No. 15-525

IN THE

Supreme Court of the United States

POM WONDERFUL, 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 Circuit

PETITIONERS' REPLY

Kristina M. Diaz
Johnny Traboulsi
Brooke S. Hammond
Roll Law Group P.C.
11444 West Olympic Blvd
10th Floor
Los Angeles, CA 90064
(310) 966-8400
Kristina.Diaz@roll.com
Johnny.Traboulsi@roll.com
Brooke.Hammond@roll.com

Thomas C. Goldstein
Counsel of Record
Eric F. Citron
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

Bertram Fields
GREENBERG, GLUSKER, FIELDS, CLAMAN & MACHTINGER LLP
1900 Avenue of the Stars
21st Floor
Los Angeles, CA 90067
(310) 201-7454
bfields@greenbergglusker.com

John D. Graubert
Megan L. Rodgers
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 662-5938
jgraubert@cov.com
mrodgers@cov.com

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The critical points for this Court's certiorari determination are undisputed. First, the Petition presents an important constitutional question: Must a court review *de novo* an agency's conclusion that advertising implies a misleading message and thus receives no First Amendment protection? Second, that question is outcome determinative here and in many other cases: It determines whether the FTC may enjoin a wide swath of petitioners' speech, and similar ads by other companies, without any constitutional scrutiny. Third, the D.C. Circuit's application of substantial-evidence review conflicts with the stated holdings of this Court and several others. With these three points undisputed, it would take an extraordinary argument to justify denial. In fact, the Commission's arguments are insubstantial.

1. The Government cannot seriously dispute that this case is an ideal vehicle for deciding the Question Presented. The record presents seventeen individual ads on which the D.C. Circuit expressly refused to find liability under *de novo* review. Pet.App. 33a. The ALJ found that these very ads do not convey impermissible disease claims because they "use language that is … substantially qualified … and/or fail to draw a sufficiently clear connection … between health effects or study results referred to in the advertisements and the diseases alleged in the Complaint." ID¶587-88. Commissioner Ohlhausen likewise considered nearly all of these particular ads on an ad-by-ad basis, and—for each—specifically adopted a similar rationale for rejecting the Commission's decision. Pet.App. 160a-163a. Put otherwise, the record precisely distills the disagreements among the

key decisionmakers about the very ads the D.C. Circuit refused to uphold under anything but the most deferential review. It thus isolates the consequences of that deferential review in a way few vehicles ever could.

Moreover, it is telling that the Commission does *not* raise two other vehicle arguments. First, the Commission does not even contend that its construction of the seventeen ads now at issue could satisfy *de novo* review. Indeed, the Commission avoids any discussion whatsoever of the ads *reproduced* in the petition. *See* Pet. 2-3. Instead, it gestures vaguely in the direction of petitioners' "marketing materials" and "advertising campaigns"—discussing only three total ads that *are not even at issue*. BIO 4-5 (citing Figures 6, 21, and 33).

Second, the Commission does not dispute that, under the ALJ's reading of the ads, its injunction against them would violate the First Amendment. The ads make true factual statements on a matter of public concern (the health effects of a food). Because that food is healthy and poses no risks to consumers, the government has no overarching interest in censoring truthful information about it.

2. The two vehicle arguments the Commission does make are not serious. First, it objects that petitioners' opening brief below did not ask the panel to apply *de novo* review. BIO 11-14. Of course it didn't: As the Commission explains here and argued below—and the panel itself held—it has been settled in the D.C. Circuit since 1985 that this question is governed by substantial-evidence review. BIO 14, 17 (citing *Novartis v. FTC*, 223 F3d 783, 787 & n.4

(2000); *FTC v. Brown & Williamson*, 778 F.2d 35, 41 n.3 (1985)); Pet.App. 33a (citing same cases). The Commission's suggestion (BIO 14) that the D.C. Circuit could have deemed the argument for *de novo* review "forfeited" is thus nonsense: The court had to apply its precedent, which is exactly what it did.

Faced with that precedent, petitioners did all they could. They made clear before the panel (both in their reply and at argument) that they believed *de novo* review *should* apply, and then sought *en banc* review urging the full court to adopt that rule. Both at argument and in its *en banc* opposition, the government fulsomely developed its argument that deferential review was required by circuit precedent. This argument was thus both pressed *and* passed upon below, though either would suffice. S*ee United States v. Williams*, 504 U.S. 36, 41 (1992).

