No. 15-525

In The Supreme Court of the United States

POM WONDERFUL, LLC, et al.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

BRIEF OF *AMICI CURIAE* ALLIANCE FOR NATURAL HEALTH-USA AND CATO INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

A Virginia nonprofit corporation founded in 1992, the Alliance for Natural Health-USA (ANH) consists of members who are consumers; healthcare practitioners; food, medical food, and dietary supplement companies; and 500,000 consumer advocates. Over the last decade, ANH's objectives have been frustrated by the Federal Trade Commission (FTC) in those instances where the FTC has restricted communication of scientifically supported claims about the effects of nutrients on health and disease and of scientifically supported claims about environmentally beneficial products.

Established in 1977, the Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.[1]

This case interests *amici* because it implicates both the First Amendment's protections for commercial speech and abusive enforcement practices by a government agency.

[1] Letters of consent have been filed with the Clerk. The parties were timely notified of *amici*'s intention to file. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored any part of the brief, and no person or entity other than *amici* and their counsel made a monetary contribution for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case raises the issue of whether the U.S. Courts of Appeals should defer broadly to Federal Trade Commission ("FTC") adjudicative factual and legal findings when the agency's order restrains commercial speech. The Court has not addressed that issue in 50 years. *See F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965). Since 1965, the deference accorded the FTC's factual and legal findings in every administrative deceptive advertising case has effectively transformed the agency into a court of last resort despite the fact that all FTC deceptive advertising decisions necessarily involve limitations on prospective commercial speech and, thus, raise First Amendment issues, and despite the fact that in administrative cases the FTC not only initiates prosecutions but also serves as the ultimate judge, an inherent conflict of interest.

Because of that conflict of interest, judicial impartiality is lacking, necessitating meaningful judicial review on a *de novo* basis to overcome bias and abuse of agency power and to ensure meaningful protection for First Amendment rights. The standard of review applied by the U.S. Courts of Appeals to FTC decisions is far more deferential than the standard of review applied to cases first brought in the district courts by the FTC on identical issues. No sound justification exists for that inequitable treatment of respondents' cases.

Under its enabling statute, the FTC may elect to try deceptive advertising cases before the agency or in the U.S. District Courts. 15 U.S.C. § 45(b); 15 U.S.C. § 45(m). The standard of review differs depending on which forum FTC chooses.

In the case for which certiorari is pending, the U.S. Court of Appeals for the D.C. Circuit refused to scrutinize FTC's factual findings despite the presence of First Amendment issues. *POM Wonderful, LLC v. F.T.C.*, 777 F.3d 478, 499 (D.C. Cir. 2015). This Court should grant certiorari to reverse that refusal and require meaningful *de novo* review of FTC deceptive advertising cases at both the district and circuit court levels. By granting certiorari to eliminate the inequitable standards of review and establish instead uniform *de novo* review in the federal courts, this Court will ensure for the first time in over 50 years equitable treatment and meaningful First Amendment review of FTC deceptive advertising cases.

Amici stress that FTC negates First Amendment challenges whenever the Seventh Circuit's *Kraft* decision is applied, because the broad deference afforded the agency eliminates meaningful federal judicial review. *Kraft, Inc. v. F.T.C.*, 970 F.2d 311 (7th Cir. 1992). FTC initiates administrative prosecutions upon law it creates, serving also as the ultimate agency judge; FTC engages in *de novo* review of its ALJ's decisions, which decisions are advisory only and have no independent legal force or effect, 16 C.F.R. § 3.54(a). In this way, every deceptive advertising adjudication by the FTC involves inherent conflicts of interest,

which help explain why over the past 65 years FTC has never once found a First Amendment violation present.[2] Since *Kraft*, the Commission has never found a respondent's advertisements to be anything but inherently misleading and has thereby always avoided First Amendment review under the deferential judicial review standard. The fact that over the past two decades the FTC has never lost a single consumer deceptive advertising case it has administratively initiated, either before the Commission or on appeal, speaks volumes concerning the absence of a meaningful review of First Amendment issues in these cases. Other agencies, such as the Food and Drug Administration, that do not enjoy this same degree of deference have suffered significant First Amendment defeats over the same period. *See, e.g.*, *Pearson v. Shalala*, 164 F.3d 650, 655-56 (D.C. Cir. 1999); *Alliance for Natural Health U.S. v. Sebelius*, 714 F. Supp. 2d 48, 63-72 (D.D.C. 2010).

