### QUESTIONSPRESENTED

- 1. Whether the court of appeals correctly affirmed a compensatory civil contempt sanction in the amount of the monetary harm to consumers caused by petitioner's violations of an injunction prohibiting deceptive "infomercial" advertising.
- 2. Whether the court of appeals correctly upheld the district court's modification of a consent decree in order to secure future compliance with the decree, which the district court found to have been repeatedly violated.
- 3. Whether the court of appeals correctly upheld a requirement that petitioner post a bond to ensure that he would not engage in further deceptive advertising.

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# In the Supreme Court of the United States

No. 12-6 Kevin Trudeau, petitioner

V.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

### BRIEF FOR THE RESPONDENT IN OPPOSITION

### **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 51a-61a) is reported at 662 F.3d 947. An earlier opinion of the court of appeals (Pet. App. 1a-50a) is reported at 579 F.3d 754. Opinions of the district court (Pet. App. 62a-75a, 76a-87a, 96a-132a) are reported at 567 F. Supp. 2d 1016, 572 F. Supp. 2d 919, and 708 F. Supp. 2d 711.

### **JURISDICTION**

The judgment of the court of appeals was entered on November 29, 2011. A petition for rehearing was denied on January 30, 2012 (Pet. App. 159a-160a). On April 23, 2012, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including June 28, 2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Petitioner is a promoter of self-help schemes and purported cures for various health problems. His "medium of choice" is the "infomercial"—"a lengthy television advertisement that takes the form of a mock interview"—in which he "raves about the astounding benefits of the miracle product he's pitching." Pet. App. 2a, 62a-63a. In 1998, the Federal Trade Commission (FTC or Commission) brought an enforcement action against petitioner in the Northern District of Illinois, charging that his infomercials were false and deceptive, in violation of Sections 5 and 12 of the Federal Trade Commission Act (FTC Act or Act), 15 U.S.C. 45, 52. Pet. App. 3a. To settle that action, petitioner stipulated to the entry of a permanent injunction that, inter alia, forbade him from making representations about the benefits or performance of any product without reliable evidence to substantiate his claims. The injunction also required petitioner to pay \$500,000 into a customer-redress fund administered by the FTC. It further obligated him to maintain a \$500,000 performance bond, which would be forfeited if he violated the injunction but would otherwise be returned to him. Id. at 4a; see Stipulated Order for Permanent Injunction and Final Judgment, 1:98-cv-00168 Docket entry No. 2, at 5, 7-9 (N.D. III. Jan. 14, 1998).

Several years later, petitioner began an infomercial campaign for a product called "Coral Calcium Supreme," which he described as an effective cure for cancer, heart disease, multiple sclerosis, lupus, and other serious ailments. His infomercials also touted "Biotape"—a product resembling black electrical tape—as a cure for severe pain from migraines, arthritis, and sciatica. In 2003, the FTC moved for an order holding petitioner in

contempt of the 1998 injunction on the ground that he lacked substantiation for his claims about those products' health benefits. At the same time, the Commission instituted a new action alleging that the infomercials were false and deceptive, in violation of 15 U.S.C. 45 and 52. The district court consolidated the actions, and petitioner stipulated ttt couC y of a preliminary injunction that prohibited him from promoting the products as ef-

2. A few years later, petitioner began to disseminate informer cials touting his new book, entitled *The Weight* Loss Cure "They" Don't Want You to Know About. The infomer cials did not disclose the details of the "cure" but claimed that it was "easy," "simple," "very inexpensive," and "the easiest [weight loss] method known on planet Earth." Pet. App. 10a, 68a (brackets in original). Petitioner asserted that the program was "not a diet, not an exercise program, not portion control, not calorie counting," and that it required "no crazy potions, powders or pills." Id. at 25a. He further "claimed in the infomercials that the protocol can be completed 'at home' and that 'you don't have to go to a clinic to do it.'" Id. at 23a-24a. Petitioner told his viewers that, after completing the program, you can "eat anything you want, as much as you want, as often as you want." Id. at 24a. "[Y]ou'll keep the weight off forever. You'll never have to diet again." Id. at 11a.

