No. _____

In The
Supreme Court of the United States

CLARENCE COCROFT, ET AL.,
Petitioners,

v.

CHRIS GRAHAM, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE MISSISSIPPI DEPARTMENT OF REVENUE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under this Court's four-part *Central Hudson* framework, truthful speech promoting a commercial transaction is protected under the First Amendment. Since *Central Hudson* was decided, however, both this Court and the circuit courts have expressed irreconcilable views on how to correctly apply *Central Hudson*'s first prong to weigh a transaction's legality. Only this Court can resolve this split—one growing ever more critical with the emergence of the nation's medical marijuana industry, a multi-billion-dollar marketplace that operates in compliance with state laws while in violation of federal.

The Fifth Circuit, below, adopted a rule under which a moribund and unenforced *federal* prohibition empowers regulators, at the *state* level, to censor speech about products that are lawful under state law. If that is correct, then states may adopt virtually any commercial speech bans they desire, so long as there is some law regulating the underlying conduct, even if that law is never enforced. Accordingly, the questions presented are:

1. Is *Central Hudson*'s first prong a constitutional "on/off" switch, which treats a product's legality as a pure threshold question; or is it a flexible and non-dispositive factor among several?

2. Does *Central Hudson*, or any alternative First Amendment framework the Court might adopt, allow a government to prohibit commercial

speech about a transaction if it does not actually seek to prohibit the transaction itself?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are Clarence Cocroft II and his business, Tru Source Medical Cannabis, LLC. Respondents are 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; and Dr. Daniel P. Edney, in his official capacity as the State Health Officer for the State of Mississippi Department of Health.

CORPORATE DISCLOSURE STATEMENT

Petitioner Tru Source Medical Cannabis, LLC is a Mississippi limited-liability company. It has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

STATEMENT OF RELATED CASES

United State District Court (N.D. Miss.):

Cocroft v. *Graham*,
No. 23-cv-431 (Jan. 22, 2024) (granting defendants' motion to dismiss)

United States Circuit Court (5th Cir.):

Cocroft v. *Graham*,
No. 24-60086 (Nov. 22, 2024) (affirming grant of defendants' motion to dismiss)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals below.

OPINIONS BELOW

The opinion of the court of appeals, App. 1a, is reported at *Cocroft* v. *Graham*, 122 F.4th 176 (5th Cir. 2024). The district court's opinion granting the motion to dismiss, App. 19a, is reported at *Cocroft* v. *Graham*, 712 F. Supp. 3d 866 (N.D. Miss. 2024).

JURISDICTION

The judgment of the court of appeals was entered on November 22, 2024. A motion for extension of time to file a petition for rehearing en banc was timely filed on November 27, 2024. On November 29, 2024, the motion was denied. This petition is timely filed on March 21, 2025. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that: "Congress shall make no law . . . abridging the freedom of speech[.]"

The relevant enabling act and challenged regulations are: Miss. Code Ann. §§ 41-137-1 *et seq.*; Miss. Code Ann. § 41-137-41(1)(d)(x); Code Miss. R. 15-22:9.1.1 (advertising ban); Code Miss. R. 15-22:9.1.2.

STATEMENT

This case implicates important doctrinal and practical First Amendment questions. Applying this Court's *Central Hudson* test, the Fifth Circuit resolved those questions in favor of censorship, applying a theory of the commercial-speech doctrine that cannot be squared with decisions of both this Court and at least one other court of appeals. Under the Fourth Circuit's version of *Central Hudson*, for example, each of the test's four factors is non-dispositive and interrelated; so a product's nominal illegality would not end the inquiry. The Fifth Circuit below, however, concluded that marijuana's legal status was all that mattered, and thus did not apply the test's other components. By doing so, the Fifth Circuit's silence on the other factors sanctioned a generally impermissible government aim—restricting commercial speech for the purpose of manipulating consumers' beliefs and behaviors.

The First Amendment tensions implicated in this case are no longer (to the extent they ever were) dormant. Medical marijuana is legal under state law in most of America. And yet many dispensaries in those states operate in First Amendment limbo—unsure whether their commercial speech is constitutionally protected or, given federal law on the matter, could be deemed as promoting a federal crime. In a state like Mississippi, this question has real-life implications: the state has at once legalized the sale

of medical marijuana and prohibited any speech promoting it.[1]

Under this Court's precedents, the power to prohibit commercial speech has been historically understood as an ancillary power—one that stems from the power to prohibit the conduct the speech proposes. So a state generally may not ban advertising about a product whose sale it has chosen *not* to prohibit. But this Court has never addressed the First Amendment implications of a speech ban that prohibits a state-legal business from advertising a transaction that is nominally illegal under federal law. Nor has it addressed the implications of a rule that empowers states to arrogate for themselves the power to prohibit speech pertaining to the literally thousands of (enforced and unenforced) federal laws and regulations. *See* Neil Gorsuch & Janie Nitze, *Over Ruled: The Human Toll of Too Much Law* 17, 21 (2024) (citations omitted). And finally, while this Court has strongly signaled that a regulator cannot prohibit *any* speech if motivated by a desire to prevent truthful information from reaching consumers, a five-vote majority on the point has proven elusive. The time to resolve these questions is now.

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[1] States in at least six federal circuit jurisdictions have similar laws to those challenged here. *See, e.g.* N.H. Code Admin. R. He-C 402.23 (First Circuit); Ky. Rev. Stat. Ann. § 218B.095(2)(f) (Sixth Circuit); Haw. Code R. 11-850-145 (Ninth Circuit); Okla. Admin. Code 442:10-7-3 (Tenth Circuit); Utah Code Ann. § 4-41a-403 (same); Fla. Stat. Ann. § 381.986(8)(h) (Eleventh Circuit). *See also* H.B. 524, 2021 Leg., Reg. Sess. (La. 2021) (Fifth Circuit).

Factual and Legal Background

1. Medical marijuana is legal under Mississippi law for qualifying patients. And Petitioners, Clarence Cocroft and Tru Source Medical Cannabis, are authorized by the state to sell it to them. To do that, Clarence possesses a state-issued license to operate Tru Source—the first black-owned medical-marijuana dispensary in Mississippi. The license is active, has never lapsed, and the business remits the appropriate taxes to the state of Mississippi (which dutifully accepts and processes them). R. 7, 11, 15, 17. In sum, Petitioners are, in every way, a state-legal operation fully authorized by the state of Mississippi to sell medical marijuana (and related supplies). R. 7. And so, for anyone credentialed by the state to purchase such things, Tru Source is where they can go to buy them.

