No. __-____

In the Supreme Court of the United States

KEVIN TRUDEAU, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a district court exercising inherent equitable power may impose a monetary sanction in an amount that exceeds the defendant's unjust enrichment (as the Seventh, Eighth, and Ninth Circuits have held, in conflict with the Second, Third, and Eleventh Circuits).

II. Whether the standard of *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992)—which held that Fed. R. Civ. P. 60(b)(5) permits modifying consent decrees based on a "significant change in circumstances"—applies to all modification requests (as the First, Sixth, and Ninth Circuits have held), only those made by defendants (as the Third and D.C. Circuits have held), only those in institutional reform cases (as the Federal Circuit has held), only those in cases affecting the public interest (as the Second Circuit has held), or only those made by defendants in institutional reform cases (as the Seventh Circuit held here).

III. Whether advertisements for a book that extensively quote the book are "inextricably intertwined" with fully protected speech and thus entitled to full First Amendment protection.

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INTRODUCTION

Petitioner Kevin Trudeau seeks review of a Seventh Circuit decision that raises critical and recurring questions that have divided the federal circuits, and a First Amendment question that this Court took up but could not resolve in *Nike, Inc.* v. *Kasky*, 539 U.S. 654 (2003) (dismissed as improvidently granted).

This case arises out of civil contempt proceedings that respondent Federal Trade Commission brought against Trudeau, a *New York Times* No. 1 best-selling author. The FTC has never proven that Trudeau violated any law or harmed any consumer. Yet for a single instance of contempt—supposedly "mischaracterizing" the weight-loss protocol described in his book, *The Weight Loss Cure "They" Don't Want You to Know About*, in alleged violation of a Consent Decree —the court below fined him $37.6 million and required him to post a $2 million bond before appearing in future infomercials. That decision rests on a breathtaking conception of the contempt power—one unconstrained by principles of equity, statutes governing the underlying case, or the First Amendment. Three issues warrant review.

First, the decision below deepened an entrenched circuit split over whether courts exercising inherent equitable power may award relief exceeding the defendant's unjust enrichment. Joining the Eighth and Ninth Circuits, the court below held that courts in such cases may award the full amount of consumer loss, even if the defendant received only a fraction of that amount. That decision conflicts with decisions of the Second, Third, and Eleventh Circuits. It also conflicts with *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204 (2002), which held that resti-

tution "in an equity case" is "an equitable remedy" and therefore must be limited to "identifiable funds" unjustly "held by the defendant." *Id.* at 213-216 (citation omitted).

Second, in modifying the Consent Decree under Federal Rule of Civil Procedure 60(b)(5), the court below declined to apply the "significant change in circumstances" standard of *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). Instead, the court held that *Rufo* only "applies when a *defendant* seeks to modify an injunction in an *institutional reform* case." Pet. 58a (emphasis added). That reading of this much-used rule of civil procedure directly conflicts with decisions of five circuits holding that *Rufo* applies outside of institutional reform cases, and with decisions of six circuits applying *Rufo* to modifications sought by plaintiffs.

Third, the court below reasoned that Trudeau's infomercials painted "an incomplete picture" of the weight-loss protocol described in his book, and thus amounted to "'false or misleading commercial speech" that "receives no [constitutional] protection.'" Pet. 24a-25a & n.12. But the infomercials here extensively quoted the book. Indeed, the court acknowledged that several of the infomercial statements it found to be "false" came directly from the book itself—*i.e.*, that the weight-loss protocol is "'easy' and 'inexpensive,'" "that dieters can 'do it at home,'" and "that after completion a dieter can eat 'anything you want' with 'no restrictions.'" Pet. 19a. It is for this reason that the FTC, in the course of litigating this very action, abandoned its 40-year-old policy known as "the Mirror Image Doctrine," which exempted from regulation statements in advertising that quoted from books.

The case thus presents the question: What First Amendment standard applies when the government regulates advertising of fully protected publications—*i.e.*, the question whether such commercial speech is inextricably intertwined with fully protected speech? The dismissal of *Nike* precluded the Court from reaching that "importan[t]" question. 539 U.S. at 663 (Stevens, J., concurring in dismissal). Given the FTC's recent abandonment of the Mirror Image Doctrine, the question is even more important today.

Certiorari should be granted.

OPINIONS BELOW

The Seventh Circuit's opinions (Pet. 1a-61a) are reported at 579 F.3d 754 and 662 F.3d 947. Its order denying rehearing (Pet. 159a-160a) is unreported. Three of the five relevant district court decisions (Pet. 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; the others are unreported.

JURISDICTION

The Seventh Circuit entered judgment on November 29, 2011, and denied a timely rehearing petition on January 30, 2012. On April 23, 2012, Justice Kagan extended the time to seek certiorari to June 28, 2012. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law … abridging the freedom of speech, or of the press."

Section 13(b) of the FTC Act, 15 U.S.C. §53(b), provides in relevant part: "Whenever the Commission has reason to believe—(1) that any person … is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and (2) that the enjoining thereof … would be in the interest of the public—the Commission … may bring suit in a district court of the United States to enjoin any such act or practice. … Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."

Fed. R. Civ. P. 60(b)(5) provides in relevant part: "On motion and just terms, the court may relieve a party … from a final judgment, order, or proceeding for the following reasons: … applying it prospectively is no longer equitable."

STATEMENT

A. Trudeau, the FTC, and the Consent Decree

Kevin Trudeau is a best-selling author and radio-show host. He has sold millions of books containing beneficial information that he believes the government has suppressed. Trudeau promotes his books largely through television, radio, and the Internet.

The FTC has long been critical of Trudeau. In 2003, it sought an injunction under §13(b) of the FTC Act, alleging that Trudeau was broadcasting deceptive infomercials. But the FTC never proved those allegations; the parties settled. They agreed that Trudeau would limit his infomercials—broadly defined as *any* statement of at least two minutes on television, radio, or the Internet that "create[s] interest" in a purchase (Pet. 90a-91a)—to books that do not refer to branded products promoted by Trudeau, and

that the infomercials would not misrepresent the books' contents. Entered as a Consent Decree, the settlement preserved Trudeau's First Amendment rights except where affirmatively waived (CA7.App.89), and stated that there had been no finding of any statutory violations (CA7.App.78-79).

The parties then coexisted peacefully for several years, during which Trudeau authored many books—most notably, *Natural Cures "They" Don't Want You To Know About*. Trudeau regularly communicated with the FTC regarding his infomercials. The FTC occasionally raised concerns, which Trudeau addressed. The FTC had no objection to Trudeau's promotion of the *Natural Cures* books (Pet. 5a), or to any of the dozen or so infomercials promoting his other books.

