

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-2584-DDD-SKC

TEVA PHARMACEUTICALS USA., INC.,

Plaintiff,

vs.

PHILIP J. WEISER, in his official capacity as Attorney General
of the State of Colorado; PATRICIA A. EVACKO, ERIC FRAZER, RYAN
LEYLAND, JAYANT PATEL, AVANI SONI, KRISTEN WOLF, and ALEXANDRA
ZUCCARELLI, in their official capacities as members of the
Colorado State Board of Pharmacy,

Defendants.

REPORTER'S TRANSCRIPT

Hearing on Preliminary Injunction

Proceedings before the HONORABLE DANIEL D. DOMENICO,
Judge, United States District Court for the District of
Colorado, commencing at 1:30 p.m., on the 18th day of
December, 2023, in Courtroom A1001, United States Courthouse,
Denver, Colorado.

APPEARANCES

Jay P. Lefkowitz, Kirkland & Ellis, LLP, 601 Lexington Avenue,
40th Floor, New York, NY 10022, and Cole T. Carter, Kirkland &
Ellis, LLP, 300 North LaSalle Street, Suite 2400, Chicago, IL
60654-3406 and Alexandra I. Russell, Kirkland & Ellis, LLP,
1301 Pennsylvania Avenue, NW, Washington D.C., DC 20004,
appearing for the Plaintiff.

1 Pawan Nelson, Colorado Attorney General's Office, Ralph L. Carr
2 Colorado Judicial Center, 1300 Broadway, Denver, CO 80203,
appearing for the defendant, Philip J. Weiser.

3 Jennifer M. Johnson, Colorado Attorney General's Office, Ralph
4 L. Carr Colorado Judicial Center, 1300 Broadway, Denver CO,
80203, appearing for the remaining defendants.

5 TAMARA HOFFSCHILDT, Official Reporter
6 901 19th Street, Room A251
7 Denver, Colorad, 80294
(303) 947-1905

8 Proceedings Reported by Mechanical Stenography
9 Transcription Produced via Computer

10 * * * * *

11 **PROCEEDINGS**

12 (In open court at 1:34 p.m.)

13 *THE COURT:* Good afternoon. Let's take our seats.
14 We're here for a hearing on a motion for a preliminary
15 injunction in case number 23-cv-2584, Teva Pharmaceuticals,
16 U.S.A. versus Weiser, et al.

17 Why don't I begin by asking counsel to enter their
18 appearances.

19 *MR. LEFKOWITZ:* Good afternoon, Your Honor. Jay
20 Lefkowitz on behalf of Teva Pharmaceuticals. I'm here with my
21 two partners, Alex Russell and Cole Carter.

22 *THE COURT:* Welcome. Thank you for being here.

23 *MR. NELSON:* Pawan Nelson, Assistant Attorney General
24 on behalf the Attorney General.

25 *MS. JOHNSON:* Jennifer Johnson, Assistant Attorney

1 General on behalf of the remaining defendants who are members
2 of the State Board Pharmacy.

3 *THE COURT:* All right. Thank you all for being here.
4 So as I think we may have explained, at least in part, kind of
5 the way I want to proceed today. There is, in addition to the
6 preliminary injunction motion, there's a Motion to Dismiss
7 pending. I want to at least give everybody a chance to address
8 both of those, but mostly, obviously, the preliminary
9 injunction motion is more pressing, given the timing.

10 So I think the way I want to proceed, essentially,
11 give the plaintiffs about an hour, and the defense about an
12 hour. Plaintiffs can reserve some time, if they want for a
13 rebuttal, I'm not going to be super strict about it, but I
14 think that should be sufficient for what we're going to do, in
15 particular, because I did review, in addition to the briefing,
16 I have reviewed the declaration and the deposition transcript,
17 so you don't need to go through all of evidence that, again.
18 You can assume that it's been reviewed, and admitted and just
19 go ahead and start addressing what you think are the important
20 parts of it.

21 I will just give you a little bit of an idea of where
22 I am, right now. I don't expect to rule today from the bench,
23 but I will get a written ruling out, at least on the
24 preliminary injunction question before the end of the year, one
25 way or another, maybe on the Motion to Dismiss, as well,

1 depending on how things go.

2 My current thinking is that I do think that there's
3 probably enough of a threat or imminent enforcement or at least
4 requiring the plaintiff to choose between various courses of
5 action that -- between either complying or paying money or
6 giving away some of their product to probably satisfy the case
7 for controversy requirement, although I do want to hear
8 argument and explanation on that.

9 I'm not sure, though, that there's -- that the same
10 evidence is sufficient for the extraordinary relief of a
11 preliminary injunction. The uncertainty surrounding how this
12 will apply, at least, seems to call into question whether the
13 plaintiffs can satisfy the, sort of, very high burden required
14 to justify enjoining an injunction, particularly an injunction
15 against a state law, when the context is a takings, where
16 presumably, it can be remedied through payment of just
17 compensation.

18 So that's, kind of, my thinking going into this. I do
19 have an open mind, and I certainly have some questions, still,
20 for everybody. So -- but I did think it was fair to at least
21 give you a heads up about where I am, at the moment.

22 So if that makes sense, I think we can go ahead and
23 let the plaintiffs begin their presentation, unless there's any
24 questions. All right. Mr. Lefkowitz.

25 MR. LEFKOWITZ: Thank you, very much, Your Honor, and

1 I appreciate the Court's overview. I think I will probably
2 only take about 20 or 25 minutes to make my argument, take
3 obviously, as many questions as the Court has, and maybe ask
4 the Court for about ten minutes, at the end, just to respond.
5 I don't know that it will require more than that.

6 THE COURT: Terrific.

7 MR. LEFKOWITZ: And I think I will start -- I will --
8 I will address, obviously, the key concern you have, which is,
9 *Is the remedy we're asking for appropriate*, in the course of
10 the 20 minutes or so that I do want to touch on each of the
11 different components, if I may, since we have the time.

12 Just to kind of -- for brief -- very brief --
13 background, this is a challenge to a statute signed into law by
14 the governor in June, and it addresses affordability of these
15 epinephrine auto-injectors through two measures. The first
16 measure is unobjectionable. It says that the carrier shall cap
17 the total amount that a covered person is required to pay for
18 all covered prescription auto-injectors, at an amount not to
19 exceed \$60 for a two-pack. It's essentially a price control.
20 The State wants to limit epinephrine pens from being sold for
21 \$30 each, they are entitled to do that, whether the drugstore
22 or the manufacturer likes it.

23 The second part of the bill is to address uninsured
24 people, who are not covered, in a sense, by that first
25 provision, and for them it says they can fill out an

1 application at a drug store, and obtain their two-pack of
2 auto-injectors for \$60. The constitutional problem is what
3 happens next. The pharmacy can pocket that \$60 payment and
4 then either make a request for a replacement auto-injector, the
5 physical property of the drug company, the manufacturer, and if
6 the drug company doesn't want to do that, the alternative,
7 under the statute, is to pay the drugstore what it paid to get
8 it.

9 Now, that's a little bit of a false choice or
10 certainly a Hobson's choice with a thumb on the scale. Why?
11 Because the drug company, in this case Teva, is a Delaware
12 company based in Pennsylvania. They sell to three principle
13 wholesalers around the country, and they sell their EpiPen®,
14 and then eventually those EpiPen®s make the way to the CVS or
15 the Walgreens or the Joe's drugstore on the corner, through,
16 obviously, at least, the one middleman of the wholesaler and
17 perhaps through other middlemen. And so the price that the
18 drugstore pays is invariably going to be a little bit more or
19 maybe more than a little bit more than Teva receives.

20 So financially there is a choice, but it's always
21 going to be the case that providing the actual EpiPen®, the
22 actual physical property, is going to be the effect of this
23 statute.

24 Now, that's the provision that we are challenging, and
25 the provision is enforced by both a fine of \$10,000, for each

1 month of noncompliance, and the Attorney General is then
2 empowered to bring a Deceptive Trade Practices case against
3 Teva, or one of the other companies that would be subject to
4 this, under the Consumer Protection Act, which carries with it
5 a treble damages remedy. So this is very much a statute that
6 has a lot of force behind it.

7 I want to start on just the substance of the takings
8 question, then we will get to the injunctive relief, and we
9 will finish with the Eleventh Amendment and a couple of the
10 other issues, and certainly standing which I want to address.

11 As to the takings, I don't think there's any serious
12 dispute, particularly after *Horne* that this reimburse or
13 resupply requirement takes property without compensation, in
14 violation of the Fifth Amendment. In fact, the Attorney
15 General didn't even offer a merits defense at the PI, however,
16 the Attorney General did offer a merits defense at the Motion
17 to Dismiss, and so even though it's not technically before the
18 Court on the PI, I want to address it anyway, because what the
19 Attorney General says is there's no violation of the Takings
20 Clause, because the State is just exercising its police power.

21 Now, the implications of that argument are enormous.
22 If the Attorney General were correct, the State could
23 commandeer any medical product for anyone that the State deems
24 worthy. It could commandeer hotel rooms in hotels for people
25 who are homeless on a cold night. It could commandeer gas from

1 gas stations, all without compensation, all without it being
2 treated as taking, because the police power is essentially the
3 plenary power of the state.

4 It's really a misnomer here to defend this as an
5 exercise of police power, because the key question, under the
6 police power is, does the government attempt to secure a
7 benefit to the public or to prevent a harm to the public? And
8 that is really the critical distinction. Police powers, when
9 they overlap with takings issues, are usually in the areas of
10 nuisance. If, for example, a hotel in Downtown Denver were
11 emitting some toxic fume, the State could clearly use its
12 police power and tell the hotel you have got to shut down until
13 it's remedied, even though they would be losing lots of the
14 value of the asset during the shutdown; that's very different
15 from telling the hotel, *You have to make a hundred rooms*
16 *available every night for people we determine should get a free*
17 *room.* In fact, the Tenth Circuit case, *Lech v Jackson*, which
18 the State relies on, basically, although it's not a published
19 case, I want to address it, it addresses this directly, because
20 it says what we're talking about is the police damaging a home
21 while trying to apprehend a suspect. Yes, there's damage to
22 the person's home, but that is a true exercise of a police
23 power. Or in the District of Kansas case, *Carrasco* that they
24 cite, cutting down a tree that could damage electrical wires.
25 Those are proper exercises of police power. In those

1 situations, there's no Fifth Amendment violation, because the
2 government is not taking property for public use. No one is
3 using the plaintiff's property at all, even though there's a
4 public benefit. We're stopping the fire. We're stopping the
5 criminal. The plaintiff's property there is being destroyed or
6 invaded in furtherance of some independent public safety goal.

