No. 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 THE STATES OF ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, TENNESSEE, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN AND THE COMMONWEALTH OF PUERTO RICO AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## INTEREST OF THE AMICI CURIAE

The 28 amici states and territory listed on the front cover (the States), by their attorneys general, file this brief as friends of the Court on behalf of the respondent Federal Trade Commission (FTC). The attorneys general are the chief law enforcement officials for their respective states and thus have a considerable interest in the issues this case raises before the Court.

In particular, the States have a vital interest in ensuring that the FTC has jurisdiction over trade or professional associations, like the California Dental Association (CDA), which engage in unfair or deceptive practices. The States, through their attorneys general, are charged with the duty of enforcing both antitrust and consumer protection laws. In discharging these duties, the attorneys general routinely investigate numerous allegations of illegal conduct by trade or professional associations and have brought many enforcement actions against such organizations. The attorneys general, however, lack the personnel and other resources necessary to investigate and prosecute all such activities which may threaten consumers. Therefore, they must rely on cooperation with the FTC in order to protect their citizens from unfair or deceptive practices. A holding that the FTC lacks jurisdiction over trade or professional associations would strain the resources of the States and increase the possibility that their citizens will be harmed by illegal conduct.

The States' interest in this Court's treatment of CDA's advertising restrictions is based on their stake in the principled application of the antitrust laws. The States themselves enforce both the federal antitrust laws within their respective boundaries and their own state antitrust laws. For the most part, moreover,

state antitrust principles closely track federal doctrine.[1] Thus, the flexible approach to the rule of reason that has developed in the federal courts has become a part of the antitrust jurisprudence of most states. To the extent that the Court clarifies or reformulates that approach, the States will be impacted in their own antitrust enforcement efforts. The abbreviated rule-of-reason analysis currently provides both federal and state antitrust enforcement agencies with a streamlined enforcement tool that can be used when a challenged arrangement has been shown to have a genuine adverse effect on competition. The alternative is a full-blown market analysis, which is both burdensome and unnecessary from a theoretical antitrust perspective in these circumstances. The States therefore oppose any change in application of the rule of reason that would signal a retreat from *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 460 (1986), where the Court made clear that not every violation of the rule of reason requires a detailed market analysis.

## SUMMARY OF ARGUMENT

1. FTC jurisdiction over not-for-profit professional associations that provide substantial economic benefits to their members is based on sound statutory interpretation of section 5 of the FTC Act, 15 U.S.C. § 45, and the legislative history of the Act. CDA is not a purely charitable institution and clearly acts in substantial part for the economic profit of its members, thus subjecting it to the FTC's jurisdiction. The exercise of

[1]*See, e.g.*, 740 Ill. Comp. Stat. 10/11 (West 1996) (Illinois courts are directed to follow federal law where possible in construing the Illinois Antitrust Act).



jurisdiction, moreover, is supported by case law as well as practical necessity. The States value the FTC's assistance in the enforcement of antitrust and consumer protection laws in matters involving professional associations, and a holding that the FTC lacks jurisdiction would seriously hamper these law enforcement efforts.

2. This Court has held that the rule of reason should be applied with flexibility, depending on the circumstances in which the potential antitrust violation has arisen. This is especially the case where, as here, the trier of fact has found actual adverse affects on competition from the targeted conduct. The courts of appeals, although not applying the rule of reason's flexibility with perfect consistency, have generally followed this Court's teaching, and their holdings support the approach adopted by the Ninth Circuit. The factual record in the case also provides a basis for implementing the flexibility of the rule of reason in such a way as to eliminate the need for an extensive market analysis.

## ARGUMENT

### I. THE FEDERAL TRADE COMMISSION PROPERLY EXERCISED JURISDICTION OVER A NONPROFIT PROFESSIONAL ASSOCIATION WHICH PROVIDES SUBSTANTIAL ECONOMIC BENEFITS TO ITS MEMBERS.

1. As the Ninth Circuit recognized, Pet. App. 14a, the text of the Federal Trade Commission Act encompasses an association, such as the CDA, which devotes a substantial part of its activities to creating economic benefits for its members.

