No. 97-1625

In the Supreme Court of the United States

OCTOBER TERM, 1998

CALIFORNIA DENTAL ASSOCIATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether petitioner is subject to the jurisdiction of the Federal Trade Commission as an association "organized to carry on business for * * * [the] profit * * * of its members," within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

2. Whether the Federal Trade Commission conducted a sufficient analysis to determine, under the antitrust rule of reason, that petitioner's restrictions on its members' advertising of prices, discounts, and quality violated Section 5 of the FTC Act, 15 U.S.C. 45.

TABLE OF CONTENTS

Table of Contents—Continued Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

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STATEMENT

1. This case involves advertising restrictions imposed as a condition of membership by petitioner California Dental Association (CDA). Petitioner's members include 75% of the dentists actively practicing in California. Pet. App. 161a-162a. Petitioner has 32 local component dental societies, and membership in a local association is mandatory for membership in petitioner. *Id.* at 162a. In addition, membership in petitioner is mandatory for California dentists who wish to be members of the American Dental Association. *Id.* at 46a. Although membership in petitioner is legally voluntary and is not required for a license to practice dentistry, membership is highly valued by California dentists for its "real economic benefit," and "no one gives up membership" in petitioner to avoid its restrictions on advertising. *Id.* at 84a; see also *id.* at 232a-234a (detailing importance of CDA membership to dentists).

Petitioner is organized under California law as a nonprofit corporation. Pet. App. 161a. It is exempt from federal income tax under 26 U.S.C. 501(c)(6), the tax category for "[b]usiness leagues, chambers of commerce, real-estate boards, boards of trade, [and] professional football leagues." It does not qualify for exemption as a charitable institution under Section 501(c)(3). See Pet. App. 50a-51a, 174a.

Although petitioner's stated purposes include improvement of public health, it also describes itself as "represent[ing] dentists in all matters that affect the profession" and "offer[ing] far more services to its members than any other state [dental] association." Pet. App. 51a.[1] Petitioner offers broad assistance to its members to increase their revenues and decrease their costs. As its promotional literature describes (J.A. 20-23), petitioner provides its members with services such as job placement, recruitment of dental assistants, review of proposed contracts with third-party payers (vaunted as affording a substantial savings over hiring a private attorney), and financial planning seminars. Pet. App. 51a-52a, 172a-188a. Through a for-profit subsidiary, petitioner offers low-cost malpractice insurance, which saves members at least $1,000 annually over other insurance plans; this insurance is available in California only to CDA members. *Id.* at 166a, 173a, 184a-185a. Other for-profit subsidiaries offer, exclusively to members, financing for dental equipment, financing assistance for patients, and a home mortgage program. *Id.* at 166a-168a, 185a-186a; see also *id.* at 181a-183a (seminars, training sessions, and publications offered to members at steeply discounted rates).

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[1] In the last year that petitioner explicitly reported its public service expenditures, they accounted for 7% of its annual budget. J.A. 19; Pet. App. 52a. In the same year, expenses for "direct member services" were 65% of petitioner's budget, and administration and indirect member services accounted for an additional 20 percent. *Ibid.*

Petitioner engages in lobbying and litigation concerning laws and regulations that affect dentists' businesses; its lobbying successes "mean money" to members, or so it claims, and have saved members thousands of dollars each year. Pet. App. 176a, 177a-179a; see J.A. 20.[2] Petitioner also conducts marketing and public relations initiatives to enhance the image of its members; these activities have brought members, on average, an additional $6,000 of annual income from new patients, equaling a "20-to-1 return on investment." Pet. App. 179a-180a. In sum, petitioner estimates that the potential value to members who take advantage of a selection of its services is $22,000 to $65,000, and that the value to members of its benefits far exceeds their membership dues. *Id.* at 175a.

2. Section 10 of petitioner's Code of Ethics, on its face, prohibits advertising that is "false or misleading in any material respect." Pet. App. 9a; J.A. 33. The record in this case demonstrates, however, that petitioner has broadly interpreted and enforced that prohibition in a way that effectively prohibits (a) most advertising about relative prices, (b) all advertising of across-the-board price discounts, and (c) virtually all advertising claims, whether relative or absolute, about the quality of a member's dentistry or service. Pet. App. 55a. These prohibitions cover even advertising claims that "are not false or misleading in a material respect." *Id.* at 260a; see *id.* at 56a-57a n.6.

Thus, petitioner has prohibited its members from using terms such as "low," "reasonable," or "affordable" in their

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[2] Although some of petitioner's lobbying has advocated measures to promote public health, much of its lobbying has been directed at protecting members' profitability. Thus, petitioner has opposed legislation regarding mandatory health insurance coverage for part-time employees and treatment of infectious and hazardous waste, and it has supported malpractice-liability and workers' compensation reforms. Pet. App. 177a-179a.

advertising, whether or not they truthfully describe the dentist's fees, Pet. App. 65a-66a, 198a-199a, under the reasoning that members' statements about their fees must be "exact" and must "fully and specifically disclos[e] all variables and other relevant factors" to avoid being branded misleading, *id.* at 9a-10a, 64a; J.A. 34-35. Under similar reasoning, petitioner has disallowed such phrases as "affordable, quality dental care," "making teeth cleaning * * * inexpensive," Pet. App. 65a, "affordable family dentistry," *id.* at 199a, "reasonable fees quoted in advance," *id.* at 227a, and "Fees that Fit a Family Budget," *id.* at 237a.

As for advertising about discounted fees, petitioner has required that such advertising contain at least five disclosures: (1) the dollar amount of the nondiscounted fee; (2) either the dollar amount of the discounted fee or the percentage of the discount for the specific service; (3) the length of time that the discount will be offered; (4) a list of verifiable fees; and (5) specific groups qualifying for the discount and any other terms or conditions for the discount. Pet. App. 64a-65a, 200a. The practical effect of those requirements is "nearly prohibitive" of advertising of any broadly applicable discounts. *Id.* at 201a.[3] Indeed, petitioner has disapproved a broad array of discounting offers because they were not accompanied by the required disclosures.[4]

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[3] One dentist testified that, to advertise an across-the-board discount, a member would have to list his regular fees for 100-300 procedures. Pet. App. 201a. A member of petitioner's Judicial Council (which is responsible for enforcing its Code of Ethics, see *id.* at 9a) acknowledged that to advertise an across-the-board discount in compliance with these requirements "would probably take two pages in the telephone book," and that "[n]obody is going to really advertise in that fashion." *Id.* at 66a.

[4] For example, petitioner disapproved advertisements that offer "20% off new patients with this ad"; "25% discount for new patients on exam x-ray & cleaning/ 1 coupon per patient/ offer expires 1-30-94"; "20% senior citizen discount; 20% military discount"; and "Complete Consultation, Exam and X-rays (if needed) * * * [for only] a $1.00 charge to you and

Finally, petitioner has made clear that virtually all advertising about quality of services (including the word "quality" itself) is deemed "likely to be false or misleading" because it is not "susceptible to measurement or verification." Pet. App. 74a-75a, 202a-203a; see J.A. 35. Petitioner has also disapproved any advertising that, in its view, implies that a dentist is superior to other dentists. Pet. App. 206a. Such quality claims have been prohibited without regard to whether they are in fact false or misleading. *Id.* at 203a-204a, 207a, 209a. Petitioner and its components have therefore required that members and would-be members eliminate any advertising phrases that refer to the quality of dental care that patients will receive, or indeed to the quality of service ancillary to the actual dentistry, such as punctuality.[5]

Petitioner enforces its advertising restrictions by requiring applicants for membership to submit copies of all of

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your entire family with this coupon" before a certain date. *Id.* at 66a-67a, 90a n.25, 200a-202a. Dentists new to an area who sought to attract patients by advertising a "Grand Opening Special $5 exam x-ray, $15 polishing and 40% off dental treatment," or a "get acquainted offer" that "an initial consultation, complete exam, any x-rays and tooth cleaning will be done for only $5 (applies to all members of your family)" also encountered petitioner's disapproval. *Id.* at 77a n.18.

[5] Thus, petitioner has disapproved such phrases as "personal quality dental care"; "we cater to those people that demand quality, personal attention, and punctuality" (Pet. App. 204a); "you shouldn't have to wait hours or days for dental care" (*id.* at 205a); "my number one concern is your care and comfort"; "You'll appreciate our warm personal attention"; "State of the art dental services" (*id.* at 208a); "dedicated to quality dental care at low cost"; "comfortable and personalized"; "latest equipment and gentle, caring, techniques" (*id.* at 214a); "fully modern . . . luxurious atmosphere" (*id.* at 236a); "all of our handpieces (drills) are individually autoclaved for each and every patient"; and "highest standards in sterilization" (*id.* at 75a). For several years, petitioner disallowed advertising that a dentist offers "gentle" care or "special care for cowards," and many local components continue to proscribe such claims. *Id.* at 76a, 211a-212a.

their own advertising, plus advertisements by their employers and referral services, to the ethics committee of their local dental society. Pet. App. 193a, 237a-239a. Petitioner's local components also publish notices in their newsletters soliciting members to report possible Ethics Code violations by the applicant. *Id.* at 194a. Applicants are denied membership in petitioner if they do not agree to withdraw or revise advertisements that petitioner deems objectionable. *Id.* at 195a-198a. Petitioner also urges its local components to review local Yellow Pages directories for nonconforming advertisements by current members. *Id.* at 194a, 234a-235a. Members who do not agree to revise offending advertisements may be subject to a hearing before petitioner's Judicial Council, and thereafter to censure, suspension, or expulsion. *Id.* at 11a; see *id.* at 56a n.6.