7 Here, by contrast, the State is clearly taking Teva's
8 auto-injectors for a public use; not to eliminate a threat to
9 public safety, and therefore, I think it is clear that this
10 violates the Takings Clause, and just to kind of punctuate this
11 with the -- one of the classic takings cases, *Penculum vs.*
12 *Mayhon* as Justice Holmes wrote in his opinion, *A strong public*
13 *desire to improve the public condition is not enough to warrant*
14 *achieving the desire by a shorter cut than the constitutional*
15 *way, of paying for the change*, and I think that's exactly what
16 we have here.

17 THE COURT: So let me interrupt you, briefly, and just
18 ask a couple of questions on things you have addressed so far.
19 So -- is this -- is your view of police power, as it's being
20 used in this takings context different than the sort of generic
21 concept of the police power? Because I think, at least
22 sometimes in my head, I view, when we talk about states have a
23 police power, just as sort of -- to do whatever they feel like
24 in -- for the health, safety and welfare of the citizens;
25 whereas, contrasting that with the federal government, which

1 only has limited granted powers. I think you could certainly,
2 if you wanted to, say, *Oh this is for the health, safety and*
3 *welfare of the people of Colorado*, right? And so is this a
4 sort of term of art in this context.

5 MR. LEFKOWITZ: I think you have put your finger on
6 it, Your Honor. It is a misnomer to just say anything that is
7 an exercise of a police power escapes scrutiny under the Fifth
8 Amendment. The police power is the plenary power of the
9 states; that's the constitutional compact. The states have
10 plenary power in pretty much every facette of life, with the
11 exception of those powers that are provided through that
12 constitutional agreement to the federal government, and then
13 there are, not only is the federal government a government of
14 limited powers, but there are certain powers in the Bill of
15 Rights, particularly, that states, because of incorporation,
16 are also now limited from. But other than that, what the state
17 does is one way or another an exercise of its police power. It
18 doesn't mean that they can take private property for a public
19 use and that's why, whether you look at the way the Tenth
20 Circuit described it in *Lech* or the Fifth Circuit in the case
21 we cited in footnote four of our response to the Motion to
22 Dismiss, which talks about the State not having to compensate,
23 when it is an exigent circumstance or in some of the land-use
24 cases, if a private party has land that is on the edge, for
25 example, of a river or a wetland, they own that land with a

1 recognition that something might happen with the land that the
2 State might have to exercise some regulation; that's a
3 regulatory taking.

4 Again, all use of the State's police powers, but when
5 you have something that constitutes a nuisance, then there's an
6 understanding that the State can eliminate that nuisance
7 without having to compensate you, but merely commandeering
8 personal property is totally off limits, and I think the
9 Supreme Court's decision in *Horne* amplifies this, as well as
10 almost any other, but there are several others that address
11 that. The *Apfel* case talks about it in the context of money,
12 not even physical property. *Horne* talks about it in terms of a
13 statute that required raisin farmers to simply set aside some
14 of their raisins and not maximize the profitability of those
15 raisins, and even though the Court recognized that maybe by
16 taking some of those raisins away from the farmers, their
17 remaining raisins would be more valuable. It didn't matter.
18 The Court said that's a taking.

19 Again, that was a federal law. So I'm kind of giving
20 you a mixed metaphor here, but the premise under state police
21 power is states have enormous police power, but it's checked by
22 the Fifth Amendment, as applied to the states.

23 *THE COURT:* Okay. Let me just ask you, before you
24 move, on a couple of questions. So you have conceded that the
25 other part of the -- the other part of the law is okay. The

1 part setting, as you called it, just a price cap, right? And
2 so my question would be could -- could the State for uninsured
3 people, just require pharmacies or manufactures to not charge
4 more than \$30 per injector, and would that raise any
5 constitutional issues?

6 *MR. LEFKOWITZ:* If they applied the statute to
7 pharmacies it wouldn't apply. It wouldn't raise any
8 constitutional issues. If it applied -- if it made the sale by
9 the manufacturer to the -- to the person manufacturer sells to,
10 a violation of the law, then you have to look at where that
11 sale takes place. This is actually a case I litigated, in
12 connection with a Maryland statute, that, essentially, wanted
13 to do exactly what you suggested, and they could have simply
14 imposed a price cap on drugs, within the state, including sales
15 within the state. But if you have an out-of-state manufacturer
16 that sells out of state, then it raises a commerce clause
17 issue --

18 *THE COURT:* There would be a jurisdictional problem --

19 *MR. LEFKOWITZ:* Due process. We won that case in the
20 Fourth Circuit, but you certainly could effectuate that result
21 by simply saying, no CVS, or whatever the drugstore is, can
22 sell an EpiPen® for more than \$30.

23 Now, the market would either respond, because either
24 the companies really don't need to sell for more than that, and
25 they would still want to sell, or at some point you basically

1 disincentive people from selling a product, if they can't make
2 money. But that would not raise a constitutional issue. We
3 would be letting the market forces work.

4 *THE COURT:* All right. And then let me ask you, and
5 this may come up in another part of the argument, but one quirk
6 of this law, besides that, of the part you are challenging is
7 that it -- even though I understand your, sort of,
8 finance/economic argument of why the other option is not a
9 legitimate option that would ever likely be used. It is an
10 option to pay money, instead. Could you view this as,
11 essentially, a tax, that part of it as a tax, that you can pay
12 either in money or by giving away some of your product?

13 *MR. LEFKOWITZ:* So, two parts to that answer; one, I
14 don't think you could treat it as a tax, because the money
15 isn't going to the government, and taxes are not -- you know,
16 they don't go to third parties. They don't go to drugstores.
17 You can't tax person A to pay person B, that is something else,
18 but it's not a tax.

19 Number two, and I think even more important, given the
20 way the statute is written, that would be a taking just as
21 much. *Koontz*, the Supreme Court's case on *Koontz* 570 US, 595,
22 it's 2013 case, basically says the government can't condition
23 your right either on a deprivation of property or on the
24 payment of money. And in *Apfel*, the Court was addressing
25 merely a taking of money. It was a statute that said some

1 company, new ownership of a company found that there wasn't
2 enough money to pay old pensioners, because the money had run
3 out, and they imposed this... you could call it a tax, but it
4 wasn't. It was a requirement, by the statute, for the private
5 party to pay money to a pension fund for these workers, and
6 that was, again, deemed to be a taking. So I think that
7 answers -- I hope that answers your question.

8 *THE COURT:* Okay. Thank you.

9 *MR. LEFKOWITZ:* Let me move now to injunctive relief,
10 and then I will save some time to talk about standing and
11 ripeness and Eleventh Amendment.

12 So, look, I understand that this is, in my view, the
13 heart of the issue, in the sense that I think it is very clear
14 that we have a taking, and the question then is, what is the
15 remedy here? I will address the pre-enforcement challenge
16 part. I know the Court is very familiar with this from just
17 dealing with it in *Bella Health*, so I will focus, right now, on
18 just the guts of the issue is, do we have an adequate available
19 remedy?

20 The Attorney General essentially says look, injunctive
21 relief is inappropriate, because we have an adequate remedy of
22 law, and I would agree if there were an adequate remedy of law,
23 we would be in a different situation. We would require
24 compensation, and then we would have to be doing it a different
25 way because of Eleventh Amendment issues, here.

1 They claim that *Knick*, the Supreme Court's 2019 case,
2 essentially, sets forth a rule that a state's compensation
3 program is always adequate. But actually *Knick* says nothing of
4 the sort. It makes clear that when a program is adequate, a
5 federal court won't enjoin a statute, and so where the rubber
6 meets the road, really, is -- and where the action is, I think
7 is, is this state compensation program adequate? And for that
8 we look at traditional principles of equity which go all the
9 way back to *Terrace vs. Thompson*. It's a Supreme Court case,
10 literally a hundred years ago, and the test is, is a remedy at
11 law adequate? And it is only adequate if it is as complete,
12 practical and efficient as that which equity could afford, and
13 that comes right out of Joseph Story's Commentaries, and that
14 is a proposition that has been followed by the Supreme Court,
15 by the Tenth Circuit, by Colorado courts, throughout, and I
16 will address that.

17 The plurality of the Supreme Court applied this
18 principle to a takings case in *Apfel*, when the Court enjoined
19 statutory mandated payments, because the Court said forcing the
20 plaintiff to recover its payments through damages suits, under
21 the Tucker Act would entail an utterly pointless set of
22 activities, and the Eighth Circuit, very recently, in the *PhRMA*
23 case, dealing with almost an identical statute, dealing simply
24 with insulin, instead of EpiPen@s, found that the state remedy,
25 and there was a state remedy in Minnesota, was, quote,

1 incapable of compensating manufacturers for the repetitive
2 future takings that will occur, and the Eighth Circuit relied
3 on *Apfel*, which in turn relied on *Duke Power*, which essentially
4 said the same thing, with respect to injunctive relief, when a
5 compensatory remedy is not adequate for efficient, and that's
6 the real question here.

7 Let me explain why it would not be adequate or
8 efficient. Here, Teva would be required to bring damages every
9 time it was forced to reimburse a pharmacy. Now, the State
10 says, *Well, you could just wait and do it at the end of two*
11 *years.* But, of course, you would have to constantly add new
12 claims, you would have joinder, and it would be an utter mess,
13 because you have maybe hundreds of different pharmacies and
14 their -- the costs that you have to pay each of them is based
15 on their cost.

16 Well again, Joe's pharmacy may not have nearly as much
17 buying power with, you know, Cardinal or McKesson or one of the
18 wholesalers, so they may be spending \$400 dollars or \$300 or
19 \$200. CVS or Walgreens may be paying much less. It's even
20 more complicated than that though, because the really big
21 retail drug stores, they end up getting rebates after two
22 years, after like a two-year look back. They get a rebate
23 that's based on all of the different things that they buy from
24 that wholesaler. Now you have got to come up with a
25 methodology to figure out of that X, you know, million-dollar

1 rebate that they got, how much of that is allocated to each
2 EpiPen®? Because the State has got to figure out or some Court
3 is going to have to figure out, how much we're entitled to get
4 back.

