No. 12-6

In the Supreme Court of the United States

KEVIN TRUDEAU, PETITIONER

v.

FEDERAL TRADE COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

WILLARD K. TOM
General Counsel
JOHN F. DALY
Deputy General Counsel for Litigation
DAVID L. SIERADZKI
Attorney
Federal Trade Commission
Washington, D.C. 20580

QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed a compensatory civil contempt sanction in the amount of the monetary harm to consumers caused by petitioner's violations of an injunction prohibiting deceptive "infomercial" advertising.

2. Whether the court of appeals correctly upheld the district court's modification of a consent decree in order to secure future compliance with the decree, which the district court found to have been repeatedly violated.

3. Whether the court of appeals correctly upheld a requirement that petitioner post a bond to ensure that he would not engage in further deceptive advertising.

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OPINIONS BELOW

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

JURISDICTION

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

STATEMENT

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

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

contempt of the 1998 injunction on the ground that he lacked substantiation for his claims about those products' health benefits. At the same time, the Commission instituted a new action alleging that the infomercials were false and deceptive, in violation of 15 U.S.C. 45 and 52. The district court consolidated the actions, and petitioner stipulated to the entry of a preliminary injunction that prohibited him from promoting the products as effective cures for cancer or other diseases while the litigation was pending. Pet. App. 4a, 63a.

Petitioner nevertheless resumed his advertising campaign, using the claims barred by the preliminary injunction. In 2004, the district court held petitioner in contempt for violating the injunction. Pet. App. 4a, 63a, 98a n.3. As "an initial interim remedy," the court ordered petitioner to "cease all promotion, advertising, marketing or distribution of coral calcium," and it scheduled a hearing to consider "imposition of further remedial measures." Order, 1:03-cv-03904 Docket entry No. 55 (N.D. Ill. June 29, 2004) (2004 Contempt Order).

Petitioner ultimately agreed to the entry of a new permanent injunction to resolve not only the contempt remedy issue but also the underlying enforcement proceedings. Stipulated Final Order for Permanent Injunction and Settlement of Claims, 1:03-cv-03904 Docket entry No. 56 (N.D. Ill. Sept. 2, 2004) (2004 Decree). *Inter alia*, the decree required petitioner to pay a compensatory civil contempt sanction of $2 million, and it prohibited him from producing or disseminating infomercials on television, radio, or the Internet—with the exception that petitioner would be permitted to run infomercials promoting his books, provided that they did "not misrepresent the content of the book." *Id.* at 9; Pet. App. 5a, 63a-64a.

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

The FTC moved for an order holding petitioner in contempt for violating the 2004 Decree. The district court granted the motion, finding that the *Weight Loss Cure* infomercials misrepresented the content of petitioner's book. Pet. App. 69a-75a. Contrary to the repeated assertions in the infomercials that the diet is "easy," the court found that, in fact, it is "overwhelming," "difficult," and "'impossible' to follow all the time." *Id.* at 73a. Specifically, to follow the program set forth in the book, one must: (1) have daily injections in one's buttocks of a hormone that the Food and Drug Administration has not approved for weight loss, and that may have "potentially devastating side effects," *id.* at 20a, 23a, 66a, 70a-71a; (2) consume no more than 500 calories a day for an extended period, *id.* at 65a, 70a; (3) endure repeated enema-like procedures, *id.* at 7a-8a, 64a, 70a;

and (4) comply with burdensome dietary and other restrictions for the rest of one's life. *Id.* at 9a, 24a, 67a, 74a. The court concluded that the infomercials' patently false statements were misrepresentations of the book's content, in violation of the 2004 Decree. *Id.* at 80a-83a.

3. The court of appeals affirmed the district court's contempt finding but vacated the remedies ordered by the district court and remanded for further proceedings. Pet. App. 16a-28a. As relevant here, the court observed that petitioner "may have quoted parts of his book, but he did so deceptively," and it concluded that the "selective quotations mislead because they present consumers with an incomplete picture of what the protocol requires, thereby inducing consumers to purchase the book on false hopes and assumptions." *Id.* at 24a-25a. The court stated that, by promising in the infomercials that his book offered "a safe, simple, inexpensive way to shed pounds without exercise or dietary restrictions," without revealing the harsh regimen actually prescribed in the book, petitioner "did more than just quote his book; he outright lied." *Id.* at 23a, 25a. The court rejected petitioner's contention that the claims in the infomercials merely contained subjective "opinions," explaining that the purported "opinions" concerning the content of the book constituted "statements that are patently false." *Id.* at 23a.

