

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CALIFORNIA DENTAL ASSOCIATION, Petitioner v.
FEDERAL TRADE COMMISSION.

CASE NO: 97-1625 C.2

PLACE: Washington, D.C.

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3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 97-1625, California Dental Association v.
5 Federal Trade Commission.

6 Mr. Sfikas.

7 ORAL ARGUMENT OF PETER M. SFIKAS

8 ON BEHALF OF THE PETITIONER

9 MR. SFIKAS: Mr. Chief Justice, and may it
10 please the Court:

11 There are two issues in this case. The first is
12 the question of whether or not the FTC Act has
13 jurisdiction over a nonprofit professional association,
14 and the second issue is whether or not the Commission and
15 the Ninth Circuit appropriately applied a quick look rule
16 of reason analysis to the facts in this case.

17 The jurisdictional dispute in this case is over
18 the interpretation of -- of the phrase in section 4 of the
19 FTC Act, which reads in its relevant part -- and this may
20 be found in the petitioner's brief at pages 1 and 2 -- a
21 company, trust, or association without shares of capital
22 or capital stock which is organized to carry on business
23 for its own profit or that of its members.

24 There is no disagreement on the record before
25 Your Honors that the CDA is a bona fide, not-for-profit

1 organized under California law, with a 501(c)(6) Federal
2 tax exemption.

3 There are two major cases that discuss this
4 jurisdictional. The first is the Community Blood Bank
5 case and the second is the AMA case.

6 In the Blood Bank case, both of the respondents
7 were not-for-profit associations. After a full trial, the
8 FTC and the hearing officer found that they had violated
9 the antitrust laws by hindering the development of two
10 commercial blood banks.

11 On the jurisdictional issue, the hearing officer
12 who heard the case and the commission made specific
13 findings that there were benefits to members in these
14 cases, and that's how they rested their jurisdiction.

15 QUESTION: Would just remind me, counsel? Was
16 the organization in the Blood Bank case -- was that a
17 501(c)(3) or (c)(6)?

18 MR. SFIKAS: If the Court please, I've searched
19 the record and I come to the conclusion that the Kansas
20 City Area Hospital Association was not a 501(c)(3).

21 QUESTION: Do you recognize that there might be
22 some 501(c)(6) organizations that would fit the definition
23 of carries on business for the profit of its members?

24 MR. SFIKAS: Oh, yes, Your Honor. Yes.

25 QUESTION: So, you're distinguishing among

1 501(c) -- you're not saying all nonprofits are out.

2 MR. SFIKAS: That is correct, Your Honor. I am
3 not.

4 QUESTION: And so, now you're going to tell us
5 why, say, the Dental Association is different from the
6 Real Estate Board.

7 MR. SFIKAS: Yes. If you -- well, I don't know
8 that I'm going to tell you that difference because I'm not
9 sure I know that much about the Real Estate Board, Your
10 Honor.

11 But in connection with the California Dental
12 Association, its primary purpose is for the public
13 interest. It's to promote the art and science of
14 dentistry. I think the critical language in the statute
15 requires, however, that there be a profit, and profit was
16 defined in the Community Blood Bank case to be the excess
17 of revenue over expenses, with a contemplation that it is
18 to be paid to the members. That was not done in the
19 California Dental Association, and that's clear in this
20 record. So, if -- I don't know the Real Estate Board well
21 enough to --

22 QUESTION: Well, how about a trade organization
23 that's there to promote, say, eggs? It wouldn't fit the
24 definition of profit that you just gave us, would it?

25 MR. SFIKAS: Well, Your Honor, in the Seventh

1 Circuit case involving egg nutrition, they made a -- the
2 trial court -- and it was affirmed in the Seventh Circuit
3 -- made a specific finding that they were organized for
4 the profit of the Egg Commission. So that -- and that's
5 not a finding in this case, Your Honor. No such
6 finding --

7 QUESTION: Well, I guess there are some
8 benefits, though, for the dentists to belong to the Dental
9 Association: better insurance vehicles and other benefits
10 that the organization may provide to its members.

11 MR. SFIKAS: Well --

12 QUESTION: Do you say that the organization
13 provides no benefits to its members?

14 MR. SFIKAS: Oh, no, I wouldn't -- I wouldn't
15 say that because the -- the membership dues for the
16 tripartite membership in dentistry is over \$1,000, and I
17 think they get their -- their membership benefits.