5 THE COURT: Let me -- that makes a lot of sense to me,
6 but let me just ask you why that's so different than your, sort
7 of, more traditional takings case. Say *Knick*, for example,
8 seems like it should be pretty straightforward, right? The
9 town in that case says you have got to leave your -- your
10 family cemetery open; but how do you value that? Why is
11 that -- that's an ongoing, forevermore, you have to leave your
12 property open. Who knows how much that's worth.

13 MR. LEFKOWITZ: Well, it's not -- it is ongoing, but
14 it's ongoing in the same way that if my father's apartment,
15 growing up in New York was condemned by Robert Moses, because
16 he wanted to build the Cross Brox Expressway. He suffered that
17 loss every day until he moved out to go to college, but it was
18 a one-time event.

19 The lighting for the cemetery is a one-time thing.
20 It's the statute, and you now could tell, you go to a Court and
21 you say, *I have now been deprived of the use, the quiet*
22 *enjoyment of my property, because I have got to keep the lights*
23 *on forever*, and someone does evaluation in the same way that
24 nearly all of these eminent-domain-type cases are. You take a
25 piece of property, you burden some land, and there is a way of

1 coming up with some economic formula. This is a series of
2 independent repetitive, multiple takings, and they will go on
3 indefinitely, which means that because there's only a two-year
4 statute of limitations, under the Colorado Inverse Condemnation
5 law, not only would you have to do everything I just described,
6 in the first two years, but then you would immediately have to
7 go and start doing it again for the next two years, and the two
8 years after, and that, I think, is what the Supreme Court
9 talked about in *Di Giovanna vs Damden Fire*, when it said, *The*
10 *avoidance of a burden of numerous suits at law between the same*
11 *or different parties where the issues are substantially the*
12 *same is a recognized ground for equitable relief in the federal*
13 *courts.*

14 And here we even have the more complicating factor,
15 which is, the payments that we're making are to a third party.
16 I'm not sure what the State's position would be if we sought,
17 you know, relief/compensation from the State. They might say,
18 *Well, you have got to look to the pharmacies, they are the ones*
19 *who have your property.* I'm sure the pharmacies would say, *We*
20 *are commanded by the state.* But if we had to go after the
21 pharmacies, some of them might not even be in business in two
22 years, but even beyond that, there's also this treble damages
23 that we would suffer, if we don't comply with the statute, and
24 for that, I'm not sure we could ever be made whole, because I
25 don't think the State has waived sovereign immunity.

1 THE COURT: My understanding is Teva intends to comply
2 with the law, right? You don't intend to just say this is
3 unconstitutional, we're going to -- we're not giving away our
4 stuff?

5 MR. LEFKOWITZ: I don't believe that our witness said
6 that at all. I think what the witness said is we intend to
7 continue to sell the drugs, and moreover, we couldn't even
8 avoid it if we wanted to, because we have already shipped so
9 many EpiPen®s into, you know -- to our wholesalers, who have,
10 in turn, sent them to Colorado, that they will be sold, and
11 when they are sold, we will then be forced to basically replace
12 the EpiPen®s or not.

13 So, I don't know that Teva -- I think Teva intends to
14 do exactly what we're kind of moving a little bit into standing
15 ground but, Teva intends to do exactly that which will bring
16 itself squarely within the ambit of the State's full authority,
17 and once that happens, I think there are enormous complicating
18 factors with respect to an adequate remedy of law.

19 Now, the Attorney General cites a couple of cases that
20 he says Courts decline to grant relief in cases that also had
21 what he calls potentially or theoretical indefinite takings.
22 But I want to look at the two key ones that he cites. He cites
23 *Gordon vs. Norton*, a Tenth Circuit case involving the federal
24 government's reintroduction of wolves in Wyoming, and then some
25 of the wolves killed some of the cattle. Importantly, as the

1 Court noted, the plaintiff wasn't challenging the lawfulness
2 of the government action. They weren't, as we are, challenging
3 and seeking to enjoin the entire statute. They were quibbling
4 with a certain aspect of the statute. How the State, under its
5 regulations, was going to cull the herd of the wolf. Very
6 different from a situation where we are trying to strike down
7 or enjoin the entire statute, because the -- not the entire
8 statute, the provision of the statute that we find
9 unconstitutional. I apologize.

10 *THE COURT:* Let me just --

11 *MR. LEFKOWITZ:* Yeah.

12 *THE COURT:* What difference does that make? Why is
13 that any different? I mean, they thought a narrower sliver of
14 the law was problematic. You think a broader one. Why is that
15 dispositive?

16 *MR. LEFKOWITZ:* Because here we have this endless
17 supply -- endless multiplicity of lawsuits. They were not
18 challenging, as the Court observed, the lawfulness of the
19 government action. We are challenging the lawfulness of the
20 government action, and that is significantly different. The
21 same distinction, actually even stronger distinction applies in
22 the more recent case that they cite from the Tenth Circuit,
23 *Williams vs. Utah Department of Corrections*. There the Court
24 did reject injunctive relief, but it expressly said it was
25 doing so for the reason that the plaintiff had named the wrong

1 defendants under ex parte.

2 But I would submit, Your Honor, that the Eighth
3 Circuit in the PhRMA case got it right. When a statute
4 authorizes an indefinite series of takings, a suit for
5 compensation is not complete, practical and efficient, which is
6 what equity demands, and Colorado courts have a long tradition
7 of applying that very principle in nuisance and trespass cases.

8 I will cite the Court two cases, *Colby vs Young*, which
9 is a 1984 case, where it recognized that where a trespass is
10 continuous, the plaintiff's, quote, only remedy at law would
11 involve a multiplicity of suits for each recurrence of the
12 trespass, and therefore the remedy would be inadequate. And in
13 2010, *Hunter v. Mansell*, Court of Appeals decision also in
14 Colorado, if as here, the trespass is continuing, the owner's
15 only remedy at law would involve a multiplicity of suits for
16 each recurrence of trespass.

17 This remedy at law is inadequate where further
18 trespasses of the same kind are threatened and an injunction
19 will lie. I really think, Your Honor, when the Eighth Circuit
20 addressed this through the prism of *Apfel*, this is the body of
21 case law they were looking for, and the case law, and the
22 scenario where an injunction is not appropriate, is the
23 situation where you have a taking, whether it's an exercise of
24 power by the State, for a nuisance or eminent domain by a
25 railroad or something, and you have an event and you can go to

1 court and someone can value that event. And sure, what you get
2 in the compensation may not be as much as what you -- might not
3 give you the kind of relief you really wanted, but the Court
4 deems that adequate; the same way that if I'm injured in an
5 accident, and I get damages, I may not get my arm back, but
6 that's deemed to be adequate compensation. But this is not an
7 adequate remedy, because we would have to be doing this,
8 literally, forever, because this statute doesn't have a sunset
9 provision.

10 THE COURT: I mean, I basically agree with you on
11 that. But I do wonder why we couldn't -- say we didn't have
12 the Eleventh Amendment issue here, and you were trying to get
13 some money, in this case, and I said, *Okay, I think this is a*
14 *taking*, but instead of telling you, You got to come in and
15 prove exactly how many you sell and, you know how many, you
16 sold to this particular pharmacy, or this particular middle
17 man, I just say, let's do like you do in a land case, and make
18 some estimates, get some economists and accountants in here and
19 say here is a reasonable present value of the likely cost of
20 these going forward in perpetuity, just like the town could --
21 the value of what the town did in *Knick* could change over time,
22 But that doesn't mean that whatever they come up with in that
23 case is inadequate.

24 MR. LEFKOWITZ: It's far more unworkable here. First
25 of all, we're dealing with private parties, not the government.

1 We're dealing with compensating all of these pharmacies, that
2 we're obligated to pay. And also, we're in a world where,
3 right now, there are two generic substitutes to the branded
4 EpiPen®, and because of Colorado's very generous state
5 substitution laws, they encourage physicians and pharmacies to
6 dispense generics, always, because generics are a lot cheaper
7 than the brand. However, we have no idea how many Teva is
8 going to sell a year from now, two years from now, three years
9 from now. We don't know how many more generics may be in the
10 market for this product. We don't know when some new product
11 will come on the market that will modify the quantities being
12 sold. There is no way -- it's not like when you are simply
13 making a bet on how much my land would be worth, you basically
14 value it based on the fair market value today. That is the
15 measure in takings cases. That is the measure for just
16 compensation. Because no other measure is really fair. But
17 here, to do the net present value, you have to make assumptions
18 about the forever, which you literally can't make, because this
19 is an endless series of takings, and even the inverse
20 condemnation proceeding that takes place two years from now, is
21 only one of many that have to take place. I just -- this
22 actually is even more inadequate than the one that the Eighth
23 Circuit found inadequate, because in the Eighth Circuit they
24 didn't even have a two-year statute of limitations. It was a
25 much longer period. They did have a statute of limitations,

1 but it was a good deal longer than we had here.

2 So, here dealing with the multiplicity of lawsuits,
3 and figuring out what the pricing would be, the requirement of
4 having to have various experts opine, look at different models,
5 understanding that the, you know, kickback arrangements, I
6 don't mean that in a pejorative way, the way drugstores get
7 reimbursed, in a look back from the wholesalers, it's just
8 impossible to really do this in any efficient way.

9 If I may, I would like to just touch briefly on the
10 standing issue. And last thing I will just say about this one
11 thing is, in *Horne*, there's actually a discussion about the
12 longstanding Cherokee Nation rule about, you know, adequate
13 compensation being appropriate, and the Supreme Court, just a
14 couple years ago, in ** *Horne* -- a few years ago in ** *Horne* --
15 cited several cases, where it found that compensation was
16 inadequate, even though there were compensation formulas
17 available, and in those cases, found that injunctive relief was
18 appropriate.

19 *THE COURT:* Let me ask you one last question, before
20 you move on from this, because I think we both agree this is
21 probably the heart of what we need to talk about, right now at
22 least.

23 *Knick*, you would concede, says a lot of things that
24 are helpful to your case, but then has one section that says,
25 *Don't read anything we're saying today as saying that courts*

1 *can just start enjoining takings.* It seems, explicitly, to try
2 to say injunctions and takings, if not never, are rarer than
3 injunctions in other areas, that we have to treat it
4 differently, somehow.

