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

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AMENDED 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.

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INTRODUCTION

Appellees' argument, oft repeated, is simple: Marijuana is illegal under federal law. And for states like Mississippi, where medical marijuana is legal, Appellees believe that means they may authorize the sale of that product and, simultaneously, outlaw truthful speech about it. That claim defies decades of Supreme Court First Amendment precedent. It is supported by no federal caselaw. And as Appellees acknowledge (and affirmatively argue), it would grant the state unchecked power to suppress protected speech. As explained below, this Court should reject that argument and reverse the district court's decision.

SUMMARY OF ARGUMENT

The parties agree that this matter turns on *Central Hudson*'s first prong, which asks whether restricted commercial speech pertains to conduct that is illegal or misleading. But the parties' arguments differ starkly when it comes to how to resolve that question. Appellees, for their part, recognize the obvious tension between their own apparatus—which authorizes and licenses the distribution, sale, and taxation of marijuana—and the federal laws that outlaw marijuana. To "resolve" this tension, they posit that this Court must deploy a Supremacy Clause analysis. Their other arguments rest on the same premise: marijuana is illegal under

federal law and, as such, courts presumably cannot decide *any* civil cases involving the product.

Appellants (hereinafter "Clarence," "Tru Source," or together "Appellants"), on the other hand, argue that First Amendment principles naturally supply the answer to these First Amendment questions—an exercise that does not require the Court to resolve any state-federal tensions. Under this approach, the laws of the jurisdiction imposing the speech ban determine, for purposes of *Central Hudson*'s first prong, the legality of the commercial conduct the speech proposes. Here, Appellants argue that the proposed speech promotes conduct that is at least *legal enough* to survive *Central Hudson*'s first prong. But even weighing federal law (or relying on it exclusively) does not end the inquiry. That is because the state's ban—restricting speech *from* medical marijuana businesses rather than just speech *promoting* them—broadly outlaws truthful, non-marijuana-related speech. No iteration of *Central Hudson* endorses such comprehensive censorship.

ARGUMENT

This argument proceeds in two parts. First, Appellants explain that this Court can resolve this First Amendment question by applying basic First Amendment principles. And second, Appellants address Appellees' attack on this Court's ability to hear and resolve constitutional cases implicating basic civil rights.

I. APPELLEES, LIKE THE DISTRICT COURT, INCORRECTLY APPLY PRONG ONE OF *CENTRAL HUDSON*.

A. First Amendment Questions Are Resolved By Applying First Amendment Principles.

Basic First Amendment principles suggest that *Central Hudson*'s first prong should turn on state law. That is true for at least three reasons. First, the state's power to regulate commercial speech is a power that is linked to, and cabined by, the exercise of that state's power to regulate commercial conduct. Second, the relevant precedent establishes that *Central Hudson* is concerned only with the laws in the jurisdiction where the transaction is proposed. And third, Appellants' speech would provide actionable information to would-be consumers who might buy their products in compliance with state law.

1. Appellees incorrectly argue that their ability to regulate commercial speech—although a "concomitant" power that is "inextricably linked" to their power to regulate commercial conduct—is ungoverned by their own state law.

As Appellants argued both below and in their opening brief, Supreme Court precedent explains that a state's "power to regulate commercial transactions *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)); *see also* App. Br. 15–16 (citing Supreme Court cases).[1] Thus, where the government either lacks or (as in this case and in *44 Liquormart*) has declined to exercise the power to regulate commercial transactions, the antecedent "justification" is absent. *Id.*

Appellees resist this reality on two primary grounds. First, Appellees seem to reject Appellants' understanding of the term "concomitant" as used by the Supreme Court. And second, Appellees insist that a central holding of *44 Liquormart*—that the government cannot ban speech about a legal product—is undermined by cases decided *before 44 Liquormart* was decided. Both are wrong.

i. "Concomitant" means concomitant.