This is the marketplace Congress has allowed to develop. In fact, in every year since 2014, Congress has declared that the Controlled Substances Act should go unenforced as it relates to state-legal medical-marijuana operations. *See* Consolidated Appropriations Act, Pub. L. No. 118-42, § 531, 138 Stat. 25, 174 (2024) (most recent appropriation). And this annual budget rider is "no anomaly, as Congress has included an identical version of it in every annual congressional appropriation to the U.S. Department of Justice since fiscal year 2015," *Ne. Patients Grp.* v. *United Cannabis Patients & Caregivers of Me.*, 45 F.4th 542, 548 (1st Cir. 2022) (citing *United States* v.

Bilodeau, 24 F.4th 705, 709 (1st Cir. 2022)).[2] Practically speaking, therefore, card-holding medical-marijuana patients in Mississippi can buy cannabis products in the state without any fear of federal prosecution whatsoever.

2. Against this backdrop of federal non-enforcement, Mississippi, like dozens of other states, has enacted a state medical-marijuana act designed to authorize and regulate the sale of medical marijuana in the state. *See* Miss. Code Ann. §§ 41-137-1 *et seq*. But although state law allows—in fact, *facilitates*—the sale of medical marijuana, advertising its sale is still almost-completely illegal. As is any advertisement by a state-licensed dispensary. That is because the Mississippi Department of Health, which has "the ultimate authority for oversight of the administration of the

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[2] The Executive, too, has signaled a significantly softer stance on marijuana. Then-President Biden issued multiple proclamations reducing the punishments for small-time marijuana crimes—from commutations to full-out pardons. *See* Proclamation No. 10688, 88 Fed. Reg. 90083 (Dec. 22, 2023), available at https://tinyurl.com/mr349sxh. During his first term, President Trump also issued commutations and pardons for marijuana crimes. *See* Alexis Keenan, *Trump gave last-minute clemency to a dozen people convicted of marijuana offenses*, Yahoo! Finance (Jan. 20, 2021), https://tinyurl.com/2p74n5p3. He also expressed support for a bill that would have recognized states' legalization of marijuana, *see*, *e.g.*, Cristiano Lima, *Trump voices support for bipartisan pot legislation*, Politico (June 8, 2018), https://tinyurl.com/3xn9dkf2, and he signed the 2018 farm bill that de-scheduled some cannabis products under the CSA, *see*, *e.g.*, Stephanie Ebbs, *Trump signs farm bill, directs USDA to expand work requirements on food stamps*, ABC News (Dec. 20, 2018), https://tinyurl.com/2w669py2.

medical cannabis program," *id.* § 41-137-7(1), completely prohibits dispensaries from all forms of advertising. *See* Code Miss. R. 15-22:9.1.1. So although the statute provides a handful of express protections for things like signage, under Mississippi Department of Health regulations, "Medical Cannabis Establishments . . . are prohibited from advertising and marketing in any media," *id.*—with "advertising" broadly defined to include "all representations disseminated in any manner or by any means, other than labeling, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of medical cannabis." *Id.* at -1.2.5.[3]

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[3] Were that prohibition not broad enough, the advertising ban contains additional broad proscriptions. *See id.* at -1.2.80 (prohibiting "marketing," which is defined as "the activity, set of institutions, and processes for creating, communicating, delivering, and exchanging offerings that have value for customers, clients, partners, and society at large"); *id.* at -9.1.1(A) (prohibiting advertising in "[b]roadcast or electronic media," including, but not limited to, "radio, television, internet pop-up advertising, and social media"); *id.* at -9.1.1(B); (prohibiting advertising in "[p]rint media"); *id.* at -9.1.1(C)(3)–(4); (prohibiting advertising "in windows or public view" or "in any manner that can be viewable or otherwise perceived as a public space, including, but not limited to . . . signs"): *id.* at -1.2.87 (prohibiting advertising through any other "media"—defined as "the communication channels through which we disseminate news, movies, education, promotional messages, and other data . . . includ[ing] . . . physical and online newspapers and magazines, television, radio, billboards, telephone, internet, fax, social media and billboards"); *id.* at -9.1.1(C) (prohibiting "other forms" of advertising, including mass texts or messaging; mass email communications; and solicited or paid patient,

The state also separately prohibits dispensaries from making medical or safety claims, advertising to children or youth, or promoting overconsumption or irresponsible use, *see id*. at 15-22:9.1.2. Petitioners have no interest in advertising to children, making medical claims, or promoting overconsumption. They therefore do not challenge those restrictions here.

Petitioners do, however, wish to do things like advertise in traditional media or on a billboard (including a billboard owned by Clarence Cocroft). The general aims of such advertising would be to inform the public about the state's medical marijuana program, instruct people how to find their location, and promote their brand and products in other traditional ways.

Procedural Background

Because Petitioners are legally barred by the state from promoting their state-legal business, they sued to vindicate their First Amendment right to communicate truthful information to potential customers.

Respondents moved to dismiss the claim on the grounds that Petitioners' proposed commercial speech is not protected by the First Amendment. Under the Supreme Court's *Central Hudson* framework, Respondents argued, Petitioners' speech is unprotected because it pertains to conduct—the sale

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caregiver, or practitioner reviews, testimonies, or endorsements).

of medical marijuana—that is illegal under federal law. The district court agreed that the speech promoted an illegal transaction and ended the First Amendment inquiry. App. 26a–27a (quoting and "agree[ing]" with Mississippi's argument). The district court, however, went one step further, indicating how it would weigh the remaining *Central Hudson* factors if it reached them. And on that point, it signaled a strong inclination to accept the state's (improper, as Petitioners argued) aim of restricting truthful speech about medical marijuana so as to limit its demand.

The Fifth Circuit affirmed, accepting the state's argument that marijuana's *federal* illegality could justify a *state* ban on advertising under *Central Hudson*. To get there, the court first applied an understanding of *Central Hudson* that treated prong one as a "threshold matter." App. 7a. And then, in parsing prong one's legality inquiry, the court rejected what it called Petitioners' "same-sovereign" argument—that the power to regulate speech about a given product is triggered by the exercise of the predicate power to regulate the conduct itself. *Id.* at 8a–12a. Instead, relying largely on Supremacy Clause theory, *id.* at 14a–18a, the court reasoned that marijuana's "status" was one of total illegality *everywhere*, and thus Petitioners' challenge could not advance beyond prong-one's "threshold" inquiry. So it ended its analysis at prong one. In other words, under the Fifth Circuit's understanding of *Central Hudson*, because marijuana is illegal under federal law and therefore illegal throughout the United States, "[i]t is

constitutionally irrelevant" what a given state's laws say. App. 11a–12a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's application of the *Central Hudson* test splits with at least one other circuit's version of the test—no doubt largely because *this* Court has described the test in at least two different ways. Additionally, this case implicates several related issues of significant public importance, both doctrinal and practical, that are in need of resolution.