B. ITV and the *Weight Loss* infomercials

In 2006, Trudeau authored *The Weight Loss Cure "They" Don't Want You to Know About* (the "*Weight Loss* book"). It was advertised by infomercials, sales from which (according to the FTC) reached $37.6 million. Pet. 56a. Trudeau, however, did not collect those revenues; a third party, ITV Global, collected them.

Specifically, a company that Trudeau founded, Trucom, L.L.C., entered an agreement with ITV pursuant to which Trucom sold the assets of several of its subsidiaries in exchange for a promissory note for $121 million, payable over ten years. CA7.App.121-160. But in September 2006, although ITV had defaulted after paying only $1.39 million, Trudeau appeared in the *Weight Loss* infomercials and gave ITV exclusive rights to sell the *Weight Loss* book via those

infomercials, which ITV produced, owned, and distributed. R.237, Ex.T, 36-37, 63-65.

It is undisputed that ITV received 100% of the revenues from the infomercial sales. It is also undisputed that Trucom and ITV are separate corporations with no common ownership; that Trudeau has no ownership interest in ITV; that Trudeau received only $1.05 million from ITV after the infomercials first aired (and $2.4 million total); and that neither Trudeau nor Trucom received any other revenues from infomercial sales of the *Weight Loss* book. CA7.App.179-181; R.237, Exs. W & 23.

Although ITV first aired the *Weight Loss* infomercials in December 2006, the FTC raised no concerns until September 2007, when it filed the civil contempt motion out of which this matter arises. The FTC separately sued ITV, but did not seek to enjoin ITV from airing the infomercials. In November 2007, after Trudeau was found in contempt, ITV ended the infomercials and ceased paying Trucom.

C. The contempt proceedings and the first appeal

1. The FTC has never challenged the safety or efficacy of the weight-loss protocol described in Trudeau's book. CA7.App.167. Nor has the FTC ever alleged (much less proved) that Trudeau's *Weight Loss* infomercial activities violated the FTC Act. Rather, the FTC asserts that Trudeau violated the Consent Decree by opining in infomercials that the weight-loss protocol described in the book was "easy," and that, once it was over, users could eat anything they wanted without regaining weight.

Those statements also appear in the book itself. While this action was pending, however, the FTC dis-

avowed its nearly 40-year-old "Mirror Image Doctrine"—a policy designed to avoid First Amendment violations by exempting from regulation any advertising that merely repeats or summarizes statements appearing in protected publications. *Advertising in Books: Enforcement Policy*, 36 Fed. Reg. 13,414 (July 21, 1971), rescinded, 74 Fed. Reg. 8542 (Feb. 25, 2009). Trudeau himself was a direct impetus for this policy change.[1]

Even so, the district court found Trudeau in contempt. Pet. 62a-75a. It barred Trudeau from airing infomercials for three years and fined him $5.1 million—the amount collected from *retail* sales of the *Weight Loss* book. Pet. 84a-87a. After the FTC moved to correct a minor mathematical error, however, the district court inexplicably—and *sua sponte*—upped the fine to $37.6 million. Pet. 91a, 33a.

2. The Seventh Circuit affirmed the contempt finding, but vacated the sanctions. Pet. 1a-50a. As to contempt, Trudeau said nothing in the infomercial that was not also found in the book. But the panel parsed the book as one might a statute or contract (Pet. 6a-11a & nn. 2, 4) and held that portions of the infomercials provided a misleading and "incomplete picture" of the book's weight-loss protocol (Pet. 18a-25a). As to sanctions, the court vacated the fine for

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[1] Keith R. Fentonmiller, *Reflections on the Mirror Image Doctrine: Should the Federal Trade Commission Regulate False Advertising For Books Promising Wealth, Weight Loss, and Miraculous Cures?*, 110 W. Va. L. Rev. 573, 589-601, 610 (2008) (article by senior FTC attorney citing Trudeau's books in support of abandoning Mirror Image Doctrine).

being unexplained and the infomercial ban for exceeding the civil contempt power by "fail[ing] to give Trudeau an opportunity to purge." Pet. 31a-32a, 45a.

The Seventh Circuit ordered the district court, on remand, to "make sufficient factual findings to substantiate its award amount" and to decide whether any award must be limited to what Trudeau actually received from infomercial sales under *FTC* v. *Verity Int'l*, *Ltd.*, 443 F.3d 48 (2d Cir. 2006). Pet. 33a-36a. As the court recognized, *Verity* "held that certain circumstances require courts to limit disgorgement to the defendant's profits" (Pet. 35a-36a)—"for example, when some middleman … takes some of the consumer's money before it reaches a defendant's hands" (443 F.3d at 68). The Seventh Circuit thus directed the district court to address the "factual and legal questions [*Verity*] posed." Pet. 36a.

D. The remand and the second appeal

1. On remand, the district court reimposed the $37.6 million fine, stating that this amount represented "consumer harm" from infomercial sales. Pet. 98a-107a. When the FTC first proposed a similar $46.9 million sanction (purportedly including everyone who bought the book by calling ITV's 800 number or at retail outlets), the district court responded: "I am troubled … because the remedy that you are suggesting is rather Draconian. … [T]o say that everybody who bought this book should be given a refund strikes me as a bit overdoing it." CA7.App.175-176.

Yet the court ultimately imposed such a "Draconian" remedy—even though the FTC (1) submitted no evidence that *any* consumer was dissatisfied; (2) admitted that "the amount of consumer loss is significantly greater than any estimate of Trudeau's

ill-gotten gains" (R.267 at 11); and (3) is separately seeking disgorgement of the same $37.6 million from ITV (*FTC* v. *Direct Mktg. Concepts Inc.*, No. 07-11870 (D. Mass.)). Ignoring these facts, the district court simply held that *Verity* was limited to direct FTC Act proceedings. Pet. 102a.

The district court also modified the Consent Decree to impose onerous new restrictions. Pet. 108a-114a. Specifically, it required that Trudeau post a $2 million bond before running any infomercial—*ever*—containing representations "about the benefits, performance or efficacy of any product, program or service referenced in [a] book." Pet. 111a-112a, 143a. The court initially acknowledged that, under the First Amendment, the bond requirement must be "narrowly tailored" to "iteration[s] of a weight loss book and infomercial[s] concerning [such books]." CA7.App.194. Without explanation, however, the court imposed dramatically broader restraints.

