UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

POLYGRAM HOLDING, INC.,
a corporation,

DECCA MUSIC GROUP LIMITED,
a corporation,

UMG RECORDINGS, INC.,
a corporation,

and

UNIVERSAL MUSIC & VIDEO
DISTRIBUTION CORP.,
a corporation.

Docket No. 9298

RESPONDENTS' POST-TRIAL REPLY BRIEF

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Respondents PolyGram Holding, Inc., Decca Music Group Limited, UMG Recordings, Inc. and Universal Music & Video Distribution Corp. (collectively, "PolyGram" or "Respondents"), respectfully submit this reply brief in support of their proposed findings of fact, conclusions of law, and proposed order in this matter.

I. INTRODUCTION

The record in this case demonstrates all of the following:

- The Three Tenors joint venture between PolyGram and Warner (the "Joint Venture") made possible the creation and production of multiple products – the 1998 World Cup Concert, the 1998 Three Tenors album ("3T3"), a Greatest Hits album, and a box set of Three Tenors albums – that could not have been created absent the joint venture. The Joint Venture thereby enhanced competition and benefited consumers.
- The Moratorium Agreement restricted discounting, advertising and promotion of two catalogue compact discs, the 1990 Three Tenors album ("3T1") and the 1994 album ("3T2"), for a period of ten weeks during the initial launch of the Joint Venture's new release, 3T3, but left PolyGram and Warner free to discount, advertise and promote 3T1 and 3T2 in any manner they chose both before and after that 10-week period.
- There is no reasonable likelihood that, in the absence of the Joint Venture and the resulting 1998 concert and album, either PolyGram or Warner would have discounted, advertised or promoted 3T1 or 3T2 in the United States in any manner that was prohibited by the alleged Moratorium Agreement. The Moratorium Agreement therefore did not restrict competition that would have occurred in the

absence of the procompetitive Joint Venture.

- There is no evidence that the Moratorium Agreement had any actual anticompetitive effect whatsoever in any market, and Complaint Counsel specifically disclaimed any effort to provide any such evidence.
- Warner and PolyGram believed that the Moratorium Agreement would enhance the efficiency of the Joint Venture because it reflected the most reasonable marketing strategy for 3T3 and the Three Tenors product line, and because it limited the opportunity for each of them to free ride on the marketing and promotional activities of the Venture or to engage in opportunistic behavior that would undermine the success of the Venture. The testimony, including that of Complaint Counsel's expert economist, and contemporaneous documents demonstrate that this belief was reasonable, was held in good faith, and was the reason the parties entered into the Moratorium Agreement.

Based on these facts, PolyGram is entitled to a decision in its favor for several reasons, as demonstrated in PolyGram's Post-Trial Brief. First, the alleged Moratorium Agreement is not *per se* illegal, because it was ancillary to a legitimate, procompetitive joint venture. Second, under the Rule of Reason, Complaint Counsel failed to meet their burden of showing that the Moratorium Agreement had any actual anticompetitive effect, as the controlling case law requires; and, in any event, the Moratorium Agreement cannot be deemed "presumptively anticompetitive" under the burden-shifting approach invoked by Complaint Counsel. Third, PolyGram has shown that it had plausible and valid efficiency justifications for the Moratorium Agreement, and Complaint Counsel have failed to show that the agreement had a net anticompetitive effect. Under any version of the rule of reason – whether "quick look" or

otherwise – these facts compel a decision in PolyGram's favor.

Complaint Counsel do not seriously dispute the facts outlined above, because they cannot. Instead, they contend that the Moratorium Agreement was nevertheless illegal because it was not "necessary" to the formation or efficient operation of the Joint Venture and, when the Joint Venture context is ignored, was "presumptively anticompetitive." Thus, Complaint Counsel over and over again characterize the issue in the case as whether the Moratorium Agreement was "necessary" for the formation or operation of the Joint Venture, *e.g.*, CCPTB at 2, 3, 8, 35, 44, 45, 46, 56, and assert that the Moratorium Agreement, when considered apart from the Joint Venture, was "presumptively anticompetitive," *id.* at 5, 6, 7, 24-34. Were "necessity" the correct legal standard, the result here might be different: it is true that PolyGram and Warner could have formed (indeed, they did form) the Joint Venture and could have released 3T3 without the Moratorium Agreement; and it is hard to dispute that, *if one simply ignores the Joint Venture*, a naked agreement between PolyGram and Warner to restrict discounting and advertising of 3T1 and 3T2 would likely be deemed presumptively anticompetitive. *But, were "necessity" the correct legal standard, the result would necessarily also have been different in many prior cases decided by the United States Supreme Court and other federal courts, where the challenged restraint was unquestionably not "necessary" to formation or operation of the joint venture but was nevertheless either held lawful or found unlawful only after a showing of actual (not "presumptive") net anticompetitive effects.*

What Complaint Counsel are attempting to do here is transparent. In 1988, the Commission decided *In the Matter of Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988), and adopted a version of the Rule of Reason under which a plaintiff would have no burden of showing any actual anticompetitive effect unless and until the defendant

proved that it had a plausible and valid efficiency justification. That dramatically truncated version of the Rule of Reason has subsequently been rejected by the Supreme Court and the Courts of Appeals, which have consistently required, in *any* Rule of Reason case, that the plaintiff prove actual anticompetitive effect (or market power as its surrogate). Indeed, the Commission has acknowledged as much. In this case, Complaint Counsel are seeking to resuscitate the discredited *Mass. Board* formulation – in the hope that this tribunal, the Commission and the Court of Appeals all will fail to recognize that they are bound to follow the United States Supreme Court's decisions to the contrary. That effort must fail.

Even if *Mass. Board* were the law, Complaint Counsel's case would fail because PolyGram's procompetitive justifications for the moratorium are both plausible as a matter of economics and valid in that they are consistent with the contemporaneous documentation and witness testimony regarding the circumstances faced by the Joint Venture. The record evidence demonstrates that the moratorium was a central part of the worldwide marketing plans for the worldwide Joint Venture, that it was designed to increase the overall output of Three Tenors products, and that it likely would have increased output and prevented inefficient free riding activities. Because they know that the economic plausibility and factual validity of PolyGram's procompetitive justifications precludes any finding of liability under their truncated approach to this case, Complaint Counsel rely on a series of contrived "rules" under which they contend that the Court must (1) ignore the testimony and expert reports of the PolyGram expert witnesses, Professors Ordover and Wind, whose depositions were designated by Complaint Counsel themselves, and whose expert reports were made a part of the record by joint stipulation; (2) ignore the procompetitive effects the worldwide Moratorium Agreement that the parties adopted as part of their worldwide joint venture could have had throughout the world, and conclude that

the Agreement was unlawful simply because it did not happen to have *any* effect on competition in the United States; (3) disregard the extensive witness testimony and contemporaneous documentation supporting PolyGram's procompetitive justifications; and (4) place upon PolyGram the burden of "proving a negative" by demonstrating that there were no substantially less restrictive alternatives to the moratorium.

Again, Complaint Counsel have the requirements of the controlling case law precisely backwards. Once PolyGram proffered a plausible procompetitive justification for the Moratorium Agreement – and Complaint Counsel's own economist here conceded that PolyGram's procompetitive justifications for the Moratorium Agreement are "plausible" as a matter of economics – it was Complaint Counsel's burden to show that the Moratorium Agreement had actual, net anticompetitive effects, and it was Complaint Counsel's burden to demonstrate that any suggested alternative to the moratorium was viable, would have been as effective as the moratorium, and would have been substantially less restrictive of competition. In light of the fact that Complaint Counsel have sought only to satisfy a burden of proof that is insufficient under the controlling case law, it is hardly surprising that they failed to meet their actual burden.

Finally, Complaint Counsel's case must fail for yet another reason: Complaint Counsel plainly did not show there was any "real threat" that conduct similar to the moratorium is likely to recur, as they admit they must do to obtain a "cease and desist" order under the FTC Act. *See* CCPTB at 83; *United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952) (holding that a "cease and desist" order may be obtained only when there is a "real threat of future violation or a contemporary violation of a nature likely to continue or recur"). The record evidence demonstrates that the Joint Venture itself was unique in the collective experience of the

witnesses who testified in this case; that the reasons for adopting the Moratorium Agreement were closely tied to the unique aspects of the Joint Venture; and that there is no evidence that any similar agreement has ever been considered or adopted in the record industry. Complaint Counsel's efforts to demonstrate a real threat of recurrence consist only of conjecture regarding a series of speculative scenarios that bear no resemblance to the Joint Venture and cannot serve as the basis for finding that there is any threat of recurrence here.

II. ARGUMENT

A. The Moratorium Agreement Is Not *Per Se* Illegal.

Complaint Counsel are either coy or confused about whether they contend that the Moratorium Agreement is *per se* illegal. They never actually say, "the Moratorium Agreement is *per se* illegal." They do, however, make the unqualified assertion that "[a] horizontal restraint on price competition or other core competitive activities of the collaborators *violates the antitrust laws* [not, "is subject to an abbreviated Rule of Reason"] unless such restraint is *necessary* for the formation or efficient operation of a pro-competitive joint venture." CCPTB at 2 (emphases added). Further, as noted, they repeatedly assert that the Moratorium Agreement was *not* necessary either to the formation or the efficient operation of the Joint Venture; thus, one might infer that they contend that the agreement is *per se* illegal.[1] Elsewhere, however, Complaint Counsel seem to argue that the "necessity" issue goes only to whether the Moratorium Agreement is subject to analysis under a full or an abbreviated rule of reason, not to whether it is *per se* illegal. *See* CCPTB at 8 (arguing that "restraints ancillary to a joint venture are often analyzed under an abbreviated rule of reason," and that "[t]he relevant issue is . . . whether the

[1] In addition, Complaint Counsel asserts that the holding of *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990), "controls this case," CCPTB at 47; and in *BRG* the challenged restraint was held *per se* illegal.

challenged restraint is necessary to achieve a cognizable pro-competitive purpose"). Either way, they are wrong.

Throughout their brief, Complaint Counsel use "necessary" as the equivalent of "absolutely necessary" or "essential." Thus, for example, they argue that the Moratorium Agreement could not have been "necessary" to the Joint Venture because it was only reached after formation of the venture. CCPTB at 2-3. Similarly, Complaint Counsel claims the Agreement could not have been "necessary" to achieve any efficiency benefits because it was, they assert, not the least restrictive alternative. CCPTB at 60-61. But the Commission itself has expressly recognized that the word "necessary," when used by the courts to describe the relationship that must exist between a horizontal restraint and a legitimate joint venture in order to justify what might otherwise be an unlawful restraint, means "reasonably related to," *not* "absolutely necessary," and does *not* imply any requirement that the restraint be the "least restrictive alternative." Brief of the United States as Amicus Curiae in *NCAA*, Attachment A to Complaint Counsel's Pretrial Brief at 13 (criticizing the petitioner for "tak[ing] the word 'necessary' out of the legal context in which it was used by the lower courts, *i.e.*, to mean 'reasonably related to,' and ascrib[ing] to it a meaning – 'absolutely necessary,' *i.e.*, there being no less restrictive alternative – not fairly attributable to those courts"); *id.* (framing "requirement that a defendant show that an anticompetitive restraint is 'necessary' to foster (*i.e.*, 'reasonably related to') a legitimate business or statutory purpose").[2] Here, PolyGram has amply demonstrated that the Moratorium Agreement was reasonably related to the Joint Venture and to enhancing the efficiency of that venture. RPF Nos. 51-104. Thus, under the "reasonably related

[2] In that brief, the Commission also emphasized "that plaintiffs and courts can [not] merely second-guess those participating in an otherwise legitimate enterprise, and invalidate any restraint that is not the 'least restrictive' imaginable or practicable." *Id.* at 6.

to" standard that the Commission correctly advocated in the *NCAA* case, PolyGram is unquestionably entitled to judgment.

To the extent Complaint Counsel contend the Moratorium Agreement is *per se* illegal because it was not "necessary," meaning "essential," their contention is squarely at odds with decades of Supreme Court and Court of Appeal precedent. As explained in detail in PolyGram's Post-Trial Brief, *see id.* at 23-29, many courts, including the Supreme Court, have applied the rule of reason to restraints adopted in the context of a joint venture without requiring any showing that the restraint was necessary or essential to the formation or efficient operation of the venture. Indeed, in most (if not all) of those cases, it could not reasonably even have been *contended* that the challenged restraint was necessary or essential to either. *See e.g.*, *NCAA v. Board of Regents*, 468 U.S. 85, 100-01, 114 (1984) (applying the rule of reason to NCAA's restrictions on college football telecasts because they were adopted in the context of a legitimate joint venture (albeit decades *after* the venture was formed), even though the Court found that those restraints had *no* beneficial effect on the operation of the NCAA – that is, the NCAA could operate "just as effectively" without them) (emphasis added); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 20-21 (1979) (applying the rule of reason to (and upholding) a "blanket license" because it provided a "substantial lowering of costs" and thus was "potentially beneficial," even though the Court recognized that ASCAP and BMI *could* instead have used individually negotiated licenses); *Chicago Prof'l Sports Ltd. P'ship v. National Basketball Ass'n*, 961 F.2d 667, 673 (7th Cir. 1992) (Posner, J.) (applying the rule of reason because "the NBA is a joint venture," even though challenged restrictions on televising of games were obviously not necessary to the formation or operation of the NBA); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224, 229 (D.C. Cir. 1986) (Bork, J.) (applying the rule of reason to (and upholding)

prohibitions on competition by members of a joint venture, not because they were "necessary" to the venture (they were not), but because they "serve to make [it] more effective" and "enhance [its] efficiency"); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 189-89 (7th Cir. 1985) (applying the rule of reason to (and upholding) an agreement between joint venture partners not to compete by selling their non-joint-venture products in the joint-venture building, not because such an agreement was "necessary" (it was not), but because it "part of a larger endeavor whose success [it] promote[s]" and "may contribute the success of a cooperative venture").[3]

In short, were the law as Complaint Counsel suggests – that a horizontal restraint adopted by joint venture partners is *per se* illegal unless it is necessary to the formation or operation of the joint venture – all of these cases would have been wrongly decided. Only the United States Supreme Court, however, has the authority to so hold.

Complaint Counsel apparently also contend that the Moratorium Agreement is *per se* illegal because 3T1 and 3T2 were not created by or included in the Joint Venture – they were. Complaint Counsel asserts, "outside" the Joint Venture. *See* CCPTB at 45-47. As explained in PolyGram's Post-Trial Brief, that contention is contrary to numerous decisions in which courts have applied the rule of reason to (and sometimes upheld) horizontal restraints that related to products that were not created by or included in the parties' joint venture. *See* CCPTB at 30-32.[4] Moreover, the contention is flatly contrary to the testimony of Complaint Counsel's economist, Dr. Stockum, who testified that restraints related to products "outside" a joint venture can

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[3] Further, Complaint Counsel's expert, Dr. Stockum, testified that a restraint may be efficiency-enhancing and pro-competitive even if it is not essential to either the formation or operation of a joint venture. Trial Tr. at 688:10-689:8, 691:23-692:8.

[4] Complaint Counsel cite *United States v. Visa U.S.A., Inc.*, 163 F.Supp.2d 322 (S.D.N.Y. 2001), as holding that a restraint on products "outside" the joint venture was illegal, but they fail to note the critical fact: that, although the restraint *did* relate to products that were outside the joint venture, the court applied a *full rule of reason analysis* to it.

enhance the efficiency of the venture and be pro-competitive. Trial Tr. (Stockum) at 693:23-694:23, 703:2-8.

Complaint Counsel's continued reliance on *Palmer v. BRG of Georgia, Inc.* ("*BRG*"), 498 U.S. 46 (1990), is meritless. There was no joint venture or other collaboration to create any new product or service involved in *BRG*; instead, there was simply a division of markets between two competitors accomplished through a license agreement. Although Complaint Counsel refer to the parties having "combined their assets in Georgia" and to "the formation of the venture," those are *still* fictions created by counsel: neither the Eleventh Circuit's nor the Supreme Court's decision in *BRG* supports the notion that there was any "combination of assets" or "formation of a venture" involved in the case. Moreover, Complaint Counsel wrongly suggest that the agreement not to compete *outside* Georgia was judged *per se* illegal "because it restricted competition outside the scope of the venture [which, according to Complaint Counsel, was limited to Georgia]." CCPTB at 47. In fact, the Supreme Court held the *entire* agreement, including the restraint on competition *in Georgia* (i.e., "inside" Complaint Counsel's supposed joint venture), *per se* illegal because it was a naked allocation of markets (there in fact being no joint venture or other combination of assets). 498 U.S. at 49-50. In short, *BRG* is still irrelevant to this case.[5]

Finally, Complaint Counsel stubbornly persist in suggesting that the Moratorium Agreement is *per se* illegal because it was adopted after formation of the Joint Venture,

[5] Complaint Counsel attempt to analogize HBJ's Georgia license to BRG and the accompanying agreement by BRG not to compete with HBJ outside Georgia to Warner's license to PolyGram to distribute 3T3 outside the United States and PolyGram's alleged agreement not to discount or advertise 3T1 in the United States for a 10-week period. CCPTB at 18. What Complaint Counsel ignore, of course, are the distinguishing facts, among others, that the alleged moratorium arose in connection with marketing of a new, jointly-owned product that could not have been produced without the joint venture, that PolyGram was paying 50% of the costs of marketing 3T3 in the United States and Warner paying 50% of the cost outside the U.S., and that PolyGram and Warner were sharing the risks and rewards of the joint venture. None of these crucial circumstances existed in *BRG*.

notwithstanding that, (1) in several of the cases cited above (and others), the courts applied the rule of reason to restraints adopted after the formation of the joint venture and (2) Complaint Counsel's expert, Dr. Stockum, testified both that restraints adopted after formation can be pro-competitive and that a legal rule that presumed otherwise could deter efficiency-enhancing behavior including the formation of otherwise procompetitive joint ventures. *See* CCPTB at 43-45; Trial Tr. (Stockum) at 703:21-705:2. Complaint Counsel's reliance on *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), in support of this argument is frivolous. In *Blackburn*, the allocation of territories was adopted after *dissolution* of the partnership, so that the restraint obviously could not even plausibly enhance the efficiency of that (defunct) partnership. *Id.* at 828.

Here, it is undisputed that the Moratorium Agreement was adopted in the context of the Joint Venture and that it at least plausibly enhanced the efficiency and promoted the success of that Venture. Accordingly, the Agreement is not subject to analysis under the *per se* rule but must instead be evaluated under the rule of reason.

B. Complaint Counsel's Decision To Disclaim Any Effort To Provide Any Evidence Of Actual Anticompetitive Effects Requires A Decision In PolyGram's Favor Under The Rule Of Reason.

Complaint Counsel contend that they can prevail under the rule of reason without presenting any evidence whatsoever that the Moratorium Agreement had an anticompetitive effect. Instead, Complaint Counsel assert that, once they show (purportedly) that the Agreement was "presumptively anticompetitive," the burden shifts to PolyGram to prove a plausible and valid efficiency justification. Complaint Counsel's rule of reason argument fails for three reasons. First, the law is that, in *any* rule of reason case, the plaintiff must present at least some

evidence of actual anticompetitive effect (or market power as its surrogate). Second, where, as here, a restraint is ancillary to a legitimate, pro-competitive joint venture and does not restrict any competition that would have occurred in the absence of that joint venture, the restraint cannot be considered "presumptively anticompetitive." Finally, PolyGram has proven plausible and valid efficiency justifications for the Moratorium Agreement and Complaint Counsel has failed to prove (indeed, disclaimed any intent even to try to prove) that the Agreement had an actual net anticompetitive effect.

1. Complaint Counsel Were Required Under The Rule Of Reason To Present Evidence Of Actual Anticompetitive Effect.

Complaint Counsel continue to contend that, even if the Moratorium Agreement was ancillary to the Joint Venture and therefore not *per se* illegal, it may be condemned under the rule of reason without any showing whatsoever of actual anticompetitive effect because, they assert, it was "presumptively anticompetitive." The law is otherwise.

Complaint Counsel rely principally on the Supreme Court's decisions in *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999) ("*CDA*"), and *NCAA v. Board of Regents*, 468 U.S. 85 (1984), neither of which supports their position. Indeed, Complaint Counsel's citation to those decisions is grossly misleading. On page 24 of their brief, Complaint Counsel assert, "[w]here such [a presumptively anticompetitive] agreement is proven, likely anticompetitive effects are presumed and the burden shifts to the defendant to demonstrate a countervailing efficiency sufficient to overcome the presumption." CCPTB at 24. Complaint Counsel cite page 771 of *CDA* and page 113 of *NCAA* for this proposition.

Page 771 of the Court's *CDA* opinion contains only one clause that even references the proposition advanced by Complaint Counsel: "Even on *Justice Breyer's view [in*

dissent] that bars on truthful and verifiable price and quality advertising are prima facie anticompetitive . . . and place the burden of procompetitive justification on those who agree to adopt them . . . ." 526 U.S. at 771 (emphasis added). Later, the majority opinion expressly *rejects* that mode of analysis, holding that "*before* a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects . . . the court . . . [must have] considered whether the effects *actually* are anticompetitive." *Id.* at 775 n.12. Thus, Complaint Counsel's position is based upon the Supreme Court's characterization of a *dissenting* view that the Court expressly *rejects* in the same opinion.

Complaint Counsel's citation to page 113 of *NCAA* is equally misleading. There, the Court wrote:

> [T]he NCAA television plan on its face constitutes a restraint upon the operation of a free market, *and the findings of the District Court establish that it has operated to raise prices and reduce output.* Under the Rule of Reason, *these hallmarks of anticompetitive behavior* place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies [the restraint].

468 U.S. at 113 (emphasis added). Earlier in the opinion, the Court detailed the District Court's findings of actual anticompetitive effect – "the hallmarks of anticompetitive behavior":

> [T]he NCAA's television has a significant potential for anticompetitive effects. *The findings of the District Court indicate that this potential has been realized. The District Court found that if member institutions were free to sell television rights, many more games would be shown on television, and that the NCAA's output restriction has the effect of raising the price the networks pay for television rights.* Moreover, the court found that by fixing a price for television rights to all games, the NCAA creates a *price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market.*

468 U.S. at 104-06 (emphasis added). Thus, the page from *NCAA* upon which Complaint Counsel rely establishes nothing more than that, *where the plaintiff has proven actual anticompetitive effects on price and output*, the burden shifts to the defendant to prove a procompetitive justification. That, of course, is entirely consistent with the Court's later holding

in *CDA*.

Complaint Counsel also quote, out of context, the *NCAA* Court's statements that "the absence of proof of market power does not justify a naked restriction on price or output," and that "competitive justification" may be required "even in the absence of a detailed market analysis." 468 U.S. at 109-10; *see* CCPTB at 25. What Complaint Counsel omit are the crucial sentences that appear *between* these statements: "Petitioner does not quarrel with *the District Court's finding that price and output are not responsive to demand [i.e., findings of actual anticompetitive effects]*. Thus the 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*." 468 U.S. at 109-10 (emphasis added). In other words, *NCAA* holds merely that, *where there is proof of actual anticompetitive effect*, proof of market power and "detailed market analysis" are unnecessary. Here, of course, Complaint Counsel has offered no evidence whatsoever of actual anticompetitive effect, market power, or market analysis.

Complaint Counsel relies extensively on *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993), for the proposition that it need not present any evidence of actual anticompetitive effect. *Brown University* was decided six years before *CDA*, in which the Supreme Court clearly repudiated the notion that a plaintiff may shift the burden to a defendant, under an "abbreviated" rule of reason, without any showing whatsoever of actual anticompetitive effect. Moreover, in *Brown University*, the Third Circuit mistakenly relied on *NCAA* and *FTC v. Indiana Federal of Dentists*, 476 U.S. 447 (1986), in support of its assertion that, under an abbreviated rule of reason, competitive harm may be presumed without any showing of actual effect or market power, and the burden of proof thereby shifted to the defendant. 5 F.3d at 669. As shown above, the *NCAA* Court held that the burden was shifted to the defendant, not by a

presumption of anticompetitive effect, but by the District Court's extensive factual findings of *actual* anticompetitive effect. *See* 468 U.S. at 104-06, 113. Similarly, in *Indiana Federation of Dentists*, the Court held that "the Commission's failure to engage in detailed market analysis [was] not fatal [under an abbreviated rule of reason]" because "the [District Court's] finding of *actual, sustained adverse effects on competition* . . . [was] legally sufficient . . . ." 476 U.S. at 460-61 (emphasis added).[6]

Finally, Complaint Counsel rely on two decisions of the Federal Trade Commission, *Mass. Board* and *In re Detroit Auto Dealers Ass'n, Inc.*, 111 F.T.C. 417 (1987). In these two decisions, the Commission employed a super-abbreviated version of the rule of reason, under which the burden was shifted to the defendant if the challenged restraint was "inherently suspect." *Mass. Board*, 110 F.T.C. at 604; *Detroit Auto Dealers Ass'n*, 111 F.T.C. at 498. In the *Detroit Auto Dealers* case, however, the Sixth Circuit disapproved the Commission's "inherently suspect" methodology, concluding that it reflected improper use of a "per se approach" without any "demonstrated effect" on competition. *In re Detroit Auto Dealers Ass'n, Inc.*, 955 F.2d 457, 470-71 (6th Cir. 1992); *see id.* (criticizing the Commission's reliance on *Indiana Federation of Dentists* for its "inherently suspect" methodology).

