NO. 13-1060

In the United States Court of Appeals for the District of Columbia Circuit

POM WONDERFUL LLC, et al.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION FOR REVIEW
OF AN ORDER OF THE FEDERAL TRADE COMMISSION
(FTC DOCKET NO. 9344)

RESPONSE OF FEDERAL TRADE COMMISSION TO PETITION FOR REHEARING EN BANC

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MAY 4, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici.

All parties, intervenors, and amici appearing before the Federal Trade Commission and in this Court are listed in the Petition for Rehearing and Rehearing En Banc.

(B) Rulings Under Review.

References to the rulings at issue appear in the Petition for Rehearing and Rehearing En Banc.

(C) Related Cases.

This case has not been previously before this Court, and no related cases are pending before this Court or any other court.

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INTRODUCTION AND SUMMARY

The Federal Trade Commission concluded that an advertising campaign run by POM Wonderful between 2003 and 2010 misrepresented clinical results and deceptively asserted that POM products treated or prevented specific diseases. The panel upheld the Commission's conclusions that POM had violated the FTC Act's ban on deceptive advertising and should thus be enjoined from making disease claims in the absence of rigorous clinical substantiation. The panel focused on the contents of 19 of the 36 ads at issue and explained why they distorted the scientific record. The panel noted that, even had it been sitting as a factfinder in the first instance, it would have concluded that "at least" those 19 ads conveyed deceptive disease claims and held open the possibility that it might have drawn the same de novo conclusion about other ads. The panel added, however, that it did not need to make such de novo findings to uphold the Commission's decision because the Commission's deception determinations as to all 36 ads were supported by at least substantial evidence. As the panel explained, the Seventh Circuit and two prior panels of this Court have held that substantial-evidence review governs findings of deceptive advertising and that the First Amendment requires no different result.

POM's en banc petition is as anomalous as it is meritless. It does not ask this Court to disturb the FTC's core liability finding or vacate the injunction. Instead, POM asks this Court to sit en banc to conduct its own de novo review of

each of the 17 ads that the panel did *not* consider de novo. The panel found, and POM appears to acknowledge, that the FTC's findings about those 17 ads are not needed to support the overall liability determination or the injunction, given the panel's de novo findings that 19 ads were deceptive. But POM asks the Court to issue an advisory opinion about those 17 ads just in case POM might wish to run some of those particular ads again—a possibility that POM has not previously broached. And POM insists that the First Amendment entitles it to de novo review of those ads, an argument it belatedly raised for the first time in its reply brief.

That argument would be unworthy of further review even if POM had preserved it. As multiple panels of this Court have each unanimously found, the First Amendment does not require de novo review of FTC deceptive-advertising findings. In an extensive analysis, the Seventh Circuit reached the same conclusion in *Kraft, Inc. v. FTC*, 970 F.2d 311 (7th Cir. 1992), as this Court has now twice noted. POM does not even cite *Kraft*, let alone acknowledge that the holding it seeks from this Court would create a circuit conflict. As the *Kraft* court explained, the Supreme Court precedent on which POM relies is inapposite because it addresses prophylactic restrictions on entire speech categories rather than retrospective findings that particular advertisements were deceptive. The same is true of the Eighth Circuit *dicta* that POM quotes out of context. In short, POM's petition is both procedurally flawed and substantively untenable.

BACKGROUND

In September 2010, the FTC issued a complaint charging POM with running 43 materially deceptive ads concerning POM juice, POM_x Pills, and POM_x Liquid. This advertising campaign did not merely claim that these products were nutritious or rich in antioxidants. Instead, POM misleadingly told consumers that its products fought specific diseases and that rigorous medical research demonstrated and quantified these supposed disease-fighting benefits. Internal company documents confirmed that POM targeted these ads at, among others, consumers "who are very health-conscious (hypochondriacs)" and who are "seeking a natural cure for current ailments" or who wish to "prevent future ailments," such as older men "who are scared to get prostate cancer." JA104.[1]

After an administrative trial, the ALJ found that 19 of the charged ads were materially deceptive and enjoined POM from, among other things, making future disease claims without adequate substantiation. POM and complaint counsel filed cross-appeals, and the Commission issued its decision on January 10, 2013. On

