24-1343-cv

United States Court of Appeals

for the

Second Circuit

COUNCIL FOR RESPONSIBLE NUTRITION,

Plaintiff-Appellant,

– v. –

LETITIA JAMES, in her official capacity as New York Attorney General,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CORRECTED REPLY BRIEF FOR PLAINTIFF-APPELLANT

MICHAEL B. LEEUW
TAMAR S. WISE
ARIANNA K. MCLAUGHLIN
COZEN O'CONNOR
Attorneys for Plaintiff-Appellant
175 Greenwich Street, 55th Floor
New York, New York 10007
(212) 509-9400

CP COUNSEL PRESS (800) 4-APPEAL • (332249)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PRELIMINARY STATEMENT

The New York Attorney General's ("NYAG") Opposition Brief ("Opp.") does little to bolster the District Court's denial of CRN's Motion to enjoin the enforcement of the Act.[1] As an initial matter, the NYAG asks this Court to create an unsupported approach for determining which types of legislation implicate the First Amendment. That the Act does not *directly* tell CRN's members what they can and cannot say is not the end of the inquiry. Where, as here, the regulation is exclusively triggered by specific speech, the First Amendment is also triggered. And the NYAG *concedes*—in the first page of its Opposition—that the Act's age-verification obligations are triggered by the speech associated with a product. The Act itself is explicitly designed to "focus[] on the way products are *marketed*, regardless of their ingredients[,]" as it targets "***drugs based on their marketing***." JA94 (emphasis added). The Act would regulate no product absent speech. Under controlling caselaw that the NYAG ignores, the Act is a speech regulation that must pass constitutional scrutiny, and is the type of regulation that inherently causes irreparable harm warranting injunctive relief.

Similar cursory analysis infects the entirety of the Opposition. For example, the NYAG repeatedly refers to the Act as a restriction on "weight loss and muscle building supplements"—but the Act does not define those terms, and there is no such

[1] Defined terms have the same meaning as in CRN's Opening Brief.

category of product in the marketplace. There is no inherent characteristic that makes a particular dietary supplement a "weight loss" or "muscle building" supplement. But using this misleading characterization fuels the NYAG to ignore the Act's speech trigger and the fact that there is not a shred of legislative history linking eating disorders in minors (on the one hand) and products with specific marketing "regardless of their ingredients" (on the other). This undermines any suggestion that the Act will materially affect the harm the Act purports to address. But the test that this Court must apply requires it to consider whether the link between the Act's goals (protecting from purportedly dangerous ingredients and reducing eating disorders in minors) and the mechanism is *actually* aimed at achieving that goal.

The amicus brief of Public Health Researchers (et al.) (collectively, "Amici") further demonstrates this point. Amici cite to studies purportedly reflecting the dangers of "weight loss" or "muscle building" supplements; but the studies either fail to define the product class with any specificity or focus on *adulterated products* and *illegal ingredients*, which are already regulated and irrelevant to the Act. Amici also suggest that "federal law has required manufacturers to disclose" whether a product is a weight-loss or muscle-building supplement to the FDA. ECF 40.1 at 37 (citing 21 U.S.C. § 343(r)(6); CFR § 101.93). But those regulations only require notice to the FDA *if* a manufacturer elects to advance a "structure/function claim"—

they do not require dietary supplement manufacturers to categorize their products at all.

Finally, the NYAG does not meaningfully respond to CRN's remaining arguments about the Act's constitutional infirmities. The NYAG suggests that the Act is "narrowly tailored" because it is more effective than any non-speech-implicating alternative at combating access to dangerous ingredients—but it fails to cite any empirical evidence whatsoever. The NYAG argues the Act is not vague but simply recites undefined, ambiguous statutory language as proof, and claims that core problems lie on the "margins." And the NYAG asks this Court to find the Act is not preempted by the FDCA even though a structure/function claim that passes muster under the FDCA would still have to abide by additional requirements (age-verification) under the Act.

Ultimately, the problems with the Act extend far beyond its constitutional deficiencies. The Act's age-based restrictions will not only ensure that minors will not have access to products that may be beneficial (and have nothing to do with dangerous, tainted, or illegal ingredients), but for some such products, the general consumer public will *also* lose access. In an over-abundance of caution to avoid violating the Act, stores will limit self-service, put products behind a counter, or otherwise make the purchase of products inconvenient—and the inevitable result is that all consumers will be limited in the health-related products they can

purchase. There is certainly no public interest in creating a marketplace where fewer dietary supplements are available.

CRN respectfully requests that the Court reverse the District Court and direct entry of a preliminary injunction enjoining enforcement of the Act.

