97-1625

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CALIFORNIA DENTAL ASSOCIATION,
PETITIONER,

v.

FEDERAL TRADE COMMISSION
RESPONDENT.

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

REPLY BRIEF OF PETITIONER CALIFORNIA DENTAL ASSOCIATION

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I. THE COMMISSION DOES NOT HAVE JURISDICTION OVER CDA

A. The Clear Language Of The Statute Does Not Vest The Commission With Jurisdiction Over Nonprofit Professional Associations

The critical language in the Federal Trade Commission Act ("FTC Act") to determine jurisdiction in this case is as follows:

> "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 . . . .

15 U.S.C. §44. In *Community Blood Bank of the Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1017-18, 1020 (8th Cir. 1969) ("*Community Blood Bank*"), the Court of Appeals, after applying familiar rules of statutory construction, held that the Commission did not have jurisdiction over nonprofit professional associations unless they were in reality organized to conduct "business" for the pecuniary "profit" of their members as those words are commonly understood. The common, ordinary meaning of "profit" is the excess of revenues over investment or expenses, which has been paid or is contemplated to be paid to members. *Id.* at 1017.

The Commission makes four erroneous contentions: that *Community Blood Bank* held that only "charitable organizations" are exempt from the FTC Act (Resp. Br. 21 n.14), that the term "profit" should be interpreted more broadly than *Community Blood Bank* did (*id.* at 17), that the legislative history supports the Commission's jurisdiction over nonprofit professional associations (*id.* at 16-17), and that the doctrine of deference should be applied to the FTC's unreasonably expansive view of its jurisdiction (*id.* at 25-26).

The Commission urges that "profit" has been "used to refer" generally to pecuniary benefit. Resp. Br. 17. In

addition, it argues that dictionaries define "profit" more broadly than *Community Blood Bank*, and that Congress has also used the term variously. *Id.* at 17-18. Significantly, the Commission overlooks the fact that a word must be read in context and that "the words associated with it may indicate . . . the true meaning." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 861 (1984) ("*Chevron*").

Moreover, the complete answer to the Commission's definitional argument can be found in *Community Blood Bank* because the Commission made the identical argument there. Initially, the Eighth Circuit noted that "profit" has different definitions because it is used for a variety of purposes and that its "meaning must be derived from the context in which it is used." 405 F.2d at 1016. The court then observed that the Commission's "strained interpretation" is at odds with the principle "that Congress will be presumed to have used a word in its usual and well-settled sense." *Id.* (quotation omitted).

The cases are legion for the proposition that "profit" means gain from business or investment after deducting expenditures.[1] Indeed, the Commission in its opinion in *Community Blood Bank* also adopted this precise definition "as the most generally accepted definition of profit" when applied to a for profit association. 405 F.2d at 1017 n.10; *see In re Community Blood Bank of the Kansas City Area, Inc.*,

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[1] *See, e.g., Rubber Co. v. Goodyear*, 76 U.S. 788, 804 (1869) ("'Profit' is the gain made upon any business or investment, when both the receipts and payments are taken into the account."); *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 1998 WL 795246, at *9 (5th Cir. Dec. 4, 1998) (King, J., dissenting) (profit defined as the "gain realized from a business over and above its [capital] expenditures"); *Brock v. Mr. W. Fireworks, Inc.*, 814 F.2d 1042, 1050-51 (5th Cir. 1987) (same); *MCA, Inc. v. Wilson*, 677 F.2d 180, 186 (2d Cir. 1981) (same); *Fechteler v. Palm Bros. & Co.*, 133 F. 462, 469 (6th Cir. 1904) (Profit implies "the gain resulting from the employment of capital -- the excess of receipts over expenditure.").

