ban them from the marketplace," that too would be unconstitutional. It necessarily follows that a nearly identical mandate—"unless the parties agree the Drug Price Negotiation Program is fair, they can no longer participate in Medicare"—is an unconstitutional condition of continued participation in a critical government program, even if deemed "voluntary" according to the District Court's formalistic analysis.

The Supreme Court's decision in *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205 (2013), is dispositive. That case concerned the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25, 117 Stat. 711, which "authorized the appropriation of billions of dollars to fund efforts by nongovernmental organizations to assist in the fight" against HIV/AIDS "around

the world." 570 U.S. at 208. A funds recipient challenged a provision of the Act mandating that "no funds made available by the Act 'may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.'" *Id.* (quoting 22 U.S.C. § 7631(f)). The Court held that the provision ran afoul of the unconstitutional conditions doctrine, because "[b]y demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects 'protected conduct outside the scope of the federally funded program.'" *Id.* at 218 (quoting *Rust v. Sullivan*, 500 U.S. 173, 197 (1991)).

> A recipient cannot avow the belief dictated by the Policy Requirement when spending Leadership Act funds, and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime. By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient.

Id.; *see Rust*, 500 U.S. at 197 ("[O]ur 'unconstitutional conditions' cases involve situations in which the government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." (emphasis in original)).

That is exactly what the Program does here—it just does so slightly less directly. As the unconstitutional conditions doctrine makes plain, the government cannot predicate the parties' participation in Medicare (or any other federal

program) on their giving up their right *not* to endorse the government's message that the program is "fair." *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548-549 (2001) ("[w]here private speech is involved," condition of participation in federally funded program "cannot be aimed at the suppression of ideas thought inimical to the Government's own interest"). What the government cannot do directly, it cannot do indirectly. *Id.* at 548 (courts must "be vigilant when Congress imposes … conditions which in effect insulate its own laws from legitimate judicial challenge"); *Perry*, 408 U.S. at 597 (unconstitutional conditions doctrine instructs that the government cannot "produce a result which [it] could not command directly" (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958))).

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted.

/s/ Felicia H. Ellsworth
FELICIA H. ELLSWORTH
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Counsel for Amicus Institute for Free Speech

November 12, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Circuit Rule 32.1(a)(4)(A).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 4,931 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Felicia H. Ellsworth
FELICIA H. ELLSWORTH

November 12, 2024