UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ABBVIE INC., *et al.*, *Plaintiffs*, *v.* PHILIP WEISER, in his official capacity as ATTORNEY GENERAL OF THE STATE OF COLORADO, *et al.*, *Defendants*.	Case No. 1:25-cv-01847-WJM-KAS Judge William J. Martinez

BRIEF OF *AMICI CURIAE* AMERICAN HOSPITAL ASSOCIATION, 340B HEALTH, COLORADO HOSPITAL ASSOCIATION, AND AMERICAN SOCIETY OF HEALTH-SYSTEM PHARMACISTS IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Over the past five years, nearly 40 drug companies, including Plaintiffs (collectively, AbbVie), have broken with decades of precedent and begun to refuse to ship drugs purchased by 340B hospitals to their contract pharmacies. The federal government believed this was unlawful and sought to require manufacturers to continue delivering these drugs to contract pharmacies on the same terms on which they delivered them to 340B in-house hospital pharmacies.[1]

The drug companies fought that effort tooth and nail. In lawsuit after lawsuit, they argued that the federal government could not interfere with their contract pharmacy restrictions. The companies began with the premise that the federal 340B statute had absolutely nothing to say about delivery, and they insisted that their new policies were *delivery* restrictions.[2] The drug companies

[1] *See, e.g.*, Letter from Dep't of Health & Hum. Servs., Health Resources & Servs. Admin. Administrator C. Johnson to AbbVie, Inc. Vice Pres., U.S. Market Access C. Compisi (Oct. 17, 2022), https://www.hrsa.gov/sites/default/files/hrsa/opa/programintegrity/hrsa-letter-abbvie-covered-entities.pdf.

[2] *E.g.*, Novartis Opening Brief at 4, *Novartis Pharms. Corp. v. Johnson*, No. 21-5299, Doc. 1949831 (D.C. Cir. June 8, 2022) ("Section 340B . . . is *silent* as to whether manufacturers must

won. *See Novartis Pharms. Corp. v. Johnson*, 102 F.4th 452, 460 (D.C. Cir. 2024) (Section 340B is "silent about delivery conditions"); *Sanofi Aventis U.S. LLC v. U.S. Dep't of Health & Hum. Servs.*, 58 F.4th 696, 703 (3d Cir. 2023) (Section 340B's "text is silent about delivery").

Like many other states, Colorado has filled the federal statutory gap that drug companies spent years fighting for by requiring delivery of 340B drugs to contract pharmacies. Faced with the drug industry's unprecedented assault on Colorado's health care safety net and the acknowledged gap in federal law, the Colorado legislature enacted Senate Bill 71 ("S.B. 71"). S.B. 71's central provision does only what the pharmaceutical industry and the federal courts said the *federal* law did not do: regulate the delivery of 340B drugs. *See* Colo. Rev. Stat. § 6-29-105(a) (prohibiting drug companies from restricting "the acquisition of a 340B drug by, or delivery of a 340B drug to, a 340B covered entity, a pharmacy contracted with a 340B covered entity, or a location otherwise authorized by a 340B covered entity to receive and dispense 340B drugs").

Now comes the whiplash: AbbVie claims that "S.B. 71 regulates *pricing*, not delivery." Mot. for Prelim. Inj. ("Mot."), ECF No. 7, at 9 (emphasis in original). Even though Colorado has legislated in precisely the area that drug companies successfully insisted was *not* addressed under federal law—the delivery of 340B drugs—AbbVie has reversed course in this litigation to claim that S.B. 71 is preempted by federal law. And as part of that about-face, AbbVie now insists that states cannot fill the federal statutory gap that drug companies spent years fighting for.

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deliver those drugs to contract pharmacies."). AbbVie's counsel made similar arguments on behalf of another drug company. *See* Eli Lilly Opening Brief at 2–3, *Eli Lilly and Company. v. Becerra*, Nos. 21-3128 & 21-3405, Doc. 19 (7th Cir. May 25, 2022) (arguing that no part of Section 340B "says anything at all about delivery or sale to third parties besides covered entities").