The Commission itself has recognized that the *Mass. Board* "inherently suspect" approach was rejected by the Sixth Circuit and is not appropriate under the rule of reason. *In the Matter of California Dental Ass'n*, 121 F.T.C. 190, 1996 FTC LEXIS 81, at *93 (1996) (acknowledging that "the Sixth Circuit indeed rejected the Commission's use of the 'inherently

[6] The Federal Trade Commission made precisely this point about *Indiana Federation of Dentists* in its brief to the Supreme Court in *CDA*. Brief for the Respondent, *CDA*, at 19 (arguing that, in *IFD*, "[the Court] ruled that "[a]pplication of the Rule of Reason to these facts is not a matter of any great difficulty,' in light of the nature of the restraint *and the Commission's finding of actual effects on competition*") (emphasis added). A copy of the Commission's Supreme Court brief in *CDA* is attached hereto as Attachment A.

suspect' approach"). Accordingly, in *CDA*, the Commission utilized a "quick look" rule of reason, but not the "supersonic" version rejected by the Sixth Circuit and advocated by Complaint Counsel here. Instead, consistent with PolyGram's position here, the Commission undertook a three-step analysis: *First*, the Commission considered evidence of the likely and actual anticompetitive effect of the challenged restraints and affirmed the ALJ's finding that "the suppression of advertising '*has injured* those consumers who rely on advertising to choose dentists.'" 1996 FTC LEXIS 81 at *64-*71. *Second*, the Commission determined that the CDA had sufficient market power to harm competition through the restraints. In doing so, the Commission interpreted *NCAA* and *Indiana Federation of Dentists* in precisely the same manner as PolyGram: "'The Supreme Court has indicated that *when a court finds actual anticompetitive effects*, no detailed examination of market power is necessary to judge the practice unlawful." *Id.* at *71 n.19 (citing *NCAA* and *IFD*) (emphasis added). Only after having found actual anticompetitive effect and market power did the Commission turn to "*the third step in our quick look*" examination of the efficiency justifications offered by the CDA. *Id.* at * 80 (emphasis added). That is precisely the three-step methodology advocated here by PolyGram. Complaint Counsel having chosen to ignore the first two steps, there is no need to reach the third in order to rule for PolyGram.[7]

[7] Any doubt about the proper interpretation of the rule of reason methodology approved by the Commission in *CDA* is laid to rest by the Commission's brief to the Supreme Court, in which the Commission emphasized that "[it] *began* its rule of reason analysis by assessing the anticompetitive effects of the restrictions," that it "amassed an extensive record" regarding the actual effect of the rules and "reached its finding of a violation of Section 5 only after a careful assessment of [that] record," and that it "found the *actual* effect [of the rules] was to suppress a vast range of truthful and nondeceptive advertising," which was "harmful to consumers." *CDA* Brief at 6, 20, 21 (Attachment A). Moreover, the Commission made clear that its consideration of the CDA's procompetitive justifications came only *after* it had "determined that [the challenged rules] had an anticompetitive effect." *Id.* at 23.

2. The Moratorium Would Not Be Presumptively Anticompetitive Even If That Were The Applicable Standard.

Even if a "presumption" that a restraint is anticompetitive could shift the burden to the defendant to show an procompetitive justification, no such presumption would be warranted here. Complaint Counsel, invoking case law involving naked price-fixing agreements and economic studies involving market-wide advertising bans, assert that the Moratorium Agreement was "presumptively anticompetitive" because it restricted discounting and advertising of 3T1 and 3T2. CCPTB at 27-35. Complaint Counsel chooses simply to ignore crucial facts about *this* alleged restraint, which demonstrate that it cannot be deemed "presumptively anticompetitive."

First, the Moratorium Agreement, unlike virtually all of the "naked" restraints involved in the price-fixing and advertising-ban cases cited by Complaint Counsel, was adopted in the context of, and was designed to contribute to the efficiency and success of, a legitimate, pro-competitive joint venture. RPF Nos. 51-104. Indeed, that is why, as explained in Section A, the agreement is not subject to the *per se* rule. Once having determined that an agreement is subject to the rule of reason because it is ancillary to a joint venture, it would be inconsistent (indeed, irrational) then to rule that the agreement, although it may contribute to the efficiency of a pro-competitive collaboration, is "presumptively anticompetitive." In short, once a court determines that, as here, an agreement is ancillary to a pro-competitive joint venture, that agreement cannot be deemed "presumptively anticompetitive."[8]

Second, the only competition even potentially restricted by the Moratorium

[8] This is not to suggest that *any* agreement between competitors may be immunized from characterization as "presumptively anticompetitive" merely because it is adopted in the context of a joint venture. But when, as here, the evidence demonstrates that the agreement was intended to and plausibly does enhance the efficiency of the joint venture – *i.e.*, when the agreement is an ancillary restraint – it cannot be so characterized.

Agreement was discounting and advertising that would not have occurred in the absence of the Joint Venture. The 1998 Three Tenors concert and the release of 3T3 created an opportunity for promotion and sales of 3T1 and 3T2 that would not otherwise have existed. There is no evidence that, had the Joint Venture not been formed, either PolyGram or Warner would have had any incentive either to discount or advertise 3T1 or 3T2 in any manner that was prohibited by the Moratorium Agreement. Complaint Counsel has pointed to nothing that PolyGram or Warner did with 3T1 or 3T2 in, for example, 1997 that would have been prohibited by the Moratorium Agreement, and there is no evidence that, but for the Joint Venture, they would have behaved differently in 1998. Trial Tr. (Stockum) at 667:16-668:25.

Thus, Complaint Counsel's position is necessarily that it is "presumptively anticompetitive" for two companies to agree that, having formed a pro-competitive joint venture, they will not undermine the efficiency and success of that venture by capitalizing on the new circumstances created by the venture itself to do things *they would not otherwise have done*. That cannot be the law. It may be that, in some circumstances, a court will determine that the actual anticompetitive effect of the parties' agreement not to do those new things outweighs the pro-competitive, efficiency enhancing effects of the agreement, and that the agreement is therefore unlawful. Here, however, Complaint Counsel has not even asked the Court to make such a determination.

Third, the Moratorium Agreement is totally unlike any of the agreements involved in either the cases or articles cited by Complaint Counsel. It restricted the discounting and advertising of *two* among thousands of compact discs for a period of *ten weeks*, leaving PolyGram and Warner free to discount and advertise those two products aggressively at all other times and to do whatever they chose with all their other competing products. Complaint

Counsel's expert, Dr. Stockum, opined that restrictions on advertising have the "potential to harm consumers and competition," and "may raise consumer search costs." JX 104-C, Stockum Report (emphasis added). However, Dr. Stockum acknowledged that a similar agreement to ban advertising of two cereal products (for an unlimited period of time) would probably have "*no effect whatsoever" on price and therefore no effect on output*. Stockum Depo. at 124:11-125:5; Trial Tr. at 653:22-655:6. Dr. Stockum also acknowledged that, in order to determine what, if any, competitive effect the Moratorium Agreement would have, he would need to do a detailed market analysis. Stockum Depo. at 135:24-136:16; *see also* Trial Tr. at 661:18-662:13 (determining whether the Moratorium Agreement's restriction of advertising would have had any meaningful effect on competition would require analysis of multiple factors). Dr. Stockum testified that he was unaware of any study regarding a restriction on advertising of "two relatively old products in a market in which there are hundreds of new products every year," *Id.* at 655:12-16, that the academic literature addressed advertising bans that were broader in scope and/or duration than the moratorium, *Id.* at 655:12-657:15, and that there are circumstances in which additional advertising can be anticompetitive. *Id.* at 662:20-665:7. Dr. Stockum testified that the actual competitive effects of any restriction on advertising such as the one included in the moratorium would depend on, *inter alia*, the extent to which the products had been advertised prior to the restriction, the presence of other advertising for products with the same brand (*i.e.*, 3T3), and the extent to which the relevant consumers' decisions would be influenced by additional advertising. Trial Tr. at 660:4-662:17. In these circumstances, Complaint Counsel cannot be allowed to avoid any burden of proving at least *some* anticompetitive effect simply by invoking the words, "presumptively anticompetitive."

3. PolyGram's Procompetitive Justifications Preclude Any Finding Of Liability Under Any Version Of The Rule Of Reason Absent Proof Of Actual, Net Anticompetitive Effects.

Complaint Counsel continue their effort to make new law in their treatment of PolyGram's procompetitive justifications for the Moratorium Agreement. Complaint Counsel argue that, to trigger a need for a more detailed analysis of the actual effects of the Moratorium Agreement under the rule of reason, PolyGram must show that its procompetitive justifications are "*necessary* in order to promote competition and benefit consumers." CCPTB at 35. In support of that proposition, Complaint Counsel again cite *BMI*, in which the Supreme Court upheld the challenged agreement not because it was "necessary," but because it provided a "substantial lowering of costs" and was "potentially beneficial" as compared with the available alternatives, 441 U.S. at 20-21; and *NCAA*, in which the Supreme Court did not ask whether the challenged agreement was "necessary," but rather concluded that it was unlawful under the rule of reason because the evidence showed that it had actual anticompetitive effects and no procompetitive justification, 468 U.S. at 100-01, 114.

Complaint Counsel again compound the error in their invocation of this non-existent "necessity" standard by ignoring the fact that, even when the term "necessary" is used in the antitrust laws, the term means "reasonably necessary," "reasonably related to" or "potentially procompetitive," and is intended to suggest that courts should defer to, rather than second-guess, the commercially reasonable decisions of business people. *See* Brief of the United States as Amicus Curiae in *NCAA*, Attachment A to Complaint Counsel's Pretrial Brief at 13 (arguing that "necessary" means "'reasonably related to,'"); *id.* (framing "requirement that a defendant show that an anticompetitive restraint is 'necessary' to foster (*i.e.*, 'reasonably related to') a legitimate business or statutory purpose"). The most recent Supreme Court decision on this subject is *Cal.*

Dental – which Complaint Counsel fail to mention in asserting that the defendant has the burden of establishing a procompetitive justification is "necessary" before the plaintiff will be required to offer any evidence of anticompetitive effect. *Cal. Dental* makes clear that a procompetitive justification need only be "plausible" as a matter of economics to foreclose any finding of liability without some consideration of the actual, net competitive effects of the challenged practice. 526 U.S. at 771 (actual, net effects of challenged practice must be considered where it "might plausibly be thought to have a procompetitive effect, or no effect at all on competition").

The record evidence and the relevant case law make it abundantly clear that the procompetitive justifications for the Moratorium Agreement are sufficient to require an analysis of actual effects under the rule of reason regardless of the relevant standard for assessing those justifications. As set forth in detail in PolyGram's post-trial brief, the Moratorium Agreement may have had procompetitive effects, and thus cannot be assessed without evidence regarding its actual competitive effects, if any, for two reasons:

First, the Moratorium Agreement was a central part of the worldwide marketing strategy for 3T3, the Joint Venture product marketed worldwide as part of the Joint Venture. The Moratorium Agreement thus was part of a commercially sound marketing strategy *for 3T3 and the Three Tenors product line* – a strategy that likely would have been adopted by a single firm owning all three Three Tenors albums and seeking to maximize the long-term output of Three Tenors products, and that was plainly legitimate in the context of a joint venture for the creation of new Three Tenors products by the two firms who owned the two pre-existing Three Tenors products. *See* RPF No. 55 (Cloeckaert Depo. Tr. at 68-70; *see also* O'Brien Tr. at 99; Saintilan Tr. at 78-84; Stainer Tr. at 57-58); *id.* No. 112 (Wind Report at 16-17).

Because it was an integral part of the worldwide marketing plans for the Joint Venture product, the Moratorium Agreement cannot be analyzed apart from the overall procompetitive benefits of the venture. *See Collaboration Guidelines* § 2.3, at 6-7 ("Two or more agreements are assessed together if their procompetitive benefits or anticompetitive harms are so intertwined that they cannot meaningfully be isolated and attributed to any individual agreement."). Complaint Counsel ignore this provision of the Guidelines, and instead ask the Court to create a new rule under which the parties to a joint venture could be obligated to engage in self-defeating conduct that is completely at odds with the purposes of their joint venture. There is no authority that would require the partners in a joint venture to compete against one another in this irrational manner. As Professor Ordover explained – and as Dr. Stockum implicitly conceded -- the adoption of the new legal rule advocated by Complaint Counsel would create a substantial disincentive to entering into procompetitive joint ventures in the first place. RPF No. 127.

Second, it is indisputable (and Complaint Counsel have effectively conceded) that it can be procompetitive to adopt measures like the Moratorium Agreement to prevent "free riding" and other opportunistic behavior that otherwise might undermine the success of a joint venture. *See Collaboration Guidelines* § 3.36(b), at 24 ("free riding or other opportunistic conduct that could reduce significantly the ability of the collaboration to achieve cognizable efficiencies"); *Polk Bros.*, 776 F.2d at 189-90 ("[C]ontrol of free riding is a legitimate objective of a system of distribution" because it "makes it easier for people to cooperate productively in the first place"); *Rothery Storage*, 792 F.2d at 212-13 ("The free ride can become a serious problem for a partnership or joint venture because the party that provides capital or services without receiving compensation has a strong incentive to provide less, thus rendering common

enterprise less effective."); *Chicago Prof'l Sports*, 961 F.2d at 673 (stating that free riding is "an accepted justification for cooperation)"; RPF No. 84 (Stockum Depo. at 56:13-15) (recognizing that "free riding can at least potentially create inefficiency in the market").

The Moratorium Agreement was designed to address the specific types of free riding concern that are recognized in the case law, in the Commission's Guidelines, and by Complaint Counsel's expert economist. The contemporaneous documents and witness testimony demonstrate that there was a significant risk that the PolyGram and Warner operating companies would "free ride" on the promotional opportunity created by the Paris concert and the release of the new album by discounting and promoting the prior albums in ways that would interfere with the launch of 3T3 and damage the long-term success of the Three Tenors brand. RPF Nos. 83-101. The contemporaneous documents and witness testimony show that this opportunity to promote the prior albums existed only because of the massive investment that PolyGram and Warner made in the Joint Venture. *Id.* No. 92.[9] And the contemporaneous documents and witness testimony demonstrate that, if the operating companies' proposed free riding activities had succeeded in interfering with the launch of 3T3, PolyGram and Warner likely would have spent less money promoting Three Tenors products in the long term and overall output of Three Tenors products likely would have been reduced in the long term. RPF Nos. 55, 72, 83, 94-95, 100-01.

Complaint Counsel's expert economist, Dr. Stockum admitted that it is "plausible" that the Moratorium Agreement was procompetitive as a matter of economics and that he would need to do a more detailed analysis of actual effects if there were "ambiguity"

[9] As the former Director of Research in the Economic Analysis Group of the Antitrust Division of the Department of Justice has explained, "a joint venture and its ancillary restraints are not subject to a quick look when the only competition restrained would not have occurred absent the joint venture." Gregory J. Werden, *Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 735 (1998).

regarding the actual effects of the Moratorium Agreement. Trial Tr. at 639:10-647:7, 641:13-644:16. Dr. Stockum's only basis for rejecting PolyGram's procompetitive justifications was the fact that he "had not seen" contemporaneous documentation validating that these justifications genuinely were held by the business people involved in the Joint Venture and were consistent with the factual circumstances surrounding the Joint Venture. *Id.* at 638:4-13. But the record is replete with contemporaneous documentation and witness testimony demonstrating that PolyGram and Warner adopted the Moratorium Agreement for these very reasons, and that their reasons for doing so were fully consistent with the factual circumstances in 1998. RPF Nos. 51-104. That should be the end of the matter. Complaint Counsel's specific arguments for rejecting PolyGram's procompetitive justifications show a complete lack of fidelity to the controlling case law and the uncontroverted record evidence.

a. Complaint Counsel's Suggestion That PolyGram's Experts' Opinions Should Be "Given Little Weight" Is Ridiculous.

Complaint Counsel's suggestion that the Court should "give little weight" to the expert opinions of Professors Ordover and Wind in considering PolyGram's procompetitive justifications is both disingenuous and meritless. Complaint Counsel deposed Professors Ordover and Wind at length concerning their expert reports and moved the entirety of their deposition testimony into evidence during Complaint Counsel's case in chief. RT at 12. Under the Commission's Rule of Practice the deposition testimony of Professors Ordover and Wind thus must be considered "as though the witness were then present and testifying." *See* Rule of Practice 3.33(c)(1). When PolyGram moved their expert reports (without which much of the already admitted deposition testimony would have been unintelligible to the Court) into evidence, Complaint Counsel did not object. Trial Tr. at 496. When PolyGram advised the

Court that it did not intend to call live witnesses at trial, Complaint Counsel did not object, did not move to strike the expert reports, and did not seek leave to call Professor Ordover or Professor Wind for purposes of cross-examination. *Id.* 846-53. Having themselves designated the expert testimony of Professors Wind and Ordover, and having themselves stipulated to the admissibility of the expert reports, Complaint Counsel cannot be heard now to suggest that the Court should disregard the expert opinions of Professors Wind and Ordover.

If Complaint Counsel thought either that the expert reports were not admissible or that they should be entitled to cross-examine the experts in person, the time to speak was at trial. Then, had the Court concluded that live testimony was necessary in order to permit consideration of the expert reports, PolyGram could have elected to call the experts in person. Instead, PolyGram had every reason to rely on Complaint Counsel's stipulation to the admission of its Professors Wind's and Ordover's reports and deposition testimony in deciding to rest its case following Complaint Counsel's case-in-chief. Complaint Counsel is now attempting to "sandbag" PolyGram, and the Court should reject that effort.

Complaint Counsel's legal argument on this point is entirely without merit. Indeed, the authorities they cite have absolutely nothing to do with the situation here. Complaint Counsel cite four cases for the proposition that, "where, as here, an expert does not testify at trial, the expert report is generally deemed unreliable (and hence inadmissible)." CCPTB at 48 & n.63 (citing cases). In each of those four cases, the opposing party *objected to the admissibility of the expert report during trial. Tokio Marine & Fire Ins. Co., Ltd. v. Norfolk & Western Ry. Co.*, 1999 U.S.App. LEXIS 476, *5 (4th Cir. 1999)[10]; *Engebretsen v. Hartford Ins. Co.*, 21 F.3d 721, 727 (6th Cir. 1994); *Forward Communications Corp. v. United States*, 608

[10] *Tokio Marine* is an unpublished Court of Appeal decision. PolyGram cites it here only to respond to its use by Complaint Counsel.

F.2d 485, 510 (Ct.Cl. 1979); *EPIS, Inc. v. Fidelity and Guaranty Life Ins. Co.*, 156 F.Supp.2d 1116, 1123-24 (N.D. Cal. 2001). Here, Complaint Counsel themselves moved the experts' depositions into evidence, RT at 12, and expressly confirmed that they *had no objection* to the admissibility of the expert reports. RT at 496.[11]

Complaint Counsel also cite several cases in support of their contention that the expert reports should be disregarded because the witnesses were not "subject to cross-examination." CCPTB at 48 & n.65. Here, of course, the witnesses *were* subject to lengthy cross-examination during deposition, all of which was admitted into evidence. In any event, the cases cited by Complaint Counsel again have absolutely nothing to do with the situation here. In *Weil v. The Long Island Savings Bank FSB*, 206 F.R.D. 38 (E.D.N.Y. 2001), the issue had nothing to do with the admissibility of or weight to be given to an expert report. Rather, the issue was whether communications between counsel and the experts had to be produced; the court ruled that they did, in part to facilitate cross-examination of the experts at trial. *Id.* at *2, *10-12. In *Toucet v. Maritime Overseas Corp.*, 991 F.2d 5 (1st Cir. 1993), the court ruled that it was not error to permit an expert witness to answer a hypothetical question, emphasizing that the

[11] Even putting aside the absence of any objection here, the circumstances in which the expert reports were offered in the cases cited by Complaint Counsel were totally unlike those here. In *Tokio Marine*, the Court upheld exclusion of an appraisal opinion purportedly rendered by a non-witness, which was offered through the testimony of his grandson, without any evidence that the non-witness was an expert. 1999 U.S. App. LEXIS at *5-10. Here, the sworn deposition testimony of Professors Ordover and Wind establishes that the opinions in the expert reports are theirs and that each of them is indisputably qualified to render those opinions (a fact which is also established on the face of the reports). *See* JX90, Ordover Depo. at 4:21-17:7; JX91, Wind Depo. at 6:7-13:11. In *Engebretsen*, the Court of Appeal affirmed admission into evidence of expert reports, over objection, in part because the other party had elicited testimony about the reports from the experts. 21 F.3d at 729-30. Under *Engebretsen*, PolyGram would have been entitled to introduce the expert reports on that basis, even over objection, because Complaint Counsel offered into evidence the cross-examination they conducted during the Ordover and Wind depositions, which took place after PolyGram served the reports. In *Forward Communications*, the plaintiff attempted to introduce an appraisal report without offering any testimony whatsoever from the person who prepared the report or even any evidence as to that person's identity or qualifications. 608 F.2d at 509-11. In *EPIS*, the district court refused, on a summary judgment motion, to admit expert declarations and reports which failed to set forth admissible evidence of the experts' qualifications or competency or to lay a foundation for the opinions. Here, of course, both the expert reports and the experts' deposition testimony do both extensively.

assumptions contained in the hypothetical could be explored on cross-examination. *Id.* at 10. Here, neither Professor Ordover nor Professor Wind was asked any hypothetical questions, and in any event Complaint Counsel had ample opportunity to cross-examine them during deposition or, had they chosen to do so, as rebuttal witnesses. Finally, in *Main St. Mortgage, Inc. v. Main Street Bancorp, Inc.*, 158 F.Supp.2d 510 (E.D.Pa. 2001), the court similarly concluded that the remedy for allegedly incorrect assumptions underlying the expert's opinions was cross-examination, not exclusion. *Id.* at 519.

None of these cases, nor any other of which PolyGram is aware, remotely supports Complaint Counsel's assertion that expert reports should be given "little weight" where, as here, (1) the reports have been prepared by eminently qualified experts in the relevant disciplines, (2) those experts have been subjected to lengthy and unrestricted cross-examination in deposition, (3) the opposing party has introduced into evidence the entirety of that deposition testimony, including testimony that requires reference to the expert reports to be fully intelligible, and (4) the other side has expressly confirmed in court that it has no objection whatsoever to admission of the reports into evidence.

b. There is No Basis for Ignoring the Extensive Record Evidence that the Moratorium Would Have Had Procompetitive Effects Outside the United States.

Complaint Counsel also ask the Court to disregard the actual fact that the Moratorium Agreement was part of the worldwide marketing plans for the worldwide Three Tenors Joint Venture, and to instead evaluate a hypothetical (but non-existent) stand-alone agreement to restrict discounting and advertising of the Three Tenors products in the United States. Thus, Complaint Counsel contend that the efficiencies the Moratorium Agreement would have obtained in dozens of the countries in which it would have applied should be ignored

simply because there is no evidence that it would have had *any* effect (adverse *or* beneficial) on competition in the United States. Complaint Counsel make this argument because the record contains page after page of witness testimony, and document after document, demonstrating that the Moratorium Agreement *was* reasonably necessary to address a serious risk of free riding by WMI outside the United States, that the Moratorium Agreement *was* reasonably necessary to manage promotional campaigns for the prior albums outside the United States that may have interfered with the launch of 3T3, and that there *were* significant efficiencies associated with adopting uniform, worldwide marketing strategies in the context of this worldwide joint venture. RPF Nos. 106-108, 130; Respondents' Objections to CPF Nos. 341-343. Complaint Counsel expressly disclaimed any effort to identify or establish the relevant market for analyzing the worldwide Moratorium Agreement, Trial Tr. at 626:20-25, and they cannot parse its effects in various undefined "markets" to suggest that the Agreement should be found unlawful.

The case law cited by Complaint Counsel is again completely inapposite. In each of Complaint Counsel's cases, a restraint was shown to have anticompetitive effects in one market, and the defendant nonetheless sought to justify the restraint on the ground that it had procompetitive effects in some other market where the restraint was not operative. *Law v. NCAA*, 902 F. Supp. 1394, 1406, *aff'd*, 134 F.3d 1010 (10th Cir. 1998) (holding that price fixing agreement that had obvious, actual anticompetitive effects in market where it applied could not be justified by hypothetical procompetitive benefits in some other market); *Sullivan v. National Football League*, 34 F.3d 1091, 1112 (1st Cir. 1994) (holding that agreement that was "decidedly in restraint of trade" in market in which it applied could not be justified by "unrelated benefits" in another market where it did not apply); *RSR Corp. v. FTC*, 602 F.2d 1317, 1325 (9th Cir. 1979) (same). None of these cases involved a worldwide joint venture (or a joint venture of any

type), or addressed a single agreement that was adopted as part of a worldwide marketing plan and that was shown to be likely to have substantial procompetitive effects in many of the territories in which it applied.

There is no authority for analyzing the potential effects of a hypothetical restraint rather than the actual effects of an actual restraint. The record evidence shows that the Moratorium Agreement was a worldwide agreement adopted as part of a worldwide Joint Venture. RPF Nos. 17-64. Complaint Counsel's expert economist, Dr. Stockum, agreed that in the context of a worldwide joint venture it is often efficient to adopt uniform rules that apply in all territories even if the rationales for those rules do not apply equally in every territory. RPF No. 130. The record evidence shows that the Moratorium Agreement likely had no effect whatsoever in the United States, but that it likely would have had substantial procompetitive effects outside the United States. RPF Nos. 111, 120. It is astounding that Complaint Counsel for the Federal Trade Commission are here arguing that an agreement that enhanced the efficiency of a worldwide joint venture between two corporations with extensive U.S. operations should be deemed unlawful *because it did not have any effect on competition in the United States.*

c. The Contemporaneous Documentation and Witness Testimony Regarding the Moratorium Agreement Establish the Validity of PolyGram's Procompetitive Justifications.

In arguing that the Court should ignore the contemporaneous documentation and witness testimony supporting PolyGram's procompetitive justifications, Complaint Counsel attempt to ignore that their expert economist admitted that the Moratorium Agreement was plausibly procompetitive as a matter of economics, Trial Tr. at 641:13-644:16, and that Professors Ordover and Wind have opined that the Moratorium Agreement could have been

procompetitive or competitively neutral and that further analysis would be required to assess its actual net effect, if any. RPF Nos. 105-131. Accordingly, the only issue in assessing PolyGram's procompetitive justifications is one of validity – *i.e.*, an assessment of whether there was a "factual basis" for those justifications. *Id.* at 640:18-24. Complaint Counsel's position that the Court should disregard the record evidence regarding the factual basis for the Moratorium Agreement is thus bizarre. *See* CCPTB at 41-42. PolyGram's witnesses and the contemporaneous documentation make clear that the Moratorium Agreement was not part of some improper effort to "maximize profits," but that it was instead a critical part of a marketing strategy for 3T3 that was designed to benefit consumers by increasing the long-term output of Three Tenors products and by preventing inefficient free riding activities. RPF Nos. 51-104.

The authorities cited by Complaint Counsel all address situations where the purported procompetitive justification was *not* plausible as a matter of economics, but the defendant pointed to the "good faith" beliefs of its employees in support of an argument that the challenged conduct should be upheld or at least analyzed under the rule of reason. *See NCAA*, 468 U.S. at 101 n. 23 (holding that beliefs of witnesses were irrelevant when argument that agreement was plausibly procompetitive was "specious" as a matter of economics); *IFD*, 476 U.S. at 463-64 (holding that genuine desire of dentists to promote quality healthcare was irrelevant when there was no evidence that restraint may have been procompetitive as a matter of economics); P. Areeda, VII Antitrust Law ¶ 1506 at 390 (1986) (noting that beliefs of employees are not relevant when the "joint venture is, on balance, substantially anticompetitive" as a matter of economics). There is no authority for the proposition that the witness testimony and

contemporaneous documentation relating to a challenged practice should be ignored when the procompetitive justifications for the practice are supported by economic analysis.[12]

d. Complaint Counsel's Proposed "Alternatives" to the Moratorium Prove Only that the Moratorium Cannot be Assessed Under Complaint Counsel's "Quick Look" Approach.