Section 5 of the FTC Act grants the Commission authority to "prevent persons, partnerships or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45 (a) (2). Whether and to what extent the Act applies to nonprofit associations turns on the definition of "corporation."

Section 4 of the FTC Act defines "corporation" as including:

> any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

15 U.S.C. § 44. This text, separated into two clauses with the word "and," demonstrates that Congress intended for the FTC Act to cover two types of corporations: (1) a corporation -- incorporated or unincorporated, with capital or capital stock -- organized to carry on business for profit, and (2) a corporation -- incorporated or unincorporated, without shares of capital or capital stock -- organized for its own profit or that of its members. The first clause clearly only applies to for-profit corporations. But Congress did not so limit the second clause, defining corporation to include a corporation organized for its own profit or that of its members. Further, the word "and"



demonstrates congressional intent to extend the Commission's jurisdiction to cover for-profit corporations *and* corporations organized for the profit of their members.

The legislative history of the 1914 enactment of the FTC Act addressing the jurisdiction of the FTC confirms that the FTC has jurisdiction over a nonprofit corporation if the nonprofit corporation is organized for the profit of its members. The House's version of what became the FTC Act defined corporation as "a body incorporated under law, and also joint-stock associations and all other associations having shares of capital or capital stock or organized to carry on business with a view to profit." H.R. Rep. No. 63-1142, 63d Cong., 2d Sess., p.11 (1914). This definition of corporation, as opposed to the one adopted by the Conference Committee, severely limits the definition of corporation and, therefore, the jurisdiction of the Commission. Because under this definition, a corporation only includes a "body" organized "to carry on business with a view to profit" -- this definition would only apply to for-profit corporations.

The Conference Committee, however, rejected the House's definition of corporation. In its place, the Conference Committee agreed on a definition that included any company or association organized to carry on business for the profit of its members. This material alteration -- changing from a definition that includes only for-profits to a definition that is more expansive and includes nonprofits -- shows that the FTC's jurisdiction extends to a nonprofit corporation if the nonprofit corporation is organized for the profit of its members.

CDA asserts that the failure of Congress to enact a proposed amendment to the FTC Act in 1977 indicates that

Congress intended to exclude professional associations from the FTC's jurisdiction. Pet. Br. at 24-25. An examination of the legislative history of the proposed amendment, however, demonstrates that this assertion is mistaken. The proposed amendment would have redefined corporation as "any . . . corporation, or other organization or legal entity." *Proposed Federal Trade Commission Amendments of 1977 and Oversight: Hearings on H.R. 3816 Before the Subcomm. On Consumer Protection and Finance of the House Comm. On Interstate and Foreign Commerce*, 95th Cong. 1st Sess. (1977). Testifying in favor of the definitional change, Calvin Collier, Chairman of the Federal Trade Commission, asserted, "the existing definition of 'corporation' has been judicially construed so as to hinder the ability of the Commission to challenge otherwise actionable behavior by certain nonprofit corporations." H.R. Rep. No.95-339, 95th Cong., 1st Sess., p.53 (1977). "This problem came to a head when the Commission began to challenge the activities of nonprofit corporations of a less traditionally commercial character." *Id.*

Discussing *Community Blood Bank of Kansas City Area, Inc. v. Federal Trade Commission*, 405 F.2d 1011 (8th Cir. 1969), Mr. Collier explained that the court held that "the Commission lacked jurisdiction . . . interpreting Section 4 [defining corporation] to exclude from Commission jurisdiction nonprofit corporations . . . which are organized for and actually engaged in business for only charitable purposes." H.R. Rep. No.95-339, 95th Cong., 1st Sess. (1977) (internal quotations omitted). But Mr. Collier also explained that the Court "affirmed the Commission's jurisdiction over nonprofit corporations whose activities redound to the economic benefit of their shareholders or members." *Id.* According to the Chairman, the Commission's efforts to reach anticompetitive



conduct engaged in by nonprofit corporations "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.*, citing *Federal Trade Commission v. National Comm'n on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1975).

