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

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Amicus Cato Institute supports a grant of certiorari on all three questions presented in the petition but here focuses on the following question:

Whether advertisements for a book that extensively quote the book are "inextricably intertwined" with fully protected speech and thus entitled to full First Amendment protection.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION AND INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE................................... 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. This Court should resolve the question left unanswered by the dismissal of certiorari in *Nike*... 5

II. The First Amendment inquiry does not end with whether the speech may be misleading. 7

III. Strict scrutiny is appropriate in light of the chilling effect on protected speech when intertwined speech is at issue. 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases

Bigelow v. Virginia,
421 U.S. 809 (1975) 15

Bolger v. Youngs Drug Products Corp.,
463 U.S. 60 (1983) 5, 6, 7

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) 13

Jamison v. Texas,
318 U.S. 413 (1943) 5

Murdock v. Pennsylvania,
319 U.S. 105 (1943) 5

NAACP v. Button,
371 U.S. 415 (1963) 13

New York Times v. Sullivan,
376 U.S. 254 (1964) 13

Nike, Inc. v. *Kasky*,
539 U.S. 654 (2003) .... *passim*

Riley v. National Federation for the Blind,
487 U.S. 781 (1988) 5, 6, 7, 12

Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.,
502 U. S. 105, 127 (1991) 7

Time, Inc. v. Hill,
385 U.S. 374 (1967) 13

United States v. Alvarez,
567 U.S. ___ (2012).. *passim*

Virginia Pharm. Bd. v. Virginia Consumer Council,
425 U.S. 748 (1976) 15

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*.

The petition raises vital questions about the scope of judicial power in contempt proceedings, and the constitutional and equitable limitations on that power, but Cato writes separately to address the significant First Amendment question involved. This case is of central concern to Cato because it addresses the further collapse of constitutional protections for speech, which lies at the very heart of the First Amendment. This Court's guidance is needed to draw a sensible and constitutionally sufficient line between the FTC's power to regulate misleading commercial speech and an author's ability to promote the ideas contained within a fully protected publication.

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[1] Supreme Court Rule 37 statement: All parties were timely notified of *amicus*'s intent to file this brief and letters of consent from all parties to this filing have been submitted to the Clerk. Further, this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT OF THE CASE

This extraordinary case arises out of civil contempt proceedings that respondent Federal Trade Commission brought against Trudeau relating to his promotion in "infomercials" of his best-selling 2006 book entitled *The Weight Loss Cure "They" Don't Want You to Know About* (the "*Weight Loss* book"). In September 2007, the FTC filed a civil contempt motion alleging that Trudeau had violated a previous consent decree in which he agreed, *inter alia*, not to misrepresent the contents of his books in infomercials promoting those books, while preserving his First Amendment rights. The FTC alleged that Trudeau violated the consent decree by describing the protocol in the *Weight Loss* book as "easy" and claiming that after users completed the regimen, they could eat anything they wanted without gaining weight. These and similar statements appear throughout the *Weight Loss* book.

The district court agreed that these and other statements in the infomercials were misleading, fined Trudeau a staggering $37.6 million, and imposed a prior restraint requiring him to post a $2 million bond before promoting his books in an infomercial.[2] The district court took this action without requiring the FTC to prove that Trudeau misled a single consumer; violated the FTC Act; violated any consumer

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[2] The bond is required for any infomercial in which Trudeau makes representations "about the benefits, performance or efficacy of any product, program or service referenced in [a] book." Pet. 111a-112a, 143a. The court broadly defined an "infomercial" as any statement over two minutes in length on television, radio, or the internet that creates interest in a purchase. Pet.90a-91a.

protection or fraud act; that any consumers relied to their detriment on Trudeau's alleged misrepresentations; or that any consumer requested a refund of the price paid for his book and did not receive one. Instead, the district court relied on the presumption of harm in the FTC Act.

Trudeau appealed and the Seventh Circuit affirmed, holding that portions of the infomercials were misleading and provided an "incomplete picture" of the *Weight Loss* book, and that, therefore, Trudeau's speech promoting his book constituted false or misleading commercial speech which was entitled to no constitutional protection at all. Pet. 24a-25a & n.12.

Trudeau seeks review of the Seventh Circuit decision because it raises the First Amendment question this Court took up, but did not resolve, in *Nike, Inc.* v. *Kasky*, 539 U.S. 654 (2003) (dismissed as improvidently granted) regarding the level of protection afforded to "intertwined speech;" because it is counter to *United States v. Alvarez*, 567 U.S. ___ (2012), which posits that the government lacks the power to prohibit speech that is merely false; and because it will have an impermissible chilling effect on protected speech by not according authors the "breathing space" necessary to promote their works.

