No. 24-1024

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Thomas A. Berry
Counsel of Record
Daniel Greenberg
Christine Marsden
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(443) 254-6330
tberry@cato.org

April 24, 2025

QUESTION PRESENTED

May a state rely on federal marijuana prohibitions to criminalize commercial speech about marijuana—despite the state's legalization of the underlying conduct, and the federal government's explicit refusal to enforce the prohibition—on the basis that such speech does not satisfy the legality prong of the *Central Hudson* test?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the Constitution and its principles, which are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Cato's interest in this case arises from its mission to prevent government overreach and overregulation. This case is especially important in light of Mississippi's egregious prohibitions on protected speech.

[1] Rule 37 statement: All parties were timely notified before the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

"I do not believe you can have effective criminal justice based on the philosophy that something is half legal and half illegal."

President Richard Nixon, March 24, 1972.[2]

Marijuana's status in the American legal system is unique. Although federal law has long prohibited the growth, sale, and consumption of marijuana, individual states have legalized it in varying degrees over the last 50 years. *See Marijuana Legality by State*, DISA GLOB. SOLS. (Apr. 1, 2025).[3] Only a handful of states ban all marijuana-related conduct. *Id.* Most states have decriminalized marijuana's sale and use, and nearly three-quarters of them have legalized its sale and use for medical purposes. *Id.* Although state marijuana law has undergone major shifts since the 1970s, federal law remained almost entirely unchanged for nearly a century after federal prohibition in the 1930s. *See* David V. Patton, *A History of United States Cannabis Law,* 34 J.L. & HEALTH 1, 15–16 (2020).

In 2014, however, Congress adopted an appropriations rider that prohibited federal funds from being used to prevent states from implementing their own medical marijuana laws; Congress then re-enacted its hands-off policy every year in subsequent legislation. *See* Consolidated Appropriations Act, Pub. L. No. 118-42, § 531, 138 Stat. 25, 174 (2024) (most recent appropriation). Mississippi is among the states that have

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[2] As quoted in David V. Patton, *A History of United States Cannabis Law*, 34 J.L. & HEALTH 1, 17 (2020).

[3] Available at https://tinyurl.com/2jb266t2.

legalized medical marijuana. *See* MISS. CODE ANN. §§ 41-137-1–67. Thus, Mississippi is among those states in which federal funds may not be used to enforce federal law in a way that would interfere with that state's governance.

Nevertheless, Mississippi has declared all commercial speech about medical marijuana illegal. Respondents' defense of this law rests on the theory that medical marijuana is federally illegal, so speech about medical marijuana is not protected by the First Amendment. *See* 15 MISS. CODE R. § 22-9.1 (2024).

This case is about whether Mississippi may constitutionally prohibit commercial speech about transactions that have been legalized for all intents and purposes. More precisely, may Mississippi rely on the theory that an unenforced and *unenforceable* federal law allows the state to ban constitutionally protected speech about transactions that the state itself has chosen to allow? The Fifth Circuit held that it could, ruling that Mississippi can rely solely on federal law to justify its speech ban. It held so even though Congress has expressly decided that the federal law in question is not enforceable in Mississippi. And it held so even though Mississippi has affirmatively legalized the conduct that the speech would advertise.

This case raises an important, unanswered question about the test that this Court has set out to determine when the government has unconstitutionally restricted "commercial speech." *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980). Although the *Central Hudson* test has four prongs, the Fifth Circuit considered only the first prong, which asks whether the speech at issue is "misleading [or] related to unlawful activity." *See id.*

The Fifth Circuit used *Central Hudson*'s "legality" prong as a blunt tool, finding that medical marijuana is *per se* unlawful and therefore not eligible for First Amendment protections. Even though Congress has annually decided to neuter the federal prohibition of marijuana in states like Mississippi, the Fifth Circuit held that this enforcement freeze does not matter under *Central Hudson*. *See* Pet. App. 18a n.5 ("Congressional funding and executive branch enforcement decisions do not alter the illegality of marihuana under the [Controlled Substances Act].").

This Court should grant certiorari to either clarify or reconsider *Central Hudson*. The *Central Hudson* test for "unlawful activity" is not well-suited for complex situations like the one presented here, where conduct is banned-in-name-only by a federal law that cannot be enforced. This case highlights the dangers of improperly interpreting *Central Hudson*. The Fifth Circuit's approach flies in the face of the practical reality in Mississippi and most other states, where medical marijuana has become a billion-dollar-business that operates in plain view. If states can rely on unenforceable laws as a justification to ban speech, that will open the door to significant First Amendment violations. The Court should grant certiorari to address this important constitutional issue.

