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

Appeal from the United States District Court
for the Northern District of Mississippi
No. 3:23-cv-00431

DEFENDANTS-APPELLEES' RESPONSE BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Under this Court's Rule 28.2.1, governmental parties need not furnish a certificate of interested persons.

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STATEMENT REGARDING ORAL ARGUMENT

The district court correctly rejected plaintiffs' commercial-speech challenge, ruling that the First Amendment does not protect advertisements for marijuana transactions forbidden by federal law. The facts and legal arguments are thoroughly and adequately presented in the briefs and record. Oral argument would not significantly aid this Court's resolution of the legal issue presented in this appeal. Fed. R. App. P. 34(a)(2); Fifth Cir. R. 28.2.3.

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INTRODUCTION

This Court should affirm the district court's order dismissing plaintiffs' First Amendment claim seeking equitable relief against Mississippi's restrictions on medical-marijuana advertising. Plaintiffs want to advertise for marijuana business through billboards, broadcast television and radio, social media, and many other means. But the federal Controlled Substances Act makes it illegal to manufacture and distribute marijuana or to advertise marijuana transactions by any means. That reality dooms plaintiffs' First Amendment challenge for two reasons.

First, as the district court held, because plaintiffs seek to advertise for an activity that is illegal, those advertisements enjoy no First Amendment commercial-speech protection. The First Amendment protects advertisements to some degree. But advertisements for "*illegal* commercial activity" enjoy no First Amendment protection. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973) (emphasis in original). States may regulate such advertisements or ban them entirely. Mississippi's medical-marijuana program does allow for marijuana transactions in highly regulated circumstances. But that state-law regime does not trump the federal drug laws. Marijuana transactions remain illegal under federal law, so plaintiffs lack any First Amendment right to advertise them. Plaintiffs' contrary arguments rest on a misunderstanding of commercial-speech doctrine, inapposite

caselaw, and a refusal to acknowledge the supremacy of federal drug laws over state marijuana programs.

Second, and alternatively, illegality principles bar federal courts from granting equitable relief that aids criminal conduct. Plaintiffs seek prospective declaratory and injunctive relief. That relief would permit plaintiffs to engage in federally forbidden marijuana advertising. But federal courts do not award *federal* relief that allows them to violate *federal* laws. That equitable rule alone requires affirmance.

Federalism principles reinforce each of those grounds for affirmance. Plaintiffs here ran to federal court on only a federal claim rather than pursuing remedies in state court or under state law. They seek injunctive relief that would upend the State of Mississippi's "very cautious" approach to permitting the narrow use of medical marijuana. ROA.141. And they demand an injunction that would override a federal law that has protected Mississippians for more than 50 years from dangerous drugs. As the district court recognized, these features strongly support dismissing plaintiffs' suit.

STATEMENT OF JURISDICTION

The district court entered final judgment granting defendants' motion to dismiss on January 22, 2024. ROA.145. Plaintiffs timely appealed. ROA.146-148. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Did the district court correctly dismiss plaintiffs' First Amendment claim seeking prospective equitable relief against Mississippi's regulation of marijuana-business advertisements, where: (a) federal law prohibits manufacturing, distributing, or advertising marijuana products and services, and thus advertisements that promote marijuana-related businesses enjoy no First Amendment commercial-speech protections; and (b) federal courts do not award equitable relief that promotes illegal conduct, yet plaintiffs seek declaratory and injunctive relief blessing prospective violations of federal drug laws?

STATEMENT OF THE CASE

This appeal arises from the district court's judgment dismissing plaintiffs' facial and as-applied First Amendment claim seeking equitable relief against Mississippi's medical-marijuana advertising regulations.

Factual Background. In 1970 Congress passed and the President signed the Controlled Substances Act, which regulates and restricts narcotic drugs and other substances nationwide. *See* 21 U.S.C. § 801 *et seq*. The Act aims to protect the "health and general welfare of the American people" from the "illegal importation, manufacture, distribution, possession, and improper use of controlled substances." *Id.* § 801(2). The Act classifies certain controlled substances in five schedules. *Id.* § 812. Schedule I drugs are often considered the most dangerous and heavily regulated controlled substances under the Act. *Id.*

§ 812(b)(1). Congress classified marijuana as a Schedule I drug in 1970 and it remains so classified today. *Id.* § 812, sched. I(c)(10).

Because marijuana is a Schedule I drug, it is "unlawful" to "manufacture, distribute, or dispense" it anywhere in the United States. 21 U.S.C. § 841(a)(1). And it is "unlawful for any person knowingly or intentionally to use any communication facility" to "facilitat[e]" the sale or distribution of marijuana. *Id.* § 843(b). That prohibition extends to communications by "mail, telephone, wire, radio, and all other means of communication." *Ibid.* It also is "unlawful" to publish any "written advertisement knowing that it has the purpose of seeking or offering illegally to receive, buy, or distribute" marijuana, including through the "internet." *Id.* § 843(c)(1), (2)(A).

Although federal law makes it unlawful to manufacture marijuana, distribute it, or advertise it for sale, in recent years some States have permitted those things as a matter of state law—most often with medical or recreational use of marijuana. And over the last 20 years, federal enforcement policies on such state-approved marijuana programs have varied. In 2009, the Department of Justice urged federal prosecutors, "[a]s a general matter," to "not focus federal resources in [their] States on individuals" who comply "with existing state laws providing for the medical use of marijuana." Memorandum from David W. Ogden, Deputy Attorney General, U.S. Dep't of Justice, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana* 1-2 (Oct. 19, 2009).

But that "guidance" did "not 'legalize' marijuana or provide a legal defense to a violation of federal law." *Id.* at 2. Two years later, the Department reaffirmed that guidance. Memorandum from James M. Cole, Deputy Attorney General, U.S. Dep't of Justice, *Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use* (June 29, 2011). The 2011 guidance maintained that it was not an "efficient use of federal resources" to target medical-marijuana use approved by "applicable state law." *Id.* at 1. But that guidance emphasized that Department policies did not insulate large-scale marijuana operations from federal drug laws, "even where those activities purport to comply with state law." *Id.* at 2. Over the years, the Department's hands-off policy views on state-approved programs have continued shifting. *E.g.*, Memorandum from James M. Cole, Deputy Attorney General, U.S. Dep't of Justice, *Guidance Regarding Marijuana Enforcement* at 3 (Aug. 29, 2013). And at times it has withdrawn those policies. *See* Memorandum from Jefferson B. Sessions, III, Attorney General, U.S. Dep't of Justice, *Marijuana Enforcement* (Jan. 4, 2018).

