

No. 16-397

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**In the Supreme Court of the United States**

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JOHN FANNING, PETITIONER

*v.*

FEDERAL TRADE COMMISSION

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

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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### QUESTION PRESENTED

Petitioner operated Jerk.com, a self-proclaimed “reputation management” website. The Federal Trade Commission (FTC) determined that petitioner had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, when he misrepresented the benefits of paid membership in Jerk.com and the source of its content. The FTC forbade petitioner from misrepresenting in the future the benefits of joining any service or the source of any content on a website he markets or promotes. The question presented is as follows:

Whether the FTC’s liability analysis or its remedial order violated petitioner’s rights under the First Amendment.

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 821 F.3d 164. The opinion of the Federal Trade Commission (FTC or Commission) (Pet. App. 31a-103a) is reported at 159 F.T.C. 885. The final order of the Commission (Pet. App. 23a-30a) is reported at 159 F.T.C. 939.

**JURISDICTION**

The judgment of the court of appeals was entered on May 9, 2016. The petition for a writ of certiorari was filed on August 8, 2016 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. Section 5(a) of the Federal Trade Commission Act (FTC Act or Act), 15 U.S.C. 41 *et seq.*, prohibits, and directs the FTC to prevent, “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C.

45(a)(1). An act or practice is “deceptive” when it (1) involves a representation that (2) is likely to deceive consumers acting reasonably under the circumstances and (3) is material. See, e.g., *Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000); *FTC Policy Statement on Deception*, appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 175-176 (1984). In this case, the FTC enforced the Act by issuing and adjudicating an administrative complaint. See 15 U.S.C. 45(b) and (m).

At the first step of the deceptiveness inquiry, the Commission evaluates a statement’s “net impression,” inquiring whether “at least a significant minority of reasonable consumers” would “likely” interpret it to assert a particular claim. *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015) (citations omitted), cert. denied, 136 S. Ct. 1839 (2016); *In re Telebrands Corp.*, 140 F.T.C. 278, 290-291 (2005), order enforced, 457 F.3d 354 (4th Cir. 2006). Claims can be express or implied. *Kraft, Inc. v. FTC*, 970 F.2d 311, 318-322 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993). Implied claims “fall on a continuum, ranging from the obvious to the barely discernable.” *Id.* at 319; see *In re Thompson Med. Co.*, 104 F.T.C. 648, 788-789 (1984), order enforced, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987). For “implied, yet conspicuous” claims, the FTC can interpret the claim without extrinsic evidence, because “common sense and administrative expertise provide the Commission with adequate tools to make its findings.” *Kraft*, 970 F.2d at 320; see *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-392 (1965) (FTC need not conduct a survey to determine that advertisements are misleading.).

At the second step, the Commission inquires whether the claim at issue is false, misleading, or unsubstantiated. *POM Wonderful*, 777 F.3d at 490. At the third step, the Commission asks whether the claim is material—in other words, whether it “involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.” *Novartis*, 223 F.3d at 786 (quoting *Cliffdale Assocs.*, 103 F.T.C. at 165). The FTC presumes the materiality of (1) express claims; (2) implied claims that the seller intended to make; and (3) claims that significantly involve health, safety, or other areas with which reasonable consumers would be concerned. *Kraft*, 970 F.2d at 322-323 (citing *Thompson Med. Co.*, 104 F.T.C. at 816-817; *FTC Policy Statement on Deception*, *Cliffdale Assocs.*, 103 F.T.C. at 182-183).

2. Petitioner and his company Jerk LLC operated Jerk.com, a “consumer reputation management” website. Pet. App. 48a n.8, 78a-84a. Jerk.com held itself out as a service to “find out if someone is a jerk, is not a jerk, or is a saint in the eyes of others.” *Id.* at 44a. The site’s purported “benefits” included the ability to track one’s own reputation, “enter[] comments and reviews” on others, “[h]elp others avoid the wrong people,” and “[p]raise those who help you.” *Id.* at 3a, 65a.

Jerk.com invited users to create profiles of other people using its “Post a Jerk” feature. Pet. App. 46a. Each profile page listed the person’s name, and many featured photographs. *Id.* at 40a, 49a-50a, 83a. The profile pages allowed users to vote on whether the profiled person was a “Jerk” or “not a Jerk” and post anonymous reviews of that person. *Id.* at 3a.

Jerk.com's homepage declared that "millions of people \* \* \* already use Jerk for important updates for business, dating, and more." Pet. App. 2a, 45a. That statement and others on the site, see *id.* at 42a-44a, implied that content on the site was posted by actual users, *id.* at 46a. In fact, only a small fraction of Jerk.com profiles were created by actual Jerk.com users. The vast majority of the profiles were created by Jerk LLC itself, which took them from Facebook and then reposted them on Jerk.com. *Id.* at 32a, 54a-57a. Jerk.com did not disclose this fact to consumers. *Ibid.*

Jerk.com marketed and sold \$30 annual "membership[s]," which it claimed would give users "additional paid premium features," including the ability to "manage your reputation" and "dispute" information posted on members' profiles. Pet. App. 63a-66a. The site cautioned users that a person "must be a subscriber member in order to create a dispute!" *Id.* at 65a.