The record in this case compiles actions taken by petitioner and its local societies against nearly 400 dentists, in which petitioner or a component disapproved particular advertising claims by members and applicants for membership, without regard to the truth of such claims. Pet. App. 56a-57a n.6, 89a-90a n.25, 199a-212a, 214a-218a, 235a.[6] Petitioner's efforts to suppress the prohibited advertising have been successful; when forced to choose between a challenged advertisement and membership in petitioner, dentists almost always give up the advertisement. *Id.* at 80a, 235a-237a. Petitioner's restrictions have also had a substantial deterrent effect. Some local societies reported that 90-100% of their members' advertisements complied with petitioner's restraints. *Id.* at 234a-235a.

3. a. On July 9, 1993, the Federal Trade Commission (FTC or Commission) issued an administrative complaint (J.A. 5-

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[6] The excerpts of the record filed by the FTC in the court of appeals include an extensive summary of petitioner's disciplinary actions as well as a long list of the words and phrases that petitioner and its components have proscribed. See FTC Supp. E.R., Vol. I, Tab 2, and Vol. II.

16) charging that petitioner had restrained competition among dentists in California by restricting truthful, non-deceptive advertising regarding price and quality of dental services. The complaint alleged that these restraints were "unfair methods of competition" in violation of Section 5 of the Federal Trade Commission Act (FTC Act or Act), 15 U.S.C. 45. After discovery and trial, an Administrative Law Judge (ALJ) concluded that the Commission had jurisdiction over petitioner's activities, and that petitioner had violated Section 5. Pet. App. 159a-265a.[7]

The ALJ determined, upon extensive factual findings (Pet. App. 161a-247a), that petitioner had "successfully withheld from the public information about prices, discounts, quality, superiority of service, guarantees, and the use of procedures to allay patient anxiety." *Id.* at 259a-260a (record citations omitted). He also found that petitioner's "illegal[] conspir[acy]" had "injured those consumers who rely on advertising to choose dentists." *Id.* at 261a-263a.[8]

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[7] Although the present case arises under Section 5 of the FTC Act, 15 U.S.C. 45, practices that violate Section 1 of the Sherman Antitrust Act, 15 U.S.C. 1, are necessarily "unfair methods of competition" under Section 5, and the Commission relied on Sherman Act principles in addressing the merits of this case. See Pet. App. 53a n.5; *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 454-455 (1986).

[8] Petitioner maintains that the ALJ found that its advertising restrictions had "no impact on competition." See Pet. Br. 2, 6-7, 13, 15, 27, 41-42; Pet. App. 246a. In context, however, it appears that the ALJ was quoting the testimony of petitioner's own expert witness, and was not adopting that testimony as his own factual finding. See *ibid.* Indeed, the ALJ noted that this witness "has no expertise in, nor has he made any study of, the economic aspects of the dental market or dental advertising." *Id.* at 244a. Even if the ALJ did credit that witness's testimony on the impact of competition (see *id.* at 83a n.22), the Commission rejected such a conclusion and found that competition was harmed by petitioner's restrictions, *ibid.*; see pp. 10-11, *infra*, and the court of appeals upheld the Commission's finding as supported by substantial evidence, see pp. 12-13, *infra*; Pet. App. 23a-24a.

The ALJ did rule that petitioner lacked "market power," *id.* at 261a, but that conclusion was based on the legal premise (later rejected by the Commission, *id.* at 83a) that such power exists only in the presence of "insurmountable" barriers to entry, *id.* at 262a. And the ALJ rejected petitioner's arguments of "procompetitive" effects flowing from its restrictions. He found that petitioner's ethics code, as actually enforced, "unjustifiably banned whole categories of advertisements which are not false or misleading in a material respect," and reflected "a hostility toward advertising by its members even if it is truthful and nondeceptive." *Id.* at 259a-260a.

b. On plenary review of the ALJ's initial decision (see 16 C.F.R. 3.54(a)-(b)), the Commission affirmed the ALJ's finding of a violation of Section 5. Pet. App. 43a-158a. The Commission first found (*id.* at 47a-52a) that petitioner was subject to the FTC Act as a corporation "organized to carry on business for its own profit or that of its members," within the meaning of Section 4 of the Act, 15 U.S.C. 44. Noting that it had previously rejected the argument that the term "profit" in this context should be limited to "direct gains distributed to * * * members," the Commission held that it had jurisdiction in this case because a substantial portion of petitioner's activities consists of practice management, marketing, public relations, lobbying, and other business-related services that confer "pecuniary benefits" on its members. *Id.* at 49a, 51a-52a.

On the merits, the Commission concluded that petitioner's advertising restrictions, both price-related and quality-related, constituted unlawful restraints of trade. Pet. App. 58a-92a. The Commission found, upon its review of the record, that "advertising is important to consumers of dental services and plays a significant role in the market for dental services." *Id.* at 60a; see *id.* at 76a-77a. As for the price advertising restrictions specifically, the Commission upheld

the ALJ's findings that petitioner had barred its members from advertising "low" or "reasonable" fees, and had effectively precluded truthful across-the-board discount offers. *Id.* at 63a-67a. The Commission also found that these restrictions on price advertising "constitute[d] a naked attempt to eliminate price competition," accomplished through the "indirect means of suppressing advertising" about prices. *Ibid.* Based on those findings, the Commission held that petitioner's price-related restraints were unlawful *per se*. *Ibid.*; see *id.* at 60a-63a, 67a-73a.

The Commission also applied the antitrust rule of reason to all the advertising restrictions at issue in this case. Pet. App. 73a-92a. After observing that this Court "has made clear that the rule of reason contemplates a flexible enquiry, examining a challenged restraint in the detail necessary to understand its competitive effect," *id.* at 74a (citing *NCAA* v. *Board of Regents*, 468 U.S. 85, 103-110 (1984)), the Commission found (*ibid.*) that application in this case of the rule of reason could be "simple and short," because "[t]he anticompetitive effects of [petitioner's] advertising restrictions are sufficiently clear, and the claimed efficiencies sufficiently tenuous, that a detailed analysis of market power is unnecessary to reaching a sound conclusion." But, the Commission added (*ibid.*), "in any event, [petitioner] clearly had sufficient power to inflict competitive harm."

The Commission began its rule of reason analysis by assessing the anticompetitive effects of the restrictions. Pet. App. 74a-78a. Supplementing its earlier findings (under the *per se* rule analysis) of the effects of petitioner's restrictions on price advertising, *id.* at 73a-74a, the Commission found that petitioner had also proscribed a "vast" range of nonprice advertising, barring virtually all claims regarding quality, regardless of the truthfulness of such claims. *Id.* at 74a-76a. It found "substantial evidence" that the challenged advertising restraints "prevented the dissemination of information

important to consumers," regarding both price and nonprice aspects of the dental services offered. *Id.* at 76a-77a. And it found that the restraints "hamper dentists in their ability to attract patients," particularly dentists new to an area. *Id.* at 78a. The Commission therefore concluded that, because of the importance of advertising to consumers in choosing dentists (*id.* at 60a, 77a), petitioner's broad bans would "deprive consumers of information they value and of healthy competition for their patronage." *Id.* at 78a. Although it did not "quantify[] the increase in price or reduction in output occasioned by these restraints," the Commission found their "anticompetitive nature" to be "plain." *Ibid.*

The Commission also found that petitioner had the "power to cause harm to consumers" by inducing its members to withhold information. Pet. App. 80a. It had "little doubt" that petitioner had "the ability to police, and entice its members to adhere to, the restrictions on advertising." *Ibid.* Moreover, it found that "the services offered by licensed dentists have few close substitutes," that "the market for such services is a local one," and that petitioner's members command "more than a substantial share of these markets" —75% of practicing dentists statewide, and more than 90% in one region. *Id.* at 82a. Contrary to the ALJ's conclusion (*id.* at 261a), the Commission found that there are "significant barriers to entry" into those markets, *id.* at 82a-84a, even if they are not "insurmountable," *id.* at 83a. Accordingly, the Commission found that petitioner "possesses the necessary market power to impose the costs of its anticompetitive restrictions on California consumers of dental services." *Id.* at 84a.

Like the ALJ, the Commission rejected petitioner's contention that its restraints were either harmless or procompetitive. Pet. App. 84a-89a. The Commission acknowledged that the prevention of false and misleading advertising is a "laudable purpose," but it concluded that "the record

will not support the claim that [petitioner's] actions [were] limited to advancing that goal." *Id.* at 84a. It found, rather, that petitioner's "broad categorical prohibitions" (*id.* at 87a) were enforced "without any enquiry as to how [prohibited claims] might be construed by consumers and whether, as construed, they are true of the particular practitioner making the claim" (*id.* at 86a). And it perceived "no convincing argument, let alone evidence" that "consumers of dental services have been, or are likely to be, harmed by the broad categories of advertising" that petitioner restricts. *Id.* at 89a.

The Commission therefore held that petitioner's advertising restrictions violated Section 5 of the FTC Act. Pet. App. 90a-91a. The Commission's cease-and-desist order prohibits those restrictions (*id.* at 27a-31a), but expressly provides that petitioner may "adopt[] * * * and enforc[e] reasonable ethical guidelines governing the conduct of its members with respect to representations that [petitioner] reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act." *Id.* at 30a.

4. The court of appeals affirmed. Pet. App. 1a-24a. As to jurisdiction, the court agreed with the FTC and with other courts that Congress "did not intend to provide a blanket exclusion for nonprofit corporations" from the reach of the FTC Act, and it approved the Commission's approach of "looking at whether the organization provides tangible, pecuniary benefits to its members" in order to determine whether it is a "corporation" subject to the Commission's jurisdiction. *Id.* at 15a-16a. Under that standard, the court was "confident that the facts of this case support the FTC's jurisdiction." *Id.* at 16a.