About 10 years ago, Congress's approach to marijuana also shifted. It began enacting annual appropriations riders (often called "Rohrabacher-Farr Amendments," for their sponsors) barring the Department of Justice from using appropriated funds "to prevent [Mississippi and most other States] from implementing their own State laws that authorize the use, distribution, possession, or cultivation of

medical marijuana." Consolidated and Further Continuing Appropriations Act, 2015 Pub. L. No. 113–235, § 538, 128 Stat. 2130, 2217; *see*, *e.g.*, Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, § 542, 129 Stat. 2242, 2332-33. A similar rider appears in Congress's most recent enacted appropriations bill. Consolidated Appropriations Act, 2024, Pub. L. No. 118–42, § 531, 138 Stat. 25, 174. But Congress has not amended the Controlled Substances Act to remove state medical-marijuana programs from its purview or to legalize distributing, manufacturing, or advertising marijuana.

In 2022, the Mississippi Legislature passed and the Governor signed the Mississippi Medical Cannabis Act. Miss. Code Ann. § 41-137-1 *et seq*. That Act allows for the production, sale, and use of marijuana in Mississippi for medicinal purposes only. *See id.* § 41-137-5. The Mississippi Department of Health oversees "the administration" and other aspects of the program, including licensed facilities and entities that grow, process, transport, test, and dispose of medical cannabis. *Id.* § 41-137-7(1), (3)(a)-(b). The Mississippi Department of Revenue is responsible for "licensing, inspection and oversight" of medical-marijuana "dispensaries." *Id.* § 41-137-7(4).

The Act takes a cautious approach to medical marijuana. In regulating medical-marijuana transactions, the Act imposes restrictions on patients, medical practitioners, and dispensaries. *See*, *e.g.*, Miss. Code Ann. §§ 41-137-3(r)(i), (ii) (qualifying medical conditions), 41-137-3(ff) &

41-137-5(7) (practitioner eligibility), 41-137-5(1)-(6) (patient registration), 41-137-39(9) (dispensary transactions). And the Act requires the state health and revenue departments to issue and enforce advertising rules. *See id.* § 41-137-41(1). Those rules must restrict "the advertising, signage, and display" of medical marijuana. *Id.* § 41-137-41(1)(d)(x). The rules "may not prevent appropriate signs on the property of a dispensary, listings in business directories, including phone books," or "listings" in certain publications. *Ibid.* And they must allow dispensaries (and other licensees) to display marijuana in their "company logos and other branding activities"; to operate a website showing the products they sell; and to sponsor "health or not-for-profit charity or advocacy events." *Ibid.*

Using that grant of authority, the state health department has issued regulations addressing medical-marijuana advertising and marketing. *See* 15 Miss. Admin. Code Pt. 22, Subpt. 9, R. 9.1.1 *et seq*. Those regulations permit licensed dispensaries to advertise in ways that do not "target" minors or pregnant women or "promote non-medical" use of marijuana. *Id.* at R. 9.2.3. Licensed dispensaries may use certain "branding activities" to "publicize their businesses," *id.* at R. 9.2.1; to create "a website and/or social[-]media presence" showing "contact information, retail dispensing locations," and "products available," *id.* at R. 9.2.2; to list in "business directories" including phone books and certain "publications," *ibid.*; and to sponsor "health or not-for-profit

charity or advocacy events," *ibid.* Dispensaries also may display on-site "business signage," "subject to local zoning and permitting requirements." *Id.* at R. 9.2.4. Beyond those parameters, dispensaries cannot "advertis[e]" or "market[ ]" themselves "in any media." *Id.* at R. 9.1.1. That precludes advertising in broadcast, electronic, and print media, such as "[m]ass text/messaging communications," "[m]ass email communications," and advertisements "viewable ... [in] a public space." *Ibid.* Dispensaries also cannot solicit reviews, testimonies, or endorsements from patients, caregivers, or healthcare practitioners. *Ibid.*

The state revenue department enforces these advertising regulations. *See* 35 Miss. Admin. Code Pt. XI. Its rules require advertising by licensed dispensaries to comply with the health department's regulations, *see id.* at R. 12, and subject violators to administrative discipline, *id.* at R. 28.

Procedural Background. In 2023, plaintiffs Clarence Cocroft and Tru Source Medical Cannabis, LLC filed this lawsuit challenging the State's medical-marijuana advertising laws. ROA.6-32. Tru Source is a state-licensed medical-marijuana dispensary owned and operated by Cocroft. ROA.6-7. The defendants—Christopher Graham, Pat Daily, and Dr. Daniel Edney, sued in their official capacities—are the health and revenue officials responsible for the laws' implementing regulations and enforcement. ROA.7-8. Plaintiffs assert a facial and as-applied First

Amendment claim, contending that the State's advertising laws on medical-marijuana violate their First Amendment commercial-speech rights. ROA.8, 30-31. Plaintiffs allege that the State's "[b]an" on medical-marijuana advertising prevents them from "advertis[ing] like any other state-legal business" and "severely hampers" their "ability to reach new potential customers." ROA.25-26. They claim that, if not for the advertising regulations, they would "place signage on major roads near the dispensary," "advertise" their business on "billboards," and advertise in other ways, including through television, radio, social media, podcasts, and direct mailing. ROA.25, 27-28. They seek a declaration that the State's advertising laws violate the First Amendment and an injunction barring defendants from enforcing them. ROA.32.

Defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) on two grounds—that plaintiffs' proposed advertisements concern activity that is illegal under federal law and so are not entitled to First Amendment protection and that equitable principles bar the relief that plaintiffs seek because federal courts may not grant equitable relief that facilitates illegal conduct. ROA.70-84.

The district court held that plaintiffs failed to state a First Amendment claim and dismissed the complaint. ROA.126-144.