The modified Decree also requires that Trudeau make only "truthful, non-misleading" statements, and not "misrepresent the benefits, performance, or efficacy of any product, program or service referenced" in his books. Pet. 113a, 138a-139a. These provisions effectively prohibit Trudeau from repeating in infomercials statements that, when made in his books, are absolutely protected by the First Amendment—all without any finding that he violated the FTC Act. Moreover, given the Decree's broad definition of "infomercial"—essentially any statement of at least two minutes on television, radio, or the Internet—Trudeau is barred from promoting his books via a host of traditional media, such as a talk show on which he appears as a guest author.

2. The Seventh Circuit affirmed. Concerning the $37.6 million fine, the court ignored the equitable nature of civil contempt and stated that the propriety of the "remedial sanction" is "informed—but not limited by—the remedies available in the underlying FTC action." Pet. 54a.

As to the proper bounds of equitable restitution, the court declared that the Second Circuit in *Verity* had merely "created a narrow middleman exception to the usual rule that consumer loss may be the proper measure of damages in a section 13(b) action." Pet. 55a. The court also misunderstood the ITV-Trucom agreement, discussed above. But the pertinent facts are not disputed by the FTC, which admits that "the amount of consumer loss is significantly greater than any estimate of Trudeau's ill-gotten gains." R.267 at 11. And the court announced that, in any event, how and how much Trudeau was paid from ITV's *Weight Loss* infomercials is "irrelevant":

> [H]aving received only $1.05 million from ITV Global, Trudeau argues that the fine should be capped there. But what if ITV Global had not paid him at all? Would the district court have been powerless to impose *any* remedial fine? Of course not. … [P]recisely how Trudeau decided to get paid for selling his books through deceptive infomercials in violation of a court order is irrelevant to the proper measure of his remedial fine.

Pet. 55a.

In approving the modified Decree under Rule 60(b)(5), the court declined to apply *Rufo*'s "significant change in circumstances" standard. Instead, it approved modification because it believed "the order was not achieving its purpose" (Pet. 58a)—the stan-

dard applied in *United States* v. *United Shoe Machinery*, 391 U.S. 244, 248 (1968), to a decree imposed *after an adjudication of wrongdoing by the defendant*. In so doing, the court held that "*Rufo* applies when a defendant seeks to modify an injunction in an institutional reform case." Pet. 57a-58a.

The court could determine that the Consent Decree was not "achieving its purpose" only by equating *the Decree's* "purpose" with *the FTC's* purpose—"to protect consumers from [Trudeau's] deceptive practices and to compensate those already allegedly deceived." Pet. 58a (quoting Pet. 18a). The court thus ignored both that the Decree was entered as a *settlement* intended to end litigation on terms satisfactory to *both* parties, with no admission of wrongdoing, and that negotiated consent decrees "cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other." *United States* v. *Armour & Co.*, 402 U.S. 673, 681-682 (1971).

Finally, applying intermediate scrutiny, the court approved the modified Decree. Specifically, the court concluded that requiring Trudeau to avoid "deceptive subjective statements" (as the FTC puts it),[2] and to post a bond as a condition of advertising *books*—without regard to the advertising's falsity—satisfies the First Amendment. Pet. 59a-61a.

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[2] FTC Stay Opp. 15 n.17, No. 10-2418 (7th Cir.) (filed June 22, 2010).

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are divided over whether district courts exercising inherent equitable power may award relief in an amount exceeding the defendant's unjust enrichment.

Consistent with this Court's decision in *Great-West*—which held that restitution ordered in an equity case is an equitable remedy—the Second, Third, and Eleventh Circuits have held that courts exercising equitable jurisdiction "may award only equitable restitution," even if that amount is less than the alleged harm to consumers. *Verity*, 443 F.3d at 67; accord *CFTC* v. *Wilshire Inv. Mgmt. Corp.*, 531 F.3d 1339, 1345 (11th Cir. 2008); *FTC* v. *Bishop*, 425 F. App'x 796, 797-798 (11th Cir. 2011); *CFTC* v. *Am. Metals Exch. Corp.*, 991 F.2d 71, 78 (3d Cir. 1993). The Seventh Circuit, by contrast, has joined the Eighth and Ninth Circuits in holding that district courts exercising inherent equitable powers may "award[] relief based on consumer loss instead of the defendant's unjust gain"—regardless of how much the defendant received. Pet. 55a; accord *FTC* v. *Stefanchik*, 559 F.3d 924, 931-932 (9th Cir. 2009); *FTC* v. *Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991). This Court should resolve the conflict.

II. The federal circuits are likewise divided over application of *Rufo*'s "significant change in circumstances" standard. According to five circuits, *Rufo* applies to Rule 60(b)(5) requests in all types of cases. The Federal Circuit, by contrast, limits *Rufo* to the "institutional reform" context. The Second Circuit applies *Rufo* somewhat more broadly, but still does not treat it as generally applicable. The Third and

D.C. Circuits agree that *Rufo* governs all *types* of cases, but only where the *defendant* makes the modification request. And below, the Seventh Circuit adopted a strict rule that conflicts with all of these circuits: *Rufo only* "applies when a *defendant* seeks to modify an injunction in an *institutional reform* case." Pet. 58a (emphasis added). Thus, this case is an excellent vehicle to restore uniformity to the application of a much-used rule of federal procedure.

III. Finally, this case raises a vital First Amendment question: What standard applies to government regulation of the advertising of fully protected publications? Applying intermediate scrutiny and reasoning that certain statements in Trudeau's infomercials "provided an incomplete picture" of the *Weight Loss* book's content, the Seventh Circuit accorded "no protection at all" to statements taken directly from the book.

That holding is questionable after *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 67-68 (1983), and *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 796 (1988). And this Court has previously granted review to consider the "importan[t]" First Amendment questions posed by applying a state deceptive practices law—patterned after the FTC Act—to speech that represents a blending of commercial and noncommercial speech. See *Nike*, 539 U.S. at 663 (Stevens, J., concurring in dismissal). The FTC's recent abandonment of its "Mirror Image Doctrine" makes review all the more necessary today.

I. Review is warranted to resolve whether district courts exercising inherent equitable power may award relief in an amount exceeding the defendant's unjust enrichment.

The court below deepened an existing circuit split —between the Second, Third, and Eleventh Circuits on one hand, and the Eighth and Ninth Circuits on the other—over whether district courts exercising inherent equitable power may award monetary relief exceeding the defendant's unjust enrichment. In so doing, the Seventh Circuit eviscerated critical limits on the contempt power, which "uniquely is 'liable to abuse.'" *Int'l Union* v. *Bagwell*, 512 U.S. 821, 831 (1994).

