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

BRIEF OF THE TAXPAYERS PROTECTION ALLIANCE FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Taxpayers Protection Alliance Foundation (TPAF) is a nonpartisan nonprofit 501(c)(3) organization dedicated to advocating for free markets and educating the public on the economic impact of governmental overreach. In its role as a watchdog, TPAF holds federal, state, and local bureaucracies to account through articles, analyses, and congressional testimony. TPAF and its affiliated 501(c)(4) organization, the Taxpayers Protection Alliance (TPA), also regularly file amicus briefs in cases that implicate free-market and limited-government principles. *See, e.g.*, *FDA v. Wages and White Lion Invs., L.L.C.*, 604 U.S. 542 (2025); *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024).

TPAF's interest in this case flows from its mission. The decision under review permits the government to suppress truthful commercial speech—and, in turn, lawful commerce—without empirical proof that the regulation will directly and materially advance its asserted interest, and without meaningful inquiry into less-restrictive alternatives. If allowed to stand, that approach risks licensing a devastating wave of speech-triggered economic regulation, burdening producers and consumers across myriad industries, and handing legislatures a blueprint for turning policy preferences into enforceable bans on commerce via the

[1] Under Rule 37.2, amicus states that counsel of record for all parties received timely notice of amicus's intent to file this brief. And under Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the brief's preparation or submission, and that no person other than amicus and its counsel made such a monetary contribution.

expedient of citing "common sense." TPAF submits this brief to explain why that result is fundamentally incompatible with first principles of our constitutional order and why this Court's intervention is warranted.

INTRODUCTION & SUMMARY OF ARGUMENT

The First Amendment's protection of commercial speech is indispensable for the free flow of information that makes America's vibrant market-based economy possible. When government suppresses truthful speech about lawful products, it not only silences sellers—it also deprives consumers of information needed to make rational choices, disrupts market forces, and substitutes paternalism for private decision-making. *Central Hudson*'s evidentiary and tailoring requirements—when applied with the rigor that the First Amendment demands—are the doctrinal mechanisms that keep this paternalism at bay. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (setting forth intermediate-scrutiny test for the constitutionality of commercial-speech restrictions).

In the decision under review, however, the Second Circuit panel defied those safeguards. New York General Business Law § 391-oo prohibits the sale to minors of dietary supplements that are "labeled, marketed, or otherwise represented" for "weight loss" or "muscle building." N.Y. Gen. Bus. Law § 391-oo(1)(a). The statute regulates no ingredient and identifies no compound as harmful; an identical product, sold under different language, remains fully lawful. Yet the Second Circuit held that "simple common sense" satisfied *Central Hudson*'s evidentiary prong and that, under the tailoring prong, the State owed no

meaningful explanation for rejecting the ingredient-based alternative that the legislature had previously embraced. The result is a diluted variation on the *Central Hudson* test that is functionally indistinguishable from rational-basis review: the State may burden truthful commercial speech, and through it lawful commerce, based on mere legislative intuition about what marketing language correlates with harm.

This Court should grant review. *First*, in decoupling regulatory authority from evidentiary accountability, the decision below undermines economic liberty and reflects an unlawful expansion of governmental power. *Second*, the speech-as-proxy-for-harm methodology adopted below imposes compounding costs on consumers, producers, and taxpayers—costs that fall hardest on the small businesses least equipped to defend themselves. *Third*, absent this Court's intervention, the threat to commerce and markets posed by the decision below will metastasize: the logic sustaining a speech-triggered supplement ban could sustain speech-triggered restrictions on countless other lawful products.

ARGUMENT

I. The Second Circuit's Watered-Down *Central Hudson* Test Flouts Fundamental Principles of the First Amendment, Commercial Speech, and Economic Liberty.

As this Court has recognized, "[s]o long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions," and "[i]t is a matter of public interest that those decisions, in the aggregate, be intelligent and well

informed." *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). That is because the "free flow of commercial information is indispensable" to the "proper allocation of resources in a free enterprise system" and to the "formation of intelligent opinions as to how that system ought to be regulated or altered." *Id.* In this way, the free flow of commercial speech promotes the First Amendment's overarching purpose: "to enlighten public decision making in a democracy." *Id.*