[1] As the panel explained, POM is triply wrong to assert that the ads at issue here made only "claims about the possible health benefits of conventional foods." Reh'g Pet. 2. First, throughout POM's advertising campaign, its "ads drew a logical connection between [particular] study results and effectiveness for … *particular diseases*," including atherosclerosis and prostate cancer. Panel Op. 19-20 (emphasis added) (quoting FTC Op. 13). Second, the ads were inadequately qualified because they relied on studies "in a way that suggests they are convincing evidence of efficacy." *Id.* at 19. Finally, two of the three products at issue, POM_x Pills and Liquid, were dietary supplements, not "conventional foods." *Id.* at 27-28.

the only issue addressed in POM's rehearing en banc petition—claims interpretation—the Commission affirmed the ALJ on the 19 ads and found that an additional 17 ads, 36 in all, conveyed the message that POM's products could treat or help prevent particular ailments. "The Commission set forth the basis for those findings in a considerable detail in [Appendix A] to its opinion, with a separate explanation for each ad." Panel Op. 18; *see* JA638-651. The Commission concluded that these ads were deceptive and warranted an injunction because they lacked clinical substantiation, misrepresented scientific evidence, or both.[2]

POM and its co-parties filed petitions for review and filed two separate full-length opening briefs totaling nearly 28,000 words. Rule 28 required petitioners to include in those briefs, "for each issue, a concise statement of the applicable standard of review." Fed. R. App. P. 28(a)(8)(B). Neither brief, however, argued that the First Amendment requires de novo appellate review.[3]

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[2] Commissioner Ohlhausen, who authored the Commission's principal opinion, noted that she would have predicated the injunctive order on a somewhat smaller number of deceptive advertisements. But she confirmed that, "[f]or most of the challenged advertisements, [she] agree[d] with the majority of the Commission about the claims conveyed." JA593 n.9. Commissioner Ohlhausen and the ALJ agreed on the status of some but not all of the ads.

[3] Similarly, neither brief cited *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), or *Novartis Corp. v. FTC*, 223 F.3d 783 (D.C. Cir. 2000). POM's brief did cite *Peel v. Attorney Reg. & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990), and *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985), but only for substantive propositions unrelated to the standard of appellate review.

As the FTC explained in its responsive brief (at 23), longstanding precedent holds that the FTC's claims interpretations and other factual findings in deceptive-advertising cases are "to be given great weight by reviewing courts" because they "rest[] so heavily on inference and pragmatic judgment" within the Commission's expertise. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *accord Kraft*, 970 F.2d at 316 (reaffirming *Colgate-Palmolive*'s continuing validity after *Peel*); *see also* note 5, *infra* (citing cases). The Commission also argued that POM had "waived any challenge to the FTC's interpretation" of "the overwhelming majority of the[] ads" underlying the injunctive order because POM had not seriously discussed the content of those ads and, indeed, had "ignore[d] Appendix A" altogether. Br. 32. In its reply brief (at 25-27), POM argued for the first time that the First Amendment entitled it to de novo review of the claims interpretations.

The panel unanimously affirmed the FTC's liability finding in its entirety and, with one exception, rejected all of POM's challenges to the Commission's remedial order.[4] In discussing POM's advertising campaign, the panel analyzed each of the 19 ads that the administrative law judge had found deceptive and concluded that it too would have found that "at least" those ads were deceptive if it

[4] The panel upheld the injunction's requirement that POM substantiate any future disease claims with statistically significant positive results from at least one well-controlled and randomized human clinical trial, but it rejected the requirement that POM demonstrate such results from two such trials.

had been sitting as a factfinder. Panel Op. at 34. The panel added that, under the Commission's analysis, the deceptiveness of those ads sufficed to justify the liability ruling and injunction. The panel had no need to conduct any similar de novo review for the remaining 17 ads, but it noted that the Commission's findings on those ads were supported by at least substantial evidence. *Id.* The panel cited circuit precedent and the Seventh Circuit's decision in *Kraft* for the proposition that substantial evidence review is appropriate in this context. *Id.*

ARGUMENT

I. ALL APPLICABLE PRECEDENT SUPPORTS THE PANEL'S REJECTION OF POM'S STANDARD-OF-REVIEW ARGUMENT

Congress provided that, on judicial review of an FTC decision, "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. § 45(c). That standard is "essentially identical [to the] 'substantial evidence' standard" of administrative law. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986). For decades, the Supreme Court and this Court have applied that statutory mandate in FTC deceptive-advertising cases.[5] In