The court explained that plaintiffs' challenge to the State's "statutes and regulations" turns on whether their proposed advertising "'concern[s] lawful activity.'" ROA. 129, 130 (quoting *Central Hudson Gas*

& Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980)). Under *Central Hudson*, the court recognized, "'commercial speech'" must "'concern lawful activity'" to be "'protected by the First Amendment.'" ROA.129 (quoting 447 U.S. at 566). "[S]ince the possession of marijuana remains illegal under federal law" and marijuana transactions do not "constitute lawful activity," the court observed, Mississippi may "greatly limit[ ]" marijuana "advertising." ROA.130. And although the State has permitted the use of medical marijuana "under state law," that "does not alter its illegality under federal law." ROA.130. "[S]omething that remains illegal under the supreme law of the land" is not "a lawful activity" under *Central Hudson*. ROA.131; *see* ROA.139 (explaining that the "basic language of the Supremacy Clause" makes clear that "whatever is unlawful under federal law is necessarily unlawful in every state"). So, the court ruled, plaintiffs' commercial-speech challenge fails: their proposed advertising does not enjoy First Amendment protection. ROA.131.

The court rejected plaintiffs' argument that Congress has "all but fully disavowed" federal prohibitions on medical marijuana by passing the Rohrabacher-Farr amendments to recent appropriations acts. ROA.131; *see* ROA.131-133. Even the "most expansive interpretation" of those riders shows only "the budgetary priority which Congress chose to assign marijuana prosecutions"; they do not amend the Controlled Substances Act to "make marijuana legal under federal law." ROA.132.

The court also rejected plaintiffs' contention that the First Amendment's lawful-activity requirement "focuses on whether a transaction is legal under the laws of the state where it is proposed," not the "laws of another jurisdiction." ROA.136; *see* ROA.133-139. Plaintiffs identified no case supporting that view, *see* ROA.133-139, and the laws of "the United States" always apply to marijuana transactions in Mississippi, ROA.136.

The court also "note[d]" "serious federalism concerns" with "exercising its injunctive authority" in plaintiffs' favor. ROA.139-140. The court observed that plaintiffs bypassed state-court and state-law remedies to seek relief "exclusively under federal law" in federal court, ROA.140; that awarding plaintiffs relief here would "strongly infringe[ ] upon [the Mississippi] Legislature's policy evaluations" in allowing but comprehensively regulating medical marijuana, ROA.141; and that a federal injunction permitting plaintiffs to advertise their marijuana business through "'billboards,'" "'broadcast advertising, including television and radio,'" and other means would intrude on the State's "sovereignty," ROA.142 (quoting ROA.27 (complaint)). The court viewed those "federalism and simple judicial responsibility concerns" as "counseling against the relief sought by plaintiffs." ROA.143. The court added that this Court has recognized that "equity will not lend its aid to the perpetration of criminal acts." ROA.143 (quotation marks omitted). Those features showed why "granting plaintiffs the relief they seek" would not be "lawful or judicially responsible." ROA.144.

The court entered final judgment the day it granted defendants' Rule 12(b)(6) motion. ROA.145. This appeal followed. ROA.146-148.

SUMMARY OF ARGUMENT

The district court correctly dismissed plaintiffs' First Amendment challenge under Rule 12(b)(6).

I. Plaintiffs claim that the First Amendment protects advertising for marijuana transactions and seek equitable relief blessing such advertising. That claim fails for two independent reasons. First, as the district court ruled, plaintiffs have no First Amendment right to advertise their marijuana business, so their claim fails as a matter of law. Second, and independently, federal courts cannot award equitable relief that promotes illegal conduct and condones prospective violations of federal drug laws, so plaintiffs cannot be granted the relief they seek.

II. Federalism principles reinforce the district court's rejection of this lawsuit. Plaintiffs have refused to pursue remedies in state court or under state law, they demand relief that would infringe on the State of Mississippi's cautious approach to permitting medical marijuana, and they seek injunctive relief that would override a federal law that has for over 50 years benefited the people of Mississippi. The district court correctly cited these features supporting the dismissal of this suit.

STANDARD OF REVIEW

This Court "review[s] *de novo*" a "grant of a Rule 12(b)(6) motion to dismiss." *Lampton v. Diaz*, 639 F.3d 223, 225 (5th Cir. 2011).

ARGUMENT

I. The District Court Correctly Rejected Plaintiffs' First Amendment Claim Seeking Equitable Relief Against Mississippi's Marijuana-Advertising Regulations.

Plaintiffs claim that Mississippi's marijuana-advertising regulations violate their First Amendment commercial-speech rights. ROA.6-32. The district court was right to reject that claim. ROA.129-139.

A. Settled Legal Principles Defeat Plaintiffs' Claim And The Relief That Plaintiffs Seek.

Plaintiffs claim that the First Amendment protects advertising for marijuana transactions and seek equitable relief blessing such advertising. That claim fails for two independent reasons.

First, as the district court ruled, plaintiffs have no First Amendment right to advertise their marijuana business, so their claim fails as a matter of law. ROA.129-139.

The First Amendment generally "accords a lesser protection" to commercial advertisements than to other forms of "constitutionally guaranteed expression." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980). But advertisements that further an "*illegal* commercial activity" enjoy no First Amendment protection at all. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human*

Relations, 413 U.S. 376, 388 (1973) (emphasis in original). That "categorical exclusion" rests on the view that "[o]ffers to provide or requests to obtain" illegal goods deserve no speech protections "whether as part of a commercial exchange or not." *United States v. Williams*, 553 U.S. 285, 298 (2008). States may thus regulate or ban "commercial speech related to illegal activity." *Central Hudson*, 447 U.S. at 564; *see Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 367 (2002) (legal activity is a "threshold matter" for commercial-speech protections); *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982) ("a government may regulate or ban entirely" "speech" that "propos[es] an illegal transaction," such as "commercial activity promoting or encouraging illegal drug use"); *Pittsburgh Press*, 413 U.S. at 388 ("We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes.").

Those principles end this case. Everywhere in the United States, federal law prohibits the "manufacture" and "distribut[ion]" of marijuana, 21 U.S.C. § 841(a)(1), bans "any written advertisement" for marijuana, *id.* § 843(c), and bars facilitating the manufacture or distribution of marijuana through virtually any "transmission" of communications, *id.* § 843(b); *see United States v. Lawrence*, 829 F. App'x 33, 34-35 (5th Cir. 2020) (affirming conviction in Mississippi for dealing marijuana). This reality dooms plaintiffs' claim. They propose

advertising for an "*illegal* commercial activity" in Mississippi. *Pittsburgh Press*, 413 U.S. at 388 (emphasis in original). That advertising enjoys no First Amendment protection. *Ibid.*; *see Central Hudson*, 447 U.S. at 564; ROA.130-131.