Ultimately, as this case demonstrates, *Central Hudson* has major flaws in need of repair—that is, if it is even to remain a mechanism for ensuring the free flow of information in the marketplace. Below, rather than safeguarding that interest and ensuring that consumers may hear relevant, actionable information, *Central Hudson* was interpreted to permit censorship of truthful commercial speech about a marketplace that is affirmatively authorized at the state level and tacitly permitted at the federal level. Worse, the ruling left in place a speech restriction plainly imposed to keep consumers in the dark.

This Court should clarify the *Central Hudson* test, or revisit it entirely, to resolve inconsistencies in the circuits and to settle a handful of related (and important) practical and doctrinal questions. This case is an ideal vehicle in which to do that: this petition presents a clean issue of constitutional law, decided purely on the pleadings, and the parties have

long agreed on the nature of the dispositive issue before the court. The moment is also right; medical marijuana is a multi-billion-dollar industry desperate for legal clarity. And this case—in which the circuit court adopted a rule that upends well-settled First Amendment principles—presents a sound opportunity in which to provide it.

Part I of this petition describes the ways in which the federal courts, including this Court, are split on the proper articulation of *Central Hudson*. Part II provides extensive discussion on why the questions presented in this case are doctrinally and practically important and suggests ways in which this Court should clarify or, alternatively, replace its *Central Hudson* framework. And Part III explains why this case is a good vehicle in which to do it.

I. The federal courts, including this one, differ over whether *Central Hudson*'s first prong operates as a constitutional "on/off" switch.

This case squarely implicates this Court's *Central Hudson* test for commercial speech. *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557 (1980). As this petition illustrates, however, conflicting descriptions of the test abound. This is true in both the federal courts below (Part A) and in this Court as well (Part B).

A. The federal courts are split on how to properly articulate the *Central Hudson* factors.

This Court's *Central Hudson* test has historically consisted of four parts: (1) The speech must concern lawful activity and not be misleading; (2) the asserted governmental interest must be substantial; (3) the regulation must directly advance the governmental interest asserted; and (4) the regulation must not be more extensive than necessary to serve that interest. *Id*. at 566.

The Fifth Circuit's interpretation of *Central Hudson* below—in which it treated the test's first prong as a First Amendment "on/off switch"—was outcome determinative. But had this case been decided in another circuit, in which prong one is *not* a rigid threshold inquiry, it likely would have come out differently.

This is primarily true with the Fourth Circuit. That court, unlike the Fifth Circuit below, applies a version of *Central Hudson* that treats each of the test's four factors as non-dispositive, and thus, interrelated. *See, e.g.*, *W. Va. Ass'n of Club Owners & Fraternal Servs., Inc.* v. *Musgrave*, 553 F.3d 292, 301–02 (4th. Cir. 2009) (describing *Central Hudson* as a four-part test in which "[t]he four parts . . . [e]ach raise[] a relevant question that *may not be dispositive* to the First Amendment inquiry" (emphasis added) (quoting *Greater New Orleans Broad. Ass'n, Inc.* v. *United States*, 527 U.S. 173, 183–84 (1999))). And given its understanding of *Central Hudson*—as a test

involving four separate but "interrelated" factors—the Fourth Circuit, again unlike the Fifth Circuit below, applies all four factors *even if* it concludes that the speech at issue fails prong one. *Recht* v. *Morrisey*, 32 F.4th 398, 409–10 (4th Cir. 2022); *see also Consol. Cigar Corp.* v. *Reilly*, 218 F.3d 30 (1st Cir. 2000) (signaling that the First Circuit also applies the "interrelated factors" version of the test), *rev'd on other grounds*, *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525 (2001).

The Fourth Circuit's ruling in *Recht* involved attorney-advertising laws that: (1) forbade attorneys from giving the false impression that their ads conveyed medical or government advice; and (2) required attorneys to disclose in their ads that listeners should not discontinue prescribed medication without consulting a doctor, and that doing so could cause injury or death. *Recht*, 32 F.4th at 405–06. The Fourth Circuit began its analysis by articulating the "interrelated factors" version of *Central Hudson*: The test's factors, it began, "are 'not entirely discrete'; they are all 'important and, to a certain extent, interrelated,' as 'the answer to one part may inform a judgment concerning the other three.'" *Id.* at 408 (citation omitted). "For more than four decades," the Fourth Circuit went on, "this has been the governing test for regulations of commercial speech." *Id.* Then, applying this version of the test, the Court first concluded, under prong one, that the attorney-advertising at issue was "either inherently or actually misleading" or "deceptive," even though some of the speech at issue might be "objectively truthful." *Recht*, 32 F.4th at 410–12. But if prong one

were a simple threshold inquiry, the court would have stopped there. The First Amendment switch does not flick on, the thinking would have gone, because no free-speech rights were implicated.

But the Fourth Circuit didn't stop there. Instead, it did what the Fifth Circuit below would not do and advanced to the other factors. *Id*. at 412–16. Applying those factors, the court then upheld the advertising restriction. In doing so, the Fourth Circuit distinguished the statute at issue—which, it concluded, was "prevent[ing] misleading speech," *id*. at 413—from what the state was doing in *Sorrell* v. *IMS Health Inc*., 564 U.S. 552 (2011)—regulating "completely truthful" speech that simply "was *too* persuasive." *Recht*, 32 F.4th at 413. This alone strongly suggests that this case, if decided under the Fourth Circuit's rationale in *Recht*, would have come out differently. That is because the state's interest below is unrelated to the first prong of *Central Hudson*: it does not seek to enforce the federal prohibition on marijuana, which its laws and regulations directly undermine. Instead, the state's interest is precisely the rationale that the court in *Recht* suggested would be illegitimate—a prohibition on truthful speech that might prove "too persuasive" for its listeners' own good.