4. On remand, the district court ordered petitioner to pay a monetary civil contempt sanction of $37,616,161, "representing a reasonable approximation of the loss consumers suffered"—*i.e.*, "the money they spent on the book that was misrepresented in the infomercials." Pet. App. 91a, 98a-103a. Based on petitioner's lack of credibility and indications that he was "hiding substantial assets," as well as his "pattern and practice of contemptu-

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

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

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

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

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

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

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

Commission, 447 U.S. 557, 564-465 (1980), because (1) the restriction advances the "substantial interest" of protecting consumers from harmful deceptive advertising; (2) it does so "directly," by creating a financial incentive for petitioner to desist from making deceptive infomercials in the future and thus avoid forfeiting the bond; and (3) it is "narrowly drawn," affecting only petitioner's infomercials (which petitioner has used to deceive consumers in the past) and not any other form of speech. Pet. App. 59a-61a.

ARGUMENT

Petitioner does not contest the district court's factual finding, affirmed by the court of appeals, that the "patently false" claims in his infomercials "misrepresented the content of his book." Pet. App. 74a-75a. Nor does he dispute the district court's conclusion that his misrepresentations placed him in contempt of the 2004 Decree. Instead, he challenges the remedies adopted by the district court, arguing that the court lacked authority to impose a fine based on the harm petitioner's misrepresentations caused to consumers (Pet. 14-21), that the court applied the wrong standard in evaluating whether to modify the decree in light of its patent ineffectiveness (Pet. 21-29), and that the restrictions added to the decree to address petitioner's continued use of deception to induce consumers to buy his products violated the First Amendment (Pet. 29-36). The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. a. The courts below correctly determined that petitioner could be required to pay a monetary sanction to compensate consumers who had been harmed by his violation of the consent decree. This Court has repeatedly

held that, in a civil contempt proceeding, "if the defendant does that which he has been commanded not to do" and thereby harms other parties, a proper civil contempt remedy is to "afford * * * compensation for the pecuniary injury caused by the disobedience." *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 441-442 (1911); see *United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 303-304 (1947) ("Judicial sanctions in civil contempt proceedings may, in a proper case, be employed * * * to compensate the complainant for losses sustained," in an amount "based upon evidence of complainant's actual loss."); *International Union, United Mine Workers of Am.* v. *Bagwell*, 512 U.S. 821, 838 (1994) (confirming "the longstanding authority of judges * * * to enter broad compensatory awards for all contempts through civil proceedings.").[1]

Petitioner cites (Pet. 18) three decisions of this Court that, in his view, establish that compensatory contempt awards are improper. None of the decisions supports that proposition. To the contrary, as noted above, *Gompers* directly contradicts it. In *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448 (1932), on which petitioner also relies, the Court held that civil contempt sanctions may be based *either* on "full compensation to the party injured" *or* on the wrongdoer's ill-gotten gains (as an "equivalent or a substitute" for the former), *id.* at 456. And *Spallone* v. *United States*, 493 U.S. 265 (1990), concerned only coercive sanctions, not monetary relief.

Nor does the decision below conflict with any decision of any other court of appeals. Petitioner cites no appel-

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[1] Petitioner's assertion (Pet. 1) that "[t]he FTC has never proven that [petitioner] harmed any consumer" is contradicted by the district court's specific factual findings of consumer harm. See, *e.g.*, Pet. App. 112a.

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

b. In seeking to demonstrate the existence of a circuit conflict, petitioner cites cases addressing the proper extent of monetary equitable remedies for violations of the FTC Act and other statutes. He cites Seventh, Eighth, and Ninth Circuit decisions confirming that monetary remedies for FTC Act violations may be based on the amount of consumer injury, and he contrasts those rulings with a Second Circuit decision limiting relief for FTC Act violations to defendants' gains, even if consumers' losses are higher. See Pet. 14-15 (citing *FTC* v. *Verity Int'l, Ltd.*, 443 F.3d 48, 66-67 (2d Cir. 2006), cert. denied, 549 U.S. 1278 (2007)); *id.* at 15-16 (citing Third and Eleventh Circuit decisions concerning violations of the Commodity Exchange Act). Those decisions relied on the discussion in *Great-West Life & Annuity*

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

None of the cited cases has any bearing on remedial civil contempt sanctions. This Court has made clear that, in civil contempt proceedings, a court may "lay to one side the question whether the [agency], when suing to restrain violations of the [statute], is entitled to" any particular monetary remedy; such questions simply are "not material" to the determination of civil contempt sanctions. *McComb*, 336 U.S. at 193. The court below therefore correctly concluded that the assessment of civil contempt sanctions may be "informed—*but not limited*—by the remedies available in the underlying FTC action." Pet. App. 54a (emphasis added).