This history is important—and not just because it exposes the hypocrisy in AbbVie's legal position. It also serves as a reminder of *why* Colorado stepped into the federal statutory void. Put simply, Colorado acted because drug companies and the federal courts all but invited it to.

The primary issue here is whether Colorado, exercising its historic police power over health and safety, can fill the gap in the federal 340B statute and regulate the delivery of 340B drugs (purchased by 340B hospitals) to contract pharmacies. It can. Numerous district courts have said so,[3] as has the Eighth Circuit in the only Court of Appeals decision to date addressing a drug industry challenge to a state contract pharmacy statute. *See PhRMA v. McClain*, 95 F.4th 1136, 1143–45 (8th Cir.), *cert. denied*, 145 S. Ct. 768 (2024).

At bottom, AbbVie's attack on S.B. 71 is really an attack on federalism itself. AbbVie tries to transform an acknowledged federal statutory silence into a reason to displace "the historic primacy of state regulation of matters of health and safety." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). That is not the law, and AbbVie's claims seeking to undermine Colorado's lawful exercise of traditional state authority should be rejected.

ARGUMENT

I. ABBVIE IS NOT LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS.

A. AbbVie's Preemption Claim Fails.

In every preemption case, "and particularly in those in which Congress has 'legislated in a field which the States have traditionally occupied,'" *Medtronic, Inc.*, 518 U.S. at 485, courts

[3] *See AbbVie v. Skrmetti*, No. 3:25-cv-519, 2025 WL 1805271 (M.D. Tenn. June 30, 2025); *AstraZeneca Pharms. LP v. Bailey*, No. 2:24-cv-4143-MDH, 2025 WL 644285 (W.D. Mo. Feb. 27, 2025); *Novartis Pharms. Corp. v. Bailey*, No. 2:24-cv-04131-MDH, 2025 WL 489881 (W.D. Mo. Feb. 13, 2025); *AstraZeneca Pharms. LP v. Fitch*, No. 1:24-cv-196-LG-BWR, 2024 WL 5345507 (S.D. Miss. Dec. 23, 2024); *PhRMA v. Murrill*, No. 6:23-cv-997, 2024 WL 4361597 (W.D. La. Sept. 30, 2024); *AbbVie Inc. v. Fitch*, No. 1:24-cv-184-HSO-BWR, 2024 WL 3503965 (S.D. Miss. July 22, 2024); *Novartis Pharms. Corp. v. Fitch*, 738 F. Supp. 3d 737 (S.D. Miss. July 1, 2024).

"assum[e] that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432 (2002). That is "particularly" true in "matters of health," given "the historic primacy of state regulation" in that area. *Medtronic, Inc.*, 518 U.S. at 485.

In arguing that the 340B statute does not *affirmatively* "authorize state involvement," Mot. at 8, AbbVie flips preemption analysis upside down; courts *assume* that Congress contemplated state involvement absent "clear and manifest" evidence otherwise. *Ours Garage*, 536 U.S. at 432. AbbVie cannot satisfy its "burden of overcoming th[e] presumption" against preemption, *PhRMA v. Walsh*, 538 U.S. 644, 662 (2003), as numerous district courts and the Eighth Circuit have held.[4]

1. Congress did not create or occupy a field in the 340B statute.

AbbVie's field-preemption theory, *see* Mot. at 7–8, both misapplies the relevant standard and mischaracterizes the 340B statute. Field preemption occurs only in narrow circumstances, when a federal statute "reflect[s] a congressional decision to foreclose any state regulation in the area," and thus "confer[s] a federal right to be free from any other" requirements in the same field. *Murphy v. NCAA*, 584 U.S. 453, 479 (2018) (citation omitted). Indeed, "[t]he subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem." *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 415