Consumers were often surprised and dismayed to find their names and photographs on a website that sought reviews on whether or not they were "jerks," and they feared that acquaintances or colleagues had created their Jerk.com profiles in order to ridicule them. Pet. App. 49a-50a, 61a-62a. Concerned for their reputations, consumers asked the company to take down their profiles or paid the website's membership fee in the expectation that payment would allow them to dispute or remove information in their profiles. *Id.* at 61a-62a, 67a, 71a-72a n.23. Those who purchased memberships, however, received no additional features. *Id.* at 68a, 73a.

3. a. In April 2014, the FTC issued an administrative complaint charging petitioner and Jerk LLC with

making false or misleading representations in violation of Section 5 of the FTC Act. Pet. App. 104a; see 15 U.S.C. 45. The first count alleged that petitioner and his company had falsely represented to consumers that the profiles on Jerk.com were created by the site's users and reflected users' views on the profiled persons. Pet. App. 113a. The second count alleged that petitioner and his company had falsely represented the benefits consumers would receive when they purchased Jerk.com memberships. *Id.* at 113a-114a.

b. After considering evidence gathered in discovery, as well as affidavits submitted by the parties, the Commission granted summary decision against petitioner and his company. Pet. App. 31a-103a; see 16 C.F.R. 3.24(a).

As to the first count, the Commission examined each relevant page on the Jerk.com website and concluded that, taken together, they conveyed the implied representation that all the profiles on the site were "created by [real] users and reflected those users' views of the profiled individuals." Pet. App. 45a-54a. That representation was false in light of unrebutted evidence that the "vast majority" of Jerk.com profiles were created by "bulk loading" information from Facebook. *Id.* at 54a-58a. Jerk.com's message of user-generated content was also material to consumers. Undisputed evidence showed that it drove traffic to the website and otherwise affected consumer conduct regarding the site. *Id.* at 60a-63a.

As to the second count, the unrebutted record evidence showed that Jerk.com had made explicit, but false, representations concerning the benefits of paid membership. Pet. App. 63a-73a. Jerk.com had promised that paying customers could dispute information

posted in their profiles, when in fact they could not. *Ibid.*

The Commission held petitioner individually liable for both counts of deception, since there was no genuine dispute that he had held himself out as his company's principal decisionmaker; managed its finances, budget, and personnel; and made key decisions, such as directing the company's programmers to take profile content from Facebook. Pet. App. 74a-87a.

The Commission entered a cease-and-desist order prohibiting petitioner, his company, and their agents from misrepresenting (1) "the source of any content on a website, including personal information"; or (2) "the benefits of joining any service." Pet. App. 25a. The order applies only to misrepresentations made "in connection with the marketing, promoting, or offering for sale of any good or service." *Ibid.*<sup>1</sup>

The FTC explained that those prohibitions were necessary because petitioner's conduct was serious, deliberate, and readily transferrable to other activities. Pet. App. 95a-98a (citing *Telebrands*, 457 F.3d at 358; *Kraft*, 970 F.2d at 326). The Commission found that petitioner's misrepresentations had been intentional, *id.* at 47a-49a, 60a-61a, 66a-67a, 96a-97a, and had caused consumers to spend time and money attempting to dispute or remove their profiles, *id.* at 95a-96a. The Commission further explained that,

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<sup>1</sup> The order also bars petitioner and his company from disclosing, using, or selling consumers' personal information obtained in operating Jerk.com and requires them to destroy such information within 30 days. Pet. App. 25a-26a. In addition, the order contains certain record-keeping, notification, and reporting requirements to assist the FTC in administering the order and in monitoring compliance. *Id.* at 26a-29a.

without those prohibitions, petitioner and his company could easily replicate their deceptive practices through other websites—indeed, they had already transferred many of the same profiles from Jerk.com to a new site called Jerk.org and had “continued making the misrepresentations.” *Id.* at 97a.

