

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 A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

No one disputes that there are dangerous ingredients that children (and adults for that matter) should not ingest. But that is not what this case (or the Law enacted by New York) is about; it is about the improper use of speech as a proxy for purported harm, the failure of the New York Legislature to justify a speech-based restriction pursuant to this Court’s *Central Hudson* jurisprudence, and the Second Circuit’s improper determination that it “must defer” to this legislative determination. Pet. App. 15a.¹ Respondent devotes her Brief in Opposition to ignoring these fundamental First Amendment concerns and to misdirecting the Court from clear circuit splits on important constitutional issues.

Respondent also mischaracterizes the Second Circuit’s decision. Despite Respondent’s spin, the opinion below directly threatens the commercial speech protections this Court established decades ago. If these circuit splits are left to stand, legislatures will be emboldened to enact laws (like the one here) infringing on commercial speech justified only by attenuated and incongruent support. With the ever-increasing proliferation of state regulation of consumer products, this threat is real and concerning. And courts would have license to take shortcuts to avoid the real work of ensuring that the rigors of intermediate scrutiny are satisfied. This Court should grant certiorari to protect commercial speech from the continued erosion of *Central Hudson*.

1. References to “Pet.” and “Pet. App.” are to Petitioner’s Petition for Writ of Certiorari, filed March 30, 2026, and its Appendices. “Opp.” refers to Respondent’s Brief in Opposition.

ARGUMENT

I. REVIEW IS ESSENTIAL BECAUSE THERE IS A CLEAR SPLIT OF AUTHORITY ON FUNDAMENTAL FIRST AMENDMENT QUESTIONS.

a. The Second Circuit Weakened and Misconstrued *Central Hudson*'s Third Prong.

Respondent's Opposition fails to address the Second Circuit's flawed analysis of *Central Hudson*'s third prong, which requires the state to show that a speech-infringing law will "*in fact* alleviate" a known harm "*to a material degree*." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (emphasis added). The Second Circuit all but ignored that mandate. Respondent argues that the State provided (and the court considered) "scientific studies that establish the dangers weight loss and muscle building supplements pose to the public, in general, and to minors, in particular." Opp. 12 n.5.²

But those studies do not support the Law's use of marketing to trigger restrictions on sales. *None of the studies* were about "weight loss and muscle building supplements" as defined in the Law—products "labeled, marketed, or otherwise represented for the purposes of achieving weight loss or muscle building." N.Y. Gen. Bus. Law § 391-oo(1)(a). To the contrary, those studies considered potential adverse effects of *specific supplement products*,

2. Respondent's brief cites studies set forth in a letter by Dr. Jason Nagata dated April 26, 2021, prior to the veto of the Predecessor Bill. C.A. App. 108-09.

or types of supplements based on their *ingredients*. Others used an undefined class of “weight loss” or “performance enhancing” supplements but provided no explanation of the contours of the category, failed to disclose whether marketing was the defining characteristic, did not mention “muscle building” at all, or were not primarily about minors. Tellingly, the studies Respondent now cites were all submitted to the Legislature in support of the Predecessor Bill—the *ingredients*-based bill—and perhaps they provided adequate support for that approach. But they do not come close to providing the necessary evidentiary support sufficient to satisfy *Central Hudson*’s third prong any more than would a study about quantum physics or hydraulics. The same limitation is true for the anecdotal accounts the State references, none of which define “weight loss” or “muscle building” supplements by reference to their associated marketing. *See* Opp. 13 (citing C.A. App. 106, 113).

Even the Second Circuit recognized that there was no *direct* evidence linking the marketing-based definition of dietary supplements with any known harm to minors, only studies that address supplements that were “generally” (but not actually) the same as those covered by the Law. *See* Pet. App. 13a-14a. The Circuit made clear that the New York Legislature was using “a product’s marketing as a proxy” for any inherent harm. *Id.* at 15a. But a “proxy” is, by definition, not direct—it is indirect.

To her credit, Respondent does not try to suggest that the State offered any more of a direct link. Instead, she erroneously argues that there is no requirement to “establish a link between the marketing of these supplements and the Legislature’s purported harms.”

