18-3848

United States Court of Appeals for the Second Circuit

1-800 CONTACTS, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Review from the Federal Trade Commission
(No. 9372)

BRIEF OF RICHARD A. EPSTEIN, KEITH N. HYLTON, THOMAS A. LAMBERT, GEOFFREY A. MANNE, HAL SINGER, AND WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[*]

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Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It appears often as *amicus curiae* in important antitrust cases. See, e.g., *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019); *Viamedia, Inc. v. Comcast Corp.*, No. 18-2852 (7th Cir., argued Feb. 7, 2019); *Pulse Network, LLC v. Visa, Inc.*, No. 18-20669 (5th Cir., filed Oct. 1, 2018).

If they too quickly label novel business practices anticompetitive, adjudicators will often mistakenly prohibit innovations that benefit consumers. Confining use of the "quick look" standard of antitrust review to its proper, narrow bounds ensures that these harmful false positives do not proliferate. *Amici* contend that the Federal Trade Commission went beyond those bounds when it took only a "quick look" at the novel practices at issue in this case.

INTRODUCTION & SUMMARY OF ARGUMENT

Building and maintaining a successful brand is no small task. First you must spot a widespread need or desire that no one else can see—or can even feel yet. "People don't know what they want until you show it to them," Steve Jobs said. An entrepreneur must aim, therefore, "to read things that are not yet on the page." Walter Isaacson, *Steve Jobs* 567 (2011). This, believe it or not, is sometimes the easy part.

Next, you must get people to notice you and your great idea. You must raise your voice above the modern din. This usually requires advertisements. *Lots* of advertisements. "Half the money I spend on advertising is wasted," nineteenth-century retailer John Wanamaker is supposed to have said; "the trouble is I don't know which half."

Finally, you must maintain your momentum. During a train ride, a friend asked William Wrigley why he spent so much advertising his chewing gum when he already dominated the market. "How fast do you think this train is going?" Wrigley replied. "About ninety miles an hour," answered the friend. "Well," said Wrigley, "do you *suggest we unhitch the engine*?" David Ogilvy, *Ogilvy on Advertising* 171-72 (1985).

All this assumes, of course, that after you have innovated, invested, and risked all to climb to the top, the antitrust laws will not thwart your efforts to recoup a reward commensurate to your sacrifices. To read the Sherman Act as "making everyone fight but forbidding anyone to be victorious" would, observed Justice Holmes, turn it into an "imbecile statute." Ron Collins, *Ask the Author: "The Great Oracle of American Legal Thought"—Revisiting the Life and Times of Justice Holmes*, SCOTUSblog, http://bit.ly/2Phv3qh (Mar. 28, 2019).

With pluck, daring, and dedication, 1-800 Contacts built the online contact lens market. People had assumed that contact lenses were available only at an optometrist's office or a brick-and-mortar store. Spending many millions of dollars on advertising, 1-800 raised awareness that contact lenses could be bought—and bought cheaply—

on the web. And 1-800 did not stop there. Thanks in no small part to its continuing to advertise widely to this day, the online lens market remains a thriving one.

Many copycat firms wisely followed 1-800 into the online contact lens market. Unfortunately, however, some of these firms sought not just to share in the successful market 1-800 created, but also to directly piggyback on 1-800's advertising. Instead of following 1-800's lead by doing the hard and expensive work of advertising broadly—on television, in print, on the radio, and so on—these firms just bought the advertising space at the top of internet search results for terms like "1-800 Contacts." Rather than attract new customers of their own, in other words, the firms just tried to divert 1-800's.

1-800 sued (or threatened to sue) each of the free-riding firms for trademark infringement, and each lawsuit settled. As part of the settlements, the parties agreed not to buy advertisements keyed to navigational searches of brand names like "1-800 Contacts." Generic search terms like "cheap contact lenses" remained fair game for all, as did advertising in all other forms of media.