Complaint Counsel's contention that it was PolyGram's burden to show the absence of less restrictive alternatives – *i.e.*, that PolyGram somehow was required to "prove a negative" – is unsupported by the case law. Consideration of less restrictive alternatives is the final step in a rule of reason analysis, a step that comes into play only when there is evidence of the actual anti- and procompetitive effects of the challenged practice and the likely effects of any proposed alternative. *County of Tuolumne v. Sonora Community Hosp.*, 236 F.3d 1148, 1159-60 (9th Cir. 2001) (affirming decision granting summary judgment in favor of antitrust defendant where "plaintiffs have failed to raise an issue of fact as to whether their proposed less restrictive alternatives can be implemented effectively without significantly increased costs"). It is well-established that the party claiming there is a less restrictive alternative to a challenged practice must show that "'an alternative is substantially less restrictive *and* is virtually as effective in serving the legitimate objective *without substantially increased cost.*" *Id.* (quoting 10 Phillip E. Areeda, *Antitrust Law* ¶ 1760d, at 369); *Capital Imaging Assoc. v. Mohawk Valley Medical Assoc*, 996 F.2d 537, 543 (2d Cir. 1993) (holding that, under the rule of reason, after the plaintiff

[12] Although Complaint Counsel argue that the good faith of PolyGram's employees should be ignored, they elsewhere in their lengthy post-trial brief that the witness testimony and contemporaneous documents relating to the reasons the parties adopted the Moratorium Agreement *should* be considered to assess whether PolyGram's procompetitive justifications are pretextual. CCPFB at 44 (citing *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 461 (1992)). But Complaint Counsel offers no evidence that PolyGram's procompetitive justifications are pretextual, and the record evidence demonstrates that they are not pretextual but instead are supported by the contemporaneous documentation and witness testimony. RPF Nos. 106-107.

"bears the initial burden of showing that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market," and the defendants have then "offer[ed] evidence of the procompetitive 'redeeming virtues' of their combination," the "burden shifts back to plaintiff for it to demonstrate that any legitimate collaborative objectives proferred by defendant could have been achieved by less restrictive alternatives"). Because Complaint Counsel disclaimed any effort to offer any evidence that the Moratorium Agreement actually had any anticompetitive effect in the United States or elsewhere, and because PolyGram offered plausible and valid procompetitive justifications for the moratorium, there is no basis for assessing whether any alternative would have been less restrictive of competition under the well-established framework for analyzing a challenged practice under the rule of reason.

Complaint Counsel's proposed alternatives would be irrelevant even if Complaint Counsel had not disclaimed any effort to assess the actual competitive effects of the Moratorium Agreement. Complaint Counsel's principal alternative to the moratorium is their suggestion that PolyGram and Warner should have formed a joint venture for some product other than 3T3. Complaint Counsel suggest that the experienced music industry executives involved in the joint venture should have anticipated that 3T3 would have been more appealing with different repertoire, different writers, or different artists. Complaint Counsel may be right that PolyGram and Warner would not have had the same concerns if they had formed a joint venture for a different product – say an Eagles or Beach Boys reunion album – but that is beside the point. The Joint Venture was formed to create, market and distribute 3T3 and the greatest hits and box-set albums. RPF Nos. 17-50. There is no record evidence that different packaging, different repertoire, a guest artist, or any other change to 3T3 would have done *anything* to address the concerns that gave rise to the Moratorium Agreement. Rather, it is uncontroverted that, in

developing their marketing plans for a new album for a given artist, record companies consider the artist's catalog albums and develop a marketing strategy that accounts for the existence of any catalog albums – strategies that often, like the Moratorium Agreement, contemplate promoting the catalog albums prior to the release of the new album, and then focusing on the new album once it becomes available. RPF Nos. 51-53.

Complaint Counsel's suggestion that PolyGram and Warner could have asked their respective operating companies to pay for their proposed free riding activities by entering into a "joint advertising agreement" or some other form of compensation scheme also misses the point of the Moratorium Agreement. Unlike in Complaint Counsel's potato farmer hypothetical, unlike in *Toys 'R Us*, unlike in *General Leaseways*, and unlike in *Chicago Prof'l Sports*, PolyGram and Warner were *not* seeking to internalize third-parties' benefits from their promotional activities when they adopted the Moratorium Agreement. As the record evidence makes clear, the concern here was not the uncompensated "positive spillover" to the operating companies that could have resulted from their promotion and discounting of the prior albums during the launch period; rather, the parties' concern was that "negative spillover" from promoting the prior albums would cause *asymmetrical* harm to 3T3 and the long-term success of the Three Tenors brand that would not be offset by any benefits from promoting the prior albums. RPF Nos. 86-101. PolyGram and Warner spent more than $18 million ensuring that the Paris concert would take place and that the new album would exist, and they sought to ensure that their operating companies were focused on the new album and the long-term success of the Three Tenors brand and that their investments would not be wasted on short-term efforts to increase the sales of older catalog albums that already were owned by millions of people. RPF Nos. 54-56, 68. Dr. Stockum conceded that this distinction between "positive spillover" effects

and "negative spillover" effects makes sense as a matter of economics, and that Complaint Counsel's proposed compensation schemes would have done nothing to address the "negative spillover" effect that was the concern that gave rise to the Moratorium Agreement. RPF Nos. 86, 141.

Moreover, as Dr. Stockum acknowledged, this case is fundamentally different from *Chicago Prof'l Sports* and *General Leaseways* because *both* parties here had the ability and incentive to free ride on the joint venture's expenditures. Consequently, the parties' aggregate incentive to free ride might be the same regardless of how Warner and PolyGram chose to allocate their respective financial responsibilities for the costs of the joint venture. *See* Stockum Depo. at 72-73, 78-79. Thus, there is nothing in the record evidence that would support a finding that any compensation scheme such as those proposed by Complaint Counsel would have been a practical, effective, and substantially less restrictive alternative to the Moratorium Agreement.

C. Complaint Counsel Failed To Demonstrate The "Cognizable Danger" Of Recurrent Violation Required To Obtain The Prospective Relief They Seek.

Complaint Counsel concede that they may obtain the purely prospective relief they seek here only if there is a "real threat" that conduct similar to the Moratorium Agreement will recur. CCPTB at 83; *United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952); *TRW, Inc. v. FTC*, 647 F.2d 942, 954-55 (9th Cir. 1981) (holding that a cease and desist order may be obtained only when "'there exists some cognizable danger of recurrent violation.'") (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). Complaint Counsel have not offered any evidence that conceivably could support any such finding here. The only "evidence" Complaint Counsel proffer in support of their assertion that there is some threat that conduct similar to the Moratorium Agreement is likely to recur is: (1) testimony regarding the

fact that artists sometimes switch from one label to another, CPF Nos. 371-72; and (2) a press release describing a joint venture under which Universal and Sony distribute music over the Internet. CPF Nos. 374. There is no evidence that the concerns that gave rise to the Moratorium Agreement exist in either of those circumstances, that either of those circumstances involved the degree of integration and shared risk that was present in the Three Tenors joint venture, or that either of those circumstances involved any risk that free riding would result in a substantial "negative spillover" to the joint venture. Rather, the record evidence unambiguously shows that the central features of the Three Tenors Joint Venture were unique and unprecedented in the record industry, and that the parties adopted the Moratorium agreement for reasons that were closely tied to the unique features of the joint venture. RPF Nos. 103-104, 149. The record evidence showed that neither PolyGram nor its successor entities within Universal Music Group have seen a need for a similar agreement in any other context. *Id.* Complaint Counsel's contention that there is a real threat of recurring violation here is based purely on conjecture that can serve as no basis for the findings they seek here.

III. CONCLUSION

For all of the foregoing reasons, the Court should adopt Respondents' Proposed Findings of Fact and Conclusions of Law, issue an initial decision in Respondents' favor, and deny all of the relief sought by Complaint Counsel as set forth in Respondents' Proposed Order.

Respectfully submitted,

Bradley S. Phillips /by JEH

Bradley S. Phillips/PhillipsBS@mto.com
Glenn D. Pomerantz/PomerantzGD@mto.com
Stephen E. Morrissey/MorrisseySE@mto.com
Munger, Tolles & Olson LLP
355 S. Grand Ave., 35th Floor
Los Angeles, CA 90071
(213) 683-9100 (Telephone)
(213) 687-3702 (Facsimile)

Counsel for Respondents

Dated: May 14, 2002

EXHIBIT A

THIS TYPESCRIPT VERSION
MAY NOT BE IDENTICAL TO THE PRINTED BRIEF

97-1625

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

CALIFORNIA DENTAL ASSOCIATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

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

BRIEF FOR THE RESPONDENT

DEBRA A. VALENTINE
General Counsel

JOHN F. DALY
Assistant General Counsel

JOANNE L. LEVINE
ELIZABETH R. HILDER
Attorneys
Federal Trade Commission
Washington, D.C. 20580

SETH P. WAXMAN
Solicitor General

JOEL I. KLEIN
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner is subject to the jurisdiction of the Federal Trade Commission as an association "organized to carry on business for * * * [the] profit * * * of its members," within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

2. Whether the Federal Trade Commission conducted a sufficient analysis to determine, under the antitrust rule of reason, that petitioner's restrictions on its members' advertising of prices, discounts, and quality violated Section 5 of the FTC Act, 15 U.S.C. 45.

STATEMENT

1. This case involves advertising restrictions imposed as a condition of membership by petitioner California Dental Association (CDA). Petitioner's members include 75% of the dentists actively practicing in California. Pet. App. 161a-162a. Petitioner has 32 local component dental societies, and membership in a local association is mandatory for membership in petitioner. Id. at 162a. In addition, membership in petitioner is mandatory for California dentists who wish to be members of the American Dental Association. Id. at 46a. Although membership in petitioner is legally voluntary and is not required for a license to practice dentistry, membership is highly valued by California dentists for its "real economic benefit," and "no one gives up membership" in petitioner to avoid its restrictions on advertising. Id. at 84a; see also id. at 232a-234a (detailing importance of CDA membership to dentists).

Petitioner is organized under California law as a nonprofit corporation. Pet. App. 161a. It is exempt from federal income tax under 26 U.S.C. 501 (c)(6), the tax category for "[b]usiness leagues, chambers of commerce, real-estate boards, boards of trade, [and] professional football leagues." It does not qualify for exemption as a charitable institution under Section 501(c)(3). See Pet. App. 50a-51a, 174a.

Although petitioner's stated purposes include improvement of public health, it also describes itself as "represent[ing] dentists in all matters that affect the profession" and "offer[ing] far more services to its members than any other state [dental] association." Pet. App. 51a.(1)

Petitioner offers broad assistance to its members to increase their revenues and decrease their costs. As its promotional literature describes (J.A. 20-23), petitioner provides its members with services such as job placement, recruitment of dental assistants, review of proposed contracts with third-party payers (vaunted as affording a substantial savings over hiring a private attorney), and financial planning seminars. Pet. App. 51a-52a, 172a-188a. Through a for-profit subsidiary, petitioner offers low-cost malpractice insurance, which saves members at least $1,000 annually over other insurance plans; this insurance is available in California only to CDA members. Id. at 166a, 173a, 184a-185a. Other for-profit subsidiaries offer, exclusively to members, financing for dental equipment, financing assistance for patients, and a home mortgage program. Id. at 166a-168a, 185a-186a; see also id. at 181a-183a (seminars, training sessions, and publications offered to members at steeply discounted rates).

Petitioner engages in lobbying and litigation concerning laws and regulations that affect dentists' businesses; its lobbying successes "mean money" to members, or so it claims, and have saved members thousands of dollars each year. Pet. App. 176a, 177a-179a; see J.A. 20. [2] Petitioner also conducts marketing and public relations initiatives to enhance the image of its members; these activities have brought members, on average, an additional $6,000 of annual income from new patients, equaling a "20-to-1 return on investment." Pet. App. 179a-180a. In sum, petitioner estimates that the potential value to members who take advantage of a selection of its services is $22,000 to $65,000, and that the value to members of its benefits far exceeds their membership dues. Id. at 175a.

2. Section 10 of petitioner's Code of Ethics, on its face, prohibits advertising that is "false or misleading in any material respect." Pet. App. 9a; J.A. 33. The record in this case demonstrates, however, that petitioner has broadly interpreted and enforced that prohibition in a way that effectively prohibits (a) most advertising about relative prices, (b) all advertising of across-the-board price discounts, and (c) virtually all advertising claims, whether relative or absolute, about the quality of a member's dentistry or service. Pet. App. 55a. These prohibitions cover even advertising claims that "are not false or misleading in a material respect." Id. at 260a; see id. at 56a-57a n.6.

Thus, petitioner has prohibited its members from using terms such as "low," "reasonable," or "affordable" in their advertising, whether or not they truthfully describe the dentist's fees, Pet. App. 65a-66a, 198a-199a, under the reasoning that members' statements about their fees must be "exact" and must "fully and specifically disclos[e] all variables and other relevant factors" to avoid being branded misleading, id. at 9a-10a, 64a;

J.A. 34-35. Under similar reasoning, petitioner has disallowed such phrases as "affordable, quality dental care," "making teeth cleaning * * * inexpensive," Pet. App. 65a, "affordable family dentistry," id. at 199a, "reasonable fees quoted in advance," id. at 227a, and "Fees that Fit a Family Budget," id. at 237a.

As for advertising about discounted fees, petitioner has required that such advertising contain at least five disclosures: (1) the dollar amount of the nondiscounted fee; (2) either the dollar amount of the discounted fee or the percentage of the discount for the specific service; (3) the length of time, if any, that the discount will be offered; (4) a list of verifiable fees; and (5) specific groups qualifying for the discount and any other terms or conditions for the discount. Pet. App. 64a-65a, 200a. The practical effect of those requirements is "nearly prohibitive" of advertising of any broadly applicable discounts. Id. at 201a.[3] Indeed, petitioner has disapproved a broad array of discounting offers because they were not accompanied by the required disclosures.[4]

Finally, petitioner has made clear that virtually all advertising about quality of services (including the word "quality" itself) is deemed "likely to be false or misleading" because it is not "susceptible to measurement or verification." Pet. App. 74a-75a, 202a-203a; see J.A. 35. Petitioner has also disapproved any advertising that, in its view, implies that a dentist is superior to other dentists. Pet. App. 206a. Such quality claims have been prohibited without regard to whether they are in fact false or misleading. Id. at 203a-204a, 207a, 209a. Petitioner and its components have therefore required that members and would-be members eliminate any advertising phrases that refer to the quality of dental care that patients will receive, or indeed to the quality of service ancillary to the actual dentistry, such as punctuality.[5]

Petitioner enforces its advertising restrictions by requiring applicants for membership to submit copies of all of their own advertising, plus advertisements by their employers and referral services, to the ethics committee of their local dental society. Pet. App. 193a, 237a-239a. Petitioner's local components also publish notices in their newsletters soliciting members to report possible Ethics Code violations by the applicant. Id. at 194a. Applicants are denied membership in petitioner if they do not agree to withdraw or revise advertisements that petitioner deems objectionable. Id. at 195a-198a. Petitioner also urges its local components to review local Yellow Pages directories for nonconforming advertisements by current members. Id. at 194a, 234a-235a. Members who do not agree to revise offending advertisements may be subject to a hearing before petitioner's Judicial Council, and thereafter to censure, suspension, or expulsion. Id. at 11a; see id. at 56a n.6.

The record in this case compiles actions taken by petitioner and its local societies against nearly 400 dentists, in which petitioner or a component disapproved particular advertising claims by members and applicants for membership, without regard to the truth of such claims. Pet. App. 56a-57a n.6, 89a-90a n.25, 199a-212a, 214a-218a, 235a.(6) Petitioner's efforts to suppress truthful and nondeceptive advertising have been successful; when forced to choose between a challenged advertisement and membership in petitioner, dentists almost always give up the advertisement. Id. at 80a, 235a-237a. Petitioner's restrictions have also had a substantial deterrent effect. Some local societies reported that 90-100% of their members' advertisements complied with petitioner's restraints. Id. at 234a-235a.

3. a. On July 9, 1993, the Federal Trade Commission (FTC or Commission) issued an administrative complaint (J.A. 5-16) charging that petitioner had restrained competition among dentists in California by restricting truthful, nondeceptive advertising regarding price and quality of dental services. The complaint alleged that these restraints were "unfair methods of competition" in violation of Section 5 of the Federal Trade Commission Act (FTC Act or Act), 15 U.S.C. 45. After discovery and trial, an Administrative Law Judge (ALJ) concluded that petitioner had violated Section 5. Pet. App. 159a-265a.(7)

The ALJ determined, upon extensive factual findings (Pet. App. 161a-247a), that petitioner had "successfully withheld from the public information about prices, discounts, quality, superiority of service, guarantees, and the use of procedures to allay patient anxiety." Id. at 259a-260a (record citations omitted). He also found that petitioner's "illegal[] conspir[acy]" had "injured those consumers who rely on advertising to choose dentists." Id. at 261a-263a.(8) The ALJ did rule that petitioner lacked "market power," id. at 261a, but that conclusion was based on the legal premise (later rejected by the Commission, id. at 83a) that such power exists only in the presence of "insurmountable" barriers to entry, id. at 262a. And the ALJ rejected petitioner's arguments of "procompetitive" effects flowing from its restrictions. He found that petitioner's ethics code, as actually enforced, "unjustifiably banned whole categories of advertisements which are not false or misleading in a material respect," and reflected "a hostility toward advertising by its members even if it is truthful and nondeceptive." Id. at 259a-260a.

b. On plenary review of the ALJ's initial decision (see 16 C.F.R. 3.54(a)-(b)), the Commission affirmed the ALJ's finding of a violation of Section 5. Pet. App. 43a-158a. The Commission first found (id. at 47a-52a) that petitioner was subject to the FTC Act as a corporation "organized to carry on business for its own profit or that of its members," within the

meaning of Section 4 of the Act, 15 U.S.C. 44. Noting that it had previously rejected the argument that the term "profit" in this context should be limited to "direct gains distributed to * * * members," the Commission held that it had jurisdiction in this case because a substantial portion of petitioner's activities consists of practice management, marketing, public relations, lobbying, and other business-related services that confer "pecuniary benefits" on its members. Id. at 49a, 51a-52a.

On the merits, the Commission concluded that petitioner's advertising restrictions, both price-related and quality-related, constituted unlawful restraints of trade. Pet. App. 58a-92a. The Commission found, upon its review of the record, that "advertising is important to consumers of dental services and plays a significant role in the market for dental services." Id. at 60a; see id. at 76a-77a. As for the price advertising restrictions specifically, the Commission upheld the ALJ's findings that petitioner had barred its members from advertising "low" or "reasonable" fees, and had effectively precluded truthful across-the-board discount offers. Id. at 63a-67a. The Commission also found that these restrictions on price advertising "constitute[d] a naked attempt to eliminate price competition," accomplished through the "indirect means of suppressing advertising" about prices. Ibid. Based on that finding, the Commission held that petitioner's price-related restraints were unlawful per se. Ibid.; see id. at 60a-63a, 67a-73a.

The Commission also applied the antitrust rule of reason to all the advertising restrictions at issue in this case. Pet. App. 73a-92a. After observing that this Court "has made clear that the rule of reason contemplates a flexible enquiry, examining a challenged restraint in the detail necessary to understand its competitive effect," id. at 74a (citing NCAA v. Board of Regents, 468 U.S. 85, 103-110 (1984)), the Commission found (ibid.) that application in this case of the rule of reason could be "simple and short," because "[t]he anticompetitive effects of CDA's advertising restrictions are sufficiently clear, and the claimed efficiencies sufficiently tenuous, that a detailed analysis of market power is unnecessary to reaching a sound conclusion." But, the Commission added (ibid.), "in any event, CDA clearly had sufficient power to inflict competitive harm."

The Commission began its rule of reason analysis by assessing the anticompetitive effects of the restrictions. Pet. App. 74a-78a. Supplementing its earlier findings (under the per se rule analysis) of the effects of petitioner's restrictions on price advertising, id. at 73a-74a, the Commission found that petitioner had also proscribed a "vast" range of nonprice advertising, barring virtually all claims regarding quality, regardless of the truthfulness of such claims. Id. at 74a-76a. It found

"substantial evidence" that the challenged advertising restraints "prevented the dissemination of information important to consumers," regarding both price and nonprice aspects of the dental services offered. Id. at 76a-77a. And it found that the restraints "hamper dentists in their ability to attract patients," particularly dentists new to an area. Id. at 78a. The Commission therefore concluded that, because of the importance of advertising to consumers in choosing dentists (id. at 60a, 77a), petitioner's broad bans would "deprive consumers of information they value and of healthy competition for their patronage." Id. at 78a. Although it did not "quantify[] the increase in price or reduction in output occasioned by these restraints," the Commission found their "anticompetitive nature" to be "plain." Ibid.

The Commission also found that petitioner had the "power to cause harm to consumers" by inducing its members to withhold information. Pet. App. 80a. It had "little doubt" that petitioner had "the ability to police, and entice its members to adhere to, the restrictions on advertising." Ibid. Moreover, it found that "the services offered by licensed dentists have few close substitutes," that "the market for such services is a local one," and that petitioner's members command "more than a substantial share of these markets" -- 75% of practicing dentists statewide, and more than 90% in one region. Id. at 82a. Contrary to the ALJ's conclusion (id. at 261a), the Commission found that there are "significant barriers to entry" into those markets, id. at 82a-84a, even if they are not "insurmountable," id. at 83a. Accordingly, the Commission found that petitioner "possesses the necessary market power to impose the costs of its anticompetitive restrictions on California consumers of dental services." Id. at 84a.

Like the ALJ, the Commission rejected petitioner's contention that its restraints were either harmless or pro-competitive. Pet. App. 84a-89a. The Commission acknowledged that the prevention of false and misleading advertising is a "laudable purpose," but it concluded that "the record will not support the claim that CDA's actions [were] limited to advancing that goal." Id. at 84a. It found, rather, that petitioner's "broad categorical prohibitions" (id. at 87a) were enforced "without any enquiry as to how [prohibited claims] might be construed by consumers and whether, as construed, they are true of the particular practitioner making the claim" (id. at 86a). And it perceived "no convincing argument, let alone evidence" that "consumers of dental services have been, or are likely to be, harmed by the broad categories of advertising" that petitioner restricts. Id. at 89a.

The Commission therefore held that petitioner's advertising restrictions violated Section 5 of the FTC Act. Pet. App. 90a-91a. The Commission's cease-and-desist order prohibits those restrictions (id. at 27a-31a), but

expressly provides that petitioner may "adopt[] * * * and enforc[e] reasonable ethical guidelines governing the conduct of its members with respect to representations that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act." Id. at 30a.

4. The court of appeals affirmed. Pet. App. 1a-24a. As to jurisdiction, the court agreed with the FTC and with other courts that Congress "did not intend to provide a blanket exclusion for nonprofit corporations" from the reach of the FTC Act, and it approved the Commission's approach of "looking at whether the organization provides tangible, pecuniary benefits to its members" in order to determine whether it is a "corporation" subject to the Commission's jurisdiction. Id. at 15a-16a. Under that standard, the court was "confident that the facts of this case support the FTC's jurisdiction." Id. at 16a.

As to the merits, although the court acknowledged "some support" in case law for the FTC's per se analysis of petitioner's restrictions on price advertising, it concluded that a rule of reason analysis is more appropriate for all aspects of petitioner's advertising restraints. Pet. App. 17a-18a. It then observed approvingly that the FTC had applied "an abbreviated, or 'quick look' rule of reason analysis" in this case because petitioner's restraints "are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry." Id. at 18a (citing NCAA, supra).

The court first noted that "[r]estrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for dentists to compete on the basis of price." Pet. App. 19a. On the other hand, the court found no reason to give petitioner's proffered justifications for its disclosures more than a "quick look," because, "in practice," under petitioner's disclosure requirements, it was "simply infeasible to disclose all of the information that is required," and there was "no evidence that [petitioner's] rule has in fact led to increased disclosure and transparency of dental pricing." Ibid.

Second, the court concluded that petitioner's restrictions on non-price advertising restricted the supply of information available to consumers, thereby "prevent[ing] dentists from fully describing the package of services they offer, and thus limit[ing] their ability to compete." Pet. App. 19a-20a. The court further suggested that the restrictions "are in effect a form of output limitation, as they restrict the supply of information about individual dentists' services." Ibid. It rejected petitioner's contention that its restrictions were justified because of the potential for deception, for even that potential "does not justify banning all quality claims without regard to whether they are, in fact, false or

misleading." Id. at 20a.

Finally, the court rejected petitioner's contentions that the FTC's findings were not supported by substantial evidence. Pet. App. 20a-24a. In particular, the court ruled that substantial evidence supported the FTC's finding that petitioner had banned categories of advertising without regard to whether they were false or deceptive. Id. at 21a-23a. It also upheld the FTC's finding that petitioner "possesses enough market power to harm competition" through its restraints on advertising. Id. at 24a. The court accordingly affirmed the Commission's opinion and enforced its order that petitioner cease and desist from restricting "truthful and non-deceptive advertisements." Ibid.

SUMMARY OF ARGUMENT

I. A. The Federal Trade Commission properly exercised jurisdiction over petitioner, even though it is formally a nonprofit corporation, because a substantial portion of its activities engenders economic benefits for its profit-seeking members. Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, which sets forth the entities subject to the Commission's jurisdiction, reaches not only conventional business enterprises but also any association "organized to carry on business for its own profit or that of its members." The FTC has consistently interpreted that statute, adhering to ordinary definitions of the term "profit," to reach trade associations that engage in activities for the economic benefit of their profit-making members, even where the association itself is organized as a nonprofit entity and the member benefits take forms other than cash disbursements. The legislative history of the FTC Act evinces Congress's intent to authorize FTC jurisdiction over such associations, and the FTC and the courts have long acted on the understanding that the Act does in fact reach such associations.

B. There is no basis in the statute for an implied, blanket exemption of associations representing profit-making professionals. Petitioner's arguments based on Congress's ostensible lack of attention to professionals when it enacted the FTC Act fail for the same reasons the Court rejected an implied exemption of professionals from the antitrust laws in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Since that ruling, the FTC has enforced the Act to protect the public from anticompetitive and deceptive practices in which professional associations have engaged.

