No. 25-1145

In the Supreme Court of the United States

COUNCIL FOR RESPONSIBLE NUTRITION,
Petitioner,

v.

LETITIA JAMES, IN HER OFFICIAL CAPACITY AS NEW YORK ATTORNEY GENERAL,
Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF OF THE MANHATTAN INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in holding that the third prong of the *Central Hudson* test can be satisfied without an evidentiary showing demonstrating that the specific manner of speech restriction will actually and materially ameliorate harm.

2. Whether the Second Circuit erred in watering down the fourth prong of the *Central Hudson* analysis by deferring to the New York legislature's manner of regulating without any meaningful consideration of less-intrusive, alternative means.

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INTEREST OF *AMICUS CURIAE*[1]

The Manhattan Institute ("MI") is a nonprofit public policy research foundation whose mission is to develop and disseminate ideas that foster greater economic choice and individual responsibility. MI has historically sponsored scholarship and filed briefs defending constitutional principles, including the free speech guarantees enshrined in the First Amendment.

This case concerns MI because the Second Circuit's decision threatens to erode the constitutional safeguards that protect commercial speech from government overreach. If left undisturbed, that precedent will invite further encroachments on the free flow of commercial information that the First Amendment was designed to protect.

SUMMARY OF ARGUMENT

The decision below reduces First Amendment protections for commercial speech to a formality. The Court should grant review and reject this approach.

Half a century ago, this Court recognized that "the free flow of commercial information is indispensable" to a free enterprise economy, *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976), and that citizens' interest in receiving commercial information "may be as keen, if

[1] Rule 37 statement: All parties were timely notified of 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.

not keener by far, than [their] interest in the day's most urgent political debate." *Id.* at 763.

Consistent with these principles, in *Central Hudson* this Court established a rigorous four-part framework to ensure that restrictions on commercial speech are supported by substantial government interests and carefully tailored to advance those interests. *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980).

However, the Second Circuit's decision continues a trend that threatens to transform the meaningful constitutional safeguards set out in *Central Hudson* to a highly deferential form of review akin to rational basis scrutiny. First, the decision below held that the State's burden under the third prong of *Central Hudson*—requiring that a restriction "directly advance" a substantial interest—may be satisfied by "simple common sense" rather than empirical evidence. Second, it held that under the fourth prong, courts must defer to the legislature's "reasonable judgment" about how to regulate speech. This combination permits a State to restrict truthful, lawful commercial speech based on "common sense" and unquestioning deference to legislative judgment, gutting the intermediate scrutiny framework established in *Central Hudson*.

This erosion of *Central Hudson* has sweeping practical consequences. If courts may defer to legislative "common sense" in finding that a content-based restriction directly advances a government interest, and then defer again to the legislature's choice of regulatory means, virtually no commercial speech regulation will ever fail this version of "intermediate scrutiny." The government need only articulate one substantial

interest—as it almost always can—and courts will wave almost any content-based restriction through.

The Court should intervene given the stakes. The questions presented are important and frequently recur. Moreover, the lower court decision moves in the opposite direction of *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 565–66 (2011), which strongly suggested that *Central Hudson*'s intermediate scrutiny standard is especially rigorous where the regulation is content-based (as is the case here). *See also Matal* v. *Tam*, 582 U.S. 218, 254 (2017) (Thomas, J., concurring in part and concurring in judgment); *Int'l Outdoor, Inc.* v. *City of Troy, Michigan*, 974 F.3d 690, 702–03 (6th Cir. 2020) (holding that a content-based regulation of commercial speech is subject to strict scrutiny).

This Court should grant certiorari to prevent *Central Hudson* from becoming a dead letter and instead confirm that commercial speech receives robust protection, including from content-based restrictions.

ARGUMENT

I. THE SECOND CIRCUIT'S ANALYSIS CONFLICTS WITH ESTABLISHED PRECEDENT

A. The Second Circuit misapplied the third prong of *Central Hudson*

Central Hudson's third prong requires the government to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield* v. *Fane*, 507 U.S. 761, 771 (1993). The government cannot rest on "mere speculation or conjecture." *Id.* at 770. This requirement is critical because, without it, "a State could with ease restrict commercial speech in the service of other

objectives that could not themselves justify a burden on commercial expression." *Id.* at 771.