70 F.T.C. 728, 907 n.41 (1966) ("*In re Community Blood Bank*"). However, it adopted its own definition of "profit" for nonprofits. 405 F.2d at 1017 n.10. The Eighth Circuit concluded that neither the statute nor the legislative history supported the FTC's position that "profit" could be interpreted differently depending on the "character of the corporation under consideration." *Id.* at 1016. Manifestly, the fact that "profit" may have more than one dictionary definition does not advance the Commission's theory since the context of the statute makes these other definitions relied upon by the Commission totally irrelevant.[2]

B. CDA Is Not Organized For Its Own Profit Or That Of Its Members

The common thread and the fundamental error in the Commission's opinion below (Cert. App. 50a-51a) and in the position taken by the Commission in this Court is the narrow view that the holding in *Community Blood Bank* only applies to nonprofits which have a 501(c)(3) charitable exemption under the Internal Revenue Code.[3] The court in *Community*

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[2] Even the Ninth Circuit characterized the Commission's approach as using a "surrogate" for "profit." Cert. App. 16a. In any event, the Commission's claim that the record contains substantial evidence "that petitioner provides its members with 'substantial pecuniary benefits'" (Resp. Br. 28) rests on a myopic examination of the record. The Commission's reliance on CDA's financial documents, which note that 65% of expenditures in one year went to "direct member services" and 7% went to "public service expenditures" (Resp. Br. 2 n.1) as evidence that CDA provides "pecuniary" benefits to members misapprehends the nature of the services provided by CDA. For example, the "seminars, training sessions, and publications offered to members" cited by the Commission (*id.*), although correctly identified as "direct member services," are obviously designed to improve the art and science of dentistry. Thus, the "direct member services" are consistent with CDA's public purpose and serve the public interest as well.

[3] The Commission's attempt to dismiss CDA's argument that its exemption from federal taxation under Section 501(c)(6) is powerful evidence that it is not "organized to carry on business for . . . profit" within the meaning of the FTC Act is unpersuasive. Resp. Br. 18 n.10.

Blood Bank uses the terms "nonprofit" and "charitable organization" interchangeably. 405 F.2d at 1019-20. In fact, in the world of nonprofits, the term "charitable" has a broad interpretation, meaning essentially that the association lessens the burden of government.[4]

In *Community Blood Bank*, it is clear that the hospital association could not have been a 501(c)(3) entity because it had two for profit members as well as a 501(c)(4) member and had another eight members who were incorporated under the Kansas general nonprofit statute and not under the state charitable statute. *In re Community Blood Bank*, 70 F.T.C. at 767. Thus, although some of its members were 501(c)(3) entities, many were not. As a result, the hospital association is strikingly similar to CDA; both associations were not 501(c)(3) associations. Of equal importance, the Eight Circuit never indicated that there was any significance associated with the applicable tax exemption so long as the nonprofit was tax exempt.

The decisions relied upon by the Commission for the assertion that many courts have entertained cases against

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In order to qualify for exemption under Section 501(c)(6), an organization must establish that it is "not organized for profit" and that "no part of [its] net earnings . . . inures to the benefit of any private shareholder or individual." 26 U.S.C. § 501(c)(6). Moreover, the Commission's assertion that CDA's reliance on Section 501(c)(6) is flawed because "there are significant differences between the purposes and operation of the revenue laws and the FTC Act" (Resp. Br. 18 n.10) is curious in light of the talismanic significance the Commission elsewhere attaches to an entity's status as exempt from taxation under Section 501(c)(3) or, alternatively, section 501(c)(6) to justify its jurisdiction over nonprofit professional associations. Cert. App. 50a-51a.

[4] *Portland Golf Club v. Commissioner*, 497 U.S. 154, 161 (1990). The Commission found that the CDA does serve the public. Cert. App. 107a. If this public service was not performed by the CDA, government would be burdened with performing these educational and standard setting services. This is the reason Congress granted nonprofit associations a tax exemption.

trade or professional associations (Resp. Br. 20-21) are not persuasive in that either the jurisdictional issue was not raised or the courts adopted the logic of *Community Blood Bank* that, in these cases, the organizations "derived a profit over and above the ability to perpetuate or maintain their existence."[5] 405 F.2d at 1019.

Thus, the Eighth Circuit aptly observed:

> Congress took pains in drafting . . . to authorize the Commission to regulate so-called nonprofit corporations, associations and all other entities if they are in fact profit-making enterprises.

405 F.2d at 1018. Clearly, the FTC Act is quite limited and not expansive as the Commission maintains. The record in this case is clear that CDA does not engage in "business" and has not paid "profits" as that term is commonly understood.

