Case No. 24-60086

In the United States Court of Appeals for the Fifth Circuit

Clarence Cocroft; Tru Source Medical Cannabis, L.L.C.,

Plaintiffs–Appellants,

v.

Chris Graham, in his official capacity as the Commissioner of the Mississippi Department of Revenue, Riley Nelson, in his official capacity as the Chief of Enforcement of the Mississippi Alcoholic Beverage Control Bureau; Doctor Daniel P. Edney, in his official capacity as State Health Officer for the State of Mississippi Department of Health,

Defendants–Appellees.

On Appeal from the United States District Court for the Northern District of Mississippi
Case No. 3:23-cv-00431, Hon. Michael P. Mills

OPENING BRIEF OF APPELLANTS

Ari S. Bargil
Katrin Marquez
INSTITUTE FOR JUSTICE
2 S. Biscayne Boulevard, Ste 3180
Miami, FL 33131
(305) 721-1600
Lead Counsel for Plaintiffs–Appellants

Michael T. Lewis, Sr.
LEWIS & LEWIS ATTORNEYS
1217 Jackson Ave E.
Oxford, MS 38655-4001
(662) 232-8886
Local Counsel for Plaintiffs–Appellants

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th CIR. Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants:	**Counsel for Plaintiffs-Appellants:**
Clarence Cocroft Tru Source Medical Cannabis, L.L.C.	LEWIS & LEWIS Michael Lewis, Sr. INSTITUTE FOR JUSTICE Ari Bargil Katrin Marquez
Appellees:	**Counsel for Appellees:**
Doctor Daniel P. Edney Chris Graham Riley Nelson	OFFICE OF THE ATTORNEY GENERAL OF MISSISSIPPI Wilson Minor Gerald Kucia

/s/ Ari S. Bargil
Lead Counsel for Plaintiffs–Appellants

STATEMENT REGARDING ORAL ARGUMENT

Appellants believe that oral argument will assist the Court in addressing two critical First Amendment issues arising under the Supreme Court's *Central Hudson* test: (1) whether a state may outlaw commercial speech solely because there is a federal prohibition on related commercial behavior; and (2) assuming the federal prohibition is not controlling, whether the state's prohibition on commercial speech may survive because it successfully (and paternalistically) limits the number and type of people who hear and act on the information it communicates.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction. On January 22, 2024, Judge Michael P. Mills of the U.S. District Court for the Northern District of Mississippi issued an order granting Appellees' Motion to Dismiss and a separate judgment dismissing the case. On February 20, 2024, Plaintiff filed a timely notice of appeal in the district court. This Court docketed the notice of appeal on February 23, 2024.

STATEMENT OF THE ISSUES PRESENTED

The state of Mississippi has established a state-legal medical marijuana program. But a state-licensed medical marijuana dispensary in Mississippi is nonetheless "prohibited from advertising and marketing in any media." The questions presented are:

1. Under Prong One of the Supreme Court's *Central Hudson* test, may Mississippi regulators ban commercial speech regarding a state-legal transaction solely on the grounds that the transaction is illegal under *federal* law?

2. If no, did the district court err when it signaled that, if it were to apply the remaining *Central Hudson* factors, it still would not grant the relief requested on the grounds that doing so might frustrate the legislature's paternalistic concerns that citizens might hear the advertisements and act on them?

STATEMENT OF THE CASE

Appellants are a state-legal medical marijuana dispensary in Mississippi and its owner. And they would like to tell eligible patients about their existence—that is, if doing so was not illegal under Mississippi law. Indeed, even though medical marijuana is legal in Mississippi, virtually every form of advertising of the product (or the business that sells it) is not. And Appellees do not contend otherwise. For that reason, the parties agree, this is a commercial-speech case.

The Supreme Court's *Central Hudson* test provides a multi-part framework for deciding whether restrictions on commercial speech violate the First Amendment. Generally understood, the first prong of *Central Hudson* asks whether the restricted commercial speech proposes commercial behavior that is legal. If the behavior is legal, *Central Hudson* instructs, then courts advance to consider the remaining factors. If the commercial behavior is illegal, however, the inquiry generally ends; the speech does not receive First Amendment protection.

This case turns on whether advertising a medical marijuana dispensary in Mississippi—a state that has *legalized* medical marijuana—promotes an unlawful transaction. Appellees acknowledge that medical marijuana is legal in Mississippi. But, they argued, Mississippi may nonetheless require licensees to surrender their First Amendment right to advertise their state-legal businesses because marijuana is

illegal under *federal* law. Still, Appellees do not contend that they have any interest in enforcing the federal prohibition. (Nor could they, since they routinely license Mississippians to violate it.) They claim, rather, that the federal prohibition renders their regulation of the state-legal marijuana industry categorically exempt from First Amendment scrutiny. The trial court agreed and granted Appellees' motion to dismiss.

But Appellees' view—adopted by the trial court—reflects an incomplete understanding of *Central Hudson*'s first prong. It resolves the inconsistency between state and federal marijuana laws not by applying First Amendment doctrine, but through an unusual (and unnecessary) application of the Supremacy Clause. In doing so, the district court never engaged with a fundamental principle of the commercial speech doctrine: The state's power to regulate speech about an illegal product is born of its threshold legislative decision to make that product illegal.

Appropriately understood, then, the *Central Hudson* prong-one question is not, (over)simplistically, "Is this product illegal?" Rather, more precisely, it is: "Has the jurisdiction that is banning this commercial speech first prohibited the commercial conduct it proposes?" Here, the implications of that more properly framed inquiry are clear: Because Mississippi has legalized medical marijuana, it is

legal for purposes of *Central Hudson*'s first prong. Accordingly, this Court should reverse the trial court's decision on that issue, correct additional doctrinal misstatements relevant to the *Central Hudson* inquiry, and remand this case.

BACKGROUND

I. MISSISSIPPI HAS LEGALIZED MEDICAL MARIJUANA.

As the district court detailed in its order, in 2022, the Mississippi Legislature passed the Mississippi Medical Cannabis Act, "which authorized the production, sale, and use of cannabis for medicinal purposes." ROA.127 (citing Miss. Code Ann. §§ 41-137-1 *et seq.*)). Among other qualifying conditions, the Act enables prescription holders to buy and use medical marijuana to treat certain debilitating medical conditions, including cancer, Parkinson's disease, Huntington's disease, muscular dystrophy, HIV/AIDS, hepatitis, ALS, Crohn's disease, ulcerative colitis, sickle-cell anemia, Alzheimer's disease, dementia, post-traumatic stress disorder, autism, chronic pain, and seizures. *Id.* § 41-137-3(r).

