No. 12-6

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

REPLY TO BRIEF IN OPPOSITION

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Nothing in the FTC's opposition undermines our showing that, in imposing a sanction 37 times greater than Trudeau's gain, the court below deepened two entrenched circuit splits and overthrew critical equitable and constitutional constraints on the civil contempt power—a power that "uniquely is 'liable to abuse.'" *Bagwell*, 512 U.S. at 831. Certiorari should be granted.

1. The FTC does not deny that six circuits are divided over whether courts exercising inherent equitable power may impose compensatory remedies that exceed equitable restitution. Nor does the FTC deny the importance of that question. Instead, it dismisses this split because some of the decisions did not arise in the civil contempt context. But since civil contempt proceedings are themselves equitable—as this Court has repeatedly held (Pet. 18), and no one disputes—the FTC cannot explain why this distinction matters. Indeed, that the question presented arises in multiple contexts (including FTC Act and civil contempt cases) only confirms its importance.

a. *Great-West* held that restitution "in an equity case" is "an equitable remedy" that must be limited to "identifiable funds" unjustly "held by the defendant." 534 U.S. at 213-216 (citation omitted). The FTC announces that *Great-West* limits only "equitable remedies available to *private plaintiffs* in suits brought under [ERISA,] *a wholly different statutory scheme*." Opp. 11 (emphasis added). But it fails to answer our showing that *Great-West* turned on the relief available in equity "[i]n the days of the divided bench," not on anything unique about ERISA. 534 U.S. at 212-214. Pet. 20.

Even if *Great-West* applied only in ERISA cases, the FTC acknowledges that various circuits disagree. Opp. 10-11. In *Verity*, for example, the Second Circuit applied *Great-West* to §13(b) of the FTC Act—the provision that gave rise to these proceedings. The Eleventh Circuit has followed *Verity* in limiting relief to equitable restitution under both the Commodity Exchange Act (*Wilshire*) and §13(b) (*Bishop*). Pet. 15-16. These circuits do not share the FTC's impression that *Great-West*'s analysis of equity's limits is irrelevant. But other circuits do. *E.g.*, *Inc21.com*, 2012 WL 1065543, *3 ("whereas the Second Circuit limits §13(b) relief to equitable restitution, the Ninth Circuit permits restitution measured by the loss to consumers").

The FTC's distinction between civil contempt proceedings and FTC Act (and CEA) cases is also belied by its own litigating positions. Below, for example, the FTC invoked cases interpreting §13(b) of the FTC Act in arguing successfully that consumer harm from misrepresentations may be *presumed* in civil contempt cases. Pet. 37a-38a n.15. And in a recent Ninth Circuit case, the FTC invoked the decision below, stating: "Although the relief ordered in *Trudeau* was a compensatory civil contempt sanction, and not a remedy directly under §13(b) of the FTC Act, the Seventh Circuit stated that its affirmance 'was informed … by the remedies available in the underlying FTC action.'" Rule 28(j) letter, *FTC* v. *Inc.21.com*, No. 11-15330 (filed Feb. 9, 2012).

It cannot be that *FTC-favorable civil contempt* decisions establish the *absence* of equitable limits under the FTC Act, but *FTC-unfavorable FTC Act* decisions have no bearing on the *presence* of equitable limits in civil contempt. In both contexts courts exercise ancil-

lary equitable authority. Pet. 14-16 & n.3. But compare Pet. 37a-38a n.15 (FTC Act justifies presuming consumer harm) with Pet. 54a ("remedial sanction[s]" available in civil contempt are "not limited by … the remedies available in the underlying FTC action").

b. While ignoring that civil contempt authority is equitable (see Pet. 18), the FTC cites language from this Court's decisions to the effect that civil contempt sanctions may "compensate" the "complainant's actual loss." Opp. 9 (citations omitted). But the FTC has not proven actual loss, and none of the FTC's cases addresses the question here—whether civil contempt remedies may fully compensate consumer loss *where that amount exceeds the defendant's gain*.

Leman sanctioned only "an equitable measure of compensation"—profits from infringing sales. 284 U.S. at 456 (citation omitted). There, "broader relief [was] obtainable in equity" than "in courts of law," and disgorgement of profits provided full compensation. *Id.* at 457. But the FTC ignores the Court's *rejection* of arguments that "equitable principles should not control the measure of relief." *Ibid.* Had full compensation exceeded equitable limits (as here), it would have been unavailable.