[2] In accord with Montesquieu's position in *The Spirit of the Laws* [Book XI], James Madison, George Washington, John Adams, Thomas Jefferson, and Alexander Hamilton each subscribed to the view that the combination of legislative, executive, and judicial powers in single hands was the very definition of tyranny. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (1748); THE FEDERALIST NO. 47 (James Madison); George Washington, Farewell Address (Sept. 17, 1796); JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA, Letter XXV (1787); THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, Query 13, 120-21 (1784); THE FEDERALIST NO. 71 (Alexander Hamilton).

ARGUMENT

This case presents important federal questions concerning review of FTC's commercial speech regulation and because of the chilling effect on speech which stems from FTC deceptive advertising decisions. *See Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S.Ct. 694 (2012).

This Court has established a general rule that federal appellate courts should review *de novo* the constitutional adequacy of protection afforded commercial speech. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984); *Peel v. Attorney Reg. & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 108 (1990); *but see POM*, 777 F.3d at 499.

As a forum that performs a trial-level review of facts and law, the FTC should receive no greater deference in appeals from its administrative decisions than is accorded an Article III trial court on appeal from its decisions concerning the very same alleged law violations. The federal courts presently condone a pernicious anomaly. On the one hand, were a trial court judge to have served as a prosecutor against a defendant immediately before ascending to the bench, that judge would be obliged to recuse himself from the matter were it on his docket. 28 U.S.C. § 455(b)(3). Not so with the FTC. The FTC routinely initiates every deceptive advertising prosecution over which it later serves as the ultimate agency judge. 16 C.F.R. § 3.11(a). That means the Commissioners review factual grounds for charges and determine

issuance of an administrative complaint appropriate against the very respondent they will later judge. 16 C.F.R. §§ 3.11(a)-(b). Following issuance of an "Initial Decision" by an FTC administrative law judge, which decision has no legal force or effect and is merely advisory to the Commission (16 C.F.R. § 3.54(a)), the Commission itself sits in ultimate agency judgment of the party the Commission has accused, doing so in a *de novo* capacity. While such a conflicting position would require recusal of a judge in an Article III court to prevent the obvious conflict, in FTC proceedings the conflict is condoned by the agency and the courts. *See, e.g.*, *Kennecott Copper Corp. v. F.T.C.*, 467 F.2d 67, 79 (10th Cir. 1972).

In light of this conflict, FTC findings and conclusions in deceptive advertising cases should instead be reviewed *de novo* by Article III courts to check agency bias and ensure meaningful protection for First Amendment rights.

I. The Court Should Grant Certiorari to Address the Question It Left Unresolved in *Bose* and Restore Meaningful Judicial Review of FTC Findings and Conclusions in Deceptive Advertising Cases

In 1965, preceding development of the commercial speech doctrine affording heightened scrutiny to government regulation of communication in commerce, this Court held that the FTC's "judgment is to be given great weight by reviewing courts . . . especially . . . with respect to allegedly deceptive advertising

since the finding of a [Section] 5 violation in this field rests so heavily on inference and pragmatic judgment." *Colgate-Palmolive*, 380 U.S. at 385. Ever since, U.S. Courts of Appeals have given FTC's deceptive advertising decisions the deference *Colgate-Palmolive* demands. *See, e.g.*, *Simeon Mgmt. Corp. v. F.T.C.*, 579 F.2d 1137, 1145 (9th Cir. 1978).

In the advent of the commercial speech doctrine, *Colgate-Palmolive* is anachronistic. Arising in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561-70 (1980), the commercial speech doctrine demands scrutiny of government actions that restrict commercial speech. Nevertheless, the Seventh Circuit in *Kraft* applied *Colgate-Palmolive* to carve out an exception peculiarly applicable in review of FTC administrative proceedings. Since *Kraft*, the Commission has consistently used its power to reject First Amendment challenges, always concluding that the speech in issue is inherently misleading and thus never concluding in a single case that a respondent's First Amendment rights have been violated. The federal courts have affirmed, refusing to review the agency's actions *de novo*. Consequently, respondents have most frequently chosen not to defend their First Amendment rights but to enter draconian consent decrees instead where they agree to broad fencing-in

restrictions on their commercial speech rather than seek vindication for their rights in the federal courts.[3]

Following precedent favoring broad judicial deference to FTC decisions, the D.C. Circuit in *POM* predictably concluded that "the Commission's findings of deception are supported by substantial evidence in the record." *POM*, 777 F.3d at 500; *see also Telebrands Corp. v. F.T.C.*, 457 F.3d 354, 358 (4th Cir. 2006); *Novartis Corp. v. F.T.C.*, 223 F.3d 783, 787 n.4 (D.C. Cir. 2000).