C. The FTC's interpretation of the statute's reach -- which is based on the provision of substantial economic benefits to an association's profit-seeking members -- is reasonable and merits judicial deference. The record amply supports the FTC's application of that standard to

petitioner, which generates significant economic benefits for its members through its provision of services to its members and its lobbying, public relations, and marketing activities designed to increase their profitability.

II. A. The FTC engaged in a proper and sufficient analysis of petitioner's advertising restraints under the antitrust rule of reason. This Court has repeatedly emphasized the flexibility of the rule of reason; it has instructed that the rule's application may be tailored to the circumstances of particular cases, and that elaborate industry analysis is not necessary in all cases to condemn a restraint of trade as unreasonable. The Commission carefully considered here all aspects of a rule of reason analysis and concluded, based on a substantial record, that petitioner's advertising restrictions harmed consumers.

B. The Commission found, based on a substantial evidentiary record, that petitioner's advertising restrictions deprive consumers of information they value and of healthy competition for their patronage. Petitioner's restrictions, as enforced, proscribe a vast range of truthful advertising claims regarding price and quality. The Commission's findings regarding the actual effects of the restrictions belie petitioner's assertion that its disclosure requirements would prompt dentists to provide more information to consumers. Recognizing the indispensable role of advertising in a free enterprise system, the Commission found that the price and quality advertising suppressed by petitioner would be important to consumers in choosing dental services. Although petitioner disparages the value of the information at issue, this Court made clear in FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986), that a private party is not entitled to preempt the working of the market by deciding for itself what information will be made available to consumers, and that the concerted withholding of information valued by consumers may be condemned even absent proof that it resulted in higher prices.

C. The Commission carefully considered petitioner's proffered "procompetitive" justifications for its restrictions, and properly found them lacking. The Commission found that petitioner's disclosure requirements do not, in fact, result in more information to consumers, and found no basis for petitioner's contention that a ban on quality claims was necessary to avoid deception. Unlike the carefully tailored state restrictions that this Court has accepted in the context of First Amendment challenges, petitioner banned broad categories of advertising without regard to whether the banned claims were truthful or nondeceptive. The Commission properly rejected such a blanket restriction on information that consumers desire as an unreasonable restraint of trade.

D. Given the Commission's findings concerning the actual anticompetitive

effects of petitioner's restraint, it was not required to engage in a further analysis of market power. It nevertheless did so, concluding first that petitioner has the ability to require members to adhere to its advertising restrictions (due to the high value placed on membership), and second that petitioner has the power to inflict the anticompetitive effects of those restrictions on California consumers. It also pointed to the substantial percentage of California dentists who comply with petitioner's restrictions, as well as substantial barriers to sufficient entry of new dentists. Those findings were sufficient for this case; the Commission was not required to engage in elaborate industry analysis that may be required in other contexts, such as merger cases.

ARGUMENT

I. THE COMMISSION PROPERLY EXERCISED JURISDICTION OVER PETITIONER BECAUSE ITS ACTIVITIES, IN SUBSTANTIAL PART, PROVIDE PECUNIARY BENEFITS FOR ITS MEMBERS

Congress has empowered the FTC to prevent "persons, partnerships, or corporations" from engaging in unfair methods of competition and unfair or deceptive acts and practices in or affecting commerce. 15 U.S.C. 45 (a)(2). The FTC Act defines "corporation" broadly, in Section 4, to include not only companies with capital stock, but also "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, * * * which is organized to carry on business for its own profit or that of its members." 15 U.S.C. 44. In this case, the FTC, applying its longstanding administrative interpretation of Section 4, properly concluded that petitioner is subject to the FTC Act's reach as an association "organized to carry on business for [the] profit * * * of its members" because a substantial part of its activities "engender a pecuniary benefit" for its profit-seeking members. Pet. App. 49a, 51a-52a.

A. The Text, Legislative History, and Enforcement History of the FTC Act Support the Commission's Exercise of Jurisdiction Over Nonprofit Associations That Engender Pecuniary Benefits For Their Members

The text of the FTC Act shows a congressional purpose to grant the FTC broad authority over companies and associations. The language of Section 4 is expansive. Section 4 extends the ordinary meaning of "corporation" to include "any" association "organized to carry on business for its own profit or that of its members," even if unincorporated and lacking such hallmarks of a profit-making enterprise as "shares of capital or capital stock or certificates of interest." As long

as the association carries on business "for [the] profit * * * of its members," it is subject to the Act's prohibition against unfair methods of competition. 15 U.S.C. 44.

The pivotal question in this case is whether an association may be said to work for the "profit" of its members, even if it does not distribute earnings to them. Petitioner argues (Br. 19-21) that Section 4 uses the term "profit" in the limited sense of the "excess of revenues over investment or expenses." Thus, it contends, to be within the reach of the FTC Act, an association must itself earn and pay such "profits" (i.e., the excess of its own revenues over expenses) to its members.

Even if the Act did use the term "profit" in the limited sense of the excess of revenues over expenses, that would not advance petitioner's jurisdictional argument. Petitioner's activities are intended to, and do, increase the revenues and decrease the expenses of its members, who are "independent competing entrepreneurs" (Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 357 (1982)). Petitioner's activities help its members achieve profitability. Thus, petitioner carries on business for its members' "profit," even if it does not distribute its own earnings to them. Nothing in logic or the text of Section 4 suggests that the only way an organization may carry on business to help its members achieve profits is to distribute its own earnings to the members.

Moreover, "profit" is, and long has been, commonly used to refer more broadly to economic benefit. When the FTC Act was passed in 1914, a standard dictionary defined "profit" to include "[a]ccession of good; valuable results; useful consequences; avail; gain; as, an office of profit." Webster's International Dictionary 1713 (def. 2) (1913); see also 2 S. Rapalje & R. Lawrence, A Dictionary of American and English Law 1020 (1883) ("In its primary sense, profit signifies advantage or gain in money or in money's worth."). Modern definitions are similar. See Webster's Third New International Dictionary 1811 (def. 2) (1986). And Congress has frequently used "profit" and "for profit" in statutes to refer to pecuniary benefit generally, rather than in the limited sense of the excess of earnings over expenses and investment.[9] The language of Section 4 thus comfortably reaches associations that work for their profit-seeking members' economic benefit, even if they do not distribute earnings to the members.

Petitioner submits (Br. 21 n.5) that any "genuine nonprofit entity" should be outside the reach of the Act. A "genuine nonprofit entity," however, may well conduct activities that are intended to be, and are, for the economic benefit of its members. Trade associations, for example, frequently work to advance their members' economic interests and provide them with benefits of substantial value, even though such

associations are genuinely nonprofit in that their revenues are not distributed to their members, and even though such entities (like petitioner) may be entitled to exemption from federal income tax under 26 U.S.C. 501(c)(6).[10]

The legislative history of the FTC Act demonstrates, moreover, that Congress considered the coverage of nonprofit associations (especially, nonprofit associations of entrepreneurs) and decided to include such entities within the Act's reach. When Congress was considering legislation to replace the Bureau of Corporations with the Federal Trade Commission, both the House and the Senate initially passed bills that would have defined "corporation" to refer only to incorporated, joint-stock, and share-capital companies organized to carry on business for profit. See H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 11, 14 (1914). Two days after the Senate passed its version of the legislation, Bureau of Corporations Commissioner Davies wrote to Senator Newlands, the bill's sponsor and a member of the Conference Committee, expressing concern about its definition of "corporation." Davies explained that the bill would prevent the new Commission from acting against trade associations that "purport to be organized not for profit," and that, although "[a]s to some of the things done by these associations, no question as to their propriety can be raised," such associations nonetheless "furnish convenient vehicles for common understandings looking to the limitation of output and the fixing of prices contrary to the law."[11] The Conference Committee subsequently revised the definition of "corporation" in Section 4 specifically to include associations lacking capital stock that are organized to carry on business for their own profit or that of their members. Id. at 3. That alteration of the statutory text shows that Congress intended the Act to reach nonprofit entities, including trade associations, if they work to advance their members' economic interests.

The FTC and the courts have consistently read the FTC Act in conformity with Congress's intent to cover trade associations advancing the economic interests of their members. From its earliest days, the FTC has exercised its jurisdiction over anticompetitive practices by nonprofit associations whose activities provided substantial economic benefits to their for-profit members' businesses, even though the associations did not themselves engage in manufacturing or retailing, and did not distribute earnings to members.[12] The courts soon confirmed that "[t]he language of the act affords no support for the thought that individuals, partnerships, and corporations can escape restraint, under the act, from combining in the use of unfair methods of competition, merely because they employ as a medium therefor an unincorporated voluntary association, without capital and not itself engaged in commercial business." National Harness Mfrs. Ass'n v. FTC, 268 F. 705,

709 (6th Cir. 1920); see also Chamber of Commerce v. FTC, 13 F.2d 673, 684 (8th Cir. 1926). Following these decisive early rulings, the FTC and reviewing courts (including this Court) have consistently acted on the understanding that nonprofit trade associations are within the FTC's jurisdiction.(13) More recently, when the FTC took action against a nonprofit association for misrepresenting that no scientific evidence linked cholesterol in eggs to increased risk of cardiovascular disease, the Seventh Circuit held that the group, which was "formed to promote the general interests of the egg industry," came within the definition of "corporation" in Section 4 because it "was organized for the profit of the egg industry, even though it pursues that profit indirectly." FTC v. National Comm'n on Egg Nutrition, 517 F.2d 485, 487-488 (1975) (internal quotation marks omitted), cert. denied, 426 U.S. 919 (1976). (14)

Despite that lengthy history of FTC enforcement actions (upheld by the courts) against nonprofit organizations, petitioner argues (Br. 24-25) that Congress's failure to act on a proposed amendment to the FTC Act in 1977 demonstrates that Congress did not intend, in 1914, to bring such organizations within the reach of the Act. This Court has frequently characterized such reliance on congressional inaction as "a particularly dangerous ground on which to rest an interpretation of a prior statute." Central Bank v. First Interstate Bank, 511 U.S. 164, 187 (1994); see FTC v. Dean Foods Co., 384 U.S. 597, 608-611 (1966). Congress's failure to take action on the 1977 proposal in fact reveals little about the matter at hand, because that proposal would have given the FTC jurisdiction even over wholly charitable institutions; the Act, as amended, would not have been limited to nonprofit institutions that advance their members' pecuniary interests.(15) Congress may have declined to amend the Act because it was satisfied with the existing state of the case law, which (then as now) allowed the FTC to exercise jurisdiction over nonprofit associations such as petitioner that advance their members' pecuniary interests (even if they do not distribute earnings to members), but not over wholly charitable institutions.(16) Accordingly, no reliable guidance can be gleaned from Congress's failure to enact legislation in 1977. Cf. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 116-120 (1980); United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1968).

B. There Is No Basis In The Statute For A "Professional Association" Exemption

Petitioner argues (Br. 16) that, even if some nonprofit entities advancing members' economic interests (such as associations of automobile dealers or retail grocers) fall within the reach of the FTC Act, professional

associations like itself nonetheless do not. The text of the statute, however, will not support any implied, blanket "professional association" exception. A voluntary nonprofit association of professionals may be organized (and legitimately so) to advance its members' economic interests even if it also engages in public service activities and monitoring of its members' ethics. Many associations of professionals (as well as other entrepreneurs) engage in both kinds of activities. See, e.g., National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 682 (1978). As the Court explained in Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 (1975), it is "no disparagement of * * * a profession to acknowledge that it has [a] business aspect." Dentists no less than industrialists may come together in a voluntary nonprofit association to advance their economic interests as a group. It is also difficult to see how any clear line could be drawn between classes of "professionals" and "non-professionals" for the purpose of defining the FTC's jurisdiction.

Petitioner suggests (Br. 24) that Congress must have intended to exclude professional associations from the FTC Act's reach because the professions were not regarded as subject to the antitrust laws when the Act was passed. This Court in Goldfarb rejected the similar argument that the business activities of "learned professions" were beyond the Sherman Act's reach because such professions were not regarded as "trade or commerce" when that Act was enacted. 421 U.S. at 787-788. Given the broad language of coverage used in Section 4 of the FTC Act, its reach cannot be frozen by assumptions in 1914 any more than the Sherman Act has been confined by assumptions extant in 1890. And whether or not Congress contemplated at its enactment that the FTC Act (or the Sherman Act) would be used against organizations of professionals such as dentists and lawyers, this Court "frequently has observed that a statute is not to be confined to the particular applications contemplated by the legislators." Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980) (internal quotation marks, brackets, and ellipsis omitted).

Since this Court made clear in Goldfarb that combinations of professionals in restraint of trade are indeed subject to the antitrust laws, the FTC has consistently acted to protect the public from anticompetitive practices of professional associations. It has brought enforcement actions against organizations that were fixing or stabilizing prices,[17] thwarting cost containment programs,[18] and blocking the development of health maintenance organizations.[19] It has also acted against deceptive advertising and promotion by professional associations, such as misrepresentation of their members' expertise.[20] Petitioner's submission that such organizations are exempt from the FTC Act would deprive the public of the important consumer protection provided by Section 5 against such unfair competition and deceptive

practices.[21]

C. The Commission's Construction Of Its Jurisdiction Under The FTC Act Is Entitled To Deference, And Its Application Of That Construction In This Case Was Proper

For the reasons we have stated, the text of the FTC Act does not support a construction exempting all nonprofit (or professional) associations. At a minimum, the text does not compel such a construction. Since the word "profit" is capable of the construction that the FTC has placed on it - encompassing the situation in which a nonprofit organization works to advance its members' economic interests, even if it does not distribute earnings to them - that construction is entitled to deference. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-844 (1984); Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 380-382 (1988) (Scalia, J., concurring) (Chevron deference applicable to agency's interpretation of its own statutory authority or jurisdiction); see, e.g., NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 89 (1995) (deferring to NLRB's interpretation of who is "employee" covered by National Labor Relations Act). Deference is particularly appropriate because the FTC has consistently acted on the view that Section 5 reaches such nonprofit associations since shortly after the FTC Act was passed. See p. --, supra; Zenith Radio Corp. v. United States, 437 U.S. 443, 457-458 (1978).

It bears emphasis that the Commission does not read the FTC Act as reaching all nonprofit associations but (consistent with the Act's requirement of "profit") only those organizations "whose activities engender a pecuniary benefit to [their] members if [those] activit[ies are] a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity." Pet. App. 49a (quoting American Med. Ass'n, 94 F.T.C. 701, 983 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982) (AMA));[22] see also College Football Ass'n, 117 F.T.C. 971, 1000-1008 (1994) (FTC's determination that it lacked jurisdiction over nonprofit organization engaged in commercial activity for its members' benefit because its members were not profit-seeking). There is no basis, therefore, for the suggestion that the FTC's reading of the Act will expand its jurisdiction beyond its proper reach, to the realm of eleemosynary institutions.[23] Rather, the Commission has sensibly read the Act as permitting it to intervene when a nonprofit entity advances its members' economic interests in the commercial world.

Petitioner's argument (Br. 19) that it falls outside the statute's reach because its "main purpose" is to promote dental health lacks textual support. The statute applies by its terms to entities that conduct

business for the profit of their members, and makes no exception for ones that also conduct activities for the benefit of the public. Furthermore, drawing a jurisdictional line based on an association's "primary" purpose would create serious difficulties as to the proper classification of an organization's activities (particularly those with both public and private benefits) as well as the weights to be assigned to them (e.g., weighing by amount of expenditure or by degree of pecuniary benefit conferred). Such a line could also allow an association to evade jurisdiction through creative accounting classifications of its expenditures. The FTC was therefore justified in construing the Act's reach to turn on the existence of a substantial pecuniary benefit to an organization's members, rather than on the nature of its primary activities.

The record also amply supports the FTC's application of that standard in this case. Given petitioner's emphasis on the economic benefits that it provides to its members (see pp. ---, supra), the services that it offers in competition with for-profit businesses (including training programs, job placement, legal services, and low-cost insurance through its for-profit subsidiaries) (see p. ---, supra; J.A. 20-23), and its lobbying on behalf of its members' pocketbook issues (Ibid.), there is substantial evidence to support the FTC's conclusion that petitioner provides its members with substantial "pecuniary benefits." Accordingly, the FTC properly concluded that petitioner is subject to the Act.

II. THE COMMISSION CORRECTLY CONCLUDED THAT PETITIONER'S ADVERTISING RESTRICTIONS CONSTITUTE AN UNREASONABLE RESTRAINT OF TRADE

Section 1 of the Sherman Act, 15 U.S.C. 1, prohibits unreasonable restraints of trade. See Standard Oil Co. v. United States, 221 U.S. 1, 65 (1911). Restraints that "always or almost always tend to restrict competition and decrease output" are deemed unreasonable per se. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289-290 (1985); see Northern Pacific R. v. United States, 356 U.S. 1, 5 (1958). Other restraints are subject to the "rule of reason," reason," which seeks to distinguish between a restraint that "merely regulates and perhaps thereby promotes competition" and one that "may suppress or even destroy competition." Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 n.15 (1977) (internal quotation marks omitted). In all cases, however, the purpose of the antitrust inquiry is "to form a judgment about the competitive significance of the restraint. NCAA v. Board of Regents, 468 U.S. 85, 103 (1984) (internal quotation marks omitted).

In this case, the Commission carefully examined petitioner's restraints in

light of their surrounding circumstances and an extensive factual record that had been compiled about their actual effect. Pet. App. 73a-92a. It found that petitioner applied its advertising rules to ban systematically a "vast" range of advertising valued by consumers, depriving them of truthful, nondeceptive information about the price and quality of dental services. Id. at 74a. It also concluded that the restraints significantly interfered with the proper functioning of the market and were therefore anticompetitive. Id. at 78a. Although the Commission found it unnecessary to quantify the precise consumer injury caused by these restrictions, it sufficiently considered pertinent factors under the rule of reason, including market impact power the ostensibly procompetitive justifications proffered by petitioner. Id. at 78a-92a; see id. at 20a-24a (consideration of same factors by court of appeals).[24]

Petitioner's primary complaint (Br. 38, 42) is that the Commission failed to make a detailed inquiry into market structure and into its market power. In fact, the Commission (and the court of appeals) did examine market power, and found that petitioner had the ability to withhold from consumers the valuable information that they seek about dentists' prices and services. See Pet. App. 23a-24a, 79a. The Commission's analysis in this case followed the Court's teachings that the rule of reason may properly be tailored to the circumstances of each case, and does not necessarily require a "detailed market analysis" in every instance. See FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460 (1986) (IFD). By insisting on what it terms a "full rule of reason" analysis in cases such as the present one -- including the detailed analysis of matters such as the structure of local geographic markets -- petitioner would interpose unjustified barriers to the adjudication of antitrust claims by the Commission and the federal courts. Although an informed judgment about an arrangement's likely competitive effects may in some cases require elaborate efforts to delineate market boundaries, no such detail was needed here to find a substantial restraint on competition. Petitioner's other objections to the FTC's analysis are all attacks on the Commission's factual determinations, which (as the court of appeals ruled, Pet. App. 20a-24a) are amply supported by the record.

A. The Commission's Analysis In This Case Was Consistent With This Court's Decisions, Holding That The Rule Of Reason Requires A Careful Yet Flexible Inquiry Into Competitive Effects, Tailored To The Circumstances Of Each Case

Antitrust tribunals apply the rule of reason to evaluate the competitive significance of a wide variety of business and trade association practices, which can vary greatly in their complexity, purpose, and effect. For this reason -- and in keeping with its common law origins -- the rule of reason is "used to give the [antitrust laws] both flexibility and definition."

National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 688 (1978).[25] The Court has emphasized the flexibility of the rule of reason on several occasions, and has instructed that the requirements of analysis under the rule vary according to the circumstances presented. For example, in NCAA, supra, the Court declined to apply the per se rule, but invalidated without detailed market analysis the NCAA's restrictions on televising football games under the rule of reason. The Court rejected on both legal and factual grounds the NCAA's argument that its television plan could not be condemned under the rule of reason because it lacked market power:

> As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."

468 U.S. at 109 (quoting Prof. Eng'rs, 435 U.S. at 692).

The Court took a similar approach to rule of reason analysis in IFD, supra, a case quite similar to the present one. There, a state association of dentists had agreed not to provide copies of dental x-rays to insurers, who sought to use them to assess the propriety of the dentists' services and charges. See 476 U.S. at 448-450. The Court rejected arguments in support of the agreement similar to the ones petitioner advances here -- namely, "that the Commission's findings were inadequate because of its failure both to offer a precise definition of the market in which the Federation was alleged to have restrained competition and to establish that the Federation had the power to restrain competition in that market." Id. at 453. Although the Court held that the refusal to provide x-rays did not amount to a per se illegal boycott, it nevertheless ruled that "[a]pplication of the Rule of Reason to these facts is not a matter of any great difficulty," in light of the nature of the restraint and the Commission's finding of actual effects on competition. Id. at 459.

In so ruling, the Court made two points about the role of market power evidence in rule of reason cases. First, some restraints are unlawful under the rule of reason without any proof of market power at all: "absence of proof of market power does not justify a naked restriction on price or output." IFD, 476 U.S. at 460 (quoting NCAA, 468 U.S. at 109). Second, other restraints may be shown to be unlawful without extensive market power analysis. As the Court explained, "even if the restriction imposed by the Federation [was] not sufficiently 'naked' to call this principle [condemnation without proof of market power] into play, the Commission's failure to engage in detailed market analysis [was] not

fatal to its finding of a violation of the Rule of Reason." Ibid. The Court reasoned that "Federation dentists constituted heavy majorities of the practicing dentists" and that insurers were actually unable to obtain x-rays, ibid., and, therefore, that the restraint "had adverse effects on competition," id. at 461. The Court further reasoned that, even if the purpose of obtaining x-rays was to minimize costs, the restraint was "likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned absent proof that it resulted in higher prices." Id. at 461-462.

In the present case, the Commission hewed closely to this analysis and to the Court's teachings "that the rule of reason contemplates a flexible enquiry, examining a challenged restraint in the detail necessary to understand its competitive effect." Pet. App. 74a (citing NCAA, 468 U.S. at 103-110) (emphasis added). The Commission referred to its rule of reason analysis as "simple and short" (ibid.), which it was, in comparison to the lengthier analysis that may be needed in (for example) a merger case, where it may be necessary to delineate numerous geographic markets. But the Commission - which has extensive experience with the effects of advertising restrictions -- reached its finding of a violation of Section 5 only after a careful assessment of the record regarding the actual and likely effects of petitioner's highly restrictive advertising rules on consumers of dental services in California. See id. at 74a-84a. Based on its finding that "the general proposition regarding the importance of advertising to competition carries over to the instant situation," ibid., the Commission reasonably concluded that petitioner's restrictions on advertising had adverse effects on competition, for an agreement that "limit[s] consumer choice by impeding the 'ordinary give and take of the marketplace' cannot be sustained under the Rule of Reason." IFD, 476 U.S. at 459 (quoting Prof. Eng'rs, 435 U.S. at 692).(26)

Petitioner (Br. 27, 45-46) and amicus NCAA (Br. 11-12) go far afield in urging the Court to establish the contours of the analysis required under the rule of reason for all possible cases. All that is at issue here is whether the restraints on advertising in this case required a more extensive analysis than the Commission afforded them. In asserting the need for a "full rule of reason analysis," petitioner would have the Court require an exhaustive market analysis whenever an antitrust tribunal applies the rule of reason (outside some ill-defined class of restraints in which it concedes that a "quick look" is sufficient, Br. 31). Such a rigid requirement is not required by this Court's precedents, however, and can stand only as an unnecessary roadblock to a measured and sensible application of the antitrust laws, especially in contexts like the present case, involving extensive suppression of information that consumers find highly useful.(27)

B. The Commission Properly Found, Based On Substantial Evidence, That Petitioner's Advertising Restrictions Had Anticompetitive Effects.

The Commission engaged in an extensive analysis of the effects of petitioner's advertising restrictions, and concluded that they harmed competition by "depriv[ing] consumers of information they value and of healthy competition for their patronage." Pet. App. 78a; see also id. at 55a-60a, 63a-67a, 74-77a. That conclusion was based on two intermediate findings. First, the Commission found that the actual effect of petitioner's restrictions was to suppress a vast range of truthful and nondeceptive advertising. Second, it found that the restraints were harmful to consumers of dental services, because the advertising that was suppressed would have been useful to them in making choices about dental services. Those conclusions are fully supported by the record.

1. As detailed above (pp. ---, supra), the Commission amassed an extensive record of the ways in which petitioner foreclosed its members from providing useful information about price and quality to consumers. Based on that record, the Commission concluded that petitioner had "effectively preclude[d] its members from making low fee or across-the-board discount claims." Pet. App. 63a. It also found that "[t]he nonprice advertising CDA prohibits is vast," and that petitioner had, in practice "prohibit[ed] all quality claims." Id. at 74a-75a.

These well-supported factual findings refute any notion that petitioner's onerous disclosure requirements, in particular, could have had the effect of "giv[ing] consumers more information, not less" (Pet. Br. 34). Although petitioner's policy concerning the advertising of discounts is superficially couched in terms of disclosure requirements, the Commission found that the actual effect of such requirements was "prohibitive" of across-the-board discount advertising. Pet. App. 66a-67a, 85a-86a. In reaching that factual finding, the Commission employed its expertise - developed in its dual function of protecting consumers against deceptive practices and preventing anticompetitive acts - in evaluating the practical effect of disclosure requirements. As petitioner points out (Br. 34-35), there are circumstances in which disclosure requirements are highly beneficial to consumers, and the FTC does in some cases mandate disclosures to prevent consumer deception. But the FTC is aware (as is this Court, see Morales v. Trans World Airlines, 504 U.S. 374, 389-390 (1992)), that excessively burdensome disclosure requirements can have the "paradoxical effect" of stifling information that might benefit consumers. See Pet. App. 66a. The FTC is often called upon to make practical judgments about the actual or likely effects of disclosure requirements, and it properly concluded in this case that petitioner's requirements were so onerous that they operated in actual

effect as a "broad ban" on discount advertising. Id. at 67a. Indeed, petitioner appears to concede (Br. 36) the unreasonableness of its requirement that across-the-board discounts on all dental procedures be accompanied by the full litany of mandated disclosures.(28)

2. The Commission also addressed at length the significance to consumers of petitioner's restraints. It was not just the fact that dissemination of truthful information was forbidden, but particularly the kind of advertising banned -- relating to the price and quality of service offered -- that concerned the Commission. As the Court has emphasized, advertising "performs an indispensable role in the allocation of resources in a free enterprise system." Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977); see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976); AMA, 94 F.T.C. at 1004; Massachusetts Bd. of Registration in Optometry, 110 F.T.C. 549 (1988); American Dental Ass'n, 94 F.T.C. 403, 405-406 (1979), modified, 100 F.T.C. 448 (1982).