As to the merits, although the court acknowledged "some support" in case law for the FTC's *per se* analysis of petitioner's restrictions on price advertising, it concluded that a rule of reason analysis is more appropriate for all aspects of

petitioner's advertising restraints. Pet. App. 17a-18a. It then observed approvingly that the FTC had applied "an abbreviated, or 'quick look' rule of reason analysis" in this case because petitioner's restraints "are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry." *Id.* at 18a (citing *NCAA*, *supra*).

The court first noted that "[r]estrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for dentists to compete on the basis of price." Pet. App. 19a. On the other hand, the court found no reason to give petitioner's proffered justifications for its disclosures more than a "quick look," because, "[i]n practice," under petitioner's disclosure requirements, it was "simply infeasible to disclose all of the information that is required," and there was "no evidence that [petitioner's] rule has in fact led to increased disclosure and transparency of dental pricing." *Ibid.*

Second, the court concluded that petitioner's restrictions on non-price advertising restricted the supply of information available to consumers, thereby "prevent[ing] dentists from fully describing the package of services they offer, and thus limit[ing] their ability to compete." Pet. App. 19a-20a. The court further suggested that the restrictions "are in effect a form of output limitation, as they restrict the supply of information about individual dentists' services." *Ibid.* It rejected petitioner's contention that its restrictions were justified because of the potential for deception, for even that potential "does not justify banning all quality claims without regard to whether they are, in fact, false or misleading." *Id.* at 20a.

Finally, the court rejected petitioner's contentions that the FTC's findings were not supported by substantial evidence. Pet. App. 20a-24a. In particular, the court ruled that substantial evidence supports the FTC's finding that petitioner had banned categories of advertising without regard to whether they were false or deceptive. *Id.* at 21a-23a. It

also upheld the FTC's finding that petitioner "possesses enough market power to harm competition" through its restraints on advertising. *Id.* at 24a. The court accordingly affirmed the Commission's opinion and enforced its order that petitioner cease and desist from restricting "truthful and non-deceptive advertisements." *Ibid.*

SUMMARY OF ARGUMENT

I. A. The Federal Trade Commission properly exercised jurisdiction over petitioner, even though it is formally a nonprofit corporation, because a substantial portion of its activities engenders economic benefits for its profit-seeking members. Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, which sets forth the entities subject to the Commission's jurisdiction, reaches not only conventional business enterprises but also any association "organized to carry on business for its own profit or that of its members." The FTC has consistently interpreted that statute, adhering to ordinary definitions of the term "profit," to reach trade associations that engage in activities for the economic benefit of their profit-making members, even where the association itself is organized as a nonprofit entity and the benefits to members take forms other than cash disbursements. The legislative history of the FTC Act evinces Congress's intent to authorize FTC jurisdiction over such associations, and the FTC and the courts have long acted on the understanding that the Act does in fact reach such associations.

B. There is no basis in the statute for an implied, blanket exemption of associations representing profit-making professionals. Petitioner's arguments based on Congress's ostensible lack of attention to professionals when it enacted the FTC Act fail for the same reasons that the Court rejected an implied exemption of professionals from the antitrust laws in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). Since that ruling, the FTC has enforced the Act to protect the

public from anticompetitive and deceptive practices in which professional associations have engaged.

C. The FTC's interpretation of the statute's reach—which is based on the provision of substantial economic benefits to an association's profit-seeking members—is reasonable and merits judicial deference. The record amply supports the FTC's application of that standard to petitioner, which generates significant economic benefits for its members through its provision of services to its members and its lobbying, public relations, and marketing activities designed to increase their profitability.

II. A. The FTC and the court of appeals engaged in a proper and sufficient analysis of petitioner's advertising restraints under the antitrust rule of reason. This Court has repeatedly emphasized the flexibility of the rule of reason; it has instructed that the rule's application may be tailored to the circumstances of particular cases, and that elaborate industry analysis is not necessary in all cases to condemn a restraint of trade as unreasonable. The Commission carefully considered here all relevant aspects of a rule of reason analysis and concluded, based on a substantial record, that petitioner's advertising restrictions harmed consumers.

B. The Commission found, based on a substantial evidentiary record, that petitioner's advertising restrictions, as enforced, proscribe a vast range of truthful advertising claims regarding price and quality. The Commission's findings regarding the actual effects of the restrictions belie petitioner's assertion that its disclosure requirements would prompt dentists to provide more information to consumers. Recognizing the indispensable role of advertising in a free enterprise system, the Commission found that the price and quality advertising suppressed by petitioner would be important to consumers in choosing dental services, and that its absence deprives consumers of information they value and of healthy competition for their patronage. Although

petitioner disparages the value of the information at issue, this Court made clear in *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447 (1986), that competitors are not entitled to preempt the working of the market by deciding in concert what information will be made available to consumers, and that the concerted withholding of information valued by consumers may be condemned even absent proof that it resulted in higher prices.

C. The Commission carefully considered petitioner's proffered "procompetitive" justifications for its restrictions, and properly found them lacking. The Commission found that petitioner's disclosure requirements do not, in fact, result in more information to consumers, and found no basis for petitioner's contention that a ban on quality claims was necessary to avoid deception. Unlike the carefully tailored state restrictions that this Court has accepted in the context of First Amendment challenges, petitioner banned broad categories of advertising without regard to whether the banned claims were truthful or nondeceptive. The Commission properly rejected such a blanket restriction on information that consumers desire as an unreasonable restraint of trade.

D. Given the Commission's findings concerning the actual anticompetitive effects of petitioner's restraint, it was not required to engage in a further analysis of market power. It nevertheless did so, concluding first that petitioner has the ability to require members to adhere to its advertising restrictions (due to the high value placed on membership), and second that petitioner has the power to inflict the anticompetitive effects of those restrictions on California consumers. It also pointed to the substantial percentage of California dentists who comply with petitioner's restrictions, as well as substantial barriers to sufficient entry of new dentists. Those findings were sufficient for this case; the Commission was not required to engage in elaborate indus-

try analysis that may be required in other contexts, such as merger cases.

ARGUMENT

I. THE COMMISSION PROPERLY EXERCISED JURISDICTION OVER PETITIONER BECAUSE ITS ACTIVITIES, IN SUBSTANTIAL PART, PROVIDE PECUNIARY BENEFITS FOR ITS MEMBERS

Congress has empowered the FTC to prevent "persons, partnerships, or corporations" from engaging in unfair methods of competition and unfair or deceptive acts and practices in or affecting commerce. 15 U.S.C. 45(a)(2). The FTC Act defines "corporation" broadly, in Section 4, to include not only companies with capital stock, but also "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, * * * which is organized to carry on business for its own profit or that of its members." 15 U.S.C. 44. In this case, the FTC, applying its longstanding administrative interpretation of Section 4, properly concluded that petitioner is subject to the FTC Act's reach as an association "organized to carry on business for [the] profit * * * of its members" because a substantial part of its activities engenders a pecuniary benefit for its profit-seeking members. Pet. App. 49a, 51a-52a.

A. The Text, Legislative History, and Enforcement History of the FTC Act Support the Commission's Exercise of Jurisdiction Over Nonprofit Associations That Engender Pecuniary Benefits For Their Members

The text of the FTC Act shows a congressional purpose to grant the FTC broad authority over companies and associations. The language of Section 4 is expansive. Section 4 extends the ordinary meaning of "corporation" to include "any" association "organized to carry on business for its own profit or that of its members," even if unincorporated and

lacking such hallmarks of a profit-making enterprise as "shares of capital or capital stock or certificates of interest." As long as the association carries on business "for [the] profit * * * of its members," it is subject to the Act's prohibitions against unfair methods of competition and deceptive Acts and practices. 15 U.S.C. 44.

The pivotal question in this case is whether an association may be said to work for the "profit" of its members, even if it does not distribute earnings to them. Petitioner argues (Br. 19-21) that Section 4 uses the term "profit" in the limited sense of the "excess of revenues over investment or expenses." Thus, it contends, to be within the reach of the FTC Act, an association must itself earn and pay such "profits" (*i.e.*, the excess of its *own* revenues over expenses) to its members.

Even if the Act did use the term "profit" in the limited sense of the excess of revenues over expenses, that would not advance petitioner's jurisdictional argument. Petitioner's activities are intended to, and do, increase the revenues and decrease the expenses of its members, who are "independent competing entrepreneurs" (*Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 357 (1982)). Petitioner's activities help its members achieve profitability. Thus, petitioner carries on business for its members' "profit," even if it does not distribute its own earnings to them. Nothing in logic or the text of Section 4 suggests that the only way an organization may carry on business to help its members achieve profits is to distribute its own earnings to the members.

Moreover, "profit" is, and long has been, commonly used to refer more broadly to economic benefit. When the FTC Act was passed in 1914, a standard dictionary defined "profit" to include "[a]ccession of good; valuable results; useful consequences; benefit; avail; gain; as, an office of *profit*." *Webster's International Dictionary* 1713 (def. 2) (1913); see also 2 S. Rapalje & R. Lawrence, *A Dictionary of American*

and English Law 1020 (1883) ("In its primary sense, profit signifies advantage or gain in money or in money's worth."). Modern definitions are similar. See *Webster's Third New International Dictionary* 1811 (def. 2) (1986). And Congress has frequently used "profit" and "for profit" in statutes to refer to pecuniary benefit generally, rather than in the limited sense of the excess of earnings over expenses and investment.[9] The language of Section 4 thus comfortably reaches associations that work for their profit-seeking members' economic benefit, even if they do not distribute earnings to the members.