That Mississippi law permits medical-marijuana transactions does not change that reality. The federal drug laws apply everywhere in the United States. So those laws necessarily outlaw marijuana transactions anywhere in Mississippi. Under our constitutional structure, "federal law" "prevail[s]" when "there is any conflict between state and federal law." *Gonzales v. Raich*, 545 U.S. 1, 29 (2005); *see United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016) (O'Scannlain, J.) ("[W]hile the [Controlled Substances Act] remains in effect, states cannot actually authorize the manufacture, distribution, or possession of marijuana" and "[s]uch activity remains prohibited by federal law" because under the Supremacy Clause "state laws cannot permit what federal law prohibits."); ROA.130-133, 139. When Congress regulates an activity, "state action cannot circumscribe that power." *Raich*, 545 U.S. at 29; *see id.* at 15-33 (ruling that the federal drug laws validly regulate intrastate manufacture and possession of marijuana); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 489-95 (2001) (rejecting a medical-necessity defense to federal drug laws based on state-sanctioned medical-marijuana use). Mississippi laws that regulate medical marijuana thus do not—and cannot—alter the status of in-state

marijuana transactions as illegal activity as a matter of supreme federal law.

The federal government's at-times-permissive approach to enforcing federal marijuana laws also does not matter. Even when the Department of Justice has relaxed its enforcement of those laws, it did not "'legalize' marijuana" or provide "a legal defense" to federal-drug-law violations. Memorandum from David W. Ogden, Deputy Attorney General, U.S. Dep't of Justice, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana* at 2 (Oct. 19, 2009). And even if the Department can decline to enforce federal marijuana laws, it cannot repeal them. *Feinberg v. C.I.R.*, 808 F.3d 813, 816 (10th Cir. 2015) (Gorsuch, J.) ("in our constitutional order it's Congress that passes the laws, Congress that saw fit to enact 21 U.S.C. § 841, and Congress that in § 841 made the distribution of marijuana a crime"); *United States v. Canori*, 737 F.3d 181, 185 (2d Cir. 2013) (ruling that the Department's marijuana-enforcement policies "unequivocally do[ ] not mean that some types of marijuana use are now legal").

Nor do Congress's restrictions on Department of Justice marijuana-enforcement spending affect the outcome here. Congress's restrictions on using appropriated funds to enforce marijuana laws (*e.g.*, Consolidated Appropriations Act, 2024, Pub. L. No. 118–42, § 531, 138 Stat. 25, 174) do not modify or repeal the Controlled Substances Act. Those riders have at most "prohibit[ed] the federal government only from preventing the

implementation of those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana." *McIntosh*, 833 F.3d at 1178 (holding that such a rider does not bar the federal government from prosecuting "[i]ndividuals who do not strictly comply with all state-law conditions"); *United States v. Bilodeau*, 24 F.4th 705, 714-15 (1st Cir. 2022) (substantial compliance); *United States v. Trevino*, 7 F.4th 414, 422 (6th Cir. 2021) (strict compliance); ROA.131-133. The riders just temporarily "restrict[ ] the government from spending certain funds to prosecute certain individuals"; they do not "provide immunity from prosecution for federal marijuana offenses" or bar future prosecutions for past offenses. *McIntosh*, 833 F.3d at 1179 n.5. And even with the riders in place, "the manufacture, distribution, or possession of marijuana" "remains prohibited by federal law." *Ibid.*; *see* ROA.132-133.

In sum: Federal law outlaws marijuana transactions in Mississippi and throughout the United States. In a commercial-speech challenge, federal courts first "ask as a threshold matter" if an advertisement "concerns unlawful activity." *Thompson*, 535 U.S. at 367. "If so," the advertisement "is not protected by the First Amendment." *Ibid.*; *Pittsburgh Press*, 413 U.S. at 388. Plaintiffs' proposed advertisements concern illegal activity. That defeats their commercial-speech challenge—as the district court ruled. ROA.129-139.

Second, and independently, federal courts cannot grant the relief that plaintiffs seek: equitable relief that promotes and condones prospective violations of federal drug laws. *Cf.* ROA.143-144.

Federal courts cannot grant relief that assists "the perpetration of criminal acts." *Cartlidge v. Rainey*, 168 F.2d 841, 845 (5th Cir. 1948); *see Warner Bros. Theatres, Inc. v. Cooper Found.*, 189 F.2d 825, 829 (10th Cir. 1951) ("[a] court of equity should not permit" a party to "take advantage of an admittedly illegal arrangement"); ROA.143-144. That rule bars the relief that plaintiffs seek. They seek relief that would facilitate the "manufacture" and "distribut[ion]" of marijuana—acts forbidden by federal law. 21 U.S.C. § 841(a)(1). That relief also would condone advertising that violates federal-law prohibitions on "written advertisement[s]" and other communication that facilitate the manufacture or distribution of marijuana. *Id.* § 843(b), (c). So a federal court cannot grant that relief.

Many federal courts have applied those principles to reject relief to marijuana businesses whose state-licensed operations conflict with federal drug laws. Those principles preclude courts from interfering in marijuana-banking disputes. *E.g.*, *Fourth Corner Credit Union v. Fed. Reserve Bank of Kansas City*, 861 F.3d 1052, 1054-56 (10th Cir. 2017) (opinion of Moritz, J.) (rejecting injunctive relief requiring banking services for marijuana-related businesses). They are grounds to dismiss claims in marijuana-business disputes. *E.g.*, *Sensoria, LLC v. Kaweske*,

581 F. Supp. 3d 1243, 1260-62 (D. Colo. 2022) (equitable claims for recovery of marijuana profits); *Shulman v. Kaplan*, 2020 WL 7094063, at *2 (C.D. Cal. Oct. 29, 2020) ("lost profits" award for marijuana business); *Polk v. Gontmakher*, 2019 WL 4058970, at *2 (W.D. Wash. Aug. 28, 2019) (contract remedies for marijuana producer). They are grounds to reject challenges to features of state medical-marijuana programs. *Original Invs., LLC v. State*, 542 F. Supp. 3d 1230, 1233-37 (W.D. Okla. 2021) (equitable challenge to state marijuana program's residency requirements). And those principles can bar marijuana businesses from federal bankruptcy relief. *E.g.*, *In re Way To Grow, Inc.*, 597 B.R. 111, 133 (Bankr. D. Colo. 2018) (denying debtor relief for marijuana grower).

