SUPREME COURT OF THE UNITED STATES

No. 97–1625

CALIFORNIA DENTAL ASSOCIATION, PETITIONER *v.* FEDERAL TRADE COMMISSION

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

[May 24, 1999]

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE KENNEDY, and JUSTICE GINSBURG join, concurring in part and dissenting in part.

I agree with the Court that the Federal Trade Commission has jurisdiction over petitioner, and I join Parts I and II of its opinion. I also agree that in a "rule of reason" antitrust case "the quality of proof required should vary with the circumstances," that "[w]hat is required . . . is an enquiry meet for the case," and that the object is a "confident conclusion about the principal tendency of a restriction." *Ante*, at 23–24 (internal quotation marks omitted). But I do not agree that the Court has properly applied those unobjectionable principles here. In my view, a traditional application of the rule of reason to the facts as found by the Commission requires affirming the Commission– just as the Court of Appeals did below.

I

The Commission's conclusion is lawful if its "factual findings," insofar as they are supported by "substantial evidence," "make out a violation of Sherman Act §1." *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447, 454–455 (1986). To determine whether that is so, I would not simply ask whether the restraints at issue are anticompetitive overall. Rather, like the Court of Appeals (and

the Commission), I would break that question down into four classical, subsidiary antitrust questions: (1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?

A

The most important question is the first: What are the specific restraints at issue? See, *e.g.*, *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 98–100 (1984) (NCAA); *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 21–23 (1979). Those restraints do *not* include merely the agreement to which the California Dental Association's (Dental Association or Association) ethical rule literally refers, namely, a promise to refrain from advertising that is "'false or misleading in any material respect.'" *Ante*, at 2 (quoting California Dental Code of Ethics §10 (1993), App. 33). Instead, the Commission found a set of restraints arising out of the way the Dental Association implemented this innocent-sounding ethical rule in practice, through advisory opinions, guidelines, enforcement policies, and review of membership applications. *In re California Dental Assn.*, 121 F. T. C. 190 (1996). As implemented, the ethical rule reached beyond its nominal target, to prevent truthful and nondeceptive advertising. In particular, the Commission determined that the rule, in practice:

> (1) "precluded advertising that characterized a dentist's fees as being low, reasonable, or affordable," *Id.*, at 301.
>
> (2) "precluded advertising . . . of across the board discounts," *ibid.*; and
>
> (3) "prohibit[ed] all quality claims," *id.*, at 308.

Whether the Dental Association's basic rule *as implemented* actually restrained the truthful and nondeceptive advertising of low prices, across-the-board discounts, and quality service are questions of fact. The Administrative Law Judge (ALJ) and the Commission may have found those questions difficult ones. But both the ALJ and the Commission ultimately found against the Dental Association in respect to these facts. And the question for us— whether those agency findings are supported by substantial evidence, see *Indiana Federation*, *supra*, at 454–455— is not difficult.

The Court of Appeals referred explicitly to some of the evidence that it found adequate to support the Commission's conclusions. It pointed out, for example, that the Dental Association's "advisory opinions and guidelines indicate that . . . descriptions of prices as 'reasonable' or 'low' do not comply" with the Association's rule; that in "numerous cases" the Association "advised members of objections to special offers, senior citizen discounts, and new patient discounts, apparently without regard to their truth"; and that one advisory opinion "expressly states that claims as to the quality of services are inherently likely to be false or misleading," all "without any particular consideration of whether" such statements were "true or false." 128 F. 3d 720, 729 (CA9 1997).

The Commission itself had before it far more evidence. It referred to instances in which the Association, without regard for the truthfulness of the statements at issue, recommended denial of membership to dentists wishing to advertise, for example, "reasonable fees quoted in advance," "major savings," or "making teeth cleaning . . . inexpensive." 121 F. T. C., at 301. It referred to testimony that "across-the-board discount advertising in literal compliance with the requirements 'would probably take two pages in the telephone book' and '[n]obody is going to really advertise in that fashion.'" *Id.*, at 302. And it

pointed to many instances in which the Dental Association suppressed such advertising claims as "we guarantee all dental work for 1 year," "latest in cosmetic dentistry," and "gentle dentistry in a caring environment." *Id.*, at 308–310.