Appellees reject the plain meaning of the word "concomitant." Thus, they insist, "[n]othing in th[e] case law says that a State's power to regulate or ban advertising . . . is 'defined and delimited' by the extent to which *the State itself* has regulated the product." State Resp. 20. Except that is precisely what it means for something to be a "concomitant power"—it exists because of, and is subordinate to,

[1] Appellees argue that Appellants "cite nothing to support" this supposedly "erroneous view." State Resp. 32. But in Appellants' opening brief and its briefing below, Appellants argue both that the power to regulate commercial speech presupposes an exercise of the power to regulate commercial conduct and that the state may not harness *federal* law as the source of its power to regulate in-state speech because the state may not enforce federal drug laws. App. Br. 31–32; ROA.107–08. Appellees do not refute this contention in their response.

an attendant power. *See Concomitant*, Merriam-Webster, merriam-webster.com/dictionary/concomitant ("accompanying especially in a subordinate or incidental way."). Here, that means that the state's power to prohibit speech about marijuana *accompanies and is incidental and subordinate to* (i.e., is "defined and delimited by") the state's power to prohibit marijuana itself—a power the state has opted not to exercise.[2] *See Katt v. Dykhouse*, 983 F.2d 690, 695 (6th Cir. 1992) ("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." (emphasis added)). So to suggest, as Appellees do, that the state possesses power to regulate speech that is *independent from and uncabined by* its own police power is wrong.

Appellees ultimately concede that *44 Liquormart* holds that the power to regulate commercial conduct *is what gives rise to* the "'concomitant' power to regulate commercial speech about those transactions." State Resp. 21. But they nonetheless insist that the state's decision to *not* exercise that predicate power is meaningless. *Id.* Thus, even after acknowledging that the power to regulate speech is both concomitant and subordinate, Appellees reject that *44 Liquormart* suggests

[2] As Appellants argued more extensively in their opening brief, the circuit courts agree with this interpretation. *See* App. Br. 17–18.

that such power is actually *concomitant with* or *subordinate to* anything. *Id.* ("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."). So, Appellees argue, "*44 Liquormart* . . . does not mean what plaintiffs say it does," *id.* at 22, seemingly because it did not explicitly enough state the obvious—that is, that courts should review a state's commercial speech ban in light of that state's regulation of the related commercial conduct. Except that is precisely what the Supreme Court did in *44 Liquormart*.[3] So Appellees' assertion that this Court must do something different is wrong.

ii. *44 Liquormart* is not undermined by cases that were decided decades before it.

Definitions aside, Appellees argue, marijuana is still illegal under federal law. And that, they say, means that Appellants' arguments—describing the state's power to regulate speech as concomitant and inextricably linked to its power to regulate conduct—cannot be right. According to Appellees, that argument, rooted in the Supreme Court's 1996 decision in *44 Liquormart*, simply "fails," because another case, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,*

[3] Appellees ask this Court to adopt a far less likely interpretation of *44 Liquormart*—that Mississippi's "concomitant" power to censor speech is tethered to whatever Congress says is legal or illegal. In other words, Appellees assert that *Congress* can define the scope of the First Amendment. Such a position finds no support either in *44 Liquormart* or the cases interpreting it.

constitutes "clear Supreme Court caselaw" that undermines it. *Id.* (citing 413 U.S. 376, 388 (1973)). That is unlikely, if not impossible. After all, *Pittsburgh Press* was decided 23 years *before 44 Liquormart* and close to a decade before the commercial speech doctrine gained formal acceptance in cases like *Virginia Board of Pharmacy* and *Central Hudson*. And even *Pittsburgh Press* acknowledges that a valid "restriction on advertising" must be "*incidental to* a valid limitation on economic activity." *Pittsburgh Press*, 413 U.S. at 389 (emphasis added).

2. The relevant precedent establishes that *Central Hudson* is concerned with the laws in the jurisdiction where the transaction is proposed.

As Appellees acknowledge, Appellants have argued consistently that *Central Hudson*'s first prong asks only "whether the transaction proposed is legal under the laws of the state where [it] is proposed." State Resp. 23 (citing App. Br. 19). Mississippi, which has legalized medical marijuana, of course must reject that. Relying on a familiar refrain, Appellees argue that marijuana's legality in Mississippi is irrelevant because, "[a]gain, marijuana is illegal under federal law—in Mississippi and every other State." *Id.* Then, resting on another recurring theme, Appellees insist that "no case" says otherwise. *Id.* at 23–24.

First, to directly address Appellees' argument about lack of clearly binding precedent: no, there are no federal cases that, squarely on all fours, support

precisely the position taken by *either* party here. But in every federal case to have come close, the court has sided with Appellants' understanding of the doctrine. Indeed, to the extent any federal circuit court has grappled with this question—how to address a speech ban pertaining to a product that is simultaneously legal and illegal in the same jurisdiction—it was this one.