In any event, even if the circuit conflict discussed in the petition were relevant to this case, 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." *Verity*, 443 F.3d at 68. The Second Circuit recently clarified that "[t]he only limitation that *Verity* placed on the district court's remedial authority was the requirement that any monetary award be limited to funds that actually were paid to the defendants, as opposed to money that was paid by the consumer but withheld by a middleman." *FTC* v. *Bronson Partners, LLC*, 654 F.3d 359, 374 (2011). Because no such middle-

man was involved in this case, "[petitioner's] situation bears no resemblance to the defendants' situation in *Verity*." Pet. App. 55a; see *id.* at 36a (noting the lack of any factual support for the suggestion that "a 'middleman' * * * skimmed the revenue from the book sales before [petitioner] could pocket any of it"); *id.* at 99a ("[T]he court is very dubious of [petitioner's] claims of relative impecunity," and the balance sheet petitioner submitted "was not worth the paper it was written on."); *ibid.* (noting that petitioner "has made it next to impossible to determine his gain and, as a result, any sanction based on disgorgement of profits would be a wholly ineffectual remedy").

2. The court of appeals' affirmance of the district court's modification of the 2004 Decree is similarly consistent with this Court's precedents and with decisions of other courts of appeals.

a. Petitioner contends (Pet. 22-25) that there is a conflict between the standards for modification of a consent decree set forth in *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992) ("[A] party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree."), and that set forth in *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 251-252 (1968) ("If the decree has not * * * achieved its 'principal objects,'" it would be "the duty of the court to modify the decree" by "prescrib[ing] other, and if necessary more definitive, means to achieve the result."). In his view, the court of appeals should have applied the *Rufo* standard rather than the standard of *United Shoe*. But rather than deeming *United Shoe* to have been implicitly overruled by *Rufo*, the court of appeals correctly explained that "[t]here is simply no con-

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

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

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

conflict is illusory. The petition assembles quotations from a variety of court of appeals decisions, and it characterizes those decisions as reaching different conclusions. But most of the statements on which the petition relies are dicta. To the extent that they addressed similar circumstances, all of the cited decisions reached consistent holdings based on an application of the "traditional flexible standard for modification of consent decrees," as codified in Rule 60(b)(5) and explicated in *Rufo* and *United Shoe*. *Rufo*, 502 U.S. at 380.

Petitioner cites eight "institutional reform" cases, in which aggrieved parties had accused government agencies or other "institutional" defendants of violating their rights. Six of those cases involved plaintiffs' motions to modify a consent decree,[2] and two involved similar motions filed by defendants.[3] Petitioner cites two cases involving commercial litigation between private parties.[4]

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[2] In two of the cases, the courts concluded that plaintiffs' modification requests satisfied the Rule 60(b)(5) standard. See *David C.* v. *Leavitt*, 242 F.3d 1206, 1210-1211 (10th Cir.), cert. denied, 534 U.S. 822 (2001); *Pigford* v. *Veneman*, 292 F.3d 918, 925-927 (D.C. Cir. 2002). In four others, plaintiffs' motions failed to satisfy it. See *Sierra Club* v. *Meiburg*, 296 F.3d 1021, 1033-1034 (11th Cir. 2002); *Ricci* v. *Patrick*, 544 F.3d 8, 20-21 (1st Cir. 2008), cert. denied, 129 S. Ct. 1907 (2009); *Labor/Community Strategy Ctr.* v. *Los Angeles Cnty. Metro. Transp. Auth.*, 564 F.3d 1115, 1120-1123 (9th Cir. 2009); *Holland* v. *New Jersey Dep't of Corrs.*, 246 F.3d 267, 281-287 (3d Cir. 2001).

[3] The Second and Ninth Circuits granted defendants' requests to vacate consent decrees in *Patterson* v. *Newspaper & Mail Deliverers' Union*, 13 F.3d 33, 38 (2d Cir. 1993), cert. denied, 513 U.S. 809 (1994), and *Bellevue Manor Associates* v. *United States*, 165 F.3d 1249, 1254-1257 (9th Cir. 1999).

[4] In both *W.L. Gore & Associates, Inc.* v. *C.R. Bard, Inc.*, 977 F.2d 558, 562 (Fed. Cir. 1992), and *Alexis Lichine & Cie.* v. *Sacha A.*

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

c. Petitioner points out that *United Shoe* allows modification of consent decrees only where "the purposes of the litigation as incorporated in the decree * * * have not been fully achieved," 391 U.S. at 248, and he contends that, in the absence of a finding of liability, consent decrees reached through a negotiated compromise "cannot be said to have a purpose." Pet. 26-28 (quoting *United States* v. *Armour & Co.*, 402 U.S. 673, 681-682 (1971)). That argument lacks merit. This Court has long held that, to assess whether a proposed change "ef-

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Lichine Estate Selections, Ltd., 45 F.3d 582, 586 (1st Cir. 1995), the courts rejected requests to modify consent decrees.