I need not review the evidence further, for this Court has said that "substantial evidence" is a matter for the courts of appeals, and that it "will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 490–491 (1951). I have said enough to make clear that this is not a case warranting our intervention. Consequently, we must decide only the basic legal question whether the three restraints described above unreasonably restrict competition.

B

Do each of the three restrictions mentioned have "the potential for genuine adverse effects on competition"? *Indiana Federation*, 476 U. S., at 460; 7 P. Areeda, Antitrust Law ¶1503a, pp. 372–377 (1986) (hereinafter Areeda). I should have thought that the anticompetitive tendencies of the three restrictions were obvious. An agreement not to advertise that a fee is reasonable, that service is inexpensive, or that a customer will receive a discount makes it more difficult for a dentist to inform customers that he charges a lower price. If the customer does not know about a lower price, he will find it more difficult to buy lower price service. That fact, in turn, makes it less likely that a dentist will obtain more customers by offering lower prices. And that likelihood means that dentists will prove less likely to offer lower prices. But why should I have to spell out the obvious? To restrain truthful advertising about lower prices is likely to restrict competition in respect to price— "the central nerv-

ous system of the economy." *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 226, n. 59 (1940); cf., *e.g., Bates* v. *State Bar of Ariz.,* 433 U. S. 350, 364 (1977) (price advertising plays an "indispensable role in the allocation of resources in a free enterprise system"); *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748, 765 (1976). The Commission thought this fact sufficient to hold (in the alternative) that the price advertising restrictions were unlawful *per se.* See 121 F. T. C., at 307; cf. *Socony-Vacuum, supra,* at 222–228 (finding agreement among competitors to buy "spot-market oil" unlawful *per se* because of its tendency to restrict price competition). For present purposes, I need not decide whether the Commission was right in applying a *per se* rule. I need only assume a rule of reason applies, and note the serious anticompetitive tendencies of the price advertising restraints.

The restrictions on the advertising of service quality also have serious anticompetitive tendencies. This is not a case of "mere puffing," as the FTC recognized. See 121 F. T. C., at 317–318; cf. *ante,* at 21. The days of my youth, when the billboards near Emeryville, California, home of AAA baseball's Oakland Oaks, displayed the name of "Painless" Parker, Dentist, are long gone– along with the Oakland Oaks. But some parents may still want to know that a particular dentist makes a point of "gentle care." Others may want to know about 1-year dental work guarantees. To restrict that kind of service quality advertisement is to restrict competition over the quality of service itself, for, unless consumers know, they may not purchase, and dentists may not compete to supply that which will make little difference to the demand for their services. That, at any rate, is the theory of the Sherman Act. And it is rather late in the day for anyone to deny the significant anticompetitive tendencies of an agreement that restricts competition in any legitimate respect, see, *e.g., Paramount*

Famous Lasky Corp. v. *United States*, 282 U. S. 30, 43 (1930); *United States* v. *First Nat. Pictures, Inc.*, 282 U. S. 44, 54–55 (1930), let alone one that inhibits customers from learning about the quality of a dentist's service.

Nor did the Commission rely solely on the unobjectionable proposition that a restriction on the ability of dentists to advertise on quality is likely to limit their incentive to compete on quality. Rather, the Commission pointed to record evidence affirmatively establishing that quality-based competition is important to dental consumers in California. 121 F. T. C., at 309–311. Unsurprisingly, these consumers choose dental services based at least in part on "information about the type and quality of service." *Id.*, at 249. Similarly, as the Commission noted, the ALJ credited testimony to the effect that "advertising the comfort of services will 'absolutely' bring in more patients," and, conversely, that restraining the ability to advertise based on quality would decrease the number of patients that a dentist could attract. *Id.*, at 310. Finally, the Commission looked to the testimony of dentists who themselves had suffered adverse effects on their business when forced by petitioner to discontinue advertising quality of care. See *id.*, at 310–311.