On the facts of this case, the Commission found fully applicable the well-established importance of price and quality advertising to consumers. Advertising, it found, "is important to consumers of dental services and plays a significant role in the market for dental services." Pet. App. 60a; see id. at 78a. Those findings by the Commission echo those of the ALJ, who concluded that petitioner's "conspiracy has injured those consumers who rely on advertising to choose dentists." Id. at 261a. The record showed that advertisements highlighting low or discount prices, comfort and gentleness in the provision of dental services, or both were effective in attracting consumers (and much more effective than "generic advertising without comparative quality or price claims"), demonstrating the importance of such information to consumers. Id. at 77a.(29) Accordingly, the Commission properly found that information about price as well as "quality and sensitivity to fears is important to consumers and determines, in part, a patient's selection of a particular dentist." Id. at 76a-77a.

Petitioner attempts to minimize the competitive significance of some of the banned ads. It argues, for example (Br. 36-37), that discount advertising conveys "negligible informational content." The short answer to such contentions is that, in a free-market economy, it is generally up to consumers to decide what information is useful and what is not. See generally N. Averitt & R. Lande, Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law, 65 Antitrust L.J., No. 3, at 713 (Spring 1997). The advertising of discounted prices and references to "affordable fees" can signal to the consumer the potential availability of cost savings, which can then be investigated further.(30) Similarly, claims about quality of service, although dismissed by petitioner as

"subjective" (Br. 40), may convey useful information concerning the attitudes and approach of the dentist -- such as commitment to punctuality, to understanding the patient's anxieties, or simply to providing high-quality care. As this Court has recognized, advertising can benefit consumers even if it requires further inquiry. See Morales, 504 U.S. at 388-389 (noting utility of advertisements for discounted air fares); Prof. Eng'rs, 435 U.S. at 692-693 (rejecting argument that "inherently imprecise" pricing information was of no value to consumers). Petitioner "is not entitled to pre-empt the working of the market by deciding for itself that its [members' patients] do not need that which they demand." IFD, 476 U.S. at 462.

3. The Commission's conclusions in this case are consistent with long-observed effects of advertising restrictions: they "increase the difficulty of discovering the lowest cost seller of acceptable ability[, and] * * * [reduce] the incentive to price competitively." Bates, 433 U.S. at 377-378. As the Commission also noted, the importance of advertising "attaches not only to price information, but to all material aspects of the transaction," including quality. Pet. App. 59a. Although the Commission found it unnecessary to "quantify[] the increase in price or reduction in output occasioned by these restraints" (id. at 78a), its conclusion that these results would ensue is supported by both the record and by "common sense and economic theory, upon both of which the FTC may reasonably rely." IFD, 476 U.S. at 456. Moreover, as this Court stressed in IFD, the market may be deemed harmed by concerted, artificial suppression of information even without direct proof of effects on prices:

> A concerted and effective effort to withhold (or make more costly) 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.

Id. at 461-462.[31] Accordingly, the FTC's conclusion that petitioner's advertising restraints had anticompetitive effects is fully consistent with this Court's decisions and supported by the record.

C. The Commission Properly Found That the Restraints Lack Any Plausible Procompetitive Justification

Contrary to petitioner's contention, the FTC did not end its rule of reason inquiry once it determined that petitioner's restraints on truthful, nondeceptive advertisements had an anticompetitive effect. Rather, consistent with this Court's instructions about rule of reason analysis (IFD, 476 U.S. at 459; Prof. Eng'rs, 435 U.S. at 693-695), the FTC

carefully considered petitioner's contentions that its advertising restrictions have procompetitive effects. See Pet. App. 84a-90a. The FTC fully recognizes that self-regulation by professional organizations "may serve to regulate and promote * * * competition" by preventing deceptive practices. See Prof. Eng'rs, 435 U.S. at 696. It also acknowledged in this case that "the prevention of false and misleading advertising is indeed a laudable purpose." Pet. App. 84a. It found, however, that petitioner's advertising bans were not tailored to that purpose, but instead "swept aside" price and quality advertising with "broad strokes," without regard to its potential for deception. Id. at 89a.

Before this Court, petitioner makes two principal arguments, neither of which has merit. With respect to price advertising, the sole procompetitive theory petitioner advances is that its disclosure requirements for advertising discounts will increase the amount of information provided to consumers. (Petitioner appears to make no argument in defense of its prohibition against comparative advertising claims such as "low fees" and "reasonable fees.") Because of that potential for increased information, petitioner maintains (Br. 34-36) that a more detailed analysis of its restrictions was required. Whatever might be the merits of such a contention where disclosure requirements really do have a procompetitive potential, it cannot be sustained in this case, where (as we have explained), the FTC, employing its expertise in such matters, found that the actual effect of petitioner's onerous disclosure requirements, as they have been interpreted and enforced, is to suppress all across-the-board discounting claims. See pp. -, supra. The FTC therefore rejected petitioner's asserted procompetitive justification for its restraint only after finding it factually unsupportable.[32]

With respect to its restrictions on quality claims, petitioner submits (Br. 38-39) that it may ban all such claims because they are "potentially misleading." This Court has suggested that some quality claims by professionals about performance may well be misleading and may therefore be restricted. See Bates, 433 U.S. at 366, 383-384. The Court has not held, however, that all quality claims by professionals -- even claims that do not relate directly to the quality of performance, such as promises of punctuality and offers of a comfortable environment, designed to dispel anxiety about visiting the dentist (p. --, supra) -- are necessarily misleading. Indeed, Bates warned of the potential of overbroad advertising restrictions used to "perpetuate the market position of established [market participants]." Id. at 377-378. The Court has also admonished, with respect to state regulation of marketing by professionals, that "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." Shapero v. Kentucky

Bar Ass'n, 486 U.S. 466, 478 (1988) (internal quotation marks omitted). That admonition is even more apt in the context of industry self-regulation, where the body imposing restrictions lacks full public accountability and may be subject to incentives to adopt approaches that restrict competition.

In the present case, drawing distinctions between deceptive and nondeceptive advertising is precisely what petitioner did not do. Instead, it imposed blanket bans on useful advertising claims without regard to whether they were truthful or deceptive. Furthermore, although it had every opportunity to do so, petitioner made no effort to show any basis on which a prophylactic restraint might be justified, such as a history of abuse or false and deceptive advertisements that could not be effectively prevented by a more narrowly tailored rule. Cf. Florida Bar v. Went For It, Inc., 515 U.S. 618, 626-628 (1995). The Commission also expressly allowed petitioner to enforce "reasonable ethical guidelines * * * with respect to representations that [petitioner] reasonably believes would be false or deceptive." Pet. App. 30a. Generalized arguments about the procompetitive benefits of suppressing false and deceptive advertising therefore cannot sustain petitioner's overbroad restrictions.

D. The Commission's Market Power Analysis Of Petitioner's Restraints Was Appropriate

In light of the Commission's conclusions regarding the anti-competitive effects of petitioner's advertising restrictions, it did not find it necessary to perform an elaborate structural analysis of the markets in which petitioner's members conduct business. Pet. App. 78a. As the Commission noted, this Court "has indicated that when a court finds actual anticompetitive effects, no detailed examination is necessary to judge the practice unlawful." Ibid. n.19 (citing NCAA and IFD). Nevertheless, the Commission did examine market power, and it had an ample basis on which to conclude that petitioner had the ability "to impose the costs of its anticompetitive restrictions on California consumers of dental services," id. at 84a, which was the relevant determination.

The facts supporting that determination are straightforward. Fully 75% of California's practicing dentists (and 90% in one region) are members of petitioner.[33] Pet. App. 82a. The Commission found substantial barriers to entry and few close substitutes for the services offered by petitioner's members. Id. at 82a-83a.[34] It also found that petitioner had the power to require members and aspiring members to comply with the restrictions, because of the importance placed on membership by California dentists. Id. at 80a-81a. Given those findings (which the court of appeals upheld and which petitioner does not challenge here), the

Commission properly concluded that conspiring members of petitioner had the power to impose their will on the market as a whole. See id. at 84a.

The FTC was not required to approach the issue of market power as if this were a merger case. Market power analysis is not an end in itself; it is a tool to help determine whether the challenged conduct is anticompetitive. See IFD, 476 U.S. at 460. Because the anticompetitive potential of different types of conduct varies, the appropriate market power analysis varies as well. See, e.g., NCAA, 468 U.S. at 109-110; IFD, 476 U.S. at 460. Certain kinds of agreements challenged under Section 1 of the Sherman Act require an extensive structural analysis because it is not possible to reach a reasoned conclusion about the competitive effects of such agreements without an understanding of the market context. See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. at 296 (buyer cooperatives); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 334 (1961) (exclusive dealing arrangements). Similarly, in merger cases, the antitrust tribunal must predict the competitive effect of structural changes to the market, and so the inquiry ordinarily focuses on structural issues. By contrast, in cases involving conduct deemed unlawful per se, there is generally no need for market analysis because the conduct is conclusively presumed to be anticompetitive.

Other cases fall between these two poles. NCAA, for example, involved a restraint that the Court characterized as a naked restraint on output, which could be condemned without an "elaborate industry analysis." 469 U.S. at 109. In IFD, the Court suggested that the agreement was sufficiently anticompetitive on its face to fall within the NCAA analysis. 476 U.S. at 460. It also made clear, however, that even if that were not the case, a full structural analysis of the market was not required. Ibid. In this case, the Commission and court of appeals properly relied on this Court's teaching in IFD that "the finding of actual, sustained adverse effects on competition in those areas where [petitioner's] dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis." 476 U.S. at 461; see also Pet. App. 24a (court of appeals noting that advertising restrictions imposed by such "large scale professional organizations" have substantial anticompetitive effects that can properly be condemned "without careful market definition") (quoting 7 P. Areeda, Antitrust Law ¶ 1503, at 377). The advertising that petitioner bans informs consumers so that they may compare competing market participants. If, as the Commission found, a combination comprising three-quarters of the practicing dentists in the State adheres to strict policies banning such advertising, then consumers

will lack the information they desire, regardless of the actions of other market participants. Accordingly, once the Commission found that the restraint had anticompetitive effects and that petitioner could inflict those effects on the market as a whole, it was amply justified in concluding that petitioner "possesses the necessary market power to impose the costs of its anticompetitive restrictions on California consumers of dental services." Pet. App. 84a.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DEBRA A. VALENTINE
General Counsel

JOHN F. DALY
Assistant General Counsel

ELIZABETH R. HILDER
JOANNE L. LEVINE
Attorneys
Federal Trade Commission

SETH P. WAXMAN
Solicitor General

JOEL I. KLEIN
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

DECEMBER 1998

1. In the last year that petitioner explicitly reported its public service expenditures, they they accounted for 7% of its annual budget. J.A. 19; Pet. App. 52a. In the same year, expenses for "direct member services" were 65% of petitioner's budget, and administration and indirect member services accounted for an additional 20 percent. Ibid.

2. Although some of petitioner's lobbying has advocated measures to promote public health, much of its lobbying has been directed at protecting members' profitability. Thus, petitioner has opposed legislation regarding mandatory health insurance coverage for part-time employees and treatment of infectious and hazardous waste, and it has supported malpractice-liability and workers' compensation reforms. Pet. App. 177a-179a.

3. One dentist testified that, to advertise an across-the-board discount, a member would have to list his regular fees for 100-300 procedures. Pet. App. 201a. A member of petitioner's Judicial Council (which is responsible for enforcing its Code of Ethics, see id. at 9a) acknowledged that to advertise an across-the-board discount in compliance with these requirements "would probably take two pages in the telephone book," and that "[n]obody is going to really advertise in that fashion." Id. at 66a.

4. For example, petitioner disapproved advertisements that offer "20% off new patients

with this ad"; "25% discount for new patients on exam x-ray & cleaning/ 1 coupon per patient/ offer expires 1-30-94"; "20% senior citizen discount; 20% military discount"; and "Complete Consultation, Exam and X-rays (if needed) * * * [for only] a $1.00 charge to you and your entire family with this coupon" before a certain date. Id. at 66a-67a, 90a n.25, 200a-202a. Dentists new to an area who sought to attract patients by advertising a "Grand Opening Special $5 exam x-ray, $15 polishing and 40% off dental treatment," or a "get acquainted offer" that "an initial consultation, complete exam, any x-rays and tooth cleaning will be done for only $5 (applies to all members of your family)" also encountered petitioner's disapproval. Id. at 77a n.18.

5. Thus, petitioner has disapproved such phrases as "personal quality dental care"; "[W]e cater to those people that demand quality, personal attention, and punctuality" (Pet. App. 204a); "you shouldn't have to wait hours or days for dental care" (id. at 205a); "my number one concern is your care and comfort"; "You'll appreciate our warm personal attention"; "State of the art dental services" (id. at 208a); "dedicated to quality dental care at low cost"; "comfortable and personalized"; "latest equipment and gentle, caring, techniques" (id. at 214a); "fully modern . . . luxurious atmosphere" (id. at 236a); "all of our handpieces (drills) are individually autoclaved for each and every patient"; and "highest standards in sterilization" (id. at 75a). For several years, petitioner disallowed advertising that a dentist offers "gentle" care, or "special care for cowards," and many local components continue to proscribe such claims. Id. at 76a, 211a-212a.

6. The excerpts of the record filed by the FTC in the court of appeals include an extensive summary of petitioner's disciplinary actions as well as a long list of the words and phrases that petitioner and its components have proscribed. See FTC Supp. E.R., Vol. I, Tab 2, and Vol. II.

7. Although the present case arises under Section 5 of the FTC Act, 15 U.S.C. 45, practices that violate Section 1 of the Sherman Antitrust Act, 15 U.S.C. 1, are necessarily "unfair methods of competition" under Section 5, and the Commission relied on Sherman Act principles in addressing the merits of this case. See Pet. App. 53a n.5; FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 454-455 (1986).

8. Petitioner maintains that the ALJ found that its advertising restrictions had "no impact on competition." See Pet. Br. 2, 6-7, 13, 15, 27, 41-42; Pet. App. 246a. In context, however, it appears that the ALJ was quoting the testimony of petitioner's own expert witness, and was not adopting that testimony as his own factual finding. See ibid. Indeed, the ALJ noted that this witness "has no expertise in, nor has he made any study of, the economic aspects of the dental market or dental advertising." Id. at 244a. Even if the ALJ did credit that witness's testimony on the impact of competition (see id. at 83a n.22), the Commission rejected such a conclusion and found that competition was harmed by petitioner's restrictions, ibid.; see pp. --, infra, and the court of appeals upheld the Commission's finding as supported by substantial evidence, see pp. --, infra; Pet. App. 23a-24a.

9. See, e.g., 7 U.S.C. 1a(5)(A)(1) (defining "commodity trading advisor" as one who, "for compensation or profit," advises others on commodity trading); 7 U.S.C. 2132(f) (defining animal "dealer" as one who "for compensation or profit" delivers animals for sale); 8 U.S.C. 1375(e)(1)(A) (Supp. II 1992) (defining "international matchmaking organization" as one that offers matrimonial services "for profit"); 18 U.S.C. 1170(a) (punishing one who "uses for profit" any Native American human remains without the right of possession); 42 U.S.C. 3604(e) (punishing one who, "[f]or profit," induces another to sell or rent a dwelling based on changes in racial composition of neighborhood); see also 12 U.S.C. 2802(4); 18 U.S.C. 31; 18 U.S.C. 921(a)(21); 18

U.S.C. 1466(b); 42 U.S.C. 2205(b); 50 U.S.C. 217.

10. Petitioner (Br. 20 n.4) and amici (ASAE Br. 10, ADA Br. 15) argue that, to qualify as tax-exempt under Section 501(c)(6), they had to satisfy that Section's requirement that "no part of [their] net earnings * * * inure[] to the benefit of any private shareholder or individual," which (they contend) necessarily means that they do not operate for the profit of their members. Under Section 501(c)(6), however, it is generally permissible for a trade association's activities to "improve[] the business conditions" of the industry as a whole, including its members, as long as such benefits are not confined to the association's members. See National Muffler Dealers Ass'n v. United States, 440 U.S. 472, 482-484 (1979); MIB, Inc. v. Commissioner, 734 F.2d 71, 76 & n.3 (1st Cir. 1984); 26 C.F.R. 1.501(c)(6)-1. Indeed, as Section 501(c)(6) is confined to entities with common business interests (as opposed to charities, which are covered elsewhere), that Section presupposes the promotion of an industry's economic interests. Furthermore, there are significant differences between the purposes and operation of the revenue laws and the FTC Act. Cf. FTC v. Bunte Bros., 312 U.S. 349, 353 (1941) ("Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business"). The fact that an entity might be considered nonprofit for tax purposes does not necessarily mean that it is outside the broad enforcement reach of the FTC Act.

11. Trade Commission Bill: Letter from the Commissioner of Corporations to the Chairman of the Senate Comm. on Interstate Commerce, Transmitting Certain Suggestions Relative to the Bill (H.R. 15613) to Create a Federal Trade Commission, 63d Cong., 2d Sess. 3 (1914).

12. See, e.g., FTC v. Association of Flag Mfrs., 1 F.T.C. 55 (1918); FTC v. United States Gold Leaf Mfrs. Ass'n, 1 F.T.C. 173 (1918); FTC v. Bureau of Statistics of the Book Paper Mfrs., 1 F.T.C. 38 (1917).

13. See, e.g., FTC v. Cement Inst., 333 U.S. 683 (1948); Millinery Creator's Guild, Inc. v. FTC, 312 U.S. 469 (1941); Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941); FTC v. Pacific States Paper Trade Ass'n, 273 U.S. 52 (1927); Standard Container Mfrs. Ass'n v. FTC, 119 F.2d 262 (5th Cir. 1941); California Lumbermen's Council v. FTC, 115 F.2d 178 (9th Cir. 1940), cert. denied, 312 U.S. 709 (1941).

14. Petitioner relies heavily (Br. 16-19) on the Eighth Circuit's decision in Community Blood Bank v. FTC, 405 F.2d 1011 (1969), which, it contends, supports its narrow reading of the term "profit." That decision, however, is consistent with the approach to Section 4 explained above. There the court of appeals rejected the theory that a community blood bank -- which it found to be organized for "only charitable purposes" -- could be said to earn "profit" by virtue of its retention of earnings "for its own self-perpetuation or expansion." Id. at 1016, 1022. Nonetheless, the court recognized that Section 4 does not "provide a blanket exclusion of all nonprofit" entities. Id. at 1017. It acknowledged Congress's intent to confer on the Commission jurisdiction over "trade associations," and emphasized the need for an "ad hoc" inquiry focusing on the facts of the particular organization. Id. at 1017-1019. Most significantly, it had no occasion to address the status of an entity, like the present petitioner, that is organized as a nonprofit corporation but whose activities provide pecuniary benefits to profit-making members. See also FTC v. Freeman Hosp., 69 F.3d 260, 266 (8th Cir. 1995) (characterizing Community Blood Bank as holding that only genuine charitable organizations are outside Section 4).

15. The proposal would have amended the definition of "person, partnership, or

corporation" in Section 4 "to include any individual, partnership, corporation, or other organization or legal entity." See H.R. 3816, 95th Cong. (1977), reprinted in Federal Trade Commission Amendments of 1977 and Oversight: Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 4, 27-28 (1977) (1977 House Hearing). The proposal therefore would have overruled the Eighth Circuit's decision in Community Blood Bank, supra.

16. Compare Community Blood Bank, supra, with National Comm'n on Egg Nutrition, supra; see also 1977 House Hearing, supra, at 82 (testimony by FTC Chairman Collier that Community Blood Bank decision "affirmed the Commission's jurisdiction over nonprofit corporations whose activities redound to the economic benefit of their shareholders or members").

We also note that, in 1982, Congress failed to pass an amendment reported out of a Senate committee that would have terminated the FTC's jurisdiction over all state-licensed professionals and their associations. See S. Rep. No. 451, 97th Cong., 2d Sess. 5-7, 34-35 (1982). Under petitioner's logic, that refusal to take action could be taken as as evidence that Congress approved of the FTC's actions in this area, especially since the minority on the committee observed that "the long list of FTC actions in this area is clearly pro-consumer and pro-competitive." Id. at 49.

17. See, e.g., FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); Empire State Pharm. Soc'y, 114 F.T.C. 152 (1991) (boycotts against third-party payers that attempted to obtain lower prices for prescriptions).

18. See, e.g., FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986); Michigan State Med. Soc'y, 101 F.T.C. 191 (1983); Indiana Dental Ass'n, 93 F.T.C. 392 (1979).

19. See, e.g., Forbes Health Sys. Med. Staff, 94 F.T.C. 1042 (1979); Medical Serv. Corp., 88 F.T.C. 906 (1976).

20. See FTC v. National Energy Specialist Ass'n, No. 92-4210, 1993 WL 183542 (D. Kan. Apr. 29, 1993).

21. Petitioner points out that, even if it is exempt from the FTC Act, it will still be subject to antitrust scrutiny by the Department of Justice under the Sherman and Clayton Acts. The same cannot be said, however, of the FTC's authority under Section 5 to prevent deceptive practices, for which there is no analogue in the antitrust laws. Petitioner's argument would leave the FTC without authority to proceed against nonprofit trade and professional associations that disseminate false information about their services or products. Cf. National Comm'n on Egg Nutrition, supra (FTC Act used to prevent dissemination of false information about health effects of cholesterol in eggs); American Dairy Ass'n, 83 F.T.C. 518 (1973) (consent order against misrepresenting fat content or caloric value of milk).

22. With respect to the Court's affirmance in the AMA case, we note that, when it reached this Court, that case presented not only the jurisdictional question, but also the propriety of the FTC's entry of a prospective cease-and-desist order in light of ethical-rule changes adopted by the AMA after the filing of the administrative complaint. See 80-1690 FTC Br. I, 46-59.

23. Amicus American College for Advancement in Medicine (ACAM) cites the FTC's investigation into its activities as evidence that the FTC has wrongly asserted

jurisdiction over a purely eleemosynary medical society (Br. 1, 3). (The IRS master list of exempt organizations reveals that ACAM is a Section 501(c)(6) business league, not a Section 501(c)(3) charity.) On December 8, 1998, ACAM agreed to settle the FTC's charges that it made false and unsubstantiated advertising claims regarding EDTA chelation therapy for treating coronary artery disease; ACAM has agreed not to make any representation about the efficacy of such chelation therapy unless supported by competent and reliable evidence. See http://www.ftc.gov (copies of complaint and proposed settlement); see also Quackery: A $10 Billion Scandal: Hearing Before the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging, 98th Cong., 2d Sess. 96-98 (1984); United States v. Evers, 643 F.2d 1043, 1045-1046 (5th Cir. 1981).

24. As we have noted (pp. --, supra), the Commission concluded that petitioner's bans on price advertising were unlawful per se. The Commission pointed (Pet. App. 67a-69a) to substantial support in the case law for such per se treatment of advertising restrictions. Although we submit the Commission's use of the per se rule was appropriate, especially given its accumulation of experience with advertising restrictions (see id. at 71a-72a) , the Court need not reach that issue if it agrees with our submission that the Commission's analysis under the rule of reason was sufficient.

25. This Court's decision in Professional Engineers itself displayed the flexibility of the rule of reason. The Court held that the Society's ban on competitive bidding, while not "price fixing as such," "impede[d] the ordinary give and take of the market place," and "deprive[d] the customer of the ability to utilize and compare prices in selecting engineering services." 435 U.S. at 692-693 (internal quotation marks omitted). Under those circumstances, the Court ruled that "no elaborate industry analysis is required" to condemn the bidding ban under the rule of reason. Id. at 692. Moreover, the Court did so without a finding of market power. See id. at 681-682 (Society had membership of 69,000 of 325,000 registered professional engineers).

26. Arguments advanced by petitioner (Br. 27, 31) regarding the supposed need to confine "quick look" analysis to a "limited class of cases" are therefore based on a misconception of the Commission's ruling. In giving what it called a "quick look" to petitioner's restraints, the FTC did not engage in a separate category of antitrust analysis. Rather, it applied the rule of reason in the particular context of advertising restrictions, in which it has considerable expertise. That context permitted it to take into account the well-established, fundamental role of advertising in the proper functioning of a free-market economy. See pp. --, infra. Furthermore, consistent with the requirements of rule of reason analysis, the Commission considered the procompetitive justifications offered by petitioner in support of its restraints. See pp. --, infra.

27. Petitioner and amicus NCAA elsewhere appear to suggest that virtually any proffer of an ostensible procompetitive effect has the effect of necessitating a "full rule of reason analysis." Pet. Br. 37-38; NCAA Br. 16-17. The cases on which they rely, however, dealt with restrictions far afield from those in the present case, which involves the well-understood effects of a suppression of advertising of discounts and comparative price and quality claims. In United States v. Brown University, 5 F.3d 658 (3d Cir. 1993), the court was presented with novel arguments about the distribution of financial aid to students based on need that had not been previously addressed, and concluded that such arguments required extensive analysis. See id. at 669, 678-679. Vogel v. American Soc'y of Appraisers, 744 F.2d 598 (7th Cir. 1984), was an antitrust challenge to an ethical rule against a percentage-based pricing system for appraisals. The court emphasized that the ethical rule appeared to promote, rather than restrict, competition, because "[t]he apparent tendency" of the outlawed pricing system was "to

raise, not lower, the absolute level of appraisal fees." Id. at 602. Neither case suggests that an exhaustive market analysis is required whenever a defendant asserts a procompetitive theory.

28. Petitioner nonetheless speculates (Br. 36) that its member dentists, even if effectively (and unreasonably) precluded from advertising across-the-board discounts by its restrictions, should be able to comply with a requirement that advertised discounts on individual services be accompanied by a litany of disclosures. The Commission, however, exercising its expertise in the effects of advertising claims, found found that "the truthful offer of a discount from the price ordinarily charged by a dentist for services is not deceptive." Pet. App. 85a. It also noted that petitioner's restrictions went far beyond any restriction that would be necessary to prevent dentists from engaging in "chicanery" such as selectively inflating the price from which the discount is computed. Ibid.