In sum, if this case had been filed in the Fourth Circuit, or perhaps in the First Circuit, *see Reilly*, 218 F.3d 30, those courts would have wrangled with prong one, and then, whatever their conclusion, continued on to address the other factors. The Fifth Circuit, on the other hand, characterized prong one's legality question as a "threshold inquiry," and then, having

concluded that marijuana is illegal under federal law, it stopped. The obvious upshot of this conflict is that Petitioners' underlying legal challenge, had it arisen in Maryland or Massachusetts, and not Mississippi, certainly would have been analyzed differently (and more favorably). And, almost as certainly, it would have produced a different (and more favorable) result.[4]

B. This Court has been inconsistent in its articulation of the *Central Hudson* test.

The doctrinal disorder in the circuit courts is, no doubt, the result of a conflict within *this* Court. Indeed, this Court has articulated the *Central Hudson* test in at least two different, irreconcilable ways.[5] In 1999, ironically while discussing the challenge of correctly applying the *Central Hudson* test, this Court (like the Fourth Circuit and, perhaps, the First) described it as a four-part test in which "[t]he four parts . . . are not entirely discrete. All are important and, to a certain extent, interrelated: Each

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[4] As Petitioners briefed below, they should prevail if the remainder of the *Central Hudson* test is applied. Appellants' Br., *Cocroft* v. *Graham*, 2024 WL 1678840, at *33–39 (5th Cir. Apr. 9, 2024); Appellants' Reply Br., *Cocroft* v. *Graham*, 2024 WL 3363265, at *23–26 (5th Cir. July 1, 2024).

[5] This is consistent with the general arc of *Central Hudson*'s application. "The courts, including this Court, have found the *Central Hudson* 'test' to be, as a general matter, very difficult to apply with any uniformity." *44 Liquormart* v. *Rhode Island*, 517 U.S. 484, 526–27 (1996) (Thomas, J., concurring) (citations omitted).

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 (emphasis added). In other words, the version of the *Central Hudson* test articulated in *Greater New Orleans* would have a court consider four factors—each in light of the other three. (Just like the Fourth Circuit still does.)

But then just three years later, this Court seemingly changed course in *Thompson* v. *Western States Medical Center*, 535 U.S. 357 (2002). In *Thompson*, the Court signaled (but did not say) that it had moved away from the "interrelated" four-factor framework described in *Greater New Orleans* in favor of a two-step test: "Under [*Central Hudson*] we ask *as a threshold matter* whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment. If the speech concerns lawful activity and is not misleading, however," the "threshold" hurdle is cleared and the court must consider the remaining *Central Hudson* factors. *Id*. at 367 (emphasis added).

In sum, this Court, in *Greater New Orleans*, held that a lone *Central Hudson* factor "may not be dispositive to the First Amendment inquiry." And yet in *Thompson*, right on its heels, this Court said the exact opposite—that the very first factor may resolve the First Amendment question conclusively. *Thompson*, of course, is irreconcilable with *Greater*

New Orleans in this regard.[6] That is because *Thompson* effectively characterized prong one as a First Amendment on/off switch, while *Greater New Orleans* expressly said there can exist no such thing. Only this Court can resolve this contradiction.[7]

II. Circuit splits aside, the questions presented are important.

The ability to advertise a business is a critical freedom for millions of American entrepreneurs. As is the freedom for their customers to hear useful information and act on it. But this freedom—the free flow of information—is imperiled if government has a free hand to censor any commercial speech it desires. The questions presented in this case are important, therefore, because circuit splits aside, the contours of these freedoms are governed by the answers to

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[6] *Thompson* also departed from prior Supreme Court precedent in another way. Whereas *Central Hudson* had described prong one as asking whether the proposed conduct was *legal*, *Thompson* suggested the inquiry asks whether the proposed conduct is *illegal*. *Compare Cent. Hudson*, 447 U.S. at 566 ("For commercial speech to come within that provision, it at least must concern *lawful* activity and not be misleading." (emphasis added)), *with Thompson*, 535 U.S. at 367 ("Under [the *Central Hudson*] test we ask as a threshold matter whether the commercial speech concerns *unlawful* activity or is misleading." (emphasis added)). In a scenario such as this one, that formulation matters. The sale of medical marijuana is, after all, legal under Mississippi law, while still being illegal under federal.

[7] *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) ("[O]nly this Court may overrule one of its precedents.").

complicated (and important) doctrinal questions (Part A). The questions presented are also important because there are significant practical consequences to a rationale that effectively provides a blueprint for the censorship of disfavored speech. (Part B). And all of this arises in an important context (commercial speech) with a rich history and tradition in America (Part C).

A. The questions presented are important doctrinally.

This case implicates significant doctrinal questions in three ways: First, this case implicates important questions about how to appropriately frame the "legality" component of *Central Hudson*'s first prong. Second this case asks whether *Central Hudson* should be reconsidered altogether. And third, *Central Hudson* questions notwithstanding, this case implicates open questions about the role of the courts in adjudicating controversies in the state-legal marijuana economy.

1. This case presents important questions about how to define and interpret prong one of *Central Hudson*. As interpreted below, that prong means that a federal prohibition on activity empowers a state to suppress all commercial speech about that activity—even where, as here, the state disclaims any interest in enforcing that federal prohibition (and, indeed, actively encourages its residents to violate it). That reading both conflicts with this Court's longstanding explanation of the source of government's power to restrict commercial speech and ignores the interests

of willing listeners—thousands of Mississippi residents interested in receiving truthful information about commercial transactions that Mississippi says are perfectly legal to do, but not to talk about.

First, assuming *Central Hudson* is applicable in a case like this one (*see* pp. 24–28 below), whether state-legal medical marijuana enterprises enjoy free-speech protections is a question that will turn largely on how to define "legality" under prong one. The Fifth Circuit held that the way to do that is to look to the Supremacy Clause, with federal law superseding state law if the two do not align. App. 15a–19a. By contrast, this Court has historically focused on the legality of the jurisdiction imposing the speech ban. And under that rubric, it has consistently held that states lack the power to enact bans on pure speech—restrictions regulating commercial speech that are not *incidental to* a prohibition on related commercial conduct in that same state.

For example, as far back as *Bigelow* v. *Virginia* (a pre-*Central Hudson* case), this Court struck down a ban on abortion-related advertisements in Virginia, as applied to a plaintiff advertising abortion services in New York, where abortion was legal. 421 U.S. 809 (1975). In finding that Virginia could prohibit ads offering abortion only in Virginia, but not in New York, this Court's admonition in *Bigelow* was clear: A state "may not, under the guise of exercising *internal* police powers," encumber speech "about an activity that is legal" *externally*, i.e., in another state. *Bigelow*, 421 U.S. at 824–25 (emphasis added). *See also Nat'l Ass'n of Tobacco Outlets, Inc.* v. *City of Worcester*, 851 F. Supp. 2d 311, 315 (D. Mass. 2012) (interpreting

Supreme Court precedent "to mean that an activity is 'lawful' under the *Central Hudson* test so long as it is lawful where it will occur").