In *Dunagin v. City of Oxford*, this Circuit addressed a state-imposed ban on liquor advertising that applied in dry and non-dry counties alike. Similar to this case, the state argued that because "consumption is banned in certain areas of wet counties, . . . liquor advertising would therefore necessarily relate to unlawful activity" no matter where it was published. 718 F.2d 738, 742 (5th Cir. 1983). Applying *Central Hudson*, the court was unmoved. *Id.* ("The state argues that liquor advertising is excluded from protection . . . because [it] promote[s] illegal activity and is inherently misleading. We do not agree with these contentions."). As this Circuit in *Dunagin* correctly held, "[t]he Mississippi laws under attack prohibit the advertisement of what may be done *lawfully in Mississippi*." *Id.* at 743 (emphasis added). That they might promote conduct that was simultaneously illegal to some degree *in every Mississippi county* did not matter. *Id.*; *see also Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1547 (10th Cir. 1991) ("[A]lthough alcohol sales and consumption may be illegal in some state counties, such activity is nonetheless

considered lawful *for First Amendment purposes*." (emphasis added) (applying *Dunagin*)).

These principles have been applied by other federal courts as well. For example, in the only case addressing the question of advertising state-legal marijuana, the First Circuit (albeit in dicta) came out squarely on Appellants' side, explaining that one state could not ban the advertisement of marijuana if the advertiser was in a state where marijuana was legal. *New England Accessories Trade Ass'n, Inc. v. City of Nashua*, 679 F.2d 1 (1st Cir. 1982).[4] The Ninth Circuit similarly held that "the advertiser who proposes a transaction in a state where the transaction is legal is promoting a legal activity." *Wash. Mercantile Ass'n v. Williams*, 733 F.2d 687, 691 (9th Cir. 1984). And the Supreme Court has held that a *federal* advertising ban cannot constitutionally proscribe speech about a purely *state-legal* enterprise. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999).[5] As Appellants have argued throughout, this line of cases is rooted in the

[4] Since *Nashua*, two state appeals courts have directly confronted this question. *Seattle Events v. State*, 512 P.3d 926 (Wash. Ct. App. 2022); *Mont. Cannabis Indus. Ass'n v. State*, 368 P.3d 1131 (Mont. 2016). Each is discussed in Part I.B. below.

[5] As noted, a Washington appeals court held that where "the commercial speech at issue proposes marijuana transactions within" a state where it is legal, "existing case law supports extending constitutional protections to advertising for activities that are legal in the state," and therefore "marijuana advertising from licensed retailers in [that state] concerns lawful activity." *Seattle Events*, 512 P.3d at 935.

Supreme Court's decision in *Bigelow*, which held that the constitution protects advertisement for conduct that is legal under the laws of the jurisdiction where it is proposed. *Bigelow v. Virginia*, 421 U.S. 809 (1975).

So Appellees now offer another argument: *Bigelow* is actually not a First Amendment case; rather, its holding reflects the Court's application of extraterritoriality principles. State Resp. 24–25.[6] Except *Bigelow* was decided entirely on First Amendment grounds. 421 U.S. at 825, 829 (concluding that Bigelow had "a legitimate First Amendment interest" and the challenged law "unconstitutionally infring[ed] upon his First Amendment rights."). In any case, *Bigelow*'s consideration of "the geographic implications of [an] advertising prohibition," does not render *Bigelow* "inapposite" here. Anything but. Indeed, "[t]hat analysis" in *Bigelow*, which Appellees try to frame as an "extraterritoriality" discussion, was "a precursor [to] the balancing in *Central Hudson*'s third and fourth factors." *Wash. Mercantile Ass'n*, 733 F.2d at 690.[7]

[6] The extraterritoriality doctrine has no place here. It is feature of the Commerce Clause that "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). But again, as Appellants have argued, this is not a Commerce Clause case. *See, e.g.*, App. Br. 28–30.

[7] This evolution of the law is consistent with, as Appellants argue below in Part I.C., the concept that each prong of *Central Hudson* is interrelated.

Appellees' "extraterritoriality" framing is also irreconcilable with later cases applying *Bigelow*. For example, in *Greater New Orleans*, the Supreme Court considered a *federally* imposed ban on speech about *state-legal* commerce. If Appellees' theory were correct—that *Bigelow* is an extraterritoriality case—it would have upheld the restriction in *Greater New Orleans* on the grounds that the federal government's territory necessarily includes every state. But the Court struck it down. Indeed, the only apparent "extraterritoriality" issue in *Bigelow* was that the state was attempting to regulate speech pertaining to commercial conduct that it had no enforcement power over. 421 U.S. at 827–28. As the Court explained, a state may not "advanc[e] an interest in shielding its citizens from information about activities outside [its] borders," *precisely because* those are "activities that [its] police powers do not reach." *Id.* So too here. Appellees are attempting to leverage federal laws (that they cannot enforce) to justify a state police power (that it has not given itself under state law).