29. Studies show that anxiety about discomfort in dental procedures is one of the principal reasons that consumers do not obtain needed dental services. See J. Elter, et al., Assessing Dental Anxiety, Dental Care Use and Oral Status in Older Adults, 128 J. Amer. Dent. Ass'n 591 (May 1997); N. Corah, et al., The Dentist-Patient Relationship: Perceived Dentist Behaviors That Reduce Patient Anxiety and Increase Satisfaction, 116 J. Amer. Dent. Ass'n 73 (Jan. 1988); N. Corah, et al., Dentists' Management of Patients' Fear and Anxiety, 110 J. Amer. Dent. Ass'n 734 (May 1985). Along with allaying concerns about pain, lower fees and a "friendlier and more caring" dentist are three of the four top factors that adults reported would make them more likely to visit a dentist. See Influences on Dental Visits, 29 ADA News 4 (Nov. 2, 1998) (citing ADA Survey Center, 1997 Survey of Consumer Attitudes and Behaviors Regarding Dental Issues).

30. Petitioner's citation to an article written by FTC Chairman Pitofsky nearly two decades ago does not advance its argument. That article emphasized the risk to consumers and the competitive process from overregulation of discount price claims "because of the special proconsumer and procompetitive effects of aggressive price competition." R. Pitofsky, Advertising Regulation and the Consumer Movement, in Issues in Advertising: The Economics of Persuasion 27, 42 (D. Tuerck ed. 1978). Thus, while Chairman Pitofsky stated that a claim of "10 percent off" may be ambiguous and therefore ignored by consumers, he also stressed that regulation of such claims "entails considerable social and economic costs," id. at 39, a proposition entirely consistent with this Court's cases on advertising restrictions.

31. Restraints on advertising, such as those in the present case, can increase a consumer's search costs in finding a dentist. The FTC has observed that agreements that increase consumer search costs are harmful to consumer welfare and form a proper concern of the antitrust laws. See Detroit Auto Dealers Ass'n, 111 F.T.C. 417, 495-496 (1989), aff'd in part and remanded, 955 F.2d 457 (6th Cir.), cert. denied, 506 U.S. 973 (1992). Furthermore, as the court of appeals recognized (Pet. App. 19a-20a), the concerted withholding of information that is of value to consumers may be viewed as a form of restriction on output. While the advertising information at issue here is not the principal output of dentists, neither were the x-rays at issue in IFD. In both cases, the information was used by consumers (or insurers acting on their behalf) to make assessments regarding the purchase of dental services. Cf. IFD, 476 U.S. at 461-462.

32. Petitioner maintains (Br. 30-31, 33) that its disclosure requirements require more extensive analysis because they are not "facially" anticompetitive (since their literal terms prohibit only false and deceptive advertising). The FTC, however, did not base its analysis on the language of Section 10 of petitioner's Code of Ethics, but rather on the actual enforcement of the advertising restrictions. As Professor Areeda noted, the

phrase "facially unreasonable" as used in antitrust cases is "reminiscent of facially unconstitutional statutes" and thus "may seem to focus attention on the words on the face of an agreement." 7 P. Areeda, Antitrust Law ¶ 1508, at 405 (1986). In fact, as he pointed out, the phrase properly refers to a restraint about which a judgment can be made based on plausible arguments about anticompetitive effects without detailed proof. Ibid. Thus, the court of appeals correctly ruled that petitioner's advertising restrictions were "facially anticompetitive" (Pet. App. 24a), even though its understanding of the nature of petitioner's restraints required an examination of its conduct in enforcing those restraints, and not merely the language of its Code of Ethics.

33. Compare IFD, where the Court affirmed the FTC's finding of an unlawful restraint of trade where 67% of the dentists in one area participated in the restraint. 476 U.S. at 451. The 75% figure in this case may actually understate petitioner's influence because its advertising strictures apply as well to affiliated employers, employees, and referral services. Pet. App. 81a.

34. The ALJ found otherwise, Pet. App. 262a, but the Commission rejected that finding as predicated on an error of law, see id. at 83a. Contrary to the view of the ALJ, market power does not require a showing of "insurmountable" barriers to entry. Cf. U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines, §§ 3.1-3.4, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1997). Furthermore, although petitioner relies heavily on the rejected findings of the ALJ, the courts review the findings of the Commission, not the ALJ, and sustain the Commission's findings if they are supported by substantial evidence. See Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431, 1437 (9th Cir.), cert. denied, 479 U.S. 828 (1986); see generally FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 364 (1955); Universal Camera Corp. v. NLRB, 340 U.S. 474, 493 (1951).

CERTIFICATE OF SERVICE

I, Stephen Morrissey, hereby certify that on May 14, 2002, I caused a copy of the **RESPONDENTS' POST-TRIAL REPLY BRIEF** to be served upon the following persons by Federal Express:

Geoffrey M. Green / John Roberti
Cary Zuk / Richard Dagen
Federal Trade Commission
6th & Pennsylvania Ave., N.W.
Washington , D.C. 20580
Complaint Counsel

Hon. James P. Timony
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington , D.C. 20580

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington , D.C. 20580

STEPHEN MORRISSEY

THIS TYPESCRIPT VERSION
MAY NOT BE IDENTICAL TO THE PRINTED BRIEF

97-1625

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

CALIFORNIA DENTAL ASSOCIATION, PETITIONER

v.

FEDERAL TRADE COMMISSION

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

BRIEF FOR THE RESPONDENT

DEBRA A. VALENTINE
General Counsel

JOHN F. DALY
Assistant General Counsel

JOANNE L. LEVINE
ELIZABETH R. HILDER
Attorneys
Federal Trade Commission
Washington, D.C. 20580

SETH P. WAXMAN
Solicitor General

JOEL I. KLEIN
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner is subject to the jurisdiction of the Federal Trade Commission as an association "organized to carry on business for * * * [the] profit * * * of its members," within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

2. Whether the Federal Trade Commission conducted a sufficient analysis to determine, under the antitrust rule of reason, that petitioner's restrictions on its members' advertising of prices, discounts, and quality violated Section 5 of the FTC Act, 15 U.S.C. 45.

STATEMENT

1. This case involves advertising restrictions imposed as a condition of membership by petitioner California Dental Association (CDA). Petitioner's members include 75% of the dentists actively practicing in California. Pet. App. 161a-162a. Petitioner has 32 local component dental societies, and membership in a local association is mandatory for membership in petitioner. Id. at 162a. In addition, membership in petitioner is mandatory for California dentists who wish to be members of the American Dental Association. Id. at 46a. Although membership in petitioner is legally voluntary and is not required for a license to practice dentistry, membership is highly valued by California dentists for its "real economic benefit," and "no one gives up membership" in petitioner to avoid its restrictions on advertising. Id. at 84a; see also id. at 232a-234a (detailing importance of CDA membership to dentists).

Petitioner is organized under California law as a nonprofit corporation. Pet. App. 161a. It is exempt from federal income tax under 26 U.S.C. 501 (c)(6), the tax category for "[b]usiness leagues, chambers of commerce, real-estate boards, boards of trade, [and] professional football leagues." It does not qualify for exemption as a charitable institution under Section 501(c)(3). See Pet. App. 50a-51a, 174a.

Although petitioner's stated purposes include improvement of public health, it also describes itself as "represent[ing] dentists in all matters that affect the profession" and "offer[ing] far more services to its members than any other state [dental] association." Pet. App. 51a.(1)

Petitioner offers broad assistance to its members to increase their revenues and decrease their costs. As its promotional literature describes (J.A. 20-23), petitioner provides its members with services such as job placement, recruitment of dental assistants, review of proposed contracts with third-party payers (vaunted as affording a substantial savings over hiring a private attorney), and financial planning seminars. Pet. App. 51a-52a, 172a-188a. Through a for-profit subsidiary, petitioner offers low-cost malpractice insurance, which saves members at least $1,000 annually over other insurance plans; this insurance is available in California only to CDA members. Id. at 166a, 173a, 184a-185a. Other for-profit subsidiaries offer, exclusively to members, financing for dental equipment, financing assistance for patients, and a home mortgage program. Id. at 166a-168a, 185a-186a; see also id. at 181a-183a (seminars, training sessions, and publications offered to members at steeply discounted rates).

Petitioner engages in lobbying and litigation concerning laws and regulations that affect dentists' businesses; its lobbying successes "mean money" to members, or so it claims, and have saved members thousands of dollars each year. Pet. App. 176a, 177a-179a; see J.A. 20. [2] Petitioner also conducts marketing and public relations initiatives to enhance the image of its members; these activities have brought members, on average, an additional $6,000 of annual income from new patients, equaling a "20-to-1 return on investment." Pet. App. 179a-180a. In sum, petitioner estimates that the potential value to members who take advantage of a selection of its services is $22,000 to $65,000, and that the value to members of its benefits far exceeds their membership dues. Id. at 175a.

2. Section 10 of petitioner's Code of Ethics, on its face, prohibits advertising that is "false or misleading in any material respect." Pet. App. 9a; J.A. 33. The record in this case demonstrates, however, that petitioner has broadly interpreted and enforced that prohibition in a way that effectively prohibits (a) most advertising about relative prices, (b) all advertising of across-the-board price discounts, and (c) virtually all advertising claims, whether relative or absolute, about the quality of a member's dentistry or service. Pet. App. 55a. These prohibitions cover even advertising claims that "are not false or misleading in a material respect." Id. at 260a; see id. at 56a-57a n.6.

Thus, petitioner has prohibited its members from using terms such as "low," "reasonable," or "affordable" in their advertising, whether or not they truthfully describe the dentist's fees, Pet. App. 65a-66a, 198a-199a, under the reasoning that members' statements about their fees must be "exact" and must "fully and specifically disclos[e] all variables and other relevant factors" to avoid being branded misleading, id. at 9a-10a, 64a;

J.A. 34-35. Under similar reasoning, petitioner has disallowed such phrases as "affordable, quality dental care," "making teeth cleaning * * * inexpensive," Pet. App. 65a, "affordable family dentistry," id. at 199a, "reasonable fees quoted in advance," id. at 227a, and "Fees that Fit a Family Budget," id. at 237a.

As for advertising about discounted fees, petitioner has required that such advertising contain at least five disclosures: (1) the dollar amount of the nondiscounted fee; (2) either the dollar amount of the discounted fee or the percentage of the discount for the specific service; (3) the length of time, if any, that the discount will be offered; (4) a list of verifiable fees; and (5) specific groups qualifying for the discount and any other terms or conditions for the discount. Pet. App. 64a-65a, 200a. The practical effect of those requirements is "nearly prohibitive" of advertising of any broadly applicable discounts. Id. at 201a.(3) Indeed, petitioner has disapproved a broad array of discounting offers because they were not accompanied by the required disclosures.(4)

Finally, petitioner has made clear that virtually all advertising about quality of services (including the word "quality" itself) is deemed "likely to be false or misleading" because it is not "susceptible to measurement or verification." Pet. App. 74a-75a, 202a-203a; see J.A. 35. Petitioner has also disapproved any advertising that, in its view, implies that a dentist is superior to other dentists. Pet. App. 206a. Such quality claims have been prohibited without regard to whether they are in fact false or misleading. Id. at 203a-204a, 207a, 209a. Petitioner and its components have therefore required that members and would-be members eliminate any advertising phrases that refer to the quality of dental care that patients will receive, or indeed to the quality of service ancillary to the actual dentistry, such as punctuality.(5)

Petitioner enforces its advertising restrictions by requiring applicants for membership to submit copies of all of their own advertising, plus advertisements by their employers and referral services, to the ethics committee of their local dental society. Pet. App. 193a, 237a-239a. Petitioner's local components also publish notices in their newsletters soliciting members to report possible Ethics Code violations by the applicant. Id. at 194a. Applicants are denied membership in petitioner if they do not agree to withdraw or revise advertisements that petitioner deems objectionable. Id. at 195a-198a. Petitioner also urges its local components to review local Yellow Pages directories for nonconforming advertisements by current members. Id. at 194a, 234a-235a. Members who do not agree to revise offending advertisements may be subject to a hearing before petitioner's Judicial Council, and thereafter to censure, suspension, or expulsion. Id. at 11a; see id. at 56a n.6.

The record in this case compiles actions taken by petitioner and its local societies against nearly 400 dentists, in which petitioner or a component disapproved particular advertising claims by members and applicants for membership, without regard to the truth of such claims. Pet. App. 56a-57a n.6, 89a-90a n.25, 199a-212a, 214a-218a, 235a.(6) Petitioner's efforts to suppress truthful and nondeceptive advertising have been successful; when forced to choose between a challenged advertisement and membership in petitioner, dentists almost always give up the advertisement. Id. at 80a, 235a-237a. Petitioner's restrictions have also had a substantial deterrent effect. Some local societies reported that 90-100% of their members' advertisements complied with petitioner's restraints. Id. at 234a-235a.

3. a. On July 9, 1993, the Federal Trade Commission (FTC or Commission) issued an administrative complaint (J.A. 5-16) charging that petitioner had restrained competition among dentists in California by restricting truthful, nondeceptive advertising regarding price and quality of dental services. The complaint alleged that these restraints were "unfair methods of competition" in violation of Section 5 of the Federal Trade Commission Act (FTC Act or Act), 15 U.S.C. 45. After discovery and trial, an Administrative Law Judge (ALJ) concluded that petitioner had violated Section 5. Pet. App. 159a-265a.(7)

The ALJ determined, upon extensive factual findings (Pet. App. 161a-247a), that petitioner had "successfully withheld from the public information about prices, discounts, quality, superiority of service, guarantees, and the use of procedures to allay patient anxiety." Id. at 259a-260a (record citations omitted). He also found that petitioner's "illegal[] conspir[acy]" had "injured those consumers who rely on advertising to choose dentists." Id. at 261a-263a.(8) The ALJ did rule that petitioner lacked "market power," id. at 261a, but that conclusion was based on the legal premise (later rejected by the Commission, id. at 83a) that such power exists only in the presence of "insurmountable" barriers to entry, id. at 262a. And the ALJ rejected petitioner's arguments of "procompetitive" effects flowing from its restrictions. He found that petitioner's ethics code, as actually enforced, "unjustifiably banned whole categories of advertisements which are not false or misleading in a material respect," and reflected "a hostility toward advertising by its members even if it is truthful and nondeceptive." Id. at 259a-260a.

b. On plenary review of the ALJ's initial decision (see 16 C.F.R. 3.54(a)-(b)), the Commission affirmed the ALJ's finding of a violation of Section 5. Pet. App. 43a-158a. The Commission first found (id. at 47a-52a) that petitioner was subject to the FTC Act as a corporation "organized to carry on business for its own profit or that of its members," within the

meaning of Section 4 of the Act, 15 U.S.C. 44. Noting that it had previously rejected the argument that the term "profit" in this context should be limited to "direct gains distributed to * * * members," the Commission held that it had jurisdiction in this case because a substantial portion of petitioner's activities consists of practice management, marketing, public relations, lobbying, and other business-related services that confer "pecuniary benefits" on its members. Id. at 49a, 51a-52a.

On the merits, the Commission concluded that petitioner's advertising restrictions, both price-related and quality-related, constituted unlawful restraints of trade. Pet. App. 58a-92a. The Commission found, upon its review of the record, that "advertising is important to consumers of dental services and plays a significant role in the market for dental services." Id. at 60a; see id. at 76a-77a. As for the price advertising restrictions specifically, the Commission upheld the ALJ's findings that petitioner had barred its members from advertising "low" or "reasonable" fees, and had effectively precluded truthful across-the-board discount offers. Id. at 63a-67a. The Commission also found that these restrictions on price advertising "constitute[d] a naked attempt to eliminate price competition," accomplished through the "indirect means of suppressing advertising" about prices. Ibid. Based on that finding, the Commission held that petitioner's price-related restraints were unlawful per se. Ibid.; see id. at 60a-63a, 67a-73a.

The Commission also applied the antitrust rule of reason to all the advertising restrictions at issue in this case. Pet. App. 73a-92a. After observing that this Court "has made clear that the rule of reason contemplates a flexible enquiry, examining a challenged restraint in the detail necessary to understand its competitive effect," id. at 74a (citing NCAA v. Board of Regents, 468 U.S. 85, 103-110 (1984)), the Commission found (ibid.) that application in this case of the rule of reason could be "simple and short," because "[t]he anticompetitive effects of CDA's advertising restrictions are sufficiently clear, and the claimed efficiencies sufficiently tenuous, that a detailed analysis of market power is unnecessary to reaching a sound conclusion." But, the Commission added (ibid.), "in any event, CDA clearly had sufficient power to inflict competitive harm."

The Commission began its rule of reason analysis by assessing the anticompetitive effects of the restrictions. Pet. App. 74a-78a. Supplementing its earlier findings (under the per se rule analysis) of the effects of petitioner's restrictions on price advertising, id. at 73a-74a, the Commission found that petitioner had also proscribed a "vast" range of nonprice advertising, barring virtually all claims regarding quality, regardless of the truthfulness of such claims. Id. at 74a-76a. It found

"substantial evidence" that the challenged advertising restraints "prevented the dissemination of information important to consumers," regarding both price and nonprice aspects of the dental services offered. Id. at 76a-77a. And it found that the restraints "hamper dentists in their ability to attract patients," particularly dentists new to an area. Id. at 78a. The Commission therefore concluded that, because of the importance of advertising to consumers in choosing dentists (id. at 60a, 77a), petitioner's broad bans would "deprive consumers of information they value and of healthy competition for their patronage." Id. at 78a. Although it did not "quantify[] the increase in price or reduction in output occasioned by these restraints," the Commission found their "anticompetitive nature" to be "plain." Ibid.

The Commission also found that petitioner had the "power to cause harm to consumers" by inducing its members to withhold information. Pet. App. 80a. It had "little doubt" that petitioner had "the ability to police, and entice its members to adhere to, the restrictions on advertising." Ibid. Moreover, it found that "the services offered by licensed dentists have few close substitutes," that "the market for such services is a local one," and that petitioner's members command "more than a substantial share of these markets" -- 75% of practicing dentists statewide, and more than 90% in one region. Id. at 82a. Contrary to the ALJ's conclusion (id. at 261a), the Commission found that there are "significant barriers to entry" into those markets, id. at 82a-84a, even if they are not "insurmountable," id. at 83a. Accordingly, the Commission found that petitioner "possesses the necessary market power to impose the costs of its anticompetitive restrictions on California consumers of dental services." Id. at 84a.

Like the ALJ, the Commission rejected petitioner's contention that its restraints were either harmless or pro-competitive. Pet. App. 84a-89a. The Commission acknowledged that the prevention of false and misleading advertising is a "laudable purpose," but it concluded that "the record will not support the claim that CDA's actions [were] limited to advancing that goal." Id. at 84a. It found, rather, that petitioner's "broad categorical prohibitions" (id. at 87a) were enforced "without any enquiry as to how [prohibited claims] might be construed by consumers and whether, as construed, they are true of the particular practitioner making the claim" (id. at 86a). And it perceived "no convincing argument, let alone evidence" that "consumers of dental services have been, or are likely to be, harmed by the broad categories of advertising" that petitioner restricts. Id. at 89a.

The Commission therefore held that petitioner's advertising restrictions violated Section 5 of the FTC Act. Pet. App. 90a-91a. The Commission's cease-and-desist order prohibits those restrictions (id. at 27a-31a), but

expressly provides that petitioner may "adopt[] * * * and enforc[e] reasonable ethical guidelines governing the conduct of its members with respect to representations that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act." Id. at 30a.

4. The court of appeals affirmed. Pet. App. 1a-24a. As to jurisdiction, the court agreed with the FTC and with other courts that Congress "did not intend to provide a blanket exclusion for nonprofit corporations" from the reach of the FTC Act, and it approved the Commission's approach of "looking at whether the organization provides tangible, pecuniary benefits to its members" in order to determine whether it is a "corporation" subject to the Commission's jurisdiction. Id. at 15a-16a. Under that standard, the court was "confident that the facts of this case support the FTC's jurisdiction." Id. at 16a.

As to the merits, although the court acknowledged "some support" in case law for the FTC's per se analysis of petitioner's restrictions on price advertising, it concluded that a rule of reason analysis is more appropriate for all aspects of petitioner's advertising restraints. Pet. App. 17a-18a. It then observed approvingly that the FTC had applied "an abbreviated, or 'quick look' rule of reason analysis" in this case because petitioner's restraints "are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry." Id. at 18a (citing NCAA, supra).

The court first noted that "[r]estrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for dentists to compete on the basis of price." Pet. App. 19a. On the other hand, the court found no reason to give petitioner's proffered justifications for its disclosures more than a "quick look," because, "in practice," under petitioner's disclosure requirements, it was "simply infeasible to disclose all of the information that is required," and there was "no evidence that [petitioner's] rule has in fact led to increased disclosure and transparency of dental pricing." Ibid.

Second, the court concluded that petitioner's restrictions on non-price advertising restricted the supply of information available to consumers, thereby "prevent[ing] dentists from fully describing the package of services they offer, and thus limit[ing] their ability to compete." Pet. App. 19a-20a. The court further suggested that the restrictions "are in effect a form of output limitation, as they restrict the supply of information about individual dentists' services." Ibid. It rejected petitioner's contention that its restrictions were justified because of the potential for deception, for even that potential "does not justify banning all quality claims without regard to whether they are, in fact, false or

misleading." Id. at 20a.

Finally, the court rejected petitioner's contentions that the FTC's findings were not supported by substantial evidence. Pet. App. 20a-24a. In particular, the court ruled that substantial evidence supported the FTC's finding that petitioner had banned categories of advertising without regard to whether they were false or deceptive. Id. at 21a-23a. It also upheld the FTC's finding that petitioner "possesses enough market power to harm competition" through its restraints on advertising. Id. at 24a. The court accordingly affirmed the Commission's opinion and enforced its order that petitioner cease and desist from restricting "truthful and non-deceptive advertisements." Ibid.

SUMMARY OF ARGUMENT

I. A. The Federal Trade Commission properly exercised jurisdiction over petitioner, even though it is formally a nonprofit corporation, because a substantial portion of its activities engenders economic benefits for its profit-seeking members. Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, which sets forth the entities subject to the Commission's jurisdiction, reaches not only conventional business enterprises but also any association "organized to carry on business for its own profit or that of its members." The FTC has consistently interpreted that statute, adhering to ordinary definitions of the term "profit," to reach trade associations that engage in activities for the economic benefit of their profit-making members, even where the association itself is organized as a nonprofit entity and the member benefits take forms other than cash disbursements. The legislative history of the FTC Act evinces Congress's intent to authorize FTC jurisdiction over such associations, and the FTC and the courts have long acted on the understanding that the Act does in fact reach such associations.

B. There is no basis in the statute for an implied, blanket exemption of associations representing profit-making professionals. Petitioner's arguments based on Congress's ostensible lack of attention to professionals when it enacted the FTC Act fail for the same reasons the Court rejected an implied exemption of professionals from the antitrust laws in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Since that ruling, the FTC has enforced the Act to protect the public from anticompetitive and deceptive practices in which professional associations have engaged.

C. The FTC's interpretation of the statute's reach -- which is based on the provision of substantial economic benefits to an association's profit-seeking members -- is reasonable and merits judicial deference. The record amply supports the FTC's application of that standard to

petitioner, which generates significant economic benefits for its members through its provision of services to its members and its lobbying, public relations, and marketing activities designed to increase their profitability.

II. A. The FTC engaged in a proper and sufficient analysis of petitioner's advertising restraints under the antitrust rule of reason. This Court has repeatedly emphasized the flexibility of the rule of reason; it has instructed that the rule's application may be tailored to the circumstances of particular cases, and that elaborate industry analysis is not necessary in all cases to condemn a restraint of trade as unreasonable. The Commission carefully considered here all aspects of a rule of reason analysis and concluded, based on a substantial record, that petitioner's advertising restrictions harmed consumers.

B. The Commission found, based on a substantial evidentiary record, that petitioner's advertising restrictions deprive consumers of information they value and of healthy competition for their patronage. Petitioner's restrictions, as enforced, proscribe a vast range of truthful advertising claims regarding price and quality. The Commission's findings regarding the actual effects of the restrictions belie petitioner's assertion that its disclosure requirements would prompt dentists to provide more information to consumers. Recognizing the indispensable role of advertising in a free enterprise system, the Commission found that the price and quality advertising suppressed by petitioner would be important to consumers in choosing dental services. Although petitioner disparages the value of the information at issue, this Court made clear in FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986), that a private party is not entitled to preempt the working of the market by deciding for itself what information will be made available to consumers, and that the concerted withholding of information valued by consumers may be condemned even absent proof that it resulted in higher prices.

C. The Commission carefully considered petitioner's proffered "procompetitive" justifications for its restrictions, and properly found them lacking. The Commission found that petitioner's disclosure requirements do not, in fact, result in more information to consumers, and found no basis for petitioner's contention that a ban on quality claims was necessary to avoid deception. Unlike the carefully tailored state restrictions that this Court has accepted in the context of First Amendment challenges, petitioner banned broad categories of advertising without regard to whether the banned claims were truthful or nondeceptive. The Commission properly rejected such a blanket restriction on information that consumers desire as an unreasonable restraint of trade.

D. Given the Commission's findings concerning the actual anticompetitive

effects of petitioner's restraint, it was not required to engage in a further analysis of market power. It nevertheless did so, concluding first that petitioner has the ability to require members to adhere to its advertising restrictions (due to the high value placed on membership), and second that petitioner has the power to inflict the anticompetitive effects of those restrictions on California consumers. It also pointed to the substantial percentage of California dentists who comply with petitioner's restrictions, as well as substantial barriers to sufficient entry of new dentists. Those findings were sufficient for this case; the Commission was not required to engage in elaborate industry analysis that may be required in other contexts, such as merger cases.

ARGUMENT

I. THE COMMISSION PROPERLY EXERCISED JURISDICTION OVER PETITIONER BECAUSE ITS ACTIVITIES, IN SUBSTANTIAL PART, PROVIDE PECUNIARY BENEFITS FOR ITS MEMBERS

Congress has empowered the FTC to prevent "persons, partnerships, or corporations" from engaging in unfair methods of competition and unfair or deceptive acts and practices in or affecting commerce. 15 U.S.C. 45 (a)(2). The FTC Act defines "corporation" broadly, in Section 4, to include not only companies with capital stock, but also "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, * * * which is organized to carry on business for its own profit or that of its members." 15 U.S.C. 44. In this case, the FTC, applying its longstanding administrative interpretation of Section 4, properly concluded that petitioner is subject to the FTC Act's reach as an association "organized to carry on business for [the] profit * * * of its members" because a substantial part of its activities "engender a pecuniary benefit" for its profit-seeking members. Pet. App. 49a, 51a-52a.