5 MR. LEFKOWITZ: I think that's not -- that's not an
6 incorrect reading.

7 First all, that entire discussion was dicta, because
8 there was no question in *Knick* about that. But because *Knick*
9 was establishing, by overruling *Williamson*, that parties can
10 come straight to federal court, and in that case, because it
11 was not a state, it was just a municipality, you know, she was
12 able to go straight to the court to seek her relief. What the
13 Court was saying, *is, Look, don't worry, when there is an*
14 *adequate remedy, we're not going to be going around enjoining*
15 *state action*, and we assume that there is, usually, going to be
16 a state remedy that's adequate, because every state has some
17 form of just compensation formula that they use in eminent
18 domain.

19 But it did not, in any way, say that it will never be
20 the case, and the backdrop rule is clearly the rule that we
21 apply in all equity, which is, is there an adequate remedy at
22 law? And the Supreme Court was very clear to modify its, kind
23 of, note to the state that says don't worry, you shouldn't
24 expect lots of injunctions, by saying when there is an adequate
25 remedy, and it certainly had the knowledge of *Duke Power* and it

1 had the knowledge of *Apfel*, when it said that, and it
2 recognized that there are going to be times when a remedy
3 wasn't adequate.

4 *THE COURT:* So *Apfel*, in particular, you have said a
5 couple times here that what you trying to argue is that this is
6 un-- this action is unconstitutional, this is an unlawful
7 provision of the statute, but that that same part of *Knick*
8 seems to me to -- well, let me strike that. Going back to
9 where I was saying. Normally, a taking is, sort of, by
10 definition, a lawful action on behalf of the government, other
11 than that they have to then pay just compensation. One way of
12 interpreting what you are saying, and certainly what you are
13 asking for, an injunction on this law, is that if a taking is
14 coupled with this inadequate remedy, it is unlawful, period.
15 There's no way of complying with the Fifth Amendment, at all;
16 is that right?

17 *MR. LEFKOWITZ:* I think that's fair. And remember,
18 there used to be a doctrine with the Court where states, as
19 long as they provided a remedy, you didn't even suffer the
20 constitutional harm until after that inverse condemnation thing
21 happened, and then a Court made very clear, about 15 years ago,
22 no, you actually suffer the constitutional depravation the
23 minute the taking takes place; that's actually why *Knick* says
24 you have right to a 1983 action, instantly, immediately. You
25 don't have to go and do your compensation program with the

1 State, because you are suffering the injury immediately. So
2 the only question is, if you recognized, from a standing
3 perspective, that we have an actual live case in controversy,
4 which we will talk about in a minute, then the question is, as
5 of January 1st, we will be suffering this Constitutional
6 depravation, and if we don't have an adequate remedy, then it
7 is perfectly appropriate to grant the injunctive relief,
8 because otherwise there's no way to unscramble that egg.

9 *THE COURT:* Okay. Thank you.

10 *MR. LEFKOWITZ:* I will be much briefer on the standing
11 and ripeness issues. I do want to, just briefly, address them
12 though because I know the State has made a big deal of them.

13 First of all, I don't think there's any dispute that
14 Teva is facing a credible threat here. Basically, there are
15 only really three different, you know, assumptions, that go
16 into this. One, that some Coloradans will use the program; two
17 that some Teva pens will be sold; and three, that pharmacies
18 will seek reimbursement.

19 I want to first address their legal argument, then I
20 will go to what's in the record. They argue that the credible
21 threat standard is restricted to First Amendment cases. First
22 of all, Susan B. Anthony, although it was a First Amendment
23 case, makes clear that the credible threat language that it was
24 articulating, relates to the injury in fact requirement, and
25 therefore it applies to any preenforcement challenge. I know

1 this Court applied it in the free exercise clause recently.
2 Chief Judge Brimmer applied it in a Second Amendment case
3 recently, and interestingly, he denied -- he rejected standing
4 in another gun case, because in that case the plaintiffs didn't
5 allege they intended to engage in the conduct forbidden by the
6 statute. So there, there wasn't credible threat. But there's
7 no question that in the Second Amendment context, it's been
8 utilized by the Tenth Circuit, as well, both when it affirmed
9 that initial injunction of Chief Judge Brimmer earlier this
10 summer, and in *Colorado Outfitters vs Hickenlooper*, which was a
11 Second and Fourteenth Amendment challenge, again in 2016. One
12 of the key lessons of *Knick*, and this is what the Court
13 specifically says, there's no reason why the taking clause
14 should be relegated to the status of a poor relation among the
15 provisions of the Bill of Rights.

16 We know, for example, that we have Second Amendment
17 cases where this standard applies, First Amendment cases, and
18 of course, when it applies to a state, it's actually just
19 applying through the Fourteenth Amendment. So there's no
20 reason to single one of the Bill of Rights out from the others.
21 For years this preenforcement challenge applied in abortion
22 cases which, depending on your view of the world, either
23 involved five or six different parts of the Bill of Rights or
24 involved none, but it certainly doesn't just involve the First
25 Amendment, and so, from my perspective, there is a credible

1 threat, and there's no basis to say that the preenforcement
2 challenge can only apply in a First Amendment case.

3 Now let's look at the facts. Teva supplied 14,000
4 epinephrine auto-injectors to Colorado. This is from the
5 declaration, in the deposition, at page 21, Mr. Galownia says,
6 *Teva plans to continue shipping the auto-injectors to Colorado.*
7 He said, the next page, *Even if the act goes into effect we*
8 *will continue to sell EpiPen®s in Colorado,* and then on page 20
9 he said, *There's already inventory in Colorado, and its*
10 *customer contracts require Teva to provide any notice of*
11 *stopping sale, which we have not done.*

12 Moreover, the Colorado laws on generic substitution
13 make it clear that these EpiPen®s are going to be sold, and
14 Teva has a 37 percent share of the market; that's on on page
15 29.

16 So, I don't think there's any question that Teva
17 satisfies the case in controversy requirement for a
18 pre-enforcement challenge both on the law and the facts.

19 I want to touch, very briefly, on ripeness and make
20 two points. The Attorney General has two ripeness arguments.
21 I think both are meritless. First, he claims that Teva's claim
22 is unripe because no taking has yet occurred, but the Tenth
23 Circuit just said, two years ago, in *303 Creative*, that in the
24 context of pre-enforcement challenges, quote, Standing and
25 ripeness often boil down to the same question. And then, the

1 Attorney General argues that Teva's claim doesn't satisfy the
2 finality requirement for takings, but the finality requirement
3 applies only to regulatory takings not per se takings, like
4 this, and it almost always arises in the land use context,
5 where a plaintiff has to get a variance before filing a
6 lawsuit, in order to make clear -- he has to seek a variance,
7 in order to actually ascertain what the force of the law is.
8 We know what the force of the law is here. That citation is
9 *Pac. Tel. vs. City and County of San Francisco*, 141 Supreme
10 Court, 2226 it's a 2021 case.

11 I won't even address, unless the State raises this,
12 the question of the whether the defendants are now the proper
13 parties. I think everybody agrees that we have now sued the
14 proper parties, and I will simply close by addressing, briefly,
15 the Eleventh Amendment. The Attorney General's argument on the
16 Eleventh Amendment is a little confusing and circular. He
17 argues that if Teva reframes the claim as one for just
18 compensation, the Eleventh Amendment, Sovereign Immunity would
19 bar the claim. But Teva will not reframe its claim as one for
20 just compensation. It doesn't believe just compensation would
21 work here, doesn't believe it would be adequate or prompt or
22 efficient, and it is not like all of these cases that they
23 cite, the *EEE Minnesota* case, the *Ladd vs Marchbanks* case,
24 *Williams vs. Utah, Los Molinos*, all of those cases are
25 basically cases where injunctive relief is disguised as a

1 request for just compensation. That's not what we are doing
2 here. We only seek an injunction preventing enforcement of the
3 reimburse or resupply requirement, and therefore, I think our
4 case falls squarely within *Ex parte Young*. The State has a lot
5 of options if it wants to make EpiPen@s available to
6 Coloradans, insured or uninsured, cheaper. It can impose a tax
7 on the sale of EpiPen@s, and then use that tax as a dedicated
8 fund for people who are uninsured. There are some states,
9 municipalities that have adopted that. They can simply impose
10 a price cap and see what the market forces do. They could
11 subsidize it more broadly, in other ways.

12 I guess, the State could even decide it wants to enter
13 the generic business and develop its own EpiPen@s. The one
14 thing that it can't do, is it can't take this private property,
15 which is clearly for public use without just compensation, and
16 when there isn't an efficient, practical remedy, as the Supreme
17 Court has articulated in *Terrace*, as the Eighth Circuit has
18 just made very clear in a statute almost on all fours,
19 injunctive relief is warranted.

20 THE COURT: Can I just ask you one question before you
21 sit down?

22 As I have read *Knick* and the *Apfel* case, and the *PhRMA*
23 case, I haven't seen any of those -- it was a little hard to
24 tell, exactly, what was going on, procedurally, in *Knick*, but,
25 *PhRMA* and the *Apfel* case seem to be not pre-enforcement cases.

1 Do you have any pre-enforcement takings cases where a Court has
2 enjoined before a law went into effect? Because what *Knick*
3 does say, you are right, once we -- even if there's possible
4 compensation, that constitutional flaw, the constitutional
5 right is infringed once the property is taken, but what
6 happens -- you are asking me to do something before that even.
7 Do you have any other cases doing that?

8 MR. LEFKOWITZ: I will think about that while I listen
9 to the State's argument, and I would gladly accept an
10 injunction that went into effect on January 1st, which would
11 satisfy that concern, but doctrinally, I actually don't think
12 there's a difference, if we have standing. In other words,
13 if -- if we are imminently threatened, there's all sorts of
14 case law that makes clear, you don't have to wait for the
15 government to effectuate punitive action on you before getting
16 your relief in court; that's the standard for all of these
17 pre-enforcement challenges that we've seen over the last
18 decade, mostly, again in the abortion context, but in a lot of
19 other context as well. Certainly in the gun context, here in
20 Colorado, just recently with Chief Judge Brimmer's opinion, but
21 I will think about it, since I know I will have a little bit of
22 time in the takings --

23 THE COURT: This is not really a question, just a
24 summary of my big question for everybody, is, to me, *Knick*, as
25 you pointed out, does suggest and say, in some ways, that

1 basically, takings cases should be treated just like other
2 constitutional cases, and that, obviously, is the heart of your
3 argument. But then it has the one section that says, but wait,
4 there's -- don't read us as thinking we are going to start
5 handing out a bunch of injunctions in federal court for takings
6 cases, and there's something just different about takings, the
7 Takings Clause, than the Second Amendment and the First
8 Amendment, which is, those typically -- those cases involve a
9 prohibition on doing something and here, you are allowed to
10 continue everything you just said; they are allowed to continue
11 selling; they are allowed to do this; but when they do, they've
12 got to hand over some of their property, and there's just
13 something different about that, isn't there?