Petitioner submits (Br. 21 n.5) that any "genuine nonprofit entity" should be outside the reach of the Act. A "genuine nonprofit entity," however, may well conduct activities that are intended to be, and are, for the economic benefit of its members. Trade associations, for example, frequently work to advance their members' economic interests and provide them with benefits of substantial value, even though such associations are genuinely nonprofit in that their revenues are not distributed to their members, and even though such entities (like petitioner) may be entitled to exemption from federal income tax under 26 U.S.C. 501(c)(6).[10]

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[9] See, *e.g.*, 7 U.S.C. 1a(5)(A)(i) (defining "commodity trading advisor" as one who, "for compensation or profit," advises others on commodity trading); 7 U.S.C. 2132(f) (defining animal "dealer" as one who "for compensation or profit" delivers animals for sale); 8 U.S.C. 1375(e)(1)(A) (Supp. II 1996) (defining "international matchmaking organization" as one that offers matrimonial services "for profit"); 18 U.S.C. 1170(a) (punishing one who "uses for profit" any Native American human remains without the right of possession); 42 U.S.C. 3604(e) (punishing one who, "[f]or profit," induces another to sell or rent a dwelling based on changes in racial composition of neighborhood); see also 12 U.S.C. 2802(4); 18 U.S.C. 31; 18 U.S.C. 921(a)(21); 18 U.S.C. 1466(b); 42 U.S.C. 2205(b); 50 U.S.C. 217.

[10] Petitioner (Br. 20 n.4) and amici (ASAE Br. 10, ADA Br. 15) argue that, to qualify as tax-exempt under Section 501(c)(6), they had to satisfy that Section's requirement that "no part of [their] net earnings * * *

The legislative history of the FTC Act demonstrates, moreover, that Congress considered the coverage of nonprofit associations (especially, nonprofit associations of entrepreneurs) and decided to include such entities within the Act's reach. When Congress was considering legislation to replace the Bureau of Corporations with the Federal Trade Commission, both the House and the Senate initially passed bills that would have defined "corporation" to refer only to incorporated, joint-stock, and share-capital companies organized to carry on business for profit. See H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 11, 14 (1914). Two days after the Senate passed its version of the legislation, Bureau of Corporations Commissioner Davies wrote to Senator Newlands, the bill's sponsor and a member of the Conference Committee, expressing concern about its definition of "corporation." Davies explained that the bill would prevent the new Commission from acting against trade associations that "purport to be organized *not for profit*," and that, although "[a]s to some of the things done by these associations, no

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inure[] to the benefit of any private shareholder or individual," which (they contend) necessarily means that they do not operate for the profit of their members. Under Section 501(c)(6), however, it is generally permissible for a trade association's activities to "improve[] the business conditions" of the industry as a whole, including its members, as long as such benefits are not *confined* to the association's members. See *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 482-484 (1979); *MIB, Inc.* v. *Commissioner*, 734 F.2d 71, 76 & n.3 (1st Cir. 1984); 26 C.F.R. 1.501(c)(6)-1. Indeed, as Section 501(c)(6) is confined to entities with common business interests (as opposed to charities, which are covered elsewhere), that Section presupposes the promotion of an industry's economic interests. Furthermore, there are significant differences between the purposes and operation of the revenue laws and the FTC Act. Cf. *FTC* v. *Bunte Bros.*, 312 U.S. 349, 353 (1941) ("Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business."). The fact that an entity might be considered nonprofit for tax purposes does not necessarily mean that it is outside the broad enforcement reach of the FTC Act.

question as to their propriety can be raised," such associations nonetheless "furnish convenient vehicles for common understandings looking to the limitation of output and the fixing of prices contrary to the law."[11] The Conference Committee subsequently revised the definition of "corporation" in Section 4 specifically to include associations lacking capital stock that are organized to carry on business for their own profit or that of their members. *Id.* at 3. That alteration of the statutory text shows that Congress intended the Act to reach nonprofit entities, including trade associations, if they work to advance their members' economic interests.

The FTC and the courts have consistently read the FTC Act in conformity with Congress's intent to cover trade associations advancing the economic interests of their members. From its earliest days, the FTC has exercised its jurisdiction over anticompetitive practices by nonprofit associations whose activities provided substantial economic benefits to their for-profit members' businesses, even though the associations did not themselves engage in manufacturing or retailing, and did not distribute earnings to members.[12] The courts soon confirmed that "[t]he language of the act affords no support for the thought that individuals, partnerships, and corporations can escape restraint, under the act, from combining in the use of unfair methods of competition, merely because they employ as a medium therefor an unincorporated voluntary association, without capital and not itself engaged in commercial business." *National Harness Mfrs. Ass'n* v. *FTC*, 268 F. 705, 709 (6th Cir. 1920); see also

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[11] *Trade Commission Bill: Letter from the Commissioner of Corporations to the Chairman of the Senate Comm. on Interstate Commerce, Transmitting Certain Suggestions Relative to the Bill (H.R. 15613) to Create a Federal Trade Commission*, 63d Cong., 2d Sess. 3 (1914).

[12] See, *e.g.*, *FTC* v. *Association of Flag Mfrs.*, 1 F.T.C. 55 (1918); *FTC* v. *United States Gold Leaf Mfrs. Ass'n*, 1 F.T.C. 173 (1918); *FTC* v. *Bureau of Statistics of the Book Paper Mfrs.*, 1 F.T.C. 38 (1917).

Chamber of Commerce v. *FTC*, 13 F.2d 673, 684 (8th Cir. 1926). Following these decisive early rulings, the FTC and reviewing courts (including this Court) have consistently acted on the understanding that nonprofit trade associations are within the FTC's jurisdiction.[13] More recently, when the FTC took action against a nonprofit association for misrepresenting that no scientific evidence linked cholesterol in eggs to increased risk of cardiovascular disease, the Seventh Circuit held that the group, which was "formed to promote the general interests of the egg industry," came within the definition of "corporation" in Section 4 because it "was organized for the profit of the egg industry, even though it pursues that profit indirectly." *FTC* v. *National Comm'n on Egg Nutrition*, 517 F.2d 485, 487-488 (1975) (internal quotation marks omitted), cert. denied, 426 U.S. 919 (1976).[14]

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[13] See, *e.g.*, *FTC* v. *Cement Inst.*, 333 U.S. 683 (1948); *Millinery Creator's Guild, Inc.* v. *FTC*, 312 U.S. 469 (1941); *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457 (1941); *FTC* v. *Pacific States Paper Trade Ass'n*, 273 U.S. 52 (1927); *Standard Container Mfrs. Ass'n* v. *FTC*, 119 F.2d 262 (5th Cir. 1941); *California Lumbermen's Council* v. *FTC*, 115 F.2d 178 (9th Cir. 1940), cert. denied, 312 U.S. 709 (1941).

[14] Petitioner relies heavily (Br. 16-19) on the Eighth Circuit's decision in *Community Blood Bank* v. *FTC*, 405 F.2d 1011 (1969), which, it contends, supports its narrow reading of the term "profit." That decision, however, is consistent with the approach to Section 4 explained above. There the court of appeals rejected the theory that a community blood bank—which it found to be organized for "only charitable purposes"—could be said to earn "profit" by virtue of its retention of earnings "for its own self-perpetuation or expansion." *Id.* at 1016, 1022. Nonetheless, the court recognized that Section 4 does not "provide a blanket exclusion of all nonprofit" entities. *Id.* at 1017. It acknowledged Congress's intent to confer on the Commission jurisdiction over "trade associations," and emphasized the need for an "ad hoc" inquiry focusing on the facts of the particular organization. *Id.* at 1017-1019. Most significantly, it had no occasion to address the status of an entity, like the present petitioner, that is organized as a nonprofit corporation but whose activities provide pecuniary benefits to profit-seeking members. See also *FTC* v. *Freeman Hosp.*, 69

Despite that lengthy history of FTC enforcement actions (upheld by the courts) against nonprofit organizations, petitioner argues (Br. 24-25) that Congress's *failure* to act on a proposed amendment to the FTC Act in 1977 demonstrates that Congress did not intend, in 1914, to bring such organizations within the reach of the Act. This Court has frequently characterized such reliance on congressional inaction as "a particularly dangerous ground on which to rest an interpretation of a prior statute." *Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 187 (1994); see *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 608-611 (1966). Congress's failure to take action on the 1977 proposal in fact reveals little about the matter at hand, because that proposal would have given the FTC jurisdiction even over wholly charitable institutions; the Act, as amended, would not have been limited to nonprofit institutions that advance their members' pecuniary interests.[15] Congress may have declined to amend the Act because it was satisfied with the existing state of the case law, which (then as now) allowed the FTC to exercise jurisdiction over nonprofit associations such as petitioner that advance their members' pecuniary interests (even if they do not distribute earnings to members), but not over wholly charitable institutions.[16] Accordingly, no reliable guidance

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F.3d 260, 266 (8th Cir. 1995) (reading *Community Blood Bank* as holding that only genuine charitable organizations are outside Section 4).

[15] The proposal would have amended the definition of "person, partnership, or corporation" in Section 4 "to include any individual, partnership, corporation, or other organization or legal entity." See H.R. 3816, 95th Cong. (1977), reprinted in *Federal Trade Commission Amendments of 1977 and Oversight: Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. 4, 27-28 (1977) (*1977 House Hearing*). The proposal therefore would have overruled the Eighth Circuit's decision in *Community Blood Bank*, *supra*.

[16] Compare *Community Blood Bank*, *supra*, with *National Comm'n on Egg Nutrition*, *supra*; see also *1977 House Hearing*, *supra*, at 82

can be gleaned from Congress's failure to enact legislation in 1977. Cf. *Consumer Prod. Safety Comm'n* v. *GTE Sylvania Inc.*, 447 U.S. 102, 116-120 (1980); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968).