Congress has questioned the FTC for its lack of objectivity. In 2013, Congressman Bachus observed, "[w]ith this kind of record and an unbeaten streak that Perry Mason would envy, a company might wonder whether it is worth putting up a defense at all in a system which the FTC brings a complaint, the case is tried before an administrative law judge at the FTC, and the FTC holds the authority to overturn a

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[3] *See* FEDERAL TRADE COMMISSION, FTC ANNUAL REPORTS (1993-2014), *available at* https://www.ftc.gov/policy/reports/policy-reports/ftc-annual-reports (last visited Oct. 27, 2015); *see also* Joshua Wright, Commissioner, Fed. Trade Comm'n, Statement before the Subcommittee on Commerce, Manufacturing, and Trade Committee on Energy and Commerce: The FTC at 100: Where Do We Go From Here? (Dec. 3, 2013) (transcript available at https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-joshua-d.wright-ftc-100-where-do-we-go-here/131203wheredowegostatement.pdf) (last visited Nov. 17, 2015) (noting that FTC's targets "typically prefer to settle Section 5 claims rather than go through lengthy and costly administrative litigation in which they are both shooting at a moving target and may have the chips stacked against them").

decision adverse to the agency."[4] One FTC Commissioner has also observed:

> FTC has voted out a number of complaints in administrative adjudication that have been tried by administrative law judges in the past nearly twenty years. In each of those cases, after the administrative decision was appealed to the Commission, the Commission ruled in favor of FTC staff. In other words, in 100 percent of cases where the ALJ ruled in favor of the FTC, the Commission affirmed; and in 100 percent of the cases in which the ALJ ruled against the FTC, the Commission reversed.[5]

In the advent of *Central Hudson* and its progeny, broad deference for FTC decisions that regulate commercial speech is unjustified and inconsistent with judicial review of comparable speech regulation by FTC's sister agencies. *Compare, e.g.*, *POM*, 777 F.3d at 499, *with Pearson*, 164 F.3d at 655-56 (applying the *Central Hudson* test to determine whether the FDA's censorship of commercial speech was valid).

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[4] David Balto, *FTC's Winning Streak is Over*, THE HILL (Feb. 11, 2014, 4:00 PM), http://thehill.com/blogs/congress-blog/economy-budget/197969-ftcs-winning-streak-is-over.

[5] Joshua Wright, Commissioner, Fed. Trade Comm'n, Remarks at the Symposium on Section 5 of the Federal Trade Commission Act: Section 5 Revisited: Time for the FTC to Define the Scope of its Unfair Methods of Competition Authority (Feb. 26, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/626811/150226bh_section_5_symposium.pdf (last visited Nov. 17, 2015).

Fifty years after *Colgate-Palmolive*, Justice Harlan's fear that the FTC would usurp the role of the judiciary has become a reality. *See Colgate-Palmolive*, 380 U.S. at 385 (Harlan, J., dissenting). To safeguard against agency abuses and to protect against agency violation of the First Amendment, there must be effective *de novo* judicial review. This Court should grant certiorari in this case to answer the question it left unresolved in *Bose* concerning the proper standard of review. *See Kraft*, 970 F.2d at 316 (citing *Bose*, 466 U.S. at 504 n.22).

A. Judicial Deference to FTC Findings and Conclusions in Cases Involving First Amendment Issues Should Be Replaced with *De Novo* Review

In 1984, the Court held that findings made by district courts and juries are subject to *de novo* review where those findings concern whether the speech in question is protected by the First Amendment. *See Bose*, 466 U.S. at 501. Where a factual question determines whether speech is protected, courts must independently review the evidence "to preserve the precious liberties established and ordained by the Constitution." *Id.* at 511. *Bose* left unresolved the standard of review that was to be applied when the FTC makes factual determinations concerning commercial advertisements. *See Kraft*, 970 F.2d at 316 (citing *Bose*, 466 U.S. at 504 n.22). The Court appeared to answer that question in *Peel*, a case that examined whether an attorney's letterhead was

misleading, by concluding that *Bose* did indeed apply to commercial speech. *Peel*, 496 U.S. at 93-94, 108.