Gompers did not authorize *any* compensatory relief, let alone compensation exceeding that available in equity. It involved an *imprisonment* sanction. Indeed, it is wholly inaccurate to say *Gompers* "held" that a "civil contempt remedy" may "'afford … compensation for the pecuniary injury.'" Opp. 9 (quoting 221 U.S. at 442). The snippet partially quoted by the FTC simply recognized that "[i]mprisonment cannot … afford any compensation for the pecuniary injury caused by the disobedience." 221 U.S. at 442.

McComb held that employers that violate injunctions to pay employees specific wages may be compelled to pay backpay (336 U.S. at 190-192)—a remedy within the "historic power of equity." *Moody*, 422 U.S. at 416-417. And the "full remedial relief" ordered there (336 U.S. at 193) equaled the employer's unjust enrichment. The FTC ignores this, along with our analysis of *United Mine Workers*. Pet. 20-21.

Misreading *McComb*, the FTC says courts in civil contempt proceedings "may 'lay to one side the question whether the [agency], when suing to restrain violations of the [statute], is entitled to' any particular monetary remedy." Opp. 11 (quoting *McComb*, 336 U.S. at 193). What *McComb* actually authorized, however, was not "any" monetary remedy but rather "*a decree of restitution for unpaid wages*." 336 U.S. at 193 (emphasis added). It did so, moreover, in the form of a *purgeable* sanction. *Ibid*. And, of course, *McComb* did not purport to overrule *Gompers* or *Leman*, which held that civil contempt proceedings are equitable (as *Spallone* later reaffirmed) and constrained by the underlying statutory framework.

At most, the FTC has shown that the petition presents a critical question left open by the Court's precedents. And if there is any tension between the foregoing authorities and *Great-West*, that only heightens the need for review. E. Gressman, *et al.*, *Supreme Court Practice* §4.5 at 252-253 (9th ed. 2007).

c. In a similar vein, the FTC says "courts of appeals have consistently held that the amount of sanctions may be based on the injury that the contemnor inflicted on consumers." Opp. 10. In all three cited cases, however, consumer loss was no greater than

the contemnors' gain. See *Kuykendall*, 371 F.3d at 764-765; *FTC* v. *Leshin*, 618 F.3d 1221, 1237 (11th Cir. 2010); *McGregor* v. *Chierico*, 206 F.3d 1378, 1388-1389 (11th Cir. 2000). These cases do stand for an "unremarkable proposition"—that when "the victim's losses" are no greater than "a perpetrator's ill-gotten gains" (Opp. 10), courts may award either remedy. But none addresses the limits of equitable relief where consumer loss *exceeds* the defendant's gain—the question here.

Unlike the decision below, moreover, both *Chierico* and *Kuykendall* recognized that "[t]he analysis which applies to consumer remedies issued under section 13(b) [of the FTC Act] is instructive … because the remedy for [the] contemptuous conduct"—an "'order … to disgorge illegally obtained funds'"—"is closely akin to [the §13(b) remedy]." *Chierico*, 206 F.3d at 1387-1388 (citation omitted); accord *Kuykendall*, 371 F.3d at 765. All three courts thus ordered disgorgement, "an equitable remedy." *Leshin*, 618 F.3d at 1237. The same principles should govern here, but the Seventh Circuit rejected them. Pet. 54a.

d. Finally, the FTC says "the conflict turns on a factual predicate that is absent here: the presence of 'some middleman not party to the lawsuit [who] takes some of the consumer's money before it reaches a defendant's hands.'" Opp. 11 (quoting *Verity*, 443 F.3d at 68). But this ignores both the opinion below and the agency's own concessions.

As the court below recognized, Trudeau "received only $1.05 million from ITV Global" (Pet. 55a)—some $36 million less than his sanction. The court simply found this immaterial, reasoning that "precisely how Trudeau decided to get paid for selling his books … is

irrelevant to the proper measure of his remedial fine." Pet. 55a; see Pet. 10, 18-19 & n.4.

Further, the FTC has admitted the only fact that matters: "the amount of consumer loss is significantly greater than any estimate of Trudeau's ill-gotten gains." R.267 at 11. Thus, whether or not ITV Global is a "middleman"—a label the FTC has never before contested—the agency's concession establishes the "factual predicate" for limiting Trudeau's sanction. Cf. *Christian Legal Society* v. *Martinez*, 130 S. Ct. 2971, 2983 (2010).