The Act gives the Mississippi Department of Health "the ultimate authority for oversight of the administration of the medical cannabis program." *Id.* § 41-137-7(1). And one of the functions that the Act expressly leaves to the discretion of the Department of Health is the regulation of advertising and marketing for medical

cannabis establishments. *Id.* § 41-137-41(1)(d)(x). Still, the Act imposes some limitations on how the Department of Health may regulate that advertising:

> [T]he restrictions may not prevent appropriate signs on the property of a dispensary, listings in business directories, including phone books, listings in cannabis-related or medical publications, display of cannabis in company logos and other branding activities, display on dispensary websites of pictures of products that the dispensary sells, or the sponsorship of health or not-for-profit charity or advocacy events.

Id. Apart from these provisions limiting how the Department of Health may regulate medical cannabis advertising, everything else is left up to the agency's discretion. *Id.*

The Department of Health has exercised that authority to completely prohibit dispensaries from engaging in all other forms of advertising. *See* Code Miss. R. 15-22:3.2.1. Thus, in Mississippi, "Medical Cannabis Establishments . . . are prohibited from advertising and marketing in any media." *Id.* And "advertising" is defined broadly to include "all representations disseminated in any manner or by any means, other than labeling, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of medical cannabis," *id.* at -3.1.2(1), while "marketing" incorporates the definition of advertising and further includes "the activity, set of institutions, and processes for creating, communicating, delivering, and exchanging offerings that have value for customers, clients, partners, and society at large." *Id.* at -3.1.2(6).

Were these prohibitions not broad enough, the Act also includes several specific prohibitions: advertising in "[b]roadcast or electronic media," including, but not limited to, "radio, television, unsolicited internet pop-up advertising, and social media," *see* Code Miss. R. at -3.2.1(1); advertising in "[p]rint media," including, but not limited to, newspapers, *id.* at -3.2.1(2); advertising "in windows or public view" or "in any manner that can be viewable or otherwise perceived as a public space, including, but not limited to, adopt a highway signs, and electronic interstate signs," *id.* at -3.2.1(3)(C)–(F); or advertising through any other "media"— that is, "the communication channels through which we disseminate news, movies, education, promotional messages, and other data," including "physical and online newspapers and magazines, television, radio, billboards, telephone, internet, fax, social media and billboards." *Id.* at -3.1.2(7). The Act also explicitly prohibits direct advertising—mass texts or messaging; mass email communications; and solicited or paid patient, caregiver, or practitioner reviews, testimonies, or endorsements. *Id.* at -3.2.1(3).

Finally, Mississippi also imposes a set of seemingly redundant restrictions (none of which are challenged here) that largely resemble typical tobacco or alcohol advertising regulations—prohibiting dispensaries from doing things like making

medical or safety claims, advertising to children or youth, or promoting overconsumption or irresponsible use. *See* Code Miss. R. 15-22:3.2.2.

Despite these sweeping prohibitions, the district court was quick to point out that "the Act does not bar all forms of marketing and branding." ROA.128. And that is true; it is the *Department of Health* that has done that, having illegalized every conceivable form of advertising not affirmatively protected by the state. For dispensary owners, that leaves the door open to communicate with would-be customers in only a handful of narrow ways: they are "allowed to create 'a website,'" "be listed in phone books and 'cannabis-related or medical publications,'" and "sponsor . . . 'charity . . . events.'" ROA.129 (citing Code Miss. R. 15-22:3.3.2).

As Appellants have alleged, these sweeping advertising prohibitions have severely kneecapped their ability to operate and threaten the viability of their enterprise altogether. ROA.27–31. Indeed, Appellants would like to advertise in virtually all the ways the Department of Health says they cannot, including on a billboard owned by Clarence Cocroft, Tru Source's owner. That is true with one exception: Appellants have no interest in advertising to children, promoting overconsumption, or otherwise advertising their business in a manner that would

conflict with the regulations Appellants have not challenged here. *See* Code Miss. R. 15-22:3.2.2.

II. THOUGH CLARENCE COCROFT AND TRU SOURCE ARE FULLY COMPLIANT WITH MISSISSIPPI LAW, MARIJUANA IS STILL TECHNICALLY ILLEGAL UNDER FEDERAL LAW.

Appellant Clarence Cocroft is the operator of Appellant business Tru Source Medical Cannabis (together "Appellants"), Mississippi's very first black-owned medical marijuana dispensary. ROA.7, 21. The son of a farmer, Clarence was born and raised in northern Mississippi, where he maintains strong roots. ROA.14. And after two decades authoring science textbooks, Clarence saw Mississippi's nascent medical marijuana industry as an opportunity to combine his career in science with his side-interest in entrepreneurship. ROA.14–15. It took over a year, but in March 2023, after countless ups and downs, Clarence was finally able to open the doors to Tru Source. ROA.15–21.

Appellants comply with all state laws. *See* ROA.7, 10–13. Their facility has been surveyed, approved, and inspected. ROA.16, 20. They possess a state-issued medical cannabis license that is active and has never lapsed, and the business remits the appropriate taxes to the state of Mississippi—which dutifully accepts and processes them. ROA.7, 17. It is, in every way, a state-legal operation. And the federal government treats it as such—as an honest, state-legal business that may be

operated without federal scrutiny. Indeed, the federal government has declared, first in 2014 and every year since, that it would not expend any funds prosecuting state-legal medical marijuana operations. *See* ROA.9 (citing *United States v. McIntosh*, 833 F.3d 1163, 1175–77 (9th Cir. 2016) (discussing the Rohrabacher-Farr Amendment)). And just recently, President Biden issued blanket pardons for small-time marijuana possession or marijuana use.[1]

This is not to say that medical marijuana is legal under federal law—a position which the district court appears to believe Appellants have taken. ROA.130–33. It is, however, highly relevant context. After all, the sovereign that criminalizes the sale of medical marijuana—the United States—has no intention of enforcing its prohibition against businesses like Tru Source. *See Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2236 (2021) (Thomas, J., statement respecting denial of certiorari) (explaining that modern federal law simply does not "prohibit entirely the possession or use of marijuana." (cleaned up)). And Mississippi has elected not to use its sovereign power to outlaw the sale of medical marijuana or (if it even can) to attempt to enforce the United States's nominal

[1] *See* Proclamation No. 10688, 88 Fed. Reg. 90083 (Dec. 22, 2023), available at https://www.whitehouse.gov/briefing-room/presidential-actions/2023/12/22/a-proclamation-on-granting-pardon-for-the-offense-of-simple-possession-of-marijuana-attempted-simple-possession-of-marijuana-or-use-of-marijuana/.

prohibition on its sale.[2] Instead, Appellees say Mississippi can ignore that prohibition when authorizing the sale of marijuana and yet rely on it to shield its speech restrictions from constitutional scrutiny.