3. Appellees do not dispute that Clarence's desired speech has real-world value.

Appellants have argued that this Court's *Central Hudson* prong-one inquiry must weigh the value of Clarence's desired speech to its intended recipients. App. Br. 21–23. Indeed, as this Circuit has noted, the whole point of the commercial speech doctrine is to promote "the *level and quality of information reaching the*

listener." *Dunagin*, 718 F.2d at 752 (emphasis added). Appellees' sole response on this point is, once again, that marijuana is illegal under federal law. State Resp. 26–27. And in light of that illegality, the state has decided, no one in Mississippi has *any* interest in hearing about medical marijuana at all. *Id.*

In other words, Appellees' position is that at least some of its citizens can benefit from consuming state-legal medical marijuana, but that none of those citizens has any interest in accessing truthful information about that product. That view is the opposite of what the First Amendment requires. Indeed, "the general rule . . . [is] that the speaker and the audience, not the government, assess the value of the information presented." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002). What matters, then, is "[t]he *listener's* interest" in hearing about where and how to buy medical marijuana in Mississippi. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (emphasis added).

Naturally, a listener's interest may fluctuate based on a proposed transaction's purported illegality. A listener may well have a diminished interest "in learning about commercial opportunities that the criminal law forbids." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 433 (1993) (Blackmun, J., concurring) (citing *Bates*, 433 U.S. at 364). But it does not follow that federal illegality alone renders speech utterly worthless. To insist as much, in a case like

this one, asks this Court to reject an obvious truth—that an authorized patient in Mississippi can walk into Tru Source and buy marijuana with zero concern she will be subject to prosecution, state or federal. The notion that such a person has no real-world interest in learning where Tru Source is, or what the prices there are, denies reality. So this Court's application of C*entral Hudson*'s first prong should focus on (or at least seriously acknowledge) the state-law apparatus making such transactions possible.

B. First Amendment Questions Are Not Resolved By Applying The Supremacy Clause.

As the parties have briefed, there are only two appellate cases, both in state court, involving state bans on medical-marijuana advertising in states that have legalized medical marijuana. Appellants argue that the correctly decided case was *Seattle Events v. State*, 512 P.3d 926 (Wash. Ct. App. 2022), while Appellees argue that this Court should follow *Montana Cannabis Industry Ass'n v. State*, 368 P.3d 1131 (Mont. 2016).

Appellants have the better of the argument and here is why: only one of those two cases, *Seattle Events*, applied First Amendment principles to reach its holding. *Montana Cannabis*, on the other hand, applied the Supremacy Clause and concluded, as Appellees argue consistently here, that "marijuana use or possession unequivocally is an unlawful activity under federal law." State Resp. 29 (citing *Mont.*

Cannabis, 368 P.3d at 1149–50). In defending *Montana Cannabis*, Appellees claim that Appellants "do not claim that [its reasoning] is wrong," and therefore "cannot fault the conclusion that follows: 'the advertisement of marijuana is not speech that concerns lawful activity' that enjoys First Amendment protections." *Id.* (quoting *Mont. Cannabis*, 368 P.3d at 1150).

Not so. Appellants devote extensive briefing to arguing, unequivocally, that *Montana Cannabis* is doctrinally wrong and the district court erred in relying on it. *See* App. Br. 27–30. So to suggest, as Appellees do here, that Appellants "do not claim that any of th[e] points" in the reasoning of *Montana Cannabis* are "wrong," State Resp. 29, is mystifying. And to the extent Appellees' actual argument is that Appellants do not dispute the general and unremarkable rule that federal law trumps state law, Appellants respond simply that such a rule—a product of Appellees' desired Supremacy Clause analysis—has no function in this (a First Amendment) case.[8]

[8] Appellees seem to begrudgingly understand this, even as they insist that the Supremacy Clause should apply here. For one thing, Appellees do not dispute Appellants' argument that "the Supremacy Clause is . . . 'only implicated when a case involves a conflict between a state and federal law.'" App. Br. 26 (quoting *Smith v. Nat'l Steel & Shipbuilding Co.*, 125 F.3d 751, 755 (9th Cir. 1997)). Appellees also do not dispute that there is in fact no conflict between state and federal law here. State Resp. 30 (acknowledging Appellants' argument that federal law "prohibit[s] medical marijuana, but Mississippi has declined to do the same" (cleaned up)). Nor does the CSA preempt state law. *See, e.g.*, App. Br. 28 (citing 21 U.S.C. § 903). Yet Appellees press on, incorrectly asserting that "whether federal and state drug laws 'conflict' here does not matter." State Resp. 30. But that is wrong. To trigger the Supremacy Clause, conflict is all that matters.