ARGUMENT

I. CRN Is Likely To Prevail on its First Amendment Claim

A. The Act Regulates Speech, Not Conduct[2]

The First Amendment is directly implicated in this case because the Act's prohibition on certain conduct (sales of dietary supplements to minors) is directly and exclusively *triggered* by speech. Interestingly, the NYAG does not appear to disagree that this is how the statute works—on the very first page of the Opposition it concedes that "the law looks to manufacturers' and retailers' *representations* about the purposes of the products to determine whether a given supplement is subject to the sale restriction." (Opp. 1; *see also id.* at 28.) The District Court also recognized this in denying the NYAG's motion to dismiss CRN's First Amendment claim. *See* ECF 58 at 4 (basing denial on recognition that "following Governor Hochul's 2022

[2] The NYAG failed to raise below its suggestion that commercial speech cannot be the basis for a First Amendment facial challenge; it is therefore waived on appeal. *See Agarunova v. Stella Orton Home Care Agency, Inc.*, 794 Fed. Appx. 138, 140 (2d Cir. 2020). Moreover the NYAG's inapposite case law addresses only "overbreadth" challenges, whereas CRN's First Amendment challenge is that the Act is unconstitutional in all its applications.

veto of the prior version of the Statute, the Legislature decided to target 'the way in which products are labeled and marketed, rather than what the actual products are within the diet pill'"). Despite this, the NYAG argues that the Act's *triggering* function "does not transform a restriction of these types of products to minors into a direct regulation of speech." (Opp. 24.) But that is precisely what this Court, and other federal appellate courts, have said *does* distinguish a restriction on conduct from a restriction on speech. *See, e.g.*, *Honeyfund.com Inc. v. Governor*, 94 F.4th 1272, 1278 (11th Cir. 2024); *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 112 (2d Cir. 2017); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010); *cf. Clementine Company, LLC v. Adams,* 74 F.4th 77, 86 (2d Cir. 2023).

The NYAG's response to this case law is an exercise in deflection. The NYAG argues—without any basis—that *Honeyfund* and *Centro* concerned laws "that had the express purpose and direct effect of prohibiting certain speech." (Opp. 26.) But that places the cart before the horse. The laws in those cases did not (on their faces) prohibit speech—they included nominally conduct-based prohibitions (as the Act does here) that were triggered by speech and were, therefore, subject to First Amendment scrutiny. The NYAG suggests that the First Amendment violation in the *Honeyfund* case hinged on whether the law at issue "clearly sought to restrict certain viewpoints." (Opp. 27.) But the Eleventh Circuit held that the First

Amendment was implicated because the law's prohibition on holding meetings was triggered by looking at the content of the speech at the meetings. That made the law a *speech* regulation rather than a *conduct* regulation. *See Honeyfund*, 94 F.4th at 1278. The NYAG similarly misrepresents this Court's holding in *Centro*. The law at issue in *Centro* did not "prohibit a specific category of speech." (Opp. 27.) Instead, to know whether a car violated the law, the enforcement agency was required to "monitor and evaluate the speech of those stopping or attempting to stop vehicles and … sanction the speaker only if a suspect says the wrong thing." *See Centro*, 868 F.3d at 112.

Contrary to the NYAG's position, these cases make clear that a regulation that purports to address *conduct* is, in fact, a regulation of *speech* where the prohibition of conduct is triggered by—and therefore requires an evaluation of—underlying speech. And, as the NYAG admits, and as the District Court acknowledged in denying the NYAG's motion to dismiss the First Amendment claim, that is exactly how the Act functions.[3]

[3] The NYAG references guidelines that do not impose any obligations or prohibitions in the first instance based *solely* on speech associated with a product. The FDCA, for example, defines "drug" by reference to many factors, *one of which* is the "intended use" of the product, and *one way* to determine "intended use" is to look at labeling and advertising. Moreover, courts have suggested that the "intended use" prong of the FDCA may itself have First Amendment implications. *See, e.g.*, *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012). Separately, the Anti-Drug Abuse Act concerns illegal conduct that cannot be the subject of protected speech. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 496

The NYAG does not even attempt to justify the District Court's extensive reliance on this Court's holding in *Adams*. Indeed, other than adding *Adams* to a string cite, the NYAG does not rely on it at all. That is because *Adams* supports CRN's position that where a law applies irrespective of "the content of [the plaintiff's] speech or the fact that they were engaged in speech at all," it is a law that regulates conduct, not speech. *See Adams*, 74 F.4th at 86.