A. The decision below deepens a substantial circuit split.

1. In *Great-West*, this Court held that, "when ordered in an equity case," "restitution is … an equitable remedy." 534 U.S. at 213 (citation omitted). Moreover, equitable restitution is limited to what was "traditionally available in equity"—namely, "the return of identifiable funds (or property) belonging to the plaintiff and held by the defendant." *Id.* at 216.

Consistent with *Great-West*, the Second, Third, and Eleventh Circuits have held that district courts exercising inherent equitable jurisdiction may award only equitable restitution, not compensatory damages. In *Verity*, for example, the Second Circuit held that, "because the availability of restitution under §13(b) of the FTC Act … derives from the district court's equitable jurisdiction, … the district court may award only equitable restitution." 443 F.3d at 67. And "[e]quitable restitution"—unlike "[l]egal restitution"—only "allow[s] the plaintiff to recover mon-

ey … in the defendant's possession that could 'clearly be traced … to the plaintiff.'" *Id.* at 66-67 (quoting *Great-West*, 534 U.S. at 212).[3]

Verity thus recognized that when a "middleman" is involved and the defendant does not receive all of the relevant proceeds, "the appropriate amount of restitution" is not "'the full amount lost by consumers,'" but rather "the benefit unjustly received by the defendants." *Id.* at 67. "Labeling the remedy 'consumer redress' or 'disgorgement,'" the court explained, "does not alter the basic principle that restitution is measured by the defendant's gain." *Ibid.*

The Eleventh and Third Circuits adopted the same rule under what was (until 2011) a virtually identical Commodity Exchange Act ("CEA") provision. Compare 7 U.S.C. §13a-1 (2006) with 15 U.S.C. §53(b). Like remedies for violations of §13(b) of the FTC Act and for civil contempt, remedies for CEA violations were imposed pursuant to the district court's ancillary equitable power to enforce its orders. See *Wilshire Inv.*, 531 F.3d at 1344 (joining five circuits

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[3] Although §13(b) of the FTC Act authorizes courts to issue only "injunction[s]," 15 U.S.C. §53(b), the circuits agree that courts may grant "other ancillary relief," including "repayment of money for consumer redress as restitution." *FTC* v. *Febre*, 128 F.3d 530, 534 (7th Cir. 1997); see *Verity*, 443 F.3d at 66 (citing cases from five circuits). Adopting a similar interpretation of the Emergency Price Control Act, this Court explained: "Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946).

so holding). In exercising such power, the Eleventh Circuit has held, courts may not order restitution "in the amount of customer loss"; rather, "[t]he proper measurement is the amount that [defendants] wrongfully gained." *Id.* at 1345. Equitable remedies "must be remedial and not punitive in nature." *Ibid.* (quoting *Am. Metals*, 991 F.2d at 78). The Eleventh Circuit has extended this rule to cases under §13(b) of the FTC Act. See *Bishop*, 425 F. App'x at 797-798.

These Eleventh Circuit decisions follow the Third Circuit in holding that courts exercising inherent equitable power are limited by "th[e] requirement that there be a relationship between the amount of disgorgement and the amount of ill-gotten gain." *Am. Metals*, 991 F.2d at 78. Investors may "seek recovery … in an independent civil action," but "investor losses" are not "an excuse to impose a remedy under circumstances in which the scope of relief falls outside" of the defendant's "ill-gotten gains." *Ibid.*

2. In conflict with these circuits, the Eighth and Ninth Circuits—now joined by the Seventh—hold that courts exercising inherent equitable jurisdiction are not limited to the defendant's unjust enrichment.

In *Security Rare Coin*, for example, the Eighth Circuit considered the "appropriate form of equitable relief under section 13(b) of the [FTC] Act" where rescission was impossible because the coins purchased by the victims were useless. 931 F.2d at 1316. The court required the seller of the coins to pay the full "customers' losses," even if they "exceed[ed] [the defendant's] gains." *Ibid.*

Likewise in *Stefanchik*, another §13(b) proceeding, the Ninth Circuit concluded that consumer loss is an appropriate equitable remedy even where there is a

middleman and the defendant does not receive the full proceeds. The court there was "unpersuaded" that the defendants "should not be liable for the full amount of [the middleman's] sales because [the middleman] paid them only a percentage as a royalty. *Equity may require a defendant to restore his victims to the status quo where the loss suffered is greater than the defendant's unjust enrichment*." 559 F.3d at 931 (emphasis added). Acknowledging the split with *Verity*, the Ninth Circuit recently reaffirmed *Stefanchik*, stating: "[W]hereas the Second Circuit limits §13(b) relief to equitable restitution, the Ninth Circuit permits restitution measured by the loss to consumers." *FTC* v. *Inc21.com Corp.*, No. 11-15330, 2012 WL 1065543, *3 (9th Cir. Mar. 30, 2012).

3. Here too, the Seventh Circuit rejected the rule of *Verity* and *Great-West*. In the first appeal below, the court acknowledged *Verity*'s holding that "the equitable remedy available under §13(b) … is properly measured as 'the benefit unjustly received by the defendants'"—even if this amount "equal[s] only a fraction of total consumer loss." Pet. 36a (quoting *Verity*). But in the second appeal, with no dispute as to any relevant facts (*supra* at 6, 10), the court refused to apply *Verity*. It was "not error" to "award[] relief based on consumer loss instead of the defendant's unjust gain," the court held, as the amounts Trudeau received, and how he received them, were "irrelevant to the proper measure of his remedial fine." Pet. 55a.

In sum, the Second, Third, and Eleventh Circuits recognize, consistent with *Great-West*, that a district court exercising inherent equitable authority may not award restitution that exceeds the defendant's unjust

enrichment. The Seventh, Eighth, and Ninth Circuits reject that position.

B. This case is an excellent vehicle to resolve this split.

This case provides an excellent opportunity to resolve this split. The FTC admits that "the amount of consumer loss is significantly greater than any estimate of Trudeau's ill-gotten gains." R.267 at 11. Thus, reversal would unquestionably alter the outcome.[4]

The court below purported to distinguish *Verity* on the ground that it "was not a contempt case, but a direct action under section 13(b) of the FTC Act." Pet. 55a. As this Court has repeatedly held, however, civil contempt cases are themselves equitable. *Spallone* v. *United States*, 493 U.S. 265, 274-276 (1990); *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 451-452 (1911); *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 457 (1932). Further, every circuit decision discussed above involves a federal court's inherent equitable power to enforce its orders. The holding below thus directly conflicts with *Verity*, *Bishop*, *Wilshire*, and *American Metals*, as well as *Great-West*.