ARGUMENT

I. CONGRESS HAS MANDATED THAT FEDERAL LAW MAY NOT BE ENFORCED IF IT CONFLICTS WITH STATE-LEVEL MEDICAL MARIJUANA LAWS.

Although marijuana has ostensibly been illegal for both recreational and medical use at the federal level for nearly a century, the federal government changed its approach to enforcement in 2014. *See* Patton, *supra,* at 28. Since that year, Congress has repeatedly passed legislation instructing that federal funds cannot be spent to enforce federal law if doing so would prevent states from implementing their own medical marijuana laws. *See* Consolidated Appropriations Act, Pub. L. No. 118-42, § 531, 138 Stat. 25, 174 (2024); *United States v. Marin All.*, 139 F. Supp. 3d 1039 (N.D. Cal. 2015).

When this Court decided *Central Hudson*, it established an analysis akin to intermediate scrutiny for protecting commercial speech. *See Central Hudson*, 447 U.S. at 565–66 (noting the "critical inquiry in this case: whether the Commission's complete suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State's interest"). The *Central Hudson* analysis begins by examining whether the challenged speech is "related to unlawful activity." *Id.* at 564. So the first question in this case is whether the sale of medical marijuana in Mississippi is "unlawful activity" under the *Central Hudson* test. The Fifth Circuit held that it is, and it treated the question as if it isn't close. *See* Pet. App. 7a ("*Central Hudson*'s first prong makes quick work of this case: Marihuana transactions are illegal in every state by virtue of federal law . . . .").

But the Fifth Circuit made this move far too quickly. Congress has decided to allow states to make their own choices about medical marijuana, mandating that federal law may not be enforced to interfere with state programs like Mississippi's. That unique historical circumstance requires a more nuanced application of *Central Hudson* than the Fifth Circuit supplied. The meaning of "unlawful activity" under *Central Hudson* should not extend to activity prohibited by laws that are unenforceable as a matter of statute.

In 2014, Congress first established its current federalist, hands-off policy toward medical marijuana. This policy marked a change in direction from the stasis in federal marijuana law that had set in over the preceding several decades. In 1970, the Controlled Substances Act replaced the Marihuana Tax Act of 1937 as the chief instrument of marijuana regulation. *See* Patton, *supra*, at 15; *see also Leary v. United States*, 395 U.S. 6, 12 (1969) (finding the Marihuana Tax Act unconstitutional under the Fifth Amendment). It was also around this time that the use of marijuana became more mainstream and enforcement began to weaken. *See* Patton, *supra*, at 18–19 (highlighting several of the ways marijuana use appeared in pop culture and politics from the 1970s to the early 2000s). Proposals for marijuana decriminalization and legalization sparked heated debate in the 1970s, as the Controlled Substances Act also introduced the Schedule system. *Id.* at 15.

Over the years, the federal government has repeatedly declined to change marijuana's classification as a "Schedule I" drug under the Controlled Substances Act, despite sustained advocacy from marijuana reform advocates. Over time, such advocacy produced

surprising results, such as when the Nixon-appointed Shafer Commission unexpectedly recommended that the federal government decriminalize marijuana. That prompted President Nixon, who was staunchly opposed to marijuana reform, to assert that reclassification would leave marijuana "half legal and half illegal"—thus diminishing the effectiveness of law enforcement and placing a substantial part of the nation's criminal justice system in a kind of limbo. *See id.* at 17.

Although Congress has declined so far to change the relevant portion of the Controlled Substances Act by reclassifying marijuana to a lower schedule, the 2014 appropriations rider limiting enforcement of marijuana law has been hailed as a victory for advocates of cannabis reform. *See* Mollie Reilly, *Medical Marijuana Dispensaries Win Battle Against Federal Crackdown*, HUFFPOST (Oct. 20, 2015, 2:13 PM).[4] Since that victory, medical marijuana has been legalized in several states, including Mississippi, where dispensaries operate openly without risk of federal criminal punishment.