This case is especially important because the rulings below open the door to potential abuse in which the government can target authors with whom it disagrees, accuse them of failing to provide a complete picture of their books in advertisements for those books, and effectively silence them by imposing crushing sanctions.

SUMMARY OF ARGUMENT

The courts below held that petitioner's statements in promoting his book—some of which were taken directly from the book itself—are entitled to "no [constitutional] protection at all." Pet. 24a-25a & n.12. Thus, the unresolved question in *Nike*, the level of constitutional protection "intertwined speech" receives is squarely presented.

Likewise, review is particularly timely in light of *Alvarez*, in which six justices agreed that speech which is merely false enjoys First Amendment protection. Here, the courts below proceeded based on merely a *presumption* of harm, without any showing that any consumers were misled, harmed, or that the FTC Act was violated and accorded Trudeau's speech *no* constitutional protection.

Finally, the courts below did not consider the chilling effect the holdings would have on fully protected speech and the need to accord authors (and others) appropriate "breathing space" to promote their works. This issue is all the more important given the FTC's decision, while the instant case was pending, to abandon the "mirror image" doctrine, which it had followed for 40 years, that exempted from regulation advertising that quoted from books. *See* Pet. 34-36. The "mirror image" doctrine reflects that the FTC had long appreciated how overzealous regulation of intertwined speech could muzzle protected expression. Its repeal leaves authors like Trudeau in the precarious position of censoring themselves in their efforts to promote their work or risk exposing themselves to millions of dollars in fines. One can readily imagine fledgling authors shying away from efforts to promote their books, lest they

inadvertently omit enough detail to provide a "complete picture" of their works or to satisfy a government regulator's view of their books' "contents."

First Amendment principles long articulated by this Court have never countenanced, let alone permitted, government regulators to be cast in the role of censor. The marketplace of ideas should not be constricted out of fear of government censors.

ARGUMENT

I. This Court should resolve the question left unanswered by the dismissal of certiorari in Nike.

In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), this Court noted that speech which advertises an activity protected by the First Amendment may be entitled to a higher degree of First Amendment protection than pure commercial speech. 463 U.S. at 67-68 n.14 ("a different conclusion may be appropriate in a case where the pamphlet advertises an activity itself protected by the First Amendment") (citing *Murdock v. Pennsylvania,* 319 U.S. 105 (1943) (advertisement for religious book cannot be regulated as commercial speech); and *Jamison v. Texas,* 318 U.S. 413 (1943)).

Five years later, in *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), the Court expressly stated that when commercial speech is "inextricably intertwined" with fully protected speech, it loses its commercial character and is entitled to full First Amendment protection:

> But even assuming, without deciding, that such speech in the abstract is indeed merely "commercial," we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. . . . Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply [the] test for fully protected expression.

Riley, 487 U.S. at 796.

Then, in *Nike,* the Court was poised squarely to address the question of the level of First Amendment protection accorded to inextricably intertwined speech: "This case presents novel First Amendment questions because the speech at issue represents a blending of commercial speech, noncommercial speech and debate on an issue of public importance." *Nike*, 539 U.S. at 663, (Stevens, J., concurring in dismissal of certiorari).

This case raises the novel question touched upon in *Bolger*, *Riley*, and *Nike*. Here, there is no question that Trudeau's book is itself fully protected under the First Amendment. The book contains core political speech and speech on important public issues, such as the power of corporations to influence governmental regulations impacting the food supply and the health and welfare of the nation; the suppression of information by the government and corporations Trudeau believes to be vital to health issues; the ill effects of the type of food prepared and served at cer-

tain "national restaurant chains;" and more. *See, e.g.,* Pet. 4, 2a, 10a, 62a, 65a. The courts below, relying on a presumption of consumer harm, simply held that Trudeau's speech was false or misleading commercial speech and, therefore, entitled to no constitutional protection *at all*. Pet. 24a-25a & n.12.

The First Amendment requires, and *Bolger*, *Riley*, and *Nike* all point toward, heightened scrutiny. This Court, therefore, should grant the petition and resolve this novel issue. As shown below, this case also affords the Court the opportunity to consider the degree of scrutiny accorded to speech which may be misleading in light of *Alvarez*, and the need to grant authors breathing space to promote their works to avoid chilling speech.

