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

BRIEF OF PETITIONER CALIFORNIA DENTAL ASSOCIATION

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QUESTIONS PRESENTED

The Federal Trade Commission (the "Commission") issued an administrative complaint alleging that the California Dental Association ("CDA"), a nonprofit 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 questions on which the Court granted certiorari 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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The opinion of the court of appeals is reported at 128 F.3d 720 and is reproduced in the Appendix to the Petition for Writ of Certiorari ("Cert. App.") at 8a. The order denying rehearing is reproduced at Cert. App. 266a. The opinion of the Commission and the initial decision of the Administrative Law Judge ("ALJ") are reproduced at Cert. App. 43a and Cert. App. 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). Certiorari was granted on September 29, 1998.

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 Commission and the United States Court of Appeals for the Ninth Circuit each presumed that CDA's Code of Ethics had an anticompetitive effect, 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.*

Cert. App. 246a (emphasis added, citation omitted). The Court granted certiorari to review two significant issues raised by the decision below: *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.

1. Factual Background

a. The California Dental Association

CDA is an association of dentists whose main purpose is to benefit the public by promoting the dental health of the citizens of California. 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. CDA is exempt from federal income taxation under United States Code, Title 26, Section 501(c)(6). Cert. App. 161a-62a, 189a; TR 1141-42, 1770.

CDA promotes a vast array of educational, scientific, and public health objectives. It develops material for use in community dental health projects such as school screenings, baby bottle tooth decay education and senior abuse/neglect detection. 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. The association is instrumental in maintaining California's Denti-Cal program, which provides dental care to the poor. Over 5,500 CDA members participate in Denti-Cal. Cert. App. 164a-65a, 178a; TR 1148-49, 1154.

CDA assists dentists in complying with federal and state regulatory requirements, including their obligations under the Occupational Safety and Health Act, Environmental Protection Agency regulations, labor laws and the Americans with Disabilities Act. CDA is also a leading force in continuing dental education, offering seminars and workshops covering scientific, clinical, practice management and other areas. Through its publications, CDA provides member dentists with up-to-date information regarding

dental research, techniques and materials, as well as legal and legislative news. Cert. App. 181a-84a; 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. Cert. App. 188a-89a; TR 814-15, 1300-01.

CDA also engages in certain ancillary activities such as lobbying concerning dental issues, marketing, and providing patient relations seminars and administrative procedures for resolving patient complaints. CDA has several for profit subsidiaries through which members can obtain liability and other types of insurance, financing for equipment purchases and home mortgages, and auto leasing. These services are also available to dentists from other sources. Cert. App. 144a, 165a-70a, 181a-82a; TR 303, 1170, 1639.

Membership in CDA is entirely voluntary. CDA membership is not a prerequisite to licensure or the successful practice of dentistry. While approximately 75% of the practicing dentists in California are members of CDA, more than 5,000 dentists in active practice in California do not belong to CDA. Cert. App. 144a, 161a-62a, 245a; TR 733-34.

b. CDA's Code of Ethics

CDA's Code of Ethics provides the "basic system for self regulation of the dental profession" in California. Joint Appendix ("J.A.") 25. The Code's requirements reinforce "the obligations inherent in the practice of a profession," including "[t]he necessity of intensive education and training," "[t]he need for continuing education and training to maintain and improve professional knowledge and skills" and "[d]edication to service rather than to gain or profit." *Id.* at 25-26. (CDA's Code of Ethics)

The Commission's complaint focuses on one provision of the Code, Section 10, that prohibits false and misleading advertising. Section 10 provides in pertinent part:

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

J.A. 33. CDA has issued eight advisory opinions to assist dentists in interpretting Section 10. *Id.* at 33-35. Advisory opinions are not binding and are not considered part of the Code. *Id.* at 24. CDA relies on California law, the regulations of the state Board of Dental Examiners and the California Business and Professions Code to define what is false and misleading. Cert. App. 190a-91a. CDA's enforcement of Section 10 is an attempt to fill the gap left by the state, which does not enforce its dental advertising requirements due to budgetary and staff constraints. *Id.* at 218a-19a.

The Commission's complaint centers on the application of the Code to price and quality advertising. The Code of Ethics does not prohibit either type of advertising. Rather, the Code has been interpreted to require member advertising claims to disclose verifiable facts, to insure that consumers are not misled. Advertisements regarding discounts are required to state (1) the amount of the non-discounted fee, (2) the amount or percentage of the discount, (3) the length of time the discount will be available, (4) a list of verifiable fees, and (5) an identification of those who qualify for the discount. Cert. App. 200a. Advertisements consisting of unverifiable pricing claims, such as "lowest prices" or "bargains," have been challenged as being not susceptible of measurement and therefore likely to be false or misleading. *Id.* at 198a-99a. Similarly, Section 10 is violated by quality or superiority claims that use subjective and ambiguous phrases that are not susceptible to measurement. Unverifiable claims, such as "progressive" dentistry or

"finest dental care," are considered likely to deceive or mislead the public. *Id.* at 202a-205a, 215a-18a.

CDA's Code of Ethics applies only to dentists associated with CDA. Non-CDA dentists are free to advertise as they please, subject to federal and state law. The maximum sanction that CDA could impose on a member who violates the Code is exclusion from CDA. As the ALJ found, "CDA membership is not a prerequisite to successful practice in any California dental market." Cert. App. 245a, 144a, 161a-62a, 196a; TR 1170-71, 1352-53.

c. The Competitive Effect of CDA's Advertising Disclosure Policies

The Commission presented *no evidence*, even in the form of expert testimony, regarding the alleged competitive effect of CDA's challenged practices. Cert. App. 110a. No evidence was presented regarding the impact of CDA's advertising guides on the prices or output of dental services. The Commission failed even to present empirical evidence on whether CDA's advertising policies affected the amount or type of dental advertising in California. Indeed, the evidence suggests that price and quality dental advertising is flourishing in California and dental advertisements have increased since the early 1980's. TR 191-92, 513-14, 720-21, 1135; RX 134; CX 1592-1602.

Based on the evidence presented at trial, the ALJ made several critical findings on the competitive effect of CDA's advertising policies, 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." Cert. 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." *Id.* at 246a (citation omitted).

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." *Id.* at 245a (citation omitted).

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

5. "CDA membership is not a prerequisite to successful practice in any California dental market." *Id.* (citation omitted).

6. "CDA could not exercise market power in any relevant geographic market, whether statewide, regional, or local." *Id.* at 262a (citation omitted).

7. "CDA has a legitimate interest in fostering truthful, informative advertising by its members . . . ." *Id.* at 258a (citation omitted).

8. "Professor Knox [CDA's economic expert] . . . testified that scrutiny of dental advertising is procompetitive because advertising which is false or misleading has a negative impact on competition." *Id.* at 245a-46a (citation omitted).

In light of the above findings, the ALJ concluded that the Commission failed "to establish the conditions for satisfaction of a Rule of Reason analysis." Cert. App. 262a.