There is thus a significant gap between the federal marijuana law *on the books* and federal marijuana law *in action*. For the last decade, Congress has signaled its intent that states should make their own medical marijuana laws and policies, *despite* the classification of marijuana as a Schedule I substance. *See* Pub. L. No. 118-42, § 531, 138 Stat. 25, 174 (2024) (most recent

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[4] Available at https://tinyurl.com/3kwjs2hj. This victory is just one example of an extraordinary increase in support for marijuana legalization over the last 20 years. *See* Katherine Schaeffer, *9 Facts About Americans and Marijuana*, PEW RSCH. CTR. (Apr. 10, 2024), available at https://tinyurl.com/59thkvkd.

appropriation). This explicit policy of non-enforcement has allowed states to legalize medical marijuana without fear of federal reprisal. Each state may decide for itself whether to permit or prohibit medical marijuana use, comfortable in the knowledge that its choice will not be overridden by the federal government.

Indeed, if there were any doubts that states like Mississippi are safe from federal interference, the courts have since removed those doubts. Shortly after the enforcement-limiting rider went into effect, the Department of Justice began arguing that the rider *only* prohibited the prosecution of state officials. This interpretation would have rendered the rider toothless, since the Department has never prosecuted state officials for operating state programs that conflict with federal drug laws. *See* Jacob Sullum, *The Justice Department's Embarrassing Medical Marijuana Switcheroo*, REASON (Aug. 6, 2015, 7:30 AM).[5] This remarkable interpretation would have allowed for the continued federal prosecution of individuals and businesses for medical marijuana sales and use. *See* Christopher Ingraham, *How the Justice Department Seems to Have Misled Congress on Medical Marijuana*, WASH. POST (Aug. 6, 2015, 8:58 AM) ("Before the bill passed, officials argued that it would severely disrupt their enforcement efforts. Now, they're maintaining that it changes nothing at all.").[6]

But the courts soon rightly put a stop to the Department's attempt to circumvent Congress's decision. A California district court soundly rejected the Justice Department's attempt to enforce federal marijuana

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[5] Available at https://tinyurl.com/y9uswn4b.

[6] Available at https://tinyurl.com/5n7krznv.

prohibitions in a state where medical marijuana had been legalized. *See Marin All.*, 139 F. Supp. 3d at 1044–45 (noting that the Department's interpretation of the rider "defies language and logic" and "tortures the plain meaning of the statute."). The Ninth Circuit soon agreed. *See United States v. McIntosh*, 833 F.3d 1163, 1177 (9th Cir. 2015) (holding that the federal government violated the plain meaning of the rider when it attempted to prosecute dispensary owners).

Despite the fact that cannabis remains a Schedule I substance, Congress has nevertheless determined that federal law may not be used to override conflicting state medical marijuana law. By passing and annually renewing this enforcement ban, Congress has permitted states to implement their own medical marijuana laws. Congress thus intended to make the states—not the federal government—the decider by neutering federal enforcement against state-level medical marijuana operations. The Fifth Circuit took a far-too-simplistic approach when it treated marijuana's Schedule I status as categorical proof that the sale of medical marijuana is "unlawful activity" in all 50 states.

II. MEDICAL MARIJUANA SHOULD BE CONSIDERED "LAWFUL ACTIVITY" FOR PURPOSES OF COMMERCIAL SPEECH.

In states that have legalized medical marijuana, commerce in medical marijuana should be considered "lawful activity" for purposes of the *Central Hudson* test. *Central Hudson* should be applied carefully, not mechanically. Courts should not apply a quick or reflexive test based solely on the law on the books when that law has fallen into desuetude or become unenforceable. Doing so would elevate abstract formalism

and would ignore the *point* of the *Central Hudson* inquiry, which is to protect the right to advertise commerce that occurs out in the open.

The view that commerce in medical marijuana is categorically "unlawful" cannot be reconciled with the reality in states like Mississippi. Consider how many people were and are involved in the creation and operation of Mississippi's medical marijuana system: the governor, the legislature, the regulators and other state employees, as well as thousands of buyers and sellers. It would likely come as a great shock to most or all of them to learn that they have been engaged in unlawful conduct.

And they would be right to be shocked. Presumably not even Respondents would genuinely believe such a charge of mass illegality to be true. *See* discussion *infra* Section III. It's perfectly reasonable to expect people to avoid "unlawful activity"; this expectation is at the very core of our legal system. But that expectation is reasonable *only* because people know—or should know—what "unlawful activity" is. For most people, the marker of "unlawful activity" is the possibility of some sort of formal sanction: for instance, a citation, a fine, an arrest, or a lawsuit. With respect to medical marijuana in Mississippi, there is no such sanction. That is perhaps the most straightforward explanation of why the Fifth Circuit's understanding of "unlawful activity" appears so counterintuitive.