Based on this testimony, Congress was informed of two facts about the FTC's jurisdiction. First, if the FTC could prove that a nonprofit corporation was organized for the profit of its members, the FTC would have jurisdiction. Second, the FTC wanted to extend its jurisdiction to include even purely charitable organizations. Indeed, Congress described the provision testified in favor of by Chairman Collier as extending "application of the Federal Trade Commission Act to *all* non-profit organizations." *Id.* at 18 (italics added). By rejecting the proposal, Congress demonstrated its intent not to extend the jurisdiction of the Commission to purely charitable, nonprofit corporations. However, Congress did not act to change the FTC Act even though Congress was clearly informed that the Act covered nonprofit corporations carrying on business for the profit of their members.

Comments in the Congressional Record on the proposed 1977 amendment also support this conclusion. Commenting on the amendments, a congressman remarked, "[c]learly, the original FTC law was not intended to cover non-business activities." 123 Cong. Rec. H. 33622 (daily ed. Oct. 13, 1977) (statement by Rep. Broyhill). "[D]uring hearings on the bill . . . [o]rganizations, including the American Association of Medical Colleges, the American Dental Association, and the American Medical Association pointed out the detrimental and potentially debilitating effects upon the non-business activities

of not-for-profit organizations that FTC regulation could have." *Id.* These statements evince congressional concern with FTC regulation of the *non-business* activities of nonprofit corporations. They do not evince congressional concern with FTC regulation of the *business* activities of nonprofit corporations.

2. While a nonprofit association by definition does not earn and distribute profits directly to its members or shareholders, it may undertake activities designed to create economic benefits for its members. When such activities occupy a substantial part of an association's resources, the association is carrying on business for the profit of its members. This is especially true when, as in the case at bar, the majority of the association's members are profit-seeking individuals or entities. Clearly, such an association falls squarely within the FTC's grant of jurisdiction.

This is not a case where the FTC is attempting to exercise jurisdiction over a purely charitable institution. The Commission has developed a fact-based inquiry to determine whether it has jurisdiction over an entity. If a substantial part of the organization's activities are designed to increase its members' profits, the FTC has jurisdiction. If such activities are only incidental to charitable functions, the FTC lacks jurisdiction.

This is also not a case where the FTC seeks to regulate the charitable, scientific, or educational activities of an association. The Commission's order relates solely to the CDA's advertising restrictions. Advertising is a commercial activity, through which dentists seek to increase their revenues.



The record in this case demonstrates that the CDA regularly acts to promote its members' economic interests. CDA's activities include lobbying, marketing, and providing advice on practice management and financial planning. Such activities clearly provide economic benefits to the CDA's members. Moreover, the majority of the CDA's members are dentists in private practice who are seeking to earn profits. The CDA, then, is carrying on business for the profit of its members and falls within the FTC's jurisdiction.

3. The decision of the Ninth Circuit is in accord with the decisions of other appellate courts which have addressed this issue. In a case involving very similar facts, the Second Circuit held that the American Medical Association was subject to the FTC's jurisdiction. *American Medical Ass'n v. Federal Trade Commission*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982) (*AMA*). In that case, the AMA had adopted ethical guidelines regarding advertising and contracting which the FTC found to violate Section 5 of the Federal Trade Commission Act. The Second Circuit observed that the AMA promoted the business interests of its physician members through lobbying and providing financial advice. The court concluded that "[t]he business aspects of the petitioners fall within the scope of the Federal Trade Commission Act even if they are considered secondary to the charitable and social aspects of their work." 638 F. 2d at 448.

Similarly, the Seventh Circuit concluded that a nonprofit corporation whose members were egg producers was subject to the FTC's jurisdiction. *National Commission on Egg Nutrition*, 517 F. 2d 485 (7th Cir. 1975). The court stated that the

defendant was organized to promote the interests of the egg industry and thus fell under the definition of "corporation" in section 4 of the FTC Act. 517 F. 2d at 487-88.

Moreover, this Court has on several occasions upheld enforcement actions brought by the FTC against nonprofit trade or professional associations, although the jurisdictional issue was not expressly addressed. For example, in *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), this Court upheld a Commission finding that a boycott organized by an association of attorneys was anticompetitive. Similarly, this Court upheld a cease-and-desist order issued by the FTC against an association of dentists in *Federal Trade Commission v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (*IFD*).