[5] Courts approved defendants' requests for relief from antitrust consent decrees in *United States* v. *Western Electric Co.*, 46 F.3d 1198, 1204-1207 (D.C. Cir. 1995), and *Kodak*, 63 F.3d at 100-102, under the Rule 60(b)(5) standard. In two other cases, courts concluded that defendants' requests for relief from consent decrees failed to satisfy the same standard. *East Brooks Books, Inc.* v. *Memphis*, 633 F.3d 459, 467-468 (6th Cir. 2011); *Building & Constr. Trades*, 64 F.3d at 884-891.

fectuate[s] or thwart[s] the basic purpose of the original consent decree," a court may look to "[t]he text of the decree itself," which often "plainly reveals the nature of that purpose." *Chrysler Corp.* v. *United States*, 316 U.S. 556, 562-563 (1942). Here, the court of appeals correctly determined that "[t]he 2004 Consent Order had two purposes: to protect consumers from deceptive practices and to compensate those already allegedly deceived." Pet. App. 18a; *id.* at 58a, 110a. It affirmed the district court's modifications as necessary to accomplish those purposes. *Id.* at 58a-59a.[6]

d. Even if there were a conflict among the circuits concerning the standard for modifying consent decrees, this case would not be a suitable vehicle to resolve it, because the decree modification in this case fully satisfies the standard articulated in *Rufo* as well as that in *United Shoe*. The district court concluded—and petitioner does not dispute—that "sufficiently changed circumstances * * * merit modification of the 2004 Order." Pet. App. 110a. Under *Rufo*, "[m]odification is * * * appropriate when a decree proves to be unworkable because of unforeseen obstacles, * * * or when enforcement of the decree without modification would be detrimental to the public interest." 502 U.S. at 384 (citations omitted). Petitioner's defiance of the original decree

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[6] In any event, petitioner mischaracterizes the 2004 Decree as an "unlitigated consent decree" that was "entered without a finding of liability." Pet. 27. In fact, the district court entered the 2004 Decree after entering a finding of contempt liability. In the 2004 Contempt Order, the court held petitioner in contempt for violating the 2003 preliminary injunction. The decree at issue here resolved, *inter alia*, remedial issues arising from that contempt ruling. See Pet. App. 4a, 63a.

was an "unforeseen obstacle," since the court and the FTC should have been able to rely on petitioner's promises embodied in the stipulated injunction; and his violations showed that the decree would be "unworkable" if it were not modified. Thus, as the district court explained, "[i]t matters not whose position is correct on the proper standard" to apply here—*Rufo* or *United Shoe*—because the modification at issue satisfies both. Pet. App. 110a.

3. Petitioner argues (Pet. 29-36) that the district court's decision to increase the amount of petitioner's performance bond violates the First Amendment. That argument lacks merit.

a. Petitioner's constitutional challenge focuses on a single issue: whether the court of appeals erred in using First Amendment standards that apply to "commercial speech" to scrutinize the measures adopted by the district court to counteract petitioner's ongoing use of deceptive and misleading infomercials.[7] He contends that his infomercials, and the injunctive provisions imposed to control them, should have been assessed using the strict scrutiny that applies to noncommercial speech. He rests that argument on the premise that, because the

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[7] Petitioner does not challenge the proposition that, if the infomercials at issue qualify as commercial speech for First Amendment purposes, then the performance-bond requirement and other provisions of the order below are constitutional. He also does not take issue with the district court's factual determination, affirmed by the court of appeals, that his infomercials for the *Weight Loss Cure* book were "misleading" and "misrepresented the content of his book." Pet. App. 75a. Nor does he question the court of appeals' conclusion that, to the extent that "[t]he bond requirement is * * * a restriction on [non-misleading] commercial speech," it satisfies each of the three elements of the *Central Hudson* standard and is therefore constitutional. *Id.* at 59a-61a.

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

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

Petitioner thus ignores this Court's admonition that "[t]here is no reason for providing" the "full panoply of First Amendment protections" for "statements * * * made only in the context of commercial transactions." *Central Hudson Gas & Electric Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 562 n.5 (1980). Petitioner suggests (Pet. 30) that *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), "flagged," but did not resolve, questions about the level of scrutiny applied to "commercial speech that is 'inextricably intertwined' with protected speech." In fact, the Court in *Bolger* considered and squarely rejected the precise argument that petitioner now attempts to resuscitate.