18 But, Your Honor, as far as the California Dental
19 Association is concerned, nonmembers can get those same
20 services by paying a little more in the way of a fee.
21 There's nothing that the California Dental Association
22 does for dentists in the State of California that dentists
23 can't get elsewhere, and in fact, only 75 percent of the
24 dentists in the State are members of the California Dental
25 Association.

1 QUESTION: Wasn't there a finding someplace that
2 the value of the membership to each dentist was worth -- I
3 don't know -- \$20,000 or something?

4 MR. SFIKAS: That was -- that was not a finding,
5 Your Honor. I think what that was, was -- was a looking
6 at the way in which the books showed the -- the amount of
7 money that -- that the California Dental Association gets
8 largely from dues and how it was paid out. There was 7
9 percent for public service, and then there was 65 percent
10 for membership. But that membership includes the
11 promotion of the art and science of dentistry and high
12 professional standards, so it's not mutually exclusive.
13 In other words, in that 65 percent, there is the promotion
14 of the public interest. It's not mutually exclusive.

15 QUESTION: But I read section 44 to say an
16 organization which is organized to carry on business for
17 its own profit or for the profit of its members. And --
18 and in some sense the Dental Association does exist for
19 the benefit of the profit of its members.

20 MR. SFIKAS: Well, if the Court please, that
21 turns on the definition of profit.

22 QUESTION: Yes.

23 MR. SFIKAS: And the Community Blood Bank case
24 said that that's the excess of revenue over expenses,
25 either paid or contemplated to be paid. And clear --

1 clearly here there has been no dividend paid, no
2 contemplation.

3 QUESTION: No, but it says, or the profit of its
4 members. It's true that the association isn't paying out
5 money, but it is in existence to help its dentists make
6 money and profit and be qualified professionals and -- and
7 succeed --

8 MR. SFIKAS: Well --

9 QUESTION: -- in the business of -- the
10 profession of dentistry.

11 MR. SFIKAS: If the Court -- well, no, Your
12 Honor, not in the -- not in the sense of the profit, the
13 way that term is defined in the Blood Bank case and in a
14 legion of cases that define the term profit, Your Honor.

15 QUESTION: Well, those are lower court cases,
16 and I don't know that we've decided that. So, as I
17 approached this initially, I would have thought it was
18 designed to distinguish trade associations from charities.
19 This is -- yours is a trade association and the Blood Bank
20 is a charity.

21 MR. SFIKAS: Well, if the Court please, the
22 other respondent in the Community Blood Bank case was not
23 a charity. That was the Kansas City Area Hospital
24 Association.

25 QUESTION: But I'm not -- I'm not speaking of a

1 particular case. I mean, if I looked at this and said,
2 look, it tries to distinguish trade associations from
3 charities, why am I wrong? Am I wrong? And -- I --
4 granted, there are some tough distinctions somewhere along
5 the line, but this wouldn't be one of them, I guess.

6 MR. SFIKAS: With all due respect, Your Honor, I
7 would say that -- that you are wrong, that this is not a
8 trade association, that this is different than the Egg
9 Nutrition, for example, situation where clearly there was
10 a finding there with reference to the organization for its
11 profits. That was not a finding here. What the FTC
12 argues in this case, as it did in the Blood Bank case and
13 as it did in the AMA case, is --

14 QUESTION: Well, let's take a trade organization
15 that unquestionably is a trade -- now, maybe milliners --
16 I don't know what it would be -- that wants to improve the
17 image of milliners or hatters in the public view. It
18 doesn't make profit in the sense that you are describing,
19 but it does say, for example, if you join our
20 organization, then you will likely have \$6,000 in
21 additional revenues, in other words, a 20 percent return
22 on the investment that you've made in paying us dues.
23 Suppose that was what the trade association said. And it
24 did public things and it did things for the -- for the
25 prestige of hatters and also was designed to help them

1 make money. Would you say that the FTC had no authority
2 over such a trade organization?

3 MR. SFIKAS: No, I would not, Your Honor,
4 because I think even though I think the statute is clear
5 on its face and you need not go to the legislative
6 history, if you go to the --

7 QUESTION: But that wouldn't -- I gave you
8 something that deliberately does not have the narrow
9 definition of profit that you have been pressing.