CDA relies on *Community Blood Bank of the Kansas City Area, Inc. v. Federal Trade Commission*, 405 F. 2d 1011 (8th Cir. 1969), which it asserts to be in conflict with the Second Circuit's decision in *AMA*. In reality, however, there is no conflict. The Eighth Circuit recognized that Congress did not intend to exclude all nonprofit organizations from the FTC's jurisdiction. *Id.* at 1017. Rather, it held that the jurisdictional issue should be resolved on an ad hoc basis. *Id.* at 1018. The Eighth Circuit simply determined that, under the facts of that case, the blood bank involved was not an association organized for the profit of its members.

An examination of the facts in *Community Blood Bank* demonstrates that the purpose and activities of the blood bank were very different from those of the professional associations at issue in this case and *AMA*. The blood bank served the charitable purpose of coordinating blood supplies for hospitals



in the area. Moreover, the majority of the blood bank's members were themselves nonprofit corporations, unlike the private-practice dentists in the CDA. The community blood bank thus was a truly charitable organization which Congress chose to exempt from the FTC's jurisdiction.

4. Acceptance of CDA's argument that professional associations are exempt from the FTC's jurisdiction would severely curtail its enforcement efforts, both in antitrust and consumer protection matters. The FTC in recent years has identified anticompetitive practices carried on by numerous professional associations and instituted enforcement proceedings against them. *See, e.g., Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *IFD*, 476 U.S. 447 (1986); *Michigan State Medical Society*, 101 F.T.C. 191 (1983). The FTC has recognized, as have the States, that such associations provide fertile ground for the development of practices which harm consumers. Reversal of the Ninth Circuit's decision, however, would eviscerate the Commission's efforts to promote competition in the professions.

The States are concerned about the FTC's continued jurisdiction over nonprofit associations because a reversal of the Ninth Circuit's decision will increase the burden on the States and make it more likely that anticompetitive practices will be undetected. States have brought actions against trade or professional associations on numerous occasions. *See, e.g., Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993) (including Reinsurance Association of America as a defendant); *California v. Ciba Vision Corp.*, Case No. 97-299-CIV-J-20A (M.D. Fla. filed Dec. 16, 1996) (naming American Optometric Association as a defendant); *State of Washington v. American Tobacco Co.*, Case No. 96-2-15056-8-SEA (Sup. Ct.

King Cty. June 5, 1996) (naming Council for Tobacco Research and Tobacco Institute as defendants). Nevertheless, the investigative and enforcement authority and resources of the FTC are an important deterrent to potential violators. The States therefore value the assistance of the FTC in promoting competition in the professions.

Reversal of the Ninth Circuit's decision would also eliminate the ability of the FTC to combat deceptive practices by professionals acting through a nonprofit association. For example, the FTC would be unable to challenge the activities of physicians who market a bogus medical treatment, as long as they form a nonprofit association. In this instance, the absence of enforcement authority could pose serious risks to the health and safety of consumers.

While some amici supporting CDA argue that the Department of Justice can adequately police antitrust violations in the professions, this reasoning has no application in the consumer protection context. The FTC is the only consumer protection agency at the federal level. As with antitrust violations, the States strive to protect their citizens from deceptive sales practices. With their limited resources, however, the States would be hard pressed to fill the void were this Court to determine that the FTC lacked jurisdiction in this important segment of the economy.

In conclusion, the Ninth Circuit properly held that the FTC had jurisdiction over a nonprofit association, such as the petitioner, which devotes substantial resources to creating economic benefits for its members. Such an association is not the type of charitable entity which Congress chose to exempt from the scope of the FTC Act.



## II. AN EXTENSIVE ANALYSIS UNDER THE RULE OF REASON IS NOT NECESSARY TO STRIKE DOWN PRACTICES WHICH, LIKE THOSE HERE, HAVE A PROVEN ADVERSE EFFECT ON COMPETITION.