The FTC moved for an order holding petitioner in contempt for violating the 2004 Decree. The district court granted the motion, finding that the *Weight Loss Cure* infomercials misrepresented the content of petitioner's book. Pet. App. 69a-75a. Contrary to the repeated assertions in the infomercials that the diet is "easy," the court found that, in fact, it is "overwhelming," "difficult," and "impossible to follow all the time." *Id.* at 73a. Specifically, to follow the program set forth

- and (4) comply with burdensome dietary and other restrictions for the rest of one's life. *Id.* at 9a, 24a, 67a, 74a. The court concluded that the infomercials' patently false statements were misrepresentations of the book's content, in violation of the 2004 Decree. *Id.* at 80a-83a.
- 3. The court of appeals affirmed the district court's contempt finding but vacated the remedies ordered by the district court and remanded for further proceedings. Pet. App. 16a-28a. As relevant here, the court observed that petitioner "may have quoted parts of his book, but he did so deceptively," and it concluded that the "selective quotations mislead because they present consumers with an incomplete picture of what the protocol requires, thereby inducing consumers to purchase the book on false hopes and assumptions." Id. at 24a-25a. The court stated that, by promising in the infomercials that his book offered "a safe, simple, inexpensive way to shed pounds without exercise or dietary restrictions," without revealing the harsh regimen actually prescribed in the book, petitioner "did more than just quote his book; he outright lied." Id. at 23a, 25a. The court rejected petitioner's contention that the claims in the infomercials merely contained subjective "opinions," explaining that the purported "opinions" concerning the content of the book constituted "statements that are patently false." Id. at 23a.
- 4. On remand, the district court or dered petitioner to pay a monetary civil contempt sanction of \$37,616,161, "representing a reasonable approximation of the loss consumers suffered"—*i.e.*, "the money they spent on the book that was misrepresented in the infomercials." Pet. App. 91a, 98a-103a. Based on petitioner's lack of credibility and indications that he was "hiding substantial assets," as well as his "pattern and practice of contemptu-

ous conduct," the court found that petitioner had "made it next to impossible to determine his gain and, as a result, any sanction based on disgorgement of profits would be \* \* \* wholly ineffectual." *Id.* at 99a, 101a. The court concluded that, "if there was ever a case in which consumer loss was the proper measure of damages, this is it." *Id.* at 103a.

The district court also granted the FTC's motion to modify the 2004 Decree under Federal Rule of Civil Procedure 60(b)(5), incorporating additional remedial measures to address the continuing problem of petitioner's deceptive sales pitches to consumers. One change to the order was a requirement that petitioner post a \$2 million performance bond before making infomercials for a book containing any representations about the benefits, performance, or efficacy of any product, program, or service discussed in the book. Pet. App. 111a-112a. The bond would be forfeited if the infomercials contained misrepresentations but otherwise would be returned to petitioner five years after his ceasing that activity. *Id.* at 143a-146a.

The district court found "sufficiently changed circumstances to merit modification of the 2004 Order to prevent further consumer harm and deter [petitioner] from further violations." Pet. App. 110a. Those "changed circumstances," the court explained, included the facts that petitioner had (1) "willfully deceived thousands of consumers" and caused "tens of millions of dollars in losses to those consumers"; (2) committed "willful violations of [the district] court's orders"; and (3) "demonstrated that he is likely to repeat his deceptive conduct in connection with marketing his book[s]." *Id.* at 110a-112a. The district court also found that modifying the 2004 Decree was necessary "to accomplish its pur-

poses of consumer protection and compensation" more effectively, and that the performance-bond requirements did not violate petitioner's First Amendment rights. *Id.* at 110a-111a.

5. The court of appeals affirmed. Pet. App. 51a-61a. The court held that the imposition of "a remedial fine measured by consumer loss" was permissible because "[I]ongstanding precedent dictates that the district court had power to provide full remedial relief to compensate \* \* \* for *losses sustained*." *Id.* at 54a (citations and internal quotation marks omitted). Here, the court explained, the district court had reasonably chosen a remedial sanction that "might come close to putting [petitioner's] victims in the same position they would have been" had petitioner not "flagrantly and repeatedly" violated the decree. *Ibid.* 

The court of appeals also affirmed the performance-bond requirement. Pet. App. 57a-59a. Applying the standard set forth in *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 252 (1968), it found that the district court had properly modified the 2004 Decree so as "to better achieve its purpose" of protecting consumers from petitioner's deceptions, and so as to "reinforce the order's protections going forward." Pet. App. 58a.