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[4] While declaring (inaccurately) that "Trudeau assigned his rights to payment [for the *Weight Loss* book] … to ITV Global in exchange for ten years of monthly million-dollar checks," the court below acknowledged that Trudeau "received only $1.05 million from ITV." Pet. 55a. The FTC has never disputed that (1) ITV was a "middleman" under *Verity*; (2) ITV collected all revenues from infomercial sales of the book; or (3) Trucom received no more than $2.4 million from ITV under the agreement, and only $1.05 million after ITV's *Weight Loss* infomercials first aired.

Moreover, because civil contempt proceedings are part of the underlying action from which they stem, they are controlled by the same equitable principles that govern relief in that underlying action. *Leman*, 284 U.S. at 457 ("the [civil contempt] proceeding is a part of the main cause in equity … , and there is no reason why in such a proceeding equitable principles should not control the measure of relief"). And since the federal circuits recognize that §13(b) of the FTC Act authorizes only equitable relief (see *supra* at 15 n.3), *both* the equitable nature of contempt *and* the nature of the underlying proceeding confirm that the district court is constrained by equity—and thus, under *Great-West*, may award only equitable restitution.

Indeed, in the first appeal below the Seventh Circuit ruled that the FTC enjoys a presumption *drawn from the FTC Act* that consumers were harmed by purchasing Trudeau's book. Pet. 37a-38a n.15. The court's ruling in the second appeal thus granted the FTC the benefits of direct actions under the Act, unshackled by the Act's corresponding burdens. Contra *FTC* v. *Kuykendall*, 371 F.3d 745, 753 (10th Cir. 2004) (en banc) ("the FTC is not entitled to rely on all the provisions of the FTC Act while also taking advantage of the simplified nature of a contempt action"). The contempt context of this case only reinforces the need for review.

C. The decision below conflicts with this Court's precedents and overthrows fundamental limits on the federal courts' inherent equitable powers.

The contempt power—unchecked by ordinary principles of separated powers—is both equitable in nature and constrained by the same equitable prin-

ciples that constrain any award of relief in the underlying action. *Spallone*, 493 U.S. at 274, *Gompers*, 221 U.S. at 451-452; *Leman*, 284 U.S. at 457. The relief awarded below is neither, and thus directly conflicts with the decisions just cited—and with *Great-West*, which confirms that only equitable restitution may be awarded in equitable cases.

Assessing the limits of equity, *Great-West* sharply distinguished between legal restitution (full compensation for loss) and equitable restitution (unjust enrichment). Although *Great-West* arose under ERISA, the relevant statute referred only to "appropriate equitable relief," and the Court's analysis was not unique to ERISA. Rather, it was based on close consideration of the relief available in equity "[i]n the days of the divided bench." 534 U.S. at 212-214.

Under *Great-West*, the district court was powerless to impose a $37.6 million sanction when, as the FTC conceded, "th[at] amount of consumer loss is significantly greater than any estimate of Trudeau's ill-gotten gains." R.267 at 11. The court below justified overriding equitable constraints by declaring that "the district court had power to provide 'full remedial relief,' *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949), 'to compensate the complainant for *losses sustained*,' *United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 303-304 (1947) (emphasis added)." Pet. 54a. But neither *McComb* nor *United Mine Workers* vindicates the decision below.

McComb dealt with a court's authority to order a contemnor to pay injured employees backpay (336 U.S. at 190-192)—a classic form of "equitable restitution." *United States* v. *Rent-A-Homes Sys. of Illinois, Inc.*, 602 F.2d 795, 798 n.2 (7th Cir. 1979); see *Albe-*

marle Paper Co. v. *Moody*, 422 U.S. 405, 416-417 (1975) (describing "backpay" as within the "historic power of equity"). Moreover, the order required the defendants to pay the amount necessary "to *purge themselves* of contempt" (336 U.S. at 189, 193-194 (emphasis added)), thus limiting the sanction to the defendant's unlawful gain—as in *Verity*.

United Mine Workers simply states that civil contempt sanctions must be coercive or compensatory—*i.e.*, *not punitive*. That case involved a $3.5 million sanction against a union for violating an order to work, $700,000 of which was for *criminal* contempt, and the rest of which was held "excessive" and modified to make it "conditional on the defendant's failure to purge itself." 330 U.S. at 304-305. Thus, *United Mine Workers* does not involve a compensatory civil contempt sanction at all, much less one imposed on a party who received a tiny fraction of an alleged $37.6 million "consumer loss."

In short, in authorizing a sanction 37 times greater than Trudeau's gain, the court below deepened a circuit split and overthrew critical limits on courts' equitable powers to enforce their orders. This Court should intervene.

II. Review is warranted to resolve when a Rule 60(b)(5) motion to modify a consent decree requires showing a "substantial change in circumstances."

Review is also warranted to resolve an entrenched circuit split over the standard applicable to requests to modify a consent decree under Fed. R. Civ. P. 60(b)(5).

Under *Rufo*, "a party seeking modification of a consent decree" under Rule 60(b)(5) must "establish[]

that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance." 502 U.S. at 383. The federal circuits, however, are intractably divided over whether this rule applies outside of institutional reform cases, and over whether it applies to modifications sought by both plaintiffs and defendants.

A. The decision below deepens an entrenched circuit split.

Five circuits apply *Rufo*'s standard to requests to modify consent decrees under Rule 60(b)(5) in all types of cases—not just to institutional reform cases.

Specifically, the First Circuit has interpreted *Rufo* as governing modification in trademark litigation, explaining: "While *Rufo* … involv[ed] institutional reform, we do not read it as being confined in principle to such cases." *Alexis Lichine & Cie.* v. *Sacha A. Lichine Estate Selections, Ltd.*, 45 F.3d 582, 586 (1st Cir. 1995). Similarly, the Sixth Circuit has applied *Rufo* in environmental litigation, stating: "The Court made clear in *Rufo* that" the significant-change-in-circumstances standard "should not be limited to institutional-reform litigation." *Kalamazoo River Study Group* v. *Rockwell Int'l Corp.*, 355 F.3d 574, 588 (6th Cir. 2004). And the Ninth Circuit, in a dispute between private landlords and HUD, "join[ed] a significant number of other Courts of Appeals in finding that *Rufo* sets forth a general, flexible standard for all petitions brought under the equity provision of Rule 60(b)(5)." *Bellevue Manor Assocs.* v. *United States*, 165 F.3d 1249, 1255 (9th Cir 1999).