The Eighth Circuit's holding in *Community Blood Bank* is much wider in scope than the Commission's artificially narrow reading as exempting only charitable organizations.[6] The court's summary of its holding succinctly states:

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[5] Indeed, in many of these cases the trade associations were established for the sole purpose of violating the antitrust laws. *See, e.g., FTC v. Cement Inst.*, 333 U.S. 683, 719 (1948); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 461 (1941); *In re Indiana Fed'n of Dentists*, 101 F.T.C. 57, 115 (1983). When an entity's sole purpose is to thwart the antitrust laws, it is organized to conduct business for a profit. The above cases represent a situation far different than CDA's, whose purpose is the public interest, namely "to promote high professional standards in the practice of dentistry," and "to promote the art and science of dentistry as a profession." RX 115; TR 1134.

[6] Commissioner Elman's dissent from the Commission's decision in *Community Blood Bank*, which was relied upon by the Eighth Circuit (405 F.2d at 1019), observed:

> I do not see how we can refuse to give effect to the words "organized to carry on business for . . . profit" in Section 4. The words are plain and unambiguous. Unless we may completely ignore express language used by Congress, it is inescapable to me

3. That the corporate petitioners are true nonprofit corporations, not engaged in business for profit for themselves or their members.

4. That the Commission lacks jurisdiction over all of the petitioners.

Id. at 1022.

C. The Legislative History Supports CDA's Construction Of The FTC Act

In light of the plain language of the statute, the Commission fails to address the threshold issue of whether a review of legislative history is appropriate. *Cf. Pennsylvania Dep't of Corrections v. Yeskey,* 118 S. Ct. 1952, 1955-56 (1998). Nevertheless, the legislative history establishes that, when the FTC Act was passed, Congress did not have in mind any concern for professional associations but, on the contrary, intended to establish an agency that would develop expertise concerning commercial and industrial organizations and combinations. H.R. Rep. No. 63-1142 at 18-19 (1914); S. Rep. No. 63-597 at 8-9 (1914). Thus, the Commission misinterprets the legislative history when it contends that there is no exemption for professional associations, citing this Court's decisions in *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) ("*Prof'l Eng'rs*"), and *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). These cases do not consider whether professional associations that do not conduct business and do not earn a profit are subject to the Commission's

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that the jurisdiction of the Commission under the Federal Trade Commission Act with respect to corporations is different from, and significantly narrower than, the jurisdiction created by the Clayton and Sherman Acts, and does not include genuine nonprofit corporations.

70 F.T.C. 728, 948-49 (1966).

jurisdiction.[7] This is not a situation involving a professional exemption but rather one of initial application of the statute to CDA.

The Commission's principal argument regarding the legislative history is that the letter from Joseph E. Davies, then Commissioner of the predecessor to the Commission, to Senator Newlands, the author of the Senate version of the FTC Act, to expand the legislation to cover "corporations without capital stock" was noteworthy because it was an effort to include nonprofit corporations within the Act. Resp. Br. 19-20. First, Mr. Davies' letter referred solely to commercial associations of manufacturers or dealers, not professional associations. 405 F.2d at 1017-18. Second, *Community Blood Bank* interpreted this history to mean only that an association, whether nonprofit or for profit, would be subject to the Commission's jurisdiction if it engages in business to make a "profit" which it distributes to its members or shareholders. *Id.* at 1016-17.

Moreover, the fact that the Commission never sought to assert jurisdiction over professional associations for the first several decades of its existence is further proof that Congress never bestowed such jurisdiction when it passed the FTC Act. As this Court has explained, although Congress, not the enforcing agency, is responsible for determining the scope of its legislation, the failure to assert "power by those who presumably would be alert to exercise it, is . . . significant in determining whether such power was actually conferred." *Bankamerica Corp. v. United States,* 462 U.S. 122, 131 (1983) (citation omitted). In addition, the Commission concedes that it did not claim such jurisdiction until *after* this Court's decision in *Goldfarb*. Resp. Br. 24.

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[7] The Commission acknowledges that the CDA would be subject to both the Sherman Act and the Clayton Act if it did not have jurisdiction over professional associations, and CDA is not urging any exemption from the antitrust laws. Resp. Br. 25 n.21.