The Federal Trade Commission examined whether the settlements are an antitrust violation under the Sherman Act (as applied through the FTC Act). Assuming the settlements are even a proper subject of antitrust scrutiny—1-800 argues they are not—the FTC needed at the outset to decide the standard under which to perform its review. It could choose to conduct either (a) a "quick look" analysis of the settlements' effect on competition, or (b) a more complete "rule of reason" analysis of it. The FTC erred, we contend in this brief, in electing to take only a "quick look" before condemning the settlements:

A. The quick-look standard governs only when the conduct at issue is obviously anticompetitive. The Supreme Court has accordingly applied the quick-look standard only to agreements that explicitly suppress competition. The settlements here, which leave almost the entire universe of contact-lens advertising intact, do nothing like that. What is more, the Supreme Court has declined to apply the quick-look standard to conduct accompanied by suspicious elements, such as a de facto advertising ban or a payment to delay entry into a market, that do not exist here.

B. Even without the Supreme Court's guidance, the need for a rule-of-reason analysis would still be clear. The FTC cited no case or research that finds behavior analogous to the settlements an unreasonable restraint of trade. This is hardly surprising given that, as the FTC itself acknowledged, search-engine keyword advertising is "relatively new." The lack of consensus about the settlements' effect on competition should have driven the FTC toward the rule-of-reason standard.

Not only do the settlements serve no anticompetitive ends; they serve procompetitive ones. As 1-800 and Commissioner Phillips, writing in dissent below, explain, the settlements save litigation costs and protect trademark rights.

We home in on one vital benefit of trademark protection: the suppression of advertisement free riding. 1-800's advertising attracted customers both to purchase contact lenses online and to purchase them from 1-800 specifically. The settlements did nothing to stop the general shoppers from finding the cheapest online contact lenses, but they *did* stop firms from diverting customers searching *for 1-800*. The settlements thus helped ensure that when 1-800's broad (and

expensive) advertising attracted new customers specifically to 1-800, competitors could not poach those customers on the cheap. By foreclosing a form of advertisement free riding, the settlements preserved the incentives that lead firms to invest in advertising in the first place. And because they therefore may have *promoted*, rather than suppressed, advertising, the settlements should not have been declared "obviously" anticompetitive and then subjected to a mere quick look.

C. The FTC claimed that, although it need not have done so, it ultimately conducted a rule-of-reason analysis. But the FTC never defined a market. And although it looked at prices, output, and quality, its analysis was abbreviated and defective. It plainly both adopted *and applied* the quick-look standard. This was error.

ARGUMENT

THE FTC ERRED IN ADOPTING THE "QUICK LOOK" STANDARD.

A. Supreme Court Precedent Establishes That The Quick-Look Standard Does Not Apply.

Under "what has come to be called the abbreviated or 'quick-look'" standard—the FTC calls it the "inherently suspect" standard—the adjudicator applies a truncated rule-of-reason analysis if "an observer with even a rudimentary understanding of economics could conclude

that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). The quick-look standard governs, in other words, only if a "great likelihood of anticompetitive effects can easily be ascertained." *Id.*

Reserving quick-look analysis for truly obvious cases is integral to the enterprise of antitrust law. "Often it takes a decade or more to determine what a business practice really does." Frank H. Easterbrook, *Does Antitrust Have a Comparative Advantage?*, 23 Harv. J.L. & Pub. Pol'y 5, 8-9 (1999). Meanwhile, "hasty or uninformed judgments may condemn novel practices just because of their novelty." *Id.* Applying the full rule-of-reason analysis to relatively new market practices ensures that courts are not too "quick to condemn what they do not understand." *Id.* Said another way, confining the quick-look standard to familiar situations helps antitrust move in step with—not ahead of or behind—economic understanding.

The Supreme Court has applied the quick-look standard to an agreement that "expressly limited output," to "an absolute ban on competitive bidding," and to a professional association's rule requiring its members to "withhold from their customers a particular service." 526

U.S. at 770 (discussing *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984); *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679 (1978); and *FTC v. Ind. Feder'n of Dentists*, 476 U.S. 447 (1986)). As these examples confirm, the bar for ditching a full rule-of-reason analysis in favor of a "quick look" is high.

Even more instructive here are the two cases in which the Court has *rejected* the quick-look standard, *Cal. Dental*, 526 U.S. 756, and *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013). In each instance the Court adopted the rule of reason for conduct more amenable to a quick look than the conduct in question here.

