No. 11-16

In the Supreme Court of the United States

REALCOMP II, LTD., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioner operates a real-estate multiple listing service (MLS) and has a policy prohibiting the distribution of certain listings from the MLS to certain public websites. The Federal Trade Commission determined that petitioner's policy did not have procompetitive justifications that outweighed its anticompetitive effects, and that the policy therefore violated Section 5 of the Federal Trade Commission Act, ch. 311, 38 Stat. 719 (15 U.S.C. 45). The question presented is as follows:

Whether the court of appeals correctly held that substantial evidence supported the Commission's determination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A42) is reported at 635 F.3d 815. The opinion and final order of the Federal Trade Commission (Pet. App. A43-A157) is not yet reported but is available at 2007 WL 6936319. The initial decision of the administrative law judge (Pet. App. A158-A457) is not yet reported but is available at 2007 WL 4465486.

JURISDICTION

The court of appeals entered its judgment on April 6, 2011. The petition for a writ of certiorari was filed on June 28, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an association of approximately 14,000 local real-estate brokers and agents (collectively referred to herein as brokers) in southeastern Michigan. Pet. App. A3-A4. Petitioner's primary service to members is its operation of the area's largest multiple listing service (MLS). *Id.* at A4. That MLS is a database of property listings containing details about each property's features, the relevant broker's compensation structure, and the bundle of brokerage services offered in return for that compensation. *Ibid.* Petitioner's MLS is a "closed" database, meaning that its listings can be viewed and searched only by petitioner's members. *Ibid.* Petitioner's members compete with one another to provide full or limited bundles of residential real-estate brokerage services to home buyers and sellers. *Ibid.* Petitioner allows both full-service and limited-service brokers to be members, and each member pays the same quarterly membership fee regardless of the bundle of brokerage services it offers customers. *Ibid.*

Petitioner also provides public advertising services to its members by disseminating its MLS property listings, by means of a daily data feed, to certain petitioner-approved Internet websites. Pet. App. A5. A member of the general public can view and search those websites without having to retain a broker. *Ibid.* Those public websites include MoveInMichigan.com, owned by petitioner; Realtor.com, owned by the National Association of Realtors, an umbrella organization of real-estate professionals with which petitioner is affiliated; and the respective broker-owned websites of petitioner's participating members, collectively referred to as IDX (Internet Data Exchange) websites. *Id.* at A4-A5. Petitioner

does not charge its members separate fees for those public advertising services. *Id.* at A5, A60, A215.

A real-estate transaction involving an MLS-listed property typically involves a "listing broker," whom the seller retains to assist her in marketing her property, and a "cooperating broker," who assists prospective buyers in finding a suitable property. Pet. App. A5. Many brokers do not specialize as either cooperating or listing brokers, but instead may represent buyers or sellers (though usually not both in the same transaction). *Ibid.* A listing broker's agreement with a seller specifies the compensation due to that broker, and it typically includes an "offer of compensation" to any cooperating broker who secures a buyer for the listed property. *Id.* at A5-A6. Petitioner requires that all listings on its MLS contain an offer of compensation to cooperating brokers, *id.* at A57, but it does not require that a cooperating broker be involved in a transaction, *id.* at A39, A107 n.26.

Under the traditional Exclusive Right to Sell (ERTS) listing agreement, a seller appoints a broker, for a specified period of time, as the seller's exclusive agent to sell the property on the seller's stated terms. Pet. App. A6. A listing broker under an ERTS agreement typically provides a full set of bundled brokerage services, such as marketing and showing the property, evaluating offers, and negotiating counteroffers. *Id.* at A7. In return, the listing broker under the ERTS model is paid a commission—often a percentage of the property's sale price—at the closing of the transaction. *Id.* at A6. The ERTS commission rate in petitioner's area is typically six percent of the property's selling price, from which a three-percent offer of compensation is made to successful cooperating brokers. *Id.* at A6-A7. Upon closing

under an ERTS agreement, the seller pays the listing broker the entire promised sales commission, regardless of whether the sale occurs through the efforts of the listing broker, a cooperating broker, or both, or even if the buyer independently approached the seller. *Id.* at A6, A7.