This approach (which the Fifth Circuit described as a "same-sovereign" theory and rejected, *see* App. 8a–12a) is consistent with how this Court has always discussed the power to regulate commercial speech—as flowing directly from the (exercised) power to regulate conduct. In this Court's words, "the State's power to regulate commercial *transactions* [is what] justifies its concomitant power to regulate commercial *speech* that is 'linked inextricably' to those transactions." *44 Liquormart* v. *Rhode Island*, 517 U.S. 484, 499 (1996) (plurality opinion) (emphasis added) (quoting *Friedman* v. *Rogers*, 440 U.S. 1, 10 n.9 (1979)); *see also Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 389 (1973) (presupposing that a valid "restriction on advertising" would have to be "*incidental to* a valid limitation on economic activity" (emphasis added)). Thus, the rule has always been that "[a] state or municipality may . . . ban a particular type of commercial transaction . . . [and] *[o]nce it has done so*, speech proposing or facilitating the unlawful transaction may be banned without offending the First Amendment." *Katt* v. *Dykhouse*, 983 F.2d 690, 695 (6th Cir. 1992) (emphasis added). So if the first prong of *Central Hudson* asks, "Is the conduct legal?" *state* law should supply the answer.

The Fifth Circuit opted not to look, as the federal courts' precedents suggested, at Mississippi's (permissive) laws regarding medical marijuana. App. 9a–12a (rejecting Petitioners' "same-sovereign"

theory). Instead, it opted to resolve prong one by asking, more simply, whether marijuana is legal in America. As the Fifth Circuit acknowledged, this approach adopted the rationale of the Montana Supreme Court in *Montana Cannabis Industry Ass'n* v. *State*, 368 P.3d 1131 (Mont. 2016), App. 17a, a case in which the court addressed this same issue by weighing not First Amendment principles, but rather this Court's ruling in *Gonzales* v. *Raich*, 545 U.S. 1 (2005). App. 17a–19a. And then, (mis)describing this Court's Commerce Clause ruling in *Raich* as a Supremacy Clause holding, the court in *Montana Cannabis*, like the Fifth Circuit, concluded that speech about medical marijuana was unprotected because marijuana is illegal under federal law, full stop.

This case thus asks whether cases like *Bigelow* and *44 Liquormart* provide an appropriate framework for analyzing the First Amendment issues in this case. Or, rather, is it necessary to look to constitutional theories having nothing to do with free speech to decide them? Only two courts—the Montana Supreme Court and the Fifth Circuit—seem to think the latter, while one other does not. *See, e.g.*, *Seattle Events* v. *State*, 512 P.3d 926, 935 (Wash. Ct. App. 2022) (applying First Amendment logic, and not the Supremacy or Commerce Clauses, and concluding that that "existing case law supports extending constitutional protections to advertising for activities *that are legal in the state where the transaction would occur*." (emphasis added)). The implications of this doctrinal question are clear. In turning away from the First Amendment—and the foundational First

Amendment concepts described above—the Fifth Circuit approved a dramatic expansion of state power: no longer is a state constrained by its own laws, if it is determined to regulate speech. It need only identify some other law, even one that is inconsistent with its own, as a basis for its desired censorship.

Second, the panel's rigid interpretation of prong one below undermines the very purpose of the commercial-speech doctrine—to promote "the free flow of commercial information" between buyers and sellers. *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976); *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 364–65 (1977) (explaining that the "free flow of commercial information" is a critical process that "serves individual and societal interests in assuring informed and reliable decisionmaking").

To promote this critical free flow of information, this Court has historically "focused principally on the First Amendment interests of the listener." *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 431–32 (1993) (Blackmun, J., concurring) (citing *Va. Bd. of Pharmacy* and *Pittsburgh Press*); *see also id.* at 433–34 ("[T]he listener's First Amendment interests" are the interest "from which the protection of commercial speech largely derives[.]"). By clarifying that the consumers' interests are the focus of the analysis, this Court can articulate an appropriately flexible version of *Central Hudson* which acknowledges that although a listener may well have a diminished interest "in learning about commercial opportunities that the criminal law forbids," *Discovery Network*, 507 U.S. at 433 (Blackmun, J.,

concurring) (citing *Bates*, 433 U.S. at 364), it does not follow that federal illegality alone renders speech utterly worthless.

If the listeners' interests are what matter most, then, a rigid version of the test, which emphasizes marijuana's (purely technical) federal illegality, is counterproductive. It allows a state to ban speech about a product it deems safe enough for an eligible listener to consume. It limits knowledge about a marketplace the state deems safe enough for an eligible listener to participate in. And it reflects a seemingly intentional denial of an eligible listener's economic and prosecutorial realities—a construction of *Central Hudson* that has no basis in First Amendment theory or precedent.[8] *See Expressions Hair Design* v. *Schneiderman*, 581 U.S. 37, 42–43 (2017) (quoting district court opinion explaining that the First Amendment is concerned not with technicalities, but with "economic realities").[9] Of

[8] Typically, the justification for a restriction on commercial speech must focus on "the harm caused by the unlawful activity that is solicited." *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 579 (2001) (Thomas, J., concurring). As the federal government has largely acknowledged, however, there is virtually no concern of harm associated with state-legal medical marijuana. The government's concerns, rather, are trafficking and illicit sales—acts for which it still prosecutes. *See* Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys (Aug. 29, 2013) 1–2, https://tinyurl.com/3pe59cyf (listing enforcement priorities); Memorandum from Jefferson B. Sessions, III, Att'y Gen., to U.S. Att'ys (Jan. 4, 2018), https://tinyurl.com/42z7t5x6.

[9] The "economic reality" (and legal reality) is that marijuana regulation in this country reflects a "half-in, half-out regime"

course, none of this is to say that federal non-enforcement *establishes* legality for prong one purposes. But it should at least *matter* as part of the legality inquiry. Again, the goal of the commercial-speech doctrine is to elevate the interests of eligible consumers in the free flow of information above impractical formalism. A flexible first prong is how to accomplish that. *See* Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 Md. L. Rev. 55, 87–88, 142 (1999) (noting that a feature of the commercial speech analysis has been "the Court's avoidance of mechanical tests and rigid categorization" in favor of "coherence and flexibility . . . for dealing with an intrinsically untidy area").[10]

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that simply does not "prohibit entirely the possession or use of marijuana" and in fact "tolerates" it. *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2236–37 (2021) (Thomas, J., statement respecting denial of certiorari) (cleaned up).

