No. 15-525

In the Supreme Court of the United States

POM WONDERFUL, LLC, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Federal Trade Commission (FTC) determined that petitioners had deceptively marketed three pomegranate-based products, in violation of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.* The FTC found that 36 of petitioners' advertisements had claimed that their products treated or prevented heart disease, prostate cancer, and erectile dysfunction, and that the ads were misleading because petitioners had failed to substantiate those claims. The FTC also found that, because petitioners' ads were misleading, they were not protected by the First Amendment. The FTC ordered petitioners to cease and desist from disseminating advertisements that assert misleading health claims.

As relevant here, the court of appeals upheld the FTC's order. The court reviewed the FTC's findings as to 19 ads under both de novo and substantial-evidence review, upheld the FTC's findings on those ads, and noted that the findings on those ads provided a sufficient basis for the FTC's liability determination and cease-and-desist order. The court upheld the FTC's findings for the remaining 17 ads under substantial-evidence review. The question presented is as follows:

Whether the court of appeals erred in declining to apply de novo review to the FTC's findings as to 17 of petitioners' ads, where the findings for the other 19 ads were sufficient to sustain the FTC's liability determination and its remedial order.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rule:

Statutes and rule—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 777 F.3d 478. The opinion of the Federal Trade Commission (Pet. App. 45a-170a) is reported at 155 F.T.C. 1. The decision of the administrative law judge (Initial Decision) is not published but is available at https://www.ftc.gov/sites/default/files/documents/cases/2012/05/120521pomdecision.pdf.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2015. A petition for rehearing was denied on May 28, 2015 (Pet. App. 180a-181a). On August 18, 2015, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 25, 2015. On September 11, 2015, the Chief Justice further extended the time to October 23, 2015, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Trade Commission Act (FTC Act or Act), 15 U.S.C. 41 *et seq.*, prohibits unfair or deceptive acts or practices in or affecting commerce, and it empowers and directs the Federal Trade Commission (FTC or Commission) to enforce that prohibition. As relevant here, Section 5 of the Act prohibits, and directs the FTC to prevent, "deceptive acts or practices in or affecting commerce." 15 U.S.C. 45(a)(1). Section 12 of the Act states that such deceptive acts include "any false advertisement" relating to "food" or "drugs." 15 U.S.C. 52(a) and (b). A "false advertisement" is an "advertisement, other than labeling, which is misleading in a material respect," whether through affirmative "representations made or suggested" by the advertisement or through a "fail[ure] to reveal facts material in the light of such representations." 15 U.S.C. 55(a)(1). To enforce the Act, the FTC may file either an administrative complaint, which initiates a trial before an administrative law judge (usually followed by an administrative appeal to the Commission), or a complaint in federal district court. See 15 U.S.C. 45(b) and (m), 53(b).

Whether made by the FTC or a district court, the determination whether an advertisement is deceptive generally involves three steps: (1) determining what claims are conveyed in the ad; (2) determining whether those claims are false or misleading; and (3) determining whether the claims would be material to prospective consumers. Pet. App. 14a-15a (citing cases). At the first step, the adjudicator asks what messages a reasonable consumer would construe a given adver-

tisement to convey. See *Thompson Med. Co.* v. *FTC*, 791 F.2d 189, 197 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987). Claims in an ad may be express or implied, *id.* at 194-195, and an ad is misleading if "at least a significant minority of reasonable consumers" would likely interpret the ad to assert a misleading claim, *In re Telebrands Corp.*, 140 F.T.C. 278, 291 (2005), order enforced, 457 F.3d 354 (4th Cir. 2006).

At the second step, the adjudicator asks whether the claims are adequately substantiated. Whether a claim has sufficient support depends on the type of claim. Pet. App. 15a. An *efficacy* claim conveys the message that a given product successfully creates the advertised benefit, without suggesting scientific proof of effectiveness; an *establishment* claim suggests that the product's effectiveness is backed up by scientific evidence. *Ibid.* For an efficacy claim, the advertiser must show a "reasonable basis" for the claim in light of a number of factors. *In re Pfizer Inc.*, 81 F.T.C. 23, 62 (1972). For an establishment claim, "the advertiser must possess a level of proof sufficient to satisfy the relevant scientific community of the claim's truth." *In re Removatron Int'l Corp.*, 111 F.T.C. 206, 297 (1988), pet. for review denied, 884 F.2d 1489 (1st Cir. 1989); see *id.* at 297-299. That standard does not require "conclusive proof" for any science-based claim. Pet. 1 (emphasis omitted). Rather, the advertiser must provide sufficient information for consumers to "understand both the extent of scientific support and the existence of any significant contrary evidence." FTC, *Dietary Supplements: An Advertising Guide for Industry* 7 (Apr. 2001), https://www.ftc.gov/tips-advice/business-center/guidance/dietary-supplements-advertising-guide-industry.