In 1987, after *Bose* and before *Peel*, the FTC filed a complaint against Kraft Foods. *See In re Kraft, Inc.*, 114 F.T.C. 40 (1991). Upholding most of the ALJ's decision finding Kraft liable, the Commission then granted Complaint Counsel's request to broaden the Order. Kraft appealed to the Seventh Circuit. *See Kraft*, 970 F.2d at 316-18. The Seventh Circuit rejected the request that circuit courts review *de novo* the Commission's findings of fact implicating First Amendment protections. *Id.* at 316. It instead upheld the pre-commercial speech doctrine, the 1965 *Colgate-Palmolive* conclusion that "an FTC finding is 'to be given great weight by reviewing courts.'" *Id.* at 316 (citing *Colgate-Palmolive*, 380 U.S. at 385).

The Seventh Circuit gave three justifications for its decision. Citing just one case and one law review article preceding this Court's decision in *Peel*, the Seventh Circuit held that "the implications of *Bose* are not as clear as Kraft suggests . . . and *Bose* itself suggests that commercial speech might not warrant the higher standard of review established for libel cases." *Id.* That argument lacked merit because the *Peel* decision had held that government regulation of commercial speech does in fact warrant a higher standard of review. *Peel*, 496 U.S. at 108. The Seventh Circuit distinguished *Bose* and *Peel* on the basis that "Commission findings are well-suited to deferential review because they may require resolution of 'exceedingly complex and technical issues.'" *Kraft*,

970 F.2d at 317 (quoting *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 645 (1985)). That argument lacks merit where the Commission itself determines whether or not the First Amendment applies. As the *Bose* Court explained, Article III judges have a constitutional duty to review the facts of a case independent of the trier-of-fact to determine whether speech falls into a narrow category of unprotected content. *Bose*, 466 U.S. at 510. The *Peel* Court held that "[t]he Commission's authority is necessarily constrained by the First Amendment. . . ." *Peel*, 496 U.S. at 108. Whatever expertise the Commission claims to have in analyzing ads should not be translated into an ultimate power to determine whether speech is protected under the First Amendment. As this Court held, determining whether the Constitution protects speech is the quintessential function of Article III courts, not of federal agencies. *Bose*, 466 U.S. at 508.

According to the Seventh Circuit, the "most important" distinction between *Kraft* and *Peel* was that *Peel*'s restriction was a "prophylactic regulation applicable to all lawyers, completely prohibiting an entire category of potentially misleading commercial speech." *Kraft*, 970 F.2d at 317. But FTC's cease and desist orders *do* act as prophylactic regulations applicable to all: "Under the 1975 amendments [ ] the FTC is empowered to file a civil complaint in United States District Court seeking civil penalties against persons the Commission alleges to have violated the provisions of cease and desist orders entered in prior

Commission cases *even though those persons were not parties to prior proceedings*." *U.S. v. Braswell*, No. C 81-558 A, 1981 WL 2144, at *2 (N.D. Ga. Sept. 28, 1981) (emphasis added) (citing 15 U.S.C. § 45(m)(1)(B)).

Indeed, FTC adjudications fundamentally change the way the regulated industry conducts business. As the Eighth Circuit observed, "[b]ringing a single case against one cigarette company would have the effect of bringing the whole industry into compliance and would do so much more quickly than would a formal rulemaking process." *Watson v. Philip Morris Co., Inc., a Corp.*, 420 F.3d 852, 859 (8th Cir. 2005), *rev'd*, 551 U.S. 142 (2007); *see also N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 295 (1974).

The FTC has recently demanded in administrative cases that all advertising "establishment" claims be supported by at least two randomized, placebo-controlled, double-blinded human clinical studies (RCTs). In POM, the Commission found of no import evidence that two RCTs meeting its requirements would cost $600 million each. Yet those costly FTC RCTs, enforced through agency adjudications, have become the *de facto* standard for all regulated entities, creating a financial bar to the utterance of truthful commercial speech. Because no business ever prevails in FTC enforcement actions (none in the past twenty-plus years), the RCT standard is understood to be an absolute, creating a palpable chilling effect that dumbs down the idea and information market. Industry well understands that under *Kraft* even if FTC violates the First Amendment in regulating speech,

the deferential standard of review will perpetually ensure that FTC never has to answer for the violation; challenges brought on First Amendment grounds will ordinarily be costly and futile.