Contrary to commercial speech's critics—who have, since the mid-1970s, sought to consign the category to an inferior constitutional class, if not to cast the category outside the First Amendment's scope altogether—commercial speech is valuable. "[T]he relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas." *Bigelow v. Virginia*, 421 U.S. 809, 825–26 (1975). Quite the contrary, commercial speech empowers consumers to "make meaningful and expressive choices via commerce" and thereby "live the life they desire." Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 Cal. L. Rev. 335, 378 (2017). It also "reflects on and reshapes the meaning of social life" and thus contributes to "cultural competence"—that is, "the ability to understand, navigate, and participate in cultural meanings and cultural discourse." Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 Nw. U. L. Rev. 1053, 1087–88 (2016); *see also* Jonathan H. Adler, *Persistent Threats to Commercial Speech*, 25 J.L. & Pol'y 289, 297–98 (2016) ("Commercial advertising and product labeling routinely appeal to potential customers' normative preferences and cultural values."); Martin H. Redish, *Commercial Speech, First*

Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination, 41 Loy. L.A. L. Rev. 67, 81 (2007) ("[S]peech concerning commercial products and services can facilitate private self-government in much the same way that political speech fosters collective self-government."); Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 Yale J. on Reg. 85, 87 (1999) ("Advertising also fosters competitive markets and educates Americans about choices vital to their lives."); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 Tex. L. Rev. 777, 781 (1993) ("To the extent that advertisers are selling fantasies, lifestyles, identity, or anything other than 'hard core' transactional information, they are doing what all other speakers routinely do."). Commercial speech—like other protected speech—facilitates the self-actualization that enriches the free marketplace of ideas on which democratic self-government depends.

Although political speech appropriately lies at the core of the First Amendment's protection, speech related to the actual market is a deserving participant in the metaphorical market. This Court acknowledged as much when it observed that "the particular consumer's interest in the free flow of commercial information … may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Va. State Bd. of Pharm.*, 425 U.S. at 763.

More fundamentally, economic freedom and political freedom are joined at the hip. As Justice Scalia put the point: "The free market, which presupposes relatively broad economic freedom, has historically been the cradle of broad political freedom, and in modern

times the demise of economic freedom has been the grave of political freedom as well." Antonin Scalia, "Economic Affairs as Human Affairs," *in Economic Liberties and the Judiciary* 31–32 (James A. Dorn & Henry G. Manne eds., 1987). This observation echoes "American political philosophy at the time of the Framing," which drew on the Whig tradition and John Locke's writings in construing "freedom of speech and property rights … simply as different aspects of an indivisible concept of liberty." John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. Chi. L. Rev. 49, 63–64 (1996). None other than Benjamin Franklin quoted the widely read and highly influential Cato's Letter No. 15 to proclaim that there was "no such thing as publick liberty, without freedom of speech": "This sacred privilege is so essential to free government, that the security of property; and the freedom of speech, always go together; and in those wretched countries where a man cannot call his tongue his own, he can scarce call anything else his own." Silence Dogood, *No. 8*, The New-England Courant (July 9, 1722), *reprinted in* 1 *The Papers of Benjamin Franklin* 28 (Leonard W. Labaree et al. eds., 1959) (quoting Thomas Gordon, *Of Freedom of Speech* (Feb. 4, 1721), *reprinted in* 1 John Trenchard & Thomas Gordon, *Cato's Letters* 110 (Ronald Hamowy ed., 1995) (reprinting No. 15)).

From this perspective, the value of truthful commercial speech becomes unassailable: it is the connective tissue between economic and political liberty. When government suppresses truthful information about lawful products, it diminishes both the marketplace of ideas and the marketplace of goods—and, with them, the economic liberty on which a free people's political liberty rests.

The *Central Hudson* test, when soundly applied, operationalizes this deeply rooted understanding. In its constitutional form—which this Court should confirm by granting review—the framework demands that federal, state, and local governments justify infringements on commercial speech by marshaling real evidence of real harm and by demonstrating a careful fit between means and ends. Those evidentiary and tailoring requirements properly separate the wheat of lawful commercial regulation from the chaff of unlawful commercial suppression. Thus, when this Court insists that the government "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), it preserves a basic condition of freedom: that the government may not darken the marketplace of goods, ideas, and choices on the strength of its say-so. *See also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505–07 (1996) (observing, in plurality opinion, that absence of "any findings of fact" and "any evidentiary support" defeated government's *Central Hudson* showing); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995) (rejecting commercial-speech restriction under *Central Hudson* where government proffered "anecdotal evidence and educated guesses").