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." Cert. App. 47a. The ALJ found that the Commission had jurisdiction over CDA because "a substantial part of CDA's activities result in pecuniary benefits to its members." *Id.* at 253a. On whether CDA violated Section 5 of the FTC Act, the ALJ ruled that the Commission's failure to show anticompetitive effects was "not fatal" to the Commission's claim. *Id.* at 262a. Instead, he applied the Commission's analytical approach announced in *In re Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988) ("*Mass. Bd.*"), and concluded that CDA's Code of Ethics is "inherently suspect" and can be "quickly condemned" without a detailed market analysis. Cert. App. 257a, 259a, 262a. The ALJ faulted enforcement of the Code as overbroad because it barred "inexact" and incomplete advertisements "without regard to their truth." *Id.* at 260a.

b. The Commission Decision

The Commission, by a vote of four to one, affirmed the ALJ's finding of a violation, but disagreed with the ALJ's analytical approach on the competitive effect of CDA's Code of Ethics. Cert. 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." *Id.* at 51a-52a. With respect to the competitive effect of CDA's Code, the Commission majority declared that it would not follow its own *Mass. Board* decision. *Id.* at 63a n.7. Instead, the majority determined that CDA's guidelines 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." *Id.* at 63a.

Alternatively, the Commission majority applied a so-called "quick look" rule of reason approach to the Code's treatment of discount and quality advertising. The majority acknowledged that its application of the rule of reason was "simple and short," involving no substantial analysis of

competitive effects or any attempt to quantify any increase in price or reduction in output. Cert. App. 74a, 78a. Nonetheless, the Commission disagreed with the ALJ's finding that CDA lacked market power, relying on CDA's enforcement of its Code of Ethics and the voluntary membership of 75% of California's practicing dentists. *Id.* at 78a, 80a-82a.

Commissioner Azcuenaga dissented. She described the majority's *per se* and "quick look" approaches as "chimerical" and unable to "withstand the hard light of day." Cert. App. 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.

The Commission entered a highly regulatory order that requires CDA, *inter alia,* to: (1) cease and desist from prohibiting advertising of superiority claims, comparative claims, quality claims, subjective claims and puffery, prices, including discounted prices, guarantees, claims using adjectives or superlatives, and claims of exclusive methods or techniques; (2) remove from its Code of Ethics Section 10 and advisory opinions 2(c), 2(d), 3, 4, and 8 thereto; and (3) within 120 days review the file of each dentist currently under a disciplinary order or suspension or for whom CDA membership was denied or withdawn during the past ten years to determine if the discipline, suspension or denial was consistent with the order. Cert. App. 29a-33a.

c. The Court of Appeals Decision

By a two to one vote, the United States Court of Appeals for the Ninth Circuit affirmed the Commission's finding of a violation, but disagreed in part with the Commission's approach. On the jurisdictional issue, the Ninth Circuit focused on CDA's marketing, lobbying, continuing education and financing assistance to dentists in holding that CDA "is engaged in substantial business activities that provide tangible, pecuniary benefits to its members." Cert. App. 16a. The court, therefore, found that "the FTC properly exercised jurisdiction over the CDA." *Id.*

On whether CDA's Code of Ethics violated the antitrust laws, the majority rejected the Commission's application of the *per se* rule. The majority recognized that the *per se* rule is inappropriate "where the economic impact of the restraint is not immediately obvious and where the restraint is a rule adopted by a professional organization." Cert. App. 17a (citations omitted). The majority noted the value of CDA's policy on false advertising and stated that the Commission's claim that the Code is overbroad requires "further inquiry into its effects on competition." *Id.* at 18a.

Nonetheless, the majority approved the Commission's "quick look" approach because it deemed CDA's advertising guides to be "fairly 'naked'" restraints. Cert. App. 18a. The majority acknowledged that CDA's policies simply mandate more disclosure, "which enhances rather than limits price competition." *Id.* at 19a. However, the majority eliminated the Commission's need to show anticompetitive effects and shifted the burden of proof to CDA, observing that there is "no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing." *Id.*

As to CDA's treatment of quality advertising, the majority recognized the danger that subjective quality claims "are inherently unverifiable and therefore misleading." Cert. App. 20a. But the majority ruled that this legitimate concern "does not justify banning all quality claims without regard to

whether they are, in fact, false or misleading." *Id.* Characterizing CDA's treatment of quality claims as "a form of output limitation," the court approved the Commission's quick look analysis. *Id.* at 19a-20a.

Judge Real dissented from both the majority's holding on jurisdiction and its application of the "quick look" approach. 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." Cert. App. 25a. He also noted that CDA's advertising guides are not "sufficiently anti-competitive on their face to eschew a full-blown rule of reason inquiry." *Id.* Judge Real recognized that CDA's Code simply required full disclosure and "[f]ull disclosure is neither price fixing nor is it a ban on non-deceptive advertising." *Id.* at 26a. He criticized the majority for applying a quick look approach "in the absence of any naked restraints" and 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.*

SUMMARY OF ARGUMENT

1.A. The clear language of the FTC Act does not confer jurisdiction on the Commission over nonprofit professional associations. Under Section 4 of the FTC Act, Commission jurisdiction over corporations is limited to those that are "organized to carry on business for [their] own profit or that of [their] members." 15 U.S.C. § 44. This limitation on Commission jurisdiction was purposeful. The same Congress that enacted the FTC Act also passed the Clayton Act, which Congress made applicable to all corporations and associations.

The only court thoroughly to analyze the applicability of the FTC Act to nonprofit associations was the Eighth Circuit in *Community Blood Bank of the Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969). Applying well established rules of statutory construction, *Community Blood*

Bank found that the FTC Act did not apply to two nonprofit associations even though the Commission found that they provided "exceedingly profitable" benefits and valuable services to their members. *In re Community Blood Bank of the Kansas City Area, Inc.*, 70 F.T.C. 728, 864 (1966). The Eighth Circuit ruled that the FTC Act is limited to entities that are "organized" to conduct "business" for the pecuniary "profit" of their members, as those words are commonly understood.

B. CDA is not organized to conduct business for its own profit or that of its members. CDA is a nonprofit California corporation and is exempt from federal income taxation under United States Code, Title 26, Section 501(c)(6). CDA's main purpose is to benefit the public by promoting dental health. It does so even when contrary to the economic interests of its members. CDA has no shares of stock and no portion of its revenues inures to the benefit of any member.

Nevertheless, the Ninth Circuit determined that the Commission has jurisdiction over CDA. It did so by substituting the word "profit" in Section 4 of the FTC Act with "tangible, pecuniary benefits." This interpretation of Section 4 conflicts with the explicit language of the statute and with the Eight Circuit's decision in *Community Blood Bank*. The Ninth Circuit's construction of the statute would extend the Commission's jurisdiction to virtually every nonprofit organization or professional association, a result that is directly contrary to the clear statutory language. As Judge Real succinctly observed in his dissent, "[t]hese nonprofit membership organizations have no place in the commercial world of the F.T.C." Cert. App. 25a.

C. In light of the clear language of Section 4, resort to legislative history in unnecessary. Nonetheless, what little legislative history bears on the meaning of Section 4 supports CDA's position. The legislative history makes it clear that Congress intended to create a commission that

would be expert in evaluating industrial businesses. While numerous witnesses representing manufacturing firms and other for profit, commercial entities testified on the FTC Act, there is not a single reference in the legislative history to a representative of a voluntary professional association.

Also telling is Congress' rejection of the Commission's request in 1977 to amend Section 4 to extend its jurisdiction to nonprofit organizations. The then-chairman of the Commission recognized the need for a congressional enactment to specifically include nonprofits in Section 4 in light of *Community Blood Bank*. Nonetheless, Congress was not persuaded to expand the Commission's jurisdiction. Further, during the first sixty years of its existence, the Commission itself accepted the limitation on its jurisdiction. Not a single action was filed against a professional association between 1914 and 1975. The Commission's failure to assert jurisdiction over nonprofit professional associations for so long is strong evidence that Congress did not grant such jurisdiction.