The NYAG also argues that, despite that the Act's restrictions are triggered by speech, it does not implicate the First Amendment because it does not dictate *what* CRN's members "may or may not say" in advertisements. (Opp. 17.) The NYAG relies on a stunted interpretation of *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006) ("*FAIR*"). The NYAG misreads *FAIR* by suggesting that the Supreme Court held that the distinction between *speech* and *conduct* regulations hinges on whether a statute "dictates what regulated entities 'must do' and 'not what they may or may not say.'" (Opp. 23.) But the *FAIR* Court did no such thing. Indeed, the law at issue in *FAIR*, the Solomon Amendment, withheld federal funds from schools that denied military recruiters the same access provided to other recruiters. On its face, it neither required (or limited) speech in

(1982). And the Consumer Product Safety Commission regulation defining "infant cushion" specifies (as one of several criteria) that the product is 'intended or promoted" for a specific use, but the speech associated with the product does not dictate obligations or prohibitions.

any way, nor did it require looking at, monitoring, or evaluating any party's speech. The NYAG's description of the Solomon Amendment—that it required conduct "tied to [] speech" and had a "speech trigger" (Opp. 25)—is pure fiction. The Court made clear that the schools' speech was unaffected by the Solomon Amendment, schools were free to speak out against the military and even organize protests. And there certainly was no "speech trigger" in the Solomon Amendment. *FAIR* is primarily a *compelled speech* case—it considered the extent to which the Solomon Amendment might be viewed as forcing schools to be conduits of the military's messaging. *See* 547 U.S. at 61-65. And, to the extent that accommodating the military recruiters required the law schools to send scheduling emails or hang up fliers that announced when interviews were taking place, the *FAIR* court found these nominal speech implications were an incidental burden. *Id.* at 62. That is not the situation here where the Act provides that speech *triggers* the statutory restrictions. Without particular language, there would be no restrictions.[4]

The NYAG's citation to *City of Austin v. Reagan National Advertisers of Austin, LLC*, 596 U.S. 61 (2022), fares no better. That case *presumed the* application

[4] The NYAG overlooks this distinction in relying on *FAIR* for the proposition that a law may illegalize conduct evidenced by speech—*FAIR* did not concern a situation where those enforcing the law must look solely to speech to evaluate legal compliance.

of the First Amendment and dealt only with the level of constitutional scrutiny to apply to the challenged regulation.

The NYAG also relies on cases where courts have found the First Amendment not to be implicated where a statute is found not to regulate *expressive conduct*—i.e., non-speech that a party argues has expressive value and is therefore worthy of First Amendment protection. (Opp. 33.)[5] But CRN does not rely on the fact that advertising dietary supplements is expressive conduct—it is speech! Indeed, the Act is only ever *triggered* by speech, as the NYAG concedes.

The NYAG strays even further by contrasting the Act with other advertising restrictions, such as laws that ban beer labels displaying alcohol content or bans on promoting drugs for off-label uses. (Opp. 23, citing *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995); *Caronia*, 703 F.3d at 164-65.) Both of those cases involved statutes directly restricted what advertisers could and could not say, and both laws were held to be unconstitutional. But that is not the only way that a law

[5] The NYAG's reliance on *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 47 (2017) is puzzling because the Supreme Court found the challenged regulation *did* in fact implicate the First Amendment. Similarly, the Seventh Circuit's decision in *United States. v. Antzoulatos*, 962 F.2d 720 (7th Cir. 1992), did not involve an analysis of speech versus conduct; it was a constitutional vagueness question in which the court noted, without analysis, that in general, "[r]egulation of economic activity, such as [defendant's] ability to sell cars, simply does not implicate the First Amendment." *Id.* at 726.

can run afoul of the First Amendment, like the one here, where commercial speech *triggers* the restrictions in the statute.[6]

B. The Law Burdens Content-Based Restrictions and Fails Intermediate Scrutiny[7]

The NYAG also argues that the Act does not impose content-based financial burdens, and tries to limit broad First Amendment principles to specific fact patterns. But that effort is belied by the broad sweep with which the Supreme Court discussed content-based financial burdens in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991), a discussion that was not limited in any way by the facts of that case:

> A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. … This is a notion so engrained in our First Amendment jurisprudence that last Term we found it so "obvious" as to not require explanation.

---

[6] NYAG's citation to *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2011), is equally misplaced. The portion of *Lorillard* that the NYAG cites relates to expressive conduct, not actual speech. *See* 533 U.S. at 569. Moreover, the portions of *Lorillard* that addressed commercial speech found that the regulations failed *Central Hudson* and violated the First Amendment. *Id.* at 561 ("we conclude that the regulations do not satisfy the fourth step of the *Central Hudson* analysis").

[7] The NYAG's argument that CRN did not make this argument before the District Court is risible. The supplemental briefing on this issue was before the District Court when it reached the decision that is the subject of this appeal. Indeed, the District Court addressed the burdened speech argument in its opinion, and CRN appeals in part from that determination.

Id. at 116 (cleaned up).[8] And here, because there is a financial burden (age verification procedures and costs) based on speech with certain content (marketing for the purpose of achieving weight loss or muscle building) but not other content (marketing for any other purpose), the Act presents a First Amendment concern under controlling precedent.