At the third step, the adjudicator asks whether the misleading claims "would be a material factor in a consumer's decision to purchase the product." *In re American Home Prods. Corp.*, 98 F.T.C. 136, 368 (1981), enforced as modified, 695 F.2d 681 (3d Cir. 1983).

2. This case concerns misleading health claims that petitioners made in marketing three pomegranate-based products—one beverage (POM Juice) and two dietary supplements (POM_x Pills and POM_x Liquid)—produced by petitioner POM Wonderful, LLC (POM). Pet. App. 3a. In their marketing materials, petitioners contended that daily consumption of those products could treat, prevent, or reduce the risk of heart disease, prostate cancer, and erectile dysfunction. *Id.* at 2a. Petitioners sold the products at much higher prices than comparable products, using the asserted medical benefits to justify the higher prices. *Id.* at 120a & n.31; see Initial Decision 16 ¶¶ 101-102.

From 2003 to 2010, petitioners promoted the three products through "a broad array of advertising campaigns," using "magazine ads, newspaper inserts, billboards, posters, brochures, press releases, and website materials." Pet. App. 4a; see *id.* at 2a. The marketing materials "regularly referenced" purported scientific support for the "claimed health benefits" of the three products. *Id.* at 4a.

First, several ads claimed that POM's products would treat, prevent, or reduce the risk of heart disease by (*inter alia*) reducing the buildup of plaque in the arteries. Pet. App. 6a-8a. One such ad, citing a "clinical pilot study," promised users that "[a] glass a day" of POM's pomegranate juice would "reduce [arterial] plaque by up to 30%." *Id.* at 212a; see *id.* at 7a.

The ad did not tell consumers that the cited study was tiny and the results were "not at all conclusive." *Id.* at 5a (quoting Initial Decision 117 ¶ 802); see *id* at 4a-5a. Petitioners' ads continued to claim that their products "ha[d] been proven to promote cardiovascular health," *id.* at 6a, and continued to cite the 30% figure, for years after petitioners learned through two additional, much larger studies that their products had little or no plaque-reducing benefit, see *id.* at 6a-7a, 130a, 299a. Petitioners did not acknowledge the later studies in their ad campaigns, and they delayed publication of the adverse results so that consumers would not know that they cast doubt on the initial study. *Id.* at 6a-7a.

Second, petitioners' marketing materials claimed that POM's products would treat prostate cancer by, for example, substantially slowing the disease's progress in patients who already had undergone treatment. Pet. App. 8a-9a. The ads claimed that recovering prostate-cancer patients who had consumed POM's products after surgery or radiation treatment had enjoyed a dramatic decrease in one of the markers for prostate cancer. *Ibid.*; see *id.* at 257a (claim that patients had experienced a "four-fold" slowing in doubling times for prostate-specific antigen (PSA), a protein marker for prostate cancer). But the study cited to support the claimed health benefit included no control group and therefore established no causal link between the products and the results. *Id.* at 8a-9a. Petitioners "made no mention of the [study's] limitations" in their ads and did not "acknowledg[e] that the patients' PSA doubling times may have slowed regardless of whether they consumed pomegranate juice." *Id.* at 9a.

Third, petitioners claimed that consumption of POM's products would successfully treat erectile dysfunction. One advertisement claimed that, "[i]n a preliminary study on erectile function," men who consumed POM_x Pills had "reported a 50% greater likelihood of improved erections as compared to placebo." Pet. App. 307a-308a; see *id.* at 11a. But POM's clinical research failed to establish that its products had a statistically significant result for patients, and petitioners' marketing materials "made no mention of the negative results" of that research. *Id.* at 10a-11a.

3. In September 2010, the FTC issued an administrative complaint that charged petitioners with making false or misleading representations in marketing their pomegranate products, in violation of Sections 5 and 12 of the FTC Act. Pet. App. 11a; see 15 U.S.C. 45, 52. The complaint identified 43 specific advertisements as violating the Act. Pet. App. 11a.