III. PROCEDURAL BACKGROUND

Appellants filed this case to vindicate their First Amendment right to communicate truthful information to potential customers. Appellees moved to dismiss the claim on the grounds that Appellants' commercial speech is not protected by the First Amendment because, under the Supreme Court's *Central Hudson* framework, the speech pertains to illegal conduct under federal law. Appellants responded, arguing, as they do here, that state law, not federal, drives the inquiry. Appellees asked the district court for additional time to submit their reply, but soon after the court granted the motion (and before Appellees submitted their reply), the district court entered an order granting their motion to dismiss. This timely appeal followed.

APPLICABLE LEGAL STANDARDS

This Court "review[s] de novo the district court's grant of a Rule 12(b)(6) motion to dismiss." *Norsworthy v. Houston Indep. Sch. Dist.*, 70 F.4th 332, 336 (5th

[2] As described below in Section I.C. of the Argument, Mississippi lacks the authority to enforce the Controlled Substances Act.

Cir. 2023) (cleaned up) (quoting *Lampton v. Diaz*, 639 F.3d 223, 225 (5th Cir. 2011)). Under this standard, the court must "accept as true all well-pleaded facts and construe the complaint in the light most favorable to the plaintiff." *Id.* (citing *Heinze v. Tesco Corp.*, 971 F.3d 475, 479 (5th Cir. 2020)). Accordingly, "the dismissal will be upheld only if it 'appears that no relief could be granted under any set of facts that could be proven consistent with the allegations.'" *Calton v. Perrin*, 222 F. App'x 417, 418 (5th Cir. 2007) (quoting *Moore v. Carwell*, 168 F.3d 234, 236 (5th Cir. 1999)).

As the trial court correctly pointed out, the parties agree this case is governed by the test first articulated by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). *See* ROA.130. And as the Court in *Central Hudson* explained, "[i]n commercial speech cases . . . a four-part analysis has developed." *Central Hudson*, 447 U.S. at 566. First, to "determine whether the [commercial speech] is protected by the First Amendment[,] . . . it at least must concern lawful activity and not be misleading." *Id.* "Next," the Court explained, it asks "whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.*

SUMMARY OF THE ARGUMENT

This case is about the source of the government's power to regulate commercial speech. The court below held that once the federal government has made a type of commerce illegal, that, by extension, empowers states to ban speech about that commerce—even if the commerce is legal in that state and even if the federal government has refused to authorize it to enforce the federal law.

As Appellants argue in Part I below, that cannot be right. The Supreme Court has very clearly explained that a state's narrow power to regulate the promotion of legally questionable commerce is rooted in—and only exists *because of*—that state's more general power to regulate the commerce itself. In other words, the Court has explained, the state's power to regulate speech is "concomitant" with its power to regulate commerce, meaning that it does not operate independently. So if a state does not exercise its power to prohibit a product, the state's limited power to prohibit speech about that product is never triggered. Such an approach fits with other well-established features of the commercial-speech doctrine—which has historically focused on the legality of the regulated conduct in the jurisdiction where the transaction is proposed and emphasizes the value of speech to the listener.

In this way, this case presents a quintessential First Amendment question. Yet the district court opted to apply a Supremacy Clause analysis in its place. That was error. This case does not ask—and the district court should not have, perhaps inadvertently, addressed—whether Mississippi's medical marijuana statutes conflict with federal laws prohibiting marijuana. But in recasting the issue, the district court rebuffed well-reasoned First Amendment precedent and, instead, applied *non*-Supremacy Clause cases in support of (what it generally fashioned as) a Supremacy Clause-rooted decision. All of this was error.

To be clear, Appellants do not seek a ruling that Mississippi is completely foreclosed from regulating medical marijuana or its advertising. Rather, they argue only that restrictions on advertising marijuana dispensaries, just like restrictions on any other state-licensed business, must comport with the First Amendment. Accepting that, the next step would be to consider the remaining *Central Hudson* factors and determine whether the speech restrictions imposed appropriately further the state's interests.

This would, typically, be a question on remand. But as explained in Part II, the district court repeatedly expressed the view that even engaging in that analysis would amount to a wrongful intrusion on state sovereignty. And in doing so, the district court strongly signaled its sympathy for the legislature's paternalistic

goals—aims that the First Amendment cannot abide. Thus, the district court's view would subordinate constitutional rights to state legislative authority, in deference to illegitimate paternalistic ends. This Court should reject that approach.

ARGUMENT

I. A STATE'S POWER TO REGULATE COMMERCIAL SPEECH IS ROOTED IN ITS POWER TO REGULATE THE COMMERCE THAT THE SPEECH PROPOSES.

The district court concluded that "inasmuch as marijuana remains illegal under federal law today, it cannot be considered 'lawful activity' within the meaning of *Central Hudson*." ROA.139. To get there, though, the court made three critical errors. First, it did not engage with a fundamental First Amendment principle—that a state's power to regulate commercial speech is rooted in, and only exists *because of*, its power to regulate the underlying commerce. Second, having made that error, the district court resolved the perceived state-federal conflict by shifting away from well-accepted First Amendment principles, and instead embracing inapplicable (and incorrect) Supremacy Clause doctrine. And third, even assuming the federal government's stance on medical marijuana were relevant, the district court nonetheless erred by finding that regulators in Mississippi may essentially lash their regulatory authority to that of the federal government and

channel federal law to justify prohibiting speech it could not otherwise prohibit. Each error is addressed below.

A. The District Court's Ruling Reflects A Deviation From The Fundamental Principles Of The Commercial Speech Doctrine.

The trial court did not address Appellants' primary argument, which explained that government's power to regulate commercial speech stems from—and is cabined by—its power to regulate commercial conduct. And its failure to do so led to legal error for three reasons. First, as the Supreme Court has made clear, states lack any authority, independent of their own state laws regulating commercial conduct, to impose bans on commercial speech. Second, and by extension, the Supreme Court and circuit courts have repeatedly held that *Central Hudson*'s first prong focuses on whether a proposed transaction is legal in the jurisdiction where it is proposed. And third, the commercial-speech doctrine's goal of ensuring that the purchasing public may receive truthful, helpful information is frustrated by the state's prohibition on providing it.

1. The Supreme Court has explicitly held that a state's power to regulate commercial speech is rooted in its power to regulate commerce.