[4] *See PhRMA v. McClain*, 95 F.4th at 1143–45; *see also, e.g.*, *AbbVie v. Skrmetti*, 2025 WL 1805271, at *11–19; *Novartis v. Fitch*, 738 F. Supp. 3d at 747; *AstraZeneca v. Fitch*, 2024 WL 5345507, at *4–9; *Novartis v. Bailey*, 2025 WL 489881, at *2–4. The only decision in which a court found a similar state contract pharmacy statute to be preempted is *PhRMA v. Morrissey*, 760 F. Supp. 3d 439 (S.D.W. Va. 2024), and *amici* respectfully submit that *Morrissey* was wrongly decided for the reasons the court articulated in *AbbVie v. Skrmetti*, 2025 WL 1805271, at *17–19.

(1973). Thus, the Supreme Court has "reject[ed] . . . the contention that pre-emption is to be inferred merely from the comprehensive character" of a federal statute. *Id.*

AbbVie's field-preemption theory relies entirely on the (supposed) proposition that the 340B statute "created a single comprehensive federal scheme that governs every detail." Mot. at 7–8. But as drug companies ferociously—and successfully—argued, the 340B statute is "silent about delivery conditions." *Novartis v. Johnson*, 102 F.4th at 460. And for precisely that reason, the Eighth Circuit concluded that the statute is *not* comprehensive and rejected a field preemption challenge to an Arkansas statute substantially similar to S.B. 71. *See PhRMA v. McClain*, 95 F.4th at 1143 ("Congress's decision not to legislate the issue of pharmacy distribution indicates that Section 340B is not intended to preempt the field."). This Court should follow the Eighth Circuit's reasoning and reject AbbVie's field preemption theory here.

2. S.B. 71 does not conflict with the 340B statute.

The Court also should follow the Eighth Circuit in rejecting AbbVie's conflict preemption theories. *See PhRMA v. McClain*, 95 F.4th at 1144–45. A proper conflict preemption analysis requires parties to demonstrate that the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). This is a "high threshold," *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607 (2011), and AbbVie comes nowhere close to meeting it.

The 340B statute was passed to help covered healthcare providers "reach[] more eligible patients and provid[e] more comprehensive services." HRSA, *Final Rule, 340B Drug Pricing Program; ADR Regulation*, 89 Fed. Reg. 28,643, 28,643 (Apr. 19, 2024) (hereinafter, "ADR Rule"). Colorado's S.B. 71, in turn, enables 340B providers to continue to benefit from contract pharmacy arrangements and thereby offer expanded healthcare to their patients and "deliver[] life-saving drugs to eligible patients, including those who have limited access to transportation [or]

live in remote or rural areas." Colo. Rev. Stat. § 6-29-102(1)(o). Not only does S.B. 71 not stand as an obstacle to the purposes of the 340B statute, "it does the opposite: [S.B. 71] assists in fulfilling the purpose of 340B." *PhRMA v. McClain*, 95 F.4th at 1144–45 (discussing substantially similar Arkansas statute).[5]

More specifically, AbbVie proffers several ways in which S.B. 71 purportedly conflicts with the federal 340B statute. Each of AbbVie's arguments fails.

a. S.B. 71 does not conflict with federal enforcement of the 340B statute.

There is no merit to AbbVie's argument that S.B. 71 somehow "contravenes HRSA's exclusive enforcement authority." Mot. at 8. Although S.B. 71 does authorize "state enforcement mechanisms," including private suits and actions by the Attorney General and Board of Pharmacy, Mot. at 9, it does not contemplate state enforcement *of the 340B statute*, which is HRSA's exclusive domain. Instead, S.B. 71 strictly provides for the enforcement of *its own* requirements, which, as AbbVie itself emphasizes, are "separate" from the requirements of the 340B statute. Mot at 13; *see* Colo. Rev. Stat. § 6-19-105(3)(a) (setting forth remedies for "a person that violates *this article 29*" (emphasis added)).[6]