Second, the government argues that even if petitioners prevailed in this Court, the Commission's injunction would stand. BIO 15-16. The petition anticipated this argument (Pet. 33), which is obviously wrong. What could be more plain? The Commission's reading prevents petitioners from running *these seventeen ads*, whereas the ALJ's reading of those ads does not. The Commission knows that: This is exactly why, when the ALJ ruled in petitioners' favor with respect to these ads and entered an injunction covering only the others, *the FTC itself appealed*—expressly asking the Commission for an injunction of broader scope. *See* Pet.App. 12a.

In fact, the scope of that injunction matters not only here, but in *all* future health-food advertising cases. Under the D.C. Circuit's decision, a truthful

claim that a given food promotes human health is now illegal whenever highly deferential review permits the FTC to imply a disease claim into the ad. The seventeen ads now at issue (which the BIO refuses to discuss) show exactly how far that deferential review extends. Indeed, given the D.C. Circuit's special role in agency review, it shows how far countless agencies—like the FCC, FDA, or USDA—could freely go in sanctioning politically-disfavored commercial speech. The broad scope of the FTC's injunction, and the D.C. Circuit's holding, will thus surely suffice to chill protected speech in this industry and others going forward—as demonstrated by the *amici* participating here.

Accordingly, the Commission's argument that the D.C. Circuit "could reasonably have declined to review the Commission's findings with respect to the additional 17 ads" is bizarre. BIO 16. The Commission, having previously appealed the ALJ's adverse ruling on these ads, issued an order enjoining them—precisely to establish a broader precedent. The D.C. Circuit could not affirm that broader injunction without considering petitioners' First Amendment challenge with respect to these ads. Moreover, what the circuit court might have done is irrelevant; the petition challenges only the actual decision below.

3. On the merits, the Commission first suggests (BIO 17, 20) that the Question Presented is governed by the Court's half-century-old decision in *FTC v. Colgate-Palmolive*, 380 U.S. 374 (1965). As the petition explained (Pet. 28), *Colgate-Palmolive* predated all of this Court's commercial-speech doctrine, let alone the precedents on which the petition relies (i.e., *Bose v. Consumers Union*, 466 U.S. 485 (1984)*; Peel*

v. Attorney Registration & Disciplinary Commission, 496 U.S. 91 (1990), and *Ibanez v. Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994)). Nonetheless, this Court has instructed the lower courts that, even when its later cases reject the reasoning of an applicable precedent, they must "follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989). The Seventh Circuit cited that very rule in declining to apply *Bose* and *Peel* in this context, *see Kraft v. FTC*, 970 F.2d 311, 317 (7th Cir. 1992), and the D.C. Circuit cited that decision in turn in *Novartis* and here. This Court cannot force lower courts to wait for it to correct outdated precedents, and then refuse to take the cases that would allow it to do so.

Moreover, as the petition explained (Pet. 24), this is precisely the context in which the *de novo* review *Peel* and *Bose* require is most essential: The Commission here acted as prosecutor (picking its target), judge (deciding the rules), and jury (applying those rules), and it convicted POM in pursuit of an avowed policy goal—as administrative law (alone) permits. While courts sometimes defer to agencies because of their special policymaking role, when it comes to the First Amendment, that role merits special *concern*, not special deference.

4. Finally, the government attempts to distinguish this case from *Bose*, *Peel,* and *Ibanez*—and numerous lower-court cases following them—on the theory that the Commission made factual findings that particular advertisements were misleading, rather than relying on more general prophylactic rules.

This argument misstates the nature of both this case and the cases it seeks to distinguish. In reality, this case is covered entirely by *Peel* and its progeny, and the consequent split is undeniable.

To begin, the Commission clearly *did* apply general prophylactic rules here regarding speech it viewed as potentially misleading. The Commission's analysis of the advertisements proceeded in two steps. First, it laid down several generally applicable rules to govern "recurring elements" in food advertising. Pet.App. 182a. Two are illustrative. First, "references to medical studies, particular medical journals, or other types of scientific evaluation helped convey the asserted efficacy and establishment claims, as did the use of statements quantifying the amount of money spent on research (*e.g.*, 'backed by $25 million in vigilant medical research')." *Id.* Second, qualifying language such as "*emerging* science" could not actually "qualify the claims conveyed in the challenged ads." *Id.* 183a.