B. There Is No Basis In The Statute For A "Professional Association" Exemption

Petitioner argues (Br. 16) that, even if some nonprofit entities advancing members' economic interests (such as associations of automobile dealers or retail grocers) fall within the reach of the FTC Act, *professional* associations like itself nonetheless do not. The text of the statute, however, will not support any implied, blanket "professional association" exception. A voluntary nonprofit association of professionals may be organized (and legitimately so) to advance its members' economic interests even if it *also* engages in public service activities and monitoring of its members' ethics. Many associations of professionals (as well as other entrepreneurs) engage in both kinds of activities. See, *e.g.*, *National Soc'y of Prof. Eng'rs* v. *United States*, 435 U.S. 679, 682 (1978). As the Court explained in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788 (1975), it is "no disparagement of * * * a profession to acknowledge that it has [a] business aspect." Dentists no less than industrialists may come to-

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(testimony by FTC Chairman Collier that *Community Blood Bank* decision "affirmed the Commission's jurisdiction over nonprofit corporations whose activities redound to the economic benefit of their shareholders or members").

We also note that, in 1982, Congress failed to pass an amendment reported out of a Senate committee that would have terminated the FTC's jurisdiction over all state-licensed professionals and their associations. See S. Rep. No. 451, 97th Cong., 2d Sess. 5-7, 34-35 (1982). Under petitioner's logic, that refusal to take action could be taken as evidence that Congress approved of the FTC's actions in this area, especially since the minority on the committee observed that "the long list of FTC actions in this area is clearly pro-consumer and pro-competition." *Id.* at 49.

gether in a voluntary nonprofit association to advance their economic interests as a group. It is also difficult to see how any clear line could be drawn between classes of "professionals" and "non-professionals" for the purpose of defining the FTC's jurisdiction.

Petitioner suggests (Br. 24) that Congress must have intended to exclude professional associations from the FTC Act's reach because the professions were not regarded as subject to the antitrust laws when the Act was passed. This Court in *Goldfarb* rejected the similar argument that the business activities of "learned professions" were beyond the Sherman Act's reach because such professions were not regarded as "trade or commerce" when that Act was enacted. 421 U.S. at 787-788. Given the broad language of coverage used in Section 4 of the FTC Act, its reach cannot be frozen by assumptions in 1914 any more than the Sherman Act has been confined by assumptions extant in 1890. And whether or not Congress contemplated at its enactment that the FTC Act (or the Sherman Act) would be used against organizations of professionals such as dentists and lawyers, this Court "frequently has observed that a statute is not to be confined to the particular applications contemplated by the legislators." *Diamond* v. *Chakrabarty*, 447 U.S. 303, 315 (1980) (internal quotation marks, brackets, and ellipsis omitted).

Since this Court made clear in *Goldfarb* that combinations of professionals in restraint of trade are indeed subject to the antitrust laws, the FTC has consistently acted to protect the public from anticompetitive practices of professional associations. It has brought enforcement actions against organizations that were fixing or stabilizing prices,[17]

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[17] See, *e.g.*, *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *Empire State Pharm. Soc'y*, 114 F.T.C. 152 (1991) (boycotts against third-party payers that attempted to obtain lower prices for prescriptions).

thwarting cost containment programs,[18] and blocking the development of health maintenance organizations.[19] It has also acted against deceptive advertising and promotion by professional associations, such as misrepresentation of their members' expertise.[20] Petitioner's submission that such organizations are exempt from the FTC Act would deprive the public of the important consumer protection provided by Section 5 against such unfair competition and deceptive practices.[21]

C. The Commission's Construction Of Its Jurisdiction Under The FTC Act Is Entitled To Deference, And Its Application Of That Construction In This Case Was Proper

For the reasons we have stated, the text of the FTC Act does not support a construction exempting all nonprofit (or professional) associations. At a minimum, the text does not *compel* such a construction. Since the word "profit" is cap-

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[18] See, *e.g.*, *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *Michigan State Med. Soc'y*, 101 F.T.C. 191 (1983); *Indiana Dental Ass'n*, 93 F.T.C. 392 (1979).

[19] See, *e.g.*, *Forbes Health Sys. Med. Staff*, 94 F.T.C. 1042 (1979); *Medical Serv. Corp.*, 88 F.T.C. 906 (1976).

[20] See, *e.g.*, *FTC* v. *National Energy Specialist Ass'n*, No. 92-4210, 1993 WL 183542 (D. Kan. Apr. 29, 1993).

[21] Petitioner points out that, even if it is exempt from the FTC Act, it will still be subject to antitrust scrutiny by the Department of Justice under the Sherman and Clayton Acts. The same cannot be said, however, of the FTC's authority under Section 5 to prevent deceptive practices, for which there is no analogue in the antitrust laws. Petitioner's argument would leave the FTC without authority to proceed against nonprofit trade and professional associations that disseminate false information about their members' services or products. Cf. *National Comm'n on Egg Nutrition*, *supra* (FTC Act used to prevent dissemination of false information about health effects of cholesterol in eggs); *American Dairy Ass'n*, 83 F.T.C. 518 (1973) (consent order against misrepresenting fat content or caloric value of milk).

able of the construction that the FTC has placed on it–encompassing the situation in which a nonprofit organization works to advance its members' economic interests, even if it does not distribute earnings to them—that construction is entitled to deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984); *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 380-382 (1988) (Scalia, J., concurring) (*Chevron* deference applicable to agency's interpretation of its own statutory authority or jurisdiction); see, *e.g.*, *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 89 (1995) (deferring to NLRB's interpretation of who is an "employee" covered by National Labor Relations Act). Deference is particularly appropriate because the FTC has consistently acted on the view that Section 5 reaches such nonprofit associations since shortly after the FTC Act was passed. See p. 20, *supra*; *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457-458 (1978).

It bears emphasis that the Commission does not read the FTC Act as reaching *all* nonprofit associations but (consistent with the Act's requirement of "profit") only those organizations "whose activities engender a pecuniary benefit to [their] members if [those] activit[ies are] a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity." Pet. App. 49a (quoting *American Med. Ass'n*, 94 F.T.C. 701, 983 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982) (*AMA*));[22] see also *College Football Ass'n*, 117 F.T.C. 971, 1000-1008 (1994) (FTC's

[22] With respect to the Court's affirmance in the *AMA* case, we note that, when it reached this Court, that case presented not only the jurisdictional question, but also the propriety of the FTC's entry of a prospective cease-and-desist order in light of ethical-rule changes adopted by the AMA after the filing of the administrative complaint. See 80-1690 FTC Br. I, 46-59.

determination that it lacked jurisdiction over nonprofit organization engaged in commercial activity for its members' benefit because its members were not profit-seeking). There is no basis, therefore, for the suggestion that the FTC's reading of the Act will expand its jurisdiction beyond its proper reach, to the realm of purely eleemosynary institutions.[23] Rather, the Commission has sensibly read the Act as permitting it to intervene when a nonprofit entity advances its members' economic interests in the commercial world.

Petitioner's argument (Br. 19) that it falls outside the statute's reach because its "main purpose" is to promote dental health lacks textual support. The statute applies by its terms to entities that conduct business for the profit of their members, and makes no exception for ones that *also* conduct activities for the benefit of the public. Furthermore, drawing a jurisdictional line based on an association's "primary" purpose would create serious difficulties as to the proper classification of an organization's activities (particularly those with both public and private benefits) as well as the weights to be assigned to them (*e.g.*, weighing by amount of expenditure or by degree of pecuniary benefit conferred).

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[23] Amicus American College for Advancement in Medicine (ACAM) cites the FTC's investigation into its activities as evidence that the FTC has wrongly asserted jurisdiction over a purely eleemosynary medical society (Br. 1, 3). (The IRS master list of exempt organizations reveals that ACAM is a Section 501(c)(6) business league, not a Section 501(c)(3) charity.) On December 8, 1998, ACAM agreed to settle the FTC's charges that it made false and unsubstantiated advertising claims regarding EDTA chelation therapy for treating coronary artery disease; ACAM has agreed not to make any representation about the efficacy of such chelation therapy unless supported by competent and reliable evidence. *See FTC, Current News Releases* (Dec. 8, 1998) http://www.ftc.gov (copies of complaint and proposed settlement*); see also Quackery: A $10 Billion Scandal: Hearing Before the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging*, 98th Cong., 2d Sess. 96-98 (1984); *United States* v. *Evers*, 643 F.2d 1043, 1045-1046 (5th Cir. 1981).

Such a line could also encourage associations to attempt to evade jurisdiction through creative accounting classifications of their expenditures. The FTC was therefore justified in construing the Act's reach to turn on the existence of a substantial pecuniary benefit to an organization's members, rather than on the nature of its primary activities.

The record also amply supports the FTC's application of that standard in this case. Given petitioner's emphasis on the economic benefits that it provides to its members (see pp. 2-3, *supra*), the services that it offers in competition with for-profit businesses (including training programs, job placement, legal services, and low-cost insurance through its for-profit subsidiaries) (see p. 2, *supra*; J.A. 20-23), and its lobbying on behalf of its members' pocketbook issues (*ibid.*), there is substantial evidence to support the FTC's conclusion that petitioner provides its members with "substantial pecuniary benefits." Accordingly, the FTC properly concluded that petitioner is subject to the Act.

II. THE COMMISSION CORRECTLY CONCLUDED THAT PETITIONER'S ADVERTISING RESTRICTIONS CONSTITUTE AN UNREASONABLE RESTRAINT OF TRADE

Section 1 of the Sherman Act, 15 U.S.C. 1, prohibits unreasonable restraints of trade. See *Standard Oil Co.* v. *United States*, 221 U.S. 1, 65 (1911). Restraints that "always or almost always tend to restrict competition and decrease output" are deemed unreasonable *per se*. *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-290 (1985); see *Northern Pacific* v. *United States*, 356 U.S. 1, 5 (1958). Other restraints are subject to the "rule of reason," which seeks to distinguish between a restraint that "merely regulates and perhaps thereby promotes competition" and one that "may suppress or even destroy competition." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49 n.15 (1977) (internal quotation marks

omitted). In all cases, however, the purpose of the antitrust inquiry is "to form a judgment about the competitive significance of the restraint." *NCAA* v. *Board of Regents*, 468 U.S. 85, 103 (1984) (internal quotation marks omitted).