After a lengthy hearing (involving 14 expert witnesses and nearly 2000 exhibits), an administrative law judge (ALJ) concluded that petitioners had violated the FTC Act. Initial Decision 2, 5-6. The ALJ concluded that 19 of the challenged ads implied claims that POM products would "treat, prevent, or reduce the risk of heart disease, prostate cancer, or erectile dysfunction," and that most of those ads also claimed "that these effects were clinically proven." *Id.* at 5; see *id.* at 84-85 ¶¶ 580-583, 225-230; see also Pet. App. 11a-12a. The ALJ determined that, because petitioners had failed to substantiate those claims with "competent and reliable scientific evidence," the ads were materially false or misleading. Initial Decision 5-6; see *id.* at 259-270, 282-283, 288-289, 292, 328 ¶¶ 18-19, 22.

As a remedy, the ALJ issued a cease-and-desist order. Initial Decision 6, 332. The ALJ noted the "seriousness" and "deliberateness" of petitioners' violations, explaining that petitioners had made false or misleading claims about "serious diseases and dysfunction of the body, including cancer," for many years through a wide variety of media outlets. *Id.* at 329-330 ¶ 32.

Both petitioners and the FTC appealed the ALJ's order to the Commission.

4. On de novo review, the Commission found that petitioners had violated the FTC Act by using misleading, unsubstantiated ads to market their products. Pet. App. 45a-170a, 182a-311a. The FTC agreed that the 19 ads identified by the ALJ were false or misleading, and it concluded that 17 additional ads also violated the Act. *Id.* at 49a-50a, 63a.

The FTC first found that 36 of the 43 charged advertisements contained efficacy claims that POM's products could treat, prevent, or reduce the risk of heart disease, prostate cancer, and/or erectile dysfunction, and that 34 of those 36 ads also contained establishment claims that the medical benefits were supported by clinical evidence. Pet. App. 47a, 63a, 127a, 309a-311a. The FTC explained those findings in a detailed, ad-by-ad analysis. See *id.* at 182a-195a. The FTC also found that petitioners had "inten[ded] to convey" those claims about health benefits and clinical results. *Id.* at 78a.

Next, the FTC concluded that petitioners had failed to substantiate their medical claims, making them false or misleading. Pet. App. 78a-121a. Relying in large part on case-specific expert testimony, the FTC concluded that "experts in the relevant fields

would require RCTs"—meaning "properly randomized and controlled human clinical trials"—"to establish a causal relationship" between POM's products and "the treatment, prevention, or reduction of risk of the serious diseases at issue in this case." *Id.* at 88a; see *id.* at 95a. The FTC explained why POM's studies were insufficient to support each of the ads' claims. *Id.* at 95a-112a. The FTC concluded that, in addition to failing to substantiate the results claimed, POM's ads contained "many omissions of material facts," such as the shortcomings of their studies or the contrary results of a "much larger, well-designed, well-controlled study." *Id.* at 130a; see *id.* at 143a. Finally, the FTC noted that, although petitioners could have avoided liability by including certain disclaimers in their ads, petitioners had not done so. *Id.* at 71a, 132a-133a.

The FTC rejected petitioners' arguments that a finding of liability would violate the First Amendment. Pet. App. 125a-133a. The FTC explained that petitioners' ads had falsely "represented to consumers that clinical studies proved that" the products "treat, prevent or reduce the risk of heart disease, prostate cancer, or ED [erectile dysfunction]." *Id.* at 127a. The Commission further explained that, in light of its determination that petitioners' ads were "actually misleading, no further analysis [wa]s necessary because misleading commercial speech is not protected by the First Amendment." *Id.* at 128a.

Like the ALJ, the FTC imposed a cease-and-desist remedy. Pet. App. 145a, 148a, 173a-175a. That order directed petitioners not to make health claims about their products unless, *inter alia*, those claims were "non-misleading" and supported by "competent and

reliable scientific evidence." *Id.* at 173a, 174a. With respect to specified types of health claims (those pertaining to the prevention of "any disease"), the order stated that "competent and reliable scientific evidence shall consist of at least two" RCTs of the relevant product. *Id.* at 173a. The FTC noted that, although its liability finding was based on a greater number of ads than the ALJ had found to be misleading, its injunctive remedy would be justified "even if based only on the smaller number of ads where the ALJ found [POM] conveyed the claims." *Id.* at 143a.[1]