The FTC found that the price advertising restrictions amounted to a "naked attempt to eliminate price competition." *Id.*, at 300. It found that the service quality advertising restrictions "deprive consumers of information they value and of healthy competition for their patronage." *Id.*, at 311. It added that the "anticompetitive nature of these restrictions" was "plain." *Ibid.* The Court of Appeals agreed. I do not believe it possible to deny the anticompetitive tendencies I have mentioned.

C

We must also ask whether, despite their anticompetitive tendencies, these restrictions might be justified by other

procompetitive tendencies or redeeming virtues. See 7 Areeda, ¶1504, at 377–383. This is a closer question– at least in theory. The Dental Association argues that the three relevant restrictions are inextricably tied to a legitimate Association effort to restrict false or misleading advertising. The Association, the argument goes, had to prevent dentists from engaging in the kind of truthful, nondeceptive advertising that it banned in order effectively to stop dentists from making unverifiable claims about price or service quality, which claims would mislead the consumer.

The problem with this or any similar argument is an empirical one. Notwithstanding its theoretical plausibility, the record does not bear out such a claim. The Commission, which is expert in the area of false and misleading advertising, was uncertain whether petitioner had even *made* the claim. It characterized petitioner's efficiencies argument as rooted in the (unproved) factual assertion that its ethical rule "challenges *only* advertising that is false or misleading." 121 F. T. C., at 316 (emphasis added). Regardless, the Court of Appeals wrote, in respect to the price restrictions, that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing." 128 F. 3d, at 728. With respect to quality advertising, the Commission stressed that the Association "offered 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 it restricts." 121 F. T. C., at 319. Nor did the Court of Appeals think that the Association's unsubstantiated contention that "claims about quality are inherently unverifiable and therefore misleading" could "justify banning all quality claims without regard to whether they are, in fact, false or misleading." 128 F. 3d, at 728.

With one exception, my own review of the record reveals

no significant evidentiary support for the proposition that the Association's members must agree to ban truthful price and quality advertising in order to stop untruthful claims. The one exception is the obvious fact that one can stop untruthful advertising if one prohibits all advertising. But since the Association made virtually no effort to sift the false from the true, see 121 F. T. C., at 316–317, that fact does not make out a valid antitrust defense. See *NCAA*, 468 U. S., at 119; 7 Areeda, ¶1505, at 383–384.

In the usual Sherman Act §1 case, the defendant bears the burden of establishing a procompetitive justification. See *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679, 695 (1978); 7 Areeda, ¶1507b, at 397; 11 H. Hovenkamp, Antitrust Law ¶1914c, pp. 313–315 (1998); see also *Law* v. *National Collegiate Athletic Assn.*, 134 F. 3d 1010, 1019 (CA10), cert. denied, 525 U. S. ___ (1998); *United States* v. *Brown Univ.*, 5 F. 3d 658, 669 (CA3 1993); *Capital Imaging Associates* v. *Mohawk Valley Medical Associates, Inc.*, 996 F. 2d 537, 543 (CA2), cert. denied, 510 U. S. 947 (1993); *Kreuzer* v. *American Academy of Periodontology*, 735 F. 2d 1479, 1492–1495 (CADC 1984). And the Court of Appeals was correct when it concluded that no such justification had been established here.

D

I shall assume that the Commission must prove one additional circumstance, namely, that the Association's restraints would likely have made a real difference in the marketplace. See 7 Areeda, ¶1503, at 376–377. The Commission, disagreeing with the ALJ on this single point, found that the Association did possess enough market power to make a difference. In at least one region of California, the mid-Peninsula, its members accounted for more than 90% of the marketplace; on average they accounted for 75%. See 121 F. T. C., at 314. In addition, entry by new dentists into the market place is fairly diffi-

cult. Dental education is expensive (leaving graduates of dental school with $50,000–$100,000 of debt), as is opening a new dentistry office (which costs $75,000–$100,000). *Id.*, at 315–316. And Dental Association members believe membership in the Association is important, valuable, and recognized as such by the public. *Id.*, at 312–313, 315–316.