In the face of this clear case law, the NYAG mischaracterizes CRN's arguments. It suggests that CRN complains about a *penalty* for disfavored speech about "weight-loss or muscle-building supplements" or that CRN is unhappy the Act "incidentally burdens speech by making it more expensive." (Opp. 28, 30). This mischaracterizes the premise of CRN's burdened speech argument: where there is a financial burden placed on *some* speech but not *other* speech, that implicates the First Amendment. Moreover, there is no such thing (in the statute or otherwise) as a "weight-loss supplement" or "muscle-building supplement"—those are just NYAG-invented shorthand for what the Act is *supposed* to do. If the New York Legislature had defined these concepts by pointing to specific, (allegedly) harmful, ingredients or products, we would not be in this Court.

[8] Contrary to the NYAG's argument, the possibility of a heightened constitutional inquiry for content-based commercial speech was not foreclosed by this Court, but specifically contemplated. In *Vugo Inc. v. City of New York* , 931 F.3d 42, 49 n.7 (2d Cir. 2019), this Court held that "strict scrutiny might apply to some commercial speech restrictions out of concern that the government is seeking to keep would-be recipients of the speech in the dark or otherwise prevent the public from receiving certain truthful information." *Id.* (cleaned up).

1. The NYAG Departs from the District Court on the Alleged "Substantial Government Interest"

The District Court found that the government has a substantial interest in promoting public health ***and*** regulating misleading information." (JA-187.) On the basis of *this* purported government interest, the District Court found the "substantial interest" prong of the *Central Hudson* analysis satisfied—and it measured the rest of the *Central Hudson* facts against *this* purported government interest. CRN argues that the District Court erred in finding that "regulating misleading information" was a substantial government interest (because, *inter alia*, "misleading" information is not protected commercial speech)—and the NYAG does not dispute that. Indeed, the NYAG nowhere mentions "regulating misleading information" as a government interest and excises that part of the quote from the District Court opinion. And the District Court's *Central Hudson* analysis is therefore premised on the wrong government interest, an error that infects the remaining *Central Hudson* analysis and undermines its conclusions.

2. The Act Does Not Alleviate a Harm to a Material Degree

The NYAG defends the District Court's conclusion on this *Central Hudson* prong by claiming that "[t]he record is replete with evidence of the dangers that ***weight-loss and muscle-building supplements*** pose to the public, in general, and to minors, in particular." (Opp. 33 (emphasis added).) But this is wrong for several reasons. The record is not "replete with evidence" of the dangers of *supplements*

(*with certain marketing or representations*) on "the public, in general, and to minors, in particular." The record is utterly lacking in this regard. Neither the District Court nor the NYAG point to a single piece of evidence linking *marketing or representations* about dietary supplements with a detriment to public health.[9] Instead, the NYAG spills pages of ink about the misleading studies in the legislative record that purport to show alleged public health effects of "weight loss and muscle building supplements," or, worse, undefined, vague references to a category of dietary supplements the NYAG calls "these products." (*Id*. 33-35.)[10] The NYAG is asking the Court to ignore that (1) the supplements subject to the Act are defined solely by their marketing and (2) there is no record evidence at all about anything related in any way to a product's marketing. This stands in stark contrast to the cigarette cases, like *Lorillard*, where there was extensive research cited by the relevant regulator, showing the connection between different types of tobacco advertising and use in minors. *See, e.g.*, *Lorillard*, 533 U.S. 558-64. Indeed, the

[9] Nor have Amici. Amici instead resort to inapposite studies, such as those addressing *adulterated* products, and misrepresenting their cited evidence. For instance, Amici claim that "the FDA has issued a warning related to teen and young adult consumption of muscle building supplements[.]" ECF 40.1 at 25. Amici neglect to inform the Court that the cited article was a targeted advisory that related only to one specific type of illegal ingredient known as a selective androgen receptor modulators.

[10] Tellingly, the NYAG fails to address the concerning fact that Dr. Nagata's letter supported the Predecessor Act based on specific ingredients in dietary supplements, not the marketing associated with them.

NYAG asks this Court to ignore the relevant standard, which requires a direct link between the regulated speech and the statutory goal—case law that the NYAG does not address. JA-189 (citing *L.T. v. Zucker*, 2021 U.S. Dist. LEXIS 196906 * 17-20 (N.D.N.Y. Oct. 13, 2021).