II. The First Amendment inquiry does not end with whether the speech may be misleading.

Alvarez underscores the importance of the issues here and casts further doubt on the decisions below. The FTC, and the courts below, adopted essentially the same categorical approach as the Government in *Alvarez*: that false speech enjoys *no* First Amendment protection. This Court in *Alvarez* squarely rejected that approach and confirmed the principle that there is no general exception to the First Amendment for false statements: "content-based restrictions on speech have been permitted, as a general matter, only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar'." *Alvarez*, slip op. at 5 (quoting *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 127 (1991) (Kennedy, J., concurring in the judgment)). In response to the Government's ar-

gument that false statements have no value and hence enjoy no First Amendment protection Justice Kennedy, writing for the plurality, stated:

> In those decisions the falsity of the speech at issue was not irrelevant to our analysis, but neither was it determinative. The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection.

Alvarez, slip op. at 7 (Kennedy, J., plurality opinion). The plurality applied the "most exacting scrutiny" to the Stolen Valor Act. *Id.* at 12.

Similarly, Justice Breyer writing for himself and Justice Kagan stated:

> I must concede, as the Government points out, that this Court has frequently said or implied that false factual statements enjoy little First Amendment protection. . . . But these judicial statements cannot be read to mean "no protection at all."

Alvarez, slip op. at 4 (Breyer, J., concurring in the judgment). Justice Breyer applied intermediate scrutiny. *Id.* at 3.

Thus, falsity alone is not enough to strip a speaker of First Amendment rights. Importantly, when considering fraud, Justice Kennedy stated for the plurality that:

> Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a

> knowing or reckless falsehood. *See Sullivan*, *supra*, at 280 (prohibiting recovery of damages for a defamatory falsehood made about a public official unless the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not"); *see also Garrison*, *supra*, at 73 ("[E]ven when the utterance is false, the great principles of the Constitution which secure freedom of expression . . . preclude attaching adverse consequences to any except the knowing or reckless falsehood"); *Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.*, 538 U. S. 600, 620 (2003) ("False statement alone does not subject a fundraiser to fraud liability").

Alvarez, slip op. at 7 (Kennedy, J., plurality opinion).

The plurality continued:

> Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom."

Id. at 11 (Kennedy, J., plurality opinion).

Here, no proof of some fraud Trudeau had committed was offered, or even required. Indeed, because the FTC accused Trudeau of violating a consent decree, no underlying violation of the FTC Act was ever

proved below. Instead, the courts below allowed the FTC to rely on the *presumption* of harm, drawn from the FTC Act, even while refusing to allow Trudeau the protections to which he otherwise would have been entitled in an actual FTC Act case. Petition at 19; Pet. 37a-37a n.15. Equally important, there was no evidence that Trudeau did not himself honestly believe his statements. Indeed, he personally used the weight loss program. Pet. 68a.

The rulings below are especially suspect because they have the potential to chill speech by blurring the line between speech traditionally considered to be mere puffery, or statements of opinion, with statements of fact which are easily verifiable. In the present case, Trudeau was assessed a massive fine for his speech and effectively prohibited from speaking in any future infomercials about his book by the bond requirement, in part, because he stated that his weight loss program was "easy." Pet. 19a. Even assuming *arguendo* that, in this case, the statement that the weight loss program was "easy" was a statement of easily verifiable fact, it is clear that courts will be traveling down a difficult path in other cases when asked to verify whether an author's statements about his or her book are accurate, non-misleading, or provide a complete picture.

For example, what if Trudeau had said, "I think it's easy"? Would a court be justified in inferring that, because of various steps contained in the program, no reasonable person honestly could believe it is easy and therefore Trudeau (or some other author) misrepresented a fact with the concomitant potential for the imposition of a massive fine and the requirement that a bond be posted before authors are al-

lowed to speak about their books? The pitfalls of such an approach are readily apparent. What if an author were to say that "my program is the easiest program out there" or "once you start the program, you'll actually enjoy doing it"? How will any court draw a line between false statements of fact and statements of opinion in such cases?

The courts below also took issue with Trudeau's statement that one did not have to exercise on the program because Trudeau's book apparently requires a user to walk for an hour per day. Pet. 25a. At first blush, it may seem to be a simple matter to say that walking for an hour is exercise. However, the word "exercise" has certain connotations such as going to a gym, doing certain calisthenics, such as sit-ups, push-ups, "crunches" and the like, or using specialized exercise equipment, while going for a walk does not necessarily have those same connotations. Courts will be called upon to parse an author's words in a manner not heretofore contemplated by the First Amendment in order to determine whether authors have provided a "complete picture" of their books.

More important, authors will be forced to walk a fine line when they discuss their books, especially when they involve controversial topics, for fear that they might choose the wrong words, stray from the "approved" path, and face an FTC complaint. The FTC, under the guise of "regulating" commercial speech, could single out speakers who, in their books, are critical of the FTC or government policies in general, when those authors promote their books on talk shows, in interviews, or on infomercials. The FTC could, therefore, regulate through the back door what it could never regulate directly.