These facts, in the Court of Appeals' view, were sufficient to show "enough market power to harm competition through [the Association's] standard setting in the area of advertising." 128 F. 3d, at 730. And that conclusion is correct. Restrictions on advertising price discounts in Palo Alto may make a difference because potential patients may not respond readily to discount advertising by the handful (10%) of dentists who are not members of the Association. And that fact, in turn, means that the remaining 90% will prove less likely to engage in price competition. Facts such as these have previously led this Court to find market power– unless the defendant has overcome the showing with strong contrary evidence. See, *e.g.*, *Indiana Federation*, 476 U. S., at 456–457; cf. *United States* v. *Loew's Inc.*, 371 U. S. 38, 45 (1962); *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 341–344 (1962); accord, *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 424 (CA2 1945). I can find no reason for departing from that precedent here.

II

In the Court's view, the legal analysis conducted by the Court of Appeals was insufficient, and the Court remands the case for a more thorough application of the rule of reason. But in what way did the Court of Appeals fail? I find the Court's answers to this question unsatisfactory– when one divides the overall Sherman Act question into its traditional component parts and adheres to traditional judicial practice for allocating the burdens of persuasion in

an antitrust case.

Did the Court of Appeals misconceive the anticompetitive tendencies of the restrictions? After all, the object of the rule of reason is to separate those restraints that "may suppress or even destroy competition" from those that "merely regulat[e] and perhaps thereby promot[e] competition." *Board of Trade of Chicago* v. *United States,* 246 U. S. 231, 238 (1918). The majority says that the Association's "advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition." *Ante,* at 14. It adds that

> "advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment as obviously comparable to classic horizontal agreements to limit output or price competition." *Ante,* at 15.

And it criticizes the Court of Appeals for failing to recognize that "the restrictions at issue here are very far from a total ban on price or discount advertising" and that "the particular restrictions on professional advertising could have different effects from those 'normally' found in the commercial world, even to the point of promoting competition . . . ." *Ante,* at 16.

The problem with these statements is that the Court of Appeals did consider the relevant differences. It *rejected* the legal "treatment" customarily applied "to classic horizontal agreements to limit output or price competition"—*i.e.*, the FTC's (alternative) *per se* approach. See 128 F. 3d, at 726–727. It did so because the Association's "policies do not, on their face, ban truthful nondeceptive ads"; instead, they "have been enforced in a way that restricts truthful advertising." *Id.*, at 727. It added that "[t]he value of restricting false advertising . . . counsels some caution in attacking rules that purport to do so but merely sweep too broadly." *Ibid.*

Did the Court of Appeals misunderstand the nature of an anticompetitive effect? The Court says:

> "If quality advertising actually induces some patients to obtain more care than they would in its absence, then restricting such advertising would reduce the demand for dental services, not the supply; and . . . the producers' supply . . . is normally relevant in determining whether a . . . limitation has the anticompetitive effect of artificially raising prices." *Ante*, at 19.

But if the Court means this statement as an argument against the anticompetitive tendencies that flow from an agreement not to advertise service quality, I believe it is the majority, and not the Court of Appeals, that is mistaken. An agreement not to advertise, say, "gentle care" is anticompetitive because it imposes an artificial barrier against each dentist's independent decision to advertise gentle care. That barrier, in turn, tends to inhibit those dentists who want to supply gentle care from getting together with those customers who want to buy gentle care. See P. Areeda & H. Hovenkamp, Antitrust Law ¶1505´, p. 404 (Supp. 1998). There is adequate reason to believe that tendency present in this case. See *supra*, at 5–6.

Did the Court of Appeals inadequately consider possible procompetitive justifications? The Court seems to think so, for it says:

> "[T]he [Association's] rule appears to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information (and hence competition) created by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators)." *Ante*, at 17–18.

That may or may not be an accurate assessment of the Association's motives in adopting its rule, but it is of limited relevance. Cf. *Chicago Board of Trade, supra*, at 238. The basic question is whether this, or some other, theoretically redeeming virtue in fact offsets the restrictions' anticompetitive effects in this case. Both court and Commission adequately answered that question.

The Commission found that the defendant did not make the necessary showing that a redeeming virtue existed in practice. See 121 F. T. C., at 319–320. The Court of Appeals, asking whether the rules, as enforced, "augment[ed] competition and increase[d] market efficiency," found the Commission's conclusion supported by substantial evidence. 128 F. 3d, at 728. That is why the court said that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing"– which is to say that the record provides no evidence that the effects, though anticompetitive, are nonetheless redeemed or justified. *Ibid.*

The majority correctly points out that "petitioner alone would have had the incentive to introduce such evidence" of procompetitive justification. *Ante*, at 18. (Indeed, that is one of the reasons defendants normally bear the burden of persuasion about redeeming virtues. See *supra*, at 8.) But despite this incentive, petitioner's brief in this Court offers nothing concrete to counter the Commission's conclusion that the record does not support the claim of justification. Petitioner's failure to produce such evidence itself "explain[s] why [the lower court] gave no weight to the . . . suggestion that restricting difficult-to-verify claims about quality or patient comfort would have a procompetitive effect by preventing misleading or false claims that distort the market." *Ante*, at 20–21.

With respect to the restraint on advertising across-the-board discounts, the majority summarizes its concerns as follows: "Assuming that the record in fact supports the

conclusion that the [Association's] disclosure rules essentially bar advertisement of [such] discounts, it does not obviously follow that such a ban would have a net anticompetitive effect here." *Ante*, at 17. I accept, rather than assume, the premise: The FTC found that the disclosure rules did bar advertisement of across-the-board discounts, and that finding is supported by substantial evidence. See *supra*, at 3–4. And I accept as *literally* true the conclusion that the Court says follows from that premise, namely, that "net anticompetitive effects" do not *"obviously"* follow from that premise. But obviousness is not the point. With respect to any of the three restraints found by the Commission, whether "net anticompetitive effects" follow is a matter of how the Commission, and, here, the Court of Appeals, have answered the questions I laid out at the beginning. See *supra*, at 2. Has the Commission shown that the restriction has anticompetitive tendencies? It has. Has the Association nonetheless shown offsetting virtues? It has not. Has the Commission shown market power sufficient for it to believe that the restrictions will likely make a real world difference? It has.

The upshot, in my view, is that the Court of Appeals, applying ordinary antitrust principles, reached an unexceptional conclusion. It is the same legal conclusion that this Court itself reached in *Indiana Federation*– a much closer case than this one. There the Court found that an agreement by dentists not to submit dental X rays to insurers violated the rule of reason. The anticompetitive tendency of that agreement was to reduce competition among dentists in respect to their willingness to submit X rays to insurers, see 476 U. S., at 456– a matter in respect to which consumers are relatively indifferent, as compared to advertising of price discounts and service quality, the matters at issue here. The redeeming virtue in *Indiana Federation* was the alleged undesirability of having insurers consider a range of matters when deciding

whether treatment was justified– a virtue no less plausible, and no less proved, than the virtue offered here. See *id.*, at 462–464. The "power" of the dentists to enforce their agreement was no greater than that at issue here (control of 75% to 90% of the relevant markets). See *id.*, at 460. It is difficult to see how the two cases can be reconciled.

* * *

I would note that the form of analysis I have followed is not rigid; it admits of some variation according to the circumstances. The important point, however, is that its allocation of the burdens of persuasion reflects a gradual evolution within the courts over a period of many years. That evolution represents an effort carefully to blend the procompetitive objectives of the law of antitrust with administrative necessity. It represents a considerable advance, both from the days when the Commission had to present and/or refute every possible fact and theory, and from antitrust theories so abbreviated as to prevent proper analysis. The former prevented cases from ever reaching a conclusion, cf. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 266 (1960), and the latter called forth the criticism that the "Government always wins," *United States* v. *Von's Grocery Co.*, 384 U. S. 270, 301 (1966) (Stewart, J., dissenting). I hope that this case does not represent an abandonment of that basic, and important, form of analysis.

For these reasons, I respectfully dissent from Part III of the Court's opinion.