Agreements among members of a professional association that govern the way in which members compete with one another are horizontal restraints of trade. *National Soc'y of Prof. Eng'rs* v. *United* States, 435 U.S. 679, 692 (1978). In this case, the Commission carefully examined petitioner's restraints in light of their surrounding circumstances and an extensive factual record that had been compiled about their actual effect. Pet. App. 73a-92a. It found that petitioner applied its advertising rules to ban systematically a "vast" range of advertising valued by consumers, depriving them of truthful, nondeceptive information about the price and quality of dental services. *Id.* at 74a. It also concluded that the restraints significantly interfered with the proper functioning of the market and were therefore anticompetitive. *Id.* at 78a. Although the Commission found it unnecessary to quantify the precise consumer injury caused by these restrictions, it sufficiently considered pertinent factors under the rule of reason, including market impact and the ostensibly procompetitive justifications proffered by petitioner. *Id.* at 78a-92a; see *id.* at 20a-24a (consideration of same factors by court of appeals).[24]

Petitioner's primary complaint (Br. 38, 42) is that the Commission failed to make a detailed inquiry into market

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[24] As we have noted (pp. 8-9, *supra*), the Commission concluded that petitioner's bans on price advertising were unlawful *per se*. The Commission pointed (Pet. App. 67a-69a) to substantial support in the case law for such *per se* treatment of advertising restrictions. Although we submit the Commission's use of the *per se* rule was appropriate, especially given its accumulation of experience with advertising restrictions (see *id.* at 71a-72a) , the Court need not reach that issue if it agrees with our submission that the Commission's analysis under the rule of reason was sufficient.

structure and into its market power. In fact, the Commission (and the court of appeals) did examine market power, and found that petitioner had the ability to withhold from consumers the valuable information that they seek about dentists' prices and services. See Pet. App. 23a-24a, 79a. The Commission's analysis in this case (and the court of appeals') followed the Court's teachings that the rule of reason may properly be tailored to the circumstances of each case, and does not necessarily require a "detailed market analysis" in every instance. See *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986) (*IFD*). By insisting on what it terms a "full rule of reason" analysis in cases such as the present one—including the detailed analysis of matters such as the structure of local geographic markets—petitioner would interpose unjustified barriers to the adjudication of antitrust claims by the Commission and the federal courts. Although an informed judgment about an arrangement's likely competitive effects may in some cases require elaborate efforts to delineate market boundaries, no such detail was needed here to find a substantial restraint on competition. Petitioner's other objections to the FTC's analysis are all attacks on the Commission's factual determinations, which (as the court of appeals ruled, Pet. App. 20a-24a) are amply supported by the record.

A. The Commission's Analysis In This Case Was Consistent With This Court's Decisions Holding That The Rule Of Reason Requires A Careful Yet Flexible Inquiry Into Competitive Effects, Tailored To The Circumstances Of Each Case

Antitrust tribunals apply the rule of reason to evaluate the competitive significance of a wide variety of business and trade association practices, which can vary greatly in their complexity, purpose, and effect. For this reason—and in keeping with its common law origins—the rule of reason is "used to give the [antitrust laws] both flexibility and defini-

tion." *Prof. Eng'rs*, 435 U.S. at 688.[25] The Court has emphasized the flexibility of the rule of reason on several occasions, and has instructed that the requirements of analysis under the rule vary according to the circumstances presented. For example, in *NCAA*, *supra*, the Court declined to apply the *per se* rule, but invalidated without detailed market analysis the NCAA's restrictions on televising football games under the rule of reason. The Court rejected on both legal and factual grounds the NCAA's argument that its television plan could not be condemned under the rule of reason because it lacked market power:

> As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."

468 U.S. at 109 (quoting *Prof. Eng'rs*, 435 U.S. at 692).

The Court took a similar approach to rule of reason analysis in *IFD*, *supra*, a case quite similar to the present one. There, a state association of dentists had agreed not to provide copies of dental x-rays to insurers, who sought to use them to assess the propriety of the dentists' services and

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[25] This Court's decision in *Professional Engineers* itself displayed the flexibility of the rule of reason. The Court held that the Society's ban on competitive bidding, while not "price fixing as such," "impede[d] the ordinary give and take of the market place," and "deprive[d] the customer of the ability to utilize and compare prices in selecting engineering services." 435 U.S. at 692-693 (internal quotation marks omitted). Under those circumstances, the Court ruled that "no elaborate industry analysis is required" to condemn the bidding ban under the rule of reason. *Id.* at 692. Moreover, the Court did so without a finding of market power. See *id.* at 681-682 (Society had membership of 69,000 of 325,000 registered professional engineers).

charges. See 476 U.S. at 448-450. The Court rejected arguments in support of the agreement similar to the ones petitioner advances here—namely, "that the Commission's findings were inadequate because of its failure both to offer a precise definition of the market in which the Federation was alleged to have restrained competition and to establish that the Federation had the power to restrain competition in that market." *Id.* at 453. Although the Court held that the refusal to provide x-rays did not amount to a *per se* illegal boycott, it nevertheless ruled that "[a]pplication of the Rule of Reason to these facts is not a matter of any great difficulty," in light of the nature of the restraint and the Commission's finding of actual effects on competition. *Id.* at 459.

In so ruling, the Court made two points about the role of market power evidence in rule of reason cases. First, some restraints are unlawful under the rule of reason without any proof of market power at all: "absence of proof of market power does not justify a naked restriction on price or output." *IFD*, 476 U.S. at 460 (quoting *NCAA*, 468 U.S. at 109). Second, other restraints may be shown to be unlawful without extensive market power analysis. As the Court explained, "even if the restriction imposed by the Federation [was] not sufficiently 'naked' to call this principle [condemnation without proof of market power] into play, the Commission's failure to engage in detailed market analysis [was] not fatal to its finding of a violation of the Rule of Reason." *Ibid.* The Court reasoned that "Federation dentists constituted heavy majorities of the practicing dentists" and that insurers were actually unable to obtain x-rays, *ibid.*, and, therefore, that the restraint had "adverse effects on competition," *id.* at 461. The Court further reasoned that, even though the purpose of obtaining x-rays was to minimize costs, the restraint was "likely enough to disrupt the proper functioning of the price-setting mechanism of the market

that it may be condemned even absent proof that it resulted in higher prices." *Id.* at 461-462.

In the present case, the Commission hewed closely to this analysis and to the Court's teachings "that the rule of reason contemplates a flexible enquiry, examining a challenged restraint *in the detail necessary to understand its competitive effect*." Pet. App. 74a (citing *NCAA*, 468 U.S. at 103-110) (emphasis added). The Commission referred to its rule of reason analysis as "simple and short" (*ibid.*), which it was, in comparison to the lengthier analysis that may be needed in (for example) a merger case, where it may be necessary to delineate numerous geographic markets. But the Commission—which has extensive experience with the effect of advertising restrictions—reached its finding of a violation of Section 5 only after a careful assessment of the record regarding the actual and likely effects of petitioner's highly restrictive advertising rules on consumers of dental services in California. See *id.* at 74a-84a. Based on its finding that "the general proposition regarding the importance of advertising to competition carries over to the instant situation," *id.* at 60a., the Commission reasonably concluded that petitioner's restrictions on advertising had adverse effects on competition, for an agreement that "limit[s] consumer choice by impeding the 'ordinary give and take of the marketplace' cannot be sustained under the Rule of Reason." *IFD*, 476 U.S. at 459 (quoting *Prof. Eng'rs*, 435 U.S. at 692).[26]

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[26] Arguments advanced by petitioner (Br. 27, 31) regarding the supposed need to confine "quick look" analysis to a "limited class of cases" are therefore based on a misconception of the Commission's ruling. In giving what it called a "quick look" to petitioner's restraints, the FTC did not engage in a separate category of antitrust analysis. Rather, it applied the rule of reason in the particular context of advertising restrictions, in which it has considerable expertise. That context permitted it to take into account the well-established, fundamental role of advertising in the proper functioning of a free-market economy. See pp. 36-38, *infra*. Furthermore, consistent with the requirements of rule of reason analysis, the Com-

Petitioner (Br. 27, 45-46) and amicus NCAA (Br. 11-12) go far afield in urging the Court to establish the contours of the analysis required under the rule of reason for all possible cases. All that is at issue here is whether the restraints on advertising in this case required a more extensive analysis than the Commission afforded them. In asserting the need for a "full rule of reason analysis," petitioner would have the Court require an exhaustive market analysis *whenever* an antitrust tribunal applies the rule of reason (outside some ill-defined class of restraints in which it concedes that a "quick look" is sufficient, Br. 31). Such a rigid requirement is not required by this Court's precedents, however, and can stand only as an unnecessary roadblock to a measured and sensible application of the antitrust laws, especially in contexts like the present case, involving extensive suppression of information that consumers find highly useful.[27]

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mission considered the procompetitive justifications offered by petitioner in support of its restraints. See pp. 40-43, *infra*.