The Supreme Court has unambiguously "explained that the State's power to regulate commercial transactions [is what] justifies its *concomitant power* to regulate commercial speech that is 'linked inextricably' to those transactions." *44*

Liquormart v. Rhode Island, 517 U.S. 484, 499 (1996) (plurality opinion) (emphasis added) (quoting *Friedman v. Rogers*, 440 U.S. 1, 10, n.9 (1979)). This rule is sensible, as the Eighth Circuit noted, because "[i]t would be illogical to permit [a state] to prohibit the sale and possession of [a product] while not allowing the state to regulate advertising which encourages these same crimes." *Casbah, Inc. v. Thone*, 651 F.2d 551, 564 (8th Cir. 1981). Thus, the state may regulate "advertising [that] . . . encourages activities which are otherwise crimes under [that state's] law." *Id.*

Still, the power to regulate commercial activity does not trump the public's interest in hearing truthful commercial speech. *44 Liquormart*, 517 U.S. at 511 (rejecting "the assumption that . . . the power to prohibit an activity is necessarily 'greater' than the power to suppress speech about it.").[3] That fixed principle remains unchanged, even accepting that marijuana is categorically illegal everywhere in the country. After all, even the federal government, which (unlike Mississippi) actually prohibits medical marijuana,[4] does not have a completely free

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[3] And if there were any doubt over which trumps which, "[i]n areas of doubt and conflicting considerations, it is thought better to err on the side of free speech." *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977). That rings especially true here because, as the Supreme Court has admonished, it is "quite clear that banning speech may sometimes prove far more intrusive than banning conduct." *44 Liquormart*, 517 U.S. at 511.

[4] Appellants did not argue, as the district court seemed to believe, that Appellants satisfy *Central Hudson*'s first prong simply because medical marijuana is effectively legal at the federal level.

hand to regulate speech on that topic. *See 44 Liquormart*, 517 U.S. at 512. Thus, the district court accepted an overly simplistic understanding of *Central Hudson*'s first prong: "marijuana is illegal under federal law and therefore speech about it can be banned everywhere." Very simply, such an iteration of *Central Hudson* is irreconcilable with what the Supreme Court said in *44 Liquormart*. *Id.* (rejecting "the absolutist view that the State may ban commercial speech simply because it may constitutionally prohibit the underlying conduct.").

The circuit courts that have considered the source of the government's power to regulate speech support this view. *See United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1142 (D.C. Cir. 2009) (explaining that the power to regulate commercial speech is a "concomitant power" justified only by the state's "power to regulate commercial transactions") (citing *44 Liquormart*); *United States v. Wenger*, 427 F.3d 840, 846 (10th Cir. 2005) (same); *Conn. Bar Ass'n v. United States*, 620 F.3d 81, 95 (2d Cir. 2010) (same); *Campbell v. Robb*, 162 F. App'x 460, 469 (6th Cir. 2006) (same); *Okla. Telecasters Ass'n v. Crisp*, 699 F.2d 490, 498 (10th Cir. 1983) (same) (holding that even a state's broad power to regulate alcohol did not override

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ROA.131–33. Of course, it is undoubtedly true that marijuana *is* effectively legal at the federal level, as federal law simply no longer "prohibit[s] entirely the possession or use of marijuana." *Standing Akimbo*, 141 S. Ct. at 2236 (Thomas, J., statement respecting denial of certiorari) (cleaned up). But to be clear, Appellants did not below (and do not here) argue that non-enforcement is the same as legality.

the need for First Amendment scrutiny of alcohol-advertising restrictions), *rev'd on other grounds sub nom. Cap. Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). In other words, Mississippi's power to regulate speech about medical cannabis is a "concomitant power"—one that is defined and delimited by the extent to which *Mississippi* has regulated that product. So if medical cannabis is legal under state law, so too must be advertising it under state law.

All of this is to say that a state may regulate commercial speech, but only if it first has regulated the related commercial conduct. In other words, "[a] state or municipality may . . . ban a particular type of commercial transaction within its borders. *Once it has done so*, speech proposing or facilitating the unlawful transaction may be banned without offending the First Amendment." *Katt v. Dykhouse*, 983 F.2d 690, 695 (6th Cir. 1992) (emphasis added). And any application of *Central Hudson* reflecting such an understanding effectively resolves the first prong in Appellants' favor. After all, the state's power to regulate speech is, again, "inextricably linked" with its power to regulate conduct; so when *Central Hudson* asks "Is the conduct legal?," state law must supply the answer.[5]

[5] Here, that answer is clear. Medical marijuana is legal under Mississippi law. To be sure, Mississippi does heavily regulate medical marijuana; but because medical marijuana is ultimately *legal* in Mississippi subject to certain limitations, commercial speech about medical marijuana

2. Under Supreme Court and circuit court precedent, the first prong of *Central Hudson* asks whether a proposed transaction is legal under the laws of the jurisdiction where it is proposed.

The state-law-focused understanding of *Central Hudson* discussed above tracks with yet another binding First Amendment principle: When a state bans an advertisement for a product or service that is illegal in that same state's jurisdiction, the First Amendment is concerned only with whether the transaction proposed is legal *under the laws of the state where the transaction is proposed*. In *Bigelow v. Virginia*, for example, the Supreme Court struck down a ban on abortion-related advertisements in Virginia, as applied to a plaintiff advertising abortion services in New York, where abortion was legal. 421 U.S. 809 (1975).

In finding that Virginia could not prohibit ads offering abortion in New York, the Court's admonition in *Bigelow* was clear: A state "may not, under the guise of exercising *internal* police powers," encumber speech "about an activity that is legal" *externally*, i.e., in another state. *Bigelow*, 421 U.S. at 824–25 (emphasis added). *See also Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Worcester*, 851 F. Supp. 2d 311, 315 (D. Mass. 2012) (interpreting Supreme Court precedent "to mean that

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must be legal too—again, subject to certain limitations. The contours of those limitations, of course, are defined by the remaining *Central Hudson* factors.

an activity is 'lawful' under the *Central Hudson* test so long as it is lawful where it will occur"). Very simply, "the advertiser who proposes a transaction in a state where the transaction is legal is promoting a legal activity. Its speech deserves First Amendment protection." *Wash. Mercantile Ass'n v. Williams*, 733 F.2d 687, 691 (9th Cir. 1984) (applying *Central Hudson*).

That a proposed transaction involves marijuana does not change this. *See New England Accessories Trade Ass'n, Inc. v. City of Nashua*, 679 F.2d 1, 3–4 (1st Cir. 1982) ("If New York, or some other state, decided to legalize the sale and use of marijuana, [another state] would have greater difficulty under *Bigelow* prohibiting an advertisement that the Big Apple was the place to [buy and sell] marijuana."); *Conant v. Walters*, 309 F.3d 629, 632 (9th Cir. 2002) (holding that the First Amendment protects a doctor providing a "professional 'recommendation' of the use of medical marijuana"); *Seattle Events v. State*, 512 P.3d 926, 935 (Wash. Ct. App. 2022) (holding, in a marijuana advertising case, that "existing case law supports extending constitutional protections to advertising for activities *that are legal in the state where the transaction would occur*" (emphasis added)). All of this supports Appellants' position that the question in this case is whether medical marijuana is a legal product in Mississippi. And the Appellees and the district court

both agree the answer to that question is yes. ROA.78 (Defendants' brief); ROA.127–28 (Order).