Congress unequivocally understood how to enact antitrust legislation that covered all corporations but purposefully chose not to do so with the FTC Act. The Commission's bold effort to eviscerate Congressional intent should not be sanctioned by this Court.

D. The Commission's Construction Of Its Jurisdiction Is Not Entitled To Deference

As discussed above, the plain text and clear meaning of the FTC Act demonstrate that the Commission does not have jurisdiction over nonprofit professional associations. Thus, the Commission's reliance on *Chevron* (Resp. Br. 25-26) for the proposition that the Court must defer to the Commission's overreaching construction of its jurisdiction not only directly contradicts the position it took during oral argument before the Ninth Circuit, but also is inapposite. "[I]n defining agency jurisdiction Congress sometimes speaks in plain terms, in which case the agency has no discretion." *Mississippi Power & Light Co. v. Mississippi ex rel. Moore,* 487 U.S. 354, 382 (1988) (Scalia, J., concurring) (discussing application of *Chevron* deference principle). *See also Chevron,* 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter . . . ."); *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.,* 474 U.S. 361, 368 (1986) ("The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress."). Clearly, the Commission's unjustified attempt to expand its jurisdiction under the FTC Act is not entitled to deference. Contrary to the Commission's suggestion (Resp. Br. 25-26), statutory construction does not begin or end with the reasonableness of an agency's interpretation of its jurisdiction and authority. *Chevron*, 467 U.S. at 842-43.

The Commission's current *Chevron* deference argument directly contradicts the position it took before the Ninth Circuit. During oral argument, Judge Hall inquired of the Commission's counsel whether the *Chevron* deference

principle was applicable. He answered: "I do not think that sort of deference . . . is necessarily owed with respect to our jurisdiction."[8] Significantly, the Commission did not raise its deference argument until its brief on the merits in this Court. Thus, the Court is entitled to ignore the Commission's belated embrace of this argument. *Cf. Schiro v. Farley,* 510 U.S. 222, 228-29 (1994).

Deference to the Commission's expansive creation of its jurisdiction is particularly inappropriate where, as here, it concedes that its construction is a recent gloss arising from this Court's decision in *Goldfarb*, and that it previously refrained from asserting jurisdiction over professional associations because it assumed that it did not have such jurisdiction. Under the circumstances, the Commission's belated, unwarranted attempt to disregard Congress' intent should be rejected by this Court.

The Commission argues that CDA's public purpose test will cause serious difficulties regarding proper classification of association activities. Ironically, the Commission's substantiality test for tangible pecuniary benefits is even more troublesome in application, and none of the decisions below made any effort to define what "substantial" means. Thus, the *Community Blood Bank* rationale, which is in harmony with Congressional intent, should be adopted by this Court. Nonprofit professional associations that in reality do not operate a business or earn a "profit," as that term is commonly understood, should not be subject to the Commission's jurisdiction.[9]

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[8] *See* audiotape of oral argument of Ernest J. Isenstadt, General Counsel, Federal Trade Commission, July 16, 1997.

[9] Alternatively, if the nonprofit association earned a "profit," was a sham nonprofit, or became a vehicle primarily to violate the antitrust laws, the Commission would have jurisdiction.

II. SUMMARY CONDEMNATION OF CDA'S ETHICAL CODE WAS LEGAL ERROR

CDA's advertising guides do not ban, but merely regulate the content of price and quality dental ads. The challenged guidelines accommodate a broad range of ads. Indeed, dental advertising continues to flourish in California. Cert. App. 114a; CX 1592-1602; RX 134; TR 191-92, 513-14, 720-21, 1135. CDA's policies encourage ads to meet two criteria: (1) discount ads should inform the consumer whether he or she qualifies for a discount and the amount he or she will pay; and (2) price and quality ads should contain verifiable claims. Both criteria have procompetitive benefits: they provide information needed by consumers to make informed decisions, reduce search costs, and protect against deception.

The ALJ found no evidence that CDA's policies have increased the price or reduced the output of dental services. Cert. App. 262a.[10] Nonetheless, the Commission and the Ninth Circuit presumed competitive injury. Such a presumption flies in the face of this Court's precedents and is contrary to sound policy. No decision of this Court supports summary condemnation of conduct that serves a procompetitive purpose and has no impact on price or output.