A flexible approach to the rule of reason allows a court to adjust the plaintiff's burden of proof depending on the circumstances of the case without violating fundamental antitrust concepts. The circumstances of this case demonstrate the wisdom of this approach and provide an opportunity for its application.

1. Several of this Court's decisions reflect that application of the rule of reason does not always require an extensive analysis of the market for the restraint at issue to be found illegal. The most enlightening language has occurred in the context of a restraint among members of an association. In *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), for example, the Court applied the rule of reason to an ethics rule that prohibited the members of a professional engineering association from submitting competitive bids. Rejecting the association's ethical justification, the Court observed that "no elaborate industry analysis is required to demonstrate the anticompetitive character" of the rule. 435 U.S. at 692.

In *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) (*NCAA*), the Court addressed an arrangement among the members of an association to limit the number of college football games its members could televise. Although the Court ultimately disagreed with the

association's argument that the arrangement lacked market power, it rejected the argument as a matter of law. The Court said:

> [T]he plan is inconsistent with the Sherman Act's command that price and supply be responsive to consumer preference. We have never required proof of market power in such a case. This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.

468 U.S. at 110. The Court did not go into detail as to all the circumstances that might justify "the absence of a detailed market analysis" in a rule of reason situation, but it did at least describe one such circumstance, namely, a "naked restraint on price and output."

The Court provided further elaboration in *IFD*, 476 U.S. 447 (1986). Although applying the rule of reason, the Court held that a detailed market analysis was not necessary to find illegal an agreement among member dentists of the defendant association to withhold x-rays from their patients' insurance companies. In so holding, the Court detailed facts and circumstances that are remarkably similar to those in the case now before the Court:

(a) Both cases involve rules adopted by a professional association of dentists to which the rule of reason was or has been deemed the appropriate mode of analysis. 476 U.S. at 458-59; Pet. App. 18a.



(b) In both cases, the practices targeted by the FTC did not involve price fixing as such but did involve an agreement among the dentists to withhold information -- x-rays in *IFD* and truthful pricing information here -- from consumers. 476 U.S. at 459; Pet. App. 18a-20a.

(c) In both cases, the dentists attempted to justify their conduct, among other ways, based on professional ethical considerations. 476 U.S. at 462-64; Pet. Br. 33-41. In *IFD*, the Court soundly dismissed this justification, stating, "[T]here is no particular reason to believe that the provision of information will be more harmful to consumers in the market for dental services than in other markets." 476 U.S. at 463.

(d) In both cases, the FTC did not purport to quantify the restrictions' effect on price and output. 476 U.S. at 461-62; Pet. App. 78a. In *IFD* the Court held that this failure was no bar to a finding of illegality:

> A concerted and effective effort to withhold . . . information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence.

476 U.S. at 461-62.

(e) Most important, in both *IFD* and the case at bar the dentists argued that the FTC was obligated, but failed, to make

detailed findings regarding market definition and market power. In *IFD*, the Court held that the FTC's "failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason" because of other findings the FTC made. 476 U.S. at 460. Specifically – and this goes to the heart of the rule of reason's flexibility – the FTC had found that in two communities where a heavy majority of the dentists were members of the dentists' association, insurers had been unable to obtain compliance with their requests for x-rays. The Court characterized these facts as a "finding of actual, sustained adverse effects on competition." 476 U.S. at 461. Such a finding made an "elaborate market analysis" unnecessary, because the purpose of such an analysis in the first place was to determine if the questioned practice had an adverse effect on competition. 476 U.S. at 460-61. The FTC made comparable findings in the case at bar. *See* pp. 21-23, *infra*.

(f) Finally, in both cases the practices in question arguably were not "naked" restraints of trade. 476 U.S. at 460; Pet. Br. 30-31. Nevertheless, the Court in *IFD* held that its abbreviated approach would still apply.