B. The FTC Continues to Extend Its Own Authority and Purported Expertise

In the "consumer deception" area, the FTC regulates speech in virtually every commercial area, including:

- Drugs (*In re Herbs Nutrition Corp.*, Dkt. 9325 (2007));
- Foods (*In re Bumble Bee Seafoods, Inc.*, Dkt. C-9354 (2000));
- Dietary supplements (*In re Nestle Healthcare Nutrition, Inc.*, Dkt. C-4312 (2011));
- Biodegradable plastics (*In re ECM Bio-Films, Inc.*, Dkt. 9368 (2013));
- Information technology (*In re LabMD, Inc.*, Dkt. 9357 (2013));
- Neurotechnology (*In re Carrot Neurotechnology, Inc.*, Dkt. 1423132 (2015));
- Automobile financing (*In re City Nissan, Inc.*, Dkt. 132-3114 (2015));
- Volatile organic compounds in mattresses (*In re EcoBaby Organics, Inc.*, Dkt. 122-3129 (2013));

- Neuroscience and brain injury (*In re Brain-Pad, Inc.*, Dkt. 122-3073 (2012));
- Cognitive development (*In re NBTY, Inc.*, Dkt. 1023080 (2012));
- Technology related to vacuums (*In re Oreck Corporation*, Dkt. 102-3033 (2012));
- Cosmetics and skin creams (*In re Beiersdorf, Inc.*, Dkt. 092-3194 (2011));
- Tanning technologies and skin cancers (*In re Indoor Tanning Association*, Dkt. 082-3159 (2010));
- Clothing and textiles (*In re Pure Bamboo, LLC*, Dkt. 082-3193 (2009));
- Computer software (*In re Sears Holdings Management Corp.*, Dkt. 082-3099 (2009));
- Influenza therapies or preventatives (*In re QVC, Inc.*, Dkt. 982-3152 (2009));
- Snore relief products (*In re Robert M. Currier*, Dkt. 012-3240 (2002));
- Alcohol advertisements depicting recreational activities (*In re Beck's North America, Inc.*, Dkt. C-3859 (1999));
- "Cultured" pearl jewelry (*In re Zale Corporation*, Dkt. C-3738 (1997));
- Computer hacking (*In re B. Stamper Enterprises, Inc.*, Dkt. C-4393 (2013));
- Assisted Living Services (*In re Carepatrol, Inc.*, Dkt. 112-3155 (2012));

- Thermal line window technology (*In re THV Holdings LLC*, Dkt. C-4361 (2012)).

No other administrative agency extends its jurisdictional reach over speech so broadly. If in deference to agency "expertise," the circuit courts can never scrutinize FTC's conclusions that speech is "misleading," then litigants can never experience independent and meaningful constitutional review; in effect, those challenges will end at the agency level. Litigants have no viable means to check FTC's determination that speech is unprotected due to misleadingness. *See, e.g.*, *POM*, 777 F.3d at 499-500; *see also Telebrands*, 457 F.3d at 358; *Novartis*, 223 F.3d at 787 n.4.

II. The Court Should Grant Certiorari Because FTC Has Abused the Deference Afforded It and Has Unconstitutionally Shifted Its Burden of Proof to Regulated Businesses

To prove that a respondent has committed a deceptive act, the FTC bears the burden of establishing by a mere preponderance of the evidence that the alleged advertising claim exists; is "false, misleading, or unsubstantiated"; and is material. *POM*, 777 F.3d at 490. Yet even that light burden the FTC shirks by administratively shifting its obligation of proof to respondents, in violation of the APA and the First Amendment. *Id.*; 5 U.S.C. § 556(d).