As the Eighth Circuit explained with respect to a similar Arkansas statute:

> Act 1103 ensures that covered entities can utilize contract pharmacies for their distribution needs and authorizes the Arkansas Insurance Division to exact penalties and equitable relief if manufacturers deny 340B drugs to covered entities' contract pharmacies. Ark. Code Ann. § 23-92-604(c). The 340B Program, on the other hand, addresses discount pricing. *Therefore, HHS has jurisdiction over different disputes*: disputes between covered entities and manufacturers regarding

[5] AbbVie's effort to distinguish the Eighth Circuit's decision in *PhRMA v. McClain* is meritless. *See* Mot. at 10. AbbVie does not highlight any relevant distinction between S.B. 71 and the Arkansas statute at issue in *PhRMA*, and instead argues that, "[i]n practice," *all* contract pharmacy arrangements violate the 340B statute. *Id.*

[6] AbbVie's argument against any "state enforcement mechanism[]" related to 340B drug sales, Mot. at 9, would produce absurd results. For example, AbbVie's argument would forclose a civil suit under *state* contract law against a manufacturer that delivered fewer drugs than promised.

> pricing, overcharges, refunds, and diversion of 340B drugs to those who do not qualify for discounted drugs.

PhRMA v. McClain, 95 F.4th at 1144 (emphasis added). Because the requirements under S.B. 71 (like the statute in *PhRMA v. McClain*) are different from the 340B program requirements, it does not conflict with the 340B program's enforcement regime.

b. S.B. 71 regulates delivery, not price.

According to AbbVie, S.B. 71 is preempted because, "like the federal statute, [it] regulates *pricing*" of drugs sold to 340B covered entities. Mot. at 9 (emphasis added). That is flat wrong: the provision of S.B. 71 on which AbbVie relies—the definition of "340B drug"—references the "reduced prices" that manufactures must offer "*pursuant to [the 340B statute]*." Colo. Rev. Stat. § 6-29-103(2)(b) (emphasis added). In making that linkage to the 340B statute itself, S.B. 71 simply takes as given the prices that are set by *federal law*, and it regulates something entirely different. The fact that S.B. 71 includes "the word 'price'" in "its very text," Mot. at 9, does not mean that it *regulates* price.

To the contrary, S.B. 71 expressly regulates manufacturer restrictions on delivery of 340B drugs to contract pharmacies. *See* Colo. Rev. Stat. § 6-20-105(1)(a) (prohibiting restrictions on "*delivery* of 340B drugs to . . . a pharmacy contracted with a 340B covered entity, or a *location* otherwise authorized by a 340B covered entity to *receive*" its 340B drugs (emphasis added)). S.B. 71 bars drug companies from discriminating between locations where Colorado 340B hospitals wish to have their drugs delivered, *i.e.*, a contract pharmacy or an in-house hospital pharmacy. S.B. 71 simply requires drug companies to let 340B hospitals choose the appropriate shipping address. Thus, to borrow the Eighth Circuit's description of a substantially similar Arkansas statute, "[S.B. 71] does not set or enforce discount pricing." *PhRMA v. McClain*, 95 F.4th at 1145;

see also PhRMA v. Murrill, 2024 WL 4361597, at *9 ("[D]iscounts are set by the federal government, not the State of Louisiana or Act 358.").

S.B. 71 *references* prices set under the 340B statute, but it *regulates* drug delivery—a subject on which the 340B statute is silent.[7] By imposing its own complementary requirements with their own consequences, S.B. 71 does not conflict with the federal 340B statute.