Taking *NCAA* and *IFD* together, the States conclude that current antitrust jurisprudence allows courts to avoid an extensive market power analysis where the rule of reason is applicable but where the circumstances make such an analysis unnecessary. The Court has not provided a listing of all such circumstances -- and, indeed, a listing as such may be impossible in view of the flexibility needed for the rule of reason to adapt to different circumstances -- but at least two are where (i) the questioned conduct is nothing but a "naked" restraint on competition, or (ii) where the plaintiff has established an actual adverse effect upon competition even though the practice



cannot be characterized as a "naked" restraint. Use of an abbreviated market analysis, moreover, is not barred simply because the defendant's conduct is claimed to have some ethical or other benefit.

2. Since *IFD*, an abbreviated market power analysis has been properly used by the courts of appeals as well as rejected for both proper and improper reasons. The States thus welcome the opportunity for the Court to reaffirm and clarify this approach.

In two relatively early cases, the Seventh Circuit rejected an abbreviated, or "quick look," approach to deciding the matters before it. *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F. 2d 722 (7th Cir. 1986); *Vogel v. American Society of Appraisers*, 744 F. 2d 598 (7th Cir. 1984). While CDA relies on both cases throughout its Petition for Certiorari, they bear very little on CDA's situation. In *Vogel*, the case went to the Seventh Circuit on denial of a motion for a preliminary injunction, causing Judge Posner to comment that, on the basis of the "scanty record" before him, he could not condemn the conduct under consideration "before any evidence on its competitive effects has been produced." 744 F. 2d at 603-04. The only "quick look" he took, moreover, was to see whether the defendant's conduct – a gem association's elimination of fixed-percentage appraiser fees – could be characterized as price fixing, and he concluded it could not. 744 F. 2d at 603. There is nothing in the *Vogel* case inconsistent with the States' interpretation of *NCAA* and *IFD*.

*Illinois Corporate Travel* similarly came before the court on denial of a motion for a preliminary injunction. The plaintiff devoted most of its appeal effort to arguing that the defendant

airline's policy of refusing to allow travel agents to advertise that they would rebate a portion of their commissions to customers, was per se illegal. 806 F. 2d at 724. At one point, however, the plaintiff made an argument about the adverse effects of the defendant's policy, which Judge Easterbrook said might give rise to a "quick look" type of analysis. 806 F. 2d at 727. He nevertheless rejected the "quick look" approach because, he said, the practice at issue did not "facially" appear to be one that always or almost always would restrict competition, quoting *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979). While the States do not agree that the "quick look" approach is limited to facially invalid practices, the result in the case appears to have been driven in significant part by other factors, including the vertical nature of the relationship between the parties, the preliminary stage of the litigation, and the potential benefits of the defendant's policy. *See* 806 F. 2d at 728-29.

The next two Seventh Circuit cases implemented this Court's teaching on the flexibility of the rule of reason. *Chicago Professional Sports Limited Partnership v. National Basketball Association*, 961 F. 2d 667 (7th Cir. 1992), *cert. denied*, 506 U.S. 954 (1992) (*NBA I*); *Wilk v. American Medical Association*, 895 F. 2d 352 (7th Cir. 1990), *cert. denied*, 496 U.S. 927, 498 U.S. 982 (1990). In *Wilk*, the court found that the AMA illegally boycotted chiropractors. Its holding was based in substantial part on evidence of adverse effects on competition, which the court said "eliminated the need for inquiry into market power." 895 F. 2d at 360. In *NBA I*, the court applied the "quick look" doctrine to an NBA rule that limited the output of televised basketball games. The court explained its understanding of *IFD* "as holding that any agreement to reduce output . . . requires some justification . . .



before the court attempts an analysis of market power." 961 F. 2d at 674. Absent justification, the court said that the "quick look" version of the rule of reason should be applied, referencing Professor Areeda's "twinkling of an eye" quote cited in *NCAA*, 468 U.S. at 109 n. 39, and the Solicitor General's brief in *NCAA*, quoted at 468 U.S. at 110 n. 42.