Having adopted these broad rules, the Commission applied them by rote to the challenged ads, paying little attention to the context in which statements were made. Instead, this second step involved formulaically asking whether each ad implicated one or more of its generally applicable rules.

Consider the Commission's analysis of Figure 12, which the petition highlighted (Pet. 2). There, the Commission found in a single sentence that the ad's accurate reference to heart health, its title ("Heart Therapy"), and its mention of scientific studies were sufficient to mislead consumers into falsely believing that POM's juice "prevents or reduces the risk of

heart disease." Pet.App. 187a. In another sentence, it deemed the ad to represent that those effects were *clinically proven*, because it truthfully referred to $20 million in studies that "uncovered encouraging results." *Id.* The Commission's opinion contains no explanation of why consumers would infer such sweeping conclusions from such everyday text. As Commissioner Ohlhausen explained, the Commission's simplistic assertions ignored that "[t]he text is qualified with references such as 'emerging science,' 'initial scientific research,' and 'encouraging results,'" all "without mention of or linkage to a specific disease." Pet.App. 161a. The ALJ similarly identified Figure 12 as one of several non-misleading ads whose claims "use language that is … substantially qualified; … fail to mention specific diseases; and/or fail to" specifically link petitioners' products to those diseases. ID¶¶587-88. The only justification for the Commission's different outcome is a different *general* approach to qualifying language and invocations of scientific research. Indeed, Commissioner Ohlhausen emphasized that her different view of the ads now at issue was driven largely by a disagreement with the Commission's general, highly skeptical approach to qualified language, Pet.App. 152a-153a & n.6, 183a-184a & nn.3-4—an approach even the D.C. Circuit highlighted with concern. *See* Pet.App. 35a.

The ruling below is thus no different from any of the cases that the government characterizes as involving generally applicable rules, rather than individualized fact-finding. *See infra* pp.8-12. Here, the Commission announced several principles by which it will deem ads inherently misleading—principles that it adopted and applied in this test case so that it

could prohibit similar ads by other food manufacturers going forward.

Moreover, even if the Commission were correct in describing its holding as representing only the factual conclusion that each ad was actually misleading under the FTC Act, that would not distinguish this case from the many others in which this Court and others have tested similar conclusions with *de novo* review. Indeed, the Commission does not even dispute that the ruling below is irreconcilable with this Court's repeated holding that courts must review *de novo* any factual findings that strip speech of First Amendment protections—including findings that commercial advertisements are misleading in fact.

Instead, the government (mis)characterizes *Peel* as merely addressing a general "prophylactic ban on an entire category of messages, rather than findings that particular advertisements were actually misleading." BIO 18. In fact, the regulatory body in that case—the Illinois Supreme Court—specifically found the ad at issue "misleading in three ways," including ad-specific factors like the physical location of certain claims, and findings about false claims "implied" by certain truthful statements. 496 U.S. at 98-99. Those are manifestly case-specific findings derived from broad standards governing the messages that can be implied into certain kinds of advertisements—indistinguishable from the conclusions the Commission reached here. This Court did not doubt the Illinois Supreme Court's greater familiarity with such advertising but nonetheless held that the First Amendment required *de novo* review. The Court then reviewed the same ad, finding that the "separate character of the two references is plain

from their text," *id.* at 103, and that consumers could properly assess the claims at issue. Petitioners seek only the same scrutiny.

Similarly, *Ibanez* was not limited to "application of a prophylactic ban on speech." BIO 20. Instead, the regulation there was indistinguishable from the FTC Act: It broadly prohibited "'false, deceptive, and misleading' advertising." 512 U.S. at 138. The regulator then interpreted that prohibition in a particular way—to prohibit a person not licensed as an accountant from claiming to be "certified"—just as the Commission in this case interpreted its organic statute to prohibit ads that, for example, truthfully report "highly qualified" scientific results. Pet.App. 152a, 183a-184a. In *Ibanez*, there was "no factual finding that the individual's speech was actually misleading," in light of the "complete absence of any evidence of deception" (BIO 20 (quoting 512 U.S. at 145)), in the same sense that there is no such finding here: The Commission did not identify *any* evidence that *any* consumer was ever mislead in *any* respect by *any* of the advertisements, as Commissioner Ohlhausen repeatedly emphasized. *E.g.*, Pet.App. 154a.