[10] There is at least one other reason to presume *Central Hudson*'s first prong does not contemplate a rigid and cramped view of legality: the rest of prong one itself. Though not implicated in this case, the *other* aspect of *Central Hudson*'s first prong asks whether speech is truthful or misleading. And on that question, resolving whether speech is truthful or misleading (inherently or potentially) is not always an easy call. *See In re R.M.J.*, 455 U.S. 191 (1982); *Peel* v. *Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990) (plurality opinion); *Alexander* v. *Cahill*, 598 F.3d 79 (2d Cir. 2010). Courts have recognized substantial nuance built into this inquiry, and have concluded that truthfulness in advertising is often a question of degree. *See, e.g.*, *Central Hudson*, 447 U.S. at 562 ("Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes

2. This case also presents a deeper and more fundamental doctrinal question: Is it time to reconsider *Central Hudson* altogether? First, because it is deeply unpopular and generally unnecessary in light of this Court's general First Amendment jurisprudence. And second, because it is especially unnecessary in a case like this one—where the state's motive is to keep potential consumers in the dark.

First, this case presents an ideal opportunity to reconsider whether this Court's idiosyncratic "commercial speech" doctrine—as defined by *Central Hudson* and its progeny—necessarily promotes the public's interest in the free flow of information. This is an idea that has long enjoyed support. For decades, Justices on this Court have expressed serious skepticism (and sometimes downright disdain) for the commercial-speech doctrine. *See, e.g.*, *Cent. Hudson*, 447 U.S. at 579–80 (Stevens & Brennan, JJ., concurring in the judgment) (expressing concerns over the definition of "commercial speech"); *City of Cincinnati*, 507 U.S. at 437–38 (Blackmun, J., concurring) (deriding the "absurdity of treating all commercial speech as less valuable than all noncommercial speech" and advocating for "abandon[ing] *Central Hudson*'s analysis entirely"); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 493 (1995) (Stevens, J., concurring in the judgment) (decrying

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that some accurate information is better than no information at all.") (citing *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 374 (1977)). A similar approach regarding legality is just as sensible.

"[t]he Court's continued reliance on the misguided approach adopted in *Central Hudson*" and calling for strict scrutiny); *44 Liquormart*, 517 U.S. at 528 (Thomas, J., concurring in part) (writing that the *Central Hudson* test "makes no sense"); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 571–72 (2001) (Kennedy & Scalia, JJ., concurring in part) (expressing "continuing concerns that the [*Central Hudson*] test gives insufficient protection to truthful, nonmisleading commercial speech"); *id.* at 575–77 (Thomas, J., concurring in part) (calling for strict scrutiny in place of *Central Hudson*). In fact, "at various times as many as four different Justices have expressed doubts about adhering to *Central Hudson*" in the same case. Rodney A. Smolla, *Free the Fortune 500! The Debate over Corporate Speech and the First Amendment*, 54 Case W. Rsrv. L. Rev. 1277, 1297 n.65 (2004) (citing *44 Liquormart* and *Greater New Orleans* as two such cases).[11]

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[11] In its place, other judges, scholars, and litigants "have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." *Greater New Orleans*, 527 U.S. at 184 & n.3 (citations omitted); *See also* Nat Stern & Mark Joseph Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech Regulation*, 47 U. Rich. L. Rev. 1171, 1171–72 (2013) (advocating an "adaptive standard of strict scrutiny for content-based commercial speech regulation . . . [that] would offer a more coherent approach than *Central Hudson*'s oft-criticized multi-pronged test").

Moving away from *Central Hudson* would not necessarily be a radical shift. For instance, substituting *Central Hudson* with this Court's already existing speech protections could provide a sensible and workable approach. Indeed, this Court has already held that, commercial or not, content-based restrictions on speech are entitled to at least "heightened" scrutiny. *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552 (2011) (commercial speech); *see also Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015) (holding that content-based speech restrictions are always subject to strict scrutiny). And again, under longstanding First Amendment doctrine, advertising bans are generally permissible as part of underlying prohibitions on related commercial conduct. *See, e.g.*, *Bigelow*, 421 U.S. at 821 (explaining that the government may ban speech "when the commercial activity itself is illegal and the restriction on advertising is *incidental to* a valid limitation on economic activity." (emphasis added)).[12] It is the act of exercising that power to prohibit illegal conduct, in fact, that triggers the power to prohibit speech about it. So a state currently could—and even without *Central Hudson* would still be able to—ban speech where the restriction is *incidental to* a related ban on commercial conduct. But on the other hand, a speech ban imposed *absent* such a ban on related commercial conduct, like Mississippi's, is not *incidental to* anything. It is a ban on pure speech. *Cf. Tinker* v. *Des*

[12] Part and parcel with marijuana's prohibition under the Controlled Substances Act, for example, the federal government can (and does) prohibit marijuana advertising. 21 U.S.C. § 843(c).

Mones Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969). This Court does not need a First Amendment offshoot to deal with such things.

Second, even if *Central Hudson* continues to apply more generally, this case is still an opportunity to hold, once and for all, that *Central Hudson* is nonetheless ill-suited for scenarios like this one—where the state's interest appears focused on maintaining consumer ignorance. *See, e.g.*, *Va. Bd. of Pharmacy*, 425 U.S. at 769–70 (rejecting a purported consumer protection measure because it was a "highly paternalistic approach" in that it "rest[ed] in large measure on the advantages of their being kept in ignorance"); *Bates*, 433 U.S. at 374–75 ("[I]t seems peculiar to deny the customer . . . at least some of the relevant information needed to reach an informed decision . . . . [T]he argument assumes that . . . the public is better kept in ignorance than trusted with correct but incomplete information."); *44 Liquormart*, 517 U.S. 484 (rejecting "paternalis[m]" generally); *Rubin*, 514 U.S. at 498 (Stevens, J., concurring) (criticizing speech restriction as "nothing more than an attempt to blindfold the public"). As Justice Thomas has advocated in three concurring opinions, *Central Hudson*'s balancing test may well be inappropriate in cases like this one—in which the government's interest is to "keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace"—because the state's motives are arguably "per se illegitimate." *44 Liquormart*, 517 U.S. at 518; *Greater New Orleans*,

527 U.S. at 197; *Lorillard Tobacco*, 533 U.S. at 575.[13] Still, five votes on this issue have proven elusive. This is a chance to establish it as a majority holding of this Court.