4. Petitioner (but not his company) sought judicial review of the Commission’s order. The court of appeals affirmed the FTC’s grant of summary decision and the relevant parts of its remedial order. Pet. App. 1a-22a.<sup>2</sup>

The court of appeals agreed with the FTC that there was “no genuine issue of material fact as to whether Jerk.com contained an implied misrepresentation about the source of its content.” Pet. App. 10a. The site referred to “millions” of users, featured a “Post a Jerk” page inviting consumers to create profiles for people they knew, and contained disclaimers asserting that Jerk.com was not responsible for the site’s content because that content was created by users. *Id.* at 7a-8a. That “emphasis on user-generated content and the lack of information to the contrary” gave consumers the reasonable impression that “other Jerk.com users created their profile pages.” *Id.* at 10a. Moreover, “extrinsic evidence” confirmed that consumers in fact believed that their Jerk.com profiles were created by someone they knew. *Ibid.*

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<sup>2</sup> The court of appeals vacated and remanded as overbroad a requirement that petitioner report to the FTC “all business affiliations and employment—regardless of whether or not the affiliate or employer has responsibilities relating to the order.” Pet. App. 20a.

The court of appeals observed that petitioner “does not dispute” that real users did not create all of Jerk.com’s profiles. Pet. App. 6a. Petitioner likewise did not dispute that Jerk.com’s misrepresentations about the source of website content were material because “[a] consumer’s belief that Jerk.com had many users or that an acquaintance made his or her profile page would influence that consumer’s decision to use Jerk.com or purchase a membership.” *Id.* at 12a.

The court of appeals also affirmed the Commission’s determination that Jerk.com “contained material and false statements about the benefits of its \$30 paid membership.” Pet. App. 12a. The site had “expressly represented” that paying the fee would entitle users to “contest and potentially remove negative reviews on their profile pages.” *Id.* at 12a-13a. Consumers thus had “paid the membership fee so that they could have their profiles (or reviews contained therein) removed.” *Id.* at 13a-14a. The court explained, however, that “the record is bereft of any evidence that Jerk.com provided even one paid member the opportunity to contest information on a profile page.” *Id.* at 13a.

The court of appeals upheld the order’s remedial injunction prohibiting petitioner from engaging in future deception. The court explained that the FTC has “wide discretion in determining the type of order that is necessary to cope with the unfair practices found.” Pet. App. 14a (quoting *Colgate-Palmolive*, 380 U.S. at 391). The court further explained that the FTC is “not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past,” but instead “must be allowed effectively to close

all roads to the prohibited goal.” *Ibid.* (quoting *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952)).

The court of appeals rejected petitioner’s constitutional challenge to the FTC’s remedial order. Pet. App. 15a-16a. The court explained that the order is “unambiguously” limited to “misleading commercial speech,” which the First Amendment does not protect. *Id.* at 15a (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980)).<sup>3</sup>

#### ARGUMENT

Petitioner contends (Pet. 10-12) that the speech on his website was not commercial speech. He further argues (Pet. 8-19) that, even if that speech was commercial, the FTC’s proceedings against him were a content-based restriction on speech that is subject to strict scrutiny under the First Amendment. The court of appeals correctly concluded that the particular speech at issue was misleading commercial speech that is not entitled to First Amendment protection, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) (*Central Hudson*), this Court held that, “[f]or commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading.” *Id.* at 566. Speech that does not meet those “threshold” requirements “is not protected by

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<sup>3</sup> The court of appeals also affirmed the order’s imposition of recordkeeping obligations and its requirement that petitioner provide a copy of the order to relevant personnel. Pet. App. 17a-20a.

the First Amendment,” *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 367 (2002), and “may be prohibited entirely,” *In re R.M.J.*, 455 U.S. 191, 203 (1982). The Court has long recognized that “[t]he States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.” *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 638 (1985).

Petitioner’s website Jerk.com used two false representations to promote the website’s services. First, the website falsely implied that its profiles were user-generated. Second, it falsely promised that a paid membership would convey various benefits. The court of appeals affirmed the Commission’s determinations on both of those matters, Pet. App. 5a-14a, and petitioner does not challenge the FTC’s findings or provide any reason to believe they were incorrect. The court below was also correct in concluding that the injunction issued by the FTC, which prohibited petitioner from “making any misrepresentations about the source of any content on a website and the benefits of joining any service,” *id.* at 15a (internal quotation marks omitted), “unambiguously limit[ed] the order’s reach” to misleading commercial speech, which is not protected by the First Amendment. *Ibid.*

2. Petitioner contends (Pet. 10-12) that the speech on his website was not commercial speech and thus merited full protection under the First Amendment. But unrebutted evidence showed that petitioner’s misrepresentations were commercial in nature. His own emails revealed that he had devised the false claims to “increase interest in Jerk.com” from consumers, investors, and advertisers, and to “encourage the sale of

\* \* \* memberships.” Pet. App. 89a; see *id.* at 48a-49a, 60a-61a; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983) (holding that pamphlets were commercial speech where they functioned as advertisements, referenced a specific product, and had an economic motivation).

The commercial nature of the speech is unchanged by petitioner’s claim (Pet. 12) that Jerk.com was intended to foster public debate. The Court has “made clear that advertising which ‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded noncommercial speech.” *Bolger*, 463 U.S. at 68 (quoting *Central Hudson*, 447 U.S. at 563 n.5). And under the Commission’s order, petitioner remains “free to engage in any business so long as he abstains from \* \* \* misrepresentations,” Pet. App. 100a, about the source of a website’s content or the benefits of services.