10 MR. SFIKAS: Yes, but it is a commercial
11 organization, and I think the phrase that we're talking
12 about says, organized to conduct business and to gain a
13 profit. I think that is doing business and --

14 QUESTION: It doesn't say, and. It says,
15 business for profit.

16 MR. SFIKAS: Correct.

17 QUESTION: Business for the profit. Business
18 for the profit.

19 MR. SFIKAS: Correct.

20 QUESTION: I don't know. Were organizations
21 like the Cement Institute, the Sugar Institute, the Maple
22 Flooring Association -- were they themselves making
23 profit? I doubt it. I had always thought they were there
24 to make profit for their members.

25 MR. SFIKAS: Well, Your Honor, I think if you

1 look at the line of cases that the FTC relies on, in many
2 of those cases, the sole purpose of the organization was
3 to evade the antitrust laws. So, I -- I think it's very
4 clear that in those cases they were making a profit, and
5 in some of these other cases, I think it's clear to say --

6 QUESTION: Their members were.

7 MR. SFIKAS: No. I think the organization --

8 QUESTION: All right, okay. So -- so -- but if
9 I --

10 MR. SFIKAS: Indiana Federation of Dentists,
11 let's say. In that case, that was a guild. That guild
12 was set up to avoid the antitrust laws --

13 QUESTION: What I'm asking --

14 MR. SFIKAS: -- and try to get the labor
15 exemption. I think those cases fall in a different
16 category, Your Honor.

17 QUESTION: Well, you'd also say they fall --
18 they fall in a different category if the dentists agreed
19 on a recommended fee schedule that was higher than the
20 market would otherwise provide. Then it would clearly be
21 covered because that would be for the profit of the
22 members.

23 I mean, a lot of trade associations have in the
24 past engaged in price fixing. Raise the prices, we all
25 make more money. And if that were alleged by your

1 association, you would agree that it would be covered.

2 MR. SFIKAS: Your Honor, that would certainly be
3 the case if that were the primary, dominant --

4 QUESTION: Maybe if just one of the subsidiary
5 purposes. They mainly are interested in ethics of the
6 industry and the reputation of the dentists, but
7 incidentally, we also get the price level up about 10
8 percent higher than otherwise would be.

9 MR. SFIKAS: Okay. Your Honor --

10 QUESTION: If that were the case, I think you'd
11 say it would be covered.

12 MR. SFIKAS: Well, Your Honor, you make another
13 point that I think is -- is very valuable, and that point
14 is that we're not asking for an exemption from the
15 antitrust laws. Clearly we're subject to the Sherman Act
16 and the Clayton Act.

17 All we're saying here is that Congress intended
18 to have a limited statute for purposes of the FTC --

19 QUESTION: Well, except on that point, one of
20 the peculiar interests of the Federal Trade Commission is
21 advertising practices. And so, once -- insofar as you're
22 in advertising, you seem to me to be perhaps more in the
23 realm that is normally an FTC area of jurisdiction than
24 just the Sherman Act.

25 MR. SFIKAS: Well, I'm -- I'm not sure how you

1 come to that, and I respectfully disagree.

2 QUESTION: Are you going to answer Justice
3 Stevens' question? Besides saying that -- that such an
4 organization for that price fixing would be subject to the
5 Sherman Act, will you answer his question of whether the
6 Federal Trade Commission would have jurisdiction --

7 MR. SFIKAS: Are you saying -- I -- I forgot all
8 the facts of your hypothetical.

9 QUESTION: The very simple fact that the trade
10 association, as some in our sorry history of antitrust
11 laws have in the past done, are engaged in price fixing.
12 They raise the level of the -- the fees that the dentists
13 charge generally by restricting advertising, recommending
14 fee rates, and doing a lot of things like that, which I'm
15 not suggesting your organization does. But a hypothetical
16 dental association doing that, would it be covered?

17 MR. SFIKAS: I would say there that there would
18 be a finding that it's organized for the profit of its
19 members and that -- that it would then probably be subject
20 to the antitrust laws.

21 QUESTION: Subject to the Federal Trade
22 Commission Act.

23 MR. SFIKAS: And the Federal Trade Commission,
24 yes, Your Honor.

25 QUESTION: Why isn't the same thing true when

1 one of its objects is -- is to make insurance cheaper?
2 That increases the profit. Pay less for insurance, get
3 more for fees. The result is the same to the members.