14 MR. LEFKOWITZ: I don't actually think there's --
15 there's something different, because factually it's different,
16 but I think that doctrinally it's not different, because the
17 job, I think, that a Court has in this situation, is to make an
18 assessment now, as to whether the compensation program is going
19 to be a full and efficient remedy. If it is, then, yes, what
20 is different about the Takings Clause is, it allows the taking,
21 if there's going to be just compensation, but based on the
22 record we have, and I don't think there's anything more that is
23 needed, and certainly the State could have taken discovery, if
24 it thought it needed additional discovery, based on what we
25 know now about the way in which this inverse condemnation

1 proceeding would have to work and how it would be endless and
2 repetitive and involve thousands or hundreds of different drug
3 stores with different price formulas. I think we can say --
4 not we -- I think the Court can say, at this point, I can look
5 and I know that this is not going to satisfy the demands that
6 equity imposes in the test for equity versus law, and so as
7 long as there's standing, I think it is appropriate to grant
8 that injunction.

9 *THE COURT:* All right. Thank you.

10 *MR. LEFKOWITZ:* Thank you, Your Honor.

11 *THE COURT:* I will let the State -- I'm not sure,
12 Mr. Nelson? Right, yeah, please.

13 *MR. NELSON:* Good afternoon, Your Honor.

14 *THE COURT:* Good afternoon. Go ahead.

15 *MR. NELSON:* Pawan Nelson, I represent the Attorney
16 General, but today I will be arguing on behalf of all
17 defendants.

18 Teva's motion for a preliminary injunction should be
19 denied and i's case should be dismissed. Colorado enacted this
20 program to give all Coloradans access to lifesaving medication
21 that they need in an emergency, in the face of price gouging.
22 It has not gone into effect yet, and it's clear Teva dislikes
23 the policy, because it may affect them, perhaps, in the future.
24 But what Teva is trying to do here, and I think the Court
25 mentioned this, was exact -- was specifically prohibited in

1 *Knick*. Coming to federal court to try to get an injunction to
2 prevent a taking from happening in the first place, that should
3 not be allowed.

4 For three principle reason the preliminary injunction
5 motion should be denied and the case should be dismissed.
6 First, Teva has an adequate remedy at law, and I think we all
7 understand that's probably the heart of the dispute right now.
8 Second point is, Teva has filed a suit prematurely, and we can
9 get to that standing and ripeness arguments, and finally, the
10 police power argument.

11 But I would like to start with the adequate remedy at
12 law argument, because it is really, I think, the heart of what
13 we're talking about here. And a few things are not in dispute,
14 Your Honor. No taking has occurred, because the program has
15 not even gone into effect yet. But if that ever does happen,
16 there are adequate compensation remedies in Colorado state
17 court for them to get just compensation.

18 And it's well established too that in the Fifth
19 Amendment Takings Clause context, no injunctive relief is
20 available where a suit for compensation can be brought,
21 subsequent to the taking.

22 In the face of these, you know, facts and
23 well-established principles, Teva makes its argument that, *But*
24 *wait, it's not adequate, because we will have to have these*
25 *repetitive suits, and therefore it's not adequate*, and I think

1 that's wrong for two principle reasons; it's wrong as a matter
2 of Fifth Amendment Takings Clause Doctrine, and it's wrong as a
3 practical matter.

4 So we're talking about Fifth Amendment Takings Clause.
5 Since the *Cherokee Nation* case, in 1890, all that's required to
6 satisfy the Takings Clause is reasonable, certain and adequate
7 provision of obtaining compensation some time after the taking,
8 and I think that's a line of precedence for 130 years that make
9 that clear, and it was reaffirmed in *Knick*.

10 A compensation remedy does not become inadequate
11 simply because multiple suits may be, theoretically, necessary.
12 And I think where Teva and the Eighth Circuit took their wrong
13 turn is by not looking at how the Takings Clause has been, sort
14 of, developed and enforced over the years. They are trying to
15 import equity concepts into this context when they've really
16 never occurred in the Fifth Amendment Takings context at all.

17 We can look at the Tenth Circuit for that. You know,
18 the *Gordon* case, the one involving the wolf pack. There,
19 theoretically, would have been a taking any time the wolf pack
20 got hungry, right? Yet, in that case, the Tenth Circuit said,
21 *Nope. You don't get to come to federal court, get injunctive*
22 *relief. You have got to use a Tucker Act.* I think the
23 *Williams* case illustrated this principle, as well. I mean,
24 interest accrues, literally, every day, right? Still, Tenth
25 Circuit said, *Nope. You have got to go use your state court*

1 *remedy. Even more than the Tenth Circuit, since Knick,*
2 *multiple federal courts have rejected the argument Teva is*
3 *making here; that somehow we get an injunction, because, Hey,*
4 *you didn't give us just compensation ahead of time; multiple*
5 *Courts have rejected that argument.*

6 So I think that the idea that somehow there's a
7 multiplicity of suit exception, that we can import from equity
8 into the Fifth Amendment Takings context, it really doesn't
9 have any basis in the case law.

10 *THE COURT:* What about the *Apfel* case?

11 *MR. NELSON:* So the *Apfel* case, essentially, what the
12 Court found there was that the Tucker Act didn't provide a
13 compensation remedy at all, given, sort of, how the Cole Act
14 worked.

15 So the holding of that case wasn't based on some sort
16 of multiplicity of suit rationale. It was simply that, Hey,
17 listen, given how Congress constructed the Cole Act they did
18 not mean the Tucker Act to be the exclusive remedy to get
19 compensation.

20 *THE COURT:* Right. And I mean why wouldn't that same
21 analysis apply here? State of Colorado clearly didn't intend
22 for the state to subsidized these pharmaceutical manufacturers,
23 right? I mean -- and maybe you can take a step back and just
24 tell me, if I agreed with you, what you think -- how would this
25 play out, if I just dismiss the case and deny it? What do you

1 think they should do? Assume that it's a taking, for purposes
2 of this question.

3 MR. NELSON: Sure. If you assume it's a taking,
4 whenever there's a final decision; that is, whenever a pharmacy
5 comes to Teva and says, *Hey, I need to get reimbursed for this.*
6 *Send me an EpiPen®.* Okay. That would be what would be
7 considered the taking, right? And at that point Teva could
8 come to state court, in Colorado, and say; A, either after they
9 give them the EpiPen® come to Colorado State court and say
10 state you owe us for a taking; a taking has happened. So you
11 owe the wholesale acquisition costs for the EpiPen® that we
12 give, right? Or if the Board tries to enact some sort of
13 enforcement proceeding against them, Teva could make a Fifth
14 Amendment Takings Clause defense to that, in Colorado state
15 court, and would have the same sort of fight, which is, you
16 know, *Hey, is this a taking?* And if it is, *You owe us the*
17 *money.*

18 So I guess I hope I answered your question,
19 Your Honor; the taking -- the taking needs to occur, and once
20 the taking occurs, they go to state court and get their
21 adequate compensation.

22 THE COURT: So then was -- do you dispute
23 Mr. Lefkowitz' description of how complicated that would be,
24 and maybe even setting that aside, even if we could do the math
25 without all of that much complication, doesn't that sound a lot

1 like -- I mean, the math in *Apfel* was pretty simple. But the
2 Supreme Court said, *Well, that's pretty pointless, because the*
3 *law is clearly intended not to have the government basically*
4 *paying these private companies who then pay it to someone else,*
5 which is what you are saying would happen here. And the Court
6 said, *Well, that's not what anybody had in mind.* So if the
7 statute is set up to do that, you can get an injunction
8 instead. Isn't that the holding of *Eastern Enterprises vs.*
9 *Apfel*.

10 MR. NELSON: No, Your Honor. I think you asked a few
11 questions there --

12 THE COURT: Yeah, probably. You can pick -- pick them
13 off one at a time.

14 MR. NELSON: I would like to answer all of them, but
15 in a particular order.

16 First of all, I do dispute the notion that somehow
17 this is going to be mind-bending complicated damages question,
18 right? The reason I say that is because the way the program
19 works is the pharmacy asks the manufacturer for replacement,
20 and then the manufacturer will send it straight to them. So
21 it's not going through the chain of commerce. It's not going,
22 first, to the wholesaler, who marks it up, but then gets some
23 kickbacks from them, and so that price changes, who then sells
24 it to the pharmacy, at a markup, other types -- no. None of
25 that is happening in the program, the way the program works.

1 Once the pharmacy asks for reimbursement, Teva ships
2 it, and Teva can say, *We would have sold that at 300/350*
3 *wholesale acquisition costs. You guys owe us now.* So I
4 dispute the notion this is somehow some complicated question,
5 right?

6 And then I think talking -- you asked me about the
7 *Apfel* case, and you know -- but again, I don't think the
8 plurality in *Apfel*, the notion of money damages, I don't think
9 that was really the basis of their holding. The basis of their
10 holding was, we presume Tucker Act applicability unless
11 congress unambiguously says it doesn't apply. In the Cole Act
12 we believe it said that it didn't apply, right? And then you
13 need to look at it, again, in the context of how the Tenth
14 Circuit has dealt with similar questions in the past, right?
15 So if we look at the *Gordon* case, again with the wolf pack -- I
16 believe, during his argument he mentioned -- Teva's argument,
17 mentioned that as a practical matter, what this program is
18 going to do is Teva is going to give the physical product. So
19 we are not talking about money, as a practical matter here at
20 all, based upon what they said in their oral argument. We are
21 talking about them shipping a physical product, and I think
22 that falls squarely into the *Gordon v Norton* realm. In the
23 Tenth Circuit, you know, distinguished *Apfel*, they said, *No,*
24 *we're talking about discrete physical products. Apfel* wasn't
25 talking about that, *Apfel* doesn't have applicability here.