Respondents' account of what constitutes "unlawful activity" under *Central Hudson* is, again, too quick. The *Central Hudson* Court likely did not anticipate laws that purport to criminalize conduct but that are also explicitly unenforceable. This case presents an ideal vehicle to resolve what "unlawful" means in this

context. And the Court should take this opportunity, because the aggressive use of *Central Hudson's* lawfulness prong poses grave difficulties when applied to an array of laws and regulations that appear to be either unenforced or unenforceable.

As Petitioners' brief shows, the lower court's *Central Hudson* analysis stopped at on-the-books illegality. The court performed only a cursory analysis before announcing that "the simple reality" is that marijuana is patently illegal. Pet. Br. at 2. Thinking the matter settled, the court declined to articulate *any* legitimate––never mind substantial—reason to ban non-misleading advertising for state-legal medical marijuana. *See* Pet. Br. at 13–14. And the court would have been hard-pressed to find one, given that Mississippi's medical marijuana law permits the prescription and use of medical marijuana. *See* MISS. CODE ANN. § 41-137-5 (2024). Mississippi counterproductively aims to suppress speech about conduct that it has legalized and encouraged.

Respondents cannot have their cake and eat it too. If medical marijuana were illegal in Mississippi as a matter of *state* law, the state would indeed have more leeway to restrict speech advertising it under the First Amendment. But since medical marijuana is legal in Mississippi, then commercial speech advertising it is constitutionally protected. Mississippi has acted as if medical marijuana is legal in the state in every respect *except* for its defense of its speech ban in this case. Mississippi cannot simultaneously treat petitioners as legitimate, licensed businesses while also arguing that petitioners operate illegally and that their speech is equivalent to advertising goods on the black market.

One of the Respondents in this case is Riley Nelson, Chief of Enforcement of the Mississippi Alcoholic Beverage Control Bureau. Mr. Nelson oversees a team of law enforcement officers who surely witness medical marijuana transactions on a regular basis. As a matter of fact, there are more than 200 dispensaries in Mississippi. *Dispensaries Near Me in Mississippi*, MISS. CANNABIS INFO. (last visited Apr. 23, 2024).[7]

If Mr. Nelson, or any of the Respondents, truly believe that medical marijuana is illegal, why are Mississippi prisons not overflowing with people whose only crime is the sale or use of medical marijuana? The simplest answer is that no one, including Respondents, truly believes that medical marijuana is illegal. Without a legitimate rationale for the prohibition of medical marijuana itself, Respondents have turned to commercial speech restrictions to undercut Mississippi's regime of duly-enacted laws that allow the sale and use of medical marijuana.

Put simply, if Mississippi would like to ban commercial speech about medical marijuana, it must also ban medical marijuana. Today, commerce in medical marijuana is lawful activity in Mississippi, and the contradictory federal prohibitions are completely neutered as a practical matter. As a result, speech about medical marijuana in Mississippi should receive First Amendment protections.

III. UNENFORCED LAWS ARE A DANGEROUS BREEDING GROUND FOR FIRST AMENDMENT VIOLATIONS AND GOVERNMENT ABUSE.

[7] Available at https://tinyurl.com/5c5d3f4j.

In the case at hand, the Fifth Circuit has used the *Central Hudson* test to circumvent both the First Amendment values it is supposed to protect and the hands-off federalism that Congress enacted into statute with its enforcement ban. Under the Fifth Circuit's strict interpretation of *Central Hudson*, any law that remains on the books—no matter how outdated or unenforced as a practical matter—may give rise to commercial speech restrictions. That rule would put businesses and individuals in danger of prosecution for speech advertising conduct that is universally understood to be completely legal in practice.

There are countless federal laws and regulations on the books, governing massive corporations to cottage bakers and everything in between. These laws are often vague and difficult to interpret, and sometimes they are even contradictory. *See* NEIL GORSUCH & JANIE NITZE, OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW 19 (2024) (describing the regulatory hurdles a business owner might face when trying to open a restaurant in New York City).[8] Individuals and sophisticated corporations alike routinely run afoul of this complex web of rules, often inadvertently. Such restrictions also allow public officials to bring pretextual claims against dispensary owners who have otherwise adhered completely to the law.