1. *Cal. Dental*. Like the present case, *Cal. Dental* involves advertising. But unlike this case, *Cal. Dental* addresses a true blanket advertising restriction: a group of dentists agreed to heavily restrict "price advertising, particularly discounted fees, and advertising relating to the quality of dental services." 526 U.S. at 762. The restraints "were so aggressive," in fact, "that they virtually prohibited all price or quality advertising of any sort." Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* §5.6d (5th ed. 2016) (citing 526 U.S. at 783 (Breyer, J., dissenting)). Yet a full rule-of-reason analysis

was needed, *Cal. Dental* concludes, to assess the dentists' claim that the restrictions procompetitively shielded consumers from perplexing claims about professional quality. 526 U.S. at 771.

This case one-ups *Cal. Dental* in several ways:

- The price effect in *Cal. Dental* was far more direct and obvious than any potential price effect here. (See Phillips Dissent 12.) Unlike the rules in *Cal. Dental*, which amounted to bans on advertising about discounts or quality, the settlements here continued to allow wide-ranging price and quality advertising. (*Id.*)
- The procompetitive justification offered in *Cal. Dental*—avoiding customer confusion—was rather hollow. "Any misleading advertising by dentists," after all, could have been "dealt with directly by the agencies charged with protecting the public from misleading advertising." Richard A. Posner, *Antitrust Law* 30 (2d ed. 2001). Here, by contrast, the procompetitive justifications are, as we will see, quite robust. The settlements impede free riding, reduce litigation costs, and preserve the benefits of trademarks.

- Even if 1-800's competitors create only a small amount of confusion by placing ads atop internet search results for "1-800 Contacts" (FTC Op. 28), that confusion is more serious than the confusion at issue in *Cal. Dental*. The dentists sought to prevent confusion merely over the precise quality or value of a dentist's work. 1-800 sought, through the settlements, to prevent confusion over the very *source* of a product.

2. *Actavis*. Like the present case, *Actavis* involves an FTC antitrust challenge to settlements of intellectual-property disputes. In *Actavis*, however, the intellectual property was a pharmaceutical patent—something that *by design* enables its holder "to charge a higher-than-competitive price" for a product. 570 U.S. at 147. And unlike this case, *Actavis* involves "reverse payment" settlements: as part of their settlement agreements, the drug manufacturer-plaintiff paid generic competitor-defendants many millions of dollars. *Id.* at 145. These payments appeared to compensate the generic manufacturers for delaying entry into the market for the patented drug. *Id.* at 157-58.

The reverse payments were, *Actavis* declares, one of several dispositive factors that, "taken together," rendered the settlements a

proper subject of antitrust scrutiny. *Id.* at 153, 158. "An unexplained large reverse payment," explains *Actavis*, will "normally suggest that the patentee has serious doubts about the patent's survival." *Id.* at 157. And "that fact, in turn, suggests that the payment's objective is to maintain supracompetitive prices." *Id. Actavis* assumes, in other words, that a large unexplained reverse payment might aim "to extend the brand's monopoly at the expense of consumers." Kevin Caves & Hal Singer, *On the Utility of Surrogates for Rule of Reason Cases*, CPI Antitrust Chronicle (May 2015). But cf. Keith N. Hylton & Sungjoon Cho, *The Economics of Injunctive and Reverse Settlements*, 12 Am. Law. & Econ. Rev. 181 (Jan. 2010) (questioning this assumption).

Still, *Actavis* declines to apply the quick-look standard. A host of "complexities"—for instance, the difficulty of assessing whether a given reverse payment has a "convincing justification"—led the Court "to conclude that the FTC must prove its case as in other rule-of-reason cases." 570 U.S. at 159.

Actavis deals with the self-evident monopoly power created by a drug patent, and with a possible attempt, through a "reverse payment," to increase that power beyond what a given patent actually allows.