A. FTC Impermissibly Shifts the First Amendment Burden of Proof

The FTC avoids constitutional review, in part, by ignoring distinctions between inherently and potentially misleading commercial speech, instead finding that any degree of misleadingness is grounds for a cease and desist order with broad fencing in provisions. *See, e.g.*, *In the Matter of POM Wonderful, LLC*, Dkt. 9344, 2013 WL 268926, *53-57 (F.T.C. Jan. 16, 2013) (categorically distinguishing FTC administrative adjudications from cases that involve potentially misleading speech). Potentially misleading speech (meaning that speech capable of being corrected by a mandated qualification) is protected by the First Amendment. *See, e.g.*, *Pearson*, 164 F.3d at 655; *Fleminger, Inc. v. U.S. Dept. of Health and Human Servs.*, 854 F. Supp. 2d 192, 195 (D. Conn. 2012); *Alliance for Natural Health U.S. v. Sebelius*, 786 F. Supp. 2d 1, 13 (D.D.C. 2011). The Court has "reasoned that so long as information can be presented in a way that is not deceptive, such information is only potentially misleading" and must not be prohibited outright but must be allowed in reliance on claim qualifications rather than censorship. *Whitaker v. Thompson*, 248 F. Supp. 2d 1, 9 (D.D.C. 2002) (citing *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

The FTC order in this case, like other Commission orders, violates the First Amendment by restraining speech that is only potentially misleading without reliance on reasonable qualifications as a less speech restrictive alternative. FTC also shifts the

burden of proof by refusing to establish the falsity of claims and, instead, presuming claims false if the accused fails to prove them true to a near certainty. Speech may not be constitutionally suppressed on the basis that the speaker lacked evidence sufficient to support the truth of the claim at the time it was uttered, yet that is FTC's rule. *Compare 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996), *with POM*, 2013 WL 268926 at *53-57. Under this Court's precedent, the government bears the burden of proving that speech is false or misleading before restricting it; the government may not shift that burden to the accused. *See, e.g.*, *Ibanez v. Fla. Dept. of Bus. and Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 142 (1994); *Edenfield v. Fane*, 507 U.S. 761, 770 (1993); *Peel*, 496 U.S. at 109; *Zauderer*, 471 U.S. at 648-49.

Compelling a party to prove its speech true or it is deemed deceptive causes speech that is not provably false to be embraced within the ambit of banned deception (when that speech may well be either true or not provably false). If speech is not provably false, it is appropriately left in the idea and information marketplace for public debate and evaluation, protected in the same manner as ribald discussion that is not provably defamatory. *See Edenfield*, 507 U.S. at 767. Speech that is not provably false should be protected to ensure that the commercial marketplace enjoys the full breadth of comparative value discussion necessary to maximize consumer choice. *See U.S. v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). At

worst, speech in this category should be accompanied by a mandated claim qualification, alerting consumers to the fact that either definitive evidence to support the claim does not exist or that the evidence supporting the claim is inconclusive. *See Retail Digital Network, LLC v. Appelsmith*, 945 F. Supp. 2d 1119, 1124 (C.D. Cal. 2013); *see also Whitaker*, 248 F. Supp. 2d at 11.

The Commission therefore bears the First Amendment burden of proving that complete suppression of a respondent's claim is "a *necessary* as opposed to *merely convenient* means of achieving its interests." *Whitaker*, 248 F. Supp. 2d at 15 (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002)); *see also R.M.J.*, 455 U.S. at 203.

Here, the POM order effectively bars POM from making any truthful, or at worst, potentially misleading claim concerning the results of studies or other factually correct information. Part I of the POM order prohibits the respondents from making any claim implying that POM's products "will treat, prevent, or reduce the risk" of heart disease, prostate cancer, or erectile dysfunction, unless respondents possesses competent and reliable scientific evidence substantiating that claim, which, for purposes of that paragraph is at least one RCT. *See POM*, 777 F.3d at 501. Under Part III of the order, the respondents are prohibited from representing anything "about the health benefits, performance, or efficacy of any Covered Product," unless the representation is supported by "competent and reliable scientific evidence that is

sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields. . . ." *POM*, 2013 WL 268926 at *1.