A. CDA's Advertising Guides Are Procompetitive

Self-regulation by the professions, particularly regulation of advertising, has long been recognized as procompetitive. *Prof'l Eng'rs*, 435 U.S. at 696; *Bates v. State Bar*, 433 U.S. 350, 384 (1977); STEPHEN BREYER, REGULATION AND ITS REFORM 27-28 (1982). Due to information asymmetries, professional advertising "poses special risks of deception" and is therefore the proper subject

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[10] This is an explicit ALJ finding, not, as the Commission contends (Resp. Br. 7 n.8), a mere recitation of CDA's expert's testimony. Cert. App. 262a. The Commission did not contradict this crucial finding.

of ethical codes. *In re R.M.J.*, 455 U.S. 191, 200 (1982). The Commission does not dispute this point.

CDA addresses potential deception in a specific, targeted manner. As to discount ads, CDA provides for disclosure of the amount of the non-discounted fee, the amount or percentage of the discount, the time period the discount is available, and those eligible for the discount. Any ad that discloses these straightforward facts is consistent with CDA's ethical code. As to all other pricing ads (*e.g.*, ads claiming "low" or "affordable" fees), CDA's guides provide only that they should contain verifiable facts. Similarly, CDA guidelines on quality ads are directed only at those that contain unverifiable claims.

Far from being "onerous" or "highly restrictive" (Resp. Br. 33, 35), CDA's guides are easily met. A dentist can readily advertise a discount by claiming: "Teeth cleaning, regularly $30, now $27 for all patients during January 1999." This ad contains all of CDA's disclosures. *See* Cert. App. 122a. A dentist seeking to market a commitment to punctuality can advertise, if true: "On average, patients are seen within ten minutes of their appointment." This quality ad contains factual information that is subject to verification.

Ads meeting CDA's criteria increase the flow of information, enabling consumers to make informed choices and reducing search costs. In the above discount example, the consumer learns the exact amount he or she will pay and may readily compare dentists' advertised prices. This reduction in search costs is "particularly procompetitive." Robert Pitofsky, *Advertising Regulation and the Consumer Movement, in* ISSUES IN ADVERTISING: ECONOMICS OF PERSUASION 27, 39-40 (David G. Tuerk ed., 1978) ("Pitofsky").

The Commission does not claim CDA's guides preclude all price or discount ads. It asserts only that the disclosures render impractical "across the board" discount ads. Resp.

Br. 35.[11] However, as Chairman Pitofsky has acknowledged, an ad offering "10% off on all services" provides no more comparative price information than one which is silent as to price. Pitofsky at 39. The only "benefit" the Commission identifies for such ads is that they "can signal . . . the potential availability of cost savings, which can then be investigated further." Resp. Br. 38. The consumer is left totally at sea as to whether the discount reduces a dentist's prices below those of others. No search costs are saved.

The record is devoid of any evidence that consumers rely on "across the board" discount ads in selecting dentists or that such ads are even used by the thousands of California dentists not subject to CDA's ethical code. In fact, the record suggests that dentists avoid "across the board" discount ads due to insurance reimbursement concerns and their ineffectiveness as a marketing tool. TR 628-29, 645-46; Cert. App. 124a.

Contrary to the Commission's assertion, CDA also does not ban all quality claims. Resp. Br. 35. CDA's guides discourage only those "quality" ads that are non-factual, whose truth cannot be determined, and therefore carry a significant potential for deception. The Commission's reference to patient anxiety (Resp. Br. 37 n.29) highlights the importance of encouraging factual claims. This Court long ago approved limits on dental advertising because anxious consumers are particularly susceptible to the potential

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[11] The Commission cites to testimony in the record that a dentist may not practically include in a yellow pages ad CDA's suggested disclosures for all of his or her procedures. Resp. Br. 4 n.3. This is not the only form of advertising. The Commission does not contest that a dentist can practicably include such disclosures in a one or two page flyer. Also, the Commission also does not dispute that only a handful of dental procedures account for a large percentage of dentists' practices (AMERICAN DENTAL ASSOCIATION, THE 1990 SURVEY OF DENTAL SERVICES RENDERED 25-29 (1994)) and that discount ads for these few procedures can easily include the disclosures promoted by CDA.

deception inherent in unverifiable claims. *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 609-12 (1935).

