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No. 15-_____

Supreme Court, U.S.
FILED

OCT 23 2015

OFFICE OF THE CLERK

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Trade Commission (FTC) deemed several of petitioners' advertisements unprotected by the First Amendment and banned them on the theory that their truthful content nonetheless implied a false or misleading message to a "significant minority" of consumers. Petitioners challenged that ban under the First Amendment. The Court of Appeals upheld the ban in its entirety because—applying only generic principles of administrative law—it gave great deference to the FTC's determination that all of the challenged ads implied the alleged false or misleading messages and for that reason received no First Amendment protection. This Court's cases, including *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), and *Ibanez v. Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994), have expressly held that when a tribunal which traditionally receives fact-finding deference on appeal finds that an advertisement implies a misleading message, that finding must be reviewed *de novo* in order to give meaningful force to the First Amendment. The question presented is:

Whether a finding by the FTC that a truthful advertisement nonetheless implies a misleading message to a minority of consumers, and therefore receives no First Amendment protection, must be reviewed *de novo*?

PARTIES TO THE PROCEEDING

The parties to the proceeding below were POM Wonderful LLC, Roll Global LLC, Stewart A. Resnick, Lynda Rae Resnick, Matthew Tupper, and the Federal Trade Commission. Apart from the Federal Trade Commission, all these parties all join in this petition.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioners POM Wonderful, LLC, and Roll Global, LLC, are both limited liability companies organized under Delaware law that are wholly owned by the Stewart and Lynda Resnick Revocable Trust. Stewart and Lynda Resnick are the sole trustees and beneficiaries of the Resnick Trust, and are the sole owners of POM Wonderful and Roll Global.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING.....	ii
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
PETITION FOR A WRIT OF CERTIORARI	6
OPINIONS BELOW	6
JURISDICTION	6
STATEMENT OF THE CASE.....	6
REASONS FOR GRANTING THE WRIT	19
I. The Decision Below Conflicts With This Court's Precedent	19
II. There Is A Circuit Conflict On The Question Presented, And The Lower Courts Are Awaiting This Court's Guidance.....	25
III. The D.C. Circuit's Error Is Critical And Requires Prompt Correction.....	29
IV. This Is A Uniquely Good Vehicle For The Question Presented.....	32
CONCLUSION.....	34

APPENDIX A: Court of Appeals Decision (January 30, 2015)	1a
APPENDIX B: Federal Trade Commission Decision (January 10, 2013)	45a
APPENDIX C: Final Order of the Federal Trade Commission (January 10, 2013)	171a
APPENDIX D: Order Denying Rehearing (May 28, 2015)	180a
APPENDIX E: Order Denying Rehearing En Banc (May 28, 2015)	181a
APPENDIX F: POM Claims Appendix (Appendix A to the Decision of the Federal Trade Commission)	182a
APPENDIX G: POM Figures Appendix (Appendix B to the Decision of the Federal Trade Commission)	196a
APPENDIX H: Summary Table Of Commission Findings Regarding POM Exhibits	309a

TABLE OF AUTHORITIES

Cases

<i>1-800-411-Pain Referral Serv., LLC v. Otto</i> , 744 F.3d 1045 (8th Cir. 2014).....	5, 27
<i>Appeal of Sutfin</i> , 141 N.H. 732, 736 (1997)	26
<i>Bose Corp. v. Consumers Union</i> , 466 U.S. 485 (1984).....	passim
<i>Braun v. Soldier of Fortune Magazine, Inc.</i> , 968 F.2d 1110 (11th Cir. 1992).....	27
<i>Byrum v. Landreth</i> , 566 F.3d 442 (5th Cir. 2009)	27
<i>Central Hudson Gas & Elec. Corp. v. Public Serv. Commission of New York</i> , 447 U.S. 557 (1980).....	16, 17, 26, 29
<i>CFTC v. Vartuli</i> , 228 F.3d 94 (2d Cir. 2000)	27
<i>FTC v. Brown & Williamson Tobacco Corp.</i> , 778 F.2d 35 (D.C. Cir. 1985).....	28
<i>FTC v. Colgate-Palmolive Co.</i> , 380 U.S. 374 (1965).....	28
<i>Hunter v. Va. State Bar</i> , 285 Va. 485 (2013).....	25
<i>Ibanez v. Florida Department of Business & Professional Regulation</i> , 512 U.S. 136 (1994)	passim
<i>Kraft, Inc. v. FTC</i> , 970 F.2d 311 (7th Cir. 1992)	5, 27, 28
<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964)	21
<i>Novartis v. FTC</i> , 223 F.3d 783 (D.C. Cir. 2000)	29
<i>Peel v. Attorney Registration & Disciplinary Commission of Illinois</i> , 496 U.S. 91 (1990)	passim
<i>Revo v. Disciplinary Bd. of Supreme Court of N.M.</i> , 106 F.3d 929 (10th Cir. 1997).....	27
<i>Rodriguez de Quijas v. Shearson / American Express, Inc.</i> , 490 U.S. 477 (1989)	28
<i>Snell v. Engineered Systems & Designs, Inc.</i> , 669 A.2d 13 (Del. 1995)	26

Statutes

28 U.S.C. § 1254(1)	6
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Other Authorities

<i>The D.C. Circuit's POM Wonderful Decision</i> , Crowell & Moring (Feb. 19, 2015)	14
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INTRODUCTION

On the other side of this page are two ads the Federal Trade Commission (FTC) deemed unprotected by the First Amendment and banned as misleading commercial speech. These ads are meant to convey—and so explicitly state—that there is reason to believe that petitioners’ pomegranate juice is good for the heart and prostate, a conclusion they say is “supported by \$20 million of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health.” Those claims are *undisputedly true*. Because POM contains high levels of antioxidants, which are believed to promote bodily health in many ways, POM invested millions into researching its possible health benefits, with many studies producing encouraging results.

The FTC nonetheless decided that these truthful ads cannot be published, and the public cannot read them, because—based solely on its own, facial analysis—it believed they might *imply* a much stronger claim to a “significant minority” of consumers. More specifically, the FTC concluded that these ads might imply to some that there is *conclusive proof* that POM’s juice cures or prevents serious diseases like heart attacks and prostate cancer. At this stage, POM does not dispute that it lacks the scientific evidence the FTC now requires to make such claims—which would ordinarily be associated with pharmaceutical products. But it certainly disputes that the ads convey anything like those claims, and the First Amendment entitles POM to *de novo* review of the FTC’s determination that they do.

That *de novo* review would clearly require reversing the FTC’s determination that these and other ads receive no First Amendment protection and its prospective ban on running anything like them. Even a cursory glance reveals that their health claims are quotidian; they are plainly

not—as the FTC would have it—claims that pomegranate juice is a proven treatment for heart disease and prostate cancer akin to Lipitor and other FDA-approved drugs.

FIGURE 12



Heart therapy.