3. The first prong of *Central Hudson* must emphasize the interests of the listener over the power of the government.

The district court's application of *Central Hudson* should also be rejected because it conflicts with the Supreme Court's repeated admonitions that the scope of the commercial-speech doctrine is defined largely by "[t]he *listener's* interest" in hearing the speech. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (emphasis added). Indeed, for the listening public, commercial speech is valuable because it "serves to inform [them] of the availability, nature, and prices of products and services," and in doing so "performs an indispensable role in the allocation of resources in a free enterprise system." *Bates*, 433 U.S. at 364 (citing *FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967) (Harlan, J., concurring)). In this way, commercial speech "serves individual and societal interests in assuring informed and reliable decisionmaking." *Id.*

Given the value of commercial speech, the government may "prohibit commercial speech proposing unlawful activities," but *only because* that power "is consistent with [the Supreme Court]'s emphasis on the First Amendment interests *of the listener*." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 432 (1993) (Blackmun, J., concurring) (emphasis added). That is, the government can ban

misleading speech on the assumption that "[a] listener has little interest in receiving false, misleading, or deceptive commercial information," and it may likewise ban speech proposing illegal activity because, "to the extent it exists at all, a listener has only a weak interest in learning about commercial opportunities that the criminal law forbids." *Id.* at 432–43 (citing *Bates*, 433 U.S. at 364).

That listener-focused analysis matters here. And it directly supports Appellants' proposed interpretation of *Central Hudson*—one that focuses on whether the speech in question concerns a transaction in which its audience may actually engage. Indeed, Mississippi residents surely have an interest in learning about commercial opportunities that the state openly permits (and that the federal government has said they cannot get in trouble for). Yet the state forbids its residents from hearing that information.

In this way, the district court's ruling reflects another deviation from accepted commercial speech doctrine: it elevates the government's power to regulate over the consumers' right to hear informative, actionable information about products it can lawfully purchase in the state. Of course, under Appellants' *Central Hudson* theory, Mississippians could still receive that helpful information—like where the state's dispensaries are located and what the prices there are. But under the state's theory, Mississippians are at once deemed sensible enough to buy

medical cannabis, but too fragile to learn how and where they can get it.[6] That departs from any basic understanding of the commercial speech doctrine.

B. The District Court Erred By Relying On Inapplicable Supremacy Clause Precedent To Resolve A First Amendment Question.

1. The district court erred by quickly dismissing applicable First Amendment cases as distinguishable or "poorly" reasoned.

The district court did not grapple with the First Amendment principles described in the sections above. Instead, it focused on distinguishing the cases Appellants cited in support of those principles. For example, the district court was unmoved by *Bigelow*, it explained, because *Bigelow* involved not the federal government, but "two constitutional equals, namely the states of New York and Virginia." ROA.136. And because "the federal government is the 'rock' to Mississippi's 'scissors,'" the court reasoned, "*Bigelow*'s observations [were] . . . completely inapplicable in this case." ROA.136.

The district court likewise discounted the First Circuit's pointed marijuana-specific example in *Nashua* as a "poor hypothetical," ROA.137, that the First Circuit conjured after "apparently overlooking"—or, elsewhere, "without even considering"—"the existence of federal marijuana laws." ROA.137–38. This, said

[6] The state's paternalistic motivations are discussed in Part II below.

the district court, rendered *Nashua* irrelevant; it was "little more than judicial hypothesizing." ROA.138. That is because, in the eyes of the district court, "the First Circuit was not even thinking," when conceiving the hypothetical, of "the existence or impact of federal laws which make marijuana illegal." ROA.138.[7]

The district court, accordingly, took no guidance from *Bigelow* or the federal circuit cases relying on it—like *Nashua* and *Williams*—because none of those cases involved the very same state-federal dynamic that this case does. ROA.137 ("None of these three federal appellate decisions involved the situation present here, where federal law specifically makes a particular activity illegal which is legal under state law."); *see also* ROA.139.

It followed, then, that the district court was unmoved by the most on-point case supporting Appellants' position, *Seattle Events v. State*, a case involving a nearly identical legal question and whose *Central Hudson* analysis hinged on the federal cases the district court rejected. In *Seattle Events*, the court addressed a less onerous ban on marijuana advertising—restrictions meant only to limit exposure to

[7] Whatever this Court makes of the district court's speculation about *Nashua*—which posits that a panel of federal appeals court judges carelessly forgot that marijuana was illegal under federal law—the implication of such a decision is clear. In rejecting *Nashua*, the district court effectively held, despite the First Circuit's plain finding to the contrary, that a state where medical marijuana was not legal *could*, consistent with *Bigelow*, prohibit a medical marijuana ad proposing its sale in a state where it was. After all, if all that matters is the federal prohibition, then Mississippi can ban advertising about medical marijuana regardless of where the sale is proposed.

"people under twenty-one years of age." *Seattle Events*, 512 P.3d at 928. The court in *Seattle Events* acknowledged the federal ban on marijuana, but nonetheless held that "existing case law support[ed] extending constitutional protections to advertising for activities *that are legal in the state where the transaction would occur*." *Id*. at 935 (emphasis added). The court below rejected that analysis (and *Williams* and *Nashua*, the "existing case law supporting" it). Instead, it concluded that the Washington appeals court "made a poor choice in citing [*Williams* and *Nashua*] as supporting a conclusion that something which is unlawful under federal law may be properly considered 'lawful activity' in any state." ROA.139.

But *Seattle Events*, in light of the First Amendment principles described above, was correctly decided. And the district court erred in brushing aside those principles—and concluding that *Seattle Events* was "fully distinguishable"—simply because a case it relied on (*Bigelow*) did not "at least mention[] the existence of federal laws criminalizing marijuana." ROA.138. For one thing, the court in *Seattle Events* did not forget this reality; it plainly acknowledged that "[t]he sale of marijuana was illegal under federal law."

Nor is *Seattle Events* distinguishable, as the district court found, because the plaintiffs there "sought recovery under the [state] constitution's free speech provisions." ROA.134. True, the court in *Seattle Events* did acknowledge that the

plaintiffs there "brought claims under the state constitution, which invokes state law." *Seattle Events*, 512 P.3d at 935. But the court expressly rejected the notion that this at all altered its *Central Hudson* analysis. *Id.* at 931, n.14 (basing its ruling on its finding that "the Washington Constitution . . . involves the same *Central Hudson* . . . test[] as the First Amendment for commercial speech."). In fact, the court in *Seattle Events* refused to even consider the idea "that the state constitution provide[d] broader protections for commercial speech than the federal constitution." *Id.* Instead, *Seattle Events* explicitly held that *Central Hudson* means the same thing under both. So it was simply wrong to conclude, as the district court did, that the *Central Hudson* analysis in *Seattle Events* was distinguishable simply because the case involved state constitutional claims. ROA.134. It is the same test.