[5] *See, e.g.*, *Colgate-Palmolive*, 380 U.S. at 385; *Novartis*, 223 F.3d at 787 (rejecting request for de novo review and reaffirming that this Court's task is "to determine if the Commission's finding is supported by substantial evidence on the record as a whole") (internal quotation marks omitted); *Thompson Med. Co. v. FTC*, 791 F.2d 189, 194 (D.C. Cir. 1986) ("whether a claim of establishment is in fact made is a question of fact the evaluation of which is within the FTC's peculiar expertise"); *Brown & Williamson*, 778 F.2d at 40 n.1 ("Because of the Commission's accumulated expertise in [deceptive advertising] matters, a

the Supreme Court's words, the admonition to "give[] great weight" to the Commission's judgment "is especially true with respect to allegedly deceptive advertising since the finding of a … violation in this field rests so heavily on inference and pragmatic judgment." *Colgate-Palmolive*, 380 U.S. at 385.

Citing *Bose* and *Peel*, *supra,* POM argues that the statutory command of substantial-evidence review violates the First Amendment when applied to the FTC's claims interpretations. As an initial matter, this Court retains the discretion to deem that argument waived because, as discussed, POM raised it for the first time in its reply brief. In any event, the argument is meritless for the reasons that this Court has now explained three times and that the Seventh Circuit explained at even greater length in *Kraft*.

First, *Bose* cuts against POM's argument rather than for it. The Supreme Court there required de novo appellate review of actual-malice findings in libel cases. But the Court also noted that deeming otherwise fully protected speech libelous (there, a *Consumer Reports* article) is more consequential than deeming advertisements deceptive because there is "minimal danger that governmental regulation of false or misleading price or product advertising will chill accurate

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reviewing court may refuse to overturn an FTC adjudication of false advertising where it would reject such a finding by a district court relying on similar evidence of deception.").

and nondeceptive commercial expression." 466 U.S. at 505 n.22 (internal quotation marks omitted). As this Court subsequently explained, "*Bose* itself suggests that commercial speech might not merit the same approach as set out therein for libel cases." *Brown & Williamson*, 778 F.2d at 42 n.3; *accord Kraft*, 970 F.2d at 317 (making same observation).

Second, *Peel* is inapposite because it involved an entirely different type of speech restriction, as the *Kraft* court explained in detail. *Peel* concerned a general state regulation that, with defined exceptions, categorically banned attorneys from claiming that they were "certified" as "specialists." Peel had made such a claim on his letterhead, but state authorities had cleared him of charges that he had violated a separate rule against "misleading statements by an attorney." 496 U.S. at 101 (plurality op.). Thus, as the Supreme Court emphasized, no lower tribunal had "made any factual finding of *actual* deception" in Peel's letterhead. *Id.* (emphasis added). Instead, Peel's liability was predicated solely on the prophylactic statutory ban, which effectively established, "as a matter of law," that claims of "being 'certified' as a 'specialist' were *necessarily* misleading absent an official state certification program." *Id.* (emphasis added). The *Peel* plurality conducted de novo review of that issue and rejected the state's asserted interest in imposing a

"categorical prohibition against lawyers' claims of being 'certified' or a 'specialist.'" 496 U.S. at 106 (plurality op.).[6]

As the *Kraft* court explained, the "restriction challenged in *Peel* is a completely different animal" for appellate-review purposes than any *ex post* FTC finding that particular advertisements are actually deceptive:

> In *Peel*, the issue was whether a prophylactic regulation applicable to all lawyers, completely prohibiting an entire category of potentially misleading commercial speech, passed constitutional muster. Here, by contrast, the issue is whether an individualized FTC cease and desist order, prohibiting a particular set of deceptive ads, passes constitutional muster.

Kraft, 970 F.2d at 317 (citations and footnote omitted). As the court added, a "determination of whether an ad has a tendency to deceive is … more closely akin to a finding of fact than a conclusion of law," *id.*, and is thus more obviously appropriate for substantial-evidence review than a challenge to an *ex ante* law

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[6] A determination that classes of commercial messages are "inherently misleading" in this sense, and must be categorically banned no matter how they are phrased, raises constitutional concerns that do not arise in cases such as this, where, unlike in *Peel*, a factfinder determines that *particular ads* were "actual[ly] decepti[ve]" (496 U.S. at 101). *See Kraft*, 970 F.2d at 317. In cases involving 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 can be presented in non-deceptive ways. Where a category of messages is only "potentially misleading," case-by-case review may be necessary to determine whether the precise content of individual ads is "actually misleading." That is the inquiry the FTC conducted here. POM misuses the term "potentially misleading" to refer to individual ads that *are* actually misleading to many but not all consumers. *E.g.*, Reh'g Pet. 12. As we have explained, that is not how the term is used in the case law. *See* FTC Br. 65-70; *see also id.* at 70 n.31 (noting that the FTC's "significant minority" standard is irrelevant to this case).

restricting entire categories of commercial messages. The *Kraft* court further noted that deferential review is particularly appropriate when the FTC is the factfinder, given "the Commission's expertise in the field of deceptive advertising" and the often "'exceedingly complex and technical factual issues'" that the Commission resolves on a nationwide basis. *Id.* (quoting *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio.*, 471 U.S. 626, 645 (1985)).