D. It is plain from the language of Section 4 that Congress granted the Commission jurisdiction over commercial and business entities that make a "profit" as that word is ordinarily understood. Congress did not grant the Commission jurisdiction over nonprofit professional associations. If the Commission seeks coverage of all entities that provide "tangible, pecuniary benefits" to their members, it must obtain such a dramatic expansion of the statute from Congress.

2.A. The Commission and the Ninth Circuit improperly evaluated CDA's advertising guidelines under the "quick look" rule of reason. Under this approach, CDA's Code of Ethics was presumed to injure competition. This presumption flies in the face of the ALJ's finding, after a full trial, that CDA's enforcement of its advertising policy "has no impact on competition in any market." Cert. App. 246a. In fact, CDA's advertising guidelines promote competition

by prohibiting false and misleading advertising and promoting the dissemination of information necessary for consumers to make informed choices.

The full "rule of reason" is the prevailing standard for evaluating conduct under the antitrust laws. Under the rule of reason, the party challenging a practice must show that the practice has had anticompetitive effects in a relevant market. If the defendant shows that the practice has procompetitive benefits, the practice is unlawful only if its anticompetitive effects outweigh its procompetitive benefits. Only certain "naked" restraints are presumed to be anticompetitive under the *per se* rule or the "quick look" rule of reason. No matter what antitrust standard is applied, this Court has ruled that "the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 103 (1984).

B. This Court and the courts of appeals have applied the "quick look" approach only to conduct that is anticompetitive on its face and has no procompetitive justification. In no case has the "quick look" been used, as it was here, to declare conduct unlawful where it has been found to have no anticompetitive effect.

CDA's ethical guides regarding advertising differ fundamentally from conduct that has been judged under the "quick look" approach. CDA's guidelines are not facially anticompetitive and they have a procompetitive purpose and effect. CDA's disclosure provisions are designed to provide the consumer with the information needed for informed decision-making. Its guidelines for discount advertising prevent deception by encouraging disclosure of facts needed to evaluate such claims. This Court has recognized that disclosures in professional advertising are beneficial to consumers. The Commission mandates disclosures in a number of its own guides and trade regulation rules to insure that consumers have the facts upon which to make reasoned

choices. CDA's guidelines serve the same procompetitive purposes.

CDA's policies regarding "quality" claims are equally procompetitive. Quality claims by professionals are particularly difficult for consumers to evaluate. Nothing in CDA's Code or its enforcement prevents dentists from making verifiable factual claims regarding the quality of their services. CDA's ethical code simply stands for the proposition that subjective and ambiguous claims – *e.g.*, "progressive" dentistry, "finest dental care" – are unverifiable, convey no useful information and carry a significant potential for deception.

After a full administrative trial, the ALJ determined that CDA's Code had "no impact on competition in any market in the State of California, particularly with respect to price or output." Cert. App. 246a. The ALJ conceded that the Commission failed "to establish the conditions for satisfaction of a Rule of Reason analysis." *Id.* at 262. Nonetheless, the Commission and the Ninth Circuit inferred injury to competition without a "detailed analysis." *Id.* at 23. The reliance on inference in the face of the ALJ's findings disregards this Court's holdings that inferences regarding competitive effects must give way to facts. In the words of the ALJ, the government produced no "convincing evidence that CDA members have acted together or could act together to raise prices or reduce output." *Id.* at 262a. As Judge Real pointed out in his dissent, the Ninth Circuit erred by finding a restraint "without the supporting help from any of the economic principles to be applied to a full market power analysis." *Id.* at 26a.

C. This case demonstrates the risk of overboard application of the "quick look" rule of reason. Here, the Ninth Circuit found a violation of the antitrust laws despite the Code's acknowledged procompetitive purpose and the ALJ's conclusion that the Code had no anticompetitive effects. Thus, CDA is barred from engaging in conduct –

enforcing its Code of Ethics – that likely has significant procompetitive benefits and, at worst, is competitively neutral. If the Ninth Circuit's decision is permitted to stand, it will have a substantial chilling effect on the ability of professions to prevent false and misleading advertising. The expanded "quick look" approach applied by the Ninth Circuit will also have a negative impact on commercial conduct outside the professions. If businesses are required to justify conduct even when it is not facially anticompetitive, innovative business strategies will be stifled out of fear of antitrust liability.

ARGUMENT

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 unambiguous language of the FTC Act and the statutory scheme of the antitrust laws clearly demonstrate the absence of Commission jurisdiction in this case. Section (5)(a)(2) of the FTC Act expressly restricts 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.

The limiting language utilized by Congress to define the jurisdiction of the Commission was purposeful. The same Congress that enacted the FTC Act expressly made the Clayton Act, like the Sherman Act before it, applicable to all corporations and associations regardless of whether these organizations were for profit or nonprofit.[1] Unlike the

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[1] The Clayton Act, 15 U.S.C. § 8, and the Sherman Act, 15 U.S.C. § 1, apply to all "persons." These two statutes define "persons" to encompass all "associations existing under or authorized by the laws of

Clayton and Sherman Acts, the FTC Act is not a "carefully studied attempt" to bring within it every type of legal entity. *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944). To the contrary, the limiting language of the FTC Act clearly manifests an attempt specifically to restrict the jurisdiction of the Commission to exclude nonprofit professional associations.

The United States Court of Appeals for the Eighth Circuit considered this limitation on the Commission's jurisdiction in *Community Blood Bank of the Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969) *("Community Blood Bank")*. In interpreting what constitutes a corporation organized "for its own profit or that of its members," the court of appeals 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. *Id.* 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. CFTC*, 519 U.S. 465, 480-81 (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. 405 F.2d at 1013. CBB was organized as a

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either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." 15 U.S.C. § 12; 15 U.S.C. § 7.

nonprofit. *Id.* The Hospital Association was a nonprofit which included as members Blue Cross Service Corporation, a 501(c)(4) corporation,[2] two for profit corporations, and a number of 501(c)(3) corporations.[3] *In re 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 the respondents had collectively restrained trade by impeding the development of two commercial blood banks. *Id.* at 881-82. The Commission affirmed this decision. *Id.* at 947.

The Commission determined that it had jurisdiction because the Hearing Examiner had made specific findings relating to the pecuniary benefits that each of these associations had provided to its members, which were "in the broadest sense exceedingly profitable for the doctors and for the hospitals to receive." *Id.* at 864. The Commission also 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 or render themselves." *Id.* at 909-10.

The Eighth Circuit reversed the Commission's decision and held that the CBB and the Hospital Association were outside the scope of the Commission's jurisdiction. *Community Blood Bank*, 405 F.2d at 1022. Although the

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[2] United States Code, Title 26, Section 501(c)(4) exempts from taxation "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare."

[3] United States Code, Title 26, Section 501(c)(3) provides an exemption for "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals."

Hospital Association may have provided "valuable services" to its members, the Eighth Circuit recognized that, in light of the FTC Act's language and legislative history, the Commission's jurisdiction is limited to entities that are "organized" to conduct "business" for the pecuniary "profit" of their members, as those words are commonly understood. *Id.* 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 Hosp. Serv., Inc. v. City of Milwaukee*, 13 Wis. 2d 447, 466, 109 N.W.2d 271, 280 (Wis. 1961)).

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

It is well established that words in a federal statute are to be "interpreted as taking their ordinary, contemporary, common meaning" unless otherwise defined. *See Perrin v. United States,* 444 U.S. 37, 42 (1979). The term "profit" is widely used and understood to mean the excess of revenues over investment or expenses. *Community Blood Bank,* 405 F.2d at 1017. Here, the Commission concedes that CDA is not "organized" as a for profit business entity. But neither is CDA engaged in business for the profit of itself or its members.