Here, by contrast, there is no sign of monopoly power, never mind of an attempt to protect such power by using a "reverse payment" to share monopoly rents. This case involves no threat of unwarranted market foreclosure analogous to the threat in *Actavis*. "The challenged agreements" here "restrict only a narrow subset of advertising: paid search advertising triggered when a user searche[s] for the settlement parties' trademark terms." Geoffrey A. Manne, Hal Singer, & Joshua D. Wright, *Antitrust Out of Focus: The FTC's Myopic Pursuit of 1-800 Contacts' Trademark Settlements*, The Antitrust Source, www.bit.ly/2YwxBo2, 4 (April 2019). "The agreements did not restrict any form of advertising per se, but only the *placement* of a settlement party's paid search ads on certain search results pages." *Id.*

Quick look was inappropriate in *Cal. Dental* and *Actavis*, and it is even more inappropriate here.

B. The Settlements' Non-Obvious Effect On Competition Confirms That The Rule of Reason Applies.

The FTC failed to establish an identity—or even a family resemblance—between the settlements and an established form of obviously anticompetitive conduct. And although that failure alone renders the FTC's quick look here erroneous, several procompetitive

effects of the settlements confirm the need for a full investigation under the rule of reason. One of these effects—our focus—is deterrence of advertisement free riding. 1-800 also raises the value of settling litigation and the benefits of protecting trademarks (of which the impediment to advertisement free riding is one).

1. The Settlements Are Not Analogous To An Established Anticompetitive Practice.

The FTC did not establish that even an economics neophyte could promptly grasp the anticompetitive effect of the settlements. *Cal. Dental*, 526 U.S. at 770. To the contrary, the FTC offered "not one citation" that "appears relevant to evaluating the competitive effects of a settlement on non-sham trademark infringement claims, least of all in the context of paid search keyword auctions." Manne, Singer, & Wright, supra, at 3.

The FTC acknowledged that search-result advertising is a "comparatively recent" phenomenon. (FTC Op. 1.) The FTC should have treated this novelty as a major, or even dispositive, reason to conduct a full rule-of-reason analysis. Instead it assumed that a new phenomenon is neatly analogous to an old one—blanket advertising restrictions.

But there is nothing "blanket" about the conditions in the settlements. The settlements restrict, to repeat, "only a narrow subset of advertising." Manne, Singer, & Wright, supra, at 4. A new practice not readily analogous to a well-known anticompetitive one is a practice in need of rule-of-reason scrutiny.

2. The Settlements Serve A Procompetitive Purpose By Discouraging Advertisement Free Riding.

There is more. Not only are the settlements not analogous to an anticompetitive practice; they plainly serve a procompetitive purpose by foreclosing advertisement free riding.

i. 1-800 Faces An Advertising Free-Rider Problem.

1-800 "pioneered the . . . online contact lens business" by spending "hundreds of millions of dollars" on advertising. (Phillips Dissent 3-4.) And 1-800 sustains the market it pioneered: it continues to spend massive amounts on publicizing its service—and thus the existence of contact lenses for sale online—in print, television, radio, and display advertising. (*Id.* at 3.) All this advertising—the television advertising, in particular—brings many people online, searching for contact lenses and for 1-800. (*Id.*)

Unlike 1-800, "other online contact lens retailers generally have not invested in broad scale (e.g., television) advertising." (*Id.* at 4.)

Advertising is an area "in which free rider problems are significant." Hovenkamp, supra, §5.2. The problem is biggest when products are fungible—as contact lenses are. (See FTC Op. 43.) "If Farmer Brown advertises the merits of Farmer Brown's Potatoes," for example, "she might discover that many customers think potatoes are potatoes." Hovenkamp, supra, §5.2. Her "advertisements may increase potato sales, but they will be distributed over all potato producers in the advertising market." *Id.* Farmer Brown's advertising benefits her competitors "whether or not they paid for the advertising." *Id.* This free-rider effect might lead Farmer Brown "not [to] advertise at all, even though the effect of the advertising would be to give consumers better information." *Id.*

Like Farmer Brown's fellow potato farmers, 1-800's smaller competitors have an incentive to free ride on another's advertising. If they let 1-800 spread the word that contact lenses can be bought cheaply online, in fact, the competitors enjoy a double benefit; they get new customers for free *and*, bearing none of the expense of the

advertising that brought those customers online, they get to undercut 1-800's prices. 1-800 indeed tends to charge more than its competitors. "Massive advertising" by 1-800 has "raise[d] [its] cost[s] and hence [its] price[s]," and "thus give[n] the more moderately advertised or nonadvertised [dealers] a price advantage." Posner, supra, at 115.

ii. The FTC Failed To Consider The Settlements' Procompetitive Power To Stanch Advertisement Free Riding.