4 MR. SFIKAS: Well, I -- I think what we're
5 quarreling about here is the definition of profit. That
6 does not meet the definition of profit.

7 QUESTION: Well, the -- the -- in each case, the
8 profit I understand is to be defined by an increase in
9 what the dentists have at the end of the day. And in
10 Justice Stevens' example, they get the increase by putting
11 the fee up. In -- in the example, I think, of your
12 client, they get it, if the association is doing its work,
13 by paying less for overhead. What's the difference?

14 MR. SFIKAS: The difference is that Congress
15 spoke a certain way in framing this legislation. This is
16 the same Congress that also enacted the Clayton Act. The
17 Clayton Act and the Sherman Act have very broad
18 definitions of who persons are, who corporations are.
19 Here clearly Congress meant something else.

20 What was going on at this time when this act was
21 passed was the concern over the big trusts. Congress was
22 not happy with the way in which the Sherman Act was being
23 prosecuted, Your Honor, and as a result, it wanted to
24 establish an agency, such as the Federal Trade Commission,
25 which would have expertise with reference to industrial

1 and commercial enterprises, not nonprofit professional --

2 QUESTION: But I -- I take it at the end of --
3 at the end of the day here, you're saying profit is -- is
4 that increase in income which results from raising fees
5 but not from lowering overhead, and that has -- that is of
6 jurisdictional significance. Is that the line you draw?

7 MR. SFIKAS: No, I -- because -- no. The
8 difference is, if what you're referring to is Justice
9 Stevens' hypothetical --

10 QUESTION: I was referring to my hypothetical --

11 MR. SFIKAS: I'm sorry.

12 QUESTION: -- in -- in which they -- they don't
13 get together to raise the fees. They get together to
14 lower the overhead, in this particular case, by
15 negotiating lower insurance rates for their members. At
16 the -- at the -- at the -- the bottom line, as people like
17 to say, is the dentists take home more money.

18 In Justice Stevens' example, they do it by
19 charging more for the filling. In my example, they pay
20 less for the insurance. Why in my example doesn't the --
21 doesn't the profit criterion get satisfied as well as in
22 his?

23 MR. SFIKAS: Because of the language in the
24 statute, Your Honor. That's not profit. That's not what
25 is -- what was contemplated by Congress when it used the

1 word profit. Clearly it meant the excess of revenue over
2 expense contemplated to be paid to the members, Your
3 Honor.

4 QUESTION: In Justice Stevens' example, the
5 association isn't paying any money to the members. The
6 association, as I understand his example, has simply
7 agreed that all of its members will charge more money for
8 the work that they do and, hence, will bring in more money
9 into their own coffers. The association isn't paying them
10 anything.

11 MR. SFIKAS: No. What I was saying was, as a
12 practical matter, if that case came before a court, I
13 think the court would make the finding that they're
14 organized to conduct business to make a profit, Your
15 Honor.

16 QUESTION: What I'm driving at with my -- I gave
17 a number of classic cases. Imagine in each of those cases
18 I change one fact, and I don't know if I'm changing it.
19 But the trade association in those cases was not itself
20 making a profit. All right, now I want to be -- that's
21 what I'm imagining.

22 MR. SFIKAS: Are we talking about --

23 QUESTION: Now, I want to say if I imagine
24 that --

25 MR. SFIKAS: That they're not making a profit --

1 QUESTION: They're not making a profit.

2 MR. SFIKAS: -- as that term is defined in
3 Community Blood Bank, Your Honor.

4 QUESTION: I -- that's correct.

5 MR. SFIKAS: Okay.

6 QUESTION: Because they're only income is dues.

7 MR. SFIKAS: Okay.

8 QUESTION: And they spend all the dues.

9 MR. SFIKAS: Okay.

10 QUESTION: I'm imagining that.

11 MR. SFIKAS: Okay.

12 QUESTION: All right. Is there any other
13 difference between your association and those?

14 MR. SFIKAS: Yes, Your Honor.

15 QUESTION: What?

16 MR. SFIKAS: We have a public purpose. We
17 promote the art and science of dentistry.

18 QUESTION: Well, I believe Maple Flooring would
19 have promoted the art and science of maple flooring. It's
20 beautiful, you know, aesthetically attractive, and so
21 forth.

22 MR. SFIKAS: I do -- I -- I -- that --

23 QUESTION: Is there any other purpose -- any
24 other difference?

25 MR. SFIKAS: That -- that is the major

1 difference, Your Honor.