1 So, to answer your question, Your Honor, I would say,
2 it's -- this is not some complicated damages question; and two,
3 since we are talking about physical products, really shouldn't
4 be talking about *Apfel* at all.

5 *THE COURT:* On the first question, so is your view,
6 that no matter who requests, no matter which pharmacy is at
7 issue, the dollar amount attached would be the same for Teva,
8 that none of the middleman stuff makes a difference or none of
9 the pharmaceutical -- who makes the requests from them, it
10 wouldn't matter?

11 *MR. NELSON:* I mean, based upon what I think their
12 declarant testified, I don't see how it wouldn't, because
13 again, it's not going through the chain of commerce. So, you
14 know, Teva would set its price. *We think you owe us this,*
15 right? There's no markups, there's no kickbacks, there's
16 nothing like that. So I don't think it's as complicated as
17 they are making it out to seem.

18 So I think, you know, this multiplicity of suit
19 exception really has no basis in Fifth Amendment Takings Clause
20 jurisprudence. The Fifth Amendment was not designed to limit
21 governmental interference with property, *per se*. It was just
22 designed to secure compensation. The Fifth Amendment does not
23 require compensation be paid in advance or contemporaneous with
24 the taking. There just needs to be a mechanism for reasonably
25 just and prompt payment after the fact, and the Colorado

1 compensation remedy does it here.

2 I don't think they've really disputed that, at all.
3 So the Court should reject that argument.

4 Now I want to move to the practicalities. We have
5 talked a little bit about the pricing argument they made. The
6 argument that we raised in our reply in support of our Motion
7 to Dismiss. Another practical problem with their argument is
8 preclusion, right? We were really -- since this is a discrete
9 identical physical product, with the same price, no matter
10 which formulation we're talking about, all we really need here
11 is a single suit to hash out our differences in Colorado state
12 court, and then depending how that court went out, there would
13 be preclusion would apply. And so if a state wins there's no
14 taking, you know, the program goes into effect, right? If Teva
15 wins and there's a taking, I could see two things happening,
16 right? A, there's legislative changes; or B, all Teva needs do
17 now, after -- anytime an EpiPen® is made or is taken under the
18 program, all they need to do is send us a letter says, *Hey,*
19 *State now you owe us this amount of money,* and I don't think
20 anyone in my office is going -- if they lose the first case, is
21 going to try to dispute that in court, because how preclusion
22 principles work.

23 So, as a practical matter, I don't think this argument
24 that somehow they don't have adequate remedy really holds
25 water, and what does that mean, right? If they have adequate

1 remedy, the Eleventh Amendment bars their suit, right? Because
2 they can't get injunctive relief against the state. And it
3 also means, if they have an adequate remedy, they have not made
4 a strong showing of the need for a preliminary injunction.

5 So, because this is the case, Your Honor, I would say
6 the State would ask you to, you know, reject Motion for
7 Preliminary Injunction and dismiss the case.

8 *THE COURT:* Let me ask you what do you make of *Knick's*
9 discussion of how -- I mean, it sounds very familiar, what you
10 are asking the plaintiff to do here, which is going to state
11 court, once you have had your property taken and ask for
12 compensation, and the Supreme Court says that's not the
13 requirement anymore. There's no state exhaustion requirement.
14 You can go straight into federal court and the taking occurs
15 the moment that the property is taken and you can go straight
16 into federal court. And I think it's a fair analysis of *Knick*
17 to say it, basically, was trying to say takings cases should
18 just be treated like every other constitutional case. Do you
19 dispute that?

20 *MR. NELSON:* I do, Your Honor, because I think that
21 the Tenth Circuit addresses it in *Williams*. *Knick* was not --
22 did not involve state defendants, right? And *Knick* did not
23 abrogate the state's sovereign immunity under the Eleventh
24 Amendment. So, since they have decided to sue the state
25 defendants, the Eleventh Amendment applies here, and you know I

1 think as the Tenth Circuit said in the *Williams* case, given
2 that the Eleventh Amendment applies, you can't bring a taking
3 claim against state entities in federal court, if there's an
4 adequate remedy available in state court.

5 So, no, I don't think this is reimposing the
6 Williamson County state litigation requirement. It has a
7 separate font where it's coming from, and this is the Eleventh
8 Amendment, and not only has the Tenth Circuit found that, it's
9 multiple circuits have found that the Eleventh Amendment
10 applies in takings cases, when you are dealing with state
11 defendants in federal court.

12 *THE COURT:* But do you think -- *Williams* seems a
13 little different. I mean, they clearly are not trying to use
14 this to get compensation. I mean, they want to block the law
15 from going into effect, and the Eleventh Amendment, generally,
16 doesn't apply to those sorts of requests, right?

17 *MR. NELSON:* So, you know, I cited a number of cases
18 in the reply in support of our Motion for Dismiss, where
19 federal courts have dismissed these types of claims, under the
20 Eleventh Amendment, because they found that inadequate remedy
21 applied. They could get adequate remedy in state court. So, I
22 would not agree with Teva's argument here. *Knick*, you know,
23 *Knick* didn't apply in the Eleventh Amendment context. *Williams*
24 held that the Eleventh Amendment applies and Fifth Amendment
25 Takings cause -- cases, and multiple federal courts since then

1 have kicked out cases exactly like this one, under this
2 principle.

3 I don't see, really, any way, in this case, that there
4 would be money paid in the way that the Eleventh Amendment
5 usually -- there would be damages coming out in this case.
6 So -- do you see -- do you see a way that there would be
7 damages that would, sort of, be the equivalent -- or some kind
8 of payment that would be what, typically, triggers the Eleventh
9 Amendment, or are you just saying that, sort of, there's --
10 maybe based on this preclusive effect that you get an
11 injunction in federal court, then you can -- even if you can't
12 get direct damages in federal court, that you could take that
13 in and have a preclusive effect somehow? Or is it just a
14 different rule for takings cases?

15 MR. NELSON: I think it's a different rule for takings
16 cases when you are dealing with state defendants. I think,
17 because of the Eleventh Amendment issue, literally, the only
18 type of remedy they could get in federal court would be
19 perspective injunctive or declaratory relief. Really, that's
20 the only one possible. But given the nature of the Fifth
21 Amendment, which is the remedy is compensation, right, as long
22 as there's a remedy where they can get compensation, no, they
23 can't come to federal court. That's what the *Williams* case
24 held.

25 So, you know, although they may not be seeking it, and

1 I think they are not seeking that, in this case, given *Ex parte*
2 *Young*, that's been well established, as a practical matter,
3 given what we discussed before about being an adequate remedy
4 of law, it's not available, at this point.

5 *THE COURT:* So that leads to, kind of, this question I
6 brought up towards the end with Mr. Lefkowitz, which is their
7 argument essentially is, if there's not an adequate remedy,
8 that the law is just invalid. It's not that, you can somehow
9 figure out compensation. But if you can't figure out
10 compensation in an adequate, efficient way, then you can't do
11 this at all. Is that right? Or do you think that -- so, I
12 guess what I'm saying is so, your position is this is not a
13 taking, but if we assume it's a taking, and then we assume that
14 it's too complicated for this ongoing, constantly changing
15 market, then the only -- there's no remedy, no compensation
16 available. So the law just is invalid. And that is the kind
17 of thing that you can get, despite the Eleventh Amendment,
18 right? You can get a federal court to say law is invalid going
19 forward.

20 *MR. NELSON:* So, I think the only cases that have --
21 going back to the principle in *Cherokee Nation*, which is you
22 need adequate -- I want to get the exact language, so let me
23 leaf back. Yeah. So, you know, given *Cherokee* reasonable
24 certain adequate provision for obtaining compensation, and
25 again, after the fact. You know, I think the way that's been

1 applied in federal courts, over the years, is the instances
2 where's they found it didn't apply, was where a plaintiff
3 couldn't get compensation at all. Simply couldn't get it, at
4 all.

5 There's, you know, this *Clajon* case, it's Tenth
6 Circuit, 70 F3d, 1566. This wasn't cited in the briefs, and
7 it's was about ripeness, but in that particular instance, Tenth
8 Circuit evaluated a Wyoming law governing the allocation of
9 hunting licenses, and there the Tenth Circuit held, because the
10 plaintiff couldn't bring inverse condemnation suit under
11 Wyoming law, it wasn't adequate. So, I think if you actually
12 look at the case law, how it's developed over the years, and
13 the Fifth Amendment Takings Clause context, it's not because
14 it's complicated. It's that if there's no remedy at all. And
15 I think that's what I'm saying here. I'm saying simply, A, I
16 disagree, as a factual matter, that this is a complicated
17 question to begin with; but B, we can hash that out; that's
18 what courts are for. Hash out these complicated questions,
19 come to a final decision, and really that's all we're saying is
20 necessary in the Fifth Amendment Takings context.

21 Unless the Court has any additional questions on this
22 point I would like to move to the standing question, now, and I
23 think that the -- at the end of Teva's argument, the Court
24 asked an interesting question, which was, can you point me to
25 any pre-enforcement takings clause case? They have not cited

1 any in their briefs. I haven't been able to find any in my
2 research, and that's not a mistake, that's because of the
3 uniqueness of the Fifth Amendment Takings Clause to begin
4 with. And I think if we look at *Knick*, they explain the
5 uniqueness of this Takings Clause. It repeatedly says, you
6 know, Fifth Amendment isn't designed to limit government
7 interference with personal -- with property. You don't need to
8 pay compensation ahead of time. Just because you enact
9 legislation doesn't mean that's a taking. And I think as *Knick*
10 said, repeatedly, the Fifth Amendment Takings Clause occurs at
11 the time of taking; that's when the plaintiff can file suit,
12 and I think there was a suggestion that that's all dicta, but
13 that wasn't dicta, Your Honor. What the Supreme Court was
14 doing in *Knick* was overruling a well-established law, and in
15 response to that, the dissent argued, *Hey, listen, you are*
16 *establishing a rule where people have to pay for compensation*
17 *ahead of time.* And what the majority did, was repeatedly
18 assured, dissent and the public, that's not what we're doing
19 here, right? The violation occurs when there's a taking.