The Third and D.C. Circuits likewise interpret *Rufo* to govern all *types* of cases, but only where modification is sought by the *defendant*. In *Building & Const. Trades Council* v. *NLRB*, 64 F.3d 880, 887-888 (3d Cir. 1995), the Third Circuit explained that "the standard for modifying an injunction cannot depend on whether the case is characterized as an institutional reform case, a commercial dispute, or private or public litigation." But the court later held, in *Holland* v. *N.J. Department of Corrections*, 246 F.3d 267, 284 n.16 (3d Cir. 2001), that while "[*Rufo*] set the standard for cases in which the defendant seeks to have a decree modified," cases in which "plaintiffs [are] seeking modification" are governed by *United Shoe*.[5]

Likewise, the D.C. Circuit has held that "[*Rufo*'s] summary of what might render a modification 'equitable' relates to all types of injunctive relief." *United States* v. *Western Elec. Co.*, 46 F.3d 1198, 1203 (D.C. Cir. 1995). But, like the Third Circuit, that court distinguishes between "the party who sought the equitable relief"—at whose request "a court may tighten the decree in order to accomplish its intended result" under *United Shoe*—and "the enjoined party," whose request for relief from the decree "come[s] within Rule 60(b)(5)" and is governed by *Rufo*. *Id.* at 1202.

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[5] Before *Rufo*, consent decree modifications were adjudicated under two distinct standards—one more stringent than *Rufo*, *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932) (modification proper on "a clear showing of grievous wrong evoked by new and unforeseen conditions"), and one less, *United Shoe*, 391 U.S. at 248 (after adjudication of wrongdoing by defendants, plaintiffs may seek modification on ground that a decree has not achieved its purpose).

This strict distinction between plaintiffs and defendants, also adopted below, is contrary to decisions from at least six circuits. As the Tenth Circuit notes, "nothing in *Rufo* limits its application to cases in which modification is sought by the defendant." *David C.* v. *Leavitt*, 242 F.3d 1206, 1211 (10th Cir. 2001); see also, *e.g.*, *Sierra Club* v. *Meiburg*, 296 F.3d 1021, 1033-1034 (11th Cir. 2002) (applying *Rufo* in reviewing consent decree modification sought by plaintiff); accord *Ricci* v. *Patrick*, 544 F.3d 8, 21 (1st Cir. 2008); *East Brooks Books, Inc.* v. *City of Memphis*, 633 F.3d 459, 465 (6th Cir. 2011); *Labor/Cmty. Strategy Ctr.* v. *Los Angeles County MTA*, 564 F.3d 1115, 1120 (9th Cir. 2009); *Pigford* v. *Veneman*, 292 F.3d 918, 925 (D.C. Cir. 2002); cf. *United States* v. *Eastman Kodak Co.*, 63 F.3d 95, 101-102 (2d Cir. 1995) (both *Rufo* and *United Shoe* apply to modification request by a *defendant* in antitrust litigation).

The Federal Circuit rejects the holdings of the five circuits that apply *Rufo* to all *types* of cases. In refusing to apply *Rufo* in patent litigation, that court stated that "[t]he institutional reform cases present considerations not found in consent decrees settling commercial disputes." *W.L. Gore & Assocs., Inc.* v. *C.R. Bard, Inc.*, 977 F.2d 558, 562 (Fed. Cir. 1992). Similarly, the Second Circuit has held that although "*Rufo* is not limited to cases in which institutional reform is achieved in litigation brought directly against a governmental entity," it applies only if the consent decree "seeks pervasive change in long-established practices affecting a large number of people, and the changes are sought to vindicate significant rights of a public nature." *Patterson* v. *Newspaper & Mail Deliverers' Union*, 13 F.3d 33, 38 (2d Cir. 1993).

The decision below conflicts in whole or in part with the holdings of *all* of the foregoing circuits. Under the Seventh Circuit's bright-line rule, *Rufo* applies *only* "when a *defendant* seeks to modify an injunction in an *institutional reform* case." Pet. 58a (emphasis added). In other situations—be they commercial disputes, government enforcement actions, or situations "where a plaintiff is seeking to impose additional restrictions on an enjoined party"—the plaintiff need only show that "the order was not achieving its purpose" under *United Shoe*. *Ibid*. This case thus provides an excellent opportunity to clarify the scope of *Rufo*.

B. The circuit conflict over the scope of *Rufo* involves an important and much-used rule of civil procedure.

The second question presented is vitally important to the functioning of the federal judiciary—"the prime responsibility" for which rests with this Court. E. Gressman, *et al.*, *Supreme Court Practice* §4.15, at 273 (9th ed. 2007). The Court regularly grants review "to assure the uniform interpretation of the governing Federal Rules." *Becker* v. *Montgomery*, 532 U.S. 757, 762 (2001). Indeed, in *System Federation No. 91* v. *Wright*, 364 U.S. 642, 646 (1961), certiorari was granted to determine whether courts could modify consent decrees under Rule 60(b)(5), following amendments to the Railway Labor Act, "because of the importance of the issues."

Rule 60 applies to "all final judgments, including consent and default judgments as well as those entered after contest." 11 C. Wright *et al.*, Fed. Prac. & Proc. §2852 (2d ed. 2011). That Rule is invoked countless times each year, and subsection (b)(5) in

particular does an immense amount of work. Given the circuits' diverse views regarding *Rufo*'s scope, review is needed to provide uniformity on the recurring issue of what standard applies to requests to modify federal judgments.

C. The modification standard applied by the Seventh Circuit conflicts with this Court's decisions.

Review is further warranted because the decision below conflicts with this Court's precedents. According to the Seventh Circuit, plaintiffs may obtain modification of consent decrees without showing a "significant change in circumstances" if the "purpose" of the decree—defined as the *plaintiff's* purpose in bringing suit—remains unachieved. That ruling conflicts not only with *Rufo*, but with this Court's repeated holdings that consent decrees entered without a finding of liability may not be interpreted based on *the government's* purpose.

1. In distinguishing institutional reform litigation from other cases, and plaintiffs from defendants, the decision below conflicts with *Rufo*. First and foremost, *Rufo* is an interpretation of Rule 60(b)(5), not merely an application thereof to a particular type of case. That *Rufo* stated a general rule—one applicable to all cases and parties—is evident from the Court's opinion, which begins with Rule 60(b) and consent decrees generally and only *then* addresses considerations unique to institutional reform. 502 U.S. 378-383. *Rufo*'s "references to institutional reform litigation" appear "in the context of interpreting the broad language of Rule 60(b)(5), which also does not draw distinctions based on the nature of the litigation." *Western Elec.*, 46 F.3d at 1203 (footnote omitted).