The court of appeals concluded that the bond requirement did not infringe petitioner's First Amendment rights. Pet. App. 59a-61a. It reasoned that, to the extent that the requirement restricts misleading commercial speech, it does not implicate the First Amendment because such speech is not constitutionally protected. *Id.* at 59a. To the extent that the restriction affects non-misleading commercial speech, the court held, it satisfies the standard this Court established in *Central Hudson Gas & Electric Corp. v. Public Service* 

*Commission*, 447 U.S. 557, 564-465 (1980), because (1) the restriction advances the "substantial interest" of protecting consumers from harmful deceptive advertising; (2) it does so "directly," by creating a financial in-

held that, in a civil contempt proceeding, "if the defendant does that which he has been commanded not to do" and thereby harms other parties, a proper civil contempt remedy is to "afford \* \* compensation for the pecuniary injury caused by the disobedience." *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 441-442 (1911); see

late decision holding that civil contempt sanctions are limited to the amount of a perpetrator's ill-gotten gains. even if the victims' losses are greater. But numerous decisions of other circuits have reached the same conclusion as the court below. For example, in civil contempt cases brought by the FTC, courts of appeals have consistently held that the amount of sanctions may be based on the injury that the contemnor inflicted on consumers. See, e.g., FTC v. Kuykendall, 371 F.3d 745, 764 (10th Cir. 2004) (en banc); FTC v. Leshin, 618 F.3d 1221, 1237-1238 (11th Cir. 2010); *McGregor* v. *Chierico*, 206 F.3d 1378, 1388-1389 (11th Cir. 2000). There is thus no conflict on the unremarkable proposition that civil contempt sanctions may be based on "the district court's valuation of the losses sustained by [the contemnor's] customers," McGregor, 206 F.3d at 1388, if such an award is necessary to satisfy "the requirements of full remedial relief," McComb v. Jacksonville Paper Co., 336 U.S. 187, 193 (1949).

b. In seeking to demonstrate the existence of a circuit conflict, petitioner cites cases addressing the proper extent of monetary equitable remedies for violations of the FTC Act and other statutes. He cites Seventh, Eighth, and Ninth Circuit decisions confirming that monetary remedies for FTC Act violations may be based on the amount of consumer injury, and he contrasts those rulings with a Second Circuit decision limiting relief for FTC Act violations to(lin)-5.i. f75 1FTC AFTC

Inurance Co. v. Knudson, 534 U.S. 204 (2002), concerning equitable remedies available to private plaintiffs in suits brought under a wholly different statutory scheme. Petitioner attempts to extend that line of reasoning yet further in arguing (Pet. 14, 20) that the decision below is contrary to Great-West. But Great-West did not involve civil contempt sanctions, and nothing in that decision suggests that this Court's precedents governing such sanctions should be reexamined or overruled.

None of the cited cases has any bearing on remedial civil contempt sanctions. This Court has made clear that, in civil contempt proceedings, a court may "lay to one side the question whether the [agency], when suing to restrain violations of the [statute], is entitled to" any particular monetary remedy; such questions simply are "not material" to the determination of civil contempt sanctions. McComb, 336 U.S. at 193. The court below therefore correctly concluded that the assessment of civil contempt sanctions may be "informed—but not limited"

flict between the two" decisions. Pet. App. 58a; accord *United States* v. *Eastman Kodak Co.*, 63 F.3d 95, 101-102 (2d Cir. 1995) ("[W]e see nothing in *Rufo* that undermines the vitality of [the] approach \* \* \* in *United Shoe*."); see *Building & Constr. Trades Council* v. *NLRB*, 64 F.3d 880, 888 (3d Cir. 1995); *Alexander* v. *Britt*, 89 F.3d 194, 200 (4th Cir. 1996); *League of United Latin Am. Citizens* v. *City of Boerne*, 659 F.3d 421, 437-438 (5th Cir. 2011).

