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NCLA Asks Second Circuit to Rule Against HHS’s Coercive Medicare Drug Price ‘Negotiation’ Program

Boehringer Ingelheim Pharmaceuticals, Inc. v. United States Department of Health & Human Services, et al.

Washington, DC (November 8, 2024) – Today, the New Civil Liberties Alliance filed an *amicus curiae* [brief](#) with the U.S. Court of Appeals for the Second Circuit in *Boehringer Ingelheim Pharmaceuticals v. Department of Health & Human Services* (HHS). NCLA urges the Second Circuit to rule it is unlawful for HHS to hold a company’s business hostage until it surrenders its constitutional property rights. The law at issue violates the “unconstitutional conditions” doctrine, which prevents the indirect trampling of constitutional rights.

Two years ago, Congress enacted the Inflation Reduction Act of 2022, part of which sought to lower Medicare drug costs. Instead of achieving this important goal lawfully, it chose an approach that cannot be reconciled with the Constitution. The Medicare cost reduction program’s goal is to force pharmaceutical companies to sell their products at less than market value. It cannot do so directly without violating the Takings Clause of the Fifth Amendment. So, it tells companies: Either forfeit your constitutional right or pay excise taxes and penalties on your products that are so draconian they will destroy your business. The U.S. Supreme Court has already spoken to this kind of behavior, choosing the descriptive word “extortion.”

It may be politically popular, albeit short-sighted, to curtail the constitutional rights of big companies that lay golden eggs, but if Congress can do this to the pharmaceutical companies, then it can do it to mom-and-pop businesses, too. Americans deserve better than a Congress that engages in extortionate behavior, and they have a right to be free of even sophisticated attempts to undermine the Constitution. NCLA has also filed an *amicus* [brief](#) opposing HHS’s unlawful program in a separate Third Circuit case.

NCLA released the following statements:

“Legislation is not supposed to be a game in which Congress gets a sporting opportunity to finagle Americans out of their constitutional rights. Government must pay for what it takes. Always.”

— **Daniel Kelly, Senior Litigation Counsel, NCLA**

“Negotiations and mutual cooperation between the government and private sector are good and to be welcomed. But extortion is not 'cooperation' and threats are not 'negotiation.' The Court should not permit the government to behave like a mob boss.”

— **Greg Dolin, Senior Litigation Counsel, NCLA**

For more information visit the *amicus* page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and

other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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