Technological change in the form of Internet-based marketing has contributed to the growth of "limited service" business models for providing real-estate brokerage services. Pet. App. A8-A9. Under those business models, listing brokers offer a menu of unbundled services; sellers can purchase only the services they need, thus providing consumers with a lower-cost alternative to the full-service ERTS model. *Id.* at A8. One type of limited-service offering is the Exclusive Agency (EA) agreement, under which the listing broker acts as the seller's exclusive agent, but the seller retains the right to sell the property without further assistance from, or compensation to, the broker. *Id.* at A7. A listing broker under an EA agreement is typically paid an up-front flat fee, with a three-percent offer of compensation paid by the seller directly to a successful cooperating broker. *Ibid.* When an unrepresented buyer purchases a property listed under an EA agreement, the seller therefore does not pay for the services of a cooperating broker, and (relative to the situation under an ERTS agreement) the seller effectively retains part of the money that would have been paid to the listing broker. *Ibid.* The practice of marketing properties directly to consumers over the Internet has contributed to an expansion in the market share of these limited-service offerings, which in turn has exerted significant competitive pressure on the traditional ERTS brokerage model. *Id.* at A8-A9.

2. This case concerns a restrictive policy that petitioner imposed with respect to non-ERTS listings. Under petitioner's "website policy," adopted in 2001, information about EA and other limited-service listings was not distributed from petitioner's MLS to the public Internet websites to which petitioner otherwise sends its data feed of listings. Pet. App. A9-A10. Thus, consumers searching those public websites were (unbeknownst to them) only shown listings offered under ERTS agreements; they could not access the limited-service offerings that were otherwise included in petitioner's MLS database. *Ibid.* Relatedly, from 2004 until 2007, petitioner required that a listing on its MLS could be labeled "ERTS"—and thus be included in the daily data feed to the public Internet websites—only if the listing broker agreed to provide a full and bundled package of enumerated brokerage services in connection with that listing. *Id.* at A10-A11.

The Federal Trade Commission (FTC or Commission) issued an administrative complaint alleging, as relevant here, that petitioner's website policy unreasonably restrained competition among brokers in the provision of residential real-estate brokerage services in southeastern Michigan. Pet. App. A9. The complaint alleged that petitioner's practices constituted unfair methods of competition, in violation of Section 5 of the Federal Trade Commission Act, ch. 311, 38 Stat. 719 (15 U.S.C. 45). Pet. App. A9.

On December 10, 2007, following an administrative hearing, the Commission's administrative law judge (ALJ) issued an Initial Decision. Pet. App. A158-A457. The ALJ concluded that petitioner's website policy was likely anticompetitive in nature, and that petitioner possessed substantial market power in the relevant mar-

kets. See *id.* at A11. The ALJ nonetheless dismissed the complaint for two separate reasons. First, the ALJ concluded that the FTC's complaint counsel had failed to show significant anticompetitive effects of petitioner's policies. See *ibid.* Second, the ALJ concluded that petitioner's website policy provided procompetitive efficiencies by addressing a free-rider problem and a bidding-disadvantage problem, arising out of the competition between EA sellers (who would prefer to save money by using their own efforts to locate unrepresented buyers) and petitioner's members who acted as cooperating brokers (who would prefer to represent buyers and be compensated). See *ibid.*

3. Reviewing the record de novo, the Commission reversed. Pet. App. A43-A146. It first concluded (in a determination that petitioner does not challenge here, see Pet. 13) that petitioner's website policy was an unreasonable restraint of trade. The Commission reached that conclusion because the policy singled out the new limited-service offerings—which put pricing pressure on the traditional brokerage business model—and put them at a considerable competitive disadvantage, given the Internet's increasingly important role in real-estate marketing. Pet. App. A84-A102, A135-A142.

In conducting that analysis, the FTC examined and rejected petitioner's proffered justifications for the website policy. Pet. App. A102-A113, A143. Petitioner first argued that the policy created efficiencies by combating free-riding by EA sellers. The Commission acknowledged that "measures to control free-riding are widely recognized as cognizable justifications under the antitrust laws," but it found that no free-riding existed on the record here. *Id.* at A105. It reasoned that EA sellers received no free ride from petitioner because

they make use of petitioner's MLS only by retaining the services of an MLS member-broker, and petitioner charged identical membership fees to its members, regardless of whether they offered EA or ERTS listings. *Id.* at A106. The FTC also analyzed and rejected petitioner's contention that its policies protected against free-riding on cooperating brokers. *Id.* at A107-A108. It reasoned that cooperating brokers were compensated—under both the EA and ERTS models—for any services they provided. *Ibid.* The FTC concluded that the underlying rationale for petitioner's website policy was "not to ensure the continued efforts of cooperating brokers, but to reduce 'price pressure' on commissions." *Id.* at A110.