Thus, this Court has consistently demanded empirical evidence to satisfy the third prong, consistent with *Central Hudson*'s focus on requiring the government to meet a real burden. For instance, in *Edenfield*, the Court struck down a ban on in-person solicitation by accountants where the State "present[ed] no studies" linking the banned speech to the harms it claimed to fear. *Id.* Similarly, in *Rubin* v. *Coors Brewing Co.*, the Court invalidated a labeling restriction supported only by "anecdotal evidence and educated guesses." 514 U.S. 476, 490 (1995). And in *44 Liquormart* v. *Rhode Island*, a plurality found a speech restriction unconstitutional because the State presented no "evidentiary support" that its prohibition would "*significantly* reduce marketwide consumption." 517 U.S. 484, 505–06 (1996) (emphasis in original). Also, when this Court upheld the Florida Bar's restriction on attorney advertising, the Court noted the support of a 106-page summary of a two-year study demonstrating a direct, data-supported link between the speech restriction and the alleviation of specific harms. *Florida Bar* v. *Went for It, Inc.*, 515 U.S. 618, 626–28 (1995).

The Second Circuit's analysis fell far short of the standard set by these cases. Rather than hold the State to its evidentiary burden, the panel invoked "simple common sense" to sustain the State's attenuated causal chain: (1) some dietary supplements contain dangerous ingredients; (2) those ingredients appear in products marketed for weight loss or muscle building; (3) therefore, a law prohibiting sales to minors of such supplements defined solely by their marketing will reduce harm to minors. But this chain of

inferences, itself based only on "simple common sense," does not constitute empirical evidence that the specific manner of regulation adopted—based on marketing language rather than ingredients—will directly and materially alleviate the asserted harms.

This methodology cannot be reconciled with this Court's precedents. In *44 Liquormart*, the Court held that even where common sense might suggest an inferential chain linking less price advertising to reduced consumption, such common-sense reasoning is insufficient to satisfy *Central Hudson*'s third prong absent findings of fact or evidentiary support. 517 U.S. at 505–06. Similarly, in another case the Court cautioned that even if "advertising concerning casino gambling increases demand for such gambling, which in turn increases the amount of casino gambling that produces those social costs . . . it does not necessarily follow that the Government's speech ban has directly and materially furthered the asserted interest." *Greater New Orleans Broad. Ass'n, Inc.* v. *United States*, 527 U.S. 173, 189 (1999).

Other circuits recognize this. Indeed, the Ninth Circuit recently confronted—and rejected—the very approach the Second Circuit adopted here. In *Junior Sports Mags. Inc.* v. *Bonta*, 80 F.4th 1109 (9th Cir. 2023), California argued that it was "simple common sense" that firearm advertising directed at minors would lead to unlawful firearm possession and gun violence. The Ninth Circuit made clear that "a state can invoke 'common sense' only if the connection between the law restricting speech and the government goal is so direct and obvious that offering evidence would seem almost gratuitous." *Id.* at 1118. When "the government's justifications for a regulation become more

attenuated, bare appeals to common sense quickly veer into impermissible speculation." *Id.*

Under the proper standard, the Second Circuit should have invalidated the law because the State failed to meet its evidentiary burden. The State's entire theory depends on the assumption that a product's marketing reliably correlates with its dangerousness. Yet the State presented no study, no dataset, no expert analysis—indeed, not a single piece of evidence—showing that marketing is a proxy for how dangerous dietary supplements are. Even the law's own sponsor could not identify any specific studies establishing a link between the marketing of supplements and the purported harms; indeed, one legislator candidly admitted to "trust[ing] that it's probably out there." Dist. Ct. Dkt. 25-1 at 7. That should not have been enough—yet the Second Circuit engaged in precisely the sort of "speculation or conjecture" that this Court has deemed impermissible. *44 Liquormart*, 517 U.S. at 507.

Certiorari is warranted to reaffirm that "the First Amendment requires more than fact-free inferences to justify governmental infringement on speech." *Junior Sports Mags.*, 80 F.4th at 1118.