The same principles bar relief here. Even if plaintiffs' proposed advertisements enjoyed First Amendment protection (they do not), their suit fails because federal courts do not award the relief they seek: a *federal-court* order that would facilitate conduct that violates *federal* law.

B. Plaintiffs' Arguments Lack Merit.

Plaintiffs attack the district court's rejection of their First Amendment challenge on three main fronts. *See* Pl. Br. 14-32. Each fails.

1. Plaintiffs start with three arguments for why the district court's ruling "deviate[s]" from "fundamental principles of the commercial speech doctrine." Pl. Br. 15 (formatting omitted); *see id.* at 15-23. Each argument lacks merit.

First, plaintiffs argue that a State's "power to regulate speech about" a product "is defined and delimited by the extent to which" *that State* "has regulated that product." Pl. Br. 18; *see id.* at 15-18. Plaintiffs thus contend that because "medical cannabis is legal under [Mississippi] state law," "advertising it" must also be legal in Mississippi. *Id.* at 18. This argument fails.

Supreme Court caselaw is clear: Advertisements that further an "*illegal* commercial activity" enjoy *no* First Amendment protection, *Pittsburgh Press Co.*, 413 U.S. at 388 (emphasis in original), and States may thus pervasively regulate or altogether ban "commercial speech related to illegal activity," *Central Hudson*, 447 U.S. at 564. Nothing in that caselaw says that a State's power to regulate or ban advertising of an illegal product is "defined and delimited" by the extent to which *the State itself* has regulated the product. Pl. Br. 18.

Nor does any case cited by plaintiffs (Pl. Br. 15-18) support their view. Start with *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996). There, one plurality of the Court said that "the State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions." *Id.* at 499 (plurality opinion). Another plurality said that "the State" cannot "ban commercial speech simply because it may constitutionally prohibit the underlying conduct." *Id.* at 512 (plurality opinion). According to plaintiffs, those passages mean that, because Mississippi has permitted

some medical-marijuana business, Mississippi cannot bar marijuana advertising—even though "marijuana is categorically illegal everywhere in the country." Pl. Br. 16; *see id.* at 15-17. Plaintiffs are wrong. Nothing in *44 Liquormart* says that defining what conduct is illegal (and thus not entitled to First Amendment protection) turns on what state law permits or forbids. That case involved a challenge to state price-advertisement restrictions on alcohol. 517 U.S. at 489. No alcohol laws—state or federal—blocked the advertisers from claiming First Amendment protection, and the parties "stipulated" that the challengers' "proposed ads do not concern an illegal activity." *Id.* at 493; *see id.* at 497 n.7 (noting that "the First Amendment does not protect commercial speech about unlawful activities"). All that the two pluralities said was that the power to regulate commercial transactions carries with it the lesser, "concomitant" power to regulate commercial speech about those transactions (*id.* at 499 (plurality opinion)) and that the power to ban conduct does not carry with it the power to "ban" all commercial speech about that conduct (*id.* at 512 (plurality opinion)). Neither plurality said that it is *state law* that must "define[ ] and delimit[ ]" the unlawfulness of underlying conduct that may strip an advertisement of First Amendment protection. Pl. Br. 18.

Similarly, none of plaintiffs' circuit precedents holds that a State's power to regulate advertising of an illegal product turns on the extent to which the State itself has regulated the product. *See* Pl. Br. 16-18. At

most those cases cite *44 Liquormart* plurality language that (as just explained) does not mean what plaintiffs say it does. Most of those cases resolved disputes over whether speech promoting *indisputably legal* conduct was commercial speech or more-protected speech. *See United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1142-45 (D.C. Cir. 2009) (court order requiring tobacco manufacturers to run ads on the dangers of smoking); *United States v. Wenger*, 427 F.3d 840, 845 (10th Cir. 2005) (SEC disclosure requirements on penny-stock promotions); *Connecticut Bar Ass'n v. United States*, 620 F.3d 81, 93-96 (2d Cir. 2010) (compelled disclosures by bankruptcy-assistance agencies); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 499 (10th Cir. 1983) (state advertising restrictions on alcohol sales); *Katt v. Dykhouse*, 983 F.2d 690, 695-97 (6th Cir. 1992) (state advertising restrictions on insurance-rebating transactions). Plaintiffs' two other cases did involve illegal underlying transactions, but neither embraces the rule that plaintiffs advocate. In *Casbah, Inc. v. Thorne*, 651 F.2d 551 (8th Cir. 1981), the court concluded that drug-paraphernalia advertising could "constitutionally be prohibited" because state law "prohibit[ed] the sale and possession of drug paraphernalia." *Id.* at 5664. But the court did not rule that only state law determines illegality or consider how illegality under federal law would matter. The same is true of *Campbell v. Robb*, 162 F. App'x 460 (6th Cir. 2006), which ruled that statements about a proposed rental transaction were commercial speech, *id.* at 467-72, but that the

statements were unlawful because they were discriminatory and prohibited by the Fair Housing Act. *Id.* at 465-66.

Second, plaintiffs contend that the question whether a transaction is unlawful (and thus commercial speech about it enjoys no First Amendment protection) turns solely on "whether the transaction proposed is legal under the laws of the state where the transaction is proposed." Pl. Br. 19 (emphasis omitted); *see id.* at 19-21. So because "medical marijuana is a legal product in Mississippi," plaintiffs maintain, advertisements about it enjoy First Amendment protection in Mississippi. *Id.* at 20.

This argument fails too. Marijuana is not a legal product in Mississippi. Again, marijuana is illegal under federal law—in Mississippi and every other State (whether it is called "medical marijuana" or not). 21 U.S.C. § 841(a)(1). Advertising marijuana business through any means is also illegal everywhere in the country. *Id.* § 843(b), (c). So those advertisements enjoy no First Amendment protection and the State is entitled to regulate or ban them. *Pittsburgh Press Co.*, 413 U.S. at 388; *Central Hudson*, 447 U.S. at 564.