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

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

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

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

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

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

tons, stuffed animals, jewelry and bumper stickers" bearing messages related to the organizations' religious beliefs and political causes. *Id.* at 1060. That ruling is fully consistent with the decision below. The Ninth Circuit found the commercial aspects of the overall activity to be "inextricably intertwined * * * [with] fully protected speech," justifying the application of strict scrutiny to the challenged restrictions, because the nonprofits' sales of objects "with messages affixed to the product * * * [constituted] 'informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues.'" *Id.* at 1064 (quoting *Schaumburg* v. *Citizens for a Better Env't,* 444 U.S. 620, 632 (1980)). But just as there is an evident distinction between the charitable solicitations conducted by professionals in *Riley* on the one hand, and the condom advertising in *Bolger* on the other, it is easy to distinguish between religious and political groups' dissemination of their ideological messages via bumper stickers or other merchandise, and a salesman's infomercials that pitch a diet book using misleading selective quotations.

c. Petitioner attempts (Pet. 32) to analogize this case to *Nike, Inc.* v. *Kasky*, 539 U.S. 654 (2003), in which the Court initially granted certiorari but later dismissed the writ as improvidently granted. That comparison is inapt. In dissenting from the dismissal of certiorari in *Nike*, Justice Breyer emphasized that the communication at issue in that case—a letter from Nike to university presidents and athletic directors concerning the labor practices of its overseas suppliers—had "predominant noncommercial characteristics" in that it did "not propose the presentation or sale of a product or any other commercial transaction." *Id.* at 677 (Breyer, J., dissent-

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

d. Virtually all of the First Amendment cases cited in the petition involved challenges to the constitutionality of generally applicable federal, state, or municipal statutes or ordinances. The present case is entirely different because the "restraint" here is part of a remedial scheme "trained on representations made in [an] individual case[]," in which the named defendant already has been adjudicated to have violated court orders by engaging in a pattern of deceptive and misleading advertising, and the restriction is specifically designed to prevent him from resuming that unlawful course of conduct. *Illinois ex rel. Madigan* v. *Telemarketing Assocs. Inc.*, 538 U.S. 600, 617 (2003). "In contrast to the * * * restraints inspected" in cases involving statutes that categorically ban certain categories of speech, which often "lack[] any nexus to the likelihood that the solicitation is fraudulent," "a properly tailored fraud action targeting fraudulent representations themselves employs no broad prophylactic rule" that might be problematic. *Id.* at 619 (alterations and internal quotation marks omitted). The contempt proceeding at issue here, like the fraud prosecution at issue in *Madigan*, "thus falls on the constitutional side of the line." *Ibid.* Like the state attorney general in *Madigan*, the Commission in this case

bore "the full burden of proof"; it demonstrated that each element of the offense was satisfied by "clear and convincing evidence"; and it showed that petitioner had "made a false representation of a material fact knowing that the representation was false," with no effort to comply with the court order forbidding him from doing so. *Id.* at 620; see Pet. App. 17a-18a, 69a-70a. "Exacting proof requirements of this order * * * have been held to provide sufficient breathing room for protected speech." 538 U.S. at 620.

This Court's precedents permit targeted restrictions on advertising "where the record indicates that a particular form or method of advertising has in fact been deceptive." *In re R.M.J.*, 455 U.S. 191, 202 (1982); *Friedman* v. *Rogers*, 440 U.S. 1, 13-14 (1979) (affirming restriction on optometrists' trade names where "concerns * * * about the deceptive and misleading uses of [such] names were not speculative or hypothetical, but were based on experience"). The Commission has well-established authority to seek broad injunctive relief in cases involving defendants who have "employed the same deceptive practice" in the past, giving "the Commission a sufficient basis for believing that [they] * * * would be inclined to * * * engag[e] in similarly illegal practices in future advertisements." *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965).[9]

e. Finally, the Commission's recent rescission of its 1971 "mirror image doctrine" lends no support to petitioner's arguments. See Pet. 34-36. As the Commission explained in taking that action, the doctrine was never

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[9] Petitioner's assertion (Pet. 1) that he committed only "a single instance of contempt" is belied by evidence that he "produced three separate infomercials that were broadcast more than 32,000 times between December 2006 and November 2007." Pet. App. 100a n.4.

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

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

WILLARD K. TOM
General Counsel
JOHN F. DALY
Deputy General Counsel for Litigation
DAVID L. SIERADZKI
Attorney
Federal Trade Commission

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