The NYAG argues, based exclusively on its own say-so, that "it is undisputed that the sales restriction will reduce minors' access to, and use of, these products"[11]—but it is again unclear what "these products" means. If the governmental concern is with "dangerous" products, how is it undisputed that age-restrictions based on marketing claims will limit minors' access to "dangerous" products, much less the illegal or adulterated products that are not even covered by the Act? The NYAG ignores the fact that products with "dangerous" ingredients might not make weight-loss or muscle-building claims about their products. And it is far from "undisputed" that the Legislature's approach will *in fact* make a *material* impact on the problem that the Legislature purported to address. *Cf. Vugo, Inc.*, 931 F.3d at 52; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 493 (1996). And while the NYAG relies on *Bad Frog Brewery, Inc. v. New York State Liquor Authority*, 134 F.3d 87, 100 (2d Cir. 1998), in arguing that the statute need not "attack a problem with a total effort" to satisfy this prong, there, this Court rejected

[11] It is contrary to what the NYAG argued below: "[n]or does the Statute generally deprive consumers—minors and adults alike—of the ability to obtain dietary supplements, including those regulated by the Statute." (ECF 36 at 23.)

the proposed "narrow [] view" that "any regulation that makes any contribution to achieving a state objective would pass muster" because this prong "requires that the regulation advance the state interest 'in a *material* way.'" *Id*. at 100 (citing cases where prohibitions failed this prong because they did not address the purported problem broadly enough).

3. The Act Is Not Narrowly Tailored

The Act fails to satisfy the fourth *Central Hudson* prong, requiring that a law "[does] not burden substantially more speech than necessary to further its legitimate interests." *Centro*, 868 F.3d at 115. The NYAG's arguments rely once again on its completely unsupported *ipse dixit* that there is some "reasonable fit" between the harm it seeks to address and the use of "weight-loss and muscle building supplements." (Opp. 40.) Again, there is absolutely no evidence of a "reasonable fit" between restricting products marketed for weight-loss and muscle-building, on the one hand, and eating disorders in children, on the other. The NYAG delves deep into the record in an attempt to show the harms of "*these products*," (Opp. 40-41), but it is futile. The products referenced in the studies in the record are *not* the same as the products age-restricted by the Act. Again, the NYAG's reliance on *Lorillard* is misplaced. There, Massachusetts restricted advertising of *tobacco products* because of undisputed harms inherent in *cigarettes*. *Id*. 533 U.S. at 542. Here, by contrast, the Act does not restrict specific dangerous products at all but, instead, age-

restricts *products based on marketing* because of phantasmagorical harms from unrelated *dietary supplements that actually contain dangerous or adulterated ingredients*.

The NYAG unpersuasively addresses the inconvenient fact that the Predecessor Bill would have been a potential solution to the problem it was seeking to engage, but without any First Amendment implications. The NYAG argues, without any record evidence (and based on inapposite case law), that the Predecessor Bill would have been "less effective at furthering the asserted state interest." (Opp. 45.) The NYAG relies only on the Governor's veto, which noted that the State's agencies are ill-equipped "to analyze ingredients used in countless products, a role that is traditionally played by the FDA." (*Id.*) But there is no reason to believe the Act, which targets *marketing* of products (with absolutely no empirical evidence that this is a viable mechanism), would be any more effective. This is particularly so because, as the NYAG concedes, the goal of the Act was to address "dangerous products." (Opp. 6-7). This means that there was a way to potentially construct the legislation *without addressing speech*—which is a fact that even under the NYAG's case law undermines the fourth *Central Hudson* factor. *See Board of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 478 (1989). Moreover, presumably, the Legislature must have had *some* dangerous products in mind when it chose to

legislate an entire industry. And if it did not, it probably should not have been legislating in this area at all.

The NYAG brazenly asserts that the Predecessor Bill did not effectively advance the State's interest "because the industry can easily work around a static list of" regulated ingredients. (Opp. 45). But what does that even mean? In any event, there was nothing in the Predecessor Bill that required the "bad ingredient" list to be static; it could address new potentially-dangerous ingredients. At the same time, the NYAG recognizes that the Act's focus on marketing and not ingredients creates "the possibility that some bad actors may attempt to willfully evade the law[.]" (*Id.* at 50). The NYAG cannot have it both ways—either the Predecessor Bill was a less restrictive alternative to the Act notwithstanding "the possibility" of "bad actors" or the Act does not directly and materially advance the State's interest because of the myriad of "work around[s]." (*Id.*) Either renders the Act unconstitutional under *Central Hudson.*

Additionally, if the legislature was concerned with raising awareness of the purported dangers of dietary supplements, *see* JA-94, the most direct way to do so would have been through an educational campaign with its own speech. *See, e.g.*, *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 97 (1977) (invalidating law and noting government could educate public through "widespread publicity" rather than regulating speech).

Finally, the NYAG misconstrues the law when it argues that the "constitutional applications" of the Act are "legion," referencing products that allegedly "clearly constitute supplements for weight loss or muscle building." (Opp. 44.) But whether or not these products are subject to the Act (a point CRN disputes) has no bearing on the *constitutionality* of the Act from a First Amendment perspective. In other words, even if CRN were to concede that any given product qualified under the Act as a regulated product, that would not be a constitutional application of the Act. The Act would *still* be triggered by speech, and would *still* require (at a minimum) intermediate scrutiny, and the Act would *still* fail the *Central Hudson* test.