3. Marijuana's federal illegality also implicates broader questions. For example, does the mere implication of the state-legal marijuana economy constitute a general barrier to vindicating *other* basic legal protections and constitutional rights?

At least one circuit court has acknowledged, in a First Amendment case no less, that medical marijuana's federal illegality is not an escape hatch for regulators. *See Conant* v. *Walters*, 309 F.3d 629 (9th Cir. 2002). In *Conant*, the Ninth Circuit addressed a law prohibiting doctors from recommending medical marijuana to patients they believed might benefit from its use. *Id.* at 634. Just as Respondents argued below, the government argued in *Conant* that there was no First Amendment protection for the speech because its very utterance, it said, proposed a federal crime. *Id*. The Ninth Circuit rejected that justification. As the court explained,

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[13] This is especially true with respect to so-called "vice" industries, with this Court having formally rejected the notion that the government may take a greater interest in protecting people from themselves by restricting the speech they hear. *44 Liquormart*, 517 U.S. at 508–14 (plurality opinion) (retreating from *United States* v. *Edge Broad. Co.*, 509 U.S. 418 (1993), and *Posadas de P.R. Assocs.* v. *Tourism Co. of P.R.*, 478 U.S. 328 (1986)).

merely telling a patient to consider medical marijuana is not itself a crime; but prohibiting a doctor from doing so is rank censorship. *Id.* at 636 ("[A] doctor's recommendation does not itself constitute illegal conduct . . . .The government policy does, however, strike at core First Amendment interests.").[14]

The First and Seventh Circuits have said the same—that medical marijuana's federal illegality does not override otherwise applicable constitutional protections—albeit outside the First Amendment context. *See Ne. Patients Grp.* v. *United Cannabis Patients & Caregivers of Me.*, 45 F.4th 542 (1st Cir. 2022) (holding that marijuana's federal illegality did not excuse a state's dormant commerce clause violation); *Finch* v. *Treto*, 82 F.4th 572, 575 (7th Cir. 2023) (same, describing as "sensible" *Finch* v. *Treto*,

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[14] In light of *Conant*, the Fifth Circuit's rationale below produces an odd juxtaposition: If a state-licensed physician tells a patient, "You should consider medical marijuana; go to a dispensary"—that speech is protected (Ninth Circuit); but if a state-licensed dispensary owner tells the same person, "You should consider medical marijuana; go to a doctor"—that speech is not (Fifth Circuit). Of course, the first scenario involves a professional merely recommending that one consider committing an unenforced federal crime, whereas the second scenario involves an authorized purveyor (at least theoretically) proposing it. And yet in the first scenario, the ban triggers "the strongest protection our Constitution has to offer," thus rendering the ban "presumptively invalid." *Conant*, 309 F.3d at 637–38. And in the other, there is no protection at all.

606 F. Supp. 3d 811, 833 (N.D. Ill. 2022), which concluded that while both parties were "engaging with the business of distributing a controlled substance, . . . only one party ha[d] soiled the federal Constitution").

But other federal courts have come out differently. Whereas the First Circuit and Seventh Circuit entered merits decisions holding that the Dormant Commerce Clause applied to licensing regimes for state-legal marijuana businesses, other federal courts have held they could do no such thing. *Original Invs., LLC* v. *Oklahoma*, 542 F. Supp. 3d 1230, 1233–35 (W.D. Okla. 2021) (relying on *Fourth Corner Credit Union* v. *Fed. Rsrv. Bank of Kan. City*, 861 F.3d 1052 (10th Cir. 2017)). In *Original Investments*, the district court, unlike the courts in *Northeast Patients Group* and *Finch*, concluded that it could not grant the desired equitable relief because doing so "would facilitate criminal activity"—the sale of marijuana. *Id*. at 1235. For the same reason, federal bankruptcy protection is often unavailable to participants in the state-legal marijuana marketplace. *See, e.g.*, *In re Way To Grow, Inc*. 597 B.R. 111 (Bankr. D. Colo. 2018). Accordingly, many of the federal courts—though seemingly not those in the First or Seventh—are unreceptive to participants in the marijuana marketplace, especially those seeking equitable relief. This Court can, and should, resolve this open question.

B. The questions presented are important practically.

Doctrinal considerations aside, the practical implications of this case are significant. First, if the Fifth Circuit's rationale is correct, then the state is no longer constrained, as it historically has been, from impairing commercial speech only insofar as the speech promotes commercial *conduct* regulated by that state. And second, this is an outcome with impacts on the entire marketplace, though especially those in the state-legal cannabis industry—a multi-billion-dollar economy that employs hundreds of thousands of Americans.

First, up until now, it was well understood that if a state wanted to regulate commercial speech, it needed to first regulate the underlying commercial conduct. Under the Fifth Circuit's rule, however, a state may forgo any regulation of the underlying conduct—in fact, it can *facilitate it*—and still ban related speech on the grounds that a separate sovereign has made that conduct nominally illegal. As a result, states now have a playbook for restricting truthful information: pass a law criminalizing a transaction; ban any speech promoting it; and then openly declare an intention to enforce only the speech component of the law. Or, even easier, identify another sovereign's conduct ban, and enact your own ban on speech.

The decision also opens the door for other mischief. A crafty regulator, for example, may identify any one of a slew of unenforced or moribund *federal* laws and

pass a law or regulation declaring any speech promoting such conduct impermissible. *See* Mike Chase, *How to Become a Federal Criminal: An Illustrated Handbook for the Aspiring Offender* 4 (2019) ("[L]awmakers have left outdated and obsolete laws on the books for decades."). This says nothing of the myriad federal laws that presumably *are* enforced—about 5,000 different criminal prohibitions and another roughly 188,000 pages of rules in the Code of Federal Regulations. Neil Gorsuch & Janie Nitze, *Over Ruled: The Human Toll of Too Much Law* 17, 21 (2024) (citations omitted); *see also* Harvey A. Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* (2009). Under the Fifth Circuit's logic, any state or state agency can prohibit commercial speech pertaining to any of these thousands of federal laws—enforced or unenforced, operational or obsolete. But again, such a rule will only work to limit the amount of information consumers receive—an outcome at odds with the commercial-speech doctrine's focus on the flow of information regarding transactions in which a consumer might participate.