Seek professional help for your heart. Drink POM Wonderful Pomegranate Juice. It helps guard your body against free radicals, unstable molecules that emerging science suggests aggressively destroy and weaken healthy cells in your body and contribute to disease. POM Wonderful Pomegranate Juice is supported by \$20 million of initial scientific research from leading universities, which has uncovered encouraging results in prostate and cardiovascular health. Keep your heart healthy and drink 8 ounces a day.

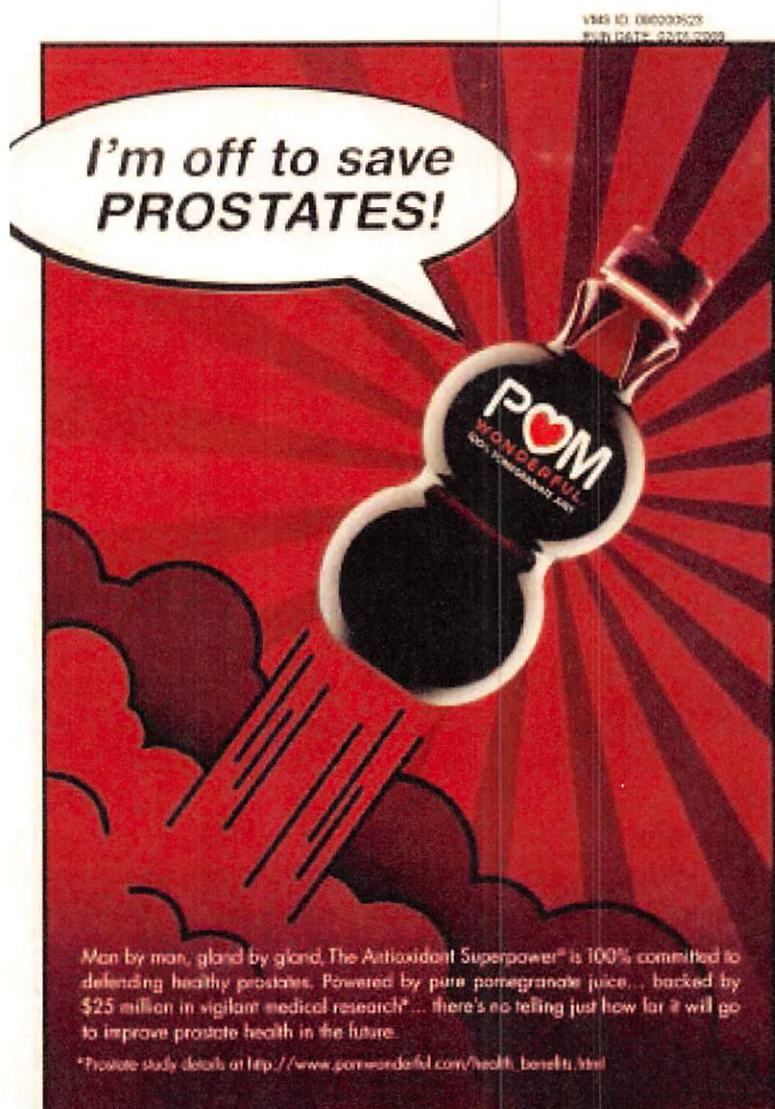
POM Wonderful Pomegranate Juice. The Antioxidant Superpower.™

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POM WONDERFUL
pommwonderful.com

FIGURE 23

VMS ID: 080000505
PUBL DATE: 02/01/2009



**I'm off to save
PROSTATES!**

**POM
WONDERFUL**
100% POMEGRANATE JUICE

Man by man, gland by gland, The Antioxidant Superpower® is 100% committed to defending healthy prostates. Powered by pure pomegranate juice... backed by \$25 million in vigilant medical research* ... there's no telling just how far it will go to improve prostate health in the future.

*Prostate study details at http://www.pomwonderful.com/health_benefits.html

It's hard to see how these ads can be read to make claims of *scientific proof* that POM treats prostate cancer and heart disease. The words used claim the *opposite* of "proof" (*i.e.*, "emerging science suggests" "encouraging results"), and they refer only to "health" generally, POM's antioxidant content, and the fact that POM is 100% juice (so consumers know nothing is added and that it can only be as good for you as fruit can be). They do not even mention the treatment of any particular disease. For that reason, the ALJ who first evaluated these ads did not find that they imply the FTC's alleged misleading claims, neither did Commissioner Ohlhausen (who wrote separately), and neither did the D.C. Circuit, which declined to exercise *de novo* review. Indeed, the D.C. Circuit pointedly held that while *other* ads banned by the Commission satisfied *de novo* review, it would make no such finding for these ads (and many others), and would instead uphold the FTC's ban only under the exceedingly deferential standard of the Administrative Procedure Act.

The decision that the FTC's ban can be upheld without *de novo* First Amendment review is a plain and critical error of law. This Court has expressly held that the very kind of predicate finding the FTC made here—namely, that a particular instance of commercial speech *implies* a misleading message—must be reviewed *de novo* in order to give compass to First Amendment protections. See *Ibanez v. Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994); *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91 (1990); *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984). Otherwise, the scope of the First Amendment would be essentially left to the censor's discretion, because it would always be free to decide that truthful speech implied some misleading message—and to ban it on that theory—subject only to highly deferential, APA review.

Nonetheless, the D.C. Circuit, and the Seventh Circuit along with it, are unwilling to apply this Court's plainly applicable precedent to federal agencies until this Court expressly requires as much. See *Kraft, Inc. v. FTC*, 970 F.2d 311, 317 (7th Cir. 1992) (so holding). In stark contrast, other circuits have recently recognized that, under this Court's precedents, "[w]hether speech is 'inherently misleading' is a question of law that we review *de novo*." See, e.g., *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1055 (8th Cir. 2014)—a rule other circuits and state supreme courts have applied consistently and uncontroversially. The D.C. Circuit's resolution against *de novo* review will critically affect this issue because of its unique role in agency appeals. Thus, if this Court intends its commercial-speech law to meaningfully curb the speech-restricting choices of federal agencies going forward, it should grant certiorari and resolve this disagreement in favor of the rule its cases already require.

This is an ideal vehicle to do so. Because of the number of ads at issue, the D.C. Circuit distinguished between those on which a ban would survive *de novo* review and those on which it would not so find. As already shown, the latter ads at issue here are a vivid demonstration of how far the agencies can and will go if constrained only by highly deferential, APA review when they choose to ban speech as "implying" a misleading message. The First Amendment requires courts to play a far more meaningful role in evaluating the decision to ban particular instances of truthful speech to consumers on the paternalistic assumption that they will be misled by some lurking implication hiding therein. This Court should grant certiorari, and reverse.

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The D.C. Circuit's opinion (Pet. App. 1a) is published at 777 F.3d 478. Its orders denying rehearing (*id.* 180a-181a) are unpublished. The FTC's opinion (*id.* 45a) and the appendices thereto (*id.* 182a) are available at <https://www.ftc.gov/enforcement/cases-proceedings/082-3122/pom-wonderful-llc-roll-global-llc-matter>.