In both *Novartis* and the panel decision here, this Court relied on *Kraft*'s extensive analysis of the relevant standard of appellate review in light of *Peel*. *See* Panel Op. 34 (citing *Kraft*); *Novartis*, 223 F.3d at 787 & n.4 (same). Tellingly, POM has ignored *Kraft*'s analysis of that issue—both in its briefs to the panel and in its rehearing petition. POM instead suggests (at 2, 10) that the panel opinion conflicts with a sentence in an Eighth Circuit decision. But that Eighth Circuit case, like *Peel*, is inapposite because it involved a challenge to a prophylactic state law broadly prohibiting categories of commercial messages. *See 1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045 (8th Cir. 2014).[7] In short, POM's rehearing petition distorts appellate precedent both by suggesting that *en banc*

[7] The quoted sentence was also dictum because the Eighth Circuit ruled for the state defendants. In addition, the parties all agreed that *Peel* applied, and there was thus no dispute about the proper standard of appellate review. *See* Br. for Appellees, No. 13-1167, at 17 (8th Cir. filed July 3, 2013).

review is needed to avoid a (nonexistent) conflict with the Eighth Circuit and by ignoring the real conflict it asks the Court to create with the Seventh Circuit.

POM's position would also improperly substitute appellate courts for expert agencies in the administration of state and federal deceptive-advertising laws. Indeed, although POM's petition requests only de novo appellate review of FTC *claims-interpretation* findings, POM fails to explain why its argument would not also require de novo appellate review of any other factual finding that "goes to the protected character of the speech" (Reh'g Pet. 8). For example, under POM's constitutional logic, must this Court also act as a de novo factfinder on materiality and substantiation (*i.e.*, the types of scientific evidence needed to validate an ad's claims)?[8] If so, that outcome would require any appellate court to conduct de novo review of any expert agency's finding of a mismatch between an advertiser's claims and the level of scientific support that experts in the relevant field would recognize. As the Supreme Court, this Court, and the Seventh Circuit have all recognized, that is not an appropriate role for an appellate court. *See* FTC Br. 22-23 (citing cases).

Finally, POM's call for de novo appellate review would transform private party litigation under the Lanham Act, which, as relevant here, enables companies

[8] POM and its codefendants expressly conceded in their principal briefs that substantial-evidence review applies to FTC substantiation findings. *See* POM Br. 39; Tupper Br. 38-39 & n.6.

to seek redress for the deceptive advertising of their competitors. This Court and others have consistently applied the deferential "clear error" standard to factual findings made by district courts and juries in Lanham Act cases. *See, e.g.*, *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 963-65 (D.C. Cir. 1990); *see also Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 589 (3d Cir. 2002). POM's proposed rule would foreclose that practice and require appellate courts to conduct de novo factfinding whenever a court has imposed liability for deceptive advertising.

II. THIS CASE WOULD BE A POOR VEHICLE FOR EN BANC REVIEW

Quite apart from the merits, this case is a flawed candidate for en banc review. First, POM forfeited the standard-of-review argument presented in its petition by failing to raise it in its opening brief, as required by Rule 28(a)(8)(B). *See* p. 4, *supra*. Although the panel noted and rejected the argument after POM belatedly included it in its reply brief, the Court retains full discretion to deem the argument waived at the en banc stage.

POM has inadequately preserved its argument in a second respect as well. Although POM asks this Court to sit en banc to review each of the 17 ads that the panel saw no need to consider de novo, POM has never meaningfully discussed most of those ads. Indeed, the rehearing petition itself cites only four of the 17—fewer than a quarter. *See* Reh'g Pet. 4-5, 11-12 (citing Figs. 11, 12, 13, and 23).

As we argued in our principal brief, POM has waived any challenge to the Commission's findings concerning "the overwhelming majority of these ads" by simply ignoring those findings. FTC Br. 32.