That is where *Seattle Events* comes in. As Appellants argued in their opening brief, *Seattle Events* reflects a doctrinally sound approach to this case. App. Br. 24–27. And the basis for Appellees' argument seeking to diminish its significance is expressly refuted by *Seattle Events* itself. Appellees wrongly assert that "*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." State Resp. 28 (citing, but not quoting, *Seattle Events*, 512 P.3d at 935). *Seattle Events*, however, explicitly said that it was applying both *Central Hudson* and the First Amendment, and that it was doing so in light of the federal prohibition on marijuana. *Seattle Events*, 512 P.3d at 931 n.14. In fact, it could hardly have been more explicit; it explained that it was deciding whether "advertising for activity that is legal under state law and illegal under federal law is 'lawful' for the purposes of the *Central Hudson* test." *Id.* at 934. Thus, Appellees' insistence that *Seattle Events* decided something else—or turned on a different doctrinal question—is incorrect.

In sum, Appellees' argument is that they win a First Amendment case on grounds doctrinally unrelated to the First Amendment. And they repeatedly attack Appellants for not providing enough sufficiently devastating caselaw holding otherwise. But in the (only two) instances in which Appellees clearly articulate the rule of law they desire, it is they who cite nothing:

> 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.

State Resp. 29 (citing nothing);

> 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.

Id. at 30 (same).

Ultimately, for all their arguments insisting Appellants' First Amendment cases are "inapposite" and their arguments "do not matter," there is but *one* appellate case—*Montana Cannabis*, a doctrinally suspect opinion issued thousands of miles away—supporting the notion that the Supremacy Clause could ever resolve a First Amendment case. This Court should not be the source of the second.

C. Even If This Court Accepts Appellees' Federal-Law Theory, That Is Not The End Of The Inquiry.

Ultimately, even if this Court disagrees with Appellants and believes that federal illegality drives *Central Hudson*'s first prong, the case is not over. That is because, as the Supreme Court has explained, "[t]he four parts of the *Central Hudson* test are not entirely discrete. All are important and, to a certain extent, interrelated: Each raises a relevant question that may not be dispositive to the First

Amendment inquiry, but the answer to which may inform a judgment concerning the other three." *Greater New Orleans*, 527 U.S. at 183–84.

This approach reflects, again, a general understanding of how courts have contemplated prong one of *Central Hudson*. Both the *degree* of illegality and the closeness of the link between prohibited speech and prohibited conduct matter. For example, for *Central Hudson* prong-one purposes, a speech restriction must be narrowly drawn to "always and *only* relate[] to illegal activity." *Greater Phila. Chamber of Com. v. City of Philadelphia*, 949 F.3d 116, 141 n.170 (3d Cir. 2020) (affirming that a ban must relate to the "promotion of activity that directly furthered *entirely illegal activity*." *Chamber of Com. for Greater Phila. v. City of Philadelphia*, 319 F. Supp. 3d 773, 787 n.8 (E.D. Pa. 2018) (emphasis added) (collecting cases)). Thus, courts should consider the remaining prongs unless "there are no other legal uses/purposes" for the desired speech. *Id.*

In practice, that means that if "the legality of [that] proposed commercial transaction depends on circumstances outside the content of the speech," prong one is satisfied. *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 128 F. Supp. 3d 597, 615 (E.D.N.Y. 2015) (collecting cases). Again, Clarence seeks only to promote state-legal medical cannabis consistent with state law. Here, because the legality of *some* of the underlying conduct "depends on circumstances

outside the content of the speech," i.e., whether Congress has enacted or repealed relevant federal laws, "the activity is lawful and the speech is entitled to protection under *Central Hudson*." *Id.*

As for the legality of the *rest* of Tru Source's commercial activities, Tru Source lawfully sells more than just medical marijuana. *See* 35 Miss. Code R. § 11-16-100 (providing that licensed dispensaries may also sell "equipment used for medical cannabis" and "related supplies and educational materials."); Miss. Code § 41-137-3(aa) (same). Yet Tru Source cannot advertise that it lawfully sells more than just medical marijuana. Nor can Tru Source—because of its *identity* as a medical marijuana dispensary—advertise other truthful, non-marijuana-related information like where it is located. To accept this degree of censorship requires applying an overly narrow (and incorrect) version of *Central Hudson*'s first prong. A state cannot evade the application of prongs two through four simply because some of a business's inventory is nominally illegal.