Again, the Commission manages only the most tenuous defense of unverifiable price and quality claims, speculating, without citation to the record or to economic literature, that such claims "may convey useful information concerning the attitudes and approach of the dentist." Resp. Br. 38. Economists, however, view subjective claims as unhelpful to consumers, Robert B. Reich, *Preventing Deception in Commercial Speech*, 54 N.Y.U. L. REV. 775, 801, 803 (1979), and useable by sellers of complex services (such as dental care) to give erroneous "signals" of quality. Philip M. Parker, *"Sweet Lemons": Illusory Quality, Self-Deceivers, Advertising, and Price*, 32 J. MKTG. RES. 291, 303, 304 (Aug. 1995).

Dentists wishing to make quality claims can easily do so through factual disclosures regarding their procedures or techniques. This Court approved such an approach in *Friedman v. Rogers*, 440 U.S. 1, 15-16 (1979) (ban on trade names in optometry upheld because optometrists remained free to advertise factual information). No verifiable information is barred by CDA's guides. Accordingly, far from "pre-empt[ing] the working of the market" (Resp. Br. 39), CDA's policies facilitate an efficient market by providing consumers with factual information. Pitofsky at 37 (mandated disclosure of octane content of gasoline in lieu of vague descriptive labels is procompetitive).[12]

The Commission invokes a supposed finding of fact that unverifiable price and quality claims provide information valued by consumers. Resp. Br. 29, 34, 35, 42. The Commission's opinion, however, refers only to the ALJ's *general* fact findings that "[a]dvertising which conveys

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[12] For this reason, this Court's decisions in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), and *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), are unavailing to the Commission. Both cases involved total bans on certain attorney solicitations.

[price and quality] information is important to consumers." Cert. App. 76a-77a, 231a. CDA does not contest the importance of factual price and quality ads – indeed, CDA's guides facilitate such advertising by encouraging disclosure of verifiable claims.

In short, CDA's policies address the unique concerns raised by professional advertising which this Court identified in *Bates*. The Court noted that the difficulty consumers have in evaluating professional advertising claims may necessitate requiring "more disclosure, rather than less." 433 U.S. at 375. This Court expressed particular concern about quality claims that "are not susceptible of measurement or verification" and thus "may be so likely to be misleading as to warrant restriction." *Id.* at 383-84.

This Court's decision in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), upon which the Commission relies, highlights the need carefully to evaluate advertising policies in light of the particular industry. The ad restrictions in *Morales* were far more onerous than those here. *Id.* at 387-88. Nonetheless, this Court performed a detailed analysis of the restrictions in light of the "dynamics of the air transportation industry," including its cost structure and the relative price sensitivity of different categories of consumers. *Id.* at 389. Only after this detailed industry analysis did the Court strike down the advertising restrictions, concluding:

> All in all, the obligations imposed by the guidelines would have a significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares they charge.

Id. at 390. In contrast, the Commission in this case engaged in no detailed analysis of the unique aspects of dentistry and consumer demand for dental services, or the impact of CDA's policies on the volume and content of ads. In fact, as Commissioner Azcuenaga pointed out in her dissent, "the record suggests that CDA has not deterred dentists in

California from advertising" (Cert. App. 114a), and the ALJ explicitly found that CDA's policies have had no impact on the price or output of dental services. Cert. App. 246a, 262a.

B. CDA's Advertising Guides Must Be Judged Under A Full Rule of Reason Analysis

All practices are judged under the antitrust laws by their "impact on competition." *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984) ("*NCAA*"). The rule of reason is the prevailing standard for evaluating competitive impact. Under the rule of reason, a practice's procompetitive and anticompetitive effects are weighed, and a practice is condemned only if on balance it has an anticompetitive effect. Departure from this analysis "must be justified by demonstrable economic effect." *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988).