Yet the Second Circuit's decision under review deemed *Central Hudson*'s evidentiary requirement satisfied based on "simple common sense" and two studies that failed to link products marketed for "weight loss" or "muscle building" to any actual harm to minors. *See* Pet. App. 13a. The court also deemed *Central Hudson*'s tailoring requirement satisfied by deferring to the New York legislature, excusing the government from its burden and dispensing with any

inquiry into whether a non-speech alternative was feasible. *See* Pet. App. 14a. Such rubber-stamping was especially uncalled for given that the law's sponsor could not identify specific research establishing the link between marketing and harm. On that missing evidence, a state assembly member even said the quiet part out loud: "I haven't seen it but I—I trust that it's probably out there." Pet. 20 n.2; Dist. Ct. ECF No. 25-1 at 7. Overall, then, the court's analysis was intermediate scrutiny in name only—and rational-basis review in substance.

While this Court has repeatedly rejected the "'highly paternalistic' view" that government may freely "suppress or regulate commercial speech," *see Central Hudson*, 447 U.S. at 562 (citation omitted), paternalism is precisely what fills the vacuum when, as here, courts vitiate *Central Hudson*'s critical doctrinal checks. A watered-down *Central Hudson* invites legislatures to enact protectionist, moralistic, or politically convenient restrictions on commerce while labeling them safety measures and gesturing at "common sense." A robust *Central Hudson*, however, is a bulwark against a particular governmental power grab that contravenes bedrock principles of economic liberty undergirding our constitutional order: governmental distortion of the free market by suppressing truthful commercial speech about lawful products based on regulatory hunches. To secure vital First Amendment protections against such governmental overreach—that is, the evidentiary and tailoring requirements—this Court should grant review.

II. The Approach Below Permits the Government to Evade Accountability and Imposes Undue Costs on Consumers, Producers, and Taxpayers.

Reviewing the Second Circuit's approach below is particularly warranted because it treats marketing as a stand-in for harm and permits the government to skirt the harder work of direct regulation by burdening speech instead. The challenged statute does not directly regulate any product; it does not restrict any product feature, ingredient, or chemical compound. Rather, it bans the sale of a product to minors based on how the product is "labeled, marketed, or otherwise represented." N.Y. Gen. Bus. Law § 391-oo(1)(a). An identical product, sold under different language, is lawful. A different product, sold under the targeted language, is unlawful. Speech is the trigger, while the product's nature is incidental.

That regulatory architecture blunts the political transparency, accountability, and legitimacy that attend direct product regulation. If the government bans a dangerous ingredient, taxpayers and their elected representatives can debate the evidence militating for that ban. If the government imposes product-safety standards, taxpayers and their elected representatives can evaluate whether those standards address meaningful risks. But if the government restricts speech as a proxy for risk, the true regulatory theory is shrouded from public view and the asserted safety risks escape public scrutiny. Rather than identify dangerous ingredients or show the hazards of covered products, the government simply burdens the messaging associated with them. The more difficult questions—which products and ingredients are

harmful, what empirical findings support those determinations—are left unanswered.

Sorrell v. IMS Health Inc., 564 U.S. 552 (2011), illustrates the danger. There, Vermont barred pharmacies from selling prescriber-identifying information for marketing purposes and barred pharmaceutical manufacturers from using that information to market brand-name drugs to doctors. *Id.* at 557–61. This Court held that the Vermont law imposed content- and speaker-based burdens on protected expression and failed heightened First Amendment scrutiny. *Id.* at 580. In doing so, this Court rejected the position of the Department of Justice, which had submitted an amicus brief supporting Vermont and invoking "common sense" as a reason to uphold the law. Br. for the United States as Amicus Curiae Supporting Petitioners, *Sorrell v. IMS Health Inc.*, No. 10-779, 2011 WL 719647, at *25 (2011).

As Professors Jane and Derek Bambauer explain, Vermont's speech restriction allowed the State to avoid "direct regulation" and thereby evade the "greater political and moral accountability" that arises when government must "reveal, and confront directly, its end goal." 105 Cal. L. Rev. at 363–64. The statute could "pretend to be protecting privacy when its real reason was to cabin drug prices," transforming a contested policy choice about pharmaceutical costs into a selective ban on information. *Id.* Policy pitfalls aside, a forthright rule limiting prescribing practices would have required the State to defend that judgment in the open, where "debates about the best way to optimize health costs and drug innovation would receive their full airing." *Id.* Instead, by "structuring the law as a ban on information," Vermont "disguised the

stakes and scattered its burdens." *Id.* So too here, New York's law is a paternalistic end-run around democratic accountability that the First Amendment forbids. Just as Vermont used privacy to avoid defending drug-price regulation, New York uses marketing to avoid defending ingredient regulation.