Although the States do not quarrel with the overall approach taken in *NBA I*, a new twist was added to the Seventh Circuit's explanation in *United States v. Brown University*, 5 F. 3d 658 (3rd Cir. 1993). In that case the Third Circuit considered a collusive arrangement among Ivy League schools for the distribution of financial aid. The court ultimately held that, given the nature of higher education and the supposed pro-competitive features of the arrangement, the full-scale rule of reason should apply. 5 F. 3d at 678. Relying on *NBA I*, the court rejected the "quick look" doctrine under the following analysis: "If the defendant offers sound pro-competitive justifications . . . the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason." 5 F. 3d at 669. To the extent that this language may be read as suggesting that a mere assertion of a pro-competitive justification by the defendant should automatically require a thorough market analysis, the States feel that it is mistaken. In both *NCAA* and *IFD*, the defendants asserted justifications for their conduct, some of which can be characterized as pro-competitive, yet this Court nevertheless adhered to a rule-of-reason approach that did not require an elaborate industry analysis.

In two other cases, the courts rejected application of a shortened rule-of-reason analysis by solely focusing – unnecessarily in the States' view – on whether the targeted

restraint could be characterized as a "naked" one. *American Ad Management, Inc. v. GTE Corp.*, 92 F. 3d 781, 789-90 (9th Cir. 1996) (payment of "yellow pages" ad commissions eliminated; "case does not present the type of naked restraint" that would justify "quick look"); *Lie v. St. Joseph Hospital of Mount Clemens*, 964 F. 2d 567, 569-70 (6th Cir. 1992) (elimination of hospital privileges was not a naked restraint). In still two other cases, the courts declined to apply the "quick look" approach for reasons that find greater justification under *NCAA* and *IFD*, including the unusual market structure in which the challenged restraint had arisen, *Chicago Professional Sports Limited Partnership v. National Basketball Association*, 95 F. 3d 593, 599-600 (7th Cir. 1996) (*NBA II*); and the absence of factual support for application of the approach, *Orson, Inc. v. Miramax Film Corp.*, 79 F. 3d 1358, 1367 n. 9 (3d Cir. 1996).

Finally, the Tenth Circuit made use of the rule of reason's flexibility in avoiding an extensive market analysis but still finding illegal an agreement among colleges to limit coaches' salaries in *Law v. National Collegiate Athletic Association*, 134 F. 3d 1010, 1019-21 (10th Cir. 1998), *cert. denied*, 142 L.Ed. 51 (1998). The court explained that once a practice is found to have anticompetitive effects,

> there is no need to prove that the defendant possesses market power. Rather, the court is justified in proceeding directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects under a 'quick look' rule of reason.

134 F. 2d at 1020. Consistent with the States' interpretation of *NCAA* and *IFD*, the court then proceeded to address the



defendant's supposed procompetitive justifications for their agreement, and determined that they did not justify the anticompetitive conduct.

3. Under *NCAA*, *IFD* and the mainstream of court of appeals decisions, the States feel that the facts determined by the FTC in the present case represent a compelling opportunity for application of an abbreviated market analysis under the rule of reason.

The FTC made fact findings concerning the effect of CDA's policies on both price advertising and nonprice advertising. As to price advertising, the FTC found that CDA "precluded advertising that characterized a dentist's fees as being low, reasonable, or affordable, as well as advertising of across-the-board discounts," Pet. App. 65a. As to nonprice advertising, the FTC found that CDA "prohibits all quality claims." Pet. App. 75a. For both types of advertising, the FTC found that CDA's prohibitions extended to truthful statements (Pet. App. 85a, 89a), that the type of information suppressed by CDA was important to consumers (Pet. App. 76a-77a), that the prohibitions "injured those consumers who rely on advertising to choose dentists" (Pet. App. 79a), and that the restrictions hampered dentists in their ability to attract patients and they reduced output (Pet. App. 78a). These general findings all had the support of many detailed underlying findings (*see* Pet. App. 63a-89a, 198a-218a, 224a-231a), including an analysis of nearly 400 CDA challenges to advertising representations (Pet. App. 235a, finding no. 282). The Ninth Circuit's opinion substantially confirmed the FTC's view of the facts.