A. The Text, Legislative History, and Enforcement History of the FTC Act Support the Commission's Exercise of Jurisdiction Over Nonprofit Associations That Engender Pecuniary Benefits For Their Members

The text of the FTC Act shows a congressional purpose to grant the FTC broad authority over companies and associations. The language of Section 4 is expansive. Section 4 extends the ordinary meaning of "corporation" to include "any" association "organized to carry on business for its own profit or that of its members," even if unincorporated and lacking such hallmarks of a profit-making enterprise as "shares of capital or capital stock or certificates of interest." As long

as the association carries on business "for [the] profit * * * of its members," it is subject to the Act's prohibition against unfair methods of competition. 15 U.S.C. 44.

The pivotal question in this case is whether an association may be said to work for the "profit" of its members, even if it does not distribute earnings to them. Petitioner argues (Br. 19-21) that Section 4 uses the term "profit" in the limited sense of the "excess of revenues over investment or expenses." Thus, it contends, to be within the reach of the FTC Act, an association must itself earn and pay such "profits" (i.e., the excess of its own revenues over expenses) to its members.

Even if the Act did use the term "profit" in the limited sense of the excess of revenues over expenses, that would not advance petitioner's jurisdictional argument. Petitioner's activities are intended to, and do, increase the revenues and decrease the expenses of its members, who are "independent competing entrepreneurs" (Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 357 (1982)). Petitioner's activities help its members achieve profitability. Thus, petitioner carries on business for its members' "profit," even if it does not distribute its own earnings to them. Nothing in logic or the text of Section 4 suggests that the only way an organization may carry on business to help its members achieve profits is to distribute its own earnings to the members.

Moreover, "profit" is, and long has been, commonly used to refer more broadly to economic benefit. When the FTC Act was passed in 1914, a standard dictionary defined "profit" to include "[a]ccession of good; valuable results; useful consequences; avail; gain; as, an office of profit." Webster's International Dictionary 1713 (def. 2) (1913); see also 2 S. Rapalje & R. Lawrence, A Dictionary of American and English Law 1020 (1883) ("In its primary sense, profit signifies advantage or gain in money or in money's worth."). Modern definitions are similar. See Webster's Third New International Dictionary 1811 (def. 2) (1986). And Congress has frequently used "profit" and "for profit" in statutes to refer to pecuniary benefit generally, rather than in the limited sense of the excess of earnings over expenses and investment.[9] The language of Section 4 thus comfortably reaches associations that work for their profit-seeking members' economic benefit, even if they do not distribute earnings to the members.

Petitioner submits (Br. 21 n.5) that any "genuine nonprofit entity" should be outside the reach of the Act. A "genuine nonprofit entity," however, may well conduct activities that are intended to be, and are, for the economic benefit of its members. Trade associations, for example, frequently work to advance their members' economic interests and provide them with benefits of substantial value, even though such

associations are genuinely nonprofit in that their revenues are not distributed to their members, and even though such entities (like petitioner) may be entitled to exemption from federal income tax under 26 U.S.C. 501(c)(6).[10]

The legislative history of the FTC Act demonstrates, moreover, that Congress considered the coverage of nonprofit associations (especially, nonprofit associations of entrepreneurs) and decided to include such entities within the Act's reach. When Congress was considering legislation to replace the Bureau of Corporations with the Federal Trade Commission, both the House and the Senate initially passed bills that would have defined "corporation" to refer only to incorporated, joint-stock, and share-capital companies organized to carry on business for profit. See H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 11, 14 (1914). Two days after the Senate passed its version of the legislation, Bureau of Corporations Commissioner Davies wrote to Senator Newlands, the bill's sponsor and a member of the Conference Committee, expressing concern about its definition of "corporation." Davies explained that the bill would prevent the new Commission from acting against trade associations that "purport to be organized not for profit," and that, although "[a]s to some of the things done by these associations, no question as to their propriety can be raised," such associations nonetheless "furnish convenient vehicles for common understandings looking to the limitation of output and the fixing of prices contrary to the law."[11] The Conference Committee subsequently revised the definition of "corporation" in Section 4 specifically to include associations lacking capital stock that are organized to carry on business for their own profit or that of their members. Id. at 3. That alteration of the statutory text shows that Congress intended the Act to reach nonprofit entities, including trade associations, if they work to advance their members' economic interests.

The FTC and the courts have consistently read the FTC Act in conformity with Congress's intent to cover trade associations advancing the economic interests of their members. From its earliest days, the FTC has exercised its jurisdiction over anticompetitive practices by nonprofit associations whose activities provided substantial economic benefits to their for-profit members' businesses, even though the associations did not themselves engage in manufacturing or retailing, and did not distribute earnings to members.[12] The courts soon confirmed that "[t]he language of the act affords no support for the thought that individuals, partnerships, and corporations can escape restraint, under the act, from combining in the use of unfair methods of competition, merely because they employ as a medium therefor an unincorporated voluntary association, without capital and not itself engaged in commercial business." National Harness Mfrs. Ass'n v. FTC, 268 F. 705,

709 (6th Cir. 1920); see also Chamber of Commerce v. FTC, 13 F.2d 673, 684 (8th Cir. 1926). Following these decisive early rulings, the FTC and reviewing courts (including this Court) have consistently acted on the understanding that nonprofit trade associations are within the FTC's jurisdiction.(13) More recently, when the FTC took action against a nonprofit association for misrepresenting that no scientific evidence linked cholesterol in eggs to increased risk of cardiovascular disease, the Seventh Circuit held that the group, which was "formed to promote the general interests of the egg industry," came within the definition of "corporation" in Section 4 because it "was organized for the profit of the egg industry, even though it pursues that profit indirectly." FTC v. National Comm'n on Egg Nutrition, 517 F.2d 485, 487-488 (1975) (internal quotation marks omitted), cert. denied, 426 U.S. 919 (1976). (14)

Despite that lengthy history of FTC enforcement actions (upheld by the courts) against nonprofit organizations, petitioner argues (Br. 24-25) that Congress's failure to act on a proposed amendment to the FTC Act in 1977 demonstrates that Congress did not intend, in 1914, to bring such organizations within the reach of the Act. This Court has frequently characterized such reliance on congressional inaction as "a particularly dangerous ground on which to rest an interpretation of a prior statute." Central Bank v. First Interstate Bank, 511 U.S. 164, 187 (1994); see FTC v. Dean Foods Co., 384 U.S. 597, 608-611 (1966). Congress's failure to take action on the 1977 proposal in fact reveals little about the matter at hand, because that proposal would have given the FTC jurisdiction even over wholly charitable institutions; the Act, as amended, would not have been limited to nonprofit institutions that advance their members' pecuniary interests.(15) Congress may have declined to amend the Act because it was satisfied with the existing state of the case law, which (then as now) allowed the FTC to exercise jurisdiction over nonprofit associations such as petitioner that advance their members' pecuniary interests (even if they do not distribute earnings to members), but not over wholly charitable institutions.(16) Accordingly, no reliable guidance can be gleaned from Congress's failure to enact legislation in 1977. Cf. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 116-120 (1980); United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1968).

B. There Is No Basis In The Statute For A "Professional Association" Exemption

Petitioner argues (Br. 16) that, even if some nonprofit entities advancing members' economic interests (such as associations of automobile dealers or retail grocers) fall within the reach of the FTC Act, professional

associations like itself nonetheless do not. The text of the statute, however, will not support any implied, blanket "professional association" exception. A voluntary nonprofit association of professionals may be organized (and legitimately so) to advance its members' economic interests even if it also engages in public service activities and monitoring of its members' ethics. Many associations of professionals (as well as other entrepreneurs) engage in both kinds of activities. See, e.g., National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 682 (1978). As the Court explained in Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 (1975), it is "no disparagement of * * * a profession to acknowledge that it has [a] business aspect." Dentists no less than industrialists may come together in a voluntary nonprofit association to advance their economic interests as a group. It is also difficult to see how any clear line could be drawn between classes of "professionals" and "non-professionals" for the purpose of defining the FTC's jurisdiction.

Petitioner suggests (Br. 24) that Congress must have intended to exclude professional associations from the FTC Act's reach because the professions were not regarded as subject to the antitrust laws when the Act was passed. This Court in Goldfarb rejected the similar argument that the business activities of "learned professions" were beyond the Sherman Act's reach because such professions were not regarded as "trade or commerce" when that Act was enacted. 421 U.S. at 787-788. Given the broad language of coverage used in Section 4 of the FTC Act, its reach cannot be frozen by assumptions in 1914 any more than the Sherman Act has been confined by assumptions extant in 1890. And whether or not Congress contemplated at its enactment that the FTC Act (or the Sherman Act) would be used against organizations of professionals such as dentists and lawyers, this Court "frequently has observed that a statute is not to be confined to the particular applications contemplated by the legislators." Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980) (internal quotation marks, brackets, and ellipsis omitted).

Since this Court made clear in Goldfarb that combinations of professionals in restraint of trade are indeed subject to the antitrust laws, the FTC has consistently acted to protect the public from anticompetitive practices of professional associations. It has brought enforcement actions against organizations that were fixing or stabilizing prices,[17] thwarting cost containment programs,[18] and blocking the development of health maintenance organizations.[19] It has also acted against deceptive advertising and promotion by professional associations, such as misrepresentation of their members' expertise.[20] Petitioner's submission that such organizations are exempt from the FTC Act would deprive the public of the important consumer protection provided by Section 5 against such unfair competition and deceptive

practices.[21]

C. The Commission's Construction Of Its Jurisdiction Under The FTC Act Is Entitled To Deference, And Its Application Of That Construction In This Case Was Proper

For the reasons we have stated, the text of the FTC Act does not support a construction exempting all nonprofit (or professional) associations. At a minimum, the text does not compel such a construction. Since the word "profit" is capable of the construction that the FTC has placed on it - encompassing the situation in which a nonprofit organization works to advance its members' economic interests, even if it does not distribute earnings to them - that construction is entitled to deference. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-844 (1984); Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 380-382 (1988) (Scalia, J., concurring) (Chevron deference applicable to agency's interpretation of its own statutory authority or jurisdiction); see, e.g., NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 89 (1995) (deferring to NLRB's interpretation of who is "employee" covered by National Labor Relations Act). Deference is particularly appropriate because the FTC has consistently acted on the view that Section 5 reaches such nonprofit associations since shortly after the FTC Act was passed. See p. --, supra; Zenith Radio Corp. v. United States, 437 U.S. 443, 457-458 (1978).

It bears emphasis that the Commission does not read the FTC Act as reaching all nonprofit associations but (consistent with the Act's requirement of "profit") only those organizations "whose activities engender a pecuniary benefit to [their] members if [those] activit[ies are] a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity." Pet. App. 49a (quoting American Med. Ass'n, 94 F.T.C. 701, 983 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982) (AMA));[22] see also College Football Ass'n, 117 F.T.C. 971, 1000-1008 (1994) (FTC's determination that it lacked jurisdiction over nonprofit organization engaged in commercial activity for its members' benefit because its members were not profit-seeking). There is no basis, therefore, for the suggestion that the FTC's reading of the Act will expand its jurisdiction beyond its proper reach, to the realm of eleemosynary institutions.[23] Rather, the Commission has sensibly read the Act as permitting it to intervene when a nonprofit entity advances its members' economic interests in the commercial world.

Petitioner's argument (Br. 19) that it falls outside the statute's reach because its "main purpose" is to promote dental health lacks textual support. The statute applies by its terms to entities that conduct

business for the profit of their members, and makes no exception for ones that also conduct activities for the benefit of the public. Furthermore, drawing a jurisdictional line based on an association's "primary" purpose would create serious difficulties as to the proper classification of an organization's activities (particularly those with both public and private benefits) as well as the weights to be assigned to them (e.g., weighing by amount of expenditure or by degree of pecuniary benefit conferred). Such a line could also allow an association to evade jurisdiction through creative accounting classifications of its expenditures. The FTC was therefore justified in construing the Act's reach to turn on the existence of a substantial pecuniary benefit to an organization's members, rather than on the nature of its primary activities.

The record also amply supports the FTC's application of that standard in this case. Given petitioner's emphasis on the economic benefits that it provides to its members (see pp. ---, supra), the services that it offers in competition with for-profit businesses (including training programs, job placement, legal services, and low-cost insurance through its for-profit subsidiaries) (see p. ---, supra; J.A. 20-23), and its lobbying on behalf of its members' pocketbook issues (ibid.), there is substantial evidence to support the FTC's conclusion that petitioner provides its members with substantial "pecuniary benefits." Accordingly, the FTC properly concluded that petitioner is subject to the Act.

II. THE COMMISSION CORRECTLY CONCLUDED THAT PETITIONER'S ADVERTISING RESTRICTIONS CONSTITUTE AN UNREASONABLE RESTRAINT OF TRADE

Section 1 of the Sherman Act, 15 U.S.C. 1, prohibits unreasonable restraints of trade. See Standard Oil Co. v. United States, 221 U.S. 1, 65 (1911). Restraints that "always or almost always tend to restrict competition and decrease output" are deemed unreasonable per se. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289-290 (1985); see Northern Pacific R. v. United States, 356 U.S. 1, 5 (1958). Other restraints are subject to the "rule of reason," reason," which seeks to distinguish between a restraint that "merely regulates and perhaps thereby promotes competition" and one that "may suppress or even destroy competition." Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 n.15 (1977) (internal quotation marks omitted). In all cases, however, the purpose of the antitrust inquiry is "to form a judgment about the competitive significance of the restraint. NCAA v. Board of Regents, 468 U.S. 85, 103 (1984) (internal quotation marks omitted).

In this case, the Commission carefully examined petitioner's restraints in

light of their surrounding circumstances and an extensive factual record that had been compiled about their actual effect. Pet. App. 73a-92a. It found that petitioner applied its advertising rules to ban systematically a "vast" range of advertising valued by consumers, depriving them of truthful, nondeceptive information about the price and quality of dental services. Id. at 74a. It also concluded that the restraints significantly interfered with the proper functioning of the market and were therefore anticompetitive. Id. at 78a. Although the Commission found it unnecessary to quantify the precise consumer injury caused by these restrictions, it sufficiently considered pertinent factors under the rule of reason, including market impact power the ostensibly procompetitive justifications proffered by petitioner. Id. at 78a-92a; see id. at 20a-24a (consideration of same factors by court of appeals).[24]

Petitioner's primary complaint (Br. 38, 42) is that the Commission failed to make a detailed inquiry into market structure and into its market power. In fact, the Commission (and the court of appeals) did examine market power, and found that petitioner had the ability to withhold from consumers the valuable information that they seek about dentists' prices and services. See Pet. App. 23a-24a, 79a. The Commission's analysis in this case followed the Court's teachings that the rule of reason may properly be tailored to the circumstances of each case, and does not necessarily require a "detailed market analysis" in every instance. See FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460 (1986) (IFD). By insisting on what it terms a "full rule of reason" analysis in cases such as the present one -- including the detailed analysis of matters such as the structure of local geographic markets -- petitioner would interpose unjustified barriers to the adjudication of antitrust claims by the Commission and the federal courts. Although an informed judgment about an arrangement's likely competitive effects may in some cases require elaborate efforts to delineate market boundaries, no such detail was needed here to find a substantial restraint on competition. Petitioner's other objections to the FTC's analysis are all attacks on the Commission's factual determinations, which (as the court of appeals ruled, Pet. App. 20a-24a) are amply supported by the record.

A. The Commission's Analysis In This Case Was Consistent With This Court's Decisions, Holding That The Rule Of Reason Requires A Careful Yet Flexible Inquiry Into Competitive Effects, Tailored To The Circumstances Of Each Case

Antitrust tribunals apply the rule of reason to evaluate the competitive significance of a wide variety of business and trade association practices, which can vary greatly in their complexity, purpose, and effect. For this reason -- and in keeping with its common law origins -- the rule of reason is "used to give the [antitrust laws] both flexibility and definition."

National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 688 (1978).[25] The Court has emphasized the flexibility of the rule of reason on several occasions, and has instructed that the requirements of analysis under the rule vary according to the circumstances presented. For example, in NCAA, supra, the Court declined to apply the per se rule, but invalidated without detailed market analysis the NCAA's restrictions on televising football games under the rule of reason. The Court rejected on both legal and factual grounds the NCAA's argument that its television plan could not be condemned under the rule of reason because it lacked market power:

> As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."

468 U.S. at 109 (quoting Prof. Eng'rs, 435 U.S. at 692).

The Court took a similar approach to rule of reason analysis in IFD, supra, a case quite similar to the present one. There, a state association of dentists had agreed not to provide copies of dental x-rays to insurers, who sought to use them to assess the propriety of the dentists' services and charges. See 476 U.S. at 448-450. The Court rejected arguments in support of the agreement similar to the ones petitioner advances here -- namely, "that the Commission's findings were inadequate because of its failure both to offer a precise definition of the market in which the Federation was alleged to have restrained competition and to establish that the Federation had the power to restrain competition in that market." Id. at 453. Although the Court held that the refusal to provide x-rays did not amount to a per se illegal boycott, it nevertheless ruled that "[a]pplication of the Rule of Reason to these facts is not a matter of any great difficulty," in light of the nature of the restraint and the Commission's finding of actual effects on competition. Id. at 459.

In so ruling, the Court made two points about the role of market power evidence in rule of reason cases. First, some restraints are unlawful under the rule of reason without any proof of market power at all: "absence of proof of market power does not justify a naked restriction on price or output." IFD, 476 U.S. at 460 (quoting NCAA, 468 U.S. at 109). Second, other restraints may be shown to be unlawful without extensive market power analysis. As the Court explained, "even if the restriction imposed by the Federation [was] not sufficiently 'naked' to call this principle [condemnation without proof of market power] into play, the Commission's failure to engage in detailed market analysis [was] not

fatal to its finding of a violation of the Rule of Reason." Ibid. The Court reasoned that "Federation dentists constituted heavy majorities of the practicing dentists" and that insurers were actually unable to obtain x-rays, ibid., and, therefore, that the restraint "had adverse effects on competition," id. at 461. The Court further reasoned that, even if the purpose of obtaining x-rays was to minimize costs, the restraint was "likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned absent proof that it resulted in higher prices." Id. at 461-462.

In the present case, the Commission hewed closely to this analysis and to the Court's teachings "that the rule of reason contemplates a flexible enquiry, examining a challenged restraint in the detail necessary to understand its competitive effect." Pet. App. 74a (citing NCAA, 468 U.S. at 103-110) (emphasis added). The Commission referred to its rule of reason analysis as "simple and short" (ibid.), which it was, in comparison to the lengthier analysis that may be needed in (for example) a merger case, where it may be necessary to delineate numerous geographic markets. But the Commission - which has extensive experience with the effects of advertising restrictions -- reached its finding of a violation of Section 5 only after a careful assessment of the record regarding the actual and likely effects of petitioner's highly restrictive advertising rules on consumers of dental services in California. See id. at 74a-84a. Based on its finding that "the general proposition regarding the importance of advertising to competition carries over to the instant situation," ibid., the Commission reasonably concluded that petitioner's restrictions on advertising had adverse effects on competition, for an agreement that "limit[s] consumer choice by impeding the 'ordinary give and take of the marketplace' cannot be sustained under the Rule of Reason." IFD, 476 U.S. at 459 (quoting Prof. Eng'rs, 435 U.S. at 692).[26]

Petitioner (Br. 27, 45-46) and amicus NCAA (Br. 11-12) go far afield in urging the Court to establish the contours of the analysis required under the rule of reason for all possible cases. All that is at issue here is whether the restraints on advertising in this case required a more extensive analysis than the Commission afforded them. In asserting the need for a "full rule of reason analysis," petitioner would have the Court require an exhaustive market analysis whenever an antitrust tribunal applies the rule of reason (outside some ill-defined class of restraints in which it concedes that a "quick look" is sufficient, Br. 31). Such a rigid requirement is not required by this Court's precedents, however, and can stand only as an unnecessary roadblock to a measured and sensible application of the antitrust laws, especially in contexts like the present case, involving extensive suppression of information that consumers find highly useful.[27]

B. The Commission Properly Found, Based On Substantial Evidence, That Petitioner's Advertising Restrictions Had Anticompetitive Effects.

The Commission engaged in an extensive analysis of the effects of petitioner's advertising restrictions, and concluded that they harmed competition by "depriv[ing] consumers of information they value and of healthy competition for their patronage." Pet. App. 78a; see also id. at 55a-60a, 63a-67a, 74-77a. That conclusion was based on two intermediate findings. First, the Commission found that the actual effect of petitioner's restrictions was to suppress a vast range of truthful and nondeceptive advertising. Second, it found that the restraints were harmful to consumers of dental services, because the advertising that was suppressed would have been useful to them in making choices about dental services. Those conclusions are fully supported by the record.

1. As detailed above (pp. ---, supra), the Commission amassed an extensive record of the ways in which petitioner foreclosed its members from providing useful information about price and quality to consumers. Based on that record, the Commission concluded that petitioner had "effectively preclude[d] its members from making low fee or across-the-board discount claims." Pet. App. 63a. It also found that "[t]he nonprice advertising CDA prohibits is vast," and that petitioner had, in practice "prohibit[ed] all quality claims." Id. at 74a-75a.

These well-supported factual findings refute any notion that petitioner's onerous disclosure requirements, in particular, could have had the effect of "giv[ing] consumers more information, not less" (Pet. Br. 34). Although petitioner's policy concerning the advertising of discounts is superficially couched in terms of disclosure requirements, the Commission found that the actual effect of such requirements was "prohibitive" of across-the-board discount advertising. Pet. App. 66a-67a, 85a-86a. In reaching that factual finding, the Commission employed its expertise - developed in its dual function of protecting consumers against deceptive practices and preventing anticompetitive acts - in evaluating the practical effect of disclosure requirements. As petitioner points out (Br. 34-35), there are circumstances in which disclosure requirements are highly beneficial to consumers, and the FTC does in some cases mandate disclosures to prevent consumer deception. But the FTC is aware (as is this Court, see Morales v. Trans World Airlines, 504 U.S. 374, 389-390 (1992)), that excessively burdensome disclosure requirements can have the "paradoxical effect" of stifling information that might benefit consumers. See Pet. App. 66a. The FTC is often called upon to make practical judgments about the actual or likely effects of disclosure requirements, and it properly concluded in this case that petitioner's requirements were so onerous that they operated in actual

effect as a "broad ban" on discount advertising. Id. at 67a. Indeed, petitioner appears to concede (Br. 36) the unreasonableness of its requirement that across-the-board discounts on all dental procedures be accompanied by the full litany of mandated disclosures.[28]

2. The Commission also addressed at length the significance to consumers of petitioner's restraints. It was not just the fact that dissemination of truthful information was forbidden, but particularly the kind of advertising banned -- relating to the price and quality of service offered -- that concerned the Commission. As the Court has emphasized, advertising "performs an indispensable role in the allocation of resources in a free enterprise system." Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977); see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976); AMA, 94 F.T.C. at 1004; Massachusetts Bd. of Registration in Optometry, 110 F.T.C. 549 (1988); American Dental Ass'n, 94 F.T.C. 403, 405-406 (1979), modified, 100 F.T.C. 448 (1982).

On the facts of this case, the Commission found fully applicable the well-established importance of price and quality advertising to consumers. Advertising, it found, "is important to consumers of dental services and plays a significant role in the market for dental services." Pet. App. 60a; see id. at 78a. Those findings by the Commission echo those of the ALJ, who concluded that petitioner's "conspiracy has injured those consumers who rely on advertising to choose dentists." Id. at 261a. The record showed that advertisements highlighting low or discount prices, comfort and gentleness in the provision of dental services, or both were effective in attracting consumers (and much more effective than "generic advertising without comparative quality or price claims"), demonstrating the importance of such information to consumers. Id. at 77a.[29] Accordingly, the Commission properly found that information about price as well as "quality and sensitivity to fears is important to consumers and determines, in part, a patient's selection of a particular dentist." Id. at 76a-77a.

Petitioner attempts to minimize the competitive significance of some of the banned ads. It argues, for example (Br. 36-37), that discount advertising conveys "negligible informational content." The short answer to such contentions is that, in a free-market economy, it is generally up to consumers to decide what information is useful and what is not. See generally N. Averitt & R. Lande, Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law, 65 Antitrust L.J., No. 3, at 713 (Spring 1997). The advertising of discounted prices and references to "affordable fees" can signal to the consumer the potential availability of cost savings, which can then be investigated further.[30] Similarly, claims about quality of service, although dismissed by petitioner as

"subjective" (Br. 40), may convey useful information concerning the attitudes and approach of the dentist -- such as commitment to punctuality, to understanding the patient's anxieties, or simply to providing high-quality care. As this Court has recognized, advertising can benefit consumers even if it requires further inquiry. See Morales, 504 U.S. at 388-389 (noting utility of advertisements for discounted air fares); Prof. Eng'rs, 435 U.S. at 692-693 (rejecting argument that "inherently imprecise" pricing information was of no value to consumers). Petitioner "is not entitled to pre-empt the working of the market by deciding for itself that its [members' patients] do not need that which they demand." IFD, 476 U.S. at 462.

3. The Commission's conclusions in this case are consistent with long-observed effects of advertising restrictions: they "increase the difficulty of discovering the lowest cost seller of acceptable ability[, and] * * * [reduce] the incentive to price competitively." Bates, 433 U.S. at 377-378. As the Commission also noted, the importance of advertising "attaches not only to price information, but to all material aspects of the transaction," including quality. Pet. App. 59a. Although the Commission found it unnecessary to "quantify[] the increase in price or reduction in output occasioned by these restraints" (id. at 78a), its conclusion that these results would ensue is supported by both the record and by "common sense and economic theory, upon both of which the FTC may reasonably rely." IFD, 476 U.S. at 456. Moreover, as this Court stressed in IFD, the market may be deemed harmed by concerted, artificial suppression of information even without direct proof of effects on prices:

> A concerted and effective effort to withhold (or make more costly) 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.

Id. at 461-462.[31] Accordingly, the FTC's conclusion that petitioner's advertising restraints had anticompetitive effects is fully consistent with this Court's decisions and supported by the record.

C. The Commission Properly Found That the Restraints Lack Any Plausible Procompetitive Justification

Contrary to petitioner's contention, the FTC did not end its rule of reason inquiry once it determined that petitioner's restraints on truthful, nondeceptive advertisements had an anticompetitive effect. Rather, consistent with this Court's instructions about rule of reason analysis (IFD, 476 U.S. at 459; Prof. Eng'rs, 435 U.S. at 693-695), the FTC

carefully considered petitioner's contentions that its advertising restrictions have procompetitive effects. See Pet. App. 84a-90a. The FTC fully recognizes that self-regulation by professional organizations "may serve to regulate and promote * * * competition" by preventing deceptive practices. See Prof. Eng'rs, 435 U.S. at 696. It also acknowledged in this case that "the prevention of false and misleading advertising is indeed a laudable purpose." Pet. App. 84a. It found, however, that petitioner's advertising bans were not tailored to that purpose, but instead "swept aside" price and quality advertising with "broad strokes," without regard to its potential for deception. Id. at 89a.