C. The Act Requires Unconstitutional Compelled Speech

The NYAG's argument that CRN did not preserve its argument regarding compelled speech is absurd; the argument was made in supplemental briefing that was before the District Court when it decided the preliminary injunction motion, and the court addressed the argument. That the specific *theory* of compelled speech is not spelled out in the pleadings is irrelevant; "under the Federal Rules of Civil Procedure, a complaint need not pin plaintiff's claim for relief to a precise legal theory." *Skinner v. Switzer*, 562 U.S. 521, 530 (2011); *see also Wynder v. McMahon*, 360 F.3d 73, 77 (2d Cir. 2004) ("Our case law makes clear that ... federal pleading is by statement of claim, not by legal theory.") (cleaned up). The NYAG relies

instead on an inapposite case where the plaintiff disclaimed a particular category of damages and then tried to walk back that position on appeal. That has no bearing here.

Substantively, the NYAG appears to misunderstand CRN's compelled speech argument. The Supreme Court has made clear that conduct can be deemed "expressive conduct" where it reflects "an intent to convey a particularized message" and the "expressive conduct would be understood as conveying the particular message." *Spence v. State of Washington*, 418 U.S. 405, 410-11 (1974). In forcing sales of certain products to be accompanied by age-verification procedures, the Act is forcing CRN members to relay a particularized message with the sale—that the product is unsafe for minors. And this is exactly the message the NY legislature wanted to convey through imposition of the age-verification procedure. The Court need look no further than the words of the Act itself, in which the legislature noted that "[b]y implementing an age-based restriction on sales, [it] can draw attention to the health risks of using these products and reduce the incidents of use among youth." JA-94. CRN's members are compelled conduits for this message with which they disagree, which is, therefore, compelled speech subject to heightened constitutional scrutiny.

Finally, the NYAG is simply wrong in arguing that compelled speech is governed by the lesser review standard articulated in *Zauderer v. Office of*

Disciplinary Counsel, 471 U.S. 626 (1985). That standard applies only where the regulation mandates disclosure of truthful and non-controversial commercial speech. *See New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 132 (2d Cir. 2009). Here, the compelled speech—that dietary supplements subject to age verification are dangerous for minors—is not truthful, nor is it "non-controversial." Indeed, it is not even commercial speech, as it relates to a message about the safety of a class of products.

D. The NYAG's Arguments on CRN's Remaining Claims Are Inapt

1. CRN's Appeal as to These Claims is Not Moot

The NYAG makes the perfunctory argument that CRN cannot appeal the denial of the preliminary injunction relating to its "other" constitutional claims (those that were dismissed by the district court). That is just wrong as a matter of law. The NYAG relies on cases that all share one key feature: in each of the cases, the district court had dismissed the *entire case*, creating a final and appealable order from which the appellant could proceed and leaving no live, justiciable case before the District Court. That has not happened here. The fact that the District Court held CRN had plausibly alleged a First Amendment violation means that there is not a final appealable order below, and this fact distinguishes all of the NYAG's cases—and the other cases that have considered this issue, including Supreme Court cases.

In *K.M. v. Adams*, No. 20-4128, 2022 WL 4352040, at *3 (2d Cir. Aug. 31, 2022), on an appeal of an order dismissing the complaint *and* the denial of the plaintiffs' motion for a preliminary injunction, this Court first addressed the appellant's merits arguments and affirmed dismissal of those claims. The Court then summarily concluded that—*of course*—the appeal of the district court's denial of appellant's motion for a preliminary injunction was moot, a party cannot be entitled to a preliminary injunction if it has no claims. The NYAG (and the panel in *K.M. v. Adams*) rely on *Pierce v. Woldenberg*, 498 F. App'x 96, 98 (2d Cir. 2012). There, this Court held that where an appellant failed to appeal a final and appealable order, his appeal—which was solely on the issue of the preliminary injunction—was moot. The Court made clear that "[i]n these circumstances, *because Pierce did not appeal from the district court's [final judgment]*, and because Pierce's complaint has been dismissed and the merits decided against him, his request for preliminary relief is moot." *Pierce*, 498 F. App'x at 98.

The Supreme Court has also had the occasion to consider an appeal from the denial of a preliminary injunction where the complaint was subsequently dismissed. In *Shaffer v. Carter*, 252 U.S. 37, 47 (1920), the petitioner appealed the denial of an injunction, but the motion court subsequently dismissed the entire case. The Court noted that, "[t]he latter appeal is in accord with correct practice, since the denial of

the interlocutory application *was merged in the final decree*. The first appeal will be dismissed." *See id*. at 44 (emphasis added).