Again, no case that plaintiffs cite overcomes those points. None rules that the First Amendment protects an advertisement for a proposed transaction that is illegal under federal law just because it is allowed "under the laws of the state where the transaction is proposed." Pl. Br. 19 (formatting omitted). Start with *Bigelow v. Virginia*, 421 U.S. 809

(1975), which, plaintiffs say, "struck down a ban on abortion-related advertisements in Virigina, as applied to a plaintiff advertising abortion services in New York, where abortion was legal." Pl. Br. 19; *see ibid.* (quoting 421 U.S. at 824-25). *Bigelow* does not help plaintiffs. In *Bigelow*, only Virginia law—not federal law—barred the advertisements. 421 U.S. at 822-24. And the Court stressed that the advertiser could not be prosecuted because of basic limits on extraterritorial lawmaking—not because of any First Amendment principle. Virginia "could not have regulated the advertiser's activity in New York," *id.* at 822-23; it "obviously could not have proscribed the activity" in New York, *id.* at 823; it "possessed no authority to regulate the [abortion] services provided in New York," *id.* at 824; and it could not "acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State," *ibid.* Those limitations on lawmaking power—not the advertiser's First Amendment rights—blocked Virginia from "bar[ring] a citizen of another State from disseminating information about an activity that is legal in that State." *Id.* at 824-25. Nor did *Bigelow* confront whether the First Amendment protects advertisements for transactions that are illegal under federal law but not state law.

Nor do any of plaintiffs' other cases establish that First Amendment protections depend "only" on "whether the [advertiser's] transaction proposed is legal under the laws of the state where the transaction is

proposed." Pl. Br. 19 (formatting omitted); *see id.* at 19-20. Most of those cases resolve commercial-speech disputes by enforcing the extraterritoriality limitations on state lawmaking announced in *Bigelow*. None holds that the First Amendment protects advertisements for federally outlawed transactions. *See Washington Mercantile Ass'n v. Williams*, 733 F.2d 687, 691 (9th Cir. 1984) (First Amendment protects advertisements for transactions "where th[ose] transactions [are] legal" but not where they are "illegal"); *New England Accessories Trade Ass'n, Inc. v. City of Nashua*, 679 F.2d 1, 3 (1st Cir. 1982) (no First Amendment protections for advertisements that "promote[ ] activity which has been determined to be criminal in all jurisdictions"); *National Ass'n of Tobacco Outlets, Inc. v. City of Worcester*, 851 F. Supp. 2d 311, 316 (D. Mass. 2012) (First Amendment protections may extend to advertisements "where the proposed transaction is illegal" but only if that "transaction is legal" somewhere else and "the advertising does not specifically propose a transaction in a locale where that transaction is illegal"); *see also Katt*, 983 F.2d at 695-97 (First Amendment protections for advertisements for transactions "lawful in the place where" they "occur") (cited at Pl. Br. 18).

Plaintiffs also cite two cases involving conflicts between state and federal marijuana laws. Pl. Br. 20-21. But neither case helps plaintiffs because neither decided any First Amendment issue that turned on state law allowing marijuana-related activities outlawed by federal law. In *Seattle Events v. State*, 512 P.3d 926 (Wash. Ct. App. 2022), the court

rejected a challenge to state marijuana-advertising restrictions after determining that the advertisers enjoyed commercial-speech protections under *Bigelow*'s extraterritorial rule. *Id.* at 934-38. But the court emphasized that the advertisers "brought claims under the state constitution" and "invoke[d] state law." *Id.* at 935. The advertisers' claims were thus "distinguishable" from claims under the First Amendment, so the court did not need to confront any issue presented by the reality that selling marijuana is illegal under federal law. *Ibid.* And in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), the court upheld an injunction barring the federal government from blocking physicians from recommending and prescribing medical marijuana. *Id.* at 634-39. But that had nothing to do with commercial-speech protections. The court ruled that the federal policy "str[uck] at core First Amendment interests of doctors and patients." *Id.* at 636.

Third, plaintiffs contend that commercial-speech protections turn on "the listener's interest in hearing the speech," and, because Mississippi residents have "an interest in learning about commercial opportunities that the state openly permits," the First Amendment limits the State from restricting marijuana advertising. Pl. Br. 21, 22 (brackets and emphases omitted); *see id.* at 21-23. This argument founders for the same reasons that plaintiffs' other arguments do. The First Amendment does not protect commercial speech tied to "*illegal* commercial activity." *Pittsburgh Press Co.*, 413 U.S. at 388 (emphasis in original). So it does

not matter if a State's power to "prohibit commercial speech proposing unlawful activities" exists 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) (quoted at Pl. Br. 21). Nor does it matter that plaintiffs' marijuana advertisements might provide some listeners "informative" or "actionable information" on "products" that state law lets them "lawfully purchase." Pl. Br. 22. Those transactions (and advertisements for them) are illegal in Mississippi and throughout the United States, 21 U.S.C. § 841(a)(1); *see id.* § 843(b), (c), so the State may "regulate or ban" them "entirely," *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982).

2. Plaintiffs next argue that the district court erred in relying on "Supremacy Clause" precedent in rejecting their First Amendment claim. Pl. Br. 23 (formatting omitted); *see id.* at 23-30. Those arguments fail.

First, plaintiffs fault the district court for distinguishing several cases that plaintiffs like—*Bigelow*, *Nashua*, *Washington Mercantile Ass'n v. Williams*, and *Seattle Events*—on the ground that those cases did not involve (or did not account for) the supremacy of federal law over state law on marijuana. Pl. Br. 23-26. But the district court was right to distinguish those cases: they are inapposite. As explained, none establish that the First Amendment protects advertisements for products outlawed by federal law. *Supra* pp. 23-26. In *Bigelow*, that issue was not before the

Court because Virginia law—not federal law—barred the advertisements, which concerned conduct that was lawful in New York. 421 U.S. at 822-24. In *Nashua*, the First Circuit speculated that a drug-paraphernalia-advertising ban "would have greater difficulty" passing muster "under *Bigelow*" if another State "decided to legalize the sale and use of marijuana." 679 F.2d at 4. But that example was dictum. *Nashua* held that the First Amendment did not protect the drug-paraphernalia advertisements at issue because they promoted "conduct that is criminal in all jurisdictions." *Id.* at 3. *Washington Mercantile Ass'n* involved underlying criminal conduct (selling drug paraphernalia) that was illegal in one State but (the court assumed) legal in another State—and thus did not involve the situation here, where federal law outlaws all transactions and advertising at issue. 733 F.2d at 691. Last, *Seattle Events* involved state-constitutional claims and so did not need to resolve whether the First Amendment protects marijuana advertising even though it is illegal under federal law. 512 P.3d at 935.