5. The court of appeals affirmed the FTC's finding of liability and all but one aspect of its remedial order. Pet. App. 1a-44a. On the first step of the analysis, the court upheld the FTC's claims interpretation as supported by substantial evidence. The court noted that the FTC had "set forth the basis for [its] findings in considerable detail, in an appendix to its opinion, with a separate explanation for each ad." *Id.* at 17a. The court reviewed a number of the ads and concluded that petitioners' advertising campaign had "repeatedly claimed the benefits of POM's products in the treatment or prevention of heart disease, prostate cancer, or erectile dysfunction, and consistently touted medical studies ostensibly supporting those claimed benefits." *Ibid.* The court found "no basis for setting aside the Commission's carefully considered findings of efficacy and establishment claims," and it specifically

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[1] In a concurring opinion, Commissioner Ohlhausen disagreed with the other Commissioners' interpretation of some of the ads, Pet. App. 151a-165a, but "[f]or most of the challenged advertisements, [she] agree[d] with the majority," *id.* at 63a n.9. Commissioner Rosch also filed a separate opinion agreeing with the majority's conclusions. *Id.* at 166a-170a.

rejected petitioners' argument that their ads had done nothing more than "correctly reference[] research connecting a food product to possible health benefits." *Id.* at 18a (emphasis omitted).

The court of appeals also upheld the FTC's determination that petitioners' ads were false or misleading because they lacked adequate support. Pet. App. 21a-28a. The court affirmed the FTC's determinations that RCTs were necessary to substantiate the "specific disease treatment and prevention claims" in petitioners' ads, and that petitioners' studies were insufficient because they either were not RCTs or were RCTs that tended to disprove rather than support the medical benefits claimed. *Id.* at 22a; see *id.* at 20a-24a. The court upheld the FTC's findings that petitioners' ads contained "many omissions of material facts" because they "selective[ly] tout[ed] * * * ostensibly favorable study results" while failing to disclose "contrary indications from the same or a later study." *Id.* at 23a (citation omitted).[2]

The court of appeals rejected petitioners' claim that the FTC's liability order violated the First Amendment. Pet. App. 32a-34a. The court observed that, under the First Amendment, "[m]isleading advertising may be prohibited entirely." *Id.* at 32a (brackets in original) (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)). It found "no basis to overturn" the FTC's conclusion that petitioners' ads were "deceptive and misleading" and therefore constitutionally unprotected. *Id.* at 33a-34a (citation omitted).

Petitioners had argued in their reply brief that the court of appeals should apply de novo review to the

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[2] The court did not consider the third step of the analysis because petitioners had conceded materiality. Pet. App. 17a.

FTC's determination that petitioners' ads were misleading. Pet. App. 33a. The court explained that circuit precedent "call[ed] for reviewing the Commission's factual findings of a deceptive claim under the ordinary (and deferential) substantial-evidence standard." *Ibid.* The court held that the FTC's findings with respect to all 36 ads were supported by substantial evidence. *Ibid.* The court of appeals further explained that it "would reach the same conclusion even if [it] were to exercise de novo review, at least with respect to the nineteen ads determined misleading by the administrative law judge and held by the Commission to form a sufficient basis for its liability determination and remedial order." *Ibid.* The court concluded that, "insofar as the FTC imposed liability on petitioners for the nineteen ads found to be deceptive by the administrative law judge, the Commission sanctioned petitioners for misleading speech unprotected by the First Amendment." *Id.* at 34a.

The court of appeals overturned the requirement in the FTC's remedial order that future claims relating to the prevention of disease must be supported by at least two RCTs. Pet. App. 34a-44a. While "hold[ing] that the Commission's order is valid to the extent it requires disease claims to be substantiated by at least one RCT," the court concluded that the order "fails [First Amendment] scrutiny insofar as it categorically requires two RCTs for all disease-related claims." *Id.* at 44a. In all other respects, the court upheld the Commission's remedial order. *Ibid.*

6. Petitioners filed a petition for rehearing en banc, which the court of appeals denied, with no judge requesting a vote on the petition. Pet. App. 180a-181a.

ARGUMENT

Petitioners contend (Pet. 19-33) that, although the court of appeals reviewed 19 of petitioners' ads de novo and concluded that they were misleading and not constitutionally protected, and the findings as to those 19 ads were sufficient to sustain the FTC's liability determination and remedial order, the court should also have reviewed the other 17 ads de novo. This Court's review is not warranted. Petitioners' argument for de novo review was raised in an untimely manner in the court of appeals, with no opportunity for the FTC to respond, and the court addressed the issue only briefly. Because the court of appeals' de novo findings with respect to the 19 ads are sufficient to sustain the FTC's order, the outcome in this case would not change even if this Court granted certiorari and held that de novo review was constitutionally required. In any event, the court of appeals' holding that substantial-evidence review applies in this context is correct and does not conflict with any decision of this Court or of another circuit or a state court of last resort.