Those restrictions constitute arbitrary limitations on POM's speech, demanding that POM attain a certain arbitrarily chosen level of proof as a condition precedent to speak rather than demonstrating that in fact the FTC has proven speech of a particular kind inherently false and, thus, verboten in perpetuity. So, those restrictions forbid POM from making a claim based on scientific evidence the company currently possesses, even if the claim would be only potentially misleading or, in other words, could be communicated truthfully if adequately qualified. The ultimate rub is that the order suppresses speech not on the basis of government proof of falsity but through imposition of a prior restraint that, absent an arbitrarily chosen level of science to FTC's satisfaction, causes no utterance in the entire category to be lawful. That facet of the order is not novel; FTC has never (at least since *Kraft*) imposed a cease and desist order wherein it allows speech if accompanied by a claim qualification or disclaimer. Instead, FTC's cease and desist orders, like the one here, impose prospective speech bans under an ambiguous and arbitrary criterion (competent and reliable scientific evidence) that invites the exercise of unbridled agency discretion, in violation of the First Amendment. *Gaudiya Vasishnava Soc'y v. City and Cnty. of S.F.*, 952 F.2d 1059, 1065 (9th Cir. 1990) (citing *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 775 (1988)). The FTC's orders

also prohibit claims that are credible, as opposed to claims definitively proven false, which credible claims have a vital role in an evolving commercial marketplace, the deprivation of which makes it far more difficult for consumers to comprehend the actual and potential benefits of products and thereby exercise fully informed choice at the point of sale. *Edenfield*, 507 U.S. at 767. Consequently, this Court should hold FTC's Cease and Desist Orders constitutionally infirm unless FTC can prove the inherent misleadingness of the speech or, in the case of potentially misleading communication, the absence of any suitable, less speech restrictive claim qualification. *R.M.J.*, 455 U.S. at 203; *see also Pearson v. Shalala*, 130 F. Supp. 2d 105, 112 (D.D.C. 2001).

B. The FTC Shifts the Burden of Proof by Requiring Respondents to Prove Claims Truthful

The Commission's framework allows it to presume that claims are false unless proven true by the respondent. That framework allows the Commission to find that a respondent's implied claims are misleading through either a falsity theory or a reasonable basis theory. *See, e.g.*, *F.T.C. v. QT, Inc.*, 448 F. Supp. 2d 908, 958-59 (N.D. Ill. 2006). Consistent with the First Amendment burden of proof, the falsity theory requires the Commission to prove that the claims, whether express or implied, are false. *Id.* Inconsistent with the First Amendment burden of proof, the reasonable basis theory requires the government to

demonstrate what level of proof the respondent needed before making the claim, and then requires the respondent to establish retrospectively that it possessed that level of proof at the time the claim was made or the claim is deemed false. *See, e.g.*, *F.T.C. v. Pantron I Corp.*, 33 F.3d 1088, 1096 (9th Cir. 1994). The FTC almost always asserts allegations under the "reasonable basis" theory.

The "reasonable basis" burden is illusory for two reasons. First, the FTC never identifies the amount of evidence required to support a claim until late in litigation – long after a litigant has already made an advertising claim and has marshaled its proof. The FTC arbitrarily assigns a baseline level of support only at the expert phase of discovery and after fact discovery has been completed. Thus, regardless of the evidence produced in fact discovery, the FTC's experts are free to argue the evidence insufficient.

The Commission then employs its "expertise" to determine the types of claims made to consumers and the level of substantiation required to support same. The Commission often finds "implied" claims that were not the subject of litigation before its ALJs and never finds the level of support possessed by a respondent sufficient. For example, in POM the Commission found that "Respondents' advertisements on their face convey the net impression that clinical studies or trials show that a causal relation has been established between consumption of the Challenged POM Products and its efficacy to treat, prevent, or reduce the risk of the serious diseases in question."

POM, 2013 WL 268926 at *35. Once the Commission identified that specific implied claim, a respondent would need evidence (no longer admissible, it being after trial) proving *that* causal relationship, rendering Complaint Counsel's burden illusory. *Id.* at *30. A litigant cannot reasonably be tasked with supporting claims that were previously unknown to the litigant until the Commission identified the "implied" claims on appeal from a trial type hearing.

Under the falsity theory, the Commission presumes claims misleading unless respondents "have substantiation before disseminating a claim." *Id.* The Commission's standards therefore impose a structural and financial burden[6] on the right to communicate potentially truthful claims to the public. Those burdens exist even when the Commission has no evidence that any deception actually occurred. *See, e.g.*, *id.* at *18 (explaining that an advertising is deceptive if it "is likely to mislead a consumer"). The Commission "determine[s] the level of substantiation the advertiser is required to have before [the Commission] can determine whether Respondents had a reasonable basis to make their claims." *Id.* at *47. The advertiser then bears the burden "of establishing [t]hat [the] substantiation they relied on for their product claims" meets the standard the Commission on appeal determined the advertiser must have, rendering Complaint

[6] Substantiation for implied claims can be "incredibly expensive, costing in the range of $600 million." *In the Matter of POM Wonderful, LLC*, 2012 WL 2340406, at *79 (F.T.C. May 17, 2012).