CDA is organized as a nonprofit California corporation. The main purpose of the association is to benefit the public by promoting the dental health of the citizens of California. CDA has no shares of stock and no portion of its revenues inures to the benefit of any member or individual. CDA dues and other revenues are used solely to implement the goals and objectives of the association as specified in its Bylaws and Articles of Incorporation. CDA is exempt from

federal income taxation under United States Code, Title 26, Section 501(c)(6). Cert. App. 161a-62a, 189a; TR 1141-42, 1770.[4]

CDA promotes a wide variety of educational, scientific and public health objectives, including community dental health projects such as dental care for the poor, the provision of educational materials and services to public and private agencies, and providing dentists with programs and materials concerning dental research, techniques and practices. Cert. App. 164a-65a, 178a; 181a-84a; TR 1148-50, 1154, 1161-62. CDA promotes public health regardless of its impact on the economic interests of its members. For example, the CDA was at the forefront of the program to provide fluoridation, which reduces the need for dental care. Cert. App. 188a-89a; TR 814-15, 1300-01. While CDA does provide some ancillary services for its members, such as patient relations seminars, assistance in complying with governmental laws and regulations, and lobbying activities, and has subsidiaries that provide insurance and financing programs, these activities do not generate any profit for CDA or its members. Cert. App. 144a, 165a-70a, 181a-82a; TR 303. Nor do these activities make CDA a commercial or business entity.

As the Eighth Circuit held in *Community Blood Bank*, Congress gave the Commission jurisdiction only over corporations "organized" for profit; it did not confer jurisdiction over every corporation that provided "tangible,

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[4] Significantly, Congress enacted Section 501(c)(6) in October 1913, before Section 4 of the FTC Act, and the distinction between for profit and nonprofit organizations under Section 501(c)(6) parallels the distinction made by FTC Act Section 4. In order to qualify for an 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). *See also National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 478 (1979) (discussing legislative history of § 501(c)(6)).

pecuniary benefits" to its members as the Commission argues in this case.[5] Nevertheless, the Ninth Circuit determined that the Commission had jurisdiction over CDA, and approved the Commission's effort to nullify the statute by reading the word "profit" out of the statute. The Ninth Circuit introduced a "surrogate" for "profit," namely, the provision of "tangible, pecuniary benefits." Cert. App. 16a. Significantly, Section 4 of the FTC Act does not include the language "tangible, pecuniary benefits."

Indeed, the *Community Blood Bank* court criticized the Commission for differentiating between for profit and nonprofit corporations for the purpose of defining the language "organized to carry on business for its profit." The Eighth Circuit noted that the Commission interpreted "profit" in a for profit corporation to mean it was organized in order that its shareholders have an equity interest in the corporation and its income and that they have an entitlement to share in the profits and in the assets upon dissolution. *Community Blood Bank*, 405 F.2d at 1016. On the other hand, the Commission interpreted "profit" in the case of nonprofits more broadly because nonprofits do not distribute profits and their members are not entitled to the corporation's assets upon dissolution. *Id.* The court held that neither the legislative history nor the language of the FTC Act supports the Commission's contention that Congress intended "profit" to be given different interpretations depending upon the character of the

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[5] 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 in fact" as a *bona fide* nonprofit corporation. *See In re Ohio Christian College*, 80 F.T.C. 815, 848 (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.

corporation under consideration. *Id.* at 1016-17. It observed:

> [B]y limiting the corporations to be embraced within the provisions of the Act, Congress intended to exclude some corporations from the Commission's jurisdiction.

Id. at 1017.

The Ninth Circuit rejected *Community Blood Bank* and followed instead the approach of the Second Circuit's decision in *American Med. Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court*, 455 U.S. 676 (1982) (*"AMA"*). In *AMA* the Second Circuit, with minimal analysis, found that the AMA served both its members' business and non-business interests and that the business aspects of the AMA fall within the scope of the Commission's jurisdiction. *Id.*

Here, the Ninth Circuit erroneously found that the CDA activities being regulated by the Commission relate to the business affairs of the members. Cert. App. 16a. This flies in the face of what the Commission has sought to regulate, namely, the CDA's Code of Ethics.[6] The construction of Section 4 used by the Second and Ninth Circuits would extend the scope of the Commission's jurisdiction to cover virtually every nonprofit organization or professional association – a result directly contrary to the express language of the statute. The Commission's continuing campaign to litigate the self regulatory efforts of professional societies imposes enormous burdens on these societies and directs their scarce resources from their nonprofit and

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[6] The Ninth Circuit also cited *FTC v. National Comm'n on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976). Cert. 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.

socially desirable objectives. As Judge Real succinctly observed, "These nonprofit membership organizations have no place in the commercial world of the F.T.C." *Id.* at 25a.

C. The Legislative History Supports CDA's Position

Although the clear language and plain meaning of the FTC Act make it unnecessary to resort to legislative history, the legislative history of the FTC Act confirms that the Commission does not have jurisdiction over nonprofit professional associations such as CDA. Instead, the legislative history demonstrates that Congress limited the scope of the FTC Act to the regulation of industrial and commercial entities organized and operated for profit, or combinations of such entities, and expected the Commission to develop specialized knowledge concerning such for profit entities.

Congress passed the FTC Act in large part because members believed that judicial enforcement of the Sherman Act had been inadequate. *See* S. Rep. No. 62-1326, at 13 (1913); S. Rep. No. 63-597, at 8-9 (1914); H.R. Rep. No. 63-1142, at 18-19 (1914). The legislative history repeatedly reports that members of Congress expected that the Commission would be "an administrative body of practical men thoroughly informed in regard to business," would have unique expertise concerning "the business and economic conditions of . . . industry," would have "a vast mass of information in numerous branches of industry," and would be "in continual touch with the business organizations in the various industries." H.R. Rep. No. 63-1142, at 18-19 (1914); S. Rep. No. 63-597, at 8-9 (1914). As one of the managers of the Senate bill explained, the Act was designed to create "a trade tribunal to assist in the administration of the [antitrust laws] respecting general industry." 51 Cong. Rec. 11379 (Sen. Cummins). In other words, Congress limited application of the FTC Act to "industrial business,"

particularly manufacturers, dealers, and associations or other combinations of such entities.[7]

The identity of the witnesses who testified concerning the proposed establishment of the Federal Trade Commission provides strong confirmatory evidence that Congress never intended the FTC Act to cover nonprofit professional associations. *See Chicago Transit Auth. v. Flohr,* 570 F.2d 1305, 1309 (7th Cir. 1977) ("[A] strong inference as to the purpose of the Act can be gleaned from the identity of the witnesses who testified."). More than 130 witnesses testified. *Hearings on H.R. 12120 to Establish Interstate Trade Commission Before Comm. on Interstate and Foreign Commerce*, 63d Cong. (1914). Numerous representatives of manufacturing corporations and other for profit, commercial and industrial entities testified. *Id.* The legislative history does not contain a single reference to a representative of a voluntary professional association. This conclusion is further confirmed by the fact that, when the FTC Act was passed, it was widely believed that the professions were not subject to any antitrust laws. *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 552-53 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979).