2 May I switch quickly to the -- the application
3 of the -- the antitrust laws to this case? And may I
4 refer you to the cert, appendix 246a, number 326.

5 The administrative law judge heard this case,
6 saw the witnesses, reviewed the testimony, came to this
7 conclusion after the trial. The activities of the CDA
8 with respect to their enforcement of their code of ethics
9 relative to advertising has no impact on competition in
10 any market in the State of California, particularly with
11 respect to price and output.

12 QUESTION: May I say at this point, I notice
13 your brief quoted that several times, and you did not
14 quote the fact that that was a quotation of what Professor
15 Knox had concluded. You treated it as though it was a
16 finding by the ALJ.

17 MR. SFIKAS: Your Honor, that is a finding of
18 the ALJ. If you will look at the beginning of the ALJ's
19 opinion, he indicates that those are findings, that
20 everything in -- that everything that he's adopted are in
21 his findings of fact, Your Honor.

22 QUESTION: The finding is, of course --

23 QUESTION: It's just a finding of fact that
24 Professor Knox concluded that, not that the ALJ concluded
25 it, isn't it?

1 MR. SFIKAS: No, Your Honor, that's not how I
2 read it. I read that -- if you look at the analysis of
3 the ALJ, he came to the conclusion that the complaint
4 counsel did not prove the elements of a rule of reason
5 case. He held that they did not define a geographic
6 market. He held --

7 QUESTION: Yes, but I must say I really was a
8 little troubled reading your brief, that you quoted it as
9 though it were an independent finding of fact without
10 referring to the fact that Professor Knox had so
11 concluded. And I don't see anything in the findings that
12 say, in so many words, I believe everything that Professor
13 Knox said.

14 MR. SFIKAS: Well, Your Honor, what we went on
15 -- and there's a footnote in our brief that actually makes
16 reference to that where he makes reference to the
17 following. And it's 161a of the cert petition appendix.
18 This decision is based on the transcript of testimony, the
19 exhibits which I received in evidence, and the proposed
20 findings of fact and conclusions of law and answers
21 thereto filed by the parties. I have adopted several
22 proposed findings verbatim. Others have been adopted in
23 substance. All other findings are rejected either because
24 they are not supported by the record or because they are
25 irrelevant.

1 QUESTION: And what in that says he believed
2 Professor Knox?

3 MR. SFIKAS: I think the -- the clear reference
4 here is that what is in his findings of fact are what he
5 found to be the facts in this case, Your Honor.

6 QUESTION: Yes. What found to be the fact was
7 that Professor Knox reached this conclusion.

8 MR. SFIKAS: But he came to the same conclusion
9 in his conclusions.

10 QUESTION: Well, where? Where did he come to
11 the same conclusion other than by quoting Professor Knox?

12 MR. SFIKAS: He came to the same conclusion that
13 they did not prove up the elements of a rule of reason
14 case, Your Honor.

15 QUESTION: If that's so -- let's assume he did
16 accept that. Are you -- are you saying that the
17 commission could not conclude the following words? It
18 says, in practice, California Dental prohibits all quality
19 claims. Now, is it your point that that -- those six
20 words I just -- eight words I just read are not supported
21 in the record? In practice, California Dental prohibits
22 all quality claims. Is it your point that that isn't
23 supported?

24 MR. SFIKAS: I think it's -- that not only is --
25 is my point, Your Honor, but I believe that that's a

1 conclusion that the commission came to, which is one that
2 can be reviewed here. There's also authority for the fact
3 that when there is an inconsistency in the findings of the
4 ALJ and the commission, you may scrutinize the findings.

5 QUESTION: All right. So, what you want us to
6 do is to look to see whether the commission could
7 reasonably conclude in practice California Dental
8 prohibits all quality claims.

9 MR. SFIKAS: Yes, Your Honor. We --

10 QUESTION: And if I conclude that there is
11 enough evidence, then you lose.

12 MR. SFIKAS: Well, no, Your Honor. I think at
13 that point in time, you look at our pro-competitive
14 justifications, and that's why you need the traditional
15 rule of reason to balance here if there is anything that's
16 anti-competitive with the pro-competitive.