JURISDICTION

The D.C. Circuit issued its decision on January 30, 2015, and denied timely rehearing petitions on May 28, 2015. The Chief Justice extended the time for this petition to October 23, 2015. *See* No. 15A173. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

1. Pomegranates have been consumed safely for thousands of years, ID¶77,¹ and have been used by many cultures for medicinal purposes over that time. ID¶986. Petitioners farm pomegranates and produce a variety of products from them—most importantly, POM Wonderful 100% pomegranate juice. There is no dispute that these products are completely safe for consumers and have no adverse health effects. ID¶¶77-88. In fact, pomegranates are not just safe: There is evidence that they are generally quite good for you because (among other things) they are extraordinarily rich in antioxidants. ID¶¶987.

¹ “ID” citations refer to the ALJ's decision, which is available at <https://www.ftc.gov/sites/default/files/documents/cases/2012/05/120521pomdecision.pdf>. Citations with no “¶” symbol refer to pages.

That evidence comes not only from the recognized benefits of antioxidants in general, but from studies that POM sponsored into the health benefits of pomegranate juice in particular. Working with scientists at leading universities—including field-leading researchers and Nobel laureates—POM spent over \$35 million on studies examining the benefits of antioxidants and pomegranate juice for issues like heart, prostate, and erectile function. Pet. App. 4a. The outcomes of that research have been positive, suggesting that POM products may well have benefits for these particular aspects of bodily health.

Many of these studies involved research techniques designed to provide initial, first-stage testing on the possible health benefits of the products. For example, leading scientists conducted laboratory research into the antioxidant effects of POM products on certain kinds of carcinogens, as well as animal studies testing consumption of the products. These studies suggested that POM's products—due at least in part to their high concentration of polyphenol antioxidants—could promote heart and prostate health and improve erectile function by inhibiting oxidative damage to cell tissue, preserving helpful concentrations of nitric oxide in the body, and mitigating arterial inflammation. See ID¶¶754, 991-1023, 1310-12.

POM's research sponsorship has great depth and is virtually unparalleled in the food industry. Over the course of more than a decade, POM sponsored more than one hundred studies at more than forty research institutions, *seventy* of which were ultimately published in peer-reviewed scientific journals. See ID¶¶128-130.

Among these studies were also some that undertook the notoriously difficult task of studying the effects of POM's nutrient products through basic human trials. Such studies have well-recognized design issues when the product being tested is a natural food like pomegranate

juice or a prevalent dietary nutrient like antioxidants. In that context, randomized controlled trials (RCTs) are often either impossible or prohibitively expensive because, among other things, there are: (1) ethical concerns associated with asking a group of “control” subjects to avoid any consumption of an important nutrient; (2) feasibility concerns associated with trying to “blind” a natural product like fruit juice, which subjects can taste; and (3) cost concerns associated with trying to get a large set of subjects to comply with long-term testing and diet restrictions outside the context of patentable drug treatments. *See* ID¶¶703-705.

For these and other reasons, many scientists have in fact concluded that in vitro trials and animal research can be better suited to study the effects of foods or nutrients on humans (and better able to provide a “control” in the study) than human trials. POM nonetheless decided to try initial human studies and see where they led. And like the laboratory and animal studies, some of these studies also showed encouraging results for heart, prostate, and erectile health. *See, e.g.,* ID¶¶754 (finding basic research suggests POM may benefit heart health), 1142 (finding POM study “supports the conclusion that the POM Products support prostate health”); 1250 (finding erectile dysfunction study had “clinical significance”).

Of course, for various reasons including the constraints above, most of these studies were not the sort of large-scale RCTs typically associated with FDA-approved drugs. But because the totality of the science—including human studies, RCTs, and laboratory research—suggested potential benefits, and because pomegranate juice is undisputedly a safe product whose dominant use is as a nutritious fruit juice and not a disease treatment, POM ran a variety of ads, like those above and on the following page, designed to share this promising research with the public.



One small pill for mankind.

"Findings from a small study suggest that pomegranate juice may one day prove an effective weapon against prostate cancer."

The New York Times (July 4, 2006)

Introducing **PCMx™** – a highly concentrated, incredibly powerful blend of all-natural polyphenol antioxidants made from the very same pomegranates in **PCM Wonderful 100% Pomegranate Juice**. Our method of harnessing astonishing levels of antioxidants is so extraordinary, it's patent-pending. So now you can get all the antioxidant power of an 8oz glass of juice in the convenience of a calorie-free capsule.

Ready to take on free radicals? Put up your POMx and fight them with a mighty 1000mg capsule - that's more concentrated pomegranate polyphenol antioxidants than any other 100% pomegranate supplement. An initial UCLA medical study on POM Wonderful 100% Pomegranate Juice showed hopeful results for men with prostate cancer.^{1,2} And preliminary human research suggests that our California-grown pomegranate juice also promotes heart health.^{2,3} Take your antioxidants into your own hands. Call 1-888-POM-PILL now, or visit pompills.com/fort and get your first monthly shipment for just ~~\$29.95~~ \$24.95 with coupon.



POM IN A PILL™

CALL 1-888-POM-PILL now, or visit pompills.com/fort

Not available in stores | 100% money-back guarantee



SAVE \$5 ON YOUR FIRST ORDER.

Call 1-888-POM-PELL or visit portpella.com/fort and mention or enter code **PORTS** at checkout. To pay by check, call 1-888-POM-PELL for instructions. Hurry, offer expires July 31, 2007.

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[illegible]

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These ads are generally representative of POM's campaign. In the main, POM either described the possible health benefits of its products only in very general and *highly* qualified terms or endeavored to share the precise results of the studies, together with information on where to find them. Notably, the most prominent text in the ad above is a direct quote from *The New York Times* for the proposition that "[f]indings from a *small* study *suggest* that pomegranate juice *may one day* prove an effective weapon against prostate cancer." *Supra* p.9 (emphasis added).

As these examples further indicate, petitioners' ads made no express claims that POM products treat, prevent, or reduce the risk of heart disease, prostate cancer, or erectile dysfunction, and none claimed that those effects had been "clinically proven." ID¶586. Instead, the vast majority used the kind of heavily qualified language above—describing results as "promising," "hopeful," "preliminary" or "initial"—and made express disclaimers that the products are not intended to treat or prevent any disease. *E.g.*, Pet. App. 234a, 251a, 304a-308a. Indeed, with the exception of a few early ads, POM's approach was to describe precisely what research was done, including where it was done, and to transparently summarize the results with quotes from the published studies themselves. *E.g.*, *id.* 308a. And at all times, POM undisputedly marketed its products as a healthy food product sold in the refrigerated section of grocery stores, never as an alternative to medical treatment. *See* ID, 246.