It is also significant that 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*

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[7] *Hearings on H.R. 12120 to Establish Interstate Trade Commission Before Comm. on Interstate and Foreign Commerce*, 63d Cong. (1914); S. Rep. No. 63-597, at 11, 25 (1914); 51 Cong. Rec. 8840 (Rep. Covington) ("covers industrial business"); *id.* at 8851 (Rep. Stevens) (discussing retailers and manufacturers and the "producers of coal and lumber"); *id.* at 8986 (Rep. Montague) ("great industrial and commercial concerns").

and Foreign Commerce, 95th Cong. (1977) ("*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.

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 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.* However, 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. 95-339, at 120 (1977). *See Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980) (relying in part on Congressional inaction to discern legislative intent).

For many years the Commission itself seemed to accept the limitation on its jurisdiction. During the first 60 years of its existence, the Commission filed no actions against professional associations. The first complaint against such an association was filed in 1975. *AMA,* 638 F.2d at 447. In

an analogous context, this Court has held that the Commission's failure to assert jurisdiction over practices in intrastate commerce for so many decades "is a powerful indication" that Congress never granted such jurisdiction, particularly in light of the Commission's unsuccessful attempt to secure such authority. *FTC v. Bunte Bros.*, 312 U.S. 349, 351-52 (1941). Similarly, the Commission here not only failed to assert jurisdiction over nonprofit professional associations during the first six decades of its existence, but also failed to secure an express grant of such jurisdiction from Congress.

D. Only Congress Can Amend The FTC Act

The plain language of Section 4 of the FTC Act establishes the limitation imposed by Congress over the Commission. Manifestly, Congress provided jurisdiction to the Commission over commercial and business associations which make a profit as that term is defined by *Community Blood Bank*. It did not, nor did it intend to, include nonprofit professional associations such as CDA within the ambit of the Act.[8]

The Commission's tactic of referring to whether a nonprofit professional association provides "tangible, pecuniary benefits" rather than whether it is "organized for its own profit or that of its members" should not be countenanced by this Court since it completely eviscerates Congressional intent. If the statute is to be revised in such a manner, it must be done by Congress. *See, e.g., Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 79 (1979).

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[8] This does not mean that these associations would have an exemption from the antitrust laws since they would continue to be subject to the Sherman Act. *See, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

II. CDA'S CONDUCT SHOULD HAVE BEEN JUDGED UNDER A FULL RULE OF REASON ANALYSIS

CDA's ethical advertising guide serves the express purpose of preventing false and deceptive advertising. The Code encourages dentists to disclose specific fee information in lieu of unverifiable discount advertisements. It also requires dentists to refrain from making unverifiable subjective claims about the pricing and quality of dental care. J.A. 33-35. These requirements are procompetitive on their face, as they encourage the increased flow of accurate information about dental services, while filtering out ads that tend to mislead consumers.

The ALJ tested the competitive effects of CDA's Code under the rule of reason in a full trial. His finding confirmed the absence of any harm to competition:

> 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.*

Cert. App. 246a (emphasis added, citation omitted).

Nonetheless, the Commission and the Ninth Circuit held that CDA violated the antitrust laws under a "quick look" approach that presumed competitive injury. In so doing, they erroneously extended the "quick look" beyond the limited class of cases to which this truncated approach has been applied by this Court and the courts of appeals, and beyond what is supportable by sound public policy. A practice that is not anticompetitive, either on its face or in its effects, cannot be condemned summarily under the antitrust laws.

A. A Full Rule Of Reason Analysis Is The Prevailing Standard For Assessing A Restraint's Competitive Effects

Section 1 of the Sherman Act and Section 5 of the FTC Act, prohibit only conduct that unreasonably restrains competition. *See 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. *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. *See Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1569-70 (11th Cir. 1991). Such an effect can be shown directly, through proof of an increase in price or a reduction in output. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) ("*IFD*"). If direct evidence is unavailable, competitive injury may be inferred from a showing of market power in a properly defined market, including the existence of barriers to entry. *See id.* Market power is the ability to raise prices above the level that would prevail in a competitive market. *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 n.38 (1984) ("*NCAA*").

If the party challenging the conduct shows anticompetitive effect, the defendant must respond by demonstrating that the conduct promotes competition. The finder of fact then balances the anticompetitive effects proved by the plaintiff against the procompetitive benefits shown by the defendant. *Seagood*, 924 F.2d at 1569. The

rule of reason is violated only if the anticompetitive effects outweigh the procompetitive benefits. *Id.*

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. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Such conduct, principally horizontal price fixing, is deemed to be *per se* illegal. *See id.* Few practices are so condemned. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 178 (1965) ("[T]he area of *per se* illegality is carefully limited."). Because the *per se* rule precludes analysis of a practice's 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 (internal quotation omitted); *see also Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985). In recent years, this Court has required more analysis of actual competitive effect, not less, before condemning business practices under the antitrust laws. *See, e.g., Northwest Wholesale Stationers*, 472 U.S. at 296-97; *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9-10 (1979). Indeed, on at least two occasions, this Court has overturned earlier precedents, and analyzed under the rule of reason conduct it previously had held to be illegal *per se* when it appeared that the conduct may have net procompetitive benefits. *See Khan*, 118 S. Ct. at 282-84; *Continental T.V.*, 433 U.S. at 54-57.

This Court has applied an "abbreviated" rule of reason only to a very limited group of practices. In *NCAA*, the Supreme Court for the first time stated that the rule of reason, in certain circumstances, could be "applied in the twinkling of an eye." 468 U.S. at 109 n.39 (internal quotation omitted). There, the Court was confronted with a practice that was a "naked restraint on price or output" for which "the anticompetitive consequences" were "apparent."

Id. at 106, 110. Although unwilling to condemn the practice as being illegal *per se*, this Court nonetheless invalidated it without "a detailed market analysis" because the challenged conduct had no plausible procompetitive justification. *Id.* at 110, 113-20.

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 104. "[T]here is a presumption in favor of a rule-of-reason standard," and "departure from that standard must be justified by demonstrable economic effect." *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988). "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, Inc. v. American Airlines, Inc*, 806 F.2d 722, 727 (7th Cir. 1986) (Easterbrook, J.).

B. The Ninth Circuit Improperly Applied The "Quick Look" Approach

In its two-to-one decision below, the Ninth Circuit properly ruled that CDA's Code of Ethics is not *per se* unlawful. Cert. App. 18a. In so holding, the majority noted that CDA's ethical policies "do not, on their face, ban truthful, nondeceptive ads." *Id.* at 18a. It acknowledged that CDA's justification for its policies – preventing false and misleading advertising – is a "legitimate, indeed procompetitive, goal"; and it conceded "that as a general matter disclosure can augment competition and increase market efficiency by providing consumers more information." *Id.* at 19a.[9] Nonetheless, the majority

[9] The ALJ confirmed CDA's "legitimate interest in fostering truthful, informative advertising" and that "scrutiny of dental advertising is pro-competitive." Cert. App. 245a, 258a.

summarily condemned the CDA's disclosure provisions under the "quick look" approach. *Id.* at 18a-19a.

The Ninth Circuit's misapplication of the abbreviated rule of reason ignores this Court's precedents, disregards the ALJ's finding of no competitive injury and imperils, rather than enhances, competition in the professions.

1. This Court has applied the abbreviated rule of reason only to naked restraints that have actual anticompetitive effects

This Court has invalidated conduct through the "quick look" in only two cases. In each, the conduct at issue was anticompetitive on its face and had no procompetitive justification. Moreover, summary condemnation was consistent with the trial court's finding as to the conduct's actual anticompetitive effects.