The Ninth Circuit and Commission strayed from these tenets of antitrust law. The ALJ found that the Commission failed to establish a violation under the rule of reason. Cert. App. 262a. Despite the ALJ's findings, the Ninth Circuit and the Commission applied a "quick look" analysis that presumed competitive injury. No decision of this Court supports such an approach in this case. Indeed, the Commission can cite to no decision by any federal court in which a practice with acknowledged procompetitive benefits and no impact on competition was summarily condemned.

The Commission and the amici curiae States principally rely on *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) ("*IFD*"). *IFD* involved an agreement among dentists to withhold x-rays from insurers. The Commission determined that the provision of x-rays was an element of competition between dentists and that the *complete ban* on providing x-rays foreclosed that competition. *Id.* at 452. The Federation proffered *no* procompetitive rationale, asserting only "noncompetitive 'quality of care' justifications." *Id.* at 462. At trial, the Commission

established that, in other states where there were no collective refusals, insurance companies had no difficulty obtaining x-rays. *Id.* at 456-57.

This Court characterized the conduct in *IFD* as akin to a group boycott and held that "[a] refusal to compete with respect to the package of services offered to customers . . . impairs the ability of the market to advance social welfare." *Id.* at 459. The Court concluded that "[a]bsent some countervailing procompetitive virtue – such as, for example, the creation of efficiencies in the operation of a market," a refusal to compete is unlawful. *Id.*

CDA's ad policies do not involve a refusal to compete as to any element of competition. CDA does not ban price or quality ads; it merely regulates their content. The challenged guidelines promote competition by encouraging more disclosure. While in *IFD* there was a finding of actual anticompetitive effect, here the ALJ found that CDA's policies had no impact on competition. Cert. App. 245a, 246a. Also in contrast to *IFD*, the Commission in this case could provide no "empirical evidence . . . that CDA members advertise less frequently than [non-members] or that dentists in California advertise less than dentists in other states." Cert. App. 114a. Indeed, dental advertising in California is flourishing. *Id.*; CX 1542-1602; RX 134; TR 191-92, 513-14, 720-21, 1135.

The Commission now asserts that it conducted "an extensive analysis of the effects of [CDA's] advertising restrictions." Resp. Br. 35. However, the Commission's "analysis" consisted only of equating CDA's ad restrictions with competitive injury. Cert. App. 74a-78a. It made no evaluation of the procompetitive benefits of CDA's disclosures, and it failed to weigh such benefits against any anticompetitive effects. The Commission failed even to evaluate whether CDA's policies had any impact on the type or quantity of dental advertising in California. At trial, the Commission failed to "offer evidence, even in the form of

testimony of an expert economist, on the fundamental elements of a rule of reason analysis." Cert. App. 110a. This examination of CDA's guidelines falls far short of the "detail necessary to understand [their] competitive effects." Resp. Br. 33 (quotation omitted).

The Commission concedes that CDA's policies have procompetitive benefits – they prevent deceptive dental ads. *See, e.g.*, Cert. App. 89a. Its complaint is that CDA's guides are overbroad, precluding some non-deceptive advertising. The rule of reason requires an evaluation of both the beneficial and adverse effects of CDA's guides and a determination of whether, on balance, the guides injure competition for dental services. *See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) (under rule of reason "fact-finder weighs all of the circumstances of a case"); *Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc.*, 123 F.3d 301, 307 (5th Cir. 1997) ("anticompetitive evils . . . must be balanced against any procompetitive benefits or justifications . . . ."). The ALJ's findings of no anticompetitive effects (Cert. App. 245a, 246a, 262a) preclude the finding of a violation under a proper rule of reason analysis. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29-31 & nn.49, 52 (1984) (no violation absent showing of anticompetitive effect, *i.e.*, "an empirical demonstration concerning the effect of the arrangement on price or quality").[13]

The Commission complains that requiring it to use its expertise to perform the assessment contemplated by the rule of reason "would interpose unjustified barriers to [its]

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[13] To the extent the Commission is suggesting that CDA's guides are unlawful because they are not the least restrictive means of accomplishing CDA's objective, this Court has never adopted a least restrictive means test under the antitrust laws and the Commission has previously disavowed that such a test is appropriate. *See* Brief for the United States as Amicus Curiae in Support of Affirmance at 28-29, *NCAA* (No. 83-271).