2. The Supremacy Clause does not dictate the scope of the First Amendment.

Having rejected *Seattle Events* (and ultimately the First Amendment), the district court relied instead on the Supremacy Clause. But the Supremacy Clause is a "provision [that] is only implicated when a case involves a conflict between a state and a federal law." *Smith v. Nat'l Steel & Shipbuilding Co.*, 125 F.3d 751, 755 (9th Cir. 1997) (quoting *N.Y. Tel. Co. v. N.Y. Dep't of Labor*, 440 U.S. 519, 539 n.32 (1979)). And despite the district court's apparent finding of a conflict here, there in fact isn't one: Congress has prohibited medical marijuana, and Mississippi has simply

declined to do the same. But even if there were a conflict between state and federal law, that perceived conflict would not alter the appropriate analytical framework. And it surely would not remove this case from the ambit of the First Amendment and turn it into a Supremacy Clause inquiry. The district court erred because it concluded otherwise.

The district court's error was rooted in its rejection of *Seattle Events* (and each of the First Amendment cases on which it relied). As the district court explained, "the federal government's unquestioned power under the Supremacy Clause simply did not come into the picture in *Bigelow*, *Nashua* and *Williams*," making the court's reliance on them in *Seattle Events* a "poor choice." ROA.139, 139. So instead of applying those cases, the district court looked to the rationale of another case, the Montana Supreme Court's ruling in *Montana Cannabis Industry Ass'n v. State*, 368 P.3d 1131 (Mont. 2016).[8] And like the court in *Montana Cannabis*, the district court's analysis spurned the First Amendment—looking

[8] For what it is worth, Appellants are aware of only one other court that was asked, like the district court, to select between *Seattle Events* and *Montana Cannabis*. And in that case, the court agreed with Appellants' view that *Seattle Events* had the better of the analysis. *See Good Day Farm Ark., LLC v. State*, Case No. 60CV-22-931 (Ark. Cir. Ct. Dec. 27, 2023), available at https://arktimes.com/wp-content/uploads/2023/12/Chip-Welch-Good-Day-Order.pdf. Notably, the court in *Good Day Farm* rejected the defendants' argument under *Montana Cannabis*—the same argument Appellees made below. In rejecting it, the court explained that *Central Hudson*'s first prong "extend[s] constitutional protections to advertising for activities that are legal in the state where the transaction would occur." Slip op. at 3 (quoting *Seattle Events*).

instead to first "resolve" the perceived state-federal "conflict" before applying *Central Hudson*'s first prong.

But the Supremacy Clause is the wrong mechanism for resolving this case. To begin with, the underlying assumption offered by the state and accepted by the district court—that the CSA categorically overrides state marijuana laws—is factually wrong.[9] The CSA itself expressly says that it does not preempt state law. *See* 21 U.S.C. § 903. And several state courts have acknowledged as much. *See Bourgoin v. Twin Rivers Paper Co.,* 187 A.3d 10, 19 (Me. 2018) (collecting cases). But even if the CSA does, as the district court held, establish that "whatever is unlawful under federal law is necessarily unlawful in every state," ROA.139, that *still* does not answer the First Amendment question. Rather, such a holding arguably only resolved a much broader question that the district court very likely did not mean to address: whether Mississippi's *entire* medical marijuana act is illegal in light of federal law.

Legality of the state act aside, the district court ultimately credited the only case the Appellees cited in support of their Supremacy Clause argument, *Gonzales*

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[9] Even if the Controlled Substances Act was the silver bullet the state says it is, even the CSA has its exceptions when important civil liberties are implicated. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (acknowledging a religious-use exception to the CSA).

v. Raich, 545 U.S. 1 (2005)—the same case the Montana Supreme Court relied on in *Montana Cannabis*. ROA.130–31 (holding that it "agrees with the State's argument in this regard" and "finds [it] particularly persuasive"). But *Raich* did not actually address the issue presented in either *Montana Cannabis* or here. To start, nowhere did it suggest that a *state* government has plenary authority, based on *federal* law, to restrict speech about *state*-legal transactions. In fact, *Raich* is not even a speech case, or even, for that matter, a Supremacy Clause one. *Raich* is a Commerce Clause case involving a state-legal marijuana user whose personal-use marijuana plants were destroyed by DEA agents. *Id.* at 8. Given that backdrop, the Court in *Raich* held that the *federal government* could enforce the *federal* Controlled Substances Act against state-legal medical marijuana users.[10]

[10] Of course, in the years since *Raich*, the federal government has all but fully disavowed this authority. Indeed, the holding in *Raich* is based on an apparently obsolete federal marijuana policy—that of a "*comprehensive* regime to combat . . . traffic in illicit drugs." 545 U.S. 1, 12 (2005) (emphasis added). As Justice Thomas and others have suggested, post-*Raich* federal policies have "greatly undermined its reasoning." *Standing Akimbo*, 141 S. Ct. at 2236–37 (Thomas, J., statement respecting denial of certiorari) (describing the federal government's "once comprehensive" approach to marijuana as a "half-in, half-out regime" that in fact partially "tolerates . . . local use of marijuana."). *Cf. United States v. Guess*, 216 F. Supp. 3d 689, 695 (E.D. Va. 2016) ("[T]he current state of the law—in which state law either legalizes or criminalizes marijuana; federal law criminalizes marijuana; and federal policy does not enforce the federal criminalization of marijuana depending on a defendant's geographic location—creates an untenable grey area in which such certainty and notice have effectively, if not formally, been eradicated.").

Ignoring these details, the Montana Supreme Court in *Montana Cannabis* seized on the commerce-clause analysis in *Raich* and dismissed the relevance, *for* Central Hudson *purposes*, of medical marijuana's legality in Montana. The district court, relying on *Montana Cannabis*, made the same mistake. It effectively adopted the Montana Supreme Court's conclusion—itself borrowed from *Raich*'s Commerce Clause discussion—that state legality "provides no defense under the federal law." *Montana Cannabis*, 368 P.3d at 1150 (quoting *Raich*'s Commerce Clause analysis, which explained that the "the power of the Congress over the subject of commerce" overrides "legislation of a state . . . which conflicts" with it).

The district court then adopted the court's mistake in *Montana Cannabis*, substituting *Raich*'s Supremacy (but actually Commerce) Clause theory in place of the appropriate *Central Hudson* analysis. *Compare Montana Cannabis*, 368 P.3d at 1150 ("Because federal law governs the analysis of this issue, we conclude that an activity that is not permitted by federal law—even if permitted by state law—is not 'lawful activity' within the meaning of *Central Hudson*'s first factor."), *with* ROA.139 ("[T]he Montana Supreme Court correctly held . . . that, inasmuch as marijuana remains illegal under federal law today, it cannot be considered 'lawful activity' within the meaning of *Central Hudson*.").

C. Focusing On Federal Law Was The Wrong Approach For Other Reasons.

Appellants explain throughout this brief why focusing on state-level regulation is the doctrinally correct approach under *Central Hudson*. But there are other reasons the district court should not have turned to federal law to resolve this case.