Petitioner's second proffered efficiency was that the website policy helped to eliminate a bidding disadvantage faced by a buyer represented by a cooperating broker when bidding for an EA listing against an unrepresented buyer. Other things being equal, petitioner argued, the unrepresented buyer's offer will be more attractive to an EA seller because the seller will not have to fulfill its offer of compensation to a cooperating broker. The FTC rejected that as "not a cognizable justification under the antitrust laws." Pet. App. A110. It noted that the antitrust laws protect competition between buyers, and that any cost advantage which one buyer may have over another is, in fact, "an efficiency to which the low cost competitor is entitled." *Id.* at A111. The Commission concluded that eliminating such a bidding disadvantage would "serve to prop up a commission structure that raises the cost of selling a home," and would "diminish the possibility of brokerage commissions falling substantially below the de facto price floor created by the [ERTS] structure." *Ibid.*

Accordingly, the Commission held that petitioner's website policy violated Section 5 of the Federal Trade Commission Act, and it issued a cease and desist order. Pet. App. A143-A157.

4. The court of appeals affirmed. Pet. App. A1-A42. As relevant here, the court concluded that substantial evidence supported the Commission's rejection of petitioner's proffered procompetitive justifications for the website policy. *Id.* at A38-A41. It first sustained the FTC's conclusion that petitioner had failed to establish a connection between its policy and the prevention of free-riding. The court pointed out that, to list a property on petitioner's MLS, an EA seller must employ a listing broker who is a paying member of that MLS, and that petitioner charges identical membership dues to each of its members regardless of the type of listings a broker places on petitioner's MLS. *Id.* at A38. The court of appeals also observed that cooperating brokers are compensated for securing a buyer for the EA seller just as they are for the ERTS seller, so the EA seller receives no free services from those brokers. *Id.* at A39. The court further emphasized that the reverse scenario is also true: a home seller may choose an unrepresented buyer regardless of the type of agreement the seller has with the listing broker, and cooperating brokers are not compensated in such cases because their services have not been utilized. *Ibid.*

The court of appeals also rejected petitioner's contention that its website policy "eliminates a 'bidding disadvantage' faced by a buyer represented by a cooperating broker when bidding against an unrepresented buyer in an EA transaction." Pet. App. A40. The court agreed with the Commission that, "rather than enhance competition," petitioner's policy "insulates cooperating

brokers' commissions from competitive pricing pressure." *Ibid.* The court of appeals therefore rejected, as having "no meritorious procompetitive justification," petitioner's attempts to protect its members from the "pressure to lower costs." *Id.* at A40-A41.

ARGUMENT

The fact-bound decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner does not challenge in this Court (Pet. 13) the correctness of the Commission's findings that petitioner's website policy was anticompetitive in its nature and effect. Instead, petitioner contends only that the court of appeals and the FTC erred in rejecting its proffered procompetitive justifications. Petitioner's argument—that a particular policy restricting the dissemination of MLS real-estate listings may nevertheless have beneficial effects on competition in the southeastern Michigan market for real-estate brokerage services—raises no legal issue of broad importance. Moreover, petitioner cites no other judicial decision that has applied the antitrust rule of reason to a policy comparable to the one at issue here, let alone a decision that has reached a different outcome on facts comparable to those involved in this case.

Nor does petitioner suggest how the decisions below might depart from the framework this Court has established for applying rule-of-reason analysis to claimed efficiency justifications. On the contrary, the decisions below adhere faithfully to this Court's teachings, recognizing that a tribunal applying the rule of reason must consider arguments "that the practice has 'some coun-

tervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market.'" Pet. App. A102-A103 (quoting *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986)); *id.* at A38-A39. Petitioner's sole dispute is with the manner in which the Commission and the court of appeals applied those settled principles to the specific facts here.

2. In any event, the court of appeals correctly sustained, as supported by substantial evidence, the FTC's determination that petitioner had failed to establish procompetitive justifications for the challenged website policy. Petitioner contends that the court and the Commission erred "by failing to weigh" the efficiencies that policy allegedly produces. Pet. 14. But the purported benefits of petitioner's website policy could appropriately be balanced against its adverse effects only if petitioner's proffered justifications were both plausible under the circumstances of the case[1] and cognizable under

[1] See, *e.g.*, *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 771 (1999) (a court should weigh a proffered justification for a restraint only if the restraint "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition"); *Indiana Fed'n*, 476 U.S. at 464 (upholding the Commission's rejection of the proffered "quality-of-care" justification on the ground that the record lacked "sufficient evidence" that the challenged restraint "in fact" served such purpose); *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 115 (1984) (rejecting proffered efficiency justification as "not supported by the record"); 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1504b, at 403 (3d ed. 2010) (Once an antitrust plaintiff establishes a prima facie case of anticompetitiveness, the "burden shifts to the defendant to show that the restraint in fact serves a legitimate objective.").