None of the issues raised in any of these cases are relevant here: there has been no final, appealable order, and there is still a live and justiciable case before the District Court.[12]

E. The Act is Void for Vagueness

The NYAG's challenge to CRN's vagueness claim rests on a superficial, cursory analysis of the Act and its obligations.[13] The NYAG argues that the Act's obligations and scope are clear, and in support, merely sets forth, verbatim, the statute's language. (Opp. 52-53.) Pointing only to this transcription, the NYAG conclusorily states that "these detailed terms give individuals and businesses ample notice of the core conduct that the law prohibits." (*Id.* at 53.) In the same way, the NYAG argues that the Act provides sufficient guidelines for enforcement because the statute "clearly delineate[s] the kinds of actions and representations that bring a

[12] The NYAG also cites *Ruby v. Pan American World Airways, Inc.*, 360 F.2d 691, 691-92 (2d Cir. 1966), a *per curiam* decision in which this Court dismissed an appeal from the district court's denial of a preliminary injunction where the district court had also dismissed the entire complaint because there was another prior-filed case pending between the parties that "would dispose of all the issues raised in [the] action." *Id.*

[13] The NYAG concedes that, in the presence of a First Amendment implication, a lesser standard than "unconstitutional in all of its applications" applies (Opp. 51), undermining the District Court's finding on this point. *See* JA-193.

product within the scope of [the Act]." (*Id.* at 56.) The NYAG's analysis appears to ignore CRN's entire opening Brief, which sets forth in painstaking detail the extent to which the Act's undefined terms are devoid of any certain meaning and invite a potentially limitless scope.

The NYAG's inability to provide more than a half-hearted attempt to give any meaning to the statutory terms is telling. For example, the NYAG argues that the term "otherwise represented" is "clear"—but ignores that this self-serving "plain meaning" flies in the face of statutory interpretation canons that would require this phrase to mean something different than the terms "marketed" and "labeled" that precede it. *See United States v. Mason*, 692 F.3d 178, 182 (2d Cir. 2012). The NYAG further argues that "otherwise represented" must refer to a statement by a retailer or manufacturer based on the Supreme Court's alleged interpretation of the term "marketed," but the Supreme Court case that the NYAG cites did no such thing. It did not interpret the term "marketed" (it looked at the *phrase* "marketed for use") and it did so in the very specific context of displays of drug paraphernalia. (Opp. 55, citing *Hoffman*, 455 U.S. at 502.) And while the NYAG suggests this Court could be guided by "any limiting instruction that a state court or enforcement agency has proffered," the case it cites involved a statute that had been *litigated* such that the courts had already interpreted the potentially vague provisions. (Opp. 56, citing

Kolender v. Lawson, 461 U.S. 352 (1983).)[14] Here, the NYAG's attempt to infuse certain meaning into the uncertain phrase is layer upon layer of conjecture and mischaracterization.

Ultimately, the NYAG resorts to its refrain that CRN's suggestions of ambiguity are "nitpicking" and "speculation about hypothetical, niche applications not before the court." (Opp. 57, 58.) But tellingly, the NYAG is unable to answer any of the basic clarifications that CRN raises about the scope of the Act and how to interpret fundamental questions: *e.g.,*

- Whether a product triggers the Act if it is marketed for more than one purpose?
- Whether the Act is triggered by a third party "otherwise represent"-ing that the product has certain properties?
- What state of mind is necessary?
- Where statements need to be made to qualify; and

[14] Moreover, the case from which the principle is derived, *Grayned v. City of Rockford*, 408 U.S. 104 (1972), noted that the Court can determine the meaning of a vague statute by looking to "the words of the ordinance itself [and] the interpretations the court below has given to analogous statutes," and then, "*perhaps*"—and *only to "some degree"*—"to the interpretation of the statute given by those charged with enforcing it." *Id.* at 110. The interpretation the NYAG proffers here is a self-serving litigation strategy, not an enforcement policy that they have deployed in real life.

- How do we know whether an "ingredient" is "represented" for the purpose of weight loss or muscle building.

The NYAG cannot self-servingly call these basic questions "marginal" simply because it has no answers.

F. CRN Is Likely To Succeed On Its Preemption Claim

The NYAG's response to CRN's preemption claim is premised on the suggestion this Court must make a presumption against preemption. (Opp. 59.) But that is not the law. This Court has unambiguously held that it does "not invoke any presumption against pre-emption' when a statute contains an express-preemption clause." *Buono v. Tyco Fire Prod., LP*, 78 F.4th 490, 495 (2d Cir. 2023). The "plain wording of the clause" instead guides the Court's analysis. *See id.*

While the State argues that "[t]he plain text" of 21 U.S.C. §343-1(a)(5) "forecloses CRN's express preemption claim," (Opp. 59), it fails to provide any actual textual analysis. Indeed, it argues that the preemption clause is limited to labeling requirements in a hyper-literal sense, but it draws that conclusion not from the "plain text" of the statute, but jurisprudence dealing with labeling requirements. (*Id.* at 60.) It then engages in misdirection[15] by claiming CRN's absence of authority otherwise is dispositive. (*Id.* at 60-61). But to the extent additional authority is

[15] The State also discusses conflict preemption, but CRN has not asserted preemption under that legal theory.

helpful, the Ninth Circuit correctly held that the FDCA "preempts state-law requirements for claims about dietary supplements that differ from the FDCA's requirements." *Kroessler v. CVS Health Corp.*, 977 F.3d 803, 808 (9th Cir. 2020). And, here, it is undisputed that the FDCA does not require dietary supplement manufacturers to impose costly age verification procedures as a penalty for providing its consumers with truthful and substantiated information relevant to their personalized care. The law is thus preempted by the FDCA.