Neither case relied on by Appellees on this topic undermines this position. For example, in *Thompson v. Western States Medical Center*, 535 U.S. 357, 367–68 (2002), the Court suggested that unlawfulness was a "threshold" question, but then expressly did not consider it because "[t]he Government d[id] not attempt to defend the . . . speech-related provisions under the first prong of the *Central*

Hudson test." Likewise, the Court in its 1973 decision in *Pittsburgh Press* expressed that it "ha[d] no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." *Pittsburgh Press*, 413 U.S. at 388. But as even Appellees must concede, post-*Central Hudson*, such a prohibition would *not* be permissible if those transactions were legal. In that case, the remaining *Central Hudson* factors would guide the analysis. As they should here.

II. IT IS NOT RADICAL TO ASK THE FEDERAL COURTS TO ENFORCE THE FEDERAL CONSTITUTION.

A. Appellants Do Not Ask This Court To Aid "Criminal Conduct." They Ask This Court To Enforce The Constitution.

Appellees do not hide from what their argument means: "Even if plaintiffs' proposed advertisements enjoyed First Amendment protection . . . their suit fails because federal courts do not award the relief they seek." State Resp. 19. That is, even if Clarence's civil rights have been violated, there is nothing this Court (or any court) can do about it. The district court agreed, though it relied on only one case, *Cartlidge v. Rainey*, 168 F.2d 841, 845 (5th Cir. 1948), whose vitality it openly questioned. ROA.143 ("*Cartlidge* was decided long ago and involved quite different facts from this case, and it is far from a foregone conclusion that the Fifth Circuit would find it applicable here."). For good reason. The court's finding "that equity

will not lend its aid to the perpetration of criminal acts" rested on the fact that the appellees did not "ha[ve] a permit to transport the seized liquors." *Cartlidge*, 168 F.2d at 845. Clarence and Tru Source, of course, are state-licensed.

Still, Appellees cite *Cartlidge* and others to support their view that vindicating constitutional liberties facilitates crime. *See* State Resp. 18–19. As before, however, Appellees' argument—like the district court's opinion—forgets that it is "the duty of th[e] court[s] to enforce constitutional liberties." *Milk Wagon Drivers Union of Chi., Loc. 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 299 (1941); *United States v. Windsor*, 570 U.S. 744, 762 (2013) ("When an Act of Congress is alleged to conflict with the Constitution, it is emphatically the province and duty of the judicial department to say what the law is." (cleaned up)).

That this case involves a state-legal medical marijuana program does not change that. Federal district courts throughout the country routinely adjudicate—and grant equitable relief on—constitutional challenges to states' regulations of their state-legal marijuana programs. *See, e.g.*, *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 45 F.4th 542, 557 (1st Cir. 2022) ("[W]e do not see how it would be equitable for us to leave a dormant Commerce Clause violation unremedied if such a violation has occurred."); *Variscite NY One, Inc. v. New York*, 640 F. Supp. 3d 232 (N.D.N.Y. 2022) (granting preliminary injunction in a

Dormant Commerce Clause challenge to a state-legal marijuana business licensing scheme); *Toigo v. Dep't of Health & Senior Servs.*, 549 F. Supp. 3d 985 (W.D. Mo. 2021) (same); *Lowe v. City of Detroit*, 544 F. Supp. 3d 804 (E.D. Mich. 2021) (same); *NPG, LLC v. City of Portland*, 2020 WL 4741913 (D. Me. Aug. 14, 2020) (same) (denying motion to dismiss). Even the Supremacy Clause case that Appellees insist resolves this matter, *Montana Cannabis*, was decided on its merits.[9]