Before this Court, petitioner makes two principal arguments, neither of which has merit. With respect to price advertising, the sole procompetitive theory petitioner advances is that its disclosure requirements for advertising discounts will increase the amount of information provided to consumers. (Petitioner appears to make no argument in defense of its prohibition against comparative advertising claims such as "low fees" and "reasonable fees.") Because of that potential for increased information, petitioner maintains (Br. 34-36) that a more detailed analysis of its restrictions was required. Whatever might be the merits of such a contention where disclosure requirements really do have a procompetitive potential, it cannot be sustained in this case, where (as we have explained), the FTC, employing its expertise in such matters, found that the actual effect of petitioner's onerous disclosure requirements, as they have been interpreted and enforced, is to suppress all across-the-board discounting claims. See pp. -, supra. The FTC therefore rejected petitioner's asserted procompetitive justification for its restraint only after finding it factually unsupportable.[32]

With respect to its restrictions on quality claims, petitioner submits (Br. 38-39) that it may ban all such claims because they are "potentially misleading." This Court has suggested that some quality claims by professionals about performance may well be misleading and may therefore be restricted. See Bates, 433 U.S. at 366, 383-384. The Court has not held, however, that all quality claims by professionals -- even claims that do not relate directly to the quality of performance, such as promises of punctuality and offers of a comfortable environment, designed to dispel anxiety about visiting the dentist (p. --, supra) -- are necessarily misleading. Indeed, Bates warned of the potential of overbroad advertising restrictions used to "perpetuate the market position of established [market participants]." Id. at 377-378. The Court has also admonished, with respect to state regulation of marketing by professionals, that "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." Shapero v. Kentucky

Bar Ass'n, 486 U.S. 466, 478 (1988) (internal quotation marks omitted). That admonition is even more apt in the context of industry self-regulation, where the body imposing restrictions lacks full public accountability and may be subject to incentives to adopt approaches that restrict competition.

In the present case, drawing distinctions between deceptive and nondeceptive advertising is precisely what petitioner did not do. Instead, it imposed blanket bans on useful advertising claims without regard to whether they were truthful or deceptive. Furthermore, although it had every opportunity to do so, petitioner made no effort to show any basis on which a prophylactic restraint might be justified, such as a history of abuse or false and deceptive advertisements that could not be effectively prevented by a more narrowly tailored rule. Cf. Florida Bar v. Went For It, Inc., 515 U.S. 618, 626-628 (1995). The Commission also expressly allowed petitioner to enforce "reasonable ethical guidelines * * * with respect to representations that [petitioner] reasonably believes would be false or deceptive." Pet. App. 30a. Generalized arguments about the procompetitive benefits of suppressing false and deceptive advertising therefore cannot sustain petitioner's overbroad restrictions.

D. The Commission's Market Power Analysis Of Petitioner's Restraints Was Appropriate

In light of the Commission's conclusions regarding the anti-competitive effects of petitioner's advertising restrictions, it did not find it necessary to perform an elaborate structural analysis of the markets in which petitioner's members conduct business. Pet. App. 78a. As the Commission noted, this Court "has indicated that when a court finds actual anticompetitive effects, no detailed examination is necessary to judge the practice unlawful." Ibid. n.19 (citing NCAA and IFD). Nevertheless, the Commission did examine market power, and it had an ample basis on which to conclude that petitioner had the ability "to impose the costs of its anticompetitive restrictions on California consumers of dental services," id. at 84a, which was the relevant determination.

The facts supporting that determination are straightforward. Fully 75% of California's practicing dentists (and 90% in one region) are members of petitioner.[33] Pet. App. 82a. The Commission found substantial barriers to entry and few close substitutes for the services offered by petitioner's members. Id. at 82a-83a.[34] It also found that petitioner had the power to require members and aspiring members to comply with the restrictions, because of the importance placed on membership by California dentists. Id. at 80a-81a. Given those findings (which the court of appeals upheld and which petitioner does not challenge here), the

Commission properly concluded that conspiring members of petitioner had the power to impose their will on the market as a whole. See id. at 84a.

The FTC was not required to approach the issue of market power as if this were a merger case. Market power analysis is not an end in itself; it is a tool to help determine whether the challenged conduct is anticompetitive. See IFD, 476 U.S. at 460. Because the anticompetitive potential of different types of conduct varies, the appropriate market power analysis varies as well. See, e.g., NCAA, 468 U.S. at 109-110; IFD, 476 U.S. at 460. Certain kinds of agreements challenged under Section 1 of the Sherman Act require an extensive structural analysis because it is not possible to reach a reasoned conclusion about the competitive effects of such agreements without an understanding of the market context. See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. at 296 (buyer cooperatives); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 334 (1961) (exclusive dealing arrangements). Similarly, in merger cases, the antitrust tribunal must predict the competitive effect of structural changes to the market, and so the inquiry ordinarily focuses on structural issues. By contrast, in cases involving conduct deemed unlawful per se, there is generally no need for market analysis because the conduct is conclusively presumed to be anticompetitive.

Other cases fall between these two poles. NCAA, for example, involved a restraint that the Court characterized as a naked restraint on output, which could be condemned without an "elaborate industry analysis." 469 U.S. at 109. In IFD, the Court suggested that the agreement was sufficiently anticompetitive on its face to fall within the NCAA analysis. 476 U.S. at 460. It also made clear, however, that even if that were not the case, a full structural analysis of the market was not required. Ibid. In this case, the Commission and court of appeals properly relied on this Court's teaching in IFD that "the finding of actual, sustained adverse effects on competition in those areas where [petitioner's] dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis." 476 U.S. at 461; see also Pet. App. 24a (court of appeals noting that advertising restrictions imposed by such "large scale professional organizations" have substantial anticompetitive effects that can properly be condemned "without careful market definition") (quoting 7 P. Areeda, Antitrust Law ¶ 1503, at 377). The advertising that petitioner bans informs consumers so that they may compare competing market participants. If, as the Commission found, a combination comprising three-quarters of the practicing dentists in the State adheres to strict policies banning such advertising, then consumers

will lack the information they desire, regardless of the actions of other market participants. Accordingly, once the Commission found that the restraint had anticompetitive effects and that petitioner could inflict those effects on the market as a whole, it was amply justified in concluding that petitioner "possesses the necessary market power to impose the costs of its anticompetitive restrictions on California consumers of dental services." Pet. App. 84a.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DEBRA A. VALENTINE
General Counsel

JOHN F. DALY
Assistant General Counsel

ELIZABETH R. HILDER
JOANNE L. LEVINE
Attorneys
Federal Trade Commission

SETH P. WAXMAN
Solicitor General

JOEL I. KLEIN
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

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1. In the last year that petitioner explicitly reported its public service expenditures, they they accounted for 7% of its annual budget. J.A. 19; Pet. App. 52a. In the same year, expenses for "direct member services" were 65% of petitioner's budget, and administration and indirect member services accounted for an additional 20 percent. Ibid.

2. Although some of petitioner's lobbying has advocated measures to promote public health, much of its lobbying has been directed at protecting members' profitability. Thus, petitioner has opposed legislation regarding mandatory health insurance coverage for part-time employees and treatment of infectious and hazardous waste, and it has supported malpractice-liability and workers' compensation reforms. Pet. App. 177a-179a.

3. One dentist testified that, to advertise an across-the-board discount, a member would have to list his regular fees for 100-300 procedures. Pet. App. 201a. A member of petitioner's Judicial Council (which is responsible for enforcing its Code of Ethics, see id. at 9a) acknowledged that to advertise an across-the-board discount in compliance with these requirements "would probably take two pages in the telephone book," and that "[n]obody is going to really advertise in that fashion." Id. at 66a.

4. For example, petitioner disapproved advertisements that offer "20% off new patients

with this ad"; "25% discount for new patients on exam x-ray & cleaning/ 1 coupon per patient/ offer expires 1-30 94"; "20% senior citizen discount; 20% military discount"; and "Complete Consultation, Exam and X-rays (if needed) * * * [for only] a $1.00 charge to you and your entire family with this coupon" before a certain date. Id. at 66a-67a, 90a n.25, 200a-202a. Dentists new to an area who sought to attract patients by advertising a "Grand Opening Special $5 exam x-ray, $15 polishing and 40% off dental treatment," or a "get acquainted offer" that "an initial consultation, complete exam, any x-rays and tooth cleaning will be done for only $5 (applies to all members of your family)" also encountered petitioner's disapproval. Id. at 77a n.18.

5. Thus, petitioner has disapproved such phrases as "personal quality dental care"; "[W]e cater to those people that demand quality, personal attention, and punctuality" (Pet. App. 204a); "you shouldn't have to wait hours or days for dental care" (id. at 205a); "my number one concern is your care and comfort"; "You'll appreciate our warm personal attention"; "State of the art dental services" (id. at 208a); "dedicated to quality dental care at low cost"; "comfortable and personalized"; "latest equipment and gentle, caring, techniques" (id. at 214a); "fully modern . . . luxurious atmosphere" (id. at 236a); "all of our handpieces (drills) are individually autoclaved for each and every patient"; and "highest standards in sterilization" (id. at 75a). For several years, petitioner disallowed advertising that a dentist offers "gentle" care, or "special care for cowards," and many local components continue to proscribe such claims. Id. at 76a, 211a-212a.

6. The excerpts of the record filed by the FTC in the court of appeals include an extensive summary of petitioner's disciplinary actions as well as a long list of the words and phrases that petitioner and its components have proscribed. See FTC Supp. E.R., Vol. I, Tab 2, and Vol. II.

7. Although the present case arises under Section 5 of the FTC Act, 15 U.S.C. 45, practices that violate Section 1 of the Sherman Antitrust Act, 15 U.S.C. 1, are necessarily "unfair methods of competition" under Section 5, and the Commission relied on Sherman Act principles in addressing the merits of this case. See Pet. App. 53a n.5; FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 454-455 (1986).

8. Petitioner maintains that the ALJ found that its advertising restrictions had "no impact on competition." See Pet. Br. 2, 6-7, 13, 15, 27, 41-42; Pet. App. 246a. In context, however, it appears that the ALJ was quoting the testimony of petitioner's own expert witness, and was not adopting that testimony as his own factual finding. See ibid. Indeed, the ALJ noted that this witness "has no expertise in, nor has he made any study of, the economic aspects of the dental market or dental advertising." Id. at 244a. Even if the ALJ did credit that witness's testimony on the impact of competition (see id. at 83a n.22), the Commission rejected such a conclusion and found that competition was harmed by petitioner's restrictions, ibid.; see pp. --, infra, and the court of appeals upheld the Commission's finding as supported by substantial evidence, see pp. --, infra; Pet. App. 23a-24a.

9. See, e.g., 7 U.S.C. 1a(5)(A)(1) (defining "commodity trading advisor" as one who, "for compensation or profit," advises others on commodity trading); 7 U.S.C. 2132(f) (defining animal "dealer" as one who "for compensation or profit" delivers animals for sale); 8 U.S.C. 1375(e)(1)(A) (Supp. II 1992) (defining "international matchmaking organization" as one that offers matrimonial services "for profit"); 18 U.S.C. 1170(a) (punishing one who "uses for profit" any Native American human remains without the right of possession); 42 U.S.C. 3604(e) (punishing one who, "[f]or profit," induces another to sell or rent a dwelling based on changes in racial composition of neighborhood); see also 12 U.S.C. 2802(4); 18 U.S.C. 31; 18 U.S.C. 921(a)(21); 18

U.S.C. 1466(b); 42 U.S.C. 2205(b); 50 U.S.C. 217.

10. Petitioner (Br. 20 n.4) and amici (ASAE Br. 10, ADA Br. 15) argue that, to qualify as tax-exempt under Section 501(c)(6), they had to satisfy that Section's requirement that "no part of [their] net earnings * * * inure[] to the benefit of any private shareholder or individual," which (they contend) necessarily means that they do not operate for the profit of their members. Under Section 501(c)(6), however, it is generally permissible for a trade association's activities to "improve[] the business conditions" of the industry as a whole, including its members, as long as such benefits are not confined to the association's members. See National Muffler Dealers Ass'n v. United States, 440 U.S. 472, 482-484 (1979); MIB, Inc. v. Commissioner, 734 F.2d 71, 76 & n.3 (1st Cir. 1984); 26 C.F.R. 1.501(c)(6)-1. Indeed, as Section 501(c)(6) is confined to entities with common business interests (as opposed to charities, which are covered elsewhere), that Section presupposes the promotion of an industry's economic interests. Furthermore, there are significant differences between the purposes and operation of the revenue laws and the FTC Act. Cf. FTC v. Bunte Bros., 312 U.S. 349, 353 (1941) ("Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business"). The fact that an entity might be considered nonprofit for tax purposes does not necessarily mean that it is outside the broad enforcement reach of the FTC Act.

11. Trade Commission Bill: Letter from the Commissioner of Corporations to the Chairman of the Senate Comm. on Interstate Commerce, Transmitting Certain Suggestions Relative to the Bill (H.R. 15613) to Create a Federal Trade Commission, 63d Cong., 2d Sess. 3 (1914).

12. See, e.g., FTC v. Association of Flag Mfrs., 1 F.T.C. 55 (1918); FTC v. United States Gold Leaf Mfrs. Ass'n, 1 F.T.C. 173 (1918); FTC v. Bureau of Statistics of the Book Paper Mfrs., 1 F.T.C. 38 (1917).

13. See, e.g., FTC v. Cement Inst., 333 U.S. 683 (1948); Millinery Creator's Guild, Inc. v. FTC, 312 U.S. 469 (1941); Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941); FTC v. Pacific States Paper Trade Ass'n, 273 U.S. 52 (1927); Standard Container Mfrs. Ass'n v. FTC, 119 F.2d 262 (5th Cir. 1941); California Lumbermen's Council v. FTC, 115 F.2d 178 (9th Cir. 1940), cert. denied, 312 U.S. 709 (1941).

14. Petitioner relies heavily (Br. 16-19) on the Eighth Circuit's decision in Community Blood Bank v. FTC, 405 F.2d 1011 (1969), which, it contends, supports its narrow reading of the term "profit." That decision, however, is consistent with the approach to Section 4 explained above. There the court of appeals rejected the theory that a community blood bank -- which it found to be organized for "only charitable purposes" -- could be said to earn "profit" by virtue of its retention of earnings "for its own self-perpetuation or expansion." Id. at 1016, 1022. Nonetheless, the court recognized that Section 4 does not "provide a blanket exclusion of all nonprofit" entities. Id. at 1017. It acknowledged Congress's intent to confer on the Commission jurisdiction over "trade associations," and emphasized the need for an "ad hoc" inquiry focusing on the facts of the particular organization. Id. at 1017-1019. Most significantly, it had no occasion to address the status of an entity, like the present petitioner, that is organized as a nonprofit corporation but whose activities provide pecuniary benefits to profit-making members. See also FTC v. Freeman Hosp., 69 F.3d 260, 266 (8th Cir. 1995) (characterizing Community Blood Bank as holding that only genuine charitable organizations are outside Section 4).

15. The proposal would have amended the definition of "person, partnership, or

corporation" in Section 4 "to include any individual, partnership, corporation, or other organization or legal entity." See H.R. 3816, 95th Cong. (1977), reprinted in Federal Trade Commission Amendments of 1977 and Oversight: Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 4, 27-28 (1977) (1977 House Hearing). The proposal therefore would have overruled the Eighth Circuit's decision in Community Blood Bank, supra.

16. Compare Community Blood Bank, supra, with National Comm'n on Egg Nutrition, supra; see also 1977 House Hearing, supra, at 82 (testimony by FTC Chairman Collier that Community Blood Bank decision "affirmed the Commission's jurisdiction over nonprofit corporations whose activities redound to the economic benefit of their shareholders or members").

We also note that, in 1982, Congress failed to pass an amendment reported out of a Senate committee that would have terminated the FTC's jurisdiction over all state-licensed professionals and their associations. See S. Rep. No. 451, 97th Cong., 2d Sess. 5-7, 34-35 (1982). Under petitioner's logic, that refusal to take action could be taken as as evidence that Congress approved of the FTC's actions in this area, especially since the minority on the committee observed that "the long list of FTC actions in this area is clearly pro-consumer and pro-competitive." Id. at 49.

17. See, e.g., FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); Empire State Pharm. Soc'y, 114 F.T.C. 152 (1991) (boycotts against third-party payers that attempted to obtain lower prices for prescriptions).

18. See, e.g., FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986); Michigan State Med. Soc'y, 101 F.T.C. 191 (1983); Indiana Dental Ass'n, 93 F.T.C. 392 (1979).

19. See, e.g., Forbes Health Sys. Med. Staff, 94 F.T.C. 1042 (1979); Medical Serv. Corp., 88 F.T.C. 906 (1976).

20. See FTC v. National Energy Specialist Ass'n, No. 92-4210, 1993 WL 183542 (D. Kan. Apr. 29, 1993).

21. Petitioner points out that, even if it is exempt from the FTC Act, it will still be subject to antitrust scrutiny by the Department of Justice under the Sherman and Clayton Acts. The same cannot be said, however, of the FTC's authority under Section 5 to prevent deceptive practices, for which there is no analogue in the antitrust laws. Petitioner's argument would leave the FTC without authority to proceed against nonprofit trade and professional associations that disseminate false information about their services or products. Cf. National Comm'n on Egg Nutrition, supra (FTC Act used to prevent dissemination of false information about health effects of cholesterol in eggs); American Dairy Ass'n, 83 F.T.C. 518 (1973) (consent order against misrepresenting fat content or caloric value of milk).

22. With respect to the Court's affirmance in the AMA case, we note that, when it reached this Court, that case presented not only the jurisdictional question, but also the propriety of the FTC's entry of a prospective cease-and-desist order in light of ethical-rule changes adopted by the AMA after the filing of the administrative complaint. See 80-1690 FTC Br. I, 46-59.

23. Amicus American College for Advancement in Medicine (ACAM) cites the FTC's investigation into its activities as evidence that the FTC has wrongly asserted

jurisdiction over a purely eleemosynary medical society (Br. 1, 3). (The IRS master list of exempt organizations reveals that ACAM is a Section 501(c)(6) business league, not a Section 501(c)(3) charity.) On December 8, 1998, ACAM agreed to settle the FTC's charges that it made false and unsubstantiated advertising claims regarding EDTA chelation therapy for treating coronary artery disease; ACAM has agreed not to make any representation about the efficacy of such chelation therapy unless supported by competent and reliable evidence. See http://www.ftc.gov (copies of complaint and proposed settlement); see also Quackery: A $10 Billion Scandal: Hearing Before the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging, 98th Cong., 2d Sess. 96-98 (1984); United States v. Evers, 643 F.2d 1043, 1045-1046 (5th Cir. 1981).

24. As we have noted (pp. --, supra), the Commission concluded that petitioner's bans on price advertising were unlawful per se. The Commission pointed (Pet. App. 67a-69a) to substantial support in the case law for such per se treatment of advertising restrictions. Although we submit the Commission's use of the per se rule was appropriate, especially given its accumulation of experience with advertising restrictions (see id. at 71a-72a) , the Court need not reach that issue if it agrees with our submission that the Commission's analysis under the rule of reason was sufficient.

25. This Court's decision in Professional Engineers itself displayed the flexibility of the rule of reason. The Court held that the Society's ban on competitive bidding, while not "price fixing as such," "impede[d] the ordinary give and take of the market place," and "deprive[d] the customer of the ability to utilize and compare prices in selecting engineering services." 435 U.S. at 692-693 (internal quotation marks omitted). Under those circumstances, the Court ruled that "no elaborate industry analysis is required" to condemn the bidding ban under the rule of reason. Id. at 692. Moreover, the Court did so without a finding of market power. See Id. at 681-682 (Society had membership of 69,000 of 325,000 registered professional engineers).

26. Arguments advanced by petitioner (Br. 27, 31) regarding the supposed need to confine "quick look" analysis to a "limited class of cases" are therefore based on a misconception of the Commission's ruling. In giving what it called a "quick look" to petitioner's restraints, the FTC did not engage in a separate category of antitrust analysis. Rather, it applied the rule of reason in the particular context of advertising restrictions, in which it has considerable expertise. That context permitted it to take into account the well-established, fundamental role of advertising in the proper functioning of a free-market economy. See pp. --, infra. Furthermore, consistent with the requirements of rule of reason analysis, the Commission considered the procompetitive justifications offered by petitioner in support of its restraints. See pp. --, infra.

27. Petitioner and amicus NCAA elsewhere appear to suggest that virtually any proffer of an ostensible procompetitive effect has the effect of necessitating a "full rule of reason analysis." Pet. Br. 37-38; NCAA Br. 16-17. The cases on which they rely, however, dealt with restrictions far afield from those in the present case, which involves the well-understood effects of a suppression of advertising of discounts and comparative price and quality claims. In United States v. Brown University, 5 F.3d 658 (3d Cir. 1993), the court was presented with novel arguments about the distribution of financial aid to students based on need that had not been previously addressed, and concluded that such arguments required extensive analysis. See id. at 669, 678-679. Vogel v. American Soc'y of Appraisers, 744 F.2d 598 (7th Cir. 1984), was an antitrust challenge to an ethical rule against a percentage-based pricing system for appraisals. The court emphasized that the ethical rule appeared to promote, rather than restrict, competition, because "[t]he apparent tendency" of the outlawed pricing system was "to

raise, not lower, the absolute level of appraisal fees." Id. at 602. Neither case suggests that an exhaustive market analysis is required whenever a defendant asserts a procompetitive theory.

28. Petitioner nonetheless speculates (Br. 36) that its member dentists, even if effectively (and unreasonably) precluded from advertising across-the-board discounts by its restrictions, should be able to comply with a requirement that advertised discounts on individual services be accompanied by a litany of disclosures. The Commission, however, exercising its expertise in the effects of advertising claims, found found that "the truthful offer of a discount from the price ordinarily charged by a dentist for services is not deceptive." Pet. App. 85a. It also noted that petitioner's restrictions went far beyond any restriction that would be necessary to prevent dentists from engaging in "chicanery" such as selectively inflating the price from which the discount is computed. Ibid.

29. Studies show that anxiety about discomfort in dental procedures is one of the principal reasons that consumers do not obtain needed dental services. See J. Elter, et al., Assessing Dental Anxiety, Dental Care Use and Oral Status in Older Adults, 128 J. Amer. Dent. Ass'n 591 (May 1997); N. Corah, et al., The Dentist-Patient Relationship: Perceived Dentist Behaviors That Reduce Patient Anxiety and Increase Satisfaction, 116 J. Amer. Dent. Ass'n 73 (Jan. 1988); N. Corah, et al., Dentists' Management of Patients' Fear and Anxiety, 110 J. Amer. Dent. Ass'n 734 (May 1985). Along with allaying concerns about pain, lower fees and a "friendlier and more caring" dentist are three of the four top factors that adults reported would make them more likely to visit a dentist. See Influences on Dental Visits, 29 ADA News 4 (Nov. 2, 1998) (citing ADA Survey Center, 1997 Survey of Consumer Attitudes and Behaviors Regarding Dental Issues).

30. Petitioner's citation to an article written by FTC Chairman Pitofsky nearly two decades ago does not advance its argument. That article emphasized the risk to consumers and the competitive process from overregulation of discount price claims "because of the special proconsumer and procompetitive effects of aggressive price competition." R. Pitofsky, Advertising Regulation and the Consumer Movement, in Issues in Advertising: The Economics of Persuasion 27, 42 (D. Tuerck ed. 1978). Thus, while Chairman Pitofsky stated that a claim of "10 percent off" may be ambiguous and therefore ignored by consumers, he also stressed that regulation of such claims "entails considerable social and economic costs," id. at 39, a proposition entirely consistent with this Court's cases on advertising restrictions.

31. Restraints on advertising, such as those in the present case, can increase a consumer's search costs in finding a dentist. The FTC has observed that agreements that increase consumer search costs are harmful to consumer welfare and form a proper concern of the antitrust laws. See Detroit Auto Dealers Ass'n, 111 F.T.C. 417, 495-496 (1989), aff'd in part and remanded, 955 F.2d 457 (6th Cir.), cert. denied, 506 U.S. 973 (1992). Furthermore, as the court of appeals recognized (Pet. App. 19a-20a), the concerted withholding of information that is of value to consumers may be viewed as a form of restriction on output. While the advertising information at issue here is not the principal output of dentists, neither were the x-rays at issue in IFD. In both cases, the information was used by consumers (or insurers acting on their behalf) to make assessments regarding the purchase of dental services. Cf. IFD, 476 U.S. at 461-462.

32. Petitioner maintains (Br. 30-31, 33) that its disclosure requirements require more extensive analysis because they are not "facially" anticompetitive (since their literal terms prohibit only false and deceptive advertising). The FTC, however, did not base its analysis on the language of Section 10 of petitioner's Code of Ethics, but rather on the actual enforcement of the advertising restrictions. As Professor Areeda noted, the

phrase "facially unreasonable" as used in antitrust cases is "reminiscent of facially unconstitutional statutes" and thus "may seem to focus attention on the words on the face of an agreement." 7 P. Areeda, Antitrust Law ¶ 1508, at 405 (1986). In fact, as he pointed out, the phrase properly refers to a restraint about which a judgment can be made based on plausible arguments about anticompetitive effects without detailed proof. Ibid. Thus, the court of appeals correctly ruled that petitioner's advertising restrictions were "facially anticompetitive" (Pet. App. 24a), even though its understanding of the nature of petitioner's restraints required an examination of its conduct in enforcing those restraints, and not merely the language of its Code of Ethics.

33. Compare IFD, where the Court affirmed the FTC's finding of an unlawful restraint of trade where 67% of the dentists in one area participated in the restraint. 476 U.S. at 451. The 75% figure in this case may actually understate petitioner's influence because its advertising strictures apply as well to affiliated employers, employees, and referral services. Pet. App. 81a.

34. The ALJ found otherwise, Pet. App. 262a, but the Commission rejected that finding as predicated on an error of law, see id. at 83a. Contrary to the view of the ALJ, market power does not require a showing of "insurmountable" barriers to entry. Cf. U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines, §§ 3.1-3.4, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1997). Furthermore, although petitioner relies heavily on the rejected findings of the ALJ, the courts review the findings of the Commission, not the ALJ, and sustain the Commission's findings if they are supported by substantial evidence. See Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431, 1437 (9th Cir.), cert. denied, 479 U.S. 828 (1986); see generally FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 364 (1955); Universal Camera Corp. v. NLRB, 340 U.S. 474, 493 (1951).