B. The Second Circuit also misapplied the fourth prong of *Central Hudson*

The fourth prong of *Central Hudson* requires the government to demonstrate that its restriction is "no more extensive than necessary." *44 Liquormart*, 517 U.S. at 507. This prong requires a showing of "reasonable fit" between the means chosen and the government's objectives. *Bd. of Trs. of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 480 (1989).

Central Hudson's fourth prong is "significantly stricter than the rational basis test," as this Court has repeatedly held. *Thompson* v. *W. States Med. Ctr.*, 535 U.S. 357, 374 (2002); *cf. FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (under rational basis review, legislative judgments may rest on "rational speculation unsupported by evidence"). Rather, the government must "carefully calculate[] the costs and benefits associated with the burden on speech imposed by its prohibition." *Greater New Orleans*, 527 U.S. at 188.

For example, in *44 Liquormart*, the Court rejected Rhode Island's assertion that it had "merely exercised appropriate 'legislative judgment'" in choosing a speech ban, emphasizing that "a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes." 517 U.S. at 508–10. And *Thompson* reaffirmed that "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." 535 U.S. at 371. Speech regulation, the Court stressed, "must be a last—not first—resort." *Id.* at 373.

The Second Circuit disregarded these principles. It adopted the wrong standard, stating: "We will defer to the Legislature's reasonable judgment about how best to achieve [its] objectives." Pet. App. 14a; *see also Vugo, Inc.* v. *City of New York*, 931 F.3d 42, 58–59 (2d Cir. 2019) (same). The Second Circuit also failed to conduct any meaningful analysis of available less speech-restrictive alternatives. Petitioner identified one such alternative: the Predecessor Bill (Assembly Bill 431-C), which regulated supplements based on their ingredients rather than their marketing. The panel acknowledged this option but dismissed it solely

on the ground that the Governor had vetoed it. Pet. App. 15a. But a gubernatorial veto says nothing about whether an ingredient-based approach is infeasible or would fail to advance the State's interest. *Cf. Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 519 (1981) (courts must protect First Amendment rights "against legislative intrusion, rather than deferring to merely rational legislative judgments in this area").

The Second Circuit's watering down of *Central Hudson*'s fourth prong to rational-basis-like deference is another reason to grant certiorari.

II. THE DECISION BELOW IMPROPERLY IMPORTS LEGISLATIVE DEFERENCE INTO FIRST AMENDMENT JURISPRUDENCE

The overarching problem with the decision below is its unwarranted deference to legislative judgment. That deference infects both prongs of the Second Circuit's *Central Hudson* analysis and, taken together, transforms intermediate scrutiny into a rubber stamp. If courts defer to the legislature on whether a speech restriction directly advances a governmental interest (third prong), and then defer again on whether the regulation is sufficiently tailored (fourth prong), intermediate scrutiny ceases to provide any meaningful check on government power. *See* Shannon M. Hinegardner, *Abrogating the Supreme Court's De Facto Rational Basis Standard for Commercial Speech: A Survey and Proposed Revision of the Third* Central Hudson *Prong*, 43 New Eng. L. Rev. 523, 529–30 (2009) (the "common sense" rationale "creates a de facto rational basis standard" because it provides "no basis for the judiciary to review legislative decisions").

This Court has rejected that approach because it does not provide sufficient protection for lawful commercial speech. As it cautioned in *Florida Bar*, "we do not equate this test with the less rigorous obstacles of rational basis review." 515 U.S. at 632. And as *44 Liquormart* emphasized, "speech restrictions cannot be treated as simply another means that the government may use to achieve its ends." 517 U.S. at 512.

The Second Circuit's approach creates two related dangers that intermediate scrutiny protects against.

1. First, a rational-basis-like approach undermines the vital role that commercial speech plays in a market economy and in democratic society more broadly by removing meaningful First Amendment protections. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 652 (1990) ("[I]n a free market economy, the ability to give and receive information about commercial matters may be as important, sometimes more important, than expression of a political, artistic, or religious nature.").

To quote Justice Thomas:

> In case after case following *Virginia Bd. of Pharmacy*, the Court, and individual Members of the Court, have continued to stress the importance of free dissemination of information about commercial choices in a market economy; the antipaternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate "commercial" information; the near impossibility of severing "commercial" speech from speech necessary to democratic

> decisionmaking; and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly.