5. Strikingly, *every* lower court to decide the Question Presented only after *Ibanez* has split from the Seventh and D.C. Circuits and applied *de novo* review. The Commission does not dispute that the ruling below squarely conflicts with those courts' statements of their holdings. Instead, it offers only inaccurate or irrelevant factual distinctions.

For example, the measure in *Appeal of Sutfin*, 141 N.H. 732 (1997) was—like the FTC Act—a prohibition on deceptive advertising. It prohibited any

ad that "[d]eceives or is intended to deceive the public concerning dental services, techniques, the qualifications of a licensee, or the prices to be charged." N.H. R.S.A. 317-A:17, II(h)(1). The specialized board in *Sutfin* was tasked by statute with reviewing dental advertising. It found that: (1) the advertisement's statements that "'State authorities have acknowledged' the benefits of the procedure" were misleading; (2) statements that the device did not require placing hands in the patient's mouth and caused less discomfort falsely "implied that the respondent's technique was superior to the conventional methods"; and (3) "the advertisement implied professional superiority." *Id.* at 734. Citing *Peel*, the court deemed these ad-specific, implied-claim findings a "question of law" reviewed *de novo*. *Id.* at 736.

Hunter v. Virginia State Bar, 285 Va. 485 (2013), similarly involved a general rule that a lawyer may not make "any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim." Va. Bar. R. 7.1(a)(4). The lower court held that *de novo* review did not apply and upheld under substantial-evidence review the Bar's finding that an attorney's *particular* blog postings amounted to misleading advertising. *Id.* at 493. The Virginia Supreme Court rejected that rule, holding that, under the First Amendment, *de novo* review applied. *Id.* at 495-96 (citing *Peel* and *Bose*). The Court found that the posts were not "inherently misleading" but instead "potentially misleading" because they merely "named [Hunter] as counsel and discussed cases he had handled" and "described the successful results he obtained." *Id.* at 499-50.

The Commission says that *1-800-411-Pain Referral Services v. Otto*, 744 F.3d 1045 (8th Cir. 2014), merely addressed "a state statute that limited advertising directed at victims of automobile accidents." BIO 21. But the fact that the regulation addressed a specific subject matter makes no difference; there was no argument that it amounted to a content-based restriction. The district court instead found that the advertisements were "'inherently misleading' for several reasons," including that they "failed to inform accident victims of the nature of 411-Pain's business" (*id.* at 1053); that customers "may receive nothing" in benefits; and that, by using an actor dressed as a medical technician, they "extend a misleading aura of authorized approval' to the company" (*id.* at 1054). These, again, are ad-specific glosses on a general standard for misleading advertising utterly indistinguishable from the kinds of conclusions the Commission reached here. Nonetheless, in direct conflict with the decision below, the Eighth Circuit rejected deferential review because "[w]hether speech is 'inherently misleading'" and whether its "inherent character … places it beyond the protection of the First Amendment" is "a question of law that we review *de novo*.'" *Id.* at 1056 (quoting *Peel*).

Finally, in *Braun v. Soldier of Fortune Magazine*, 968 F.2d 1110 (11th Cir. 1992), the jury was not applying a prophylactic rule at all, but instead instructed to determine whether "a reasonable reading of the advertisement would have conveyed to a magazine publisher … that this ad presented a clear and present danger." *Id.* at 1113. The court explained that although the jury's finding would ordinarily be subject only to substantial-evidence review, this

Court's precedents instead required *de novo* review of what message the ad conveyed. *Id.* at 1120. Under the First Amendment, "we subject to independent examination the jury's finding that Savage's ad, on its face, would convey to a reasonably prudent publisher that it created a clearly identifiable unreasonable risk," a task the Court accomplished by carefully studying "the language of Savage's ad," including its "sinister terms" and offers for services involving guns, which made "the implication … clear that the advertiser would consider illegal jobs." *Id.* at 1121. The Court specifically "emphasize[d] that we are not adopting a *per se* rule" about the use of certain terms, but rather based its decision on a case-specific *de novo* analysis of the advertisement, *id.*, exactly as the Commission says it did here.

In short, the ruling below squarely conflicts with decisions of this Court, other Courts of Appeals, and several state supreme courts. Certiorari should thus be granted.

Respectfully submitted,

Thomas C. Goldstein
Counsel of Record
Eric F. Citron
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com