1. This case would be a poor vehicle for addressing the question whether de novo review applies to FTC determinations that an advertisement is misleading.

a. Petitioners did not urge de novo review in a timely fashion in the court of appeals. Petitioners filed two full-length opening briefs, in which they were required to include, "for each issue, a concise statement of the applicable standard of review." Fed. R. App. P. 28(a)(8)(B). Neither brief argued that the court of appeals should review de novo the FTC's determination that various ads were misleading. Rather, the briefs accepted that substantial-evidence

review applied to the FTC's factual findings, including the finding that petitioners' ads were misleading because their claims lacked sufficient support. See POM C.A. Br. 39; Tupper C.A. Br. 38-39 & n.6. Although one of petitioners' opening briefs advanced a First Amendment argument—contending that the ads were non-misleading commercial speech and that the FTC's order constituted impermissible regulation of such speech, POM C.A. Br. 11-52—it did not address the FTC's ad-by-ad factual findings or advocate de novo review.

In its responsive brief, the FTC explained that its fact-based conclusions that petitioners' ads were misleading were supported by substantial evidence and that, because petitioners' ads were actually misleading, they were not protected commercial speech. FTC C.A. Br. 29-71. The FTC argued that its underlying factual findings—that the ads implied certain health claims and that petitioners lacked support for those claims—should be reviewed under the substantial-evidence standard. *Id.* at 22-23 (citing *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986), and *Kraft, Inc.* v. *FTC*, 970 F.2d 311, 316 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993)). The brief also noted that the FTC Act requires deference to the Commission's factual findings. See *id.* at 22 (citing 15 U.S.C. 45(c)).

On page 26 of their reply brief, petitioners argued for the first time that the court of appeals should apply de novo review to the FTC's findings that the ads were misleading. See Pets. C.A. Reply Br. 26. That brief did not attempt, however, to apply that standard to the FTC's detailed, ad-by-ad findings. The brief also did not address the standard-of-review

precedent cited by the FTC. Petitioners' argument for de novo review constituted only a few paragraphs of their 45-page reply brief. See *id.* at 25-26. Because circuit precedent establishes that an argument raised for the first time in an appellant's reply brief may be deemed forfeited, see, *e.g.*, *American Wildlands* v. *Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008), the court of appeals had no obligation to consider petitioners' standard-of-review argument. Petitioners' failure to urge de novo review in its opening brief also deprived the FTC of the opportunity to respond to the standard-of-review argument in its brief.

The court of appeals addressed the standard-of-review issue only briefly. The court noted the argument and stated that circuit precedent "call[ed] for reviewing the Commission's factual finding of a deceptive claim under the ordinary (and deferential) substantial-evidence standard." Pet. App. 33a (citing cases). With respect to all 36 ads, the court "conclude[d] that the Commission's findings of deception are supported by substantial evidence in the record." *Ibid.* The court further explained that it "would reach the same conclusion even if [it] were to exercise de novo review, at least with respect to the nineteen ads determined misleading by the administrative law judge and held by the Commission to form a sufficient basis for its liability determination and remedial order." *Ibid.* The court thus made clear that the choice between the competing standards of review would not affect the outcome of the appeal.

b. Petitioners' failure to urge de novo review in a timely manner, and their failure (even in their reply brief below) to present the ad-by-ad analysis that such review would require, make this case a poor vehicle

for determining the appropriate standard of review of FTC findings that particular ads are misleading. This Court's review is especially unwarranted because a ruling favorable to petitioners on the standard-of-review issue would not affect the outcome of the case. The court of appeals upheld on de novo review the FTC's findings that 19 ads were misleading, and it recognized that those findings were sufficient to sustain the FTC's liability determination and cease-and-desist order. Pet. App. 33a.

Petitioners contend that this Court's review is needed to determine the "scope" of the FTC's injunction (as modified by the court of appeals). Pet. 33 (emphasis omitted). The injunction orders petitioners not to make representations about the health effects of their products unless, *inter alia*, those representations are "non-misleading." Pet. App. 173a, 174a. Petitioners appear to argue that, if the court of appeals had reviewed de novo the Commission's findings with respect to the other 17 ads, its opinion would have given petitioners greater guidance as to the range of representations that the remedial order forbids. See Pet. 33 (stating that "the *scope* of th[e FTC's] remedial injunction depends entirely on what counts as an ad making an impermissible disease claim").