This Court's decisions in Rufo and United Shoe are consistent with one another, and with Federal Rule of Civil Procedure 60(b)(5), which authorizes courts to modify injunctions, including consent decrees, where "applying [them] prospectively is no longer equitable." Thus, in both *United Shoe* and *Rufo*, the Court held that lower courts had erred in refusing to modify consent decrees based on a mistaken application of the "grievous wrong" standard of *United States* v. Swift & Co., 286 U.S. 106, 119 (1932) ("Nothing less than a clear showing of grievous wrong evoked by new and unfor eseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."). See *United Shoe*. 391 U.S. at 248-249: *Rufo*. 502 U.S. at 379-380. Both *Rufo* and *United Shoe* teach the same lesson: that "the 'grievous wrong' language of *Swift* was not intended to take on a talismanic quality, warding off virtually all efforts to modify consent decrees," but that courts must instead apply "the traditional flexible standard for modification of consent decrees," as incorpor at ed into Rule 60(b)(5). Rufo, 502 U.S. at 379, 380; accord *United Shoe*, 391 U.S. at 248.

b. Petitioner asserts (Pet. 22-25) that the courts of appeals disagree about how and when to apply the *Rufo* standard for modifying consent decrees. The purported

conflict is illusory. The petition assembles quotations from a variety of court of appeals decisions, and it characterizes those decisions as reaching different conclusions. But most of the statements on which the petition relies are dicta. To the extent that they addressed similar circumstances, all of the cited decisions reached consistent holdings based on an application of the "traditional flexible standard for modification of consent de-

He also cites four cases that, like the present case, involved consent decrees resolving government enforcement agencies' civil lawsuits against alleged violators—except that in each of these cases, unlike in this one, the defendants sought to modify or vacate the decree in order to free themselves from its strictures. But none of the cited cases was similar to the present one, in which the government-agency plaintiff sought changes to more effectively ensure the defendant's compliance. *United Shoe* was precisely such a case, and its articulation of the standard for government-agency plaintiffs' Rule 60(b)(5) motions is fully applicable here. Petitioner identifies no other court of appeals that has endorsed his contention that, in the wake of *Rufo*, the *United Shoe* standard no longer applies to a case like this.

c. Petitioner points out that *United Shoe* allows mod-

infomer cials include "quotations of the book" (Pet. i, 31-32), they should have been viewed as "inextricably intertwined with protected speech" (Pet. 29, 30), or as a "blending of commercial and noncommercial speech" (Pet. 32).

That argument finds no support in this Court's commercial-speech jurisprudence, and it is based on an attempt to blur the "commonsense differences between speech that does 'no more than propose a commercial transaction' and other varieties" of speech. Virginia State Bd. of Pharmacy v. Virginia Consumer Citizens Council, Inc., 425 U.S. 748, 771 n.24 (1976) (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973)). Petitioner is also wrong in characterizing (Pet. 32) the "Decree's expansive definition of 'infomercial'" as comprising "essentially any statement of at least two minutes on television, radio, or the Internet." In fact, the relevant definition of "infomercial" is limited to statements "designed to effect a sale or create interest in the purchasing of goods or services." 2004 Decree 6.

Petitioner thus ignores this

The Court in *Bolger* carefully distinguished between the condom advertising mailings at issue there and the charitable solicitations at issue in Riley v. National Federation of the Blind, 487 U.S. 781 (1988)—the other First Amendment decision on which petitioner chiefly relies. The Court concluded that ordinary commercial advertising, which often combines sales pitches with general information about matters such as venereal disease and family planning (or, in the present case, improving one's health and losing weight), cannot be characterized as "inextricably intertwined" with fully protected speech, or deemed eligible for strict scrutiny. To the contrary, communications can "constitute commercial speech notwithstanding the fact that they contain discussions of important public issues." Bolger, 463 U.S. at 67-68 (citing *Central Hudson*, 447 U.S. at 563 n.5).