[27] Petitioner and amicus NCAA elsewhere appear to suggest that virtually *any* proffer of an ostensibly procompetitive effect has the effect of necessitating a "full rule of reason analysis." Pet. Br. 37-38; NCAA Br. 16-17. The cases on which they rely, however, dealt with restrictions quite unlike those in the present case, which involves the well-understood effects of a suppression of advertising of discounts and comparative price and quality claims. In *United States* v. *Brown University*, 5 F.3d 658 (3d Cir. 1993), the court was presented with novel arguments about the distribution of financial aid to students based on need, and concluded that such arguments required more extensive analysis. See *id.* at 669, 678-679. *Vogel* v. *American Society of Appraisers*, 744 F.2d 598 (7th Cir. 1984), was an antitrust challenge to an ethical rule against a percentage-based pricing system for appraisals. The court emphasized that the ethical rule appeared to promote, rather than restrict, competition, because "[t]he apparent tendency" of the outlawed pricing system was "to raise, not lower, the absolute level of appraisal fees." *Id.* at 602. Neither case suggests that an exhaustive market analysis is required whenever a defendant asserts a procompetitive theory.

B. The Commission Properly Found, Based On Substantial Evidence, That Petitioner's Advertising Restrictions Had Anticompetitive Effects.

The Commission engaged in an extensive analysis of the effects of petitioner's advertising restrictions, and concluded that they harmed competition by "depriv[ing] consumers of information they value and of healthy competition for their patronage." Pet. App. 78a; see also *id.* at 55a-60a, 63a-67a, 74-77a. That conclusion was based on two intermediate findings. First, the Commission found that the actual effect of petitioner's restrictions was to suppress a vast range of truthful and nondeceptive advertising. Second, it found that the restraints were harmful to consumers of dental services, because the advertising that was suppressed would have been useful to them in making choices about dental services. Those conclusions are fully supported by the record.

1. As detailed above (pp. 9-10, *supra*), the Commission amassed an extensive record of the ways in which petitioner foreclosed its members from providing useful information about price and quality to consumers. Based on that record, the Commission concluded that petitioner had "effectively preclude[d] its members from making low fee or across-the-board discount claims." Pet. App. 63a. It also found that "[t]he nonprice advertising CDA proscribed is vast," and that petitioner had, in practice, "prohibit[ed] all quality claims." *Id.* at 74a-75a.

These well-supported factual findings refute any notion that petitioner's onerous disclosure requirements, in particular, could have had the effect of "giv[ing] consumers *more* information, not *less*" (Pet. Br. 34). Although petitioner's policy concerning the advertising of discounts is superficially couched in terms of disclosure requirements, the Commission found that the *actual* effect of those requirements was "prohibitive" of across-the-board discount advertising. Pet. App. 66a-67a, 85a-86a. In reaching that factual finding, the

Commission employed its expertise—developed in its dual function of protecting consumers against deceptive practices and preventing anticompetitive acts—in evaluating the practical effect of disclosure requirements. As petitioner points out (Br. 34-35), there are circumstances in which disclosure requirements are highly beneficial to consumers, and the FTC does in some cases mandate disclosures to prevent consumer deception. But the FTC is aware (as is this Court, see *Morales* v. *Trans World Airlines*, 504 U.S. 374, 389-390 (1992)), that excessively burdensome disclosure requirements can have the "paradoxical effect" of stifling information that might benefit consumers. See Pet. App. 66a. The FTC is often called upon to make practical judgments about the actual or likely effects of disclosure requirements, and it properly concluded in this case that petitioner's requirements were so onerous that they operated in actual effect as a "broad ban" on discount advertising. *Id.* at 67a. Indeed, petitioner appears to concede (Br. 36) the unreasonableness of its requirement that across-the-board discounts on all dental procedures be accompanied by the full litany of mandated disclosures.[28]

2. The Commission also addressed at length the significance to consumers of petitioner's restraints. It was not just the fact that dissemination of truthful information was forbidden, but particularly the kind of advertising banned—relating to the price and quality of service offered—that

[28] Petitioner nonetheless speculates (Br. 36) that its member dentists, even if effectively (and unreasonably) precluded from advertising across-the-board discounts by its restrictions, should be able to comply with a requirement that advertised discounts on individual services be accompanied by a litany of disclosures. The Commission found, however, that "the truthful offer of a discount from the price ordinarily charged by a dentist for services is not deceptive." Pet. App. 85a. It also noted that petitioner's restrictions went far beyond any restriction that would be necessary to prevent dentists from engaging in "chicanery" such as selectively inflating the price from which the discount is computed. *Ibid.*

concerned the Commission. As the Court has emphasized, advertising "performs an indispensable role in the allocation of resources in a free enterprise system." *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 364 (1977); see also *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); *AMA*, 94 F.T.C. at 1004; *Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988); *American Dental Ass'n*, 94 F.T.C. 403, 405-406 (1979), modified, 100 F.T.C. 448 (1982).

On the facts of this case, the Commission found fully applicable the well-established importance of price and quality advertising to consumers. Advertising, it found, "is important to consumers of dental services and plays a significant role in the market for dental services." Pet. App. 60a; see *id.* at 78a. Those findings by the Commission echo those of the ALJ, who concluded that petitioner's "conspiracy has injured those consumers who rely on advertising to choose dentists." *Id.* at 261a. The record showed that advertisements highlighting low or discount prices, comfort and gentleness in the provision of dental services, or both were effective in attracting consumers (and much more effective than "generic advertising without comparative quality or price claims"), demonstrating the importance of such information to consumers. *Id.* at 77a.[29] Accordingly, the Commission properly

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[29] Studies show that anxiety about discomfort in dental procedures is one of the principal reasons that consumers do not obtain needed dental services. See J. Elter, et al., *Assessing Dental Anxiety, Dental Care Use and Oral Status in Older Adults*, 128 J. Amer. Dent. Ass'n 591 (May 1997); N. Corah, et al., *The Dentist-Patient Relationship: Perceived Dentist Behaviors That Reduce Patient Anxiety and Increase Satisfaction*, 116 J. Amer. Dent. Ass'n 73 (Jan. 1988); N. Corah, et al., *Dentists' Management of Patients' Fear and Anxiety*, 110 J. Amer. Dent. Ass'n 734 (May 1985). Along with allaying concerns about pain, lower fees and a "friendlier and more caring" dentist are three of the four top factors that adults reported would make them more likely to visit a dentist. See *Influences on Dental*

found that information about price as well as "quality and sensitivity to fears is important to consumers and determines, in part, a patient's selection of a particular dentist." *Id.* at 76a-77a.

Petitioner attempts to minimize the competitive significance of some of the banned ads. It argues, for example (Br. 36-37), that discount advertising conveys "negligible informational content." The short answer to such contentions is that, in a free-market economy, it is generally up to consumers to decide what information is useful and what is not. See generally N. Averitt & R. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 Antitrust L.J. 713 (1997). The advertising of discounted prices and references to "affordable fees" can signal to the consumer the potential availability of cost savings, which can then be investigated further.[30] Similarly, claims about quality of service, although dismissed by petitioner as "subjective" (Br. 40), may convey useful information concerning the attitudes and approach of the dentist—such as commitment to punctuality, to understanding the patient's anxieties, or simply to providing high-quality care. As this Court has recognized, advertising can benefit

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Visits, 29 ADA News 4 (Nov. 2, 1998) (citing ADA Survey Center, *1997 Survey of Consumer Attitudes and Behaviors Regarding Dental Issues*).

[30] Petitioner's citation to an article written by FTC Chairman Pitofsky two decades ago does not advance its argument. That article emphasized the risk to consumers and the competitive process from overregulation of discount price claims "because of the special proconsumer and procompetitive effects of aggressive price competition." R. Pitofsky, *Advertising Regulation and the Consumer Movement*, in *Issues in Advertising: The Economics of Persuasion* 27, 42 (D. Tuerck ed., 1978). Thus, while Chairman Pitofsky stated that a claim of "10 percent off" may be ambiguous and therefore ignored by consumers, he also stressed that regulation of such claims "entails considerable social and economic costs," *id.* at 39, a proposition entirely consistent with this Court's cases on advertising restrictions.

consumers even if it requires further inquiry. See *Morales*, 504 U.S. at 388-389 (noting utility of advertisements for discounted air fares); *Prof. Eng'rs*, 435 U.S. at 692-693 (rejecting argument that "inherently imprecise" pricing information was of no value to consumers). Petitioner "is not entitled to pre-empt the working of the market by deciding for itself that its [members' patients] do not need that which they demand." *IFD*, 476 U.S. at 462.

3. The Commission's conclusions in this case are consistent with long-observed effects of advertising restrictions: they "increase the difficulty of discovering the lowest cost seller of acceptable ability[, and] * * * [reduce] the incentive to price competitively." *Bates*, 433 U.S. at 377. As the Commission also noted, the importance of advertising "attaches not only to price information, but to all material aspects of the transaction," including quality. Pet. App. 59a. Although the Commission found it unnecessary to "quantify[] the increase in price or reduction in output occasioned by [petitioner's] restraints" (*id.* at 78a), its conclusion that such results would ensue is supported by both the record and by "common sense and economic theory, upon both of which the FTC may reasonably rely." *IFD*, 476 U.S. at 456. Moreover, as this Court stressed in *IFD*, the market may be deemed harmed by concerted, artificial suppression of information even without direct proof of effects on prices:

> A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices.

Id. at 461-462.[31] Accordingly, the FTC's conclusion that petitioner's advertising restraints had anticompetitive effects is fully consistent with this Court's decisions and supported by the record.