This Court's later decisions confirm *Rufo*'s general applicability. For example, in *Frew ex rel. Frew* v. *Hawkins*, 540 U.S. 431, 441 (2004), the Court stated the general "changed circumstances" standard—"[Rule 60(b)(5)] encompasses the traditional power of a court of equity to modify its decree in light of changed circumstances"—before noting that *Rufo* "explored the application of the Rule to consent decrees involving institutional reform litigation." So too in *Horne* v. *Flores*, 129 S. Ct. 2579, 2593 (2009).

To justify excusing the FTC from *Rufo*'s requirements, the court below asserted that "*Rufo* cites with approval the page in *United Shoe* explaining that the 'new and unforeseen conditions' requirement for defendants asking for relief from an injunction *does not apply to* requests for increased protections by a plaintiff." Pet. 58a. But *United Shoe* has no such page. Instead, the page cited below (391 U.S. at 248) merely explains that "*Swift* … holds that [a decree] may not be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree … have not been fully achieved."

Critically, however, *United Shoe* involved a decree entered after a finding of liability. The "purpose" of the decree, therefore, was to remedy the defendant's wrongdoing. Here, by contrast, the decree simply settled the plaintiff's claims. *United Shoe* does not authorize modifying an unlitigated consent decree to impose new restrictions on one party based on the litigation goals of the other. Yet the court below did just that.

2. By using the FTC's consumer protection "purpose" as the touchstone for modification, the decision below further conflicts with this Court's decisions

holding that consent decrees are the product of "careful negotiation" and "cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other. … Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, *the conditions upon which he has given that waiver must be respected*." *Armour*, 402 U.S. at 681-682 (emphasis added). And just as consent decrees may not be *interpreted* based on the government's purpose, neither may they be *modified* on that basis.

According to the court below, however, the district court could impose stringent additional restrictions on Trudeau—who has never been found to have violated the FTC Act—because his supposed noncompliance frustrated the Decree's "purpose." The court could justify modification only by imbuing the decree with the FTC's "purpose"—"to protect consumers from deceptive practices." Pet. 18a. But whatever *the FTC's* aim, *Armour* teaches that the Consent Decree should have been construed "without reference to the legislation the Government originally sought to enforce but never proved applicable." *United States* v. *ITT Cont'l Baking Co.*, 420 U.S. 223, 236-237 (1975).

In sum, even if *United Shoe* survives *Rufo*, the *Armour* line of cases confirms that a "purpose" standard could only justify "impos[ing] additional obligations on a defendant party to a consent decree *when the decree is entered into after an adjudication of wrongdoing*." *David C.*, 242 F.3d at 1211 (emphasis added) (citing *United Shoe*, 391 U.S. at 251). Yet the court below made no effort to reconcile its "purpose" standard with *Armour* or its progeny.

Certiorari should be granted to resolve the circuit split over *Rufo*'s applicability outside the institutional reform context, and over its applicability to defendants but not plaintiffs, as well as to address when (if ever) an unlitigated consent decree may be modified to impose additional restrictions on a defendant based on a plaintiff's litigation goals.

III. This case raises a critical First Amendment issue that has long awaited the Court's resolution—the level of protection applicable to commercial speech blended with fully protected speech.

This case also raises an important First Amendment question: What constitutional standard applies when the government seeks to regulate advertising of publications that are fully protected—that is, the question whether such commercial speech is inextricably intertwined with fully protected speech? The Court flagged this question in *Bolger* and took it up as part of the second question presented in *Nike*, but could not resolve it because the petition was dismissed. 539 U.S. at 657-658.[6] The importance of the

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[6] Nike's second question challenged the California courts' application of a state deceptive practices law to impose liability for allegedly false statements of fact accompanying protected statements of opinion. See *Nike*, 539 U.S. at 657 (Stevens, J. concurring in dismissal) (the Court "granted certiorari" on "two questions: … (2) even assuming the California Supreme Court properly characterized such statements as commercial speech, whether the 'First Amendment … permit[s] subjecting speakers to the legal regime approved by that court in the decision below") (quoting Pet. for Cert. i, No. 02-575).

question is heightened by the FTC's recent repeal of the "Mirror Image Doctrine."

A. This case provides an opportunity for the Court to address a question flagged in *Bolger* and taken up in *Nike* before that case was dismissed.

1. This Court generally distinguishes between regulation of non-commercial speech, such as books, and regulation of commercial speech, "usually defined as speech that does *no more than* propose a commercial transaction." *United States* v. *United Foods, Inc.,* 533 U.S. 405, 409 (2001) (emphasis added). The former receives strict scrutiny (*Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991)), the latter intermediate scrutiny (*Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 623 (1995)).

Bolger involved regulation of advertisements for contraceptives that also discussed family planning and disease prevention. 463 U.S. at 67-68. The Court ruled that the pamphlets, viewed as a whole, were commercial speech, but cautioned: "Of course, a different conclusion may be appropriate in a case *where the pamphlet advertises an activity itself protected by the First Amendment*." *Id.* at 67-68 & n.14 (emphasis added) (citing *Jamison* v. *Texas*, 318 U.S. 413 (1943), and *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943), as establishing that "advertisement[s] for [a] religious book cannot be regulated as commercial speech").

Five years later, this Court explained in *Riley* that commercial speech that is "inextricably intertwined" with protected speech receives full constitutional protection. 487 U.S. at 796. The law in *Riley* required

solicitors for charities to provide information about their organization's use of funds. *Id.* at 795. The Court held that "where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical." *Id.* at 796. The Court thus "appl[ied] [the] test for fully protected expression." *Ibid.*

Citing neither *Bolger* nor *Riley*, the court below held that Trudeau's infomercials for the *Weight Loss* book were pure commercial speech. The court acknowledged that the advertisements consist largely of quotations of the book—*e.g.*, that the weight-loss protocol is "'easy' and 'inexpensive,'" "that dieters can 'do it at home,'" and "that after completion a dieter can eat 'anything you want' with 'no restrictions.'" Pet. 19a. But believing these quotations provided "an incomplete picture of what the protocol requires," the court deemed the infomercials to be "'false or misleading commercial speech" that "receives no [constitutional] protection.'" Pet. 24a-25a & n.12; accord Pet. 59a (upholding modified consent decree on same basis). Accordingly, the court affirmed the $37.6 million fine and the requirement that Trudeau post a lifetime, $2 million bond before engaging in *future* speech—a prior restraint on speech.[7] And given the

[7] See, *e.g.*, *Am. Target Advertising, Inc.* v. *Giani*, 199 F.3d 1241, 1250-1251 (10th Cir. 2000) (recognizing that pre-speech bond requirement "definitionally qualifies as a prior restraint" under *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 553 (1975)); *Collin* v. *Smith*, 578 F.2d 1197, 1208-1209 & n.21 (7th Cir. 1978) (invalidating insurance/bonding ordinance as prior restraint).