Second, plaintiffs fault the district court for "reject[ing]" the "First Amendment" and relying "instead on the Supremacy Clause" in dismissing their claim. Pl. Br. 26; *see id.* at 26-30. But the district court did not "reject[ ]" the First Amendment, and it properly used the Supremacy Clause in resolving plaintiffs' claim. As plaintiffs agree, "this case is governed by the test" for commercial-speech cases "articulated by the Supreme Court in *Central Hudson*." Pl. Br. 11. The first question

under that test is "whether the [commercial speech at issue] is protected by the First Amendment," which "at least" requires that the speech "concern lawful activity." 447 U.S. at 566; *see Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 367 (2002) (legal activity is a "threshold matter"). And where (as here) federal law dictates that the speech at issue does not "concern lawful activity," the Supremacy Clause plays a decisive role: it dictates that the activity is unlawful and enjoys no First Amendment protection—no matter what any state law says. The district court correctly recognized these points and thus properly used the Supremacy Clause to reject plaintiffs' First Amendment claim. ROA.130-139.

Other well-reasoned authority does the same. In rejecting a commercial-speech challenge to Montana's marijuana-advertising framework in *Montana Cannabis Industry Ass'n v. State*, 368 P.3d 1131 (Mont. 2016), the Montana Supreme Court explained that "marijuana use or possession unequivocally is an unlawful activity under federal law," that state laws "must yield" when "Congress" validly "acts upon the same subject," and that marijuana-related activity is "not permitted by federal law—even if permitted by state law." *Id.* at 1149-50. Plaintiffs resist that decision (Pl. Br. 27, 29-30), but they do not claim that any of those points is wrong. So they cannot fault the conclusion that follows: "the advertisement of marijuana is not speech that concerns lawful activity" that enjoys First Amendment protections. 368 P.3d at 1150.

These points dispatch of plaintiffs' arguments that the Supremacy Clause is not "implicated" here, that the district court's analysis "spurned the First Amendment," and that "the Supremacy Clause is the wrong mechanism for resolving this case." Pl. Br. 26, 27, 28.

Those points also make short work of plaintiffs' remaining arguments. Plaintiffs argue that the Supremacy Clause matters "only" when there is a "conflict between a state and a federal law" and that there is no conflict here: federal law "prohibit[s] medical marijuana" but "Mississippi has declined to do the same." Pl. Br. 26-27 (quotation marks omitted). But whether federal and state drug laws "conflict" here does not matter. Federal law makes marijuana transactions and advertising unlawful everywhere, including in Mississippi, no matter what state law provides. Because, under the Supremacy Clause, federal law trumps state law in this context, plaintiffs have no First Amendment claim.

Plaintiffs dispute the "assumption" that federal drug laws "categorically override[ ]" or "preempt" "state marijuana laws." Pl. Br. 28. But that is not an "assumption." Marijuana transactions and advertising are illegal everywhere in the country because federal law applies everywhere in every State no matter what state law provides. *See Gonzales v. Raich*, 545 U.S. 1, 12-15 (2005); *United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016) ("Anyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes (or attempts or conspires to do so) is committing a

federal crime."). That makes marijuana-related activities in Mississippi illegal. Plaintiffs claim that if "'whatever is unlawful under federal law is necessarily unlawful in every state'" then "Mississippi's entire medical marijuana act is illegal in light of federal law." Pl. Br. 28 (quoting ROA.139; emphasis omitted). But the validity of the State's medical-marijuana *laws* is immaterial here. The issue is the legality of marijuana-related activities in Mississippi. Under federal law, those activities are illegal—so they are unlawful no matter what state law says. Plaintiffs add that federal drug laws have "exceptions" for "important civil liberties." *Id.* at 28 n.9. But they cite only a religious-use exemption and do not claim that their advertising would target customers who invoke that exemption. So the exemption does not help them.

Last, plaintiffs fault the district court's reliance on *Gonzales v. Raich*, which rejected a constitutional challenge to the Controlled Substances Act. Pl. Br. 28-30. According to plaintiffs, that precedent does not matter because it was not "a speech case" or even a "Supremacy Clause" case, but instead rested on "Commerce Clause" principles. *Id.* at 29. But *Raich* confirms why plaintiffs' proposed advertisements enjoy no First Amendment protection. *Raich* holds that Congress validly enacted the Controlled Substances Act, 545 U.S. at 15-33; that confirms that the Act is a valid "law of the United States" and so its restrictions on drug are "supreme" over state laws, U.S. Const. art. VI, cl. 2; and that means

that plaintiffs' proposed advertisements concern illegal activity and so enjoy no First Amendment protection.

3. Plaintiffs close with two more reasons why their claim should not turn on federal drug laws. Pl. Br. 31-32. Neither reason has merit.

Plaintiffs first say that state "regulators have no authority" to enforce federal drug laws, which is vested in various federal authorities. Pl. Br. 31. But defining illegal commercial activity does not turn on who may pursue those who break the law. Federal laws make illegal many activities while limiting who may enforce those laws. *E.g.*, 8 U.S.C. § 1324(a)(1)(A)(iv) (encouraging or inducing illegal immigration); 18 U.S.C. § 1531 (partial-birth abortion); 42 U.S.C. § 3604(c) (housing discrimination). On plaintiffs' view, no state or local government could prohibit advertisements promoting those activities without passing a locally enforceable analogue of federal law. They cite nothing to support that erroneous view.