Under the Second Circuit's logic, a legislature that could not muster the evidence to ban an ingredient may instead ban speech about products containing that ingredient, thus achieving the same suppressive effect without ever having to defend the empirical premise. But "[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). The Second Circuit's approach conflicts with that command. Indeed, the New York legislature had pivoted from an ingredient-based bill to a speech-based bill—not because ingredient-based regulation had proven to be an unsuccessful policy, but rather because speech-based regulation was politically easier. *See* Pet. 6.

More specifically, the speech-as-proxy-for-harm method ushers in three types of compounding costs. *First*, it imposes costs on consumers. Regulations such as New York's law operate by reducing the truthful information available about products in the marketplace. Producers respond rationally: they scrub from their marketing phrases that might attract regulatory attention, even when those phrases accurately describe what the product does. For consumers searching for products that meet a particular need, those products are harder to find. Counterfeit and unregulated alternatives, sold online or through gray-market channels, become more attractive, as they

remain outside the speech-based regulatory net. The regulation's intended beneficiaries are ultimately saddled with worse information and products.

Second, the speech-as-proxy method generates costs for producers, especially small businesses. Litigation over what speech triggers New York's statutory prohibition is now a fixture of New York's regulatory landscape. Indeed, the statute contemplates this outcome: it instructs courts to determine, on a case-by-case basis, whether a supplement "is labeled, marketed, or otherwise represented for the purpose of achieving weight loss or muscle building" by assessing such subjective factors as: "whether the product's labeling or marketing bears statements or images that express or imply that the product will help … reduce … the process by which nutrients are metabolized"; or "whether the retailer" has objectionably "categorized" the supplement through "signs" or "display[s]." N.Y. Gen. Bus. Law § 391-oo(6); *see also* Pet. App. 5a. While large incumbents can readily absorb the compliance burdens of such laws—by redesigning labels, segmenting distribution channels, and managing a patchwork of state-specific restrictions—smaller manufacturers and new market entrants frequently cannot. As TPA has observed, "[i]t is ever the case that regulatory complexity subsidizes large incumbents at upstarts' and innovators' expense. Small businesses usually lack the large pools of on-hand cash and lawyers necessary to navigate complex regulatory waters." David B. McGarry, *When the Red Tape Gets All Tangled Up With Itself*, Taxpayers Protection Alliance Blog (July 29, 2024). Speech-triggered regulation is a potent form of that "regulatory complexity" because liability turns on contested interpretive judgments about marketing copy rather than on

objectively measurable product attributes. Speech restrictions such as New York's thus become barriers to entry, protecting incumbents while impeding market competition and constraining consumer choice.

Third, the speech-as-proxy method foists costs onto taxpayers. Speech-triggered regulations do not enforce themselves. They require government officials to investigate marketing claims; private and public parties (such as the New York Attorney General) to litigate whether a forbidden message has been "represented"; and courts to conduct fact-intensive inquiries into whether the speech crosses the statutory line. Appeals follow. None of that regulatory machinery—which turns on contested judgments about speech rather than on objective product features—is free, and taxpayers foot the bill.

III. Without This Court's Review, the Approach Below Will Spread.

As the petition notes, once marketing alone becomes a sufficient regulatory trigger, the technique is perniciously portable. Restaurants offering "fast food" could be barred from serving so-labeled products to minors. So too with manufacturers offering "snacks." Vehicles advertised for "performance" could be denied to drivers under twenty-five. *See* Pet. 33–34. In each case, the legislature would point to its "common sense" understanding that the marketing language correlates with the regulated harm, and the courts—under the Second Circuit's framework—would defer.

The risk this regulatory move poses to economic liberty and free speech is acute because it is so politically attractive. Marketing-based regulation supplies legislators with a fig leaf of consumer protection while sparing them the more difficult, more accountable

work of gathering evidence and adopting direct, product-level rules. It permits selective enforcement against disfavored industries, depending on which marketing vocabulary regulators choose to police. In a republic premised on the rule of law for predictable economic activity, that is a corrosive arrangement.

The petition presents this Court with a clean vehicle to restore or clarify the evidentiary and tailoring requirements for commercial-speech laws before the speech-as-proxy-for-harm method proliferates. The legal questions are sharply presented, the conflict is mature, and further percolation will serve no useful purpose. Delay will only enable the regulatory technique endorsed below to spread to new industries and new States, multiplying the costs to consumers, producers, and taxpayers along the way.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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