The entire campaign, however, involved many different ads, some of which characterized the research results more strongly than others. For example, one of POM's early ads depicted a POM bottle with a toothbrush and toothpaste under the headline "Floss your arteries," and contained a sentence stating: "Just eight ounces a day

can reduce plaque by up to 30%!" Pet. App. 208a. A footnote connected that claim to one of POM's early, non-RCT human trials, which it described as a "clinical pilot study." To be sure, ads like these arguably imply stronger claims about POM's effectiveness in promoting human health than some of the foregoing examples (ignoring for the moment their emphasis on naturally occurring antioxidants in 100% fruit juice). Yet, quite notably, even such ads lack any claim of unqualified scientific *proof* and do not remotely market POM as having the effects or testing pedigree of a pharmaceutical product.

2. The FTC's staff nonetheless concluded that many POM ads were misleading because—their truthful text aside—they supposedly *implied* to consumers that pomegranate juice was an unqualifiedly proven means of curing or preventing serious diseases like arteriosclerosis or prostate cancer in the absence of support from gold-standard RCTs. The FTC thus filed an administrative complaint against POM, asserting, *inter alia*, that these ads misleadingly implied that POM had been scientifically established as an effective disease intervention. It did not claim, however, that petitioners' ads placed public health or safety at risk.

Faced with such allegations, the vast majority of advertisers settle with the FTC to avoid the threat of monetary sanctions or follow-on suits by enterprising class-action claimants. But POM was adamant that its ad campaign was intended only to truthfully report the results of its research, and it contested the FTC's allegations in a trial before the Commission's chief administrative law judge. The FTC ultimately alleged that 43 of POM's ads implied a misleading message about POM's status as a proven treatment for serious diseases. Critically, the ALJ determined that only a minority of those ads—nineteen in all—contained any such implied message. Pet. App. 12a. As a result, the ALJ entered only a limited injunction,

instructing POM not to run any future ads making health claims about its products without “competent and reliable scientific evidence.” *Id.*

Both petitioners and the FTC staff appealed to the full Commission for review. As relevant, the FTC argued that the ALJ erred in finding that only nineteen ads implied the allegedly misleading claims, and urged the Commission to impose liability on a much broader set of ads. *Id.*

Over the disagreement of Commissioner Ohlhausen, the Commission adopted a far broader interpretation of health claims in advertising and used it to reverse much of the ALJ’s reasoning—banning a substantially larger category of ads. *Id.* 12a-13a. Under the Commission’s reasoning, 34 different ads (including all three of those above) made implied, *unqualified* claims that POM was a *scientifically proven* treatment for serious human ailments including heart disease, prostate cancer, and erectile dysfunction. (The FTC refers to these claims of proof as “establishment claims.”) For two other ads, it agreed with the ALJ that they claimed that POM was an effective disease treatment, but did not discuss whether these ads made claims of clinical proof. (Claims of effectiveness without claims of proof are called “efficacy claims,” and together with establishment claims, are called “disease claims.”) *See id.* 182a-195a (FTC appendix with findings for various ads); 309a-311a (FTC summary table of ad-by-ad findings by FTC and ALJ). Thus, in contrast with the ALJ, the Commission imposed liability based on 36 ads in total, in the process demonstrating that it would, going forward, imply much stronger disease claims into any ads purporting to discuss the possible health benefits of natural food products like juice. *Id.* 12a-13a.

It avowedly did so without any evidence regarding how consumers actually read these ads, relying solely on

its own facial analysis instead. *Id.* 60a-72a. At the same time, it relied on testimony from experts about what kind of evidence scientists in the field would require to make the disease claims the FTC inferred into the ads—finding that they would require RCTs. *Id.* 82a-86a. This allowed the Commission to vastly expand the set of banned ads to include all those that *laypeople* would perceive as making disease claims if they were not substantiated by the evidence *experts* would require to make such claims. The FTC did not care, for example, what evidence experts would demand for a “small study” to “suggest” that POM might “one day” provide a health benefit. *See supra* p.13; Pet App. 85a (“Although there is substantial testimony regarding the level of support required for generalized nutritional and health benefit claims, such evidence does not address the issue before us.”). Nor did it ask *any* questions of laypeople, including what kind of scientific evidence *they* would expect from the actual ads at issue. *Id.* 73a (explaining that FTC offered no extrinsic evidence of its own).

The Commission’s decision to apply a much broader standard for facially implying disease claims into POM’s ads without any extrinsic evidence dramatically affected the injunctive relief it imposed on POM. The FTC’s injunction forbids POM from making any disease claims without support from an RCT. Pet. App. 13a, 44a.² The scope of that injunction thus turns entirely on what counts as a disease claim. For example, under the ALJ’s ruling, there are seventeen specific ads POM would be able to run tomorrow, because they make no disease claims. But

² The Commission initially attempted to prevent POM from making any such claims without support from *two* RCTs. But the D.C. Circuit held that this ban on future speech could not be justified under the First Amendment. *See* Pet. App. 44a.

under the Commission's view, these ads *do* make the impermissible "implied" claims, and POM cannot run them or anything like them now or in the future.

The same is true for the industry as a whole. The precedential effect of the Commission's order in this case is that any natural-food advertiser cannot make a disease claim in the absence of RCT support. Indeed, the FTC clearly intended this case to serve as a precedent-setting decision expanding a requirement for RCT testing in the natural-food context, and the industry and its counsel have seen it just that way. *See, e.g., The D.C. Circuit's POM Wonderful Decision*, Crowell & Moring (Feb. 19, 2015), <https://goo.gl/A71Alz>. But, again, the meaning of that rule depends entirely on what counts as a disease claim. Under the ALJ's standard, substantially fewer ads would be interpreted as making the kind of unqualified, pharmaceutical-style claim that the Commission now forbids in the absence of RCT support. But if the Commission is correct that a far broader set of ads make the impermissible claims, then other commercial speakers must rein in their speech severely to avoid transgressing the Commission's new standard.

Commissioner Ohlhausen's separate opinion emphasized this problem and refused to agree that many of the ads at issue made efficacy or establishment claims. She emphasized that the Commission was finding *implied* disease claims when the ads largely discussed only "continued healthy functioning," Pet. App. 151a, and that the Commission was eliding that well-recognized distinction without any evidence "that consumers viewing the exhibits would actually perceive [the] stronger claims." *Id.* 151a-156a (further noting that "Congress and the Food and Drug Administration have created carefully drawn boundaries between different types of claims," and expressing "concern[] that the majority's interpretation of certain exhibits blurs these boundaries"). In her view, it

was inappropriate to make such strong conclusions from the face of the ads themselves because it would throw off the balance between requiring appropriate substantiation for health claims and getting useful information to consumers. She urged the Commission to “keep in mind ... that if we are too quick to find stronger claims than the ones reasonable consumers actually perceive, then we will inadvertently, but categorically, require an undue level of substantiation for those claims.” *Id.* 155a. She then proceeded, on an ad-by-ad basis, to explain why the Commission had over-read many of POM’s claims—especially by ignoring their qualified language. *Id.* 160a-161a (discussing Fig.12, *supra* p.2, and noting that “the text is qualified with references such as ‘emerging science’”), 161a (discussing Fig.13, *supra* p.9, and noting that the ad contains “heavily qualified descriptions of studies”).