the antitrust laws.[2] Neither of petitioner's proffered justifications meets those conditions.

a. Petitioner's proffered "free-riding" justification is not plausible. To be sure, efforts to prevent free-riding have been recognized as cognizable justifications under the antitrust laws; such efforts can preserve the incentives of market participants to make beneficial investments by ensuring that those investments will not be exploited by their competitors. See, *e.g., Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977); *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 731 (1988). As the Commission and the court of appeals both recognized, however, petitioner has failed to identify any free-riding problem in the circumstances of this case. Free-riding refers to the "diversion of value from a business rival's efforts without payment." *Chicago Prof'l Sports Ltd. P'ship* v. *NBA*, 961 F.2d 667, 675 (7th Cir.), cert. denied, 506 U.S. 954 (1992). But neither petitioner nor any of its member brokers who might be involved in a real-estate transaction (whether as the listing broker or as the cooperating broker) provides services that the EA seller gets for free but for which others are required to pay.

First, the court of appeals correctly found substantial record evidence to support the Commission's findings that petitioner does not provide any free service to

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[2] See *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 696 (1978) ("[W]e may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition."); *Indiana Fed'n*, 476 U.S. at 463 (rejecting, as incompatible with the purposes of the antitrust laws, defendant's proffered justification that withholding dental x-rays from insurers protects consumers from making inadequate treatment choices).

the EA seller. Pet. App. A38. An EA seller can make use of petitioner's services—both in listing a property on petitioner's MLS and in having that listing included in petitioner's data feed to public websites—only by retaining (and paying a fee to) a listing broker, who in turn is a dues-paying member of petitioner's MLS. *Id.* at A106 (citing the parties' joint stipulations of fact); see Pet. 4 (acknowledging that because the MLS is a closed database, "the general public cannot list a home, and/or search for a home, on the MLS without assistance from a participating, *paying* Realcomp broker"). The EA seller therefore pays for use of petitioner's services.

There is no free-riding on petitioner's services when a seller decides to use (and pay for) those services through an EA agreement instead of an ERTS agreement. Petitioner itself suffers no loss of revenue, and thus no change in its incentives to make investments in its business, based on the type of listing. Significantly, petitioner charges identical membership fees to each of its members, regardless of whether they offer their clients EA or ERTS listings. Pet. App. A106 (citing the parties' joint stipulations of fact). And because petitioner charges those fees on a per-quarter basis, not a per-transaction basis (*id.* at A215), petitioner does not suffer any loss of revenue when a seller in a particular transaction secures an unrepresented buyer.

Nor does the cooperating broker (if there is one) provide any free services to the EA home seller. Petitioner requires all listings on its MLS database to contain an offer of compensation to cooperating brokers. Pet. App. A7, A55; see Pet. 4. Thus, under EA contracts, when a cooperating broker secures the buyer, the cooperating broker is paid for his efforts (by the seller), just as the cooperating broker would be paid under an ERTS listing

contract (by the listing broker, who has in turn been paid by the seller). Pet. App. A7, A107. And when the successful buyer is not represented by a cooperating broker, the cooperating broker is not entitled to any compensation because he has not provided any service to the EA seller. Indeed, petitioner's argument that its policies are designed to guard against free-riding on its cooperating brokers (Pet. 18) is belied by the fact that petitioner does not require that sales it facilitates involve a cooperating broker at all (let alone a cooperating broker who pays membership fees to petitioner). See Pet. App. A39, A107 n.26.

Relatedly, petitioner argues that in a transaction involving an unrepresented buyer, the buying side does not directly fund petitioner's operations, which (in its view) amounts to "an EA seller * * * effectively 'free rid[ing]' on the part of (subscription) fees paid by cooperating brokers." Pet. 21. Petitioner may be correct that an unrepresented buyer does not fund petitioner's operations. That would be equally true, however, for both EA and ERTS listings, so it cannot be a justification for discriminating against the former, as petitioner's website policy does. Thus, as both the court of appeals and the Commission held, the record in this case does not support petitioner's theory that EA sellers free-ride on the services of petitioner's members who act as cooperating brokers.