G. The Remaining Factors Weigh In Favor of a Preliminary Injunction

The NYAG concedes that the deprivation of a constitutional right warrants a finding of irreparable harm. To the extent the Court determines that CRN is likely to prevail on the merits of its claims, the NYAG's arguments about irreparable harm and the public interest are moot. *See, e.g.*, *Tripathy v. Lockwood*, No. 22-949-PR, 2022 WL 17751273, at *2 (2d Cir. Dec. 19, 2022) ("[I]n the First Amendment context, likelihood of success on the merits is the dominant, if not the dispositive, factor[.]") (cleaned up); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (the State has no interest in enforcing an unconstitutional law).

Indeed, the NYAG acknowledges that irreparable harm is satisfied where the First Amendment is sufficiently *implicated*. (Opp. 64 (citing *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 72 (2d Cir. 1996)).) In an attempt to circumvent this clear holding, the NYAG cobbles together out-of-context quotes to suggest that *Amestoy*

applies only to compelled speech. *See id.* That opinion contains no such limitation. Instead, it ruled, without restriction, that a regulation that "'contravene[s] core First Amendment values ... 'satisfie[s] the initial requirement for securing injunctive relief[.]'" *Amestoy*, 92 F.3d at 72 (quoting *Paulsen v. Cty. of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991)).

The NYAG also ignores Second Circuit precedent on the issue of delay.[16] It cites to *Citibank, N.A. v. Citytrust,* 756 F.2d 273, 276-77 (2d Cir. 1985), in arguing that CRN's purported delay rebuts a finding of irreparable harm. But it ignores this Court's holding just two years ago in *Tripathy*, which expressly disclaimed reliance on the *Citibank* case the NYAG cites, as well as other "intellectual property cases" where a party alleges the deprivation of a constitutional right. *See* 2022 WL 17751273, at *2. And the NYAG's own authority reflects that this Court has only recognized delay as a relevant consideration in the context of trademark, copyright, and fraudulent advertising, where "a months-long delay before seeking an injunction suggests that a plaintiff does not believe she has a viable claim" *Silber v. Barbara's Bakery, Inc.*, 950 F. Supp. 2d 432, 442 (E.D.N.Y. 2013). Additionally, in the trademark and consumer fraud context, every day an injunction is delayed is another

[16] The NYAG's suggestion that the time it took CRN to evaluate the Act and its implications on its members should not be credited ignores that part of this consideration was *discussions with the NYAG* about how the Act would work, as the NYAG well knows. The NYAG was therefore aware of this use of time.

day that a true trademark owner loses its market and more consumers are being deceived. It strains credulity to apply this same principle to this case—the Act was not even *in effect* when CRN brought its motion for preliminary injunction, so the principle that a party cannot sit idly by watching while its rights are violated is not the same as in the trademark infringement and consumer fraud context.

The NYAG's assertion that chilled speech cannot constitute irreparable harm is belied by its citation to *Bronx Household of Faith v. Board of Education of City of New York,* in which this Court held that chilled speech constitutes irreparable harm where there is a "'present objective harm or a threat of specific future harm.'" (Opp. 63-64.) CRN met that requirement: evidence reflects (Br. 16-17) that CRN members have and will continue to "self-censor rather than risk the perils of" enforcement. *See Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 658 (2004).

CONCLUSION

For the reasons set forth herein and in CRN's opening brief, CRN respectfully requests that this Court reverse and remand directing the District Court to enter a preliminary injunction.

Dated: August 21, 2024

Respectfully submitted,

COZEN O'CONNOR

BY: /s/ *Michael de Leeuw*
Michael de Leeuw
Tamar S. Wise
Arianna K. McLaughlin
3 WTC, 175 Greenwich Street
New York, NY 10007
(212) 509-9400

Attorneys for Plaintiff-Appellant
Council for Responsible Nutrition

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Local Rule 32.1(a)(4)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f): this document contains 6,999 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font Time New Roman.

Dated: August 21, 2024

COZEN O'CONNOR

BY: */s/ Michael de Leeuw*

Michael de Leeuw
Tamar S. Wise
Arianna K. McLaughlin
3 WTC, 175 Greenwich Street, 55th Floor
New York, NY 10007
(212) 509-9400

Attorneys for Plaintiff-Appellant Council for Responsible Nutrition