POM's reluctance to discuss most of these 17 ads is telling because they are no less deceptive than the 19 ads the panel already reviewed de novo, and many of them are very similar to certain of those ads. For example, six of the 17—Figs. 25, 28, 29, 30, 31, and 32—are POM_x Pill print advertisements that make explicit claims about clinical results and the prevention or treatment of specific diseases. *See* JA729, 750-58; *see also* FTC Br. Addenda 2-3 (reprinting Figs. 25 and 28). In both appearance and substance, each of those six ads closely resembles Fig. 33, which the panel has already reviewed de novo and found deceptive. Panel Op. 19-20, 34; *see also id.* at 7 (citing Fig. 25 as an example of POM's misrepresentation of clinical results even though it was not included within the 19).

Finally, the anomalous posture of this petition also counsels against granting it. POM asks this Court to sit en banc to consider whether de novo appellate review is constitutionally required in this context. But the panel in fact conducted de novo review of 19 ads, found them deceptive, and observed that, even by themselves, these ads had been "held by the Commission to form a sufficient basis for its liability determination and remedial order." Panel Op. 34; *see* FTC Op. 50; FTC Br. 32-33. POM understands that this Court will not sit en banc to reconsider

those factbound determinations. *See* Reh'g Pet. 6-7. POM thus appears to acknowledge that, even if it obtained all the relief it seeks from the en banc Court, it would still be subject to an injunction and the same core findings that it deceived consumers about clinical evidence and the supposed disease-fighting benefits of POM products. *Id.*

POM nonetheless insists that it has standing to seek de novo review of the remaining 17 ads on the theory that it might someday choose to "publish them" (or their close "equivalent[s]") again. *Id.* POM has not made that claim before, and it is unclear which of the 17 ads it might wish to revive. For example, POM voluntarily discontinued three of the four ads it mentions in its rehearing petition (Figs. 11, 12, and 13) in 2007, three years before the Commission even issued its complaint. In short, POM is asking the Court to convene en banc to render advisory opinions about many ads that POM may have no serious intention of republishing. If this Court wishes to sit en banc to consider the legal question presented here, it should wait for a case in which disposition of that issue will make an obvious difference to the affected advertiser and its consumers. This is not such a case.

III. POM'S PANEL REHEARING REQUEST SHOULD BE DENIED

The short panel-rehearing request at the end of POM's petition (at 14-15) should be denied as well. POM asks the panel to delete two paragraphs on pp. 23-

24 of the opinion that describe how POM deceived consumers through "selective touting of ostensibly favorable study results and nondisclosure of contrary indications from the same or a later study." Panel Op. 24.[9] POM suggests that the Commission made no such findings. That is incorrect.

As the panel itself observed, the Commission expressly found both (1) "that there were 'many omissions of material facts in [the] ads that consumers cannot verify independently'" and (2) that POM "made numerous deceptive representations and were aware that they were making such representations despite the inconsistency between the results of some of their later studies and the results of earlier studies to which [they] refer in their ads." Panel Op. 24 (quoting FTC Op. at 43, 49). The FTC's brief also focused extensively on POM's deceptive cherry-picking of scientific evidence. *See* FTC Br. 1-2, 29-48. In short, the two paragraphs that POM moves to strike are well-supported and necessary for a complete understanding of this case, and they should be preserved.

CONCLUSION

The petition for rehearing and rehearing en banc should be denied.

[9] This Court's order of April 17, 2015 requested "a response to the petition for rehearing en banc." The panel-rehearing portion of POM's petition appears to fall outside that request, but we address it here out of an abundance of caution.

Respectfully submitted,

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May 4, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 35(b)(2), 32(a) & (c)(2), and this Court's Circuit Rules 35 and 32(a), I hereby certify that the foregoing Response of the Federal Trade Commission complies with the page limitations and typeface of these Rules, because it does not exceed 15 pages, excluding the parts of the response exempted by the Federal Rules of Appellate Procedure and this Court's Circuit Rules, and is prepared in 14-point, proportionally spaced font.

May 4, 2015 /s/ Imad Abyad
Imad D. Abyad

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2015, I filed the foregoing Response of the Federal Trade Commission, using this Court's CM/ECF system (in addition to the 19 paper copies to be filed with the Clerk's office pursuant to this Court's Circuit Rule 35(b)). All counsel of record in this case are registered CM/ECF users and will be served by this Court's CM/ECF system, pursuant to Circuit Rule 25(c).

/s/ Imad Abyad
Imad D. Abyad