"The nature of litigation invites judges to treat the parties' circumstances as fixed and to apportion gains and losses." Frank H. Easterbrook, *The Court and The Economic System*, 98 Harv. L. Rev. 4, 10 (Nov. 1984). "Once a firm possesses a patent and tries to extract royalties," for instance, "it may seem wise to restrict the devices available to that end." *Id.* After all, "the royalties lead to less use of the invention and consequent social loss, while restricting the collection of royalties has no visible social costs." *Id.*

But this is a myopic approach. Taking today's gains and losses as a given "almost invariably ensure[s] that there will be fewer gains and more losses tomorrow." *Id.* at 10-11. When, to return to the patent example, "a court restricts the patent holder's ability to collect royalties,

it reduces the rewards anticipated from patents and thus the incentive for other people to invent." *Id.* at 11.

It is essential, in short, to view a case from both an ex post *and* an ex ante perspective. Seeing things from the ex ante perspective requires understanding the rules, incentives, and assumptions that got the parties to where they are when litigation begins.

The FTC looked at the settlements strictly from the ex post perspective. It treated 1-800's past and present advertising as fixed, then speculated about what might increase competition in the circumstances that exist *thanks to that advertising*.

Under the ex ante view, one must ask what drove—and drives—1-800's investment in market pioneering—and market sustaining—advertising. The answer is that 1-800 expects to generate sales sufficient to justify the investment. Which raises a further question: does allowing smaller firms to squat on navigational internet searches for "1-800 Contacts" unduly upset that expectation? Under a full rule-of-reason analysis, this is a crucial question that needs extensive analysis. Under a quick-look analysis, it is a crucial question that receives little or no attention.

The FTC ignored the possibility that banning the settlements' (minor) restriction on intra-medium internet advertising could reduce both (1) future pioneer advertising (why should an entrepreneur spend money creating the next online market if competitors can poach consumers off navigational searches?) and (2) current inter-medium advertising (why should 1-800 spend money advertising on television if customers can be diverted to its rivals?). The FTC never considered, in other words, whether the settlements maximize the *net* amount of advertising. If they do, the claim that they are anticompetitive falls apart. But by jumping to the conclusion that the settlements are just like a blanket advertising ban, the FTC never reached this key issue.

It is possible, to be sure, that barring the settlements will not turn out to affect how much 1-800 and aspiring pioneer firms invest in advertising. The problem is that we are in the dark, because the FTC gave the settlements only a quick look. The FTC took the world 1-800 created and sustains for granted. It failed to assess whether, by creating an avenue for more advertising *but also* more free riding, it created merely "a transitory cheapness unprofitable to the community as a

whole." *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 412 (1921) (Holmes, J., dissenting).

Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185 (7th Cir. 1985) (Easterbrook, J.), confirms the need for more than a quick look here. Polk, a seller of home appliances, and Forest City, a seller of hardware, agreed to open side-by-side stores in a shared building. To ensure that their joint venture remained cooperative, Polk and Forest City each covenanted not to sell certain of the other's main products on the property. When the relationship soured, Forest City attacked the covenant in court. Applying a state-law equivalent of federal antitrust law, the district court declared the covenant a per se antitrust violation.

The Court of Appeals reversed. Polk, the court notes, "spent substantial sums in advertising to attract customers to its stores." 776 F.2d at 190. "It might be tempting," the court continues, "for another retailer to take a free ride on these efforts." "Once Polk had persuaded a customer to purchase a color TV, its next door neighbor might try to lure the customer away by quoting a lower price." *Id.* The competitor could afford to do this if it let Polk bear the costs of advertising. But "Polk would not continue doing the work while its neighbor took the

sales." *Id.* "It would do less . . . promotion, to the detriment of consumers who valued the information." *Id.* Because the covenant had the potential procompetitive effect of reducing free riding, the rule of reason applied. *Id.*

When they squat at the top of navigational "1-800 Contacts" search results, 1-800's competitors act just as the "next door neighbor" does in the *Polk* hypothetical. Just as the covenant might have combatted free riding in *Polk*, the settlements might have combatted free riding here. A full rule-of-reason analysis is needed here, therefore, no less than in *Polk*.