In *NCAA*, the Court considered rules of the National Collegiate Athletic Association ("NCAA") that limited the number of games member football teams could televise and had the effect of setting prices networks would pay for the right to televise games. 468 U.S. at 91-93. The rules, on their face, fixed prices and reduced output. *Id.* at 113. Because the NCAA failed to identify any plausible procompetitive rationale, the Court condemned the challenged practices without "a detailed market analysis." *Id.* at 110, 113-20. A detailed analysis was unnecessary given that the "anticompetitive consequences of this arrangement [were] apparent" and "no countervailing competitive virtues [were] evident." *Id.* at 104, 110 n.42 (internal quotation omitted). Further, summary condemnation was consistent with the district court's factual finding that the NCAA's conduct "ha[d] operated to raise prices and reduce output." *Id.* at 113.

Facially anticompetitive conduct also was at issue in *IFD*. There, a group of dentists organized a "union" solely to evade the antitrust laws. 476 U.S. at 451. The group promulgated a "work rule" which prohibited members from

supplying x-rays to insurers, who were using the x-rays to review the dentists' diagnoses. *Id.* at 450. The Court found that the dentists' rule was "a horizontal agreement . . . to withhold from . . . customers a particular service that they desire – the forwarding of x rays to insurers." *Id.* at 459. Such an arrangement had an obvious anticompetitive character. In fact, after a lengthy trial, the Commission found that the challenged practice had caused "actual, sustained adverse effects on competition." *Id.* at 451-52, 461. In the absence of any countervailing procompetitive virtue, the Court held that the restraint violated the rule of reason even without a detailed showing of its impact on competition. *Id.* at 459-61.

Adhering to the narrow circumstances present in *NCAA* and *IFD*, the lower courts have held that the abbreviated rule of reason is appropriate only where conduct is "on its face" a restraint on price or output for which there is no procompetitive justification. *Chicago Prof'l Sports Ltd. Partnership v. National Basketball Ass'n*, 95 F.3d 593, 601 (7th Cir. 1996) (Cudahy, J., concurring) ("[T]he 'quick look' approach should have a narrow application, reflecting its recent and sharply delimited origin in the NCAA case."); *American Ad Management, Inc. v. GTE Corp.*, 92 F.3d 781, 789 (9th Cir. 1996) ("[T]his so-called 'quick look' analysis is the exception, rather than the rule."); *Vogel v. American Soc'y of Appraisers*, 744 F.2d 598, 603 (7th Cir. 1984) (summary condemnation of ethical bylaw improper unless "it has clear anticompetitive consequences and lacks any redeeming competitive virtues"). Absent exceptional circumstances, courts of appeals continue to evaluate antitrust claims under the traditional rule of reason analysis. *See, e.g., United States v. Brown Univ.*, 5 F.3d 658, 678 (3d Cir. 1993).

As exemplified by this case, a full rule of reason analysis is necessary in most instances to ensure that procompetitive or competitively neutral conduct is not mistakenly condemned. *Chicago Prof'l Sports*, 95 F.3d at

602 (Cudahy, J., concurring). No court, except the Ninth Circuit in this case, has used the "quick look" to condemn facially procompetitive conduct that was found to have no anticompetitive effects.

2. CDA's advertising guidelines are procompetitive on their face

CDA's advertising guidelines differ fundamentally from the conduct condemned in *NCAA* and *IFD* in that they are *pro*competitive in nature, by increasing the supply of accurate information, and do not involve nakedly anticompetitive misconduct. As the Ninth Circuit conceded, "CDA's policies do not, on their face, ban truthful, nondeceptive ads." Cert. App. 18a. The policies instead prevent misleading and deceptive advertising.

a. The prevention of misleading and deceptive professional advertising is procompetitive

Self regulation of the ethical conduct of professionals generally serves procompetitive ends. In *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 696 (1978) ("*Prof'l Eng'rs*"), this Court noted that professional "[e]thical norms may serve to regulate and promote . . . competition, and thus fall within the Rule of Reason."

The procompetitive role of professional ethical codes is particularly true as to professional advertising. Consumers frequently lack sufficient information to evaluate adequately professional services, and there is little standardization of such services. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 27-28 (1982) ("The layman cannot readily evaluate the competence of a doctor or lawyer."). Advertising by professionals "poses special risks of deception" to consumers. *In re R.M.J.*, 455 U.S. 191, 200 (1982). Thus, "professional deception is a proper subject of an ethical canon." *Prof'l Eng'rs*, 435 U.S. at 696. Indeed, in *Bates v. State Bar*, 433 U.S. 350, 384 (1977), this Court noted that professional associations have a special role to play in

assuring that professional "advertising . . . flows both freely and cleanly."

b. CDA's disclosure provisions prevent misleading professional advertising and increase consumer information

The CDA's disclosure provisions encourage member dentists to give consumers *more* information, not *less*. When advertising a price discount, CDA provides for disclosure of the non-discounted fee, the dollar amount or percentage of the discount, the length of time the discount will be honored, a list of verifiable fees, and an identification of the groups of persons eligible to receive the discount. Cert. App. 200a. These guides prevent deception caused by the failure to disclose the "variables and other relevant factors" needed to evaluate discount claims. J.A. 34.

Both this Court and the Commission have recognized the procompetitive benefit of disclosure requirements. In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 655 (1985), the Court approved Ohio's mandatory disclosures in the advertisement of contingency fees because the disclosures "prevent[] deception of consumers." *Id.* at 651. This conclusion was consistent with the Court's earlier admonition in *Bates* that, when a State seeks to prevent advertising which is misleading by omission, "the preferred remedy is more disclosure, rather than less." 433 U.S. at 375.

The Commission utilizes mandatory disclosures in a number of its guides and trade regulation rules to prevent consumer deception. Advertisements which must bear disclosures include those promoting bargains, the fuel economy of new cars, and pay-per-call services. 16 C.F.R. §§ 228.16(a)(4), 233.4(c), 259.2, 308.3(b) (1998). Commission disclosure requirements can be extensive. For example, the Commission's Funeral Industry Practices Rule states that it is a deceptive act to fail to disclose:

> the cost to the purchaser for each of the specific funeral goods and funeral services used in connection with the disposition of deceased human bodies, including at least the price of embalming, transportation of remains, use of facilities, caskets, outer burial containers, immediate burials, or direct cremations, to persons inquiring about the purchase of funerals.

Id. at § 453.2(a) (1998). *See also id.* at § 453.2(b)(4)(ii) (1998) (listing required disclosures).

The CDA's disclosure provisions serve the same procompetitive purpose as the Commission's. Information disclosed as a result of CDA's Code enables consumers to determine accurately the savings offered by a discount, whether an alleged "discount" is actually based on inflated non-discounted fees, when the discount is available, and whether they are entitled to receive the discount. None of this information is imparted in ads that say, for example, "10% off oral exams," even if the ads are literally true. CDA's disclosure policies allow consumers to evaluate and compare discount claims, without overburdening advertisements. Thus, these policies cannot be properly viewed as naked restraints on price or output meriting application of *NCAA*'s abbreviated rule of reason. 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.*

Cert. App. 25a-26a (emphasis added).[10]

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[10] Economists recognize that requiring disclosures can increase the flow of accurate price information to consumers and have the

Nor can the CDA's disclosure policies be summarily condemned, as the Ninth Circuit did, for requiring too much disclosure. Cert. App. 19a. The Ninth Circuit identified only *one* instance where it believed CDA's disclosure guidelines might become excessive – advertisements in which a dentist chose to promote "across-the-board-discounts." *Id.* The majority concluded that in such a case "it is simply infeasible to disclose all of the information that is required" by CDA. *Id.* In other words, a list of the fees for *every* dental procedure performed by a dentist would be too voluminous to include in an advertisement.