B. AbbVie's Takings Clause Claim Fails.

Courts have uniformly rejected AbbVie's and other drug companies' Takings challenges to similar prohibitions on refusing to deliver 340B drugs to contract pharmacies. *See AstraZeneca v. Bailey*, 2025 WL 644285, at *4; *PhRMA v. Murrill*, 2024 WL 4361597, at *13–15; *AbbVie v. Fitch*, 2024 WL 3503965, at *16–20; *Eli Lilly & Co. v. HHS*, 1:21-cv-81-SEB-MJD, 2021 WL 5039566, at *21 (S.D. Ind. Oct. 29, 2021). In particular, *amici* respectfully refer the Court to the Southern District of Mississippi's decision in *AbbVie v. Fitch* for a compelling, point-by-point rejection of the exact same Takings arguments that AbbVie now polishes off and repurposes for this case. *See* 2024 WL 3503965, at *16–20.

AbbVie's Takings claim fails because S.B. 71 will not effect a taking of AbbVie's property, and even if it will, any such taking would serve a public purpose, which forecloses the *injunctive* relief that AbbVie seeks.

1. S.B. 71 will not result in a taking of AbbVie's property.

AbbVie is wrong to argue that S.B. 71 effects a taking of its property by "compelling AbbVie . . . to make sales at 340B-discounted prices under terms [it] would otherwise never agree

[7] Numerous courts, including the Tenth Circuit, have held that congressional silence cannot give rise to preemption. *See, e.g., Paul v. Monts*, 906 F.2d 1468, 1475 n.8 (10th Cir. 1990) ("Congressional silence will not be presumed to mandate preemption. On the contrary, it will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intent to do so." (citation omitted)).

to." Mot. at 11. The *federal* 340B statute—not S.B. 71—is the source for the requirement that any drug company that chooses to participate in the 340B program must offer its drugs at or below a statutory ceiling price to 340B entities. *See* 42 U.S.C. § 256b(a)(1). The 340B statute both sets the price (the "ceiling price") and dictates to whom the price must be offered ("covered entities"). *Id.* S.B. 71 addresses only sales *to covered entities*—prohibiting practices that restrict *those sales*, including manufacturers' efforts to "discriminate against . . . delivery of a 340B drug to . . . a pharmacy contracted with a 340B covered entity, or a location otherwise authorized by a 340B covered entity to receive and dispense 340B drugs." Colo. Rev. Stat. § 6-29-105(a). Regulating certain terms of a presupposed contractual relationship—like forbidding restrictions on "delivery" to a particular "location," *id.*—is not the same as "forcing . . . sales." Mot. at 11.[8]

AbbVie is also wrong that S.B. 71 "permits a *private, for-profit pharmacy* to take AbbVie's property." Mot. at 12 (emphasis added). S.B. 71 is expressly limited to drugs that are "purchased *by a covered entity*." Colo. Rev. Stat. § 6-29-103(2)(c) (emphasis added). Contract pharmacies appear in the statute only as "location[s]" that may be "authorized *by a 340B covered entity* to receive and dispense 340B drugs"—not as purchasers in their own right. *Id.* § 6-29-105(a) (emphasis added). This dooms AbbVie's argument that S.B. 71 effects a taking by forcing sales to contract pharmacies. *See AbbVie v. Fitch*, 2024 WL 3503965, at *19 ("Nor is the Court persuaded that the manner of delivery to covered-entity patients can constitute a *per se* taking: Plaintiffs are still only required to sell at 340B discounts *to covered entities*." (emphasis added)).

[8] As explained above, S.B. 71 is not a price-control regulation because it does not dictate the price of manufacturer sales to covered entities, but even if it did, it still would not effect a physical taking. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 532 (1992) (holding that rent-control ordinance did not amount to a physical taking).

AbbVie's Complaint invokes the regulatory takings framework "[i]n the alternative," Compl., ECF No. 1, ¶ 159, but AbbVie does not assert this theory in its Motion, and for good reason. AbbVie's drugs are *personal* property, and the Takings Clause does not protect personal property from state regulation on its use. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–28 (1992).