20 So why am I emphasizing that, right? I'm emphasizing
21 that because there's been no taking in this case, right? You
22 know, they want -- they want you to assume that there's going
23 to be a taking in the future. Maybe, maybe not.

24 I think it's also possible that don't get wrapped up
25 in it, but --

1 THE COURT: It seems pretty likely, highly likely to
2 me, can given that they sold 14,000 of these into Colorado,
3 that at least one will fall within this provision sometime
4 reasonably soon. And so what -- and they clearly have to --
5 Teva clearly has to, sort of, decide. They are being put to
6 this choice of what to do here, soon, right? Starting on the
7 1st. And normally, if a law is putting someone to the choice
8 of complying with a state law or violating it, and they think
9 it is unconstitutional, normally, as long as it seems likely
10 that they are actually going to be subject to the law, that's
11 typically enough for standing. I mean, there hasn't been
12 any -- this is not like some of the other cases I have had here
13 where the state has said, *Oh, we're not going to enforce this,*
14 *until there's a rule making, or We're not going to enforce this*
15 *for a certain period of time.* Like, it's going into effect in
16 a couple of weeks, and it seems to apply to their business, and
17 normally that seems to be enough. Am I wrong?

18 MR. NELSON: Well, that seems to be enough in, again,
19 the First Amendment, due process, equal protection context,
20 right? It's not accidental that we don't find cases in the
21 Takings Clause context where this happens. And again, it's for
22 this principle that I'm saying from *Knick* which is, the
23 violation occurs when there's a taking. I think you mentioned
24 too, Your Honor, *Knick, Horne, Cedar Point*, they brought suit
25 after there was arguably a taking that happened, because that's

1 when you can bring suit, at all, and that simply is not the
2 case here. And, you know -- and I think the difference between
3 the First Amendment context, the due process, equal protection
4 context, is people have a right to act in a certain way, right?
5 And arguably the law that prevents them from exercising the
6 rights that they already have. And the Fifth Amendment Takings
7 Clause, people do not have a right to avoid a taking. Under
8 the Fifth Amendment they just have the right to compensation,
9 and I think that's where their arguments about standing and
10 ripeness all fall down, given the difference between this
11 unique context and the context they are trying to import here.

12 Again, it's not accidental that we don't find these
13 pre-enforcement challenges in Takings Clause cases.

14 *THE COURT:* But isn't that partly because this is an
15 unusual type of taking? You know, it's different when the
16 state or local government wants to build a road across your
17 property, sort of know what's happening there. This is sort of
18 ongoing, they never really know quite -- it could be suddenly
19 they get in a -- two weeks from now they suddenly get 200 of
20 these or they get none for a month, but they have to sort of
21 change their analysis of how to do business. Now, it seems,
22 and it's just a different kind of regulation or different kind
23 of taking, isn't it?

24 *MR. NELSON:* I don't think so, Your Honor. I think
25 the message from *Horne*, right, is that you know land-use cases

1 and takings of personal property, they are analyzed the same.
2 You know, they are different when you to get the substance,
3 when you get to the *Penn Central* factors, obviously. It's kind
4 of the same, they are governed by the same standards, and you
5 know -- and I think the message from *Knick* is, there needs to
6 be a taking in order for a violation to occur, right?

7 And so, no, I don't think this is somehow unique
8 because it -- you know, it requires or might require Teva to
9 give an EpiPen® some time in the future to a pharmacy. The
10 Fifth Amendment Takings Clause jurisprudence can address that
11 perfectly well, and I think that's all we are saying.

12 *THE COURT:* Say in *Apfel* they brought a
13 pre-effectiveness, pre-enforcement challenge, it's not totally
14 clear to me, exactly, what kind of a challenge that was, based
15 on my recollection, but say they had, what would have been the
16 difference of bringing it two weeks before that law went into
17 effect or the day after?

18 *MR. NELSON:* So, I think it's also important to
19 recognize in *Apfel* it wasn't a pure Takings Clause case. It
20 was also a due process case. And if you look at the reasoning
21 in that case, the due process element loomed large in their
22 decision. So, I mean, arguably could they have made a due
23 process pre-enforcement challenge there? I think, sure, right?
24 But not Fifth Amendment Takings Clause, right. So that -- I
25 think that's the best way of dealing with that.

1 THE COURT: Okay. Fair enough. Thanks.

2 MR. NELSON: And just -- I just want to highlight a
3 few points from their witness' deposition, which again I think
4 highlights that there are too many unknowns in this case for
5 the Court to really adjudicate, at this point, right?

6 Teva can't say how many of its products were sold in
7 the past to individuals who might be in the program, right?
8 They were not able to say how many of their EpiPen®s were
9 dispensed to people on Medicare or Medicaid. How many EpiPen®s
10 were dispensed to people who have private insurance with a cap.
11 And they have not been able to say how many they anticipate
12 will be -- people will be eligible for the program in the
13 future.

14 There are multiple generic manufacturers in this
15 market. There are four versions of generics EpiPen®s on the
16 market, including Viatris, who prices their product the same as
17 Teva, has the same AB Rating as Teva. And Teva was able to say
18 how much market share has in Colorado. It was able to say
19 nationally. And nationally is not the majority of the market,
20 right?

21 So, I don't think, given what we have before us, this
22 claim is ripe, because no taking has happened, and I think it
23 would require the Court to make a bunch of assumptions that are
24 not warranted or allowed under the Fifth Amendment Takings
25 Clause jurisprudence.

1 THE COURT: I mean, Teva -- you are right, we don't
2 know for sure what the Colorado market share is, but you don't
3 have any reason to doubt that it's similar to the whatever
4 30-something percent that they said it was nationally, if I'm
5 remembering right. There's no reason to doubt its
6 significantly different than that. They sold 14,000 of these
7 into Colorado last year. Obviously, some of those could have
8 been shipped out of state, but probably not all.

9 So that part of your argument, I'm not all that
10 persuaded by the idea that they may not send any into Colorado
11 that would be subject to this. The arguments about not knowing
12 how many people are going to participate, how much -- how many
13 pharmacies will bother to go to the trouble, that seems a
14 little bit more problematic, to me. But if -- I mean, what do
15 you think would actually have to happen for them to have
16 standing? You think -- it's not enough, in your view, that the
17 law just goes into effect; is that right?

18 MR. NELSON: Correct.

19 THE COURT: And would it be enough if one -- one
20 pharmacy submitted the demand to them?

21 MR. NELSON: Yes. So, they could either -- the demand
22 comes, the pharmacy could say, *Give us an EpiPen®*, they give
23 the EpiPen®, ripe. Or they could say, *We are not giving you*
24 *the EpiPen® and maybe the board will do some enforcement*
25 *action, maybe not*, but if they do, they can say, *Takings Claim*,

1 ripe. That's what the Fifth Amendment Takings Clause law
2 shows.

3 THE COURT: Okay.

4 MR. NELSON: So, first all, I think this case isn't
5 properly before this Court, because of the Fifth Amendment, but
6 if the Court rejects that, it's not ripe for adjudication yet,
7 and so it should be dismissed. The preliminary injunction
8 denied, and the case dismissed on that basis.

9 And finally, and again, I don't think the Court again,
10 because of the Eleventh Amendment, I believe this question
11 properly belongs in state court, but I want to end on the
12 police power question.

13 There was interesting back-and-forth, you had with
14 counsel about the price controls, right? And I think what they
15 said was it would be constitutional for the state to just
16 impose a price control as long as it was in the proper chain of
17 commerce. I think that's what I heard. Right? And again,
18 what would be the source of that authority? Right? It's the
19 police power, right? It's the power Colorado has to regulate
20 the sale of drugs for the public good, right? And I think what
21 the *Lech* case, the *Lech* case, I think, the Tenth Circuit
22 attempted to give the line between takings and police power,
23 and the line that they drew was use of property for the public
24 good, police power. Use of property for public use, eminent
25 domain power, Takings Clause. And I think what our argument

1 here is, is this is necessary, life-saving medicine for a lot
2 of people in the state, who, unfortunately, have been priced
3 out, given some pricing practices that -- some pricing
4 practices, which some people call price gouging, right?

5 The state has the power to ensure that people have
6 access to life-saving medication and I think that is exactly
7 what the Affordability Program is attempting, here.

8 So there's lots of discussion about where you draw the
9 line. Slippery slope? No. What we're talking about here, is
10 something that is necessary for people to live in an emergency.

11 *THE COURT:* I definitely don't contest that. I
12 definitely find the pricing of some of this, I understand why
13 the State and other people feel the need to get involved, but
14 you could make that argument with the most obvious, sort of,
15 traditional taking, right? *We need to build a hospital on your*
16 *property or We need to build a road through your property,*
17 *because it's dangerous up here.* That doesn't -- that's still a
18 taking, right?

19 *MR. NELSON:* But it's not -- I would say it's not for
20 the public good, right? And I think that's the distinction
21 that *Lech* was talking about.

22 I mentioned this is in the reply, in support of the
23 Motion to Dismiss. You know, we have laws in this country
24 where hospitals can't turn away people from emergency rooms,
25 based on their lack of ability to pay, right? And it's the

1 same concept we're talking about here, Your Honor, right?

2 People shouldn't be denied access to emergency
3 medicine, in an emergency, simply because they can't pay, and
4 so, you know; whereas, I don't think there's any discussion
5 that a law like that, that you can't turn away people from the
6 emergency rooms who need help, is squarely within the police
7 power, and I think merely just we are just drawing a line from
8 that to the Affordability Program here, squarely about safety.

9 *THE COURT:* Yeah. I think I agree with that, but
10 there are some ways you can do certain things, and some ways
11 that require paying compensation. The hospital one is
12 definitely an interesting analogy, but here you are making one
13 private party give away their property to someone else. You
14 are not imposing a price cap. You are not subsidizing people
15 directly. You are -- you are saying to Teva, in this case, in
16 order to help us solve this problem, we're going to make you
17 provide your property to someone else, and isn't that just
18 different, at least in terms of this part of the constitution,
19 than any of the other examples you have given? The motivation
20 may be the same, and maybe the effect is the same, or at least
21 similar, but the method of getting there triggers a different
22 constitutional problem for you.

23 *MR. NELSON:* And again, I understand what the Court is
24 saying. I would just, again, point to *Lech* and be given the
25 line there. You know, the cases I also cited in support of

1 that, you know, it was taking of people's property for safety
2 reasons, and I think the same holds here.