C. The Commission Properly Found That the Restraints Lack Any Plausible Procompetitive Justification

Contrary to petitioner's contention, the FTC did not end its rule of reason inquiry once it determined that petitioner's restraints on truthful, nondeceptive advertisements had an anticompetitive effect. Rather, consistent with this Court's instructions about rule of reason analysis (*IFD*, 476 U.S. at 459; *Prof. Eng'rs*, 435 U.S. at 693-695), the FTC carefully considered petitioner's contentions that its advertising restrictions have procompetitive effects. See Pet. App. 84a-90a. The FTC fully recognizes that self-regulation by professional organizations "may serve to regulate and promote * * * competition" by preventing deceptive practices. See *Prof. Eng'rs*, 435 U.S. at 696. It also acknowledged in this case that "the prevention of false and misleading advertising is indeed a laudable purpose." Pet. App. 84a. It found, however, that petitioner's advertising bans were not tailored to that purpose, but instead "swept aside" price and quality

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[31] Restraints on advertising, such as those in the present case, can increase a consumer's search costs in finding a dentist. The FTC has observed that agreements that increase consumer search costs are harmful to consumer welfare and form a proper concern of the antitrust laws. See *Detroit Auto Dealers Ass'n*, 111 F.T.C. 417, 495-496 (1989), aff'd in part and remanded, 955 F.2d 457 (6th Cir.), cert. denied, 506 U.S. 973 (1992). Furthermore, as the court of appeals recognized (Pet. App. 19a-20a), the concerted withholding of information that is of value to consumers may be viewed as a form of restriction on output. While the advertising information at issue here is not the principal output of dentists, neither were the x-rays at issue in *IFD*. In both cases, the information could be used, and was desired, by consumers (or insurers acting on their behalf) to make assessments regarding the purchase of dental services. Cf. *IFD*, 476 U.S. at 461-462.

advertising with "broad strokes," without regard to its potential for deception. *Id.* at 89a.

Before this Court, petitioner makes two principal arguments, neither of which has merit. With respect to price advertising, the sole procompetitive theory petitioner advances is that its disclosure requirements for advertising discounts will increase the amount of information provided to consumers. (Petitioner appears to make no argument in defense of its prohibition against comparative advertising claims such as "low fees" and "reasonable fees.") Because of that supposed potential for increased information, petitioner maintains (Br. 34-36) that a more detailed analysis of its restrictions was required. Whatever might be the merits of such a contention where disclosure requirements really do have a procompetitive potential, it cannot be sustained in this case, where (as we have explained) the FTC, employing its expertise in such matters, found that the *actual effect* of petitioner's onerous disclosure requirements, as they have been interpreted and enforced, is to suppress all across-the-board discounting claims. See p. 9, *supra*. The FTC therefore rejected petitioner's asserted procompetitive justification for its restraint only after finding it factually unsupportable.[32]

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[32] Petitioner maintains (Br. 30-31, 33) that its disclosure requirements require more extensive analysis because they are not "facially" anticompetitive (emphasizing that the literal terms of its Code of Ethics prohibit only false and deceptive advertising). The FTC, however, did not base its analysis on the *language* of Section 10 of petitioner's Code of Ethics, but rather on the actual enforcement of the advertising restrictions. As Professor Areeda noted, the phrase "facially unreasonable" as used in antitrust cases is "reminiscent of facially unconstitutional statutes" and thus "may seem to focus attention on the words on the face of an agreement." 7 P. Areeda, *Antitrust Law* ¶ 1508, at 405 (1986). In fact, as he pointed out, the phrase properly refers to a restraint about which a judgment can be made based on plausible arguments about anticompetitive effects without detailed proof. *Ibid.* Thus, the court of

With respect to its restrictions on quality claims, petitioner submits (Br. 38-39) that it may ban all such claims because they are "potentially misleading." This Court has suggested that *some* quality claims by professionals about performance may well be misleading and may therefore be restricted. See *Bates*, 433 U.S. at 366, 383-384. The Court has not held, however, that *all* quality claims by professionals—even claims that do not relate directly to the quality of performance, such as promises of punctuality and offers of a comfortable environment, designed to dispel anxiety about visiting the dentist (p. 5, n.5, *supra*)—are necessarily misleading. Indeed, *Bates* warned of the potential of overbroad advertising restrictions used to "perpetuate the market position of established [market participants]." *Id.* at 377-378. The Court has also admonished, with respect to state regulation of marketing by professionals, that "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Shapero* v. *Kentucky Bar Ass'n*, 486 U.S. 466, 478 (1988) (internal quotation marks omitted). That admonition is even more apt in the context of industry self-regulation, where the body imposing restrictions lacks full public accountability and may be subject to incentives to adopt approaches that restrict competition.

In the present case, drawing distinctions between deceptive and nondeceptive advertising is precisely what petitioner did *not* do. Instead, it imposed blanket bans on useful advertising claims without regard to whether they were truthful or deceptive. Furthermore, although it had every

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appeals correctly ruled that petitioner's advertising restrictions were "facially anticompetitive" (Pet. App. 24a), even though its understanding of the nature of petitioner's restraints required an examination of its conduct in enforcing those restraints, and not merely the language of its Code of Ethics.

opportunity to do so, petitioner made no effort to show any basis on which a prophylactic restraint might be justified, such as a history of abuse, or false and deceptive advertisements that could not be prevented effectively by a more narrowly tailored rule. Cf. *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 626-628 (1995). The Commission also expressly allowed petitioner to enforce "reasonable ethical guidelines * * * with respect to representations that [petitioner] reasonably believes would be false or deceptive." Pet. App. 30a. Generalized arguments about the procompetitive benefits of suppressing false and deceptive advertising therefore cannot sustain petitioner's overbroad restrictions.

D. The Commission's Market Power Analysis Of Petitioner's Restraints Was Appropriate

In light of the Commission's conclusions regarding the anticompetitive effects of petitioner's advertising restrictions, it did not find it necessary to perform an elaborate structural analysis of the markets in which petitioner's members conduct business. Pet. App. 78a. As the Commission noted, this Court "has indicated that when a court finds actual anticompetitive effects, no detailed examination is necessary to judge the practice unlawful." *Ibid.* n.19 (citing *NCAA* and *IFD*). Nevertheless, the Commission did examine market power, and it had an ample basis on which to conclude that petitioner had the ability "to impose the costs of its anticompetitive restrictions on California consumers of dental services," *id.* at 84a, which was the relevant determination.

The facts supporting that determination are straightforward. Fully 75% of California's practicing dentists (and 90% in one region) are members of petitioner.[33] Pet. App. 82a.

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[33] Compare *IFD*, where the Court affirmed the FTC's finding of an unlawful restraint of trade where 67% of the dentists in one area participated in the restraint. 476 U.S. at 451. The 75% figure in this case

The Commission found substantial barriers to entry and few close substitutes for the services offered by petitioner's members. *Id.* at 82a-83a.[34] It also found that petitioner had the power to require members and aspiring members to comply with the restrictions, because of the importance placed on membership by California dentists. *Id.* at 80a-81a. Given those findings (which the court of appeals upheld and which petitioner does not challenge here), the Commission properly concluded that conspiring members of petitioner had the power to impose their will on the market as a whole. See *id.* at 84a.

The FTC was not required to approach the issue of market power as if this were a merger case. Market power analysis is not an end in itself; it is a tool to help determine whether the challenged conduct is anticompetitive. See *IFD*, 476 U.S. at 460. Because the anticompetitive potential of different types of conduct varies, the appropriate market power analysis varies as well. See, *e.g.*, *NCAA*, 468 U.S. at 109-110; *IFD*, 476 U.S. at 460. Certain kinds of agreements challenged under the antitrust laws require an extensive structural analysis because it is not possible to reach a

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may actually understate petitioner's influence because its advertising strictures apply as well to affiliated employers, employees, and referral services. Pet. App. 81a.

[34] The ALJ found otherwise, Pet. App. 262a, but the Commission rejected that finding as predicated on an error of law, see *id.* at 83a. Contrary to the view of the ALJ, market power does not require a showing of "insurmountable" barriers to entry. Cf. U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines* §§ 3.1-3.4, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1997). Furthermore, although petitioner relies heavily on the rejected findings of the ALJ, the courts review the findings of the Commission, not the ALJ, and sustain the Commission's findings if they are supported by substantial evidence. See *Southwest Sunsites, Inc.* v. *FTC*, 785 F.2d 1431, 1437 (9th Cir.), cert. denied, 479 U.S. 828 (1986); see generally *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 493 (1951).

reasoned conclusion about the competitive effects of such agreements without an understanding of the market context. See *Northwest Wholesale Stationers*, 472 U.S. at 296 (buyer cooperatives); *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 334 (1961) (exclusive dealing arrangements). Similarly, in merger cases, the antitrust tribunal must predict the competitive effect of structural changes to the market, and so the inquiry ordinarily focuses on structural issues. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 335 (1962). By contrast, in cases involving conduct deemed unlawful *per se*, there is generally no need for market analysis because the conduct is conclusively presumed to be anticompetitive.

Other cases fall between these two poles. *NCAA*, for example, involved a restraint that the Court characterized as a naked restraint on output, which could be condemned without an "elaborate industry analysis." 468 U.S. at 109. In *IFD*, the Court suggested that the agreement was sufficiently anticompetitive on its face to fall within the *NCAA* analysis. 476 U.S. at 460. It also made clear, however, that even if that were not the case, a full structural analysis of the market was not required. *Ibid.*

In this case, the Commission and court of appeals properly relied on this Court's teaching in *IFD* that "the finding of actual, sustained adverse effects on competition in those areas where [petitioner's] dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis." 476 U.S. at 461; see also Pet. App. 24a (court of appeals noting that advertising restrictions imposed by such "large scale professional organizations" have substantial anticompetitive effects that can properly be condemned "without careful market definition") (quoting 7 P. Areeda, *Antitrust Law* ¶ 1503, at 377 (1986)). The advertising that petitioner bans

informs consumers so that they may compare competing market participants. If, as the Commission found, a combination comprising three-quarters of the practicing dentists in the State adheres to strict policies banning such advertising, then consumers will lack the information they desire, regardless of the actions of other market participants. Accordingly, once the Commission found that the restraint had anticompetitive effects and that petitioner could inflict those effects on the market as a whole, it was amply justified in concluding that petitioner "possesses the necessary market power to impose the costs of its anticompetitive restrictions on California consumers of dental services." Pet. App. 84a.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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