Opp. 14 (cleaned up). But that is precisely the Government’s burden on *Central Hudson*’s third prong—demonstrating “direct advancement.” See *Edenfield*, 507 U.S. at 770. And as applied here, that standard requires demonstrating that age-restricting dietary supplements based on their marketing will “*in fact* alleviate” harm to minors “*to a material degree*.” *Id.* at 771 (emphasis added). That showing cannot be made by referencing studies that *do not show harmful effects on minors of dietary supplements defined by their marketing*. The only way to fill the gap left by this evidentiary void is to *speculate* that the specific types of dietary supplements covered by the Law (those marketed for weight loss and muscle building) are harmful to minors, such that restricting their purchase will actually—and materially—protect minors. But the State cannot satisfy *Central Hudson*’s third prong with speculation. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality).³

For this very reason, Respondent’s attempt to argue that the Petition presents “fact-bound disputes about the State’s evidence,” Opp. 14, is unconvincing. Respondent concedes there is no direct evidentiary link between the

3. While Respondent cites, see Opp. 12, to the “history, consensus and common sense” dicta from *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995), she fails to engage Petitioner’s extensive debunking of the application of this language to the third prong analysis. Pet. 18-19. For good reason, Respondent does not appear to be relying on “common sense” alone to argue that the State satisfied its third prong burden. In any event, that language cannot support the proposition that common sense alone would be sufficient for a third prong showing. While there may be some cases where “history, consensus **and** common sense” collide to make patently obvious the link between a regulation and the harm it seeks to prevent, this is not such a case.

Law and the purported harm. The Circuit reached the same conclusion. In light of these concessions, no further factual inquiry into the deficiencies of the studies is necessary.

The circuit split is real. Respondent argues that “the Second Circuit’s record-bound determination that the State had sufficiently demonstrated [satisfaction of the third prong] . . . is fully consistent with the holdings [Petitioner cites as circuit splits].” Opp. 19. But the fallacy lies in the premise that the State made a sufficient demonstration. While Respondent suggests it provided evidence “[no] different in kind” from the evidentiary showing in cases Petitioner cited as a circuit split, Opp. 15, the decision in *Recht v. Morrissey*, 32 F.4th 398 (4th Cir. 2022), highlights Respondent’s misconception. In *Recht*, the challenged statute regulated certain phrases in attorney advertising—and the submitted studies and anecdotes demonstrated that “attorneys often use *the precise tactics that the State prohibits in the Act.*” *Id.* at 414 (emphasis added). There is no such direct line between the studies and the Law in this case, only an attenuated and indirect connection. It is that type of scant showing that at least five circuits have rejected, finding *Central Hudson*’s third prong not satisfied without a direct evidentiary link between the manner of the restriction and the harm it seeks to alleviate. Pet. 21-23. Only the First Circuit follows the Second Circuit’s approach, finding “common sense” to be adequate in the absence of “direct evidence.” *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 55, 57 (1st Cir. 2008).

The Second Circuit’s ruling widens the current split and warrants review by this Court. Over 20 years ago,

this Court declined to address the issue in a petition for certiorari; it should do so now. *See Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080 (2002) (Thomas, J., dissenting) (“Our decisions have not . . . sufficiently clarified the nature and the quality of the evidence a State must present to show that the challenged legislation directly advances the governmental interest asserted.”).

b. The Second Circuit Impermissibly Weakened *Central Hudson*’s Fourth Prong.

Central Hudson’s fourth prong requires courts to consider whether there is a “reasonable fit” between the speech-infringing legislation and the goal it seeks to achieve. It is not an exercise in deference. Respondent whistles past the graveyard, seeking to ignore the Second Circuit’s clear (but legally wrong) statement that it “must defer to [the Legislature’s] reasonable judgment,” Pet. App. 15a, as to “how best to achieve [its] objectives.” *Id.* at 14a.