Notably, Commissioner Ohlhausen also recognized the First Amendment implications of the Commission’s decision. As she noted, its broad willingness to imply unqualified disease claims into commercial speech—without any extrinsic evidence to support the proposition that consumers would actually be misled—“raises questions about whether this approach qualifies as a case-by-case analysis or is more like a broad prohibition on certain categories of speech, which has implications for First Amendment review of our actions.” Pet. App. 154a & n.8. And she further clarified the “broad prohibition” that she saw at work in the Commission’s facial analysis: Pointing to some of the same ads identified above, she concluded that, under the precedent set in this case, “the mere mention of ‘health’ or healthy functioning can imply a disease-related efficacy [claim] ... and the mere mention of scientific evidence can imply a related establishment claim.” *Id.* 157a. Accordingly, she noted that, “[b]ased on the majority’s views about these exhibits, it is difficult

to imagine any structure/function claims that POM could associate with its products in the marketplace without such claims being interpreted, under the FTC precedent set in this case, as disease-related claims.” *Id.*³ Simply put, her concern was that the decision would function as a broad gag order on the industry going forward.

3. POM appealed to the D.C. Circuit, arguing that the Commission’s aggressive interpretation of its ads led it to ban them in violation of the First Amendment and the balancing test for commercial speech imposed by *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). POM explained that the ads were only *potentially* misleading because the Commission had no evidence that consumers were actually misled and was instead proceeding based solely on its facial judgment that a “significant minority” would misperceive unqualified disease claims that the ads did not actually make. Forbidding language that is true but might *imply* something misleading to consumers is the kind of action that must be balanced against the First Amendment costs of withholding information from the marketplace. And because, as POM explained, there was no risk to health or safety from POM’s products, the FTC’s broad ban on making any kind of health-related claims in natural-food ads violated *Central Hudson* and the First Amendment.

Of course, *Central Hudson*’s balancing test only applies if commercial speech is truthful and non-misleading, raising the predicate issue whether the speech in question

³ “Structure/function” claims are a term of art for claims that relate merely to the continued healthy functioning of a body structure, rather than a claim to treat or prevent a particular disease, and have always required less scientific substantiation than disease claims or claims of scientific proof.

satisfies that standard. *See* 447 U.S. at 566. But this Court has made very clear that when an agency or lower court determines that a particular advertisement cannot be shown to consumers because it may mislead them, the appellate court must scrutinize that claim *de novo* to avoid placing the ad outside the First Amendment's protections at the discretion of the censor. *See Ibanez*, 512 U.S. at 144-148; *Peel*, 496 U.S. at 108; *Bose*, 466 U.S. at 503-511. These cases include the decision to withhold deference from state supreme courts acting in their capacity as regulators of the state bar and preventing lawyers from running particular, individual ads *ex post* on the theory that they implied, on their face, a misleading message to the public. *Peel*, 496 U.S. at 101, 104-105, 108. POM thus asked the D.C. Circuit to review *de novo* the determination that its ads implied that there was unqualified proof that pomegranate juice could cure or prevent diseases.

Notably, the FTC declined to defend its order under *Central Hudson*, and instead rested its argument entirely on the theory that it had determined that POM's ads contained a misleading message that it had concluded received no First Amendment protection whatsoever. It urged the court to review those determinations only with substantial deference, and to end the First Amendment inquiry there.

The D.C. Circuit agreed, and affirmed in relevant part. Importantly, it did so for all of the ads prohibited by the Commission—including the seventeen ads the ALJ found not to include the alleged misleading claims—based on the “deferential” standard of review. Pet. App. 33a. As to those seventeen ads, it held only that there was “substantial evidence in the record” to sustain the FTC's finding; put otherwise, it found it sufficient to affirm that the FTC had not acted *arbitrarily* in finding that “at least a significant minority of reasonable customers” would have

read POM's ads to convey misleadingly unqualified disease claims. *Id.* 15a, 33a (describing FTC's "significant minority" standard).

The panel made clear, however, that it had reached that conclusion on *de novo* review only "with respect to the nineteen ads determined misleading" by the ALJ—conspicuously failing to make such a finding with respect to the seventeen further ads the Commission prohibited under its more sweeping standard. *Id.* 33a. Like the FTC, the panel relied exclusively on the face of the ads for these findings. Among the seventeen ads whose ban the D.C. Circuit affirmed only under deferential review—and without any substantial discussion—are all three of those above.

Indeed, the Court of Appeals decided to apply only deferential review even though it recognized that the standard the Commission had settled on for implying claims of *unqualified* clinical proof into health ads would have quite broad effect going forward. Elsewhere in its opinion, the court recognized that the "evident leeway to make 'effectively qualified' disease claims ... appears to be highly circumscribed," in the sense that "[r]epresentations characterizing a study's results as 'preliminary' or 'initial'" would be read by the FTC as completely unqualified claims of clinical proof that a product treats or prevents disease. *Id.* 35a-36a. Put otherwise, the panel fully recognized that the FTC found POM's ads to contain misleading messages of unqualified clinical proof according to a standard that broadly implies such claims into ads that contain the *opposite* words. But it still determined that the First Amendment permits a court to affirm an FTC decision applying that standard solely under the APA's highly deferential standard of review.

4. POM sought rehearing en banc, emphasizing that the decision conflicted with this Court's cases. In

particular, POM emphasized that the decision had relied on circuit precedent that had never even considered *Peel*. Rehearing was denied. Pet App. 181a.

REASONS FOR GRANTING THE WRIT

The question of the proper standard of review when an agency bans speech by reading an implied, misleading message into otherwise truthful commercial speech plainly merits certiorari review for four reasons. First, the D.C. Circuit's determination that review must be deferential is clearly contrary to this Court's precedent. Second, there is a division of authority in the courts on this question, and the few courts that have refused to follow this Court's cases are expressly waiting for this Court's guidance. Third, the issue is important and necessary to resolve now because the decision itself will frustrate future vehicles. And fourth, any such future vehicles that do arise are unlikely to be as good as this one: This is the rare case in which the Court of Appeals (and decisions below) distinguished among a large set of ads meeting different standards of review. Accordingly, this case provides a golden opportunity to clarify the standard in a situation where it makes a difference, and the broad record of ads at issue allows that question to be resolved in a concrete fashion that gives guidance to future courts.

I. The Decision Below Conflicts With This Court's Precedent.

As an initial matter, the D.C. Circuit's decision in this case is wrong. This Court has insisted that appellate courts review the kind of predicate factual finding at issue *de novo* in the First Amendment context precisely because a contrary rule leaves the First Amendment's application almost entirely in the hands of the censor. And the D.C. Circuit's rule here does just that: By affirming a speech ban whenever the FTC can survive deferential, arbitrary-and-capricious review on the proposition that a

“substantial minority” of consumers will be misled by an ad, the D.C. Circuit leaves the Commission (and other agencies) free to read broad claims into everyday examples of commercial speech, with the end of keeping them from the public on the very kind of paternalistic grounds that this Court’s doctrine condemns.