In light of *Alvarez*, the court below improperly punished Trudeau for falsity alone based on the constitutionally erroneous view that because Trudeau's speech was arguably misleading, it received *no* First Amendment protection at all. Considering the expanded protection for commercial speech that is inextricably intertwined with fully protected speech as presaged by *Bolger*, *Riley*, and *Nike*, and in light of *Alvarez*'s rejection of the notion that falsity alone strips speech of First Amendment protection, the Court should grant certiorari and resolve the issue of the degree of scrutiny to which non-fraudulent commercial speech that is inextricably intertwined with fully protected speech is entitled under the First Amendment.

Amicus believes that, where, as here, the advertisement at issue directly quotes from and summarizes parts of the book, strict scrutiny is warranted. *See Riley*, 487 U.S. at 796, ("where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply [the] test for fully protected expression."). Strict scrutiny will avoid both the potential chilling effect and casting government in the role of censor.

III. Strict scrutiny is appropriate in light of the chilling effect on protected speech when intertwined speech is at issue.

This Court has long recognized that First Amendment freedoms require breathing space to survive and that the threat of sanctions can deter their

exercise. *NAACP v. Button*, 371 U.S. 415, 433 (1963) (First Amendment freedoms "are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.") (citations omitted).

In *New York Times v. Sullivan,* 376 U.S. 254, 279-80 (1964), the Court applied this concept to defamation of a public official and held that only knowing falsehoods or those made with reckless disregard of the truth or falsity could be punished. The Court stated that erroneous statements were inevitable in a free society and they needed protection so that freedom of expression could have the breathing space it needs to survive. *Sullivan*, 376 U.S. at 272. The importance of breathing space was noted in subsequent decisions of this Court, such as *Time, Inc. v. Hill*, 385 U.S. 374, 388-389 (1967) and *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340 (1974) (applying the *Sullivan* standard to public figures and to private figures involved in matters of public concern).

More recently, Justice Breyer's dissent from the dismissal of certiorari in *Nike* recognized the potential chilling effect when government regulates even *false* statements in commercial speech:

> The Court, however, has added, in commercial speech cases, that the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern." And in other contexts the Court has held that speech on matters of public concern

> needs "breathing space"—potentially incorporating certain false or misleading speech—in order to survive.

Nike, 539 U.S. at 676 (Breyer, J., dissenting) (internal citations omitted).

Most recently, *Alvarez* noted the importance of considering the chilling effect on protected speech when the government regulates purportedly "false" speech:

> Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

Alvarez, slip op. at 11 (Kennedy, J., plurality opinion).

Trudeau's travails with the FTC and the courts below, coupled with the sanction imposed upon him, surely will not go unnoticed by other authors who advance ideas that may fall outside mainstream scientific, medical, or mental health orthodoxy. One can imagine a novice author vacillating over whether she should appear on a three-minute *Good Morning America* segment to discuss her book describing a new, and controversial, exercise regimen which she genuinely believes promotes dramatic improvements in a person's cardiovascular health. If she described the regimen as "easy," would the FTC's iron fist slam

down upon her? One can readily expect that our hypothetical author could decide that she will be better served by not commenting on her book at all, rather than risk leaving out some detail that the government later contends was necessary to provide her readers a "complete picture" of the "content" of the book.

The Seventh Circuit's reasoning, that because Trudeau's speech was misleading commercial speech it automatically received *no* First Amendment protection, was clearly insufficient and constitutionally suspect. That court failed to consider the fact that Trudeau's statements addressed matters of public concern; failed to consider that the First Amendment requires "breathing space" for free and open debate to survive, even if it potentially protects some misleading speech; and failed to consider the chilling effect of imposing an astounding $37.6 million fine and prior restraint on an author promoting his book will have on other, similarly situated authors. Because the decision of the court below threatens to chill protected speech, this Court should grant certiorari.

CONCLUSION

The decision of the court below, if left unreviewed, threatens core First Amendment values, *see Virginia Pharm. Bd. v. Virginia Consumer Council*, 425 U.S. 748, 763 (1976) (a "particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate"); *Bigelow v. Virginia,* 421 U.S. 809, 825-26 (1975) (error to assume that commercial speech is entitled to no First Amendment protection or is without value), and ignores longstanding precedent holding that government efforts to regulate advertising that extensively repeats content from a book is no different, from a constitutional perspective, than regulating the underlying work itself. The rule adopted below casts a chill on protected speech and makes the government a censor of ideas that may permissibly enter the market, a role antithetical to our constitutional values.

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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