2. The split over *Rufo* is likewise real—and here too, reversal would make a difference.

a. While it defends application of *United Shoe*, the FTC does *not* defend the Seventh Circuit's bright-line rule—that *Rufo only* "applies when a defendant seeks to modify an injunction in an institutional reform case," while *United Shoe* "supplies the rule where a plaintiff is seeking to impose additional restrictions on an enjoined party." Pet. 58a. That strict cabining of *Rufo* conflicts with five circuits' holdings that *Rufo* applies beyond institutional reform cases, and with six circuits' applications of *Rufo* to plaintiffs' modification motions. Pet. 22-25. The disarray over *Rufo* is anything but "illusory." Opp. 14.

The FTC's effort to bury the conflict is also internally inconsistent. If *United Shoe* and *Rufo* were "consistent" and every circuit resolved Rule 60(b)(5) motions using the same "traditional flexible standard" (Opp. 13, 14), then procedural details would be irrelevant. Yet it is by type of case and movant that the FTC seeks to organize and distinguish the cases. Opp. 14-15 & nn. 2-5.

The FTC's taxonomy aside, the case law reflects a deep and acknowledged conflict over the standard governing Rule 60(b)(5) motions. For example, the FTC dismisses the precedents arising from government enforcement actions on the ground that (unlike here) modification was sought by the defendant rather than the plaintiff. Opp. 15. But the import of those cases is that the courts applied (or refused to apply) *Rufo* beyond the "institutional reform" context—thereby conflicting with (or supporting) the decision below. This is not rocket science.

Take *Building & Construction Trades Council* (see Pet. 23; Opp. 15 n.5), where the Third Circuit held 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." 64 F.3d at 887-888. Unlike the court below (and the Federal Circuit), the Third Circuit applies *Rufo* outside institutional reform cases—as do the First, Sixth, Ninth, and D.C. Circuits (the Second Circuit takes an intermediate position). Decisions and quotations from these courts give lie to the FTC's position. Pet. 22-24.

The decision below also exacerbates the conflict along a second axis—party type. Like the court below, the Third and D.C. Circuits afford defendants one standard (*Rufo*) and plaintiffs another (*United Shoe*). Pet. 23. But that asymmetrical approach is inconsistent with Rule 60(b)(5), *Rufo* itself, and cases from six circuits. Indeed, one district court recently rejected the FTC's reliance on the decision below because "[t]he Seventh Circuit's narrow reading of *Rufo* does not accord with the Eleventh Circuit's interpretation." *FTC* v. *Garden of Life, Inc.*, No. 06-80226, 2012 WL 1898607, *2-3 (S.D. Fla. May 25, 2012).

b. Resolving this split would make a difference here. The FTC points to *the district court's* conclusion that modification would be proper under *Rufo* as well as *United Shoe*. Opp. 16. But in holding *Rufo* inapplicable, the Seventh Circuit rejected that alternative holding. And, if directed to reach the issue, that court will be bound to reverse, having held that there is nothing "unforeseeable" about "violation of a consent decree. … Rather than rewrite the decree, the appropriate remedy is a civil or criminal contempt action." *South* v. *Rowe*, 759 F.2d 610, 614 & n.6 (7th Cir. 1985); accord *Holland*, 246 F.3d at 286-287.

c. Finally, the FTC says unilaterally modifying a settlement based on its own partisan "purposes" is consistent with *Armour* because a court may discern "purpose" from "[t]he text of the decree." Opp. 16 (citation omitted). But the notion that the court below interpreted the Decree's "text" as part of its modification analysis is fiction. The court stated the Decree's supposed "purposes" in passing in the first appeal (Pet. 18a)—which did not involve *Rufo* or *United Shoe*—and only reiterated them when modification arose the second time around. Pet. 58a (quoting Pet. 18a).[1]

In sum, the split is no illusion, resolving it would make a difference, and the FTC's choice to defend the decision below indirectly (and inaccurately) speaks volumes. Review is warranted.

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[1] For the first time, the FTC contests our characterization of the Consent Decree as "unlitigated" and "entered without a finding of liability." Opp. 16 n.6 (quoting Pet. 27). The Decree did resolve one contested remedial issue, but it was principally concerned with the FTC Act claims and was undeniably a *settlement*.

3. The First Amendment question too is squarely presented and urgently warrants review.

a. The FTC inaccurately describes the question presented as whether "the court of appeals correctly upheld a requirement that petitioner post a bond to ensure that he would not engage in further deceptive advertising." Opp. (I). That formulation does not begin to describe the sanctions entered below, or the First Amendment issues they raise. Pet. i.