The summary invalidation of the CDA's disclosure policies on this ground exemplifies why use of the "quick look" was inappropriate. Even if it is infeasible for a dentist to run an ad which includes a list of *all* dental procedures he or she offers, this objection has no applicability to discounts that apply only to one or a few *specific* dental procedures (*e.g.*, an ad offering a 10% discount off the price of an oral exam or filling a cavity). Not even the Commission asserts that it would be too onerous for a dentist to meet the CDA's information disclosure guidelines in such procedure-specific discount ads.[11]

Further, consumers suffer little or no loss of relevant pricing data if dentists choose not to advertise across-the-

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procompetitive effect of lowering prices. *See* Stephen A. Rhoades, *Reducing Consumer Ignorance: An Approach and Its Effect*, 20 ANTITRUST BULL. 309, 322-27 (1975) (describing benefits to consumers of mandated product disclosures).

[11] Studies have shown that while dentists offer over one hundred procedures, only a handful of dental procedures comprise a large percentage of a dentist's practice. *See* AMERICAN DENTAL ASSOCIATION, THE 1990 SURVEY OF DENTAL SERVICES RENDERED 25-29 (1994). Thus, a dentist can easily advertise discounts on the five procedures he or she most frequently performs, meet the CDA's disclosure requirements, and provide consumers with the information they need to evaluate prices for the procedures they are most likely to require.

board discounts rather than comply with the CDA's disclosure requirements. Ads that merely hawk services at "10% off" do not promote informed consumer choice. A consumer cannot determine whether a dentist offering 10% off his or her fees truly offers better prices than a dentist promoting a 5% discount, or no discount at all, unless ads disclose the base prices from which discounts are taken. Long before he penned the Commission's decision in this case, Chairman Pitofsky acknowledged this point:

> [M]ost government charges of deceptive advertising have to do with product claims that are extremely difficult or impossible to measure by observation or use. How can a consumer determine the accuracy of a claim that a product has "twice as much vitamin C" as a competing brand? How can a consumer reliably evaluate a claim that a particular disinfectant "helps prevent colds and flu"? *Even price claims can be difficult to evaluate – when the claim is "10 percent off manufacturer's list" or "lowest price in town."*

Robert Pitofsky, *Advertising Regulation and the Consumer Movement*, *in* ISSUES IN ADVERTISING: THE ECONOMICS OF PERSUASION 27, 34 (David G. Tuerck ed., 1978) (emphasis added). The negligible informational content of such discounts claims is not lost on consumers. According to Chairman Pitofsky, ads merely offering "10 percent off" are "so ambiguous . . . that they will be ignored by almost all consumers." *Id.* at 39.

At worst, CDA's disclosure policies have procompetitive benefits, while potentially constraining some discount advertising. Contrary to the Ninth Circuit's approach, this realization begins the rule of reason inquiry; it does not end the analysis. To determine the net competitive effect of a disclosure requirement, its actual procompetitive and anticompetitive effects must be weighed in light of the market in which it operates. Such an analysis can be done only through a full rule of reason analysis. *See Vogel*, 744

F.2d at 603-04 (Posner, J.) (bylaw of professional association banning percentage fees may have procompetitive effect and, therefore, must be judged under full rule of reason); *see also Brown*, 5 F.3d at 678 (remand to district court to evaluate effects of conduct under full rule of reason).

The Commission did not even attempt a full evaluation of the competitive effects of CDA's policy. Instead, both the Commission and the Ninth Circuit presumed that CDA's disclosure provisions caused competitive injury without a "detailed analysis." Cert. App. 23a.

c. CDA's substantiation policies prevent misleading professional advertising

It is equally plain that CDA's substantiation policies do not constitute a naked restraint warranting a "quick-look" analysis. CDA's ethical code requires that claims about dental services be verifiable. Those that are unverifiable – such as claims that a dentist provides "progressive" dentistry or the "finest dental care" – are potentially misleading. Cert. App. 203a-06a, 208a. CDA's policy on quality claims is consistent with both the economic literature and court decisions regarding subjective ads.

Almost twenty years ago, Robert Reich noted that subjective product claims are of little or no benefit to consumers:

> [A]dvertising presenting purely subjective claims about quality (such as "the best available") can be expected to generate very little efficient comparison shopping. Such advertising does not facilitate shopping because the units in which it is expressed do not lend themselves to comparison and the claims are not easily verifiable.
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> Words or phrases whose meanings are imprecise, connoting a variety of attributes, are not factually verifiable, since it is unclear what facts are at issue.

> Nor do they facilitate comparison shopping, since they do not represent uniform qualities or consistent measures.

Robert B. Reich, *Preventing Deception in Commercial Speech*, 54 N.Y.U. L. REV. 775, 801, 803 (1979). Reich's analysis of subjective claims is of particular import to professional services because of the difficulty consumers have in evaluating such claims by professionals.

This Court has recognized that subjective professional advertising is inherently misleading. In *Bates*, the Court stated that, "advertising claims as to the quality of services . . . are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction." 433 U.S. at 383-84. Much earlier, in *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 609-10 (1935), this Court upheld an Oregon law providing for the revocation of a dental license where a dentist advertised, among other things, "superior" services, a guarantee, or promises to perform a dental operation "painlessly." The Court stated:

> We do not doubt the authority of the State to estimate the baleful effects of such methods [of advertising] and to put a stop to them . . . . The community is concerned with the maintenance of professional standards which will insure . . . protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief.

Id. at 612.[12]

In addition, in *Friedman v. Rogers*, 440 U.S. 1, 3 (1978), this Court upheld a Texas statute prohibiting the

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[12] This Court cited approvingly to *Semler* in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 (1978), and *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975).

practice of optometry under "trade names" because of their potential for deception. *Id.* at 12-13. The Court held that the prohibition against trade names was appropriate because it still allowed "the factual information associated with trade names [to] be communicated freely and explicitly to the public." *Id.* at 16. The restriction increased the amount of useful information provided to consumers, as it "ensure[d] that information regarding optometrical services [would] be communicated more fully and accurately . . . than it had been in the past when optometrists were allowed to convey the information through unstated and ambiguous associations with a trade name." *Id.*

CDA's policies regarding quality claims operate in the same fashion. All that is prohibited are subjective, unverifiable claims. Nothing in CDA's guides or enforcement prohibits a dentist from making factual claims that can be objectively verified. He or she is free to advertise the facts that underlie subjective claims of the supposedly "progressive" or "finest" nature of his or her services. CDA's policies stand only for the proposition that terms like "progressive" or "finest," by themselves, convey no useful information and carry a significant potential for deception.

Even the Commission admitted it could not say CDA's guideline concerning "nonprice" advertising "facially appear[ed] to be one that would always or almost always tend to restrict competition and decrease output.'" Cert. App. 73a (citation omitted). Indeed, the Commission's opinion conceded that advertising "a service as 'painless,' for example, may be inherently deceptive." *Id.* at 89a.[13]

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[13] The Commission's own rules restrict unverifiable advertising claims. For example, the Commission's environmental marketing rules state that "[u]nqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers." 16 C.F.R. § 260.7(a) (1998). According to the Commission, environmental claims that have the

In short, CDA's advertising policies, both as to price and quality, are not facially anticompetitive and do not directly affect the price or output of dental services. Thus, CDA's advertising guidelines are far different from the restraints in *NCAA* and *IFD* to which this Court applied a "quick look" analysis. Indeed, CDA's policies are procompetitive in that they encourage dentists to provide sufficient factual information in their advertisements to permit consumers to make reasoned decisions. *See Friedman*, 440 U.S. at 16. *See also Brown*, 5 F.3d at 677. Therefore, summary condemnation of CDA's policies was unwarranted. Advertising requirements promulgated by professional associations directed at potentially misleading and unverifiable claims, such as those at issue here, should be prohibited only upon a showing of anticompetitive effect after a full rule of reason analysis. No such showing was made in this case.