17 And let me tell you what those pro-competitives
18 are. It is to remove the -- the untruthful aspects of
19 someone's advertising. It is to give consumers more
20 information so that they may be better shoppers for dental
21 services, and it reduces search costs. If you -- if you
22 provide --

23 QUESTION: Counsel, may I ask you just to back
24 up on something that was puzzling me because you speak of
25 a full rule of reason examination. These cases come from

1 the FTC directly to the court. So, you're not suggesting
2 -- well, maybe you are -- that the court of appeals is the
3 appropriate tribunal to engage in this extensive -- you're
4 saying that's what the commission should have done. Is
5 that --

6 MR. SFIKAS: That's -- that's what the
7 commission should have done, and because they did not do
8 it, we believe that you should reverse the Ninth Circuit
9 Court of Appeals, Your Honor.

10 QUESTION: What more would you have had the
11 commission do?

12 MR. SFIKAS: I would have had the commission
13 look to see whether there are any anti-competitive effects
14 in this case. All they -- they concluded -- they didn't
15 -- there's -- there's nothing in this record to indicate
16 whether advertising of dentists has been restrained, Your
17 Honor. If you look at the telephone books in the State of
18 California, you'll know that that -- that conclusion could
19 not be come to by this -- by this commission.

20 QUESTION: Is Painless Parker still there?

21 (Laughter.)

22 MR. SFIKAS: No, Your Honor. No. He's gone on,
23 Your Honor. He's gone on to meet his just rewards, I
24 think.

25 (Laughter.)

1 MR. SFIKAS: But -- but as a matter of fact,
2 Your Honor, you have 25 percent of the -- of the dentists
3 who don't belong to the association. If the commission
4 were right, if -- if what has occurred here is the -- CDA
5 has voluntarily tied its own hands, why wouldn't the other
6 25 percent use advertising and build up their practice and
7 become extremely successful, and in becoming successful,
8 why wouldn't there be droves of dentists moving into --
9 into California to do just that?

10 There are five dental schools in the State of
11 California. They produce individuals all the time who add
12 to the output. There has been no restraint. There has
13 been no restriction of output and no increase in prices
14 here as was the case in the two cases where you did apply
15 the quick look: the NCAA and the --

16 QUESTION: That's a different -- that's a
17 different matter. Whether prices have gone up or not, I
18 take it, is not something the FTC has to prove. What they
19 have to prove is that there's a restriction on competition
20 and a determination that California Dental prohibits all
21 quality claims is the restriction on competition. That is
22 a determination that the members of the association have
23 agreed not to compete in respect of making quality claims.

24 What else do you want? That is the restriction
25 on competition? Why do you have to have some big market

1 investigation? I mean, maybe it's justified, as you first
2 said. That would be a different matter.

3 MR. SFIKAS: Well, if the Court please, first of
4 all, as a matter of fact, all we ask for is verification
5 in the ads. The ads are not banned. There are no banning
6 of ads in this case. This is not a banning of ads case.
7 This is requesting more disclosure, more information.
8 This --

9 QUESTION: Yes, but counsel, you must concede
10 that sometimes more means nothing because it -- you have
11 to disclose so much that it becomes impossible.

12 MR. SFIKAS: The -- well --

13 QUESTION: So, but something that on its face
14 can look like full disclosure can mean, in effect, you
15 can't do it.

16 MR. SFIKAS: Your Honor, that -- I will agree
17 that that can happen. That's not this case, however.

18 QUESTION: Well, I think that the commission
19 said it was, at least with respect to the --

20 MR. SFIKAS: Across-the-board?

21 QUESTION: -- across-the-board discount.

22 MR. SFIKAS: Well, with the across-the-board
23 discounts, the FTC's own witness testified that across-
24 the-board doesn't work because it may fool customers. Pac
25 Bell doesn't permit across-the-board in telephone books.

1 So, if the Court please, the facts don't sustain the
2 across-the-board.

3 But in any event, all we were requiring -- let's
4 -- let's take the non-across-the-board. All we're saying
5 is that if a dentist wants to advertise a reduction in
6 price, for example, and you -- you have to include in that
7 ad the old price, the reduced price, who it applies to,
8 and the length of time that it applies. Those are very
9 reasonable, Your Honor.

10 With the across-the-board, there's also evidence
11 that all dentists -- although dentists may do 100
12 different treatments, they only do --

13 QUESTION: Do we owe any deference to the
14 commission saying that would be such a cluttered ad,
15 nobody would -- nobody would read it?