Accordingly, over 30 years ago, this Court made clear that “factual” determinations by lower tribunals that go to the protected character of the speech in question are reviewed *de novo*. See *Bose*, 466 U.S. at 503-511. And not long thereafter, this Court applied that rule to require *de novo* review in two indistinguishable situations where regulators determined that particular ads could imply a misleading message and should be sanctioned as a result. See *Peel*, 496 U.S. at 108; *Ibanez*, 512 U.S. at 144-148.

The Court’s seminal decision in this area is *Bose*, which held that a finding of “actual malice” in defamation cases is subject to *de novo* appellate review because it goes to the protected character of the speech. 466 U.S. at 503-511. *Bose* noted that such “factual” determinations are always reviewed *de novo* by successive courts—including in such various contexts as whether the allegedly unprotected speech is knowingly false, fighting words, likely to incite violence, obscenity, or child pornography. *Id.* at 504-08. That broad holding, and its reasoning, strongly suggest that *de novo* review is likewise required in the analogous context where the FTC claims that speech is in an unprotected category because it implies a misleading message to a minority of consumers.

Indeed, it is worth noting how emphatic a holding *Bose* laid down. *Bose* was a defamation case, in which the relevant evidentiary issue was whether the speaker knew that the statements he was making were false. After a nineteen-day bench trial, *id.* at 489, an Article III judge concluded that the speaker knew the statements were

false, expressly relying on credibility findings. *Id.* at 497. This Court recognized that, under Rule 52(a), “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.” *Id.* at 498. And it openly acknowledged that “an inquiry into what a person knew at a given point in time” easily falls within the findings of “fact” on which Rule 52(a) requires deference. *Id.* Nonetheless, *Bose* held that “Rule 52(a) ... does not prescribe the standard of review,” and instead “reaffirm[ed] the principle of independent appellate review that we have applied uncounted times before,” when the “factual” question goes to the constitutionally protected character of the speech. *Id.* at 514.

Further, this Court recognized the importance of laying down that rule by both reaching out to do so and giving it remarkable breadth. The *Bose* Court noted that it could well have reversed even “under the clearly-erroneous standard of review.” *Id.* at 514. It likewise recognized that the “actual malice” standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964), did not even obviously apply, as the allegedly defamatory statements in *Bose* concerned only the quality of Bose loudspeakers. *See* 466 U.S. at 514. But this Court nonetheless took the opportunity to emphasize that “[a]ppellate judges in such a case *must exercise independent judgment*,” even though “the question presented reaches us on a somewhat peculiar wavelength.” *Id.* (emphasis added). And this Court even emphasized that “the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact,” even if the fact-finding at issue falls within the province of “a jury” as constitutional factfinder. *Id.* at 501.

The Court in *Bose* also carefully explained why independent judicial review on such “factual findings”

was required—namely, because it is the responsibility of the judiciary under the First Amendment to establish the breadth of any category of unprotected speech. As the Court explained, “[p]roviding triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas.” *Id.* at 505. Indeed, *Bose* emphasized the ever-present risk in the First Amendment context that an alleged factual finding may represent bias against the speech at issue: “The principle of viewpoint neutrality that underlies the First Amendment itself also imposes a special responsibility on judges *whenever* it is claimed that a particular communication is unprotected.” *Id.* (emphasis added, citation omitted).

Although a passing footnote in *Bose* led to questions whether this Court would apply the same rule to commercial speech cases, *see id.* at 504 n.22, those questions were rapidly put to rest in *Peel*. 496 U.S. at 108. There, the Illinois Supreme Court sanctioned certain attorney advertisements on the theory that they could imply a set of misleading messages to some consumers. Citing *Bose*, this Court expressly held that, in that commercial-speech context as well, “[w]hether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which Members of this Court should exercise *de novo* review.” *Id.* That was particularly so because the issue was not any ad’s “facial accuracy, but ... its implied claim[s].” *Id.* at 101. This Court thus rigorously scrutinized the ads and their supposed implied claims and determined that—where the ads did not “necessarily” imply the misleading message—it would not permit banning them based on “paternalistic assumption[s]” about the audience. *Id.* at 104-05.

Finally, this Court reaffirmed its *de novo* approach to deceptive-advertising determinations in *Ibanez*. 512 U.S. at 144-48. There, the Florida Board of Accountancy sanctioned Ibanez for using designations in her promotional materials it believed would deceive the public into thinking that she was certified by the state. *Id.* at 144-45. This Court reaffirmed *Peel*, gave no deference to the Board's finding that consumers would be *actually* misled by the ads into believing petitioner was state certified, and proceeded to apply the First Amendment's balancing analysis to ultimately reject the proposition that such designations could be regulated as "potentially misleading" commercial speech. *Id.* at 145-148.

These cases—particularly *Peel*—are remarkably on point. In *Peel*, as here, the Court had before it an *ex post* determination that *particular* advertisements implied a misleading message. 496 U.S. at 101. There, as here, the lower tribunal found that the allegedly misleading implied messages existed based solely on a facial analysis of the ads, with "no contention that any person was actually misled or deceived." *Id.* at 101, 106, 108; *see also Ibanez*, 512 U.S. at 145 (noting that there, as in *Peel*, the regulator did not rely on "any evidence of deception"). And in those cases, as here, the regulator who found the implied, misleading message was a fact-finding tribunal *and* subject-matter expert ordinarily entitled to great deference on appeal. *Peel*, 496 U.S. at 108 (rejecting deference to Illinois Supreme Court in its capacity as regulator of the state bar); *Ibanez*, 512 U.S. at 144-45 (giving no deference to state board specifically charged with regulating accountancy). Indeed, *Peel* specifically rejected the dissent's call for deference to the Illinois Supreme Court on the ground that it was "in a far better position ... to determine which statements are misleading or likely to mislead," 496 U.S. at 108, holding instead that where such a tribunal "[I]ack[s] empirical evidence to support its

claim of deception,” the question “[w]hether the inherent character of a statement places it beyond the protection of the First Amendment” requires “*de novo* review.” *Id.* That exact holding determines the outcome here.

Indeed, there is no meaningful way to distinguish these cases, which perhaps explains why the D.C. Circuit did not even try to do so—instead relying on footnotes from its own, plainly outdated circuit precedent. Pet. App. 33a; *infra* pp.28-29. In particular, a federal agency like the FTC is entitled to no more deference in this area than a state agency or state supreme court regulating the state bar, and it is largely backwards for *First Amendment purposes* to give a political body like the FTC greater “fact-finding” deference than an Article III court or jury of the kind at issue in *Bose*. As this Court noted, one of the principal First Amendment concerns that leads to the *de novo* review requirement is that a decision-maker’s “factual” determination placing speech in an unprotected category may not really be value or viewpoint neutral. *Bose*, 466 U.S. at 505. Surely, that risk is far *lesser* where the decision-maker is a neutral, life-tenured judge rather than an agency avowedly free to pursue its own policy preferences. Choosing to defer to the facial analysis of a political agency, when this Court has instructed courts not even to defer to a neutral court’s analysis of a nineteen-day trial record, represents an indefensible refusal to apply this Court’s settled law.