3. CDA's policies were found to have no anticompetitive effect

CDA's ethical guides differ from the conduct in *NCAA* and *IFD* in a second, critical respect. Unlike those cases, after a full trial, the ALJ found that CDA's enforcement of its Code of Ethics had "no impact on competition in any market in the State of California, particularly with respect to price and output." Cert. App. 246a (citation omitted). This finding was inevitable given the Government's complete failure to produce evidence of harm to competition. The ALJ 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). Complaint counsel did not even proffer expert testimony on competitive effects. Commissioner

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potential for deception include representations that a product is "Environmentally Friendly" and "Earth Smart." *Id.*

Azcuenaga's dissent summarized the glaring shortcomings of the Government's case:

> 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.

Id. at 110a.

The finding of no anticompetitive effect should have ended this action. The Commission and the Ninth Circuit, however, side-stepped the fatal deficiencies in the Government's case by *inferring* harm to competition. In an analysis it conceded was "simple and short," Cert. App. 74a, the Commission relied on evidence from a limited number of dentists regarding their alleged loss of some potential customers because of the inability to make prohibited claims in their advertising. *Id.* at 76a-78a. The Commission coupled this evidence with a cursory evaluation of the CDA's "market power," which even the Ninth Circuit acknowledged lacked "detailed analysis." *Id.* at 23a.

The Ninth Circuit's and the Commission's reliance on "inference" to brush aside the ALJ's factual findings disregards the holdings of this Court. The Court has made it clear that inferences regarding competitive effects must give way to actual facts:

> Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the particular facts disclosed by the record.

Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 466-67 (1992) (quotation omitted). *Accord Northwest Wholesale Stationers*, 472 U.S. at 297 n.8 (rejecting conclusion of Ninth Circuit which contradicted

district court's express finding of no anticompetitive effect). Exalting inference over evidence, as the Ninth Circuit did here, conflicts with the foundation principle underlying both the rule of reason and the *per se* rule – "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.[14]

Indeed, the Commission made no effort to ascertain the actual impact of CDA's policies on the market. Membership in CDA is not required for the successful practice of dentistry in California. Over 5,000 dentists do not belong to CDA and are not governed by the Code of Ethics. Cert. App. 144a, 161a-62a; TR 1170-71, 1352-53, 1640-41. Evidence suggested that dental advertising in California has increased substantially over the past decade. TR 191-92, 513-14, 720-21, 1135; RX 134. Despite these facts, the Commission concluded that the anticompetitive nature of the CDA's advertising guidelines were "plain," even "without quantifying the increase in price or reduction in output occasioned by these restraints." Cert. App. 78a. As Commissioner Azcuenaga concluded: "The evidence does not support the conclusion that CDA can control the price and output of dental services in California." *Id.* at 145a.

Moreover, the minimal anecdotal evidence of selected dentists cited by the Commission in no way undercuts the ALJ's finding of no harm to competition. One former Commission official (who was at the Commission when the *CDA* case was litigated) zeroed in on the inadequacy of the Commission's evidence:

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[14] The United States Court of Appeals for the D.C. Circuit has expressly held that the Commission may not infer injury to competition when such an inference ignores contradictory evidence showing an absence of competitive effects. *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1144 (D.C. Cir. 1988) ("Specific, substantial evidence of absence of competitive injury is . . . sufficient to rebut what is, after all, only an inference.") (internal citation omitted).

> In all, this evidence merely established that some consumers responded to some dentists' advertisements by using their services. It could not establish that this type of advertising fostered competition or that consumers who got their information on the quality of dental care from dentists' advertisements had to do without such advertising . . . .
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> The fact that particular dentists who drew patients by claiming to practice "gentle dentistry" could not make such claims by virtue of a restriction does not tell us whether the restriction actually affected competition . . . .

Joseph Kattan, *The Role of Efficiency Considerations in the Federal Trade Commission's Antitrust Analysis*, 64 ANTITRUST L. J. 613, 631-32 (1996).

Given that the very purpose of the rule of reason is to determine a restraint's impact on competition, the ALJ's finding of no anticompetitive effect is dispositive. As Judge Real pointed out, the Ninth Circuit's majority opinion "finds a restraint on competition without the supporting help from any of the economic principles to be applied to a full market power analysis." Cert. App. 26a. Had either the Commission or the Ninth Circuit conducted a full rule of reason inquiry in this case, it could not have condemned CDA's conduct. Indeed, the ALJ specifically found that the Commission failed "to establish the conditions for satisfaction of a Rule of Reason analysis." *Id.* at 262a. The Ninth Circuit's use of an analytical short-cut to strike down CDA's practices, where no impact was shown, turns the rule of reason on its head.

C. The Ninth Circuit's Improper Use Of The "Quick Look" Rule of Reason Jeopardizes Efficient Conduct

This case presents in stark relief the hazards of overbroad application of the "quick look" rule of reason.

The ALJ candidly admitted that CDA's conduct could not be invalidated under a full rule of reason analysis. Cert. App. 262a. Nonetheless, through the use of inference and presumption, the Commission and the Ninth Circuit found a violation of the antitrust laws.

Last term, this Court acknowledged that the use of legal short-cuts, which 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. This 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. v. ITT Grinnell 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 227, 234 (1st Cir. 1983). The Ninth Circuit's significant broadening of the abbreviated rule of reason in this case threatens that very harm, as it weakens the ability of the professions to prevent fraudulent and misleading advertising.

The Ninth Circuit's expanded "quick look" also is likely to have a chilling effect beyond professional codes of conduct. If conduct that is not facially anticompetitive can be presumed to be unlawful, a firm must shoulder the burden of demonstrating a practice's procompetitive impact in order to rebut that presumption. Broader use of the "quick look" analysis will lead to findings of violations where, as here, the challenged practices have had no anticompetitive effect.

Thus, the Ninth Circuit's approach can only harm consumer welfare by inhibiting the implementation of innovative business strategies. *See* 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). One commentator has already predicted this very result from the type of "quick look" analysis employed by the Ninth Circuit. James A. Keyte, *What It Is and How It Is Being Applied: The "Quick Look" Rule of Reason*, ANTITRUST, Summer 1997, at 21, 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").

The Ninth Circuit's decision contravened basic tenets of antitrust law. It used a "quick look" to invalidate conduct which is not a naked restraint on price or output, and has no anticompetitive effects. At trial, the Commission had a full opportunity to prove that CDA's advertising policies unreasonably restrained trade. It failed to make the required showing. The judgment of the Ninth Circuit should be reversed and enforcement of the Commission's Order should be denied.

CONCLUSION

The Commission lacked jurisdication over CDA as a nonprofit professional association. Even if the Commission had jurisdiction over CDA, the Ninth Circuit and the Commission erred in presuming that CDA's advertising guidelines were anticompetitive. CDA respectfully requests that the Court reverse the judgment of the Ninth Circuit.

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