The FTC ignores both that Trudeau has been sanctioned $37.6 million for discussing his own best-selling books, and that the prior restraints imposed here extend well beyond traditional advertising. Let's be clear: Trudeau may not speak about his fully protected books on television, radio, or the Internet for more than two minutes without posting a $2 million bond. And if he does promote his books on, say, "Today," he could forfeit that $2 million if, *in the FTC's judgment*, he is less than "truthful." Pet. 8-11.

These extraordinary sanctions were entered without proof that Trudeau actually harmed anyone, much less intentionally. Moreover, they were based solely on infomercials that described and quoted the fully protected speech in Trudeau's book.

b. The FTC does not dispute the "importance of the difficult First Amendment questions" raised when court orders "implicate both free speech and important forms of public regulation." See *Nike*, 539 U.S. at 663 (Stevens, J., concurring in dismissal); *id.* at 683 (Breyer, J., dissenting). It brushes off any "comparison" with *Nike* as "inapt." Opp. 21. But the FTC addresses only *one* of nine documents at issue there (539 U.S. at 665); refuses to acknowledge that Trudeau's infomercials repeat fully protected speech; and

ignores that the restraints reach talk show appearances no less than infomercials.

The FTC's recent repudiation of the Mirror Image Doctrine further supports review. Pet. 34-36. The FTC says that Doctrine was "overtaken by subsequent development of this Court's commercial-speech jurisprudence." Opp. 24. But the Doctrine was adopted in 1971, and the intervening decades have brought only *more rigorous* protection for commercial speech. *E.g.*, *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 561-562 (1980); *Sorrell* v. *IMS Health Inc.*, 131 S. Ct. 2653, 2664-2665 (2011).

c. Nor is the FTC's merits position convincing. To the FTC, books are just "products," and regulating advertisements for books threatens free speech no more than regulating advertisements for Tupperware (*Fox*) or condoms (*Bolger*). But as *Bolger* confirms, ordinary commercial speech rules may not apply when advertising promotes "an activity itself protected by the First Amendment." 463 U.S. at 67-68 & n.14 (citations omitted). Advertising books promotes core First Amendment activity—writing, distributing, and receiving protected publications. Thus, whether the infomercials are "commercial speech" or "misleading" (Opp. 17 n.7) is beside the point. When book advertising explains and quotes from the book itself, the advertisement and book are "inextricably intertwined"—warranting strict scrutiny under *Riley*.[2]

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[2] Nor, in fact, were the infomercials false (Opp. 17 n.7), as independent appellate review under the First Amendment would confirm. *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 499-501 & n.17 (1984).

The FTC acknowledges that commercial speech is sometimes inextricably intertwined with protected speech. Opp. 19-21. Yet the FTC sees an "evident distinction" between such situations and this case—namely, that Trudeau's infomercials "hardly touched on 'important public issues.'" Opp. 20-21.

This view only highlights the grave constitutional concerns raised by the FTC's newfound appetite to regulate advertising for books. What Trudeau's infomercials concerned in their *entirety* was a book on health issues entitled to full First Amendment protection. Both the book and the infomercials, moreover, criticized government regulators, including the FTC. This is not a case of artificially injecting matters of public concern into advertising so as to "drain" the advertising of its commercial nature. Opp. 20. "No law of man or of nature makes it impossible to sell housewares without teaching home economics" (*Fox*, 492 U.S. at 474), but selling a book without discussing its contents is unprecedented.

d. Finally, citing *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600 (2003), the FTC attempts to defend a strict-liability regime governing book advertisements (enforced by multi-million dollar sanctions). Opp. 22-23. But the regulations in *Madigan* neither imposed strict liability nor presumed damages. 538 U.S. at 620. Here, by contrast, *scienter* was not required and, although the FTC says it "demonstrated that each element of the offense was satisfied" (Opp. 22-23), consumer harm was *presumed*. Pet. 37a-38a n.15.

These critical facts also implicate *United States* v. *Alvarez*, 132 S. Ct. 2537 (2012). Here as there, the Government argued that false speech gets *no* First

Amendment protection. *Alvarez* rejected that argument—but not before it prevailed here. Pet. 25a n.12; Pet. 33. Thus, the court below required neither proof of harm nor proof of fault. Nor did it consider the chilling effect of "penaliz[ing] purportedly false speech." *Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring) (quoting dissent); see Cato Br. 7-15.

The FTC has obtained unprecedented and draconian sanctions on the speech of one of its most outspoken critics. The First Amendment question is squarely presented and urgently warrants review.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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SEPTEMBER 2012