Counsel's "burden of proving that Respondents' purported substantiation is inadequate" illusory. *Id.* (citing *QT*, 448 F. Supp. 2d at 959). Because the Commission can set its substantiation burden at any threshold during its *de novo* review of the ALJ's findings, the FTC can always prevail by setting a *post hoc* threshold beyond the evidence which the respondent marshaled at the ALJ level. Simply put, because the FTC's factual findings are entitled to broad deference, the agency never loses.

III. The Court Should Grant Certiorari to Set a Meaningful Standard to Check FTC Regulation of Commercial Speech

Circuit courts have allowed the Commission to find implied claims from a "facial analysis" of advertisements without resorting to extrinsic evidence, leading to a burden shift that requires respondents, like POM, to guess what claims FTC may deem implied and to do the temporally impossible, establish retention of proof for those implied claims before the time they were allegedly made. Kraft challenged on appeal the Commission's holding that it need not look at extrinsic evidence but instead may "determine whether a claim is made in an advertisement without resorting to extrinsic evidence even if the claim is implied." *Kraft*, 970 F.2d at 318-19. The Seventh Circuit's conclusion, however, "shocked many members of the legal community" by upholding the FTC's decision that it need not look to extrinsic evidence to find implied claims. Dennis P. Stolle, *The FTC's*

Reliance on Extrinsic Evidence in Cases of Deceptive Advertising: A Proposal for Interpretive Rulemaking, 74 Neb. L. Rev. 352, 353 (1995).

The Commission "reviews implied claims as if they are on a continuum," and relies on extrinsic evidence only where the Commission itself concludes that "the impression that consumers would take away from an ad are [not] reasonably clear from the face of the advertisement." *POM*, 2013 WL 268926 at *20 (citing *Kraft*, 970 F.2d at 319). The FTC has used that lenient standard to find that claims are implied from the face of the advertisement that lacked substantiation at the time of advertising. Thus, invariably, FTC concludes that every ad challenged is false and misleading, at least to the extent of claims said to be implied.

While purportedly needing extrinsic evidence in certain circumstances, since *Kraft* the Commission has *always* found that a facial analysis alone is sufficient to find an implied claim. *See In the Matter of ECM BioFilms, Inc.*, Dkt. 9358, 2015 WL 6384951, *11 (F.T.C. Oct 19, 2015); *In the Matter of Daniel Chapter One*, Dkt. 9329, 2009 WL 5160000, at *15 (F.T.C. Dec. 24, 2009); *In the Matter of Telebrands Corp.*, 140 F.T.C. 278, 307 (2005); *In the Matter of Novartis Corp.*, 127 F.T.C. 580, 682 (1999); *In the Matter of Stouffer Foods Corp.*, 118 F.T.C. 746, 804 (1994). In this case, the Commission, purportedly based on its own expertise, again concluded that the advertisements at issue implied deceptive claims. *POM*, 2013 WL 268926 at *54.

History therefore teaches that the FTC has become the court of last resort on First Amendment issues in deceptive advertising cases since *Kraft* and has never found itself to have constitutionally erred in charging a party with deception. Those Commission findings based on "facial analyses" should not be given deference. The notion that Commissioners of the FTC have some prescient ability to perceive what ads mean to individual consumers without extrinsic evidence is entirely fictive. The FTC Commissioners should have to rely strictly on competent evidence of consumer understanding as a basis for any finding of deception, or else they wield unbridled discretion over speech. *See City of Lakewood*, 486 U.S. at 772. Certiorari should be granted here not only to require *de novo* review as the standard for federal court evaluation of FTC speech regulation but also to resolve the important subissues that arise from the failure to require *de novo* judicial review in FTC deceptive advertising cases.

CONCLUSION

For the foregoing reasons and those stated by the petitioners, *amici* urge the Court to grant certiorari.

Respectfully submitted,

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