adjudication of antitrust claims." Resp. Br. 30. The Commission forgets that only *anticompetitive* conduct is unlawful. If the Commission can summarily condemn conduct that has no competitive effect, a wide range of legitimate commercial conduct would be subject to challenge, discouraging innovative and efficient business practices. *See NYNEX Corp. v. Discon, Inc.*, 67 U.S.L.W. 4031, 4033-34 (U.S. Dec. 14, 1998). CDA does not seek a "rigid requirement" that "exhaustive market analysis" occur in all rule of reason cases. Resp. Br. 34. CDA asserts only that advertising disclosure requirements promulgated by professional associations and directed at potentially misleading and unverifiable claims may be prohibited only if the requirements' anticompetitive effects outweigh their procompetitive benefits. Pet. Br. 41.[14]

The Commission now argues that a presumption that CDA's practices would affect price and output "is supported by both the record and by common sense and economic theory." Resp. Br. 39 (quotation omitted). The challenged practices have existed for years, yet, after a full trial, the ALJ found that the Commission "ha[s] not produced any convincing evidence" that CDA's practices "have . . . or could . . . raise prices or reduce output." Cert. App. 262a. Thus, the record directly contradicts the Commission's presumption. Moreover, "common sense" and "economic theory" are no substitutes for the trial record. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466-67 (1992) ("This Court has preferred to resolve antitrust

[14] The amici curiae States contend that an abbreviated rule of reason is applicable where the challenged practice is a naked restraint or has been shown to have an adverse effect on competition. States' Br. 16-17. Under this standard, the "quick look" rule of reason was inappropriate here. States' Br. 16-17.

claims on a case-by-case basis, focusing on the particular facts disclosed by the record.") (quotation omitted).[15]

While asserting that no market structure or market power assessment was necessary, the Commission argues that CDA had market power based on membership by 75% of California's dentists, the presumed value of membership, and entry barriers. Resp. Br. 43-44. "Market power is the ability to raise prices above those that would be charged in a competitive market." *NCAA*, 468 U.S. at 109 n.38. Here, the ALJ specifically found that CDA had no such power. Cert. App. 262a.[16]

The Commission correctly points out that "[m]arket power analysis is not an end in itself." Resp. Br. 44. Where there is direct evidence of competitive effects, or the lack

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[15] The Commission implies that this Court can apply the *per se* rule if the Court concludes that the Commission's rule of reason analysis was insufficient. Resp. Br. 29 n.24. The Ninth Circuit found the *per se* rule inapplicable (Cert. App. 18a) and the Commission did not seek review of that ruling. Moreover, this Court has declined to apply the *per se* rule to conduct far more egregious than that here. *See IFD*, 476 U.S. at 458-59; *NCAA*, 468 U.S. at 100-01; *Prof'l Eng'rs*, 435 U.S. at 686-87.

[16] That 75% of California's dentists are CDA members says nothing about CDA's market power as membership is voluntary and not a prerequisite to successful practice. Cert. App. 144a, 245a. The Commission argues that membership is so valuable that dentists remain members despite CDA's ad guidelines. Resp. Br. 44. It is equally plausible that dentists retain their membership because they do not find compliance with CDA's disclosures to be burdensome. Cert. App. 145a-46a. The Commission's market structure/market power analysis is also defective in that it fails to define the geographic market(s) in which to evaluate CDA's market position. Cert. App. 138a-39a, 262a; *Doctor's Hosp. of Jefferson, Inc.*, 123 F.3d at 310 (market power can only be assessed in properly defined geographic market). Finally, the Commission held that the ALJ applied the wrong legal standard in finding no entry barriers. Cert. App. 83a-84a. However, the ALJ correctly ruled that an entry requirement is a barrier only if it was not faced by existing competitors. 2A PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 420C, at 61 (1995). No such barrier was identified in this case. Cert. App. 139a-43a.

thereof, market power analysis is unnecessary. Here, the ALJ found "no impact on competition in any market in the State of California." Cert. App. 246a. Thus, the Commission and the Ninth Circuit erred in summarily condemning CDA's advertising guides.

CONCLUSION

CDA respectfully requests that the Court reverse the judgment of the Ninth Circuit and deny enforcement of the Commission's Order.

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