3 But again, this really isn't a question for this
4 Court, given the Eleventh Amendment bar, given that they have
5 an adequate state remedy, you know, and given that this case is
6 premature, I think. I would ask the Court to deny their Motion
7 for Preliminary Injunction, and grant our Motion to Dismiss,
8 and let's take this to the Colorado state courts where this
9 belong. Unless the Court has any further questions from me?

10 *THE COURT:* I have one question that's probably
11 unfair. This is for both people. In *Knick* there was a part
12 of -- the plaintiff asked for all sorts of relief, including
13 injunctive relief, and lost in the lower courts, and then won
14 in the Supreme Court with no real distinction about what
15 happened, and we've tried to look at what happened on remand
16 after *Knick*, just because I'm curious about how important this
17 sort of exception for injunctive relief is.

18 Does anyone know what happened in *Knick* after it went
19 back down? I told you this was an unfair question.

20 *MR. NELSON:* I wish I knew.

21 *THE COURT:* Well, if you can find it, let me know.
22 Okay. I don't have any other questions. Thank you.

23 *MR. NELSON:* Thank you, Your Honor.

24 *THE COURT:* Mr. Lefkowitz.

25 *MR. LEFKOWITZ:* Thank you, Your Honor. I just have

1 six or seven very brief points I will try to rattle through. I
2 will start with the last question, and neither my colleague nor
3 I know what happened on remand in *Knick*, because the injunction
4 issue really wasn't at all relevant at the Supreme Court. The
5 Supreme Court really was just deciding the question of do you
6 have a right to go to federal court the minute there's a
7 taking.

8 *THE COURT:* Right.

9 *MR. LEFKOWITZ:* And they were overruling Williamson.
10 Everything else that they talk about, which we have been
11 talking about, is actually not even part of the holding.

12 I will say we're not going to end up in state court
13 here, because, I guess in theory, you know, we would just --
14 the first time we got a letter from a pharmacy saying, *You owe*
15 *us money, pursuant to this law*, we would be right back here
16 renewing our request for injunctive relief, but that, of
17 course, just demonstrates why it is ripe now, and we have
18 standing.

19 We are entitled to injunctive relief, and I want to
20 start with what you asked me about before. *Apfel*, itself, was
21 essentially a pre-enforcement challenge. The Cole Act,
22 obviously, had gone into effect, but the Cole Act didn't, in
23 any way, implicate directly how much this company would have to
24 pay. The minute they got the assessment, before they paid,
25 before they did anything, they brought the lawsuit, and they

1 didn't pay the premiums. They requested a declaration and an
2 injunction. And importantly, the Supreme Court citing *Duke*
3 *Powers*, said, and I quote, "The declaratory judgment act allows
4 individuals threatened with a taking, to seek a declaration of
5 the constitutionality of the disputed governmental action
6 before potentially in-compensable -- I'm mangling the word --
7 damages are sustained."

8 Now, to be clear, in usual takings cases we do have
9 adequate remedies. So usually this does not happen. The key
10 language from the Supreme Court's decision in *Knick* says as --
11 this is at the flip between 2176 to 2177, *As long as an*
12 *adequate provision for obtaining just compensation exists,*
13 *there's no basis to enjoin the government action effecting a*
14 *taking.* And to the same point, Justice Thomas concurring, says
15 a couple of pages later 2180, *Injunctive relief is not*
16 *available when an adequate remedy exists.* So that's what we're
17 talking about here.

18 Now, adequacy. I don't understand the argument about
19 why this is not complicated. The statute says, *Reimburse the*
20 *pharmacy in the amount that the pharmacy paid, for the number*
21 *of epinephrine auto-injectors dispensed.* Each pharmacy is
22 paying something different. There's no doubt about that, and
23 even were Teva, and it doesn't plan to, but even were Teva to
24 turn over its physical property, the value of that property to
25 Teva changes all the time, because the average wholesale -- the

1 average wholesale price, this formula that they were talking
2 about, is adopted for different wholesalers in the same way
3 that wholesalers change it for different retailers. It's
4 constantly fluctuating.

5 The declarant testified, in his deposition, that there
6 are rebates for wholesalers too, just like for pharmacy. So
7 there's no avoiding the difficulty in calculating the value of
8 the EpiPen®s to Teva as time goes on and different wholesalers
9 are involved.

10 Now, the Attorney General says, *We shouldn't import,*
11 *those are his words, equity principles to the takings context,*
12 *but it's a whole one context. This is an equity case. We are*
13 *here seeking equitable relief, and as in Knick traditional*
14 *equity principles apply, and not one of the other federal cases*
15 *that the State cites involved an alleged multiplicity of*
16 *lawsuits. Read the cases that they cite. The argument was*
17 *never made, because the cases didn't involve statutes that*
18 *authorize repeated indefinite takings.*

19 The *Gordon* case, which they rely on, involved the
20 introduction of wolves, but the introduction of the wolves was
21 not a taking. All the plaintiffs there were seeking was an
22 alteration of the policy and the Court said, *No. You don't get*
23 *to do that. If you have been injured, you can try to get*
24 *compensation. Here, by contrast, the statute, itself,*
25 *necessarily effectuates a taking.*

1 I just want to finish on the police power point. The
2 scope of their argument is breathtaking. We're not dealing
3 with a regulation governing the way a hospital that has a
4 special license to operate in the state, has to conduct itself.
5 How many hours it has to be open, who it has to take, those are
6 regulatory issues, and to the extent they want to frame it as a
7 taking, it is a regulatory taking. It is not a, per se,
8 physical taking that we have here. Very different situation.

9 All of the other things that you suggested that you
10 alluded to are absolutely true. On a very cold night in
11 Denver, there are people who are going to freeze, who are
12 living on the streets. If they want to have a policy that
13 says, for the public benefit we want to put them in hotels, the
14 way they did in New York, during COVID, they commandeered some
15 of the hotels on the Upper West Side and they put homeless
16 people in those hotels, but they have to provide compensation,
17 because that is the essence of a taking for public use, and it
18 is completely different, and if you read the *Lech* case, even
19 though its not a published decision, it couldn't be more clear.

20 All of the examples they cite of the police power when
21 it is not a taking, are when they are knocking down trees
22 because they are causing harm; they are breaking down the front
23 door of someone's house, because they are chasing after a
24 felon. Sure they -- that conduct also is beneficial to the
25 public, but that's not a taking for the public benefit. That

1 is, the use of the police's emergency police powers.

2 I will conclude, simply, Your Honor, unless you have
3 questions, because I think I answered your question about *Apfel*
4 and the procedure in which *Apfel* arose, and the way in which
5 they cited *Duke Power* for exactly the proposition we are asking
6 this Court to enforce, I will close simply by reminding the
7 Court, again, of what Justice Holmes said, which is, there are
8 lots of things that a state, in its infinite wisdom, wants to
9 do, but it can't take shortcuts through the Constitution. The
10 takings claim is not the poor stepchild in the Bill of Rights.
11 To be sure, when there's adequate compensation available, then
12 injunctions are not appropriate, but here, with ongoing
13 multiplicity of suits, the way in which Colorado has treated
14 these trespass cases for generations, including, very recently,
15 give us all of the precedent that we need to know that this is
16 that unique case where we are not going to be able to get a
17 clear, efficient and complete remedy.

18 We certainly can't get a complete remedy because we
19 are going to have to do it every two years, and we are going to
20 have to bring together all of these different pharmacies and
21 all of their pricing information, and it's going to be a
22 never-ending set of economic calculations, and that is what
23 makes equity appropriate, here.

24 *THE COURT:* Can I just ask you, I think, one question?
25 If I'm -- say I'm unsure whether there's an adequate

1 compensatory remedy available, and I just can't figure it out,
2 right now, who do I hold that against? Seems to me I might
3 hold it against you, for purposes of the preliminary
4 injunction, but against the State for purposes of the Motion to
5 Dismiss. Am I wrong?

6 MR. LEFKOWITZ: I think if we have -- I think we have
7 clearly established that we have a likelihood of success on the
8 merits, in the sense that this is a taking, this violates the
9 Constitution, and clearly the public interest favors the State
10 obeying the Constitution, that's standard in all of these
11 cases. The question is, do we have an adequate remedy? We
12 have, now, provided evidence, not just my argument, but
13 evidence in the record, they examined this witness, they could
14 have tried to do whatever they want and show any evidence, but
15 the record, in the evidence, suggests that we actually have a
16 stronger case for injunctive relief than the Eighth Circuit
17 found in *PhRMA*, relying on *Duke Power*, relying on *Apfel*. I
18 think there's ample evidence in the record to suggest that
19 there's no adequate, efficient, complete remedy available.

20 THE COURT: Okay. All right. Thank you.

21 MR. LEFKOWITZ: Thank you, Your Honor, very much, and
22 thank you for accommodating us on the scheduling, and I
23 appreciate the State accommodating us on the scheduling, as
24 well.

25 THE COURT: You are welcome. Thank you for your time.

1 Mr. Nelson, did you want to respond just to that last
2 question? Did you have a position on whose burden it is, if it
3 differs? You can just stay there. You don't have to come up
4 here.

5 MR. NELSON: It's their burden.

6 THE COURT: Okay. All right. Your position is it's
7 their burden. Their position is they've met their burden, so I
8 probably should have anticipated that would be everybody's
9 position.

10 MR. LEFKOWITZ: We disagree.

11 MR. NELSON: Our position is they have not met their
12 burden.

13 MR. LEFKOWITZ: We all agree, it's your decision.

14 THE COURT: Well, good. Good. Me too. All right.
15 Thank you. I appreciate everybody's efforts in this case.
16 It's been, in my view, well briefed and well argued and that,
17 unfortunately, in this case, doesn't necessarily make it any
18 easier, but will make a better analysis, and so I do appreciate
19 it.

20 As I said, I will be getting an order at least on the
21 preliminary injunction out before the end of the year and
22 perhaps also on the Motion to Dismiss.

23 If there's nothing else, we will be in recess. Thank
24 you.

25 THE COURTROOM DEPUTY: All rise. Court is now in

recess.

(Recess at 3:19 p.m.)

REPORTERS' CERTIFICATE

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 25thh day of December
2023.

s/ Tamara Hoffschildt

Tamara Hoffschildt, FCRR, CRR, RMR