Petitioners do not challenge the court of appeals' fact-bound conclusion, based on de novo review of the FTC's findings, that at least 19 of petitioners' ads were misleading. Nor do they dispute that the Commission's identification of 19 misleading ads provided a sufficient basis for its remedial order. Once those propositions are accepted, the court of appeals was plainly under no obligation to render an advisory

opinion addressing the application of the injunction to the other 17 ads. Indeed, even if the court had held that the First Amendment required de novo review of all FTC findings that were essential to the remedial order, it could reasonably have declined to review the Commission's findings with respect to the additional 17 ads, particularly in light of petitioners' failure to offer the ad-by-ad analysis that such review would require. Appellate courts routinely and appropriately decline to decide contested legal and factual issues whose resolution would not affect the court's judgment. See *PDK Labs. Inc.* v. *United States Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) (noting the "cardinal principle of judicial restraint" that "if it is not necessary to decide more, it is necessary not to decide more").

2. In any event, contrary to petitioners' argument, the FTC factual findings at issue in this case are entitled to judicial deference under the substantial-evidence standard.[3] Petitioners cite no decision of this Court, another circuit, or a state court of last resort that has reached a different conclusion.

a. The FTC Act directs that, on judicial review of an FTC decision, "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclu-

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[3] Petitioners seek de novo review only of the FTC's findings as to what claims the ads convey, and not the separate question whether petitioners had sufficient scientific support for those claims. See, *e.g.*, Pet. i, 1, 4, 12-13, 19. Petitioners have conceded that substantial-evidence review applies to the latter question, see POM C.A. Br. 39; Tupper C.A. Br. 38-39 & n.6, and they do not challenge the court of appeals' holding that substantial evidence supports the FTC's substantiation findings in this case.

sive." 15 U.S.C. 45(c). That standard is "essentially identical [to the] 'substantial evidence' standard." *Indiana Fed'n of Dentists*, 476 U.S. at 454 (citation omitted). This Court has applied that standard to review FTC findings that an advertisement is deceptive. See *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, 395 (1965). The Court in *Colgate-Palmolive Co.* explained that the FTC's finding that an ad is deceptive should "be given great weight by reviewing courts" because the FTC "deals continually with cases in the area," and because the finding that an ad is "deceptive * * * rests so heavily on inference and pragmatic judgment." *Id.* at 385.

Consistent with that decision, the D.C. Circuit has applied substantial-evidence review, in the context of First Amendment claims, to the FTC's factual findings that an ad is deceptive. See *Novartis Corp.* v. *FTC*, 223 F.3d 783, 787 & n.4 (2000); *FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41 n.3 (1985); see also Pet. App. 33a. The Seventh Circuit likewise has held that FTC factual findings underlying a determination that an ad is unprotected commercial speech should be reviewed for substantial evidence. See *Kraft*, 970 F.2d at 316-318.

b. Relying on *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), and *Peel* v. *Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), petitioners contend (Pet. 20-24) that courts must review de novo FTC findings about what claims an advertisement makes when those findings underlie a conclusion that the ad is unprotected commercial speech. *Bose* and *Peel* are inapposite, however, because they addressed different types of speech restrictions.

The question in *Bose* was whether the First Amendment requires de novo review of actual-malice findings in a libel case brought by a product manufacturer. 466 U.S. at 487, 489-499. The case did not present any issue concerning the standard of review for misleading commercial advertising; indeed, the speech at issue was not commercial speech at all but instead was a product review. In the *Bose* opinion's only reference to commercial speech, the Court distinguished such speech from the alleged libel at issue, noting that "false and misleading commercial speech" is "unprotected" and that there is a "minimal danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression." *Id.* at 504 n.22 (citation and internal quotation marks omitted). The D.C. Circuit has accordingly recognized that *Bose* "does not change the standard of review in deceptive advertising cases," and that "*Bose* itself suggests that commercial speech might not merit the same approach as set out therein for libel cases." *Brown & Williamson Tobacco Corp.*, 778 F.2d at 41 n.3; accord *Kraft*, 970 F.2d at 317 (making the same observation).