The first is because Mississippi and its regulators have no authority to harness it here: the Controlled Substances Act is "enforceable only by the Attorney General and, by delegation, the Department of Justice." *Schneller v. Crozer Chester Med. Ctr.*, 387 F. App'x. 289, 293 (3d Cir. 2010); *Safe Sts. All. v. Alt. Holistic Healing, LLC*, 2016 WL 223815, at *4 (D. Colo. Jan. 19, 2016) (same). True, that authority has been delegated, but to the DEA—*not* the Mississippi Department of Health. *See* 28 C.F.R. § 0.100(b) (assigning to the DEA the AG's power to enforce the CSA).[11]

Another reason is because Appellees' views on the import of federal law are fundamentally inconsistent. Indeed, Appellees are openly facilitating the violation

[11] This is consistent with the general rule that only the federal government may enforce federal statutes. *See* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. Rev. 698, 708 (2011) ("States have no inherent power to enforce federal statutory law."); 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.").

of the very same federal statutes they insist win them this case. This is a curious stance; and it is one of Appellees' own creation. As the district court correctly pointed out, legalizing medical marijuana was "not something that Mississippi was required to do at all." ROA.141. In fact, if it wanted to, Mississippi could have "ma[de] federal law its own"—that is, by enacting a similar prohibition on medical cannabis and a related law prohibiting its advertisement. *California v. Zook*, 336 U.S. 725, 735 (1949). But it has not done that. Instead, Mississippi is actively licensing businesses in Mississippi to sell medical marijuana, a policy that is (under Appellees' own theory) in contravention of the CSA. Yet that is the very same act Appellees claim cover behind to explain why, in their view, the speech regulations at issue here are immune from First Amendment scrutiny. This is a deeply flawed theory—that an unenforced federal statute should conclusively resolve a *constitutional* question in favor of a state agency. And the district court erred in accepting it.

* * *

II. THE DISTRICT COURT ERRED BY ACCEPTING THE STATE'S PRESUMED GOAL OF "PROTECTING" CONSUMERS BY SHIELDING THEM FROM TRUTHFUL INFORMATION.[12]

In addition to its holding on *Central Hudson*'s first prong, the district court offered additional "notes for the record" indicating how it would rule on the remaining *Central Hudson* factors "if First Amendment principles . . . allowed it to do so." ROA.139–40. And its apparent application of those factors was incorrect.[13] In a section in which it voiced its "further concerns about exercising federal injunctive power," ROA.139, the district court openly sympathized with the state's presumably paternalistic aims, stressing its belief that applying the remaining

[12] In addition to the paternalistic concerns discussed in this section, the district court further noted its belief "that *Pennhurst*'s admonition against federal courts making unwarranted 'intrusion[s] on state sovereignty' cast[] a lengthy shadow over the recovery plaintiffs seek in this case." ROA.141 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984)). But as the district court acknowledged, *Pennhurst* is triggered when a plaintiff asks "a federal court [to] instruct[] state officials on how to conform their conduct to state law," a ruling that would conflict "with the principles of federalism that underlie the Eleventh Amendment." ROA.141 (citing *Pennhurst*, 465 U.S. at 105–06). *Pennhurst*, therefore, is not implicated here. Appellants did not ask the district court to order state officials to "conform their conduct to state law." Appellants asked the district court to enforce the U.S. Constitution. ROA.30–32.

[13] To be sure, the district court's entire discussion regarding the remaining factors was premature at the motion to dismiss stage: "the State ha[s] the burden to prove all elements of the *Central Hudson* test." *Byrum v. Landreth*, 566 F.3d 442, 447 (5th Cir. 2009). Yet the district court indicated it could apply the test now—even without making the government meet its burden to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993) (collecting cases).

Central Hudson factors and ruling for Appellants could undermine the state's policy interests and harm the public. As for the state's policy goals, the district court said:

- "[I]t is not at all clear to this court that [Mississippi] would have chosen to [legalize medical marijuana] if it had known that, soon afterwards, a federal judge would order it to permit a form of advertising of which it so clearly disapproves." ROA.141;

- "[T]he plaintiffs would have this court make an extraordinarily powerful exercise of federal judicial authority, which, if implemented, would effectively prevent the Mississippi Legislature from exercising its best judgment regarding how to provide for the health and safety of its citizens." ROA.142; and

- "The intrusion upon state sovereignty urged by plaintiffs in this case would serve to fundamentally change the nature of the careful legislation which the Mississippi Legislature thought it was enacting, and it would do so in a manner which would have unpredictable societal impacts." ROA.142;

And in sympathizing with the state's paternalistic aims, the district court said:

- "[T]his court can discern very rational reasons why a Legislature . . . would nevertheless have recoiled from having the airwaves and public billboards filled with marijuana advertisements which would inevitably be seen by children and other vulnerable citizens." ROA.141–42[14];

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[14] The district court, apparently, believed that using "the airwaves and public billboards," specifically to advertise to "children and other vulnerable citizens," is what Appellants *want* to do. ROA.141–42 ("[P]laintiffs candidly admit in their complaint that, if they were to prevail in this lawsuit, they would advertise their cannabis business through, among other things, 'billboards' and 'broadcast advertising, including television and radio.'" ROA.142 (citing ROA.10). Again expressing its concerns about this outcome from a policy standpoint, the court explained that "[t]his is a result which the Mississippi Legislature was clearly eager to avoid, inasmuch as it specifically forbade it from occurring." ROA.142. To be clear, Appellants have no desire to advertise to children, vulnerable citizens, or otherwise ineligible patients. ROA.9, 106 & n.1. In any case, as Appellants (and the district court) are aware, doing so is already illegal under

- "[T]his court believes that the Legislature could have reasonably feared that permitting cannabis merchants to fill the airwaves with advertisements would tend to 'move the needle' towards greater societal acceptance of drug use in general." ROA.142–43;

- "[I]f something is permitted to be openly advertised over the airwaves, would this not lead children and others to conclude that it is more or less harmless?" ROA.143; and

- "It seems likely to this court that concerns of this nature were paramount in leading the Legislature to bar cannabis advertising in the first place, and this court is extremely reluctant to take any action to disturb the State of Mississippi's evaluation of *how best to promote the safety and welfare of its citizens*." ROA.143 (emphasis added).

In sum, the district court—intentionally or unintentionally—openly signaled how it would rule on the remaining *Central Hudson* factors. And just as clearly, it signaled that it would apply those factors incorrectly.