Plaintiffs next say that Mississippi has taken "fundamentally inconsistent" positions on "the import of federal law." Pl. Br. 31. In their view, the State is "openly facilitating the violation" of federal drug laws by "actively licensing businesses in Mississippi to sell medical marijuana," and so the State should not be able to claim "cover" from those federal laws. *Id.* at 32. But plaintiffs cite nothing to show that the State's position bears on the legal question whether marijuana-related conduct is illegal for commercial-speech purposes. And defendants are

not seeking affirmative relief in federal court—plaintiffs are. So no unclean-hands defense aids plaintiffs' cause.

II. Federalism Principles Reinforce The District Court's Rejection Of Plaintiffs' Claim.

After ruling that plaintiffs' proposed advertisements promote unlawful activity and dismissing their claim on that basis, ROA.129-139, the district court "note[d]" several "serious federalism concerns about exercising its injunctive authority" as "urged by plaintiffs." ROA.139-40. Plaintiffs fault the district court's observations, Pl. Br. 33-39, but their objections are unfounded. The court was right to mention those "important" "federalism principles," ROA.140: they reinforce why plaintiffs' claim must be rejected.

First, plaintiffs decided to run to federal court on only a federal claim, rather than pursuing remedies in state court or under state law. ROA.140-141. As the district court "note[d]," plaintiffs "sought recovery exclusively under federal law" (unlike challengers who pressed state-constitutional claims in *Seattle Events*), likely because the district court "lack[ed] authority" under *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), to "order state officers to comply with" state law. ROA.140; *see Hughes v. Savell*, 902 F.2d 376, 378 (5th Cir. 1990). Asking a federal court to use federal law to mow down state law is always a serious matter.

Second, the injunctive relief that plaintiffs seek would "strongly infringe[ ] upon [the Mississippi] Legislature's policy evaluations" in "mak[ing] a very cautious entry into the legalization of marijuana." ROA.141. Mississippi has chosen to narrowly allow—subject to careful, comprehensive regulation—some business in medical marijuana. As plaintiffs cannot dispute, Mississippi is not required to allow any such business. *See* ROA.142 ("by legalizing marijuana to any degree, the Mississippi Legislature has gone further than Congress itself has been willing to go"). Yet plaintiffs seek to capitalize on Mississippi's careful foray into allowing some medical-marijuana business to require it to accept widespread marijuana advertising through every conceivable means. ROA.27-30; *see* ROA.142 (noting that if plaintiffs "prevail in this lawsuit, they would advertise their cannabis business through, among other things, billboards and broadcast advertising, including television and radio") (quotation marks omitted). The district court was right to see problems with that effort. *See* ROA.142 ("This court can discern no federal interest which would justify the drastic intrusion upon state sovereignty urged by the plaintiffs in this case."). Federal courts must proceed with caution when litigants launch constitutional attacks on state policy decisions. *See*, *e.g.*, *Hay v. Waldron*, 834 F.2d 481, 485 (5th Cir. 1987) ("in cases implicating federal/state relations, federal courts ought not to intrude into state affairs any more than is necessary"). Plaintiffs want the federal courts to throw caution aside.

Third, courts should see—as the district court here saw—"cause for hesitation" in granting an injunction that would override a federal law that has for over 50 years promoted the wellbeing of the people of Mississippi. ROA.143. This Court has instructed that "'equity will not lend its aid to the perpetration of criminal acts.'" ROA.143 (quoting *Cartlidge v. Rainey*, 168 F.2d 841, 845 (5th Cir. 1948)). As the district court noted, that authority may supply an "additional reason not to grant the injunctive relief" that plaintiffs seek. ROA.144. That observation was again well founded. As explained, the illegality principle—which *Cartlidge* deemed "well settled" decades ago, 168 F.2d at 845—provides an independent basis to affirm the district court's judgment. *Supra* pp. 18-19.

Plaintiffs do not refute these points. Instead, they contend that the district court's observations unduly "indicat[ed] how it would rule on the remaining *Central Hudson* factors." Pl. Br. 33 (quotation marks omitted). They say that "discussion" of the "remaining factors was premature at the motion to dismiss stage," *id.* at 33 n.13; that the court credited the State's illegitimate "policy goals," *id.* at 34; and that the court "sympathiz[ed] with the state's paternalistic aims" behind its marijuana-advertising laws, *ibid.* Plaintiffs then pit those perceived "policy goals" and "aims" against First Amendment precedents. *See id.* at 35-39.

None of this helps plaintiffs. Their claim fails for reasons discussed in Part I. So the district court's federalism-based observations do

plaintiffs no harm. Either reason set out in Part I is sufficient to affirm the district court's judgment. So plaintiffs' belief that the district court agreed with the State's "policy goals" and "paternalistic aims" does not matter, even if true. *Contra* Pl. Br. 33-35. In any event, the district court simply noted legitimate federalism concerns: beyond illegality, it did not rule on or prejudge any of the *Central Hudson* factors. ROA.139-144. Far from showing that the district court's federalism concerns are unfounded, plaintiffs ignore them. They instead try to draw attention away from the problems in their case by repeatedly tarring Mississippi's elected representatives and other public servants as "paternalistic." Pl. Br. 33-34, 36, 38. That tack goes a long way to showing how little plaintiffs care about federalism or about the "intrusions on state sovereignty" that their lawsuit demands. ROA.142. A State's desire to proceed cautiously in a long-controversial area—involving a product that has for half a century been illegal under federal law—is reasonable and responsible.

If this Court were to reverse the district court's judgment and remand (it should not), it should do so without comment on the last three *Central Hudson* factors. That is a fact-based inquiry. There are no facts in the record. Defendants moved to dismiss the complaint under Rule 12(b)(6) for failure to state a claim. ROA.70-72. Reversal without comment on unresolved fact-based issues is the usual resolution in this scenario—and the right one here. *See*, *e.g.*, *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 381 (5th Cir. 2009).

CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

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June 10, 2024

CERTIFICATE OF SERVICE

I, Wilson D. Minor, hereby certify that this brief has been filed with the Clerk of Court using the Court's electronic filing system, which sent notification of such filing to all counsel of record.

Dated: June 10, 2024

s/ Wilson D. Minor
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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 8,150 words, excluding parts exempted by Fed. R. App. P. 32. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because its text has been prepared in proportionally spaced typeface, including serifs, using Microsoft Word 2016, in Century Schoolbook 14-point font.

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