Peel is inapposite because the Court there addressed a prophylactic ban on an entire category of messages, rather than findings that particular advertisements were actually misleading. In *Peel*, the Court held that a state regulation categorically prohibiting attorneys from claiming that they were "certified" as "specialist[s]" violated the First Amendment as applied to an attorney who actually was certified as a trial specialist by a national board. 496 U.S. at 97, 110-111 (plurality op.); see *id.* at 111 (Marshall, J., concurring in the judgment). Central to the plurali-

ty's analysis were the undisputed facts that the attorney's own statement was "true and verifiable" and that the State's only rationale for the prophylactic ban was that messages about certification are "potentially misleading" depending on phrasing and context. *Id.* at 100-101, 107-109 (plurality op.). The plurality did not apply de novo review to a finding that the attorney's statement was misleading, because there were no such findings in the record. *Id.* at 101 (plurality op.). Rather, the plurality applied de novo review in resolving the *legal* question whether the State's reasons for deeming all such statements potentially misleading justified the adoption of a prophylactic rule. See *id.* at 108.

As the Seventh Circuit has explained, *Peel* is inapposite here because the Court in *Peel* addressed "a prophylactic regulation applicable to all lawyers, completely prohibiting an entire category of potentially misleading commercial speech." *Kraft*, 970 F.2d at 317. The court in *Kraft* specifically contrasted the regulation at issue in *Peel* with "an individualized FTC cease and desist order" that prohibits "a particular set of deceptive ads" based on detailed, ad-by-ad conclusions that they are actually misleading. *Ibid.*[4] Defer-

[4] Petitioners repeatedly suggest (Pet. 16, 23, 26) that the FTC found only that their ads were potentially misleading, not that they were actually misleading. That is wrong. See Pet. App. 34a, 126a-129a. Petitioners misuse the term "potentially misleading" (Pet. 16, 23, 26) to refer to individual ads that are *actually* misleading to many but not all consumers. But in cases (like *Peel*) that involve prophylactic bans, courts distinguish between categories of messages that are so "inherently misleading" that the ban is justified and those that are only "potentially misleading" because the messages (*e.g.*, claims about an attorney's qualifications) can be presented in non-deceptive ways. *Peel*, 496 U.S. at 100 (emphasis

ence to the Commission's findings in this context is particularly appropriate because the FTC has significant expertise in evaluating deceptive advertising. See *Colgate-Palmolive Co.*, 380 U.S. at 385; see also *Kraft*, 970 F.2d at 317. *Bose* and *Peel* did not overrule, or even consider, the rule set out in *Colgate-Palmolive Co.* See *Kraft*, 970 F.2d at 317 (rejecting the suggestion that *Bose* and *Peel* "effectively overrule[d] *Colgate-Palmolive*").

Ibanez v. *Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994), is likewise inapposite. See Pet. 4, 20, 23. Like *Peel*, that case involved the application of a prophylactic ban on speech as applied to a person who had truthfully stated her credentials. 512 U.S. at 144-146. The Court did not analyze the standard of review for a finding that speech is misleading, because there was no factual finding that the individual's speech was actually misleading. *Id.* at 145 (noting the "complete absence of any evidence of deception") (citation omitted).

c. As noted above, the Seventh and D.C. Circuits have held that courts should apply substantial-evidence review to FTC factual findings underlying the conclusion that an advertisement is misleading and therefore receives no First Amendment protection. See Pet. App. 33a (citing cases); *Kraft*, 970 F.2d at 316-318. No court of appeals has reached a contrary conclusion.

None of the decisions that petitioners cite holds that findings of fact (whether by an agency or a dis-

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and citation omitted). When a category of messages is only "potentially misleading," review of specific communications may be necessary to determine whether individual ads are actually misleading. The FTC conducted that ad-by-ad inquiry here.

trict court[5]) that a commercial advertisement is actually misleading must be reviewed de novo. Only one of the cited cases—*CFTC* v. *Vartuli*, 228 F.3d 94, 108 n.7 (2d Cir. 2000)—involved appellate review of an agency's finding that an advertisement was deceptive. But that decision does not support petitioners because the court in *Vartuli* did not hold that de novo review applied. Rather, the court applied clear-error review; observed in a footnote that it was "arguable" that de novo review applied; but then concluded that it would affirm the agency's finding "even upon such a review." *Id.* at 101, 107, 108 n.7.