Given this background, it is perhaps unsurprising that at least one federal court has already rejected—in a marijuana case, no less—the exact argument Appellees make here. *Finch v. Treto*, 606 F. Supp. 3d 811, 816 (N.D. Ill. 2022). In *Finch*, as here, the defendant "argue[d] that federal courts 'cannot' use their equitable power to facilitate federally illegal conduct." *Id.* at 833; *cf.* State Resp. 19 (arguing that federal courts cannot award "a *federal-court* order that would facilitate conduct that violates *federal* law."). The court in *Finch* rejected the defendant's

[9] Indeed, if Appellees' theory were correct, all cases involving state-legal marijuana would be dismissed rather than decided on their merits. But that, too, is wrong. *See, e.g.*, *Ball v. Madigan*, 245 F. Supp. 3d 1004 (N.D. Ill. 2014) (granting summary judgment for plaintiffs in a First Amendment challenge to a ban on campaign contributions from medical marijuana businesses); *Sinclair v. City of Grandview*, 973 F. Supp. 2d 1234 (E.D. Wash. 2013) (granting summary judgment for defendants in Fourth Amendment challenge because plaintiffs' state-legal possession of marijuana did not negate probable cause); *Conant v. Walter*, 309 F.3d 629 (9th Cir. 2002) (affirming summary judgment and permanent injunction for plaintiffs' First Amendment challenge to policy punishing doctors for advising patients on medical marijuana); *N. Cal. Small Bus. Assistants Inc. v. Comm'r*, 153 T.C. 65 (2019) (considering summary judgment in an Eighth Amendment challenge to IRS's application of a provision disallowing business deductions against state-legal medical marijuana businesses).

argument, explaining that it makes no "equitable sense in a case like this one, where the plaintiff seeks to participate in a state-sanctioned (but federally illegal) market and the defendant has allegedly engaged in a constitutional violation in organizing that market." *Finch,* 606 F. Supp. 3d at 833. As the court explained, both parties were "engaging with the business of distributing a controlled substance, but only one party ha[d] soiled the federal Constitution." *Id.*[10] That is what is happening here.

The cases cited by Appellees do not counsel otherwise. In fact, other than *In re Way to Grow, Inc.*, 597 B.R. 111 (Bankr. D. Colo. 2018) (bankruptcy), the court in *Finch* considered each of the cases Appellees rely on and concluded that it was "not persuaded." *Finch*, 606 F. Supp. 3d at 834 & n.23. That is because, the court explained, while courts have been hesitant "to award equity in or profits derived from federally illegal cannabis businesses," that is different from a scenario where, like here, a case implicates "a generally applicable law in the context of a state-sanctioned cannabis business." *Id.* In that latter scenario, "courts have been more willing to provide relief." *Id.* (collecting cases). It is perhaps not surprising, then,

[10] Although the court ultimately denied the preliminary injunction on other grounds, its rejection of the state's argument was left intact by the Seventh Circuit. See *Finch v. Treto*, 82 F.4th 572, 575 (7th Cir. 2023) ("We see no basis to disturb [the district court's] sensible equitable judgment.").

that virtually all of the cases Appellees cite do not involve constitutional challenges. They cite only one—*Original Investments, LLC v. Oklahoma*, 542 F. Supp. 3d 1230 (W.D. Okla. 2021)—a case which reflects the minority approach and has been rejected by at least one U.S. Court of Appeals. *See Patients Grp.*, 45 F.4th at 557.

The rule of law that Appellees advocate is troubling. If the courts have no authority to rule in a constitutional case simply because the case involves state-legal marijuana—ostensibly because doing so would facilitate federal crimes—what's to stop a state from enacting a law restricting dispensary licensure to only white men? Or confiscating marijuana farms and facilities without notice or just compensation? This Court should reject this assertion of uncheckable legislative power and the concept of a fully hamstrung judiciary.[11]

B. Appellees Acknowledge The District Court's Embrace Of The Legislature's Paternalism, But Argue That It Merely Reflects "Federalism Concerns" That This Court Must Ignore.

In Appellees' view, "[a]sking a federal court to use federal law to mow down state law is always a serious matter." State Resp. 33. But also a serious matter—and

[11] Federal illegality aside, this Court should not quickly brush aside the fact that state-legal medical marijuana is a multibillion-dollar industry nationwide. It is comprised of sophisticated state-legal entities, spans dozens of states, and employs many thousands of Americans—from clerical workers to scientists and lawyers. To announce that such an industry should operate wholly without access to the courts, as Appellees ask this Court to do, would leave countless individuals and businesses vulnerable.

one worthy of a federal courtroom—is a state law telling someone that they are not permitted to speak. Thus, despite Appellees' allegation that Appellants "ignore[d]" "the district court's federalism concerns," *id.* at 36, Appellants in fact devoted seven pages to addressing why those "federalism concerns"—actually, findings embracing Appellees' paternalistic motives—were both incorrect and improper.