First, Respondent argues that CRN’s members have other channels of speech available to them despite the speech-infringing nature of the Law. *See* Opp. 16 (citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 569 (2001)). The Second Circuit did not raise this argument—nor is it helpful. *Lorillard* considered whether other channels of communication were available where a Massachusetts sales regulation limited retailers’ placement of tobacco products. Those considerations are irrelevant here where the age restriction is linked to speech (not expressive conduct), there is no known harm from products simply on the basis of their marketing (unlike tobacco), and any (and all) marketing triggers the restriction. Respondent’s

reference to *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024), is similarly unavailing. There, this Court held that the proponent of a facial First Amendment challenge must demonstrate that the unconstitutional applications of the challenged law outweigh its constitutional applications. *Id.* at 723-24. Here, regardless of the specific application, the Law is always triggered by speech, and it is that very trigger that fails intermediate scrutiny and makes the Law unconstitutional. That is sufficient to sustain a facial First Amendment challenge, which is subject to a more flexible bar “[t]o provide breathing room for free expression.” *Id.* at 723 (cleaned up); *Imperial Sovereign Court of Montana v. Knudsen*, 170 F.4th 820, 845 (9th Cir. 2026) (noting that *Moody* did not displace the tiered scrutiny analysis that is implicated by a commercial speech challenge).

Second, Respondent argues that the Second Circuit was correct in deferring to the Legislature—but this Court’s precedent tells a different story. In *44 Liquormart*, a plurality rejected the type of legislative deference the Second Circuit applied here, expressly disavowing the Court’s prior reasoning from *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), and concluding that the *Posadas* court “clearly erred in concluding that it was ‘up to the legislature’ to choose suppression over a less speech-restrictive policy” in light of the Court’s “longstanding hostility to commercial speech regulation[s].” *44 Liquormart*, 517 U.S. at 509. This repudiation was a recognition of the “unbroken line of prior cases striking down similarly broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives were available.” *Id.* at 509-10.

Against this backdrop, Respondent urges that “such deference is, in fact, a touchstone of intermediate scrutiny.” Opp. 18. But that is wrong. For example, *Bd. of Trs. of S.U.N.Y. v. Fox*, 492 U.S. 469 (1989), does not require deference to legislative determinations. To the contrary—*Fox* established only that *Central Hudson*’s fourth prong does not have a “least-restrictive-means requirement,” and that by declining to impose such a requirement, the Court was “tak[ing] account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide the Legislative and Executive Branches needed leeway in a field (commercial speech) ‘traditionally subject to governmental regulation.’” *Id.* at 480–81. The recognition of “needed leeway” was the justification for not imposing a “least-restrictive-means requirement”—not an independent statement that courts “must defer” to legislative determinations. The same infirmities infect the other cases Respondent cites, most of which are not commercial speech cases and cannot support an argument that the Second Circuit correctly applied *Central Hudson*’s fourth prong. *See* Opp. 18 n.6.⁴

Finally, Respondent addresses the ingredient-based Predecessor Bill—a potential solution without First Amendment concerns. The Second Circuit superficially deferred to the Governor’s veto, which suggested that State agencies are ill-equipped “to analyze ingredients used in countless products, a role that is traditionally played by the FDA.” Opp. 4. But there is no empirical

4. The only commercial speech case Respondent cites is *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), but that case is in the *sui generis* billboard category, where this Court has deemed deference to be acceptable. *See* Pet. 28 & n.5.

reason to believe that the marketing-based Law would be effective at all, particularly because, as the State concedes, the goal was to address “dangerous” products. Opp. 3-4. The existence of the Predecessor Bill, which the Legislature *passed* and therefore decided was the proper way to address the problem, means that there was a non-speech-infringing alternative. This unavoidable fact undermines any suggestion that the Second Circuit properly engaged the fourth *Central Hudson* factor.

Respondent cannot avoid the Circuit’s statement that it “*must defer*” to the Legislature’s determination about how to achieve its interests. Pet. App. 15a (emphasis added). That level of deference is unprecedented and erodes *Central Hudson*’s intermediate scrutiny into rational basis review. If left to stand, courts could bypass a bedrock protection of commercial speech—despite this Court’s admonition that “regulating speech must be a last—not first—resort.” *Thompson v. W. States Medical Center*, 535 U.S. 357, 373 (2002).