Petitioners cite (Pet. 27) three decisions that, like *Peel*, involved challenges to prophylactic state laws that broadly prohibited particular categories of commercial messages. None addressed the standard for reviewing an agency's factual findings that a particular advertisement is actually misleading. In *1-800-411-Pain Referral Service, LLC* v. *Otto*, 744 F.3d 1045 (2014), the Eighth Circuit rejected a facial challenge to a state statute that limited advertising directed at victims of automobile accidents. See *id.* at 1051-1052, 1062-1063. The court stated that "[w]hether speech is 'inherently misleading' is a question of law that we review de novo." *Id.* at 1056. The case did not involve agency findings that a particular ad was deceptive, and there was no dispute about the standard of review

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[5] Petitioners assert (Pet. 29) that "findings of misleading advertising are reviewed *de novo* when they come from courts." That is incorrect. See, *e.g.*, *Osmose, Inc.* v. *Viance, LLC*, 612 F.3d 1298, 1309-1312 (11th Cir. 2010) (reviewing for clear error false-advertising findings under the Lanham Act, 15 U.S.C. 1051 *et seq.*); *S.C. Johnson & Son, Inc.* v. *Clorox Co.*, 241 F.3d 232, 237-240 (2d Cir. 2001) (same).

because the parties agreed that *Peel* applied. See Appellees' Br. at 17, *1-800-411 Pain Referral Serv., LLC*, *supra* (8th Cir. filed July 3, 2013) (No. 13-1167). The cited decisions from the Fifth and Tenth Circuits are similarly inapposite because they addressed categorical bans on speech without any particularized evidence that specific ads were deceptive.[6]

Braun v. *Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992), cert. denied, 506 U.S. 1071 (1993), is even further afield. *Braun* concerned liability for publishing an advertisement that was found to have created a substantial danger of harm to the public. *Id.* at 1116-1121. The court of appeals stated that the Constitution required it to conduct an "independent review" of the jury's verdict. *Id.* at 1120. But the court emphasized the unusual circumstances of that case, noting that holding a publisher liable for running third-party ads raised constitutional concerns that are not present in the usual deceptive-advertising case. *Id.* at 1117-1118.

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[6] *Byrum* v. *Landreth*, 566 F.3d 442 (5th Cir. 2009), involved a facial challenge to a state law that limited advertising for interior designers. *Id.* at 446-448. The Fifth Circuit stated that whether the speech reached by the statute was protected by the First Amendment was a legal question subject to de novo review on appeal. See *id.* at 445, 448 n.5. But the court did not address the standard of review for agency factual findings that a particular ad was misleading because no such findings had been made. *Id.* at 447. The Tenth Circuit's decision in *Revo* v. *Disciplinary Board of the Supreme Court of New Mexico*, 106 F.3d 929 (10th Cir.), cert. denied, 521 U.S. 1121 (1997), likewise concerned a prophylactic ban on categories of advertising, not review of an agency's determination (based on extensive factual findings) that particular ads were deceptive. *Id.* at 930-933. The court in *Revo* therefore did not address the question whether substantial-evidence review should apply in the latter circumstance.

Similarly, none of the state court decisions that petitioners cite (Pet. 25-26) requires de novo review of agency findings that specific ads are misleading. *Hunter* v. *Virginia State Bar*, 744 S.E.2d 611 (Va.), cert. denied, 133 S. Ct. 2871 (2013), concerned a state bar's decision to discipline an attorney for posting blog entries without disclaimers required by state disciplinary rules. *Id.* at 613-615. The state bar had made no finding that the attorney's statements were actually misleading, but had based its disciplinary decision solely on the attorney's failure to use the mandated disclaimers. *Id.* at 614, 618. Similarly in *In re Sutfin*, 693 A.2d 73 (N.H. 1997), a state dental board had disciplined a dentist for violating a statute that prohibited dentists from claiming that their services were superior to those of other dentists. *Id.* at 73-75. The court found a First Amendment violation because the board had determined that the dentist's ad was "inherently misleading" rather than "misleading in fact," and the record contained "no evidence" of actual deception. *Id.* at 75. In *Snell* v. *Engineered Systems & Designs, Inc.*, 669 A.2d 13 (Del. 1995), the court addressed whether a State, as part of its regulation of the engineering profession, could prohibit companies from using the word "engineered" in their trade names. *Id.* at 19, 21. The propriety of that ban was a legal question decided on summary judgment, and there was "no disputed issue of material fact." *Id.* at 16. Accordingly, none of the decisions on which petitioners rely addressed the standard of review for an agency's factual finding that a particular advertisement is actually misleading.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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