Finally, and perhaps most fundamentally, AbbVie cannot construe S.B. 71 (or the 340B program itself) as compelling transfers of its property to private parties because, as AbbVie expressly concedes, its participation in the 340B program is "a voluntary choice." Compl. ¶ 5. In the healthcare context, courts have repeatedly rejected Takings claims where the plaintiff voluntarily participates in the program that it claims is taking its property.[9] Because participation in the 340B program is voluntary, AbbVie is not being "forc[ed] . . . to make sales," Mot. at 12, and its Takings Clause claim must fail. *See AbbVie v. Fitch*, 2024 WL 3503965, at *17–19.

AbbVie's attempt to sidestep the voluntary participation doctrine is unavailing. *See* Mot. at 12–13. According to AbbVie, it "voluntarily accepted *federal* 340B obligations as a condition of participating in the *federal* Medicare and Medicaid program," but not *state*-imposed obligations like the ones set forth in S.B. 71. Mot. at 13. But even before S.B. 71 and similar statutes in other states were enacted, such contract pharmacy requirements "should have been foreseeable to [AbbVie], as Section 340B has had a well-known 'gap' about how delivery must occur." *AbbVie v. Fitch*, 2024 WL 3503965, at *19–20. Not only did drug companies argue in favor of that gap,

[9] *See Se. Ark. Hospice, Inc. v. Burwell*, 815 F.3d 448, 450 (8th Cir. 2016); *Baker Cnty. Med. Servs., Inc. v. U.S. Atty. Gen.*, 763 F.3d 1274, 1276 (11th Cir. 2014); *Garelick v. Sullivan*, 987 F.2d 913, 916 (2d Cir. 1993); *Burditt v. HHS*, 934 F.2d 1362, 1376 (5th Cir. 1991); *Whitney v. Heckler*, 780 F.2d 963, 968–73 (11th Cir. 1986); *Minn. Ass'n of Health Care Facilities v. Minn. Dep't of Pub. Welfare*, 742 F.2d 442, 446 (8th Cir. 1984); *St. Francis Hosp. Ctr. v. Heckler*, 714 F.2d 872, 875 (7th Cir. 1983); *Eli Lilly & Co. v. HHS*, 2021 WL 5039566, at *21; *AbbVie v. Fitch*, 2024 WL 3503965, at *16–20.

but in light of 340B hospitals' longstanding use of contract pharmacies, "[AbbVie] could have foreseen that states might enact policies favoring dispensation at contract pharmacies." *Id.*; *accord PhRMA v. Murrill*, 2024 WL 4361597, at *15 (rejecting Takings claim because "regulations requiring delivery and forbidding restrictions against delivery to contract pharmacies were foreseeable"); *see also Nat'l Lifeline Assoc. v. FCC*, 983 F.3d 498, 515 (D.C. Cir. 2020) ("[W]hen an owner of property voluntarily participates in a regulated market, additional regulations that may reduce the value of the property regulated do not result in a taking." (citation omitted)). Tellingly, even though AbbVie is now apprised of S.B. 71 and similar statutes in other states, it continues to voluntarily participate in the 340B program.[10]

[10] AbbVie offers no support for its supposed principle that voluntary participation in the federal 340B program "cannot justify separate state-imposed requirements where no state benefit is conferred." Mot. at 13. AbbVie relies on a D.C. Circuit case, *Valancourt Books, LLC v. Garland*, 82 F.4th 1222, 1232 (D.C. Cir. 2023), that did not involve any state law and that the D.C. Circuit itself said was "tied to the particular circumstances" of that case, *id*. at 1239; *see Bristol Myers Squibb Co. v. Becerra*, No. 23-3335, 2024 WL 1855054, at *8 (D.N.J. Apr. 29, 2024) (rejecting drug company reliance on *Valancourt Books*). Here, the "particular circumstances" differ immensely because, unlike the property owner in *Valancourt Books*, AbbVie is not required under S.B. 1414 to *entirely* surrender its property with no economic value in return: AbbVie receives payment from hospitals for the drugs it sells to them—including when the drugs are delivered to contract pharmacies.