The FTC also found that the restriction on price advertising constituted a "naked" restraint on competition. Pet. App. 67a. The Ninth Circuit went a step further and found that both the price and nonprice restrictions represented "naked" restraints. Pet. App. 18a, 20a. CDA devotes a major part of its brief trying to dispel the notion that its policies constitute a "naked" or "facial" restraint of anything and that, therefore, use of an abbreviated market analysis was error. Pet. Br. 31-41. CDA, of course, focuses on the text and purported purpose of its ethical rules, while the FTC and Ninth Circuit focused on how the rules were applied in practice. The Court can hardly agree with CDA on this point, for whether a restraint is a "naked" one or "facially" anticompetitive should not depend on its written, idealistic form. Indeed, if there were no written rule for advertising and the policy were left entirely to the CDA board to enforce on an ad hoc basis, CDA's position would preclude courts ever from finding the restraint "facially" anticompetitive.

Paraphrasing *IFD*, however, the States believe that "even if the restriction imposed by [CDA] is not sufficiently 'naked'. . . the Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason." 476 U.S. at 460. The issue under *IFD* is whether there exists " 'proof of actual detrimental effects, such as a reduction of output,' " and if such proof does exist, it "obviate[s] the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.' " 476 U.S. at 460-61, quoting 7 P. Areeda, *Antitrust Law* ¶ 1511 (1986). Upon careful review of the record, both the FTC and the Ninth Circuit found the necessary detrimental effects. Their findings gave them the opportunity to apply the rule of reason with the same kind of flexibility that this Court demonstrated in *NCAA* and



*IFD* so as to avoid a prolonged, expensive and unnecessary analysis of market power.

While perhaps not critical to the outcome, the FTC and Ninth Circuit nevertheless went on to find that CDA has significant market power. Pet. App. 23a-24a, 78a-84a. In so finding, the Commission and court relied upon some of the same kinds of factors – *e.g.*, professional membership in the association – that this Court used in *IFD*, 476 U.S.A. at 450-51, and that the Seventh Circuit relied on in *Wilk*, 895 F. 2d at 360 ("The district court properly relied on the AMA membership's substantial market share in finding market power"). The finding of market power confirmed the appropriateness of the "quick look" approach.

CDA vigorously protests that its advertising guidelines help to prevent deceptive professional advertising and increase consumer information. Pet. Br. 33-41. The States do not question that these procompetitive goals may have been a substantial part of the purpose of the guidelines. Although there is evidence in the record that the CDA also had an anticompetitive purpose (Pet. App. 191a-193a), the States do not think it necessary for the Court totally to reject the CDA's stated rationale. In *IFD* the Court noted conflicting evidence on the quality-of-care justification for the defendant association's policy, 476 U.S. at 464, and in *Wilk* the Seventh Circuit went so far as to find that the AMA's "dominant motivating factor" for its policy was "its concern about scientific method," 895 F. 2d at 363. These cases demonstrate that good motivation alone will not avoid a less-than-detailed market analysis under the rule of reason. *NCAA*, 468 U.S. at 101n. 23.

The major weakness in CDA's position is its failure to justify its broad categorical bans on forms of advertising important to consumers. Under *NCAA*, a restraint must be "tailored" to serve a legitimate procompetitive goal. *NCAA*, 468 U.S. at 119 (finding goal of promoting competitive balance among teams legitimate, but concluding that television plan was not tailored to serve that goal). *See also* P. Areeda, *Antitrust Law* ¶ 1505 (1986)(restraint must be reasonably necessary to achieve a legitimate objective). To serve a procompetitive goal in this case, CDA's advertising guidelines should have distinguished between misleading and nonmisleading statements and should not have swept so broadly. Recognizing the problem of overbreadth, the FTC's order made allowance for CDA's enforcement of guidelines directed to "false or deceptive" representations. Pet. App. 30a. Thus, CDA may continue to pursue the procompetitive aspect of its advertising policies. It is only that portion of its policies seeking to interfere with truthful advertising that the FTC cease-and-desist order affects.

In sum, the facts of record justify the analysis applied. While most rule of reason cases require a detailed market analysis, the abbreviated approach represents a practical and sensible way of analyzing a case where market power has been demonstrated through anticompetitive effects.



## CONCLUSION

The States respectfully urge the Court to affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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