This perversion of *Central Hudson* is in direct conflict with the rigorous analysis other circuits perform.⁵

5. Respondent entirely mischaracterizes Judge Elrod’s partial dissent in *Reagan National Advertising of Austin, Inc. v. City of Austin*, 64 F.4th 287, 298 (5th Cir. 2023). As Petitioner noted, in that opinion, Judge Elrod noted the *general principle* that intermediate scrutiny is not compatible with legislative deference. See Pet. 30. Respondent cites language from that opinion regarding “heightened deference” in the context of commercial speech, see Opp. 23, but that language comes from *Metromedia*, 453 U.S. at 490—which is part of a line of cases pertaining to billboards where courts have found legislative deference appropriate. Notably, *Reagan* is a billboard case too. That reference to “heightened deference” for commercial speech is therefore inapplicable to this case.

Respondent’s suggestion that there is no circuit split ignores the elephant in the room: Respondent has not identified a single other circuit stating that it *must defer* to a legislature’s judgment in the commercial speech context. Respondent tries to minimize this point, suggesting that other circuits do not “forbid any deference to legislative judgment.” Opp. 23. Petitioner has never suggested that this Court’s precedent “forbids any deference”—but that certainly does not mean that courts “must defer” to legislative determinations. This Court should make clear that *Central Hudson*’s fourth prong requires rigor.

II. This Case is an Ideal Vehicle for Resolving Purely Legal Questions.

Finally, Respondent is wrong to argue that this case is not a proper vehicle for certiorari because it is an appeal of a preliminary injunction ruling. Over the past few terms, this Court has repeatedly granted certiorari from grants and denials of preliminary injunctions, including several First Amendment cases. *See, e.g., Chiles v. Salazar*, 146 S. Ct. 1010 (2026); *Mahmoud v. Taylor*, 606 U.S. 522 (2025); *Free Speech Coalition, Inc. v. Paxton*, 606 U.S. 461 (2025); *Moody*, 603 U.S. 707. The questions presented here regarding the *Central Hudson* factors are purely legal, and further factual development is unnecessary for the Court to resolve these straightforward issues.

Respondent’s argument that the issues presented are not “outcome determinative” is similarly wrong. Had the Circuit correctly applied *Central Hudson*, CRN would have prevailed on the merits of its motion. And, as this Court has repeatedly recognized, “[t]he loss of First Amendment freedoms, for even minimal periods of time,

unquestionably constitutes irreparable injury.” *Mahmoud*, 606 U.S. at 569 (cleaned up). Respondent is left in the unenviable position of arguing that the “balance of the equities” can alone tilt the preliminary injunction analysis in its favor, but the balance of the equities “necessarily fall[s]” with the merits of the First Amendment claim. Pet. App. 30a; *see also Mahmoud*, 606 U.S. at 569.

Finally, Respondent’s attempt to downplay the centrality of the Law’s commercial speech issues involves a complete mischaracterization of the Law. Respondent tries to cloak the marketing-based trigger of the age restriction, instead referring to the Law as one triggered by “ingredients, labeling, marketing, and retail categorization.” Opp. 26. That is simply wrong. The New York Legislature made clear, after the Predecessor Bill was vetoed, that “[t]his legislation takes a new approach, focused on the way products are marketed, *regardless of their ingredients*.” C.A. App. 94 (emphasis added).⁶ Respondent also suggests that the Law focuses on a product’s “intended function”⁷ rather than “speech”—but this ignores that the only “intended function” that could trigger the age restriction in the Law is one that is reflected in the product’s “labeling” and “marketing”

6. In its Second Circuit briefing, the NYAG repeatedly referred to the law as triggered by speech. *See* C.A. ECF No. 37 at 28 (“This statutory context demonstrates that [the Law] does not aim to suppress the advertising of weight-loss and muscle-building supplements, but rather, references manufacturers’ and retailers’ own descriptions of their products only to identify which supplements are subject to the law.”); *see also id.* at 56.

7. Respondent references consumer product guidelines that do not impose any obligations or prohibitions in the first instance based solely on a product’s associated speech. Opp. 26-27.

(its associated speech). Respondent cannot avoid what the Circuit made clear: the Law uses “a product’s marketing as a proxy.” Pet. App. 15a. And legislating speech as a proxy for unsubstantiated harm invites the types of legislative and judicial shortcuts that will erode this Court’s commercial speech protections.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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