In *Bolger*, the Court made clear that "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." 463 U.S. at 68. Yet that is exactly what petitioner is attempting here. He cannot "immunize" himself from contempt remedies (aimed to protect consumers from his false and misleading advertising) simply by salting his infomercials with quotes from his book. Nor can he evade well-founded injunctive provisions designed to restrict his "false, deceptive, and misleading commercial speech"—restrictions that the First Amendment permits. *Friedman* v. *Rogers*, 440 U.S. 1, 9 (1979).8

<sup>&</sup>lt;sup>8</sup> The petition mischaracterizes both *United States* v. *Alvarez*, 132 S. Ct. 2537 (2012), and the decision below, in arguing that the latter "endorsed [a] categorical rule \* \* \* that false statements receive no First Amendment protection." Pet. 33. The decision below endorses no such rule; it merely applies this Court's established jurisprudence

Thus, even assuming *arguendo* that petitioner's "advertising contains statements \* \* \* that, in another context, would be fully protected speech[,]" that "does not alter the status of the advertisements as commercial speech." Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 n.7 (1985). In the present case, the quotations included in petitioner's infomercials hardly touched on "important public issues" or a "current public debate," Bolger, 463 U.S. at 68 (quoting Central Hudson, 447 U.S. at 563 n.5); they merely concerned his (false) characterization of the "eas[e]" of his weight loss program. But even if those statements had involved issues of public concern, mentioning such topics in advertisements does not drain them of their commercial nature and cannot transform them into fully protected noncommercial speech. See Board of Trs. v. Fox, 492 U.S. 469, 474-475 (1989) ("Including \* \* \* home economics elements no more converted [sales] presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech.").

b. Petitioner cites (Pet. 32) Gaudiya Vaishnava Society v. City and County of San Francisco, 952 F.2d 1059 (1990), cert. denied, 504 U.S. 914 (1992), in which the Ninth Circuit struck down a city ordinance restricting religious and political groups' sale of "message-bearing ('expressive') merchandise such as T-shirts, books, but-

to commercial speech. Pet. App. 59a-61a. And all three opinions in *Alvarez* acknowledge the legitimacy of content-based restrictions on "fraud, or some other legally cognizable harm associated with a false statement," 132 S. Ct. at 2544-2545 (plurality opinion), and the validity of prohibiting false statements "in contexts in which a tangible harm to others is especially likely to occur," *id.* at 2554 (Breyer, J. concurring in the judgment); accord *id.* at 2561 (Alito, J., dissenting).

ing from dismissal of cert.). By contrast, the infomercials at issue here fall squarely within the core of what Justice Breyer characterized as "purely 'commercial speech' \* \* \* 'usually defined as speech that does no more than propose a commercial transaction' \* \* \* [and] 'relate[s] solely to the economic interests of the speaker and its audience.'" *Id.* at 678 (quoting *United States* v. *United Foods, Inc.*, 533 U.S. 405, 409 (2001) (emphasis omitted), and *Central Hudson*, 447 U.S. at 561 (emphasis omitted)).

d. Virtually all of the First Amendment cases cited in the petition involved challenges to the constitutionality of generally applicable federal, state, or municipal statutes or ordinances. The present case is entirely different because the "restraint" here is part of a remedial scheme "trained on representations made in [an] individual case[]," in which the named defendant already has been adjudicated to have violated court orders by engaging in a pattern of deceptive and misleading advertising, and the restriction is specifically designed to prevent him from resuming that unlawful course of conduct. *Illinois ex rel. Madigan* v. *Telemarketing Assocs. Inc.*, 538 U.S. 600, 617 (2003). "In contrast to the \* \* \* restraints inspected" in cases involving statutes that cate-

more than a discretionary enforcement guide to FTC staff, and it had been overtaken by the subsequent development of this Court's commercial-speech jurisprudence. See 74 Fed. Reg. 8542 (Feb. 25, 2009). The courts below correctly recognized that, under that jurisprudence, petitioner's right to publish his book does not give him license to lie about the content of that book—e.g., by claiming that purchasing it will provide consumers with an "easy" diet plan—in speech aimed specifically at inducing such purchases. Petitioner identifies no decision of any court recognizing a First Amendment right to engage in the sort of egregious commercial deception that is involved in this case.

### **CONCLUSION**

The petition for a writ of certiorari should be denied. Respectfully submitted.

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