It is, in fact, not enough to say merely that the settlements "might" reduce advertisement free riding. "The vast majority of consumers searching for 1-800 Contacts' trademark do so with navigational intent." (Phillips Dissent 12 n.12.) And "even for those customers not looking for 1-800 Contacts' website, the cost of additional discovery is minimal: another search, a scroll down the results page, a moment's hesitation." (*Id.* at 12.) Trying to withhold information from price-shopping customers would, in this context, be futile. The evidence

thus suggests that 1-800 was simply trying to discourage free riding on its procompetitive advertising.

The settlements' supposed anticompetitive effect cannot be "obvious" in the face of the advertisement free-rider problem.

3. The Settlements Serve A Procompetitive Purpose By Reducing Litigation Costs And Protecting Trademark Rights.

Still other factors further undermine the notion that the settlements are "obviously" anticompetitive. 1-800 raised, as procompetitive justifications for the settlements, (1) the value of settling litigation and (2) the benefits of trademark protection (which include the reduction of advertisement free riding). The FTC "fail[ed] to give appropriate credit" to these justifications. (Phillips Dissent 35.)

"Litigation," observes legendary investor Charlie Munger, "is notoriously time-consuming, inefficient, costly and unpredictable." Roger Lowenstein, *Buffett: The Making of an American Capitalist* 217 (2008). Settlements save litigants' and courts' scarce resources. Although it acknowledged as much, the FTC claimed that 1-800 needed, but failed, to show "that the litigation cost savings" arising from the settlements here "would be passed through to consumers." (FTC

Op. 37.) But money saved by settling today will likely be money spent on research and development tomorrow. (Phillips Dissent 36 & n.50.) And because reduced litigation costs are capital savings rather than marginal-cost savings, it would in any case be "impossible to show" whether they go directly toward price cuts. (*Id.*)

The FTC all but ignored the benefits of protecting trademarks. Yet trademarks are a crucial vehicle for addressing the advertising free-rider problem discussed above. 1-800 can recoup its advertising investment only if prospective customers, once online, can recognize 1-800 *as* 1-800; and this they can do only if 1-800 has a trademark.

In the same way—that is, by ensuring that consumers do not "view each good as a perfect substitute"—trademarks ensure that competitors cannot free ride on a company's investment in product quality or customer service. Ronald A. Cass & Keith N. Hylton, *Laws of Creation: Property Rights in the World of Ideas* 129 (2013). Investments in quality and in advertising tend, in fact, to be synergistic. "The investment in brand identity that the manufacturer has made through his heavy advertising . . . gives the consumer greater assurance of quality control, since the manufacturer has more to lose if he

disappoints the consumer than he would if he advertised less." Posner, supra, at 175; Cass & Hylton, supra, at 129-30. But these kinds of signals—in this case, signals of 1-800's superior customer service (see Phillips Dissent 5)—can be sent and received only if sellers can "internalize the benefits of quality investment and promotion" through well-protected trademarks. Cass & Hylton, supra, at 130.

Rather than swat these procompetitive justifications away during a quick look at the settlements, the FTC should have addressed them more comprehensively while applying the rule of reason.

C. The Adoption Of The Quick-Look Standard Derailed The FTC's Analysis.

The FTC asserted that, despite adopting the quick-look standard, it "perform[ed] the 'sedulous' analysis required under the rule of reason." (FTC Op. 41.) That claim is belied, however, by the analysis the FTC actually performed.