Decree's expansive definition of "infomercial"—essentially any statement of at least two minutes on television, radio, or the Internet—Trudeau must post a bond even before promoting books on talk shows.

The Seventh Circuit thus sidestepped the "difficult First Amendment questions" raised when the government regulates a blending of commercial and noncommercial speech. See *Nike*, 539 U.S. at 663 (Stevens, J., concurring in dismissal) (citing *id.* at 676-678 (Breyer, J, dissenting)). *Nike*'s dismissal precluded this Court from resolving those questions, but it can do so here.

2. Unlike the court below, numerous lower courts have applied *Bolger* and *Riley* to hold that regulation of commercial speech that summarizes fully protected speech is subject to strict scrutiny. *E.g.*, *Gaudiya Vaishnava Soc'y* v. *City & County of San Francisco*, 952 F.2d 1059, 1064 (9th Cir. 1991); *Frazier* v. *Boomsma*, No. 07-8040, 2008 WL 3982985, *3-4 (D. Ariz. Aug. 20, 2008); *Lacoff* v. *Buena Vista Publ'g, Inc.*, 705 N.Y.S.2d 183, 189-190 (Sup. Ct. 2000); *Gordon & Breach Sci. Publishers S.A.* v. *Am. Inst. of Physics*, 859 F. Supp. 1521, 1540-1541 (S.D.N.Y. 1994); see also *Nike*, 539 U.S. at 676-679 (Breyer, J., dissenting).

The Seventh Circuit's decision conflicts with these decisions and infringes on core First Amendment rights.[8] In refusing to engage *Riley* and *Bolger* on the

[8] Although this case arises in the context of a consent order (entered into when the Mirror Image Doctrine was in effect), that does not alter the analysis. Nothing in the order waived Trudeau's right to repeat statements from his book in his advertising—let alone in any television,

ground that "'false or misleading commercial speech receives no protection at all'" (Pet. 25a n.12), the court ignored the essential point of those cases: Regulating advertising that extensively repeats content from a book is tantamount to regulating the underlying work, warranting strict First Amendment scrutiny. The decision below also conflicts with *United States* v. *Alvarez*, No. 11-210 (U.S. June 28, 2012), which reaffirmed that "[t]he Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection." Plurality op. 7; accord *id*., opinion concurring in judgment 4 (Breyer, J.).

Riley's logic is especially compelling in a case like this. In *Board of Trustees* v. *Fox*, 492 U.S. 469, 474 (1989), this Court declined to apply *Riley* to "Tupperware parties" that "touch[ed] on" noncommercial subjects because it is not "impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares." An author, however, cannot effectively advertise a publication without summarizing its contents. Affording authors strong First Amendment protection for their books' content, but weak protection for communications about that content, discourages the underlying expression. That is especially pernicious when, as here, the underlying work criticizes a government agency that can otherwise regulate the author's speech.

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radio, or Internet appearance of at least two minutes—and the Seventh Circuit's decision was not based upon any finding of waiver. Moreover, the constitutional concerns apply equally to the bond requirement. *Supra* at 31-32.

"The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). "[A] rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship" and insufficient "'breathing space'" for opinion, see *id.* at 339-342—such as whether a weight-loss program is "easy." Indeed, if authors may be heavily fined for omissions in advertisements that create "an incomplete picture" of their works' contents (Pet. 24a), many will be dissuaded from writing in the first place. Cf. *Simon & Schuster*, 502 U.S. at 118 (applying strict scrutiny to a law that "establishes a financial disincentive to create or publish works with a particular content").

B. The FTC's recent repeal of the "Mirror Image Doctrine" confirms the need for review.

Review of this question is also particularly timely. While this case was pending below, the FTC abruptly abandoned its Mirror Image Doctrine, which for nearly 40 years had precluded enforcement actions like this. That doctrine provided:

> The Commission, as a matter of policy, ordinarily will not proceed against advertising claims which promote the sale of books and other publications: *Provided, The advertising only purports to express the opinion of the author or to quote the contents of the publication*; the advertising discloses the source of statements quoted or derived from the contents of the publication; and the advertising discloses the author to be the source of opinions expressed about the publication. Whether the ad-

> vice being offered by the publication will achieve, in fact, the results claimed for it in the advertising will not be controlling if appropriate disclosures have been made….

Advertising in Books Enforcement Policy, 36 Fed. Reg. 13,414 (July 21, 1971) (emphasis added).

In 2009, *after* the contempt finding below, and in a transparent attempt to aid its efforts here, the FTC rescinded this policy. See *Advertising of Books: Enforcement Policy*, 74 Fed. Reg. 8542-8543 (Feb. 25, 2009); Fentonmiller, 110 W. Va. L. Rev. at 589-601, 610 (article by senior FTC attorney citing Trudeau's books in support of abandoning this doctrine). Now the FTC says "a commercial advertisement does not necessarily enjoy full First Amendment protection just because it promotes a fully protected product or activity or incorporates statements that, outside the advertising context, are fully protected." 74 Fed. Reg. 8543. In support, however, the FTC cites only *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 637 & n.7 (1985), which did not involve advertising inextricably intertwined with a protected publication.

The FTC's recent policy reversal underscores the importance of review. Aggressive enforcement efforts threaten to chill speakers who risk financial ruin if the agency decides that quotations used in promoting their books are "incomplete." Pet. 24a. "Uncertainty about how a court will view [such] statements, can easily chill a speaker's efforts to engage in public debate—particularly where a 'false advertising' law … imposes liability based upon negligence or without

fault." *Nike*, 539 U.S. at 680 (Breyer, J., dissenting).[9] All the more so where the penalty is a $37.6 million fine.

This Court should intervene to ensure that the FTC's considerable powers remain confined to the commercial marketplace, not the marketplace of ideas. See *Craig* v. *Harney*, 331 U.S. 367, 368 (1947) (certiorari granted to review whether contempt order violated the First Amendment "because of the importance of the problem" and "doubts [about] whether it conformed to the principles announced in [this Court's precedent]"); *Bridges* v. *California*, 314 U.S. 252, 258-259 (1941) (certiorari granted in contempt case because of the "importance of the constitutional question" concerning "our national constitutional policy safeguarding free speech").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[9] Speech subject to full First Amendment protection, even if misleading, normally cannot be punished without proof of fault and injury. See generally *Smith* v. *California*, 361 U.S. 147, 152-153 (1959); *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 52 (1988).

Respectfully submitted.

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