Petitioner’s contention that the court of appeals was obligated to apply a “First Amendment balancing” test (Pet. 10) or “strict scrutiny” (Pet. 18) is therefore incorrect. The Court has “ma[d]e clear that the [government] may ban commercial expression that is fraudulent or deceptive *without further justification.*” *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (emphasis added).

3. Petitioner further contends (Pet. 12-19) that, even assuming his speech was commercial in nature, heightened scrutiny should apply because the Commission was improperly motivated by the content of the speech, rather than by its falsity.<sup>4</sup> That argument lacks merit.

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<sup>4</sup> Petitioner also objects (Pet. 9) to the FTC’s use of a summary-decision procedure in this case. Because petitioner cites no evi-

a. Petitioner questions the motives of both the Commissioners themselves and the FTC enforcement staff who investigated and litigated the case. See Pet. 16.<sup>5</sup> Petitioner’s unsupported allegations provide no basis for questioning the validity of the Commission’s order. “[I]n the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties.” *Brown v. Plata*, 563 U.S. 493, 575-576 (2011) (second set of brackets in original) (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996)). Actions taken by FTC enforcement staff likewise are entitled to “the longstanding presumption of regularity accorded to prosecutorial decisionmaking,” and the Court does not “lightly discard” the “presumption that a prosecutor has legitimate grounds for the action he takes.” *Hartman v. Moore*, 547 U.S. 250, 263 (2006).

Nothing in the Commission’s opinion suggests any improper motive, and petitioner provides no reason to infer one, let alone the “clear evidence” of impropriety that is required under *Brown*. The opinion is limited to the specific misrepresentations made by petitioner, which he does not attempt to refute. Pet. App. 45a-

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dence that raises a factual dispute over the falsity of his claims, he provides no reason to believe that summary proceedings were inappropriate. This Court has recognized that due process does not require more “when it appears conclusively” from the record that the nonmovant’s claims “cannot succeed.” See *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 621 (1973); see also *Costle v. Pacific Legal Found.*, 445 U.S. 198, 214 (1980).

<sup>5</sup> Under decades-old administrative practice, FTC procedural rules separate the Commission’s adjudicatory and prosecutorial roles by walling off the Commissioners from enforcement staff once an administrative complaint has been issued. See, e.g., 16 C.F.R. 4.7.

73a. The remedial order is likewise limited to preventing petitioner from deceiving consumers in the future. *Id.* at 25a. Other than directing petitioner to refrain from future deceit, the order does not restrict petitioner’s ability to create and manage websites, nor does it restrict the substantive content expressed on any such sites. See *id.* at 15a. As long as the Commission has identified a valid basis for its conclusions—and petitioner does not dispute that it did—the presumption of regularity applies. *United States Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001). Just as a court of appeals may not engage in extra-record examination of a district judge’s motives, “so the integrity of the administrative process must be equally respected.” *United States v. Morgan*, 313 U.S. 409, 422 (1941).

The record likewise does not support petitioner’s contention (Pet. 15) that FTC enforcement staff brought this case because it “did not approve of the content of the Jerk.com site.” Petitioner’s assertion is premised on the exhibits that were attached to the administrative complaint, which showed examples of website pages. See Pet. 15-16. Those exhibits were offered to support the complaint’s two theories of deception, which were well-founded, not because FTC enforcement staff believed that the content on Jerk.com was “offensive and required censoring.” Pet. 15; see Pet. App. 90a (Commission explains that “the Complaint does not challenge the nature of the content or comments found in Jerk.com profiles”). Those exhibits do not suggest any improper motivation for the filing of the administrative complaint, let alone provide the compelling evidence needed to overcome the presumption of regularity.

b. In the absence of a showing that the Commission targeted the ideas expressed in his speech rather than its falsity, petitioner's reliance on *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015), and *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), is misplaced. The Court in both of those cases invalidated *content-based* laws restricting *accurate* speech. *Reed* involved restrictions on non-commercial outdoor signs based on their communicative content. 135 S. Ct. at 2227-2228. *Sorrell* involved a prohibition on the disclosure of information about doctors' prescribing practices for pharmaceutical-marketing purposes but not for other purposes. 564 U.S. at 564-565. The Court specifically noted that the law did not target "false or misleading speech," and that its First Amendment precedents on that issue therefore were not implicated. *Id.* at 579. In this case, in contrast, the FTC filed an administrative complaint against petitioner pursuant to a content-neutral statute that declares "unfair or deceptive acts or practices in or affecting commerce" to be unlawful, and that authorizes the Commission to prevent the use of such practices. 15 U.S.C. 45(a).

**CONCLUSION**

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

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