Even standing alone, the D.C. Circuit’s vast departure from this Court’s binding precedent requires review. But, as explained below, the case for certiorari is far stronger than that because review of federal agency cases appears to be the *sole* context in which *any* courts have departed from *Bose* and *Peel*, creating a clear split on how false-advertising cases are reviewed under the First Amendment.

II. There Is A Circuit Conflict On The Question Presented, And The Lower Courts Are Awaiting This Court's Guidance.

The D.C. Circuit here joined the Seventh Circuit as the only court since *Bose* and *Peel* to deny that independent judicial review applies to the question whether a given ad's language on its face implies a misleading message to consumers. In various, closely related contexts, other courts have routinely recognized that *Bose* and *Peel* govern. And, importantly, it is clear from both the decisions of the D.C. and Seventh Circuits that they are awaiting a definitive holding from this Court on the question presented. This Court should provide the guidance these courts evidently need.

Many courts have recognized that *Bose* and *Peel* uncontroversially require *de novo* review in this context. This includes multiple holdings from state supreme courts, which frequently encounter this issue when state boards enforce advertising standards for regulated professions. In a recent example, the Virginia Supreme Court considered whether certain blog posts by an attorney were misleading commercial speech because they discussed his victories without a disclaimer that results in legal cases cannot be guaranteed. *Hunter v. Va. State Bar*, 285 Va. 485, 492 (2013). The state bar claimed the posts were actually or inherently misleading and unprotected by the First Amendment. *Id.* at 500. Citing *Peel* and *Bose*, the Virginia Supreme Court recognized that it would have to review that suggestion *de novo* because “[a]n appellate Court must independently examine the entire record in First Amendment cases to ensure that a ‘a forbidden intrusion on the field of free expression’ has not occurred.” *Id.* at 495-496. And it found that the posts were *not* inherently or actually misleading, and were instead protected speech

that was only potentially misleading and thus subject to *Central Hudson's* balancing test. *Id.* at 499-500.

Other state supreme courts are in accord. In *Snell v. Engineered Systems & Designs, Inc.*, 669 A.2d 13, 19 (Del. 1995), the Delaware Supreme Court considered a lower court finding about whether a given trade name misleadingly implied to consumers that the company at issue involved state-licensed engineers. Again, citing *Peel*, the court recognized that the question whether the speech at issue was "actually or inherently misleading, although resembling a factual question, is actually a matter of law, subject to this Court's *de novo* review." *Id.* And the court then refused to find that the trade name at issue was actually or inherently misleading commercial speech absent some *evidence* that reasonable people were actually being misled. *Id.* at 21.

Likewise, in *Appeal of Sutfin*, 141 N.H. 732, 736 (1997), the New Hampshire Supreme Court considered a decision by the Board of Dental Examiners that had reviewed a dentist's ad and determined that his truthful advertisement for a surgical procedure implied various misleading messages about its superiority. The court recognized that, because the Board had no actual evidence of deception, its facial judgment amounted to a claim that the ad was "inherently misleading" because of its implied messages. And, again citing *Peel*, it recognized that this is manifestly a question "that an appellate court must review *de novo*." *Id.* at 736. Undertaking that review, the court reversed. *Id.* at 736-737.

Decisions like these plainly demonstrate that the supreme courts of the several states recognize that they cannot, under *Bose* and *Peel*, show their state agencies the First Amendment deference as censors of commercial speech that the D.C. Circuit here extended to the FTC. And no court has ever articulated a rationale under which

state subject-matter experts governing particular, long-regulated professions would be shown *less* deference than federal agencies purporting to regulate advertising far more generally.

Federal court decisions likewise adhere to the plain meaning of *Peel* and *Bose* and routinely note the broad rule that “in cases involving First Amendment claims, an appellate court must undertake independent review of the record.” *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1120-21 (11th Cir. 1992). They have applied that rule to a jury finding that a particular ad would have implied to reasonable people that it advertised illegal services, *id.*; to a Texas rule that it would mislead consumers for non-licensed individuals to refer to themselves as interior designers, *Byrum v. Landreth*, 566 F.3d 442, 447-48 & n.5 (5th Cir. 2009); to district court fact-findings regarding a ban on direct mail solicitation of personal-injury victims, *Revo v. Disciplinary Bd. of Supreme Court of N.M.*, 106 F.3d 929, 932 (10th Cir. 1997); to a civil enforcement action based on fraudulent commodity marketing, *CFTC v. Vartuli*, 228 F.3d 94, 108 n.7 (2d Cir. 2000); and—quite recently—to a district court judgment that particular ads by a health-care referral service misled consumers regarding the source and nature of potential compensation for medical injuries. *Otto*, 744 F.3d at 1055.

In contrast, only the D.C. and Seventh Circuits have denied the application of *Bose* and *Peel* in this context. And to the extent they even offer a defense of that decision, it only further demonstrates the need for this Court’s intervention.

In particular, the Seventh Circuit has made clear that it is only waiting for this Court’s guidance. In *Kraft*, the FTC had found Kraft liable for running misleading ads regarding the calcium content of cheese slices, and Kraft appealed, seeking *de novo* review under *Bose* and *Peel*. See

970 F.2d at 313. The case arose shortly after *Peel* and before *Ibanez*, and the Seventh Circuit concluded that while “*Peel* arguably extended *de novo* review to ... commercial advertising,” it was not clear that this Court intended that result, so it would “decline to apply *de novo* review in [the FTC] context.” *Id.* at 317. *Kraft*’s core reasoning was that—in a decision long predating *any* of this Court’s commercial-speech cases—this Court had applied deferential review in an FTC false-advertising case, *see id.* at 316 (citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965)), and the Seventh Circuit believed it was compelled to wait for this Court to overturn that precedent before it did so itself based on *Bose* and *Peel*. *See id.* at 317 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), for the proposition that “[i]f a precedent of this Court has a direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [Courts] of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions”). So, while “*Colgate-Palmolive* preceded the extension of first amendment protection to commercial speech,” and “one might argue that *Bose* and *Peel* operating in tandem effectively overrule *Colgate-Palmolive*,” the Seventh Circuit refused to take that step absent this Court’s guidance. *Id.* at 316-317.

The D.C. Circuit’s endorsement of deferential review is likewise rooted entirely in the stickiness of outdated precedents. Shortly after *Bose*, and before *Peel*, a footnote in a D.C. Circuit decision expressed doubt whether *Bose* would apply to commercial-speech cases. *See FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41 n.3 (D.C. Cir. 1985). Then, *after Peel*, the Seventh Circuit relied on that footnote to reject *de novo* review in *Kraft*. *See* 970 F.2d at 317. Thereafter, yet another D.C. Circuit footnote would rely on these precedents to reject an

argument for *de novo* review in an FTC false-advertising case *without even acknowledging* that *Peel* had intervened. See *Novartis v. FTC*, 223 F.3d 783, 787 n.4 (D.C. Cir. 2000). And in this case, the D.C. Circuit once again rejected an argument for *de novo* review under *Bose* based entirely on its own previous footnotes and the decision in *Kraft*—again omitting any mention of *Peel* and its application of *Bose* in the commercial-speech context.