Although the lines separating the per se rule, the quick-look standard, and the rule of reason are admittedly blurred, "the first step in any Rule of Reason case" is still ordinarily "an assessment of market power." *Polk*, 776 F.2d at 191. "Virtually always, anti-competitive effects under the rule of reason require that the arrangement or action

in question create or enhance market power—meaning the power to control prices or exclude competition." *E. Food Services, Inc. v. Pontifical Catholic Univ. Services Ass'n, Inc.*, 357 F.3d 1, 5 (1st Cir. 2004) (Boudin, J.).

The FTC neither defined a market nor established that 1-800 enjoys market power. An antitrust analysis that lacks a showing of market power is arguably closer to a "quick look" than to a "more sedulous one." *Cal. Dental*, 526 U.S. at 781.

The FTC's lack of interest in looking for market power is all the more problematic given that contact lenses are a commodity product; that, even just online, 1-800 has many competitors (look no further than the number of settlements at issue in this case); and that the "dissemination of price information online"—which is sure to occur for contact lenses, with or without 1-800's settlements—"ma[kes] demand curves for online sellers much more elastic." (FTC Op. 11, 21, 43.) All of this suggests that the barriers to entering the online contact lens market are low. Low entry barriers decrease the probability that a company can harm competition. See, e.g., *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 119 (1986) ("Without barriers to entry it would

presumably be impossible to maintain supracompetitive prices for an extended time."); *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1439 (9th Cir. 1995) ("To justify a finding that a defendant has the power to control prices, entry barriers must be significant[.]").

It is true that, even without a showing of market power, a plaintiff might still prove an antitrust violation by establishing that a practice has produced "higher prices, reduced output, or lower quality" in the market as a whole. *MacDermid Printing Solutions LLC v. Cortron Corp.*, 833 F.3d 172, 183 (2d Cir. 2016). But the FTC failed to show any of these things:

1. *Prices*. Although it noted that 1-800 tends to charge more than its online competitors, the FTC failed to connect 1-800's prices to the settlements. 1-800's prices are, as we have seen, likely a product of its role as a major advertiser and brand builder. And the premium charged by 1-800 predates the settlements. (Phillips Dissent 32.)

2. *Output*. The FTC "did not demonstrate any output effect." (*Id.* at 12.) Instead it strained to distinguish binding precedent. Faced with the dentists' advertising restrictions, *Cal. Dental* concludes that "the relevant output for antitrust purposes" is "presumably not information

or advertising," but "services themselves." 526 U.S. at 776. "The question is not," *Cal. Dental* explains, "whether the universe of possible advertisements has been limited"; it is, rather, "whether the limitation on advertisements obviously tends to limit the total delivery of dental services." *Id.* The FTC says these statements apply only when the advertisements' claims might be hard for consumers to understand. (FTC Op. 42-43.) But the pertinent passage is more general than that. It tells an adjudicator that, short of an outright advertising ban, *advertising* output is not as sound a proxy for spotting anticompetitive harm as is *product* output. Applied here, *Cal. Dental* tells an adjudicator to avoid distractions and look at the output of contact lenses. If there is no evidence that that output has dropped—and there is none—there is no evidence of anticompetitive harm.

At any rate, there is no evidence that the settlements affected the amount the settlement parties spend on advertising. (Phillips Dissent 40-41.) This perhaps explains why the FTC later shifted its attention to search engines, arguing that the settlements harmed *them* by reducing search-engine advertising output on searches for 1-800 Contacts' trademarks. But although a drop in bids on "1-800 Contacts" search

results may "be bad news for Google," the "link between Google's ad sales and consumer welfare overall" is "tenuous at best." Manne, Singer, & Wright, supra, at 7.

3. *Quality*. The FTC insisted that the settlements reduced the "quality" of internet search results. (FTC Op. 53.) This, however, is implausible. Google's users do not go to Google for advertisements; they go to Google for pertinent search results. Fewer advertisements would, if anything, improve most users' experience. (See Phillips Dissent 42.)

The FTC's use of the quick-look standard was not a harmless error.

CONCLUSION

The petition should be granted, and the FTC's final order vacated.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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This brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) and Local Rule 29.1(c) because it contains 5,612 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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June 14, 2019

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I hereby certify that on this 14th day of June, 2019, a true and correct copy of the foregoing brief was filed and served on all registered counsel through the Court's CM/ECF system.

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