Petitioner would distinguish between "services" provided by its member-brokers to EA sellers and what it terms the "benefits" that petitioner provides its members. In particular, petitioner argues that EA sellers do not pay for petitioner's data feed of listings to the public Internet websites. Pet. 17-19; see Pet. 20-22 (faulting the court of appeals and the Commission for not recog-

nizing that distinction). Such a distinction is beside the point, however, because listing brokers pay subscription fees to petitioner; they pay the same fees regardless of whether they offer ERTS or EA listings; and there can be no free-riding unless someone provides a service for which it is not paid. Moreover, because petitioner's fees, and thus its revenues, do not depend on either the type or the number of sales in which its members are involved, the purported distinction between "services" to EA sellers and "benefits" to petitioner's members is immaterial to petitioner's financial well-being.[3]

The factual record in this case likewise does not support petitioner's contention that the court of appeals'

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[3] For those same reasons, petitioner's reliance (Pet. 23) on *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987), is misplaced. In that case, a nationwide moving company (Atlas) routinely contracted with "moving companies throughout the country [to act] as its agents." *Id.* at 211. Atlas refused to provide facilities and services to agents that also operated independently of (and thus in competition with) Atlas itself. As the court of appeals in *Rothery* noted, that refusal was permissible because the provision of facilities and services to such agents would have resulted in "Atlas subsidizing its competitors." *Id.* at 222.

Such is not the case here. Like Atlas's refusal to provide facilities and services to independent operators, the website policy denies some of petitioner's services to EA sellers. EA sellers do not compete with petitioner, however, because petitioner's revenues do not depend on either the type of listing a seller chooses or the involvement of a cooperating broker in a particular transaction. Of course, EA sellers may compete with cooperating brokers. But those brokers are always compensated when they actually provide services. And to the extent that cooperating brokers' membership fees subsidize the advertising of listings on public websites, petitioner's policy of limiting such advertising to ERTS listings does not plausibly address that subsidy, which inures to the benefit of both EA listing brokers (and, indirectly, EA sellers) and ERTS listing brokers.

decision will reduce the incentives for cooperating brokers to support petitioner through subscription fees. As the court of appeals correctly pointed out (Pet. App. A39), the cooperating broker is not entitled to compensation when a listing is sold to an unrepresented buyer, whether under an ERTS or EA agreement. Under an EA listing, the seller will retain the portion of the brokerage compensation that would otherwise go to the cooperating broker; under an ERTS listing, the listing broker will retain the money. Thus, to the extent that cooperating brokers' incentives to participate in petitioner's MLS may be adversely affected by the sale of a listed property to an unrepresented buyer, those cooperating brokers are as much affected by an ERTS listing as by an EA listing. Because petitioner's website policy does not rectify any free-riding problem that may exist, the court of appeals was correct to reject this justification.

b. Petitioner's proffered "bidding disadvantage" defense (see Pet. 25-26) is not cognizable under the antitrust laws. Petitioner's argument turns on the fact that, if an EA seller receives identical offers from represented and unrepresented buyers, the unrepresented buyer's offer may be more attractive because the seller will not have to pay the cooperating broker out of the property's sale price. For that reason, petitioner argues, buyers represented by cooperating brokers are at a competitive disadvantage vis-a-vis buyers who rely only on publicly available methods (such as the Internet, yard signs, open houses, and newspaper ads) of searching for real estate for sale. Petitioner's website policy could alleviate the effects of that disparity in some instances, by reducing the range of information available to the second category of buyers, and thus precluding

some such buyers from making competing bids. But such efforts to favor one actor over another—and to make it more difficult for consumers to avoid particular costs associated with buying a home—are not protected by the antitrust laws, which "were enacted for 'the protection of *competition*, not *competitors*.'" *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)). That a buyer without a cooperating broker may have a cost advantage over a represented buyer does not make the competition itself unfair.

As the court of appeals and the Commission correctly recognized, any bidding advantage enjoyed by an unrepresented buyer is in fact a market efficiency, attributable to the elimination of an unnecessary middleman (the cooperating broker), that reflects consumer savings on the costs of brokerage services. Pet. App. A40, A110-A111. Reducing the cost of selling (and hence, buying) a home—even at the expense of intermediaries like real-estate brokers—is to be protected, not condemned, by the antitrust laws. See, *e.g.*, *C.B. Trucking, Inc.* v. *Waste Mgmt.,Inc.*, 137 F.3d 41, 45 (1st Cir. 1998); *Tri-State Rubbish, Inc.* v. *Waste Mgmt., Inc.*, 998 F.2d 1073, 1080 (1st Cir. 1993). An effort like petitioner's website policy to discourage such cost savings by seeking to eliminate a competitive disadvantage is "nothing less than a frontal assault on the basic policy of the Sherman Act." *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 695 (1978); see *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 117 (1984) ("By seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner

forwards a justification that is inconsistent with the basic policy of the Sherman Act.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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