Even if AbbVie's requirement of an additional state-law benefit had some basis in precedent—and it does not—AbbVie plainly receives an important benefit from Colorado in exchange for compliance with Colorado law. AbbVie seems to forget that Medicaid is a "cooperative federal-state program." *Planned Parenthood of Kansas v. Andersen*, 882 F.3d 1205 (10th Cir. 2018). And state Medicaid coverage of outpatient drugs is optional, not mandatory. *See* 42 U.S.C. § 1396a(54); *see also PhRMA v. Walsh*, 538 U.S. 644, 665 (2003) ("We have made it clear that the Medicaid Act gives the States substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage, as long as care and services are provided in the best interest of the recipients." (citation omitted)). Colorado's decision to cover such drugs confers a specific benefit on AbbVie and other drug manufacturers. Colorado could revisit that decision, along with others that benefit AbbVie and other drug manufacturers, if they refuse to comply with its laws concerning delivery of 340B drugs. This is more than enough to meet the "additional-state-benefit" standard that AbbVie has invented out of whole cloth.

2. S.B. 71 serves a public purpose.

Even if AbbVie could somehow establish that S.B. 71 will result in its property being taken, AbbVie's Takings claim would still fail because S.B. 71 serves a legitimate public purpose within Colorado's police power. AbbVie seeks to *enjoin* S.B. 71 altogether, *see* Compl. at 59—a form of equitable relief that "is generally unavailable" when the government takes private property for public use. *Knick v. Township of Scott, Pa.*, 588 U.S. 180, 201 (2019).[11] AbbVie therefore must show not only that S.B. 71 results in a taking, but also that it falls outside the "broad and inclusive" conception of "public use" that the Supreme Court has repeatedly reaffirmed under the Takings Clause. *Kelo v. City of New London*, 545 U.S. 469, 480–81 (2005). AbbVie cannot do so.

"The public use requirement is . . . coterminous with the scope of a sovereign's police powers," and courts play "an extremely narrow" role in scrutinizing "a legislature's judgment of what constitutes a public use." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 (1984). Any taking that is "rationally related to a conceivable public purpose" must be upheld (subject only to the requirement of just compensation). *Id.* at 241.

The Court need look no further than the detailed legislative findings set forth in S.B. 71 to easily conclude that it serves a public purpose. *See* Colo. Rev. Stat. § 6-29-102. Like other state contract pharmacy statutes, S.B. 71 "assists in fulfilling the purpose of [the 340B program]," which Congress created "to support" covered entities that "perform valuable services for low-income and

[11] Equitable relief is generally unavailable for a government taking of private property for public use because the Constitution specifically provides a *monetary* remedy for such a taking: "just compensation." U.S. Const. Amdt. V. Thus, "as long as an adequate provision for obtaining just compensation exists," as it does in "nearly all state[s]," "there is no basis to enjoin the government's action effecting a taking." *Knick*, 588 U.S. at 201; *accord Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984). AbbVie does not argue, nor could it, that Colorado has failed to provide an adequate process for obtaining just compensation. *See, e.g.*, *Kobobel v. State Dep't of Nat. Resources*, 249 P.3d 1127, 1133 (Colo. 2011); *Knellinger v. Young*, 134 F.4th 1034, 1045 (10th Cir. 2025).

rural communities but have to rely on limited federal funding for support." *PhRMA v. McClain*, 95 F.4th at 1141, 1145. Supporting hospitals that form a state's health care safety net is obviously a legitimate public purpose. *See, e.g.*, *Kelo*, 545 U.S. at 484 (discussing Supreme Court's "cases upholding takings that facilitated agriculture and mining" because of "the importance of those industries to the states in question").