These examples all presume of course that an underlying law is clear. But the federal statutes, the CFR, and various other rules, regulations, and guidance documents are rife with instances of ambiguity. For example, can the government ban commercial speech by a regulated business solely on the basis that an applicable agency guidance document (but no rule or regulation) suggests that the advertised business practice is not allowed? Can an accountant or tax preparer advertise that she will

save clients money by harnessing a legally controversial (but good-faith) interpretation of the Internal Revenue Code? May an at-home gig worker advertise their skills on Thumbtack if their zoning prohibits home-based businesses? Examples abound. But without clarity from this Court, each of these hypothetical entrepreneurs could be silenced.

Second, state-legal medical marijuana is a rapidly expanding marketplace in an industry starving for any clarity it can get from the courts. And there are a lot of Americans with a stake in the outcome. There are over 3 million registered medical marijuana patients in the United States. *See* Marijuana Policy Project, *Medical Cannabis Patient Numbers*, https://tinyurl.com/3cez684n. The industry employs roughly 440,000 people in this country. *See* Bruce Barcott & Beau Whitney, *Vangst Jobs Report 2024 Positive Grown Returns* 2 (2024), https://tinyurl.com/4ptssnx4. And it generates over $40 billion in annual revenue. *See* Grant T. Baldwin et al., *Current Cannabis Use in the United States: Implications for Public Health Research*, 114 Am. J. Pub. Health S624, S624 (2024). To continue to treat this industry—and more generally, this issue—as "the stepchild of first amendment jurisprudence," serves no one. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 652 (1990).

Given the vast implications of a decision on this issue, it makes little sense to wait for other circuits to weigh in or to deepen the split. Either *Central Hudson*'s first prong is an on/off switch, or it is not. Even as it stands, moreover, this Court's *own* jurisprudence reflects decades of doctrinal

disharmony on many of the issues raised in this petition. *See* Stern, *supra*, at 84–85 (noting that "it is common for the Court's approach [on commercial speech] to be dismissed as 'vague,' 'cumbersome,' 'unintelligible,' and 'random and haphazard'" (collecting articles)). Hence, "[e]ver since [*Central Hudson* was decided], judges and Justices have filled quite a bit of space in the case reporters trying to figure out precisely what forms of regulation the four-part test permits." Kozinski & Banner, *supra*, at 631. The time to resolve (or reconsider) these long-simmering questions and critiques is now.

C. The questions presented are important in light of this country's history and tradition.

Finally, these questions—and Petitioners' view of them—implicate important aspects of the history and tradition of free speech in America. Commercial speech has strong historical footing in this country. "Advertising, while not the high-tech operation it is today, was a common feature of the newspapers of the late eighteenth century. The Framers and their contemporaries would have encountered commercial speech in a number of other contexts as well: They would have seen signs outside shops announcing the prices of goods and services; they would have heard the cries of itinerant salesmen hawking products in the street; and they would have experienced the clamor of public marketplaces." Kozinski & Banner, *supra*, at 632. And as this Court has recognized, "the value of commercial speech" has been acknowledged for centuries. *City of Cincinnati*, 507 U.S. at 421 n.17

(historical citations omitted); *see also 44 Liquormart*, 517 U.S. at 495–96 (plurality opinion) (same).

Despite this robust historical backdrop, "[i]t was not until the 1970's, however, that this Court held that the First Amendment protected the dissemination of truthful and nonmisleading commercial messages." *44 Liquormart*, 517 U.S. at 496 (plurality opinion) (citing Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 Tex. L. Rev. 747 (1993) (explaining the evolution of commercial speech in the decades preceding its formal acceptance)). The Court's recognition of greater protection for commercial speech was consistent with what some commentators had advocated for years—an end to the distinction between (then-unprotected) commercial speech and various other types of (long-protected) speech. *See, e.g.*, Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash. L. Rev. 429, 473 (1971) (advocating for the Court to "disregard mechanical formulas" and formally apply free-speech protections to speech deemed commercial in nature).

In the modern era, though, commercial speech, quite controversially, still enjoys only second-class status. *See generally* Stern, *supra*; *see also* Christopher C. Faille, *Spinning the Roulette Wheel: Commercial Speech and Philosophical Cogency*, 41 Fed. B. News & J. 58 (1994) (arguing against treating commercial speech differently from other classes of speech). This case presents an ideal opportunity in which to change that.

III. This case is a good vehicle.

This case is a good vehicle for three reasons. *First*, this matter presents a clean issue of constitutional law. There are no ongoing state proceedings, there has been no discovery, and the parties agree that the case implicates a ripe and straightforward legal question. In fact, the only substantive motion practice in the case has been the Respondents' dispositive motion to dismiss—which the district court decided purely on the merits.

Second, this is a narrowly framed First Amendment question. Petitioners challenge the state's restrictions only to the extent that they prohibit a licensed dispensary from advertising responsible medical-marijuana consumption by eligible patients. Petitioners do *not* challenge, however, a separately codified set of regulations that generally prohibit dispensaries from making health claims, advertising to children, or promoting overconsumption. Those prohibitions, in other words, would remain intact if Petitioners prevailed in this case. Such an outcome, therefore, would not "fill the airwaves" for marijuana advertising in Mississippi so as to "lead children and others to conclude it is more or less harmless." App. 43a. Rather, it would simply leave Mississippi's advertising restrictions to largely mirror those of alcohol and tobacco.

Third, Congressional intervention, though oft-discussed, is not coming. Repeated efforts to eliminate or soften the federal marijuana prohibition, originating both in Congress and in the Executive, have routinely failed. *See*, *e.g.*, Mary Jane Gibson,

Federal marijuana legalization is stopped in its tracks, Vox (Mar. 31, 2022), https://tinyurl.com/msybux2m (cataloguing various federal bills—including bipartisan ones—to liberalize cannabis regulation that ultimately failed); Jean Smith-Gonell et al., *Cannabis Rescheduling: ALJ Cancels Upcoming Hearings on Proposed Rulemaking*, Regulatory Oversight Blog (Jan. 15, 2025), https://tinyurl.com/4cm4hmn7 (noting that ongoing efforts to reschedule cannabis as a Schedule III drug have stalled). But just because Congress *could* resolve a policy problem (and refuses to) does not mean that this Court should decline to address a constitutional one. Only this Court, for example, can define the contours of the First Amendment, clarify the application of the individual *Central Hudson* factors, or explain the extent to which its First Amendment precedents should be interpreted as empowering states to claim for themselves powers reserved to the federal government. This case is an ideal vehicle in which to do any (or all) of those things.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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