16 MR. SFIKAS: You mean the across-the-board?

17 QUESTION: Um-hum.

18 MR. SFIKAS: Well, I think that's true too, Your
19 Honor.

20 QUESTION: Well, then you're conceding that the
21 additional disclosure isn't a fact of prohibition.

22 MR. SFIKAS: No, no, no.

23 QUESTION: You conceded that's the purpose of
24 advertising.

25 MR. SFIKAS: Oh, oh. You're -- I see. I

1 thought you were talking about an across-the-board --
2 simply an across-the-board ad. You're saying --

3 QUESTION: I was just saying that --

4 MR. SFIKAS: With the verification.

5 QUESTION: -- an ad that met all of these
6 requirements because your code I think doesn't prohibit
7 them. It just says you have to do all this.

8 MR. SFIKAS: Correct, Your Honor.

9 QUESTION: If the FCC -- FTC concludes an ad
10 that cluttered simply wouldn't be run, nobody would do
11 it --

12 MR. SFIKAS: Well, but if the Court please --

13 QUESTION: -- don't we owe some deference to
14 that judgment?

15 MR. SFIKAS: Well, if the Court please, let's
16 pay deference to that judgment, but that's just the
17 beginning of the rule of reason analysis. That doesn't
18 show that advertising has been restricted or that output
19 has been reduced or prices have been increased, Your
20 Honor.

21 QUESTION: Well, it shows that advertising has
22 been restricted. It may not, in and of itself, show that
23 competition has been affected, but advertising has
24 certainly been restricted. You can't make that kind of an
25 advertising claim. You can't say 10 percent off all fees.

1 That's a restriction, isn't it?

2 MR. SFIKAS: Well, even if we assumed that it
3 is, Your Honor, we have pro-competitive justification.

4 QUESTION: Well, don't we have to assume that it
5 is. If -- if the commission tells me that, as a member, I
6 cannot run an advertisement that says 10 percent off all
7 charges, isn't that by definition a restriction on my
8 advertising?

9 MR. SFIKAS: That's the across-the-board that
10 you're talking about.

11 QUESTION: That's right. That's right.

12 MR. SFIKAS: Well, suppose --

13 QUESTION: Well, isn't that a restriction?

14 MR. SFIKAS: Even if it is, that's the beginning
15 of the rule of reason analysis, Your Honor.

16 QUESTION: Well, is it or isn't it? Is it or
17 isn't?

18 MR. SFIKAS: Is a restriction if people actually
19 do advertise that way. I'm not sure that dentists
20 advertise that way --

21 QUESTION: Well, then why did you agree with me
22 when I said that is the restriction on competition? The
23 marketplace effects are the effects of the restriction,
24 not the restriction. I thought you were agreeing with me
25 on that, and certainly there are dozens of cases,

1 Paramount, Famous Laske, First National Theaters.

2 So, you don't have to make a big market
3 investigation. Just look to see if there's a restriction.
4 Then see if it's counterbalanced. Very well. What the
5 FTC says is, we've looked into that. We agree with you.
6 There is something to be said for your position. We agree
7 that this is misleading sometimes, but on balance, we
8 think it's not worth it. Okay? On balance, we think that
9 the restriction is worse than the justification.

10 Now, what are we supposed to do about that? You
11 mean when I read through the record, I'm going -- supposed
12 to find out that they're completely off base? Is that
13 what you want me to do?

14 MR. SFIKAS: I think if you read the record,
15 you'd find that to be the case, Your Honor.

16 But, no, I didn't believe that I was being
17 inconsistent when I answered the two questions. I believe
18 that even if you assume that there is something here which
19 is anti-competitive, that you look at the pro-competitive
20 justifications and you balance and you don't do this on a
21 quick look.

22 A quick look is nothing more than an expansion
23 of the per se rule. This Court has been moving away from
24 the per se rule.

25 QUESTION: May I ask you on your reference to

1 quick look, whether you think our opinion in the National
2 Society of Professional Engineers case was a quick look
3 case or not?

4 MR. SFIKAS: No, because there, there was no --
5 no pro-competitive justification.

6 QUESTION: Well, they made an effort to make a
7 pro-competitive justification.

8 MR. SFIKAS: No. It was outside competition,
9 Your Honor. As you -- as Your Honor had said, it was a
10 frontal attack on competition.

11 What I'd like to do, if I can, is reserