97- 97 1625 APR 3 1998

IN THE

Supreme Court of the United States

OCTOBER TERM 1997

CALIFORNIA DENTAL ASSOCIATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Trade Commission (the "Commission") issued an administrative complaint alleging that the California Dental Association ("CDA"), a non-profit professional association, violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by prohibiting member dentists, through its Code of Ethics, from engaging in false or misleading advertising. Despite the finding by the Administrative Law Judge that CDA's enforcement of its Code of Ethics "has no negative impact on competition," the Commission and the Court of Appeals held that CDA violated the antitrust laws. The two basic questions presented by this petition are:

1. Whether the Commission has jurisdiction over nonprofit professional associations.

2. Whether a nonprofit professional association violates the antitrust laws under the rule of reason when its advertising disclosure requirements are animated by procompetitive purposes, do not directly affect price or output, and have no negative impact on competition.

RULE 29.1 LISTING

The California Dental Association has no parent companies or nonwholly owned subsidiaries.

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

Petitioner, CDA, respectfully prays that a writ of certiorari issue to review the judgments of the Court of Appeals for the Ninth Circuit entered on October 22, 1997 and January 28, 1998.

OPINIONS BELOW

The opinion of the court of appeals is reported at 128 F.3d 720 and is reproduced in the Appendix at 8a. The order denying rehearing is reproduced in the Appendix at 266a. The opinion of the Commission and the initial decision of the Administrative Law Judge ("ALJ") are reproduced in the Appendix at 43a and 159a, respectively.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1997. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1993).

STATUTORY PROVISIONS

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . .

Section 4 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 44, provides in pertinent part:

> The words defined in this section shall have the following meaning when found in this subchapter, to wit:
>
> * * * *

> "Corporation" shall be deemed to include any company . . . or association, which is organized to carry on business for its own profit or that of its members . . . .

Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), provides in pertinent part:

> (1) Unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
>
> (2) The Commission is hereby empowered and directed to prevent persons, partnerships or corporations . . . from using unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce.

STATEMENT OF THE CASE

This case involves a nonprofit professional association charged with restraining trade by enforcing a provision of its code of ethics which bars false and misleading advertising. The case has been controversial from its outset, resulting in differing methods of analysis at each level of adjudication and split decisions by both the Commission and the Ninth Circuit. The Commission majority held that CDA's Code of Ethics violated Section 5 of the FTC Act, 15 U.S.C. § 45, despite the ALJ's finding that

> the activities of the California Dental Association with respect to their enforcement of their Code of Ethics relative to advertising has *no impact on competition* in any market in the State of California, *particularly with respect to price and output.*

App. 246a (emphasis added). The panel majority of the Ninth Circuit affirmed the Commission's decision, raising two significant issues of antitrust law: *first,* does the Commission have jurisdiction over CDA as a nonprofit professional association; and *second,* can a prohibition against false

and misleading advertising which has been affirmatively found to have no impact on competition, nonetheless violate the antitrust laws under the rule of reason.

1. Factual Background

a. The California Dental Association

CDA is an association of dentists whose principal purposes are to promote high professional standards in the practice of dentistry, encourage the improvement of the health of the public, and advance the art and science of dentistry. CDA is not organized for profit, has no shares of stock or certificates of interest, and no portion of its net earnings inures to the benefit of any member or individual. The dues revenue received by CDA is not distributed to its officers, members or directors. Rather, CDA's funds are used to implement the objectives and goals of the association as specified by its Bylaws and Articles of Incorporation. App. 161a-62a; RX 117-D; TR 1140-42, 1769-70. CDA is exempt from federal income taxation under IRS Code Section 501(c)(6). App. 174a.

CDA promotes a vast array of educational, scientific, and public health objectives. For example, it develops material for use in community dental health projects such as school screenings, baby bottle tooth decay videos, dental health materials for school age children, and senior abuse/neglect detection. App. 165a; TR 1148-49. CDA provides information to the public regarding scientific aspects of dental treatment and procedures, and up-to-date data on public health issues such as AIDS, transmission of infectious diseases, infection control techniques and hazardous substances. App. 164a; TR 1154. CDA is also a leading force in continuing dental education. TR 1150, 1161-62.

CDA promotes public health even when doing so is contrary to the economic interests of its members. It led the fight for fluoridation in California, perhaps the most cost-

effective dental health initiative enacted, despite the fact that fluoridation reduces the need for dental care. App. 188a-89a; TR 814-15, 1300-01.

CDA also provides certain ancillary services to its members such as lobbying concerning dental issues, marketing, public relations and practice management seminars, assistance in compliance with OSHA and other laws and regulations, and administrative procedures for resolving patient complaints. App. 164a-65a, 181a-82a. In addition, CDA operates several ancillary for-profit subsidiaries through which members can obtain liability and other types of insurance, financing for equipment purchases and home mortgages, and auto leasing. App. 165a-70a.

While approximately 75% of the practicing dentists in California are members of CDA, membership is entirely voluntary and is not a prerequisite to licensure or the successful practice of dentistry. More than 5,500 dentists who actively practice dentistry in California do not belong to CDA. App. 144a, 161a-62a, 245a; TR 733-34, 833, 1639.

b. CDA's Ethical Standards

To promote public confidence in the practice of dentistry, CDA has promulgated a Code of Ethics. The Commission's complaint focuses on the provisions of the Code that prohibit false and misleading advertising. These provisions substantially mirror California state law. App. 190a-91a; RX-64-A; RX 136 A-E; TR 1085-87. Section 10 of the Code sets forth CDA's basic ethical standard:

> Although any dentist may advertise, no dentist shall advertise or solicit patients . . . in a manner that is false or misleading in any material respect.

App. 190a. CDA relies on the California Dental Practice Act to define what is false and misleading. App. 218a.

The Commission's complaint centers on the application of Section 10 to discount and quality advertising. The Code of Ethics does not prohibit either type of advertising. Rather, the Code requires such ads to disclose specified facts to insure that consumers are not misled. Advertisements regarding a discounted fee are required to disclose the amount of the non-discounted fee, the amount or percentage of the discount, the length of time the discount will be available, and an identification of those who qualify for the discount. App. 200a. With respect to advertisements regarding quality, the Code requires member dentists to refrain from using subjective and ambiguous phrases that are not susceptible to measurement or verification and are therefore more likely to deceive or mislead the public. App. 202a-04a, 216a-18a.

The maximum sanction that CDA can impose on a member who violates the Code of Ethics is exclusion from CDA. CDA has no power or ability to impede a member's practice of dentistry. CDA has no control over whether a dentist chooses to join CDA, and CDA cannot impose its ethical principles on dentists who have no connection with CDA. App. 144a; TR 1170-71, 1352-54, 1640-41.

2. Proceedings Below

a. The Administrative Hearing

The Commission asserted jurisdiction over CDA under Section 4 of the FTC Act, claiming that CDA is "organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44. On the substantive antitrust issues, the Commission presented *no evidence*, even in the form of expert testimony, regarding the competitive effect of CDA's challenged practices. App. 110a.

The ALJ found that the Commission had jurisdiction over CDA because a "substantial" portion of CDA's activities "engender a pecuniary benefit to its members." App.

253a. On the competitive effect of CDA's Code of Ethics, the ALJ made several critical findings, including:

1. "complaint counsel have not produced any convincing evidence that CDA members have acted or could act together to raise prices or reduce output, nor have they established in what geographic market or markets the alleged market power could be exercised." App. 262a.

2. "the activities of the California Dental Association with respect to their enforcement of their Code of Ethics relative to advertising has no impact on competition in any market in the State of California, particularly with respect to price and output." App. 246a.

3. "CDA's enforcement of its Code of Ethics with respect to advertising has no negative impact on competition in any dental market in California because it cannot erect any barriers to entry . . . into any dental market in California." App. 245a.

4. "The oversupply of dentists . . . [is] strong evidence of low entry barriers." *Id.*

5. "CDA membership is not a prerequisite to successful practice in any California Dental Market." *Id.*

6. "CDA could not exercise market power in any relevant geographic market, whether statewide, regional, or local." App. 262a.

7. "CDA has a legitimate interest in fostering truthful, informative advertising by its members . . . ." App. 258a.

8. "Professor Knox [the only economist to testify] testified that scrutiny of dental advertising is pro-competitive because advertising which is false and mis-

leading has a negative impact on competition." App. 245a-46a.

In light of these findings, the ALJ held that the Commission failed to establish a Section 5 violation under traditional rule of reason analysis. App. 262a. Nevertheless, the ALJ found that this failure was "not fatal." *Id.* Instead, he applied the Commission's analytical approach announced in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988) ("*Mass. Board*"), and concluded that CDA's Code of Ethics is "inherently suspect" and can be "quickly condemned" as an unreasonable restraint of trade without a detailed market analysis. App. 257a, 259a, 262a. The ALJ faulted enforcement of the Code as overbroad because it barred "inexact" and incomplete advertisements. App. 260a.

b. The Commission Decisions

The Commission, by a vote of 4 to 1, affirmed the ALJ's finding of a violation, but disagreed with the ALJ's analytical approach. App. 45a. On the jurisdictional issue, the Commission ruled that CDA comes within Section 4 of the FTC Act because "CDA confers pecuniary benefits upon its members as a substantial part of its activities." App. 51a. With respect to the competitive effect of CDA's Code of Ethics, the Commission majority declared that it would not follow its own *Mass. Board* decision. Instead, the majority determined that CDA's disclosure requirements for discount advertising constituted a *per se* violation of the antitrust laws, even though the Code concededly "differ[s] from the classic price fixing conspiracy." App. 63a. Alternatively, the Commission majority applied the "quick look" rule of reason approach to the Code's treatment of discount advertising and to claims of superiority. By its own admission, the majority's application of the rule of reason was "simple and short," involving no substantial analysis of market definition, market power or competitive effects or any attempt to quan-

tify any increase in price or reduction in output. *Id.* at 74a, 78a.

The majority's reliance on the *per se* rule and its cursory rule of reason analysis brought a thorough and strongly worded dissent from Commissioner Azcuenaga.[1] She described the majority's approach as "chimerical" and unable to "withstand the hard light of day." *Id.* at 108a. The focus of Commissioner Azcuenaga's dissent was the "weakness of the majority's anticompetitive effects story." *Id.* at 146a. She noted that at trial, the Commission "did not offer evidence, even in the form of testimony of an expert economist, on fundamental elements of a rule of reason analysis." *Id.* at 110a. She found "startling" the majority's "failure to identify a geographic market before finding liability" and its "treatment of the entry issue." *Id.* at 147a. Commissioner Azcuenaga concluded: "No anticompetitive effects having been shown, the complaint should be dismissed . . . ." *Id.* at 110a.

c. The Court of Appeals Decisions

The Court of Appeals for the Ninth Circuit had jurisdiction over CDA's Petition for Review pursuant to 15 U.S.C. § 45(c). By a 2 to 1 vote, the Court of Appeals affirmed the Commission's finding of a violation, but disagreed in part with the Commission's approach. On the jurisdictional issue, the Ninth Circuit acknowledged a split among the circuits. The majority disagreed with the Eighth Circuit, and sided with the Second Circuit, in holding that the FTC Act confers jurisdiction over nonprofit organizations that "provide tangible, pecuniary benefits to" their members. App. at 16a. On whether CDA's Code of Ethics violated the antitrust laws, the majority rejected the Commission's application of the *per se* rule to CDA's disclosure requirements

[1] Commissioner Starek also dissented from the majority's *per se* analysis. App 148a.

for discount advertising, but affirmed the Commission's "quick look" rule of reason approach. *Id.* at 17a.

Judge Real dissented from both the majority's holding on jurisdiction and its application of the "quick look" rule of reason. Judge Real stated that CDA, as a nonprofit professional association, does not operate commercially and "ha[s] no place in the commercial world of the F.T.C." *Id.* at 25a. He also noted that CDA's advertising restrictions are not "sufficiently anticompetitive on their face to eschew a full-blown rule of reason inquiry." *Id.* Judge Real criticized the majority for finding "a restraint on competition without the supporting help from any of the economic principles to be applied to a full market power analysis." *Id.* at 26a.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE COMMISSION HAS JURISDICTION OVER NONPROFIT, PROFESSIONAL ASSOCIATIONS IS AN IMPORTANT QUESTION ON WHICH THERE IS A CONFLICT AMONG THE FEDERAL COURTS OF APPEALS

As the Ninth Circuit acknowledged below, there is an irreconcilable conflict among the courts of appeals as to whether the Commission has jurisdiction over *bona fide* nonprofit professional associations such as CDA. App. 15a. This Court previously granted certiorari to settle this conflict but divided equally and produced no opinion. *American Medical Association v. Federal Trade Commission*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court,* 455 U.S. 676 (1982) ("*AMA*"). Thus, this jurisdictional issue has never been resolved by this Court since the passage of the Act in 1914.

A. The Ninth Circuit Expressly Acknowledged A Conflict

The Ninth Circuit applied the test enunciated in the Second Circuit's decision in *AMA,* which admittedly placed it in

direct conflict with the Eighth Circuit's decision in *Community Blood Bank of Kansas City Area, Inc. v. Federal Trade Commission*, 405 F.2d 1011 (8th Cir. 1969). App. 15a-16a. Unlike the Sherman Act, the FTC Act does not apply to all entities. Instead, Section 5(a)(2) of the FTC Act expressly limits the Commission's jurisdiction to "persons, partnerships, or corporations." 15 U.S.C. § 45(a)(2). Section 4 defines "corporations" to include only "any company . . . which is organized to carry on business for its own profit or that of its members . . . . *Id.* at § 44. In *AMA*, the Second Circuit held that Section 4 includes nonprofit associations; in *Community Blood Bank*, the Eighth Circuit held that Section 4 does not.

Since *AMA*, the Commission has made regulation of nonprofit associations a top priority.[2] The Commission's continuing campaign to litigate the self-regulatory efforts of professional societies imposes enormous burdens on these societies, including the diversion of scarce resources from their nonprofit and socially desirable objectives. The Court should once again grant certiorari in order to resolve finally

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[2] The following represent consent decrees entered by the Commission against professional associations since 1990. Frequently, these associations do not have the financial resources to endure the time and expense of litigation and thus enter into consent decrees rather than contesting jurisdiction. *See, e.g., La Association Medica de Puerto Rico,* 60 Fed. Reg. 35,907 (July 12, 1995); *American Association of Language Specialists,* 59 Fed. Reg. 48,882 (September 23, 1994); *American Society of Interpreters,* 59 Fed. Reg. 48,882 (September 23, 1994); *McClean County Chiropractic Association,* 59 Fed. Reg. 22,163 (April 29, 1994); *National Society of Professional Engineers,* 58 Fed. Reg. 44,841 (August 25, 1993); *National Association of Social Workers,* 58 Fed. Reg. 17,411 (April 2, 1993); *Association of Engineering Firms Practicing in the Geosciences,* 58 Fed. Reg. 37,483 (April 2, 1993); *United States Golf Association,* 58 Fed. Reg. 5,991 (January 25, 1993); *American Psychological Association,* 57 Fed. Reg. 46,028 (Oct. 6, 1992); *Connecticut Chiropractic Association,* 56 Fed. Reg. 65,093 (December 13, 1991); *Capital Area Pharmaceutical Society,* 114 F.T.C. 159 (1991); *Empire State Pharmaceutical Society, Inc.,* 114 F.T.C. 152 (1991).

the conflict among the circuits regarding the Commission's jurisdiction over nonprofit professional associations.

In deciding what constitutes a corporation organized "for its own profit or that of its members," the *Community Blood Bank* court relied upon several familiar rules of statutory construction: that the Commission has only such jurisdiction as Congress conferred upon it by statute; that when the Commission's jurisdiction is challenged, it has the burden of establishing its jurisdiction; that legislative intent should be ascertained from the language of the statute itself when it is clear and plain; that the plain, obvious, rational meaning of the statute is to be preferred to any curious, narrow, hidden sense; and that common words are to be taken in their ordinary significance in the absence of any evidence of a contrary intent. 405 F.2d at 1015. Where, as here, the language of a statute is clear and unambiguous, review of the statute's legislative history is unnecessary. *See, e.g., Dunn v. Commodity Futures Trading Commission,* __ U.S. __, 117 S.Ct. 913, 921 (1997) (Scalia, J., concurring).

In *Community Blood Bank,* the Commission asserted jurisdiction over Community Blood Bank ("CBB"), the Kansas City Hospital Association and individual pathologists. CBB was organized as a nonprofit. The Association was a nonprofit which included as members Blue Cross Service Corporation, a 501(c)(4) corporation, two for-profit corporations, and a number of 501(c)(3) corporations. *Community Blood Bank of the Kansas City Area, Inc.*, 70 F.T.C. 728, 755-57 (1966). After a full trial the Hearing Examiner found that the Commission had jurisdiction over the respondents and that respondents had collectively restrained trade by impeding the development of two commercial blood banks. The Commission affirmed this decision. *Id.* at 728.

The Commission's determination of jurisdiction rested on the finding that both the CBB and the Hospital Association conferred pecuniary benefits upon their members in that

"both organizations performed very valuable services" that were "in the broadest sense exceedingly profitable for the doctors and for the hospitals to receive." *Id.* at 767. In addition, the Commission found that the hospital association "is also engaged in business for the benefit or profit of its members when it supplies to them information and other services which they might otherwise have to gather and render themselves." *Id.* at 909-10.

The Eighth Circuit reversed the Commission's decision and held that the CCB and the Association were outside the scope of the Commission's jurisdiction. Although the Association may have provided "valuable services" to its members, the Eighth Circuit recognized that, in light of the language and the legislative history of the FTC Act, the Commission's jurisdiction is limited to entities that are "organized" to conduct "business" for pecuniary "profit" of their members, as those words are commonly understood. *Community Blood Bank*, 405 F.2d at 1017-18, 1020. To help define the word "profit," the court quoted the following language from the Supreme Court of Wisconsin:

> [w]hether dividends or other pecuniary benefits are contemplated to be paid to its members is generally the test to be applied to determine whether a given corporation is organized for profit.

Id. at 1017 (quoting *Associated Hospital Service, Inc. v. City of Milwaukee*, 109 N.W.2d 271 (Wis. 1961)).

It is clear from *Community Blood Bank* that Congress gave the Commission jurisdiction over corporations "organized" for profit; it did not confer jurisdiction over every corporation that provides "pecuniary" benefits to its members.[3]

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[3] Under the standard articulated in *Community Blood Bank*, the Commission is not bound by the mere form of incorporation. The Commission is free to determine whether an entity operates "in law and

Here, rather than apply the *Community Blood Bank* standard, the Ninth Circuit followed *AMA* to find that the Commission had jurisdiction because, although organized and operated as a *bona fide* professional association, CDA's activities purportedly "provide tangible, pecuniary benefits to its members." App 16a.[4] However, this test, applied by the Second Circuit in *AMA* and adopted by the Ninth Circuit, departs from the clear language and meaning of the FTC Act and would extend the scope of the Commission's jurisdiction to cover virtually every nonprofit organization or professional association.

B. The Legislative History Supports CDA's Position

The language of the FTC Act is clear that the Commission does not have jurisdiction over nonprofit professional associations. Thus, there is no need to resort to the legislative history. Nevertheless, the legislative history supports CDA's position that nonprofit professional associations are not subject to the reach of the FTC Act. *See* H.R. Rep. No. 553, 63d Cong., 2d Sess. (1914); S. Rep. No. 597, 63d Cong., 2d Sess. (1914); H.R. Rep. No. 1142, 63d Cong., 2d Sess. (1914). Both the original Senate and House of Representatives versions of the bill to create the Commission were designed specifically to give the Commission jurisdiction

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in fact" as a *bona fide* nonprofit corporation. *See Ohio Christian College,* 80 F.T.C. 815 (1972) (asserting jurisdiction over ostensible nonprofit based on finding it was a mere "shell" for an individual entrepreneur "to further his own finance and comfort"). However, where, as here, an association is organized and operated as a genuine nonprofit entity, the Commission's inquiry is at an end and the association is beyond the Commission's jurisdiction.

[4] The Ninth Circuit also cited *FTC v. National Comm'n on Egg Nutrition,* 517 F.2d 485 (7th Cir. 1985). App. 15a. However, in that case, the court upheld the Commission's jurisdiction based on the express finding that the Commission on Egg Nutrition "was organized for the profit of the egg industry." *Egg Nutrition,* 517 F.2d at 488. Here, there is no similar finding in the record.

over purely commercial corporations. *See* H.R. Rep. No. 1142, 63d Cong., 2d Sess. 11 (1914); H.R. Rep. No. 1142, 63d Cong., 2d Sess. 14 (1914).

Moreover, the same Congress that limited the FTC's jurisdiction to for-profit corporations expressly made the Clayton Act, like the Sherman Act before it, applicable to all corporations and associations irrespective of whether they were for-profit or not-for-profit.[5] A comparison of these statutes clearly demonstrates that the FTC Act is not a "carefully studied attempt" to bring within it every entity "whose activities might restrain or monopolize commercial intercourse." *See U.S. v. Southeastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944).

C. In 1977 Congress Expressly Refused To Expand The Jurisdiction Of The FTC Act

Significantly, Congress rejected the Commission's 1977 request that it amend Section 4 of the FTC Act to extend its jurisdiction to nonprofit organizations, including professional associations. *See Proposed Federal Trade Commission Amendments of 1977 and Oversight: Hearings on H.R. 3816 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce,* 95th Cong., 1st Sess. (1977) (hereinafter *1977 Hearings*). As Commission Chairman Collier conceded:

> The bill [H.R. 3816] would make several changes in the jurisdiction of the Commission. In particular, it would: (1) Broaden the reach of the FTC Act by redefining 'corporation' to include nonprofit corporations . . . . We strongly support each of these changes.

1977 Hearings at 69.

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[5] The Clayton Act, like the Sherman Act, applies to all "persons." *See* 15 U.S.C. §§ 7, 12.

Chairman Collier argued that the proposed statutory change was necessary in light of the Eighth Circuit's decision in *Community Blood Bank*:

> After *Community Blood Bank*, the Commission's efforts to reach nonprofit corporations engaged in deceptive or anticompetitive practices have succeeded only after the often time-consuming proof that the respondent, whatever its nominal form, was in reality a conduit for essentially commercial interests.

Id. at 82. Chairman Collier testified that the Commission encountered such problems when it challenged activities "of nonprofit corporations of a less traditionally commercial character." *Id.* Congress was not persuaded to extend the scope of the FTC Act. The Committee on Interstate and Foreign Commerce of the House of Representatives rejected the proposed provision to broaden the Commission's jurisdiction after hearing testimony noting the absence of jurisdiction under the current wording of Section 4. H.R. Rep. No. 339, 95th Cong., 1st Sess. 120 (1977). Thus, by exercising jurisdiction over nonprofit professional associations, the Commission claims authority that Congress refused to extend when it enacted the FTC Act and when it denied the Commission's proposed amendments in 1977.

D. The Court Should Resolve The Acknowledged Conflict

In the decision below, Judge Real succinctly observed "[t]hese non-profit membership organizations have no place in the commercial world of the F.T.C." App.25a. The position taken by CDA herein is not an argument for an exemption from the antitrust laws. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). The important issue here is: did Congress expressly confer jurisdiction on the Commission over nonprofit professional associations?

There are now four opinions from the federal courts of appeals on the Commission's jurisdiction and there is a direct conflict. The Supreme Court failed to resolve this conflict when it granted certiorari in the *AMA* case. It should grant this Petition now in order to clarify the Commission's jurisdiction.

II. THE NINTH CIRCUIT'S RULE OF REASON STANDARD IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND AT LEAST TWO OTHER COURTS OF APPEALS

The Ninth Circuit invalidated an ethical code which is facially procompetitive, supported by sound procompetitive justifications, and has been found to have no anticompetitive effects. This perverse result flows from the court's reliance on an abbreviated rule of reason that is in direct and irreconcilable conflict with the decisions of this Court, and the Courts of Appeals for the Third and Seventh Circuits. *See National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) ("*NCAA*"); *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993); *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722 (7th Cir. 1986); *Vogel v. American Soc. of Appraisers*, 744 F.2d 598 (7th Cir. 1984). The majority's decision in this case even conflicts with the decision of another panel of the Ninth Circuit. *American Ad Management Inc. v. GTE Corp.*, 92 F.3d 781 (9th Cir. 1996).

The conflict caused by *CDA* goes to the very heart of antitrust enforcement, as it creates confusion regarding the proper rule of reason standard under which the vast majority of conduct is evaluated. Unless this conflict is resolved by the Court, businesses in all industries will be unable to predict what conduct is consistent with antitrust requirements. Some businesses will refrain from procompetitive activity out of fear of antitrust sanctions, including treble damages, and the substantial litigation costs necessary to defend such

claims. Other businesses and associations may be judged to have acted unlawfully even where, as here, the conduct has no anticompetitive effect. In either case, efficiency enhancing practices are deterred and consumer welfare is harmed.

A. The Full-Scale Rule Of Reason Is The Prevailing Standard

Section 1 of the Sherman Act, and Section 5 of the FTC Act, prohibit only conduct that unreasonably restrains competition. *State Oil Co. v. Khan*, __ U.S. __, 118 S. Ct. 275, 279 (1997). The "test of legality" is "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918). The "rule of reason" is the prevailing standard for evaluating a restraint's impact on competition. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

Under the rule of reason, the party challenging a practice has the burden of showing that the conduct has an anticompetitive effect in a relevant product and geographic market. *Brown*, 5 F.3d at 668. Such an effect can be shown directly, through proof of an increase in price or a reduction in output. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986). If direct evidence is unavailable, competitive injury can be inferred from a showing of market power in a properly defined market, including barriers to entry. *Id.* Market power is the ability to raise price above the level that would prevail in a competitive market. *NCAA*, 468 U.S. at 109 n. 38.

If the party challenging the conduct shows anticompetitive effect, the defendant must show that the conduct promotes a procompetitive goal. The finder of fact balances the anticompetitive effects proved by the plaintiff against the procompetitive benefits shown by the defendant. *American*

Ad, 92 F.3d at 791. The rule of reason is violated only if a practice's anticompetitive effects outweigh its procompetitive benefits. *Vogel*, 744 F.2d at 604.

Carefully limited and well identified practices have been determined by this Court to be so pernicious and lacking in procompetitive benefits, that a rule of reason analysis is unnecessary to assess their competitive effect. Such conduct, principally horizontal price fixing, is deemed to be *per se* illegal. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 178 (1965) ("[T]he area of per se illegality is carefully limited."); *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958). Because the *per se* rule precludes analysis of competitive impact, it is applied only after "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Khan,* 118 S. Ct. at 279.

In *NCAA*, the Supreme Court used for the first time an abbreviated rule of reason. *NCAA*, 468 U.S. at 109 n.39. As this Court suggested, the "quick look" approach may be used only to condemn practices that are "naked" restraints on price or output for which there are no procompetitive justifications. *Id.* at 109. In the vast majority of cases, a traditional "full-blown" rule of reason analysis is required. *See, e.g., Brown*, 5 F.3d at 678; *American Ad*, 92 F.3d at 789 ("this so-called 'quick look' analysis is the exception, rather than the rule").

Ultimately, whatever test is applied, "the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *NCAA*, 468 U.S. at 103. As is demonstrated by this case, full rule of reason analysis is necessary in most instances to ensure that procompetitive or competitively neutral conduct is not mistakenly condemned. *Chicago Professional Sports Ltd. Partnership v. National Basketball Association*, 95 F.3d 593, 602 (7th Cir. 1996) (Cudahy, J., concurring). Erroneous, over-inclusive applica-

tion of the antitrust laws results in over-deterence, which is itself anticompetitive. *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 235-36 (1st Cir. 1983) (Breyer, J.).

B. The Ninth Circuit's Use Of The Abbreviated Rule Of Reason Conflicts With The Rulings Of This Court, The Seventh Circuit, And Another Panel Of The Ninth Circuit

In its 2-1 decision below, the panel majority properly ruled that the *per se* rule is inapplicable to CDA's Code of Ethics. App. 18a. In so holding, the majority noted that CDA's ethical policies "do not, on their face, ban truthful, nondeceptive ads" and "the economic impact of the restraint is not immediately obvious." App. 17a-18a. Nonetheless, the majority applied an abbreviated rule of reason to CDA's disclosure requirements. App. 18a-19a. Because the practices in issue are not facially anticompetitive, the Court's use of the "quick look" is squarely at odds with this Court's decision in *NCAA*, and decisions by the Seventh Circuit and another panel of the Ninth Circuit.

At issue in *NCAA* were association rules that limited the number of televised football games and set the price for television rights. As the rules, on their face, fixed prices and reduced output, the Court concluded that the "anticompetitive consequences of this arrangement are apparent." *Id.* at 104. The trial court in *NCAA* found actual increased prices and reduced output caused by the challenged rules. *Id.* at 113. Thus, this Court condemned the practices under an abbreviated rule of reason without "a detailed market analysis." *Id.* at 109. In contrast, the ALJ in *CDA* explicitly found that the challenged advertising policies had *no effect* on price or output. App. 262a.

Construing *NCAA*, courts of appeals have held that an abbreviated rule of reason is appropriate only where a restraint is, on its face, anticompetitive. *Brown*, 5 F.3d at 669.

Absent such a restraint, a court must analyze the conduct's competitive effects under the traditional rule of reason approach. "Unless the practice 'almost always' makes consumers worse off, it is not subject to condemnation without more detailed study of its effects -- including proof of market power and actual injury." *Illinois Corporate Travel*, 806 F.2d at 727.

Illinois Corporate Travel involved a prohibition against discount advertising. 806 F.2d at 724. The Seventh Circuit refused to apply the "quick look" analysis even while acknowledging that the rule is "functionally" a price restriction. The court concluded that the rule is not a naked restraint because it "does not 'always or almost always' work to consumers' detriment." *Id.* at 724, 728. The prohibition had the possible effect of curtailing free-riding. *Id.* at 728-29. Since "some potential benefits" of the practice were proffered, "summary denunciation" of the rule as facially anticompetitive was inappropriate. *Id.*

Similarly, the Ninth Circuit refused to apply an abbreviated rule of reason in *American Ad*, 92 F.3d 781. That case involved a change in a seller's commission policy to eliminate agent discounting. The Ninth Circuit affirmed summary judgment in favor of the seller, rejecting application of the abbreviated rule of reason:

> [T]his so-called quick look analysis is the exception, rather than the rule. Proving injury to competition in a rule of reason case almost uniformly requires a claimant to prove the relevant market and to show the effects of competition within that market. . . . [T]he present case does not present the type of naked restraint on price or output that would justify a quick look.

Id. at 789-90 (internal quotations and citation omitted). The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice recently expressed the Di-

vision's view that the "quick look" be applied only to the "narrow" range of facially anticompetitive practices that "directly limit competition on price or output." Joel I. Klein, *A Stepwise Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review*, ANTITRUST, Spring 1998, at 41, 42 ("*Klein*").

The Ninth Circuit's "quick look" condemnation of CDA's policies is directly at odds with *NCAA*, *Illinois Corporate Travel*, *American Ad,* and the views of the Antitrust Division. The *CDA* panel majority applied an abbreviated rule of reason to practices that it concedes "do not, on their face, ban truthful, nondeceptive [advertising]." App. 18a. Further, the majority acknowledged that CDA's justification for its policies -- preventing false and misleading advertising -- is a "legitimate, indeed pro-competitive, goal;" and it conceded "that as a general matter disclosure can augment competition and increase market efficiency by providing consumers more information." App. 19a. The ALJ confirmed CDA's "legitimate interest in fostering truthful, informative advertising" and that "scrutiny of dental advertising is procompetitive." App. 245a-46a, 258a.

Given these findings by the Ninth Circuit and the ALJ, it is impossible to view CDA's policies as naked restraints. As Judge Real's dissent emphasized:

> What the CDA was attempting to accomplish by its rules concerning advertising did not amount to a restraint on price competition. . . . What the CDA was monitoring was that dentists who wish[] to advertise discounts would have to fully disclose to the public the nature of the discounts. *Full disclosure is neither price fixing nor is it a ban on non-deceptive advertising.*

App. 25a-26a (emphasis added).

It is even more plain that CDA's policies regarding *non-price* quality advertising do not constitute a "naked" restraint

that might warrant a "quick-look" analysis. The Commission itself admitted that CDA's activities concerning "nonprice advertising are entitled to an examination under the rule of reason" because "we cannot say with equal confidence that . . .'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.'" App. 73a.

By using an abbreviated rule of reason to condemn CDA policies which, on their face, are not naked restraints, the panel majority has strayed far afield from the limited use of the quick look approved in *NCAA* and supported by the Antitrust Division. Further, the court's ruling is flatly inconsistent with the decisions in *Illinois Corporate Travel* and *American Ad*, which rejected the quick look even as to conduct with greater anticompetitive potential than that at issue here. The defendant in *Illinois Corporate Travel prohibited* discount advertising altogether, which the court acknowledged was "functionally" a price restriction. 806 F.2d at 724. Similarly, the defendant in *American Ad* completely *eliminated* commissions paid to sales agents. 92 F.3d at 783. In contrast, CDA's policies do not tamper directly with price or output, requiring only certain disclosures to reduce the risk that consumers will be misled.

An irreconcilable conflict exists between the Ninth Circuit's decision in *CDA* and *NCAA*, *Illinois Corporate Travel* and *American Ad*. That conflict threatens to broaden application of the "quick look" rule of reason to condemn conduct that, as here, has no anticompetitive effect. The Court should grant certiorari to resolve this conflict.

C. Use Of The Abbreviated Rule Of Reason In The Face Of CDA's Proffered Procompetitive Justification Conflicts With The Decisions Of The Third And Seventh Circuits

The manner in which the Ninth Circuit applied the abbreviated rule of reason also is in fundamental conflict with the decisions of other courts of appeals. The Ninth Circuit condemned CDA's advertising policies despite a procompetitive justification and a finding by the ALJ that the policies had no anticompetitive effect. This ruling is at odds with the Third Circuit's decision in *Brown*, 5 F.3d 658, and the Seventh Circuit's decision in *Vogel*, 744 F.2d 598.

Brown involved an agreement among Ivy League colleges to award financial aid only on the basis of need and to collectively determine the amount of financial aid for commonly admitted students. While the agreement was a naked restraint, the colleges met their burden under *NCAA*'s "quick look" to come forward with "'some competitive justification.'" *Id.* at 669. The need-based aid policies potentially widened the scope of students who could afford an Ivy League education. *Id.* at 669; 676-677. Given this explanation, the Third Circuit concluded that the arrangement potentially "enhances consumer choice" and that, rather than suppress competition, the agreements "may in fact merely regulate competition in order to enhance it." *Id.* at 677. The court held that the agreement must be judged under a "full-scale rule of reason analysis." *Id.* at 678.

In *Vogel*, the Seventh Circuit refused to invalidate an association's ethical bylaw under the "quick look" rule of reason, even though the bylaw "'tamper[ed]' with a 'price structure.'" 744 F.2d at 601. The court declined to condemn the bylaw unless "it has clear anticompetitive consequences and lacks any redeeming competitive virtues." *Id.* at 603. The court determined that the bylaw had a sound procompetitive rationale -- it barred a fee structure which incents

overstated valuations. *Id.* Accordingly, the plaintiff was required to demonstrate at trial that the bylaw was unreasonable under a full-blown rule of reason -- *i.e.*, to establish a relevant market, a substantial market share by the association's members, and an anticompetitive effect which exceeded any procompetitive benefits. *Id.* at 604.

The Ninth Circuit's *CDA* ruling cannot be reconciled with *Vogel* and *Brown*. Both decisions required a traditional rule of reason analysis of facially anticompetitive conduct once the defendant proffered a plausible procompetitive justification. The Antitrust Division recently expressed the same view. *Klein*, ANTITRUST, Spring 1998, at 42-43. CDA's advertising bylaws have the procompetitive purpose of augmenting consumer information to prevent deceptive advertising. Thus, the Ninth Circuit was required to abandon the "quick look" and apply a full-scale rule of reason analysis.

The importance of a full-scale rule of reason analysis where a plausible procompetitive rationale is tendered is demonstrated by this case. After a full trial, the ALJ found:

> the activities of the California Dental Association with respect to their enforcement of their Code of Ethics relative to advertising has *no impact on competition* in any market in the State of California, *particularly with respect to price and output*.

App. 246a (emphasis added). The ALJ also found that "complaint counsel have not produced *any* convincing evidence that CDA members have acted or could act together to raise prices or reduce output." *Id.* at 262a (emphasis added).

Moreover, the Commission failed to establish (i) a relevant market, (ii) that CDA had market power, or (iii) that there were high entry barriers. *Id.* Given that the very purpose of the rule of reason is to determine a restraint's impact on competition, *NCAA*, 468 U.S. at 103, the ALJ's finding of

no anticompetitive effect should have been dispositive. Instead, as Judge Real stated, "the majority finds a restraint on competition without the supporting help from any of the economic principles to be applied to a full market power analysis." App. 26a.

Commissioner Azcuenaga's dissent points out the glaring shortcomings of the Commission's case on competitive effects:

> In presenting their case, complaint counsel relied on a theory of virtual *per se* illegality and did not offer evidence, even in the form of testimony of an expert economist, on fundamental elements of a rule of reason analysis, such as market definition, barriers to entry and anticompetitive effects.

App. 110a. She also laid bare the fallacy of the Commission's inferences of market power:

> *The evidence does not support the conclusion that CDA can control the price and output of dental services in California.* The majority relies on the single fact that approximately 75 percent of California dentists are members of CDA to support its finding of market power. . . . But even hypothesizing a relevant geographic market with membership similar to that statewide, entry could undercut any claimed ability to exercise market power, and the evidence suggests that entry is, in fact, easy.
>
> * * * * *
>
> If CDA had successfully controlled its members to halt advertising, why would not the other 25 percent of dentists in California who are not CDA members expand their practices by advertising, and why would not newly licensed dentists or dentists from other areas step in to take advantage of the fact that CDA members had voluntarily tied their own hands in competition to

> attract patients? The Commission finds it "implausible at best" that this would happen. *A better conclusion is that it is "implausible at best" that CDA has had any significant adverse effect on competition.*

App. 145a-46a (emphasis added, citation omitted).

CDA's use of the abbreviated rule of reason to strike down a practice that has a procompetitive justification, and has been determined to have no anticompetitive effect, places it in fundamental conflict with *NCAA*, *Brown* and *Vogel*.

D. Resolution Of The Inter-Circuit Conflict Created By *CDA* Is Critical To The Proper Administration Of The Antitrust Laws

The broadened "quick look" rule of reason articulated in *CDA* is not confined to professional associations, but is applicable to all commercial enterprises. If the conflict caused by *CDA* remains unresolved, the ambiguity and overinclusiveness of the *CDA* "quick look" will have serious adverse consequences for competition and consumer welfare throughout the economy.

The Court has long recognized that uncertainty in antitrust rules chills procompetitive conduct. *United States v. Philadelphia National Bank*, 374 U.S. 321, 362 (1963) ("unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded"). The Antitrust Division and the Commission have noted the importance of clear, uniform antitrust rules. *See, e.g.*, Department of Justice and Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care*, 4 Trade. Reg. Rep. (CCH) ¶ 13,153, at 20,799 (1996). Indeed, the Antitrust Division has acknowledged that "[t]he economy is harmed when lawful, efficient conduct is avoided because of legal uncertainty." Department of Justice, *Vertical Restraints Guidelines*, 4 Trade Reg. Rep. (CCH) ¶ 13,105, at 20,577 (1985) (withdrawn August 10, 1993). The potential

harm resulting from the circuit conflict created by *CDA* is particularly acute because it involves the proper application of the rule of reason, the foundation antitrust standard by which the vast majority of conduct is judged.

In contrast to the Third and Seventh Circuits, *CDA* applies the "quick look" to conduct that has no direct impact on price or output. In the Ninth Circuit's view, CDA's disclosure requirements are "fairly" or "sufficiently" naked restraints. App. 18a, 20a. The obliquity of *CDA*'s new "standard" makes it impossible for businesses to predict with any confidence the practices to which an abbreviated rule of reason will be applied. Antitrust scholars have noted the confusion caused by the lack of a uniform "quick look" standard. James A. Keyte, *What It Is And How It Is Being Applied: The "Quick Look" Rule of Reason*, ANTITRUST, Summer 1997, at 21 ("*Keyte*"). The problem is compounded by the Ninth Circuit's treatment of CDA's procompetitive justifications. *CDA* appears to require a defendant not only to proffer a plausible procompetitive justification, as in the Third and Seventh Circuits, but also to *prove* actual procompetitive benefits from the challenged conduct. App. 19a.

Placing this burden on the business whose practices are challenged virtually assures that the implementation of innovative and potentially procompetitive practices will be inhibited. Requiring proof of procompetitive benefits for any challenged conduct increases the risk that the antitrust laws' treble damage and attorneys' fees sanctions will be imposed. *Klein,* ANTITRUST, Spring 1998, at 44 ("the specter of deterring or condemning efficiency-enhancing arrangements cautions against imposing too great a burden on parties to horizontal agreements").

CDA's approach also dramatically increases the likelihood that businesses instituting new initiatives will be forced to expend substantial attorneys' fees defending their conduct, even if ultimately successful. Summary dismissal of private

antitrust suits will become virtually impossible. Increasing these risks, as *CDA* does, can only harm consumer welfare by inhibiting the implementation of innovative business strategies. *See, Barry Wright Corp.*, 724 F.2d at 235-36 (overbroad antitrust rules can "'chill' highly desirable pro-competitive" conduct). *See also,* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2-3, 15 (1984) (condemnation of procompetitive or competitively neutral conduct is particularly costly to a competitive economy). The potential harm of *CDA*'s new abbreviated rule of reason is brought home by the fact that in this case a violation was found despite the ALJ's definitive conclusion that CDA's enforcement of the Code "has no impact on competition in any market in the State of California, particularly with respect to price and output." App. 246a. One commentator predicted this very result from the type of "quick look" analysis employed by the Ninth Circuit. *Keyte*, ANTITRUST, Summer 1997, at 24 (imposing burden on defendants places them "at a distinct disadvantage and has the potential of condemning conduct that may well be 'efficient' without the government ever having to prove anticompetitive effects").

Earlier this term, the Court acknowledged that the use of legal short-cuts that permit a court to invalidate a practice without careful examination of its competitive impact, not only suppresses procompetitive conduct, but may also inadvertently facilitate practices that harm consumers. *Khan*, 118 S. Ct. at 283. The Court admonished that summary denunciation of a practice must be avoided except where experience with the practice enables a court "to predict with confidence that the rule of reason will condemn it." *Id.* at 279. In all other cases, the delicate balancing required to protect and enhance consumer welfare can be accomplished only by thorough analysis of a practice's competitive effect under the full-scale rule of reason. As then Judge Breyer noted in *Barry Wright Corp.*:

> [W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.

724 F.2d at 234.

The Ninth Circuit contravened these basic antitrust tenets in its opinion below. It used a "quick look" to strike down conduct which admittedly is not a naked restraint, and has no anticompetitive effects. Because the circuit conflict and uncertainty caused by *CDA* risks harming, rather than enhancing competition, the Court should grant certiorari to review the Ninth Circuit's decision.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

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APPENDIX

APPENDIX

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