AbbVie cannot negate S.B. 71's public purpose by decrying it as forcing transfers to private parties. *See* Mot. at 11–12. If a governmental taking of property serves a legitimate public purpose, as S.B. 71 plainly does, it makes no difference if the property is "transferred . . . to private beneficiaries." *Midkiff*, 467 U.S. at 243; *see also id.* at 244 ("[I]t is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause."). The Supreme Court has repeatedly found "public uses" in cases that involved transfers to private parties. *See, e.g.*, *Kelo*, 545 U.S. at 478 n.6; *Midkiff*, 467 U.S. at 231–32; *Clark v. Nash*, 198 U.S. 361, 368–70 (1905). Even if S.B. 71 could be viewed as forcing a transfer of AbbVie's property to 340B entities, that fact would not undermine the statute's obvious public purpose—which is fatal to AbbVie's effort to enjoin it.

II. AN INJUNCTION WOULD NOT SERVE THE PUBLIC INTEREST.

Contract pharmacy arrangements play a crucial role in 340B hospitals' ability to serve their communities, and so the public interest would not be served by enjoining S.B. 71.

AbbVie spends a significant portion of its Complaint maligning hospitals that rely on the 340B program and that partner with contract pharmacies. *See* Compl. ¶¶ 52–76. But this is not how the Supreme Court has viewed 340B hospitals. As Justice Kavanaugh wrote for a unanimous Supreme Court just a few years ago: "340B hospitals perform valuable services for low-income and rural communities but have to rely on limited federal funding for support." *Am. Hosp. Ass'n v. Becerra*, 596 U.S. 724, 738 (2022). Colorado's General Assembly agrees. *See* Colo. Rev. Stat.

§ 6-29-102(1)(c) ("The 340B program supports Colorado's medically vulnerable and underserved populations by providing additional resources to 340B covered entities and allowing these entities to determine the most effective use of these resources.").

Savings from the 340B program are crucial in enabling 340B hospitals to continue serving their communities. For example, Intermountain Health, which operates four 340B hospitals in Colorado, uses 340B savings to support a range of programs and services including a charity care program, a program that provides free access to certain medications, and an HIV clinic. San Luis Valley Health, located in Alamosa, uses 340B savings to support reduced cost infusion and chemotherapy services, as well as a program that helps approximately 560 uninsured and underinsured patients access needed medication. And Lincoln Community Hospital, located in Hugo, transfers 340B savings directly to patients through a discount card program.

Relationships with contract pharmacies play a crucial role in 340B hospitals' ability to serve their communities. AbbVie is wrong that "[t]here is no evidence that uninsured and needy patients—in Colorado or anywhere else—benefit from the use of contract pharmacies." Mot at 15. For example, partnerships with contract pharmacies "allow for drug dispensation closer to where low-income patients reside." *PhRMA v. McClain*, 95 F.4th at 1139. As HRSA has noted in issuing guidance for 340B hospitals' use of contract pharmacies:

> It would be a significant benefit to patients to allow the use of more easily accessible, multiple contract pharmacy arrangements by covered entities. This would permit covered entities to more effectively utilize the 340B program and create wider patient access by having more inclusive arrangements in their communities which would benefit covered entities, pharmacies, and patients served.

HRSA, Notice Regarding 340B Drug Pricing Program—Contract Pharmacy Services, 75 Fed. Reg. 10,272, 10,273 (Mar. 5, 2010). In enacting S.B. 71, the General Assembly expressly declared as much. *See* Colo. Rev. Stat. § 6-29-102(1)(o) ("Outpatient pharmacies are a key mechanism for

the delivery of life-saving drugs to eligible patients, including those who have limited access to transportation, live in remote or rural areas, or are confined to their homes." (citation omitted)).

The General Assembly, with an unbiased interest in protecting Colorado citizens, hospitals, and pharmacies, has acted to advance the objectives of the 340B program and protect 340B hospitals' ability to serve their communities by partnering with contract pharmacies. Enjoining S.B. 71 would not serve the public interest.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for a Preliminary Injunction should be denied.

Dated: July 16, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 16, 2025, I caused the foregoing to be served via the Court's ECF filing system on all registered counsel of record.

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