First, the role of the court is to intervene when constitutional rights are violated. *See United States v. Windsor*, 570 U.S. 744, 762 (2013) (defining the "primary role" of the Court as "determining the constitutionality of a law"); *Milk Wagon Drivers Union of Chi., Loc. 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 299 (1941) (explaining that it is "the duty of th[e] court[s] to enforce constitutional liberties"). Yet the district court indicated it was inclined to defer to the

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state laws that Appellants have not challenged. ROA.9, 106 & n.1 (referencing Code Miss. R. 15-22:3.2.2).

government's presumed goals of averting "unpredictable societal impacts," fighting "greater societal acceptance of drug use in general," and preventing people from adopting the belief that medical marijuana "is more or less harmless." ROA.142–43.[15] The district court further expressed hesitance to act, explaining that the Mississippi legislature might not have legalized medical marijuana at all "if it had known that, soon afterwards, a federal judge would order it to permit a form of advertising of which it so clearly disapproves." ROA.141.

But the courts must not defer to "legislative judgments" that aim to steer consumer behavior by prohibiting speech. *44 Liquormart*, 517 U.S. at 508–10 (expressly rejecting the notion that "choos[ing] suppression over a less speech-restrictive policy" is a policy question solely left "'up to the legislature'"). Rather, "a state legislature does *not* have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes." *Id.* at 510 (emphasis added).

Next, to be sure, the government has zero authority to "protect" consumers by shielding them, for "paternalistic purposes," from truthful information. But paternalistic purposes are precisely what the district court signaled it was inclined

[15] The district judge also signaled it found persuasive the government's apparent desire to protect "children and other vulnerable citizens." ROA.142. Again, Mississippi law already addresses that concern separately and Appellants do not challenge those laws.

to accept. In fact, much of its order is devoted to its concerns about how Appellants' desired injunctive relief might stymie the state's goals of curbing the sale and popularity of medical marijuana.[16] But "suppression of information" in order "to 'dampen' demand for or use of [a] product" is not "ever a permissible way" to regulate. *Central Hudson*, 447 U.S. at 574 (Blackmun, J., concurring). Indeed, "such a regulatory measure strikes at the heart of the First Amendment . . . because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice." *Id.* at 574–75.[17]

The free flow of speech is the default. That is because "information is not in itself harmful, [and] people will perceive their own best interests if only they are well enough informed." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). Thus, the Supreme Court has held, "a State's

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[16] Of course, absent evidence, any presumed link between medical marijuana advertisement and public safety is purely speculative. Should this Court remand the case, Appellants will adduce evidence that such speculation is unfounded.

[17] And it is irrelevant, despite the district court's concerns, that "[l]egalizing medical marijuana was . . . not something that Mississippi was required to do at all." ROA.141. To the complete contrary, the Supreme Court has held, "[e]ven though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right." *44 Liquormart*, 517 U.S. at 513 "That the State has chosen to license its liquor retailers does not change the analysis." *Id.*

paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it." *44 Liquormart*, 517 U.S. at 497 (citing *Va. Bd. of Pharmacy*, 425 U.S. at 770); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring) ("the Government's asserted interest, that consumers should be . . . uninformed for their own protection, does not suffice to justify restrictions on protected speech in *any* context").[18]

Finally, the state's speech ban does not directly advance any legitimate government purpose and, even if it did, is still insufficiently tailored to any such end. Indeed, any link between the advertising prohibition and its impact on public attitudes is, impermissibly, "highly speculative." *Central Hudson*, 447 U.S. at 569. Even the district court acknowledged as much, noting that the "societal impacts" it is worried about are "unpredictable." ROA.142. And in the words of the Supreme Court, "[s]uch speculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends." *44 Liquormart*, 517 U.S. at 507. In fact, "a commercial speech regulation 'may not be sustained if it provides

[18] That the product is marijuana does not change the analysis. Indeed, any vestige of a "vice exception" to the commercial speech doctrine has been abandoned by the Supreme Court. *See, e.g.*, Brendan Lucas, *Commercial Speech Restriction and Legal Brothels: Is There A "Vice" Exception to* Central Hudson*'s Intermediate Scrutiny?*, 30 J.L. & Com. 221, 228 (2012).

only ineffective or remote support for the government's purpose.'" *Id.* at 505 (quoting *Central Hudson*, 447 U.S. at 564).

Nor is the state's chosen method the least restrictive means. Far from it. Here, just as in *44 Liquormart*, the state has many options at its disposal if it wishes to reduce medical marijuana consumption. *Id.* at 507–08 (listing as examples that the state could encourage temperance by raising beverage taxes, limiting per capita purchases "as is the case with prescription drugs," or by developing "educational campaigns focused on the problems of excessive, or even moderate" consumption). The state, in fact, already does many of these things. *See, e.g.*, Code Miss. R. 35-VIII:4.01 (imposing an excise tax); Miss. Code Ann. § 41-137-39(10)–(14) (setting limits on quantity and potency and mandating "a notice of harm"); *see also id.* § 41-137-11 (establishing a seed-to-sale system to fully track all production and distribution); Code Miss. R. 15-22:3.2.2 (prohibiting advertising targeted at children and promoting overconsumption of cannabis).

Accordingly, the state's restrictions go well beyond the traditional advertising limitations on products like tobacco and alcohol. And they do so, apparently, not because the state wishes to promote sensible use or protect vulnerable citizens, but rather *specifically because* it wants to dampen demand. That is impermissible.

CONCLUSION

Under any correct understanding of the commercial speech doctrine, this is a straightforward case. The speech Mississippi seeks to prohibit pertains to lawful commercial conduct for purposes of the *Central Hudson* analysis—a legal finding that is critically distinct from whether the state's medical marijuana policy conflicts with federal law. As such, Appellants satisfy *Central Hudson*'s first prong, and this case should be remanded for the trial court to consider the remaining *Central Hudson* factors.

In applying those factors, the district court may not defer to legislative judgments in the face of a plain First Amendment violation. That is especially true in a case like this one, where the speech restrictions at issue are designed, paternalistically, to manipulate consumer behavior. Thus, to correct the district court's mistaken analysis and prevent it from committing additional related errors, this Court should provide further instruction to the district court regarding the correct application of the remaining *Central Hudson* factors on remand.

Accordingly, Plaintiffs-Appellants respectfully request that the District Court's decision granting Defendants-Appellees' Motion to Dismiss be REVERSED and that this matter be remanded to the District Court for further proceedings and eventual judgment on the merits.

Dated: April 9, 2024

Respectfully submitted,

/s/ Ari S. Bargil
Ari S. Bargil
Katrin Marquez
INSTITUTE FOR JUSTICE
2 S. Biscayne Boulevard, Ste 3180
Miami, FL 33131
(305) 721-1600
abargil@ij.org
kmarquez@ij.org

Michael T. Lewis, Sr.
LEWIS & LEWIS ATTORNEYS
1217 Jackson Ave E.
Oxford, MS 38655-4001
(662) 232-8886
mike@lewisattorneys.com

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April, 2024, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Ari S. Bargil
Lead Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

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/s/ Ari S. Bargil
Lead Counsel for Plaintiffs-Appellants