Unfortunately, the lower court's idiosyncratic reading of *Central Hudson*'s legality prong has potential impacts that reach far beyond medical marijuana

[8] Justice Gorsuch notes that the hopeful restaurateur may have to navigate 11 city agencies, dozens of permits, and almost two dozen inspections—without even considering the additional requirements for a liquor license. These requirements frequently contradict each other. *See id.*

laws. Take "blue laws," for example. Blue laws, also called "Sunday laws," restricted certain activities from taking place on a Sunday, stemming from religious Sabbath beliefs. *See* Ira P. Robbins*, The Obsolescence of Blue Laws in the 21st Century*, 33 STAN. L. & POL'Y REV. 289, 290–91 (2022). In many states, it is still illegal to sell a car[9] or alcohol[10] on a Sunday, and states still ban Sunday activities like hunting,[11] horse racing,[12] and shopping,[13] among other things. These laws, originally designed to uphold a Christian Sabbath, have a long, mixed history of enforcement. *See* Robbins, *supra* at 310. In fact, many blue laws were repealed because they were no longer being enforced. *Id.* at 320–21. Yet many blue laws remain on the books, and the decision below would allow states to enact and enforce laws banning advertisements for conduct that would run afoul of these laws. A state could prosecute, for example, a car dealer who advertises that his dealership is open seven days a week in a state with a blue law prohibiting car sales on Sundays.

Some of these little-enforced laws have been on the books for hundreds of years. New York banned businesses from selling on Sundays in 1656, over one hundred years before the ratification of the Constitution.

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[9] *See* IND. CODE § 24-4-6-1 (2020); MINN. STAT. § 168.275 (2020); MO. REV. STAT. § 578.120 (2020); N.J. STAT. ANN. § 39:10-38 (2021).

[10] *See, e.g.*, 47 PA. STAT. AND CONS. STAT. ANN.§ 4-406 (West 2022).

[11] *See* Robbins, *supra* at 329.

[12] DEL. CODE ANN. tit. 28, § 906 (2020) (prohibiting horse racing on Easter Sunday and Good Friday).

[13] *See* Robbins, *supra* at 310.

Tom Goldstein, *New York Appeals Court Voids Sunday Sale Bans*, N.Y. TIMES (June 18, 1976).[14] The ban was voided as unconstitutional in 1976, more than 300 years later, due to a finding that "parts of the statute . . . are rarely enforced by the police and routinely disregarded by thousands of businesses." *Id.* Because many of these laws still exist today in other states, it is no exaggeration to say that thousands of businesses could be subject to significant penalties if a state chose to enact laws punishing them simply for advertising a sale or putting their Sunday hours on Google Maps.

If "unlawful" status under *Central Hudson* is truly a simple threshold question that has no connection to real-world enforcement, a court could theoretically revive outdated laws and regulations as a pretext to uphold suppressions of unpopular speech. And it could do so even when the underlying conduct would not result in prosecution. The U.S. marijuana industry is a $45 billion industry. *See Cannabis – United States*, STATISTA.[15] Even if the ripple effect of this decision is limited to this single industry, it could be catastrophic for thousands of business owners who could find themselves subject to strict state-imposed penalties just for speaking about conduct that has been functionally legal for years.

Notably, the stigmatization of medical marijuana itself puts Mississippi business owners at risk, even if they are making every attempt to adhere to the law. Many consumers of medical marijuana rely on access to it to treat chronic pain and illnesses. A complete ban on advertising will stifle business and harm

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[14] Available at https://tinyurl.com/3dcy965h.

[15] Available at https://tinyurl.com/4fekx6px.

consumers' access to a product that the state of Mississippi has already decided should be legal and accessible. If no commercial speech is permitted for dispensary owners, presumably they cannot announce a grand opening, hours, or any online services.

Essentially, Mississippi claims that Petitioners may own a medical marijuana business, as long as they never tell a soul about it. Even Richard Nixon, in his vehement opposition to legalized marijuana, understood that a system of "half-legal, half-illegal" marijuana was destined to become hopelessly confused. Mississippi officials seek to ban speech, but *not* the conduct that they themselves assert is completely illegal. This strongly suggests that there is some pretext at work.

The State of Mississippi should not be allowed to use a speech ban to suppress conduct *indirectly* that it has already permitted directly. The Court should take this case to make clear that a state cannot ban speech advertising conduct that the state itself has legalized and that no other sovereign can punish.

CONCLUSION

For these reasons, and those described by the Petitioners, this Court should grant the petition.

Respectfully submitted,

Thomas A. Berry
Counsel of Record
Daniel Greenberg
Christine Marsden
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(443) 254-6330
tberry@cato.org

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