First, to reiterate, the district court's findings were incorrect. As its threshold defense to those findings, however, Appellees maintain that "the injunctive relief that plaintiffs seek would 'strongly infringe upon the Mississippi Legislature's policy evaluations' in making a very cautious entry into the legalization of medical marijuana," State Resp. 34 (cleaned up)—supposedly a purely legislative matter the courts should not wade into. But the Supreme Court has squarely rejected the notion that First Amendment questions should be characterized as "policy debates" for the legislature to resolve. So this Court need not defer to so-called "legislative judgments" aiming to steer consumer behavior by prohibiting speech. *44 Liquormart*, 517 U.S. at 508–10 (plurality opinion) (rejecting the notion that "choos[ing] suppression over a less speech-restrictive policy" is a policy question solely left "'up to the legislature'").

So too with Appellees' discussion of (and the district court's findings regarding) the Legislature's "very cautious" approach to regulating medical

marijuana. A state's concerns over how "the public will use truthful, nonmisleading commercial information . . . cannot justify a decision to suppress it." *Id.* at 497 (citing *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 746, 770 (1976)). Similarly incorrect is Appellees' belief—and the district court's explicit finding—that a state may regulate medical marijuana more pervasively because it simply could have completely banned it. It is incorrect to assert that if a state "could have enacted a wholesale prohibition," it necessarily may "take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising." *44 Liquormart*, 517 U.S. at 508–09, 510–11 (plurality opinion) (citing *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 483 n.2 (1995), and distinguishing *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986)). The district court thus "clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy." *Id.* at 509 (citing *Posadas*).[12]

[12] In this way, Appellees' arguments seek to reinvigorate a bygone era of First Amendment law, in which the Court arguably recognized a "vice" exception to the commercial-speech doctrine. *44 Liquormart*, 517 U.S. at 513–514 (plurality opinion). If such an exception ever existed, it still would not apply here: "a 'vice' label that is *unaccompanied* by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity." *Id.* (emphasis added). This of course is consistent with Appellants' arguments about "concomitant" powers in Part I.A.1 above.

Second, the district court's embrace of Appellees' regulatory approach was improper. But Appellees argue that this improper discussion is ultimately irrelevant. According to them, Appellants' argument on this point merely reflects their desire "to draw attention away from the problems in their case by repeatedly tarring Mississippi's elected representatives . . . as 'paternalistic,'" State Resp. 36—a tactic that "show[s] how little plaintiffs care about federalism or the 'intrusions on state sovereignty' that their lawsuit demands." *Id.* (citing ROA.142).

Appellants take exception to this characterization. Indeed, Appellants agree with Appellees that *Central Hudson*'s remaining factors generally involve "a fact-based inquiry" and that "[t]here are no facts in the record." State Resp. 36. Hence why, as Appellants noted in their opening brief, discussion of the remaining *Central Hudson* factors "would, typically, be a question on remand." App. Br. 13. But the district court has now already expressed an erroneous view of the *legal* framework under which those facts will be weighed. So, while "[r]eversal without comment on unresolved fact-based issues is the usual resolution in this scenario," State Resp. 36, the district court's lengthy discussion of its "federalism concerns" makes this not a "usual scenario." Thus, for the reasons Appellants laid out in their opening brief—reasons Appellees mostly do not respond to—remand with a full discussion of *Central Hudson*'s factors is appropriate.

CONCLUSION

Appellees openly declare that they have a free hand to ban all speech promoting the sale of any product that the federal government has even nominally criminalized. And they can wield that power to advance a goal of consumer manipulation about that product, even if the product itself is legal under state law. For those aggrieved by this exertion of power, Appellees argue, the courts provide no redress. In sum, Appellees believe their power to regulate in the state-legal medical marijuana field is unlimited and uncheckable.

The state claims for itself all of the benefits flowing from marijuana's legality and, simultaneously, all of the power attendant to its prohibition. But the state cannot have it both ways. Its view is in tension with Supreme Court precedent and an elementary understanding of the role of the courts as a check on the other branches. Accordingly, the decision of the district court should be remanded with instructions to apply the four-factor *Central Hudson* test in accordance with this Court's decision.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 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
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CERTIFICATE OF COMPLIANCE

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