44 Liquormart, 517 U.S. at 520 & n.2 (Thomas, J., concurring in part and concurring in judgment).

By abdicating their role as a check on governmental suppression of information, courts "put[] the fox in charge of the chicken coop," because "[a] legislature rarely passes a restriction it explicitly finds to be unreasonable or unnecessary." Albert P. Mauro, Jr., *Commercial Speech After* Posadas *and* Fox*: A Rational Basis Wolf in Intermediate Sheep's Clothing*, 66 Tul. L. Rev. 1931, 1951 (1992). Thus, deference undermines the very values that justify protecting commercial speech, giving way to bare policy preferences.

2. Second, excessive deference enables regulation that seeks to keep the public in the dark for its own supposed good. The Court has repeatedly expressed deep skepticism of such paternalistic justifications. As Justice Stevens explained, "[a]ny 'interest' in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment; more speech and a better informed citizenry are among the central goals of the Free Speech Clause." *Rubin*, 514 U.S. at 497 (Stevens, J., concurring); *see also Virginia State Bd. of Pharmacy*, 425 U.S. at 769–70.

In *Thompson*, this Court squarely rejected the notion that "the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information." 535 U.S.

at 374. The First Amendment rests on the opposite premise: that individuals are best able to determine their own interests when they are well informed. "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id.* at 375. Paternalistic regulation that suppresses speech for supposed policy benefits substitutes governmental judgment for individual autonomy and distorts the marketplace of ideas. It presumes that regulators, not citizens, should decide what information is too risky to be heard—an assumption fundamentally at odds with the First Amendment. *See 44 Liquormart*, 517 U.S. at 526 (Thomas, J., concurring in part and concurring in judgment) (opining that "all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible").

This hostility to paternalism in speech regulation is not an isolated doctrinal point but a foundational structural principle of the First Amendment. *See generally* Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 Creighton L. Rev. 579 (2004). As Professor Carpenter explains, the "antipaternalism principle" disfavors any "restriction on otherwise protected speech justified by the government's belief that speaking or receiving the information in the speech is not in citizens' own best interests." *Id.* at 582–83. The principle entails several core commitments: it "prevents the state from adopting . . . an information-denying strategy to achieve what it thinks are citizens' best interests"; it "restrains the state's role as a central decision-maker, disabling the state from restricting the flow of speech as a method of discouraging choices made by individuals in their own best interests"; and it "forbids information-denying

speech regulation even if the speech restriction will actually accomplish its aim of manipulating citizens' decision-making in a direction the state believes is in citizens' best interests." *Id.* at 583. These commitments rest on the conviction that the First Amendment "treats the adult citizen as an adult, presuming his competence rather than his gullibility" and "makes the citizen sovereign over the life of his own mind." *Id.* at 633.

Moreover, the antipaternalism principle serves as a critical structural safeguard against three distinct evils of government speech regulation: "incompetence, entrenchment, and intolerance." *Id.* at 632. Speech restrictions adopted under paternalistic rationales "obscure the government's real interest—manipulating the public and at the same time undermining democratic accountability." *Id.* at 603.

These concerns are directly implicated here. New York's law does not regulate dietary supplements based on their ingredients or demonstrated risks; it restricts them based on how they are described. The result is a regime in which Product 1 and Product 2—chemically identical in every respect—face opposite regulatory treatment solely because of the words on their labels. A manufacturer may sell a product containing the very ingredients the legislature deemed dangerous so long as it does not *say* the product aids in weight loss or muscle building. Conversely, a perfectly safe multivitamin is swept into the ban the moment its label references a weight-management or muscle-building benefit. Rather than directly regulating the harmful ingredients it purports to fear, the State suppresses the communication of truthful information about lawful products in the hope of

influencing consumer behavior—precisely the kind of paternalistic intervention this Court has condemned.

The Second Circuit's willingness to sustain this speech-as-proxy-for-harm approach, without demanding evidence or considering less restrictive alternatives, invites further incursions on commercial speech. If *Central Hudson* is to retain any vitality as a constitutional safeguard, this Court must intervene to ensure that intermediate scrutiny means something more than reflexive deference to legislative will.

CONCLUSION

For the above reasons and those stated by Petitioner, the Court should grant the petition.

Respectfully submitted,

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