These outlier decisions refusing to follow *Bose* and *Peel* where they obviously apply are rooted in no more than outdated precedent that this Court's decisions have passed by. Perhaps it is understandable that these courts would wait for this Court to acknowledge that its own, ancient precedents regarding review of FTC decisions have been eclipsed not only by *Bose* and *Peel*, but also by *Central Hudson* and the entire doctrine of commercial-speech protection. But if this Court is going to instruct lower courts to await its specific guidance before jettisoning outdated precedent, that guidance should be swiftly provided—especially when those courts *expressly say* they are waiting for it. Otherwise, a bizarre divergence of authority will persist where findings of misleading advertising are reviewed *de novo* when they come from courts, juries, and expert state regulators, but not federal agencies, for a reason no court has even tried to explain.

III. The D.C. Circuit's Error Is Critical And Requires Prompt Correction.

Allowing agencies to imply purportedly misleading messages into truthful commercial speech, subject only to deferential review, is also enormously consequential.

As an initial matter, the outcome of this case is of critical, nationwide importance for two reasons. First, the FTC brought this action as a test case, *supra* p.14, and the Commission's precedential opinion will govern the entire industry nationwide. That rule has never been subjected

to independent First Amendment analysis. If anything, the D.C. Circuit's refusal to uphold the ban on nearly half the ads at issue under *de novo* review strongly suggests that the FTC has in fact banned POM's protected speech and chilled the protected speech of others going forward. This Court should not allow a major, precedent-setting, nationwide speech restriction to go into effect without any independent First Amendment review.

Separately, the question presented has huge practical significance. Subject only to APA review, the FTC (and *any* other agency, state or federal) will have essentially a free hand to ban certain kinds of truthful commercial statements in *any* industry on the theory that a substantial minority of consumers will misunderstand them, even if the underlying motive is likely political. A commission that believes daily fantasy sports games are too close to gambling—perhaps after lobbying from casinos—could sanction a company for prominently discussing large payouts on the theory that some substantial minority of consumers are misled regarding the likelihood of winning. A commission that thinks guns are more dangerous than people believe could fine manufacturers for advertising their safety features. A commission that believes in organic farming could forbid use of the word “natural” by any foods containing conventionally farmed products on the theory that some minority of consumers would understand organic and natural as synonyms. And a commission that disfavors certain medical procedures can find that claims regarding those procedures are misleading because of what they “imply” and sanction providers accordingly. Subjecting such speech-restrictive decisions only to highly deferential, arbitrary-and-capricious review is an invitation to First Amendment mischief.

Moreover, the nature of this rule is that leaving it in place will itself restrict this Court's opportunities for review. Speakers who know independent judicial review

is unavailable will avoid making any statements that could come within the arguable orbit of agency prohibitions—however unjustified those prohibitions might be. And when they do raise regulators’ hackles, they are very unlikely to go to trial and appeal all the way to this Court. That’s particularly true because “trial” here involves expensive litigation before the agency, which is then appealed to the full agency, which (as this case shows) can then do pretty much anything within its discretion, unconstrained by ALJ factual findings or the prospect of meaningful judicial review.

The FTC’s experience in this regard is instructive. Cases like these are already overwhelmingly likely to settle: While there have been many consent decrees on this issue in the thirty-plus years since *Bose*, see Pet. App. 41a-42a (citing many), petitioners have found only six Court of Appeals cases in that span concerning implied claims in FTC false-advertising suits—half of which arose in the D.C. Circuit. And the disincentive created by the D.C. Circuit’s holding in this case will only make future cases even fewer and further between. That is particularly so because contested findings of liability from the agency give rise to follow-on class action suits aggregating a tremendous number of (largely dubious) claims, where the company will be held up for a large settlement. This Court can safely assume that, if the D.C. Circuit’s grant of enormous deference to the FTC in this case remains in place, the agencies’ settlement leverage will derail most future vehicles before they leave the station.

This is not to say the issue arises infrequently—far from it. The FTC is active in seeking to enforce its rules and has in fact vastly increased its activity in this area. *Supra* p.14. The point is merely that, given deferential review in the courts, vehicles that actually take this issue through the appellate process are unlikely.

That effect is further multiplied by the unique role the D.C. Circuit plays in agency review. It will be the forum in most or all cases arising from many federal agencies—including the FTC, FCC, FDA, USDA, DOT, and others that routinely purport to regulate the way companies can communicate with consumers. This case thus confirms to the entire breadth of the federal regulatory state that it has a highly favorable forum for defending any decision it might make to condemn a company for how it chooses to speak in the marketplace. This Court's intervention is therefore merited.

IV. This Is A Uniquely Good Vehicle For The Question Presented.

For the reasons given, it would be appropriate to grant certiorari on the question presented now even if this were an ordinary vehicle for reviewing it. But, in fact, this case presents a particularly good vehicle for considering the appropriate standard of review. Even leaving aside the chilling effect of this decision on the already infrequent vehicles that make it all the way through an administrative trial and appeal, future vehicles as strong as this one are unlikely to arise.

The typical case involves one relevant claim; this case presents 36 separate and distinct ads which—given both the various administrative opinions and the approach taken by the D.C. Circuit—allow this Court to articulate the standard of review in a concrete fashion that will provide guidance to the lower courts. Not only is there a breadth of different ads at issue, but many of them were read quite differently by the ALJ and Commission, and Commissioner Ohlhausen's separate opinion carefully explains how an independent judgment on most of those ads should reach a different result. Moreover, the D.C. Circuit's opinion itself suggests that the standard of review would likely require different outcomes among those ads

by refusing to say that it would affirm the ban on nearly half the ads at issue under *de novo* review. Accordingly, this set of facts will allow this Court to demonstrate the importance and application of the standard of review in a concrete setting that will clarify future cases and permit POM to run several constitutionally protected ads that the Commission has banned.

The Commission will no doubt protest that the standard is not outcome-determinative here because the D.C. Circuit did not affirmatively say it would strike down the FTC's ban on the seventeen additional ads under *de novo* review, and in fact suggested that the FTC's remedial injunction could be affirmed even if liability was assessed on a smaller number of ads. *See* Pet. App. 33a. But this overlooks the critical point that the *scope* of that remedial injunction depends entirely on what counts as an ad making an impermissible disease claim, which—in turn—is certainly dependent on the standard for reviewing the FTC's suggestion that the ads found innocuous by the ALJ and Commissioner Ohlhausen and reproduced above really imply that POM is a scientifically proven cure for heart disease and cancer. Indeed, it is rare to be presented with a vehicle in which there is so strong an indication that the standard of review will make a difference in evaluating a prohibition on protected speech. This Court should take this opportunity and clarify that *Bose* and *Peel* apply to First Amendment review of federal agency orders no less than they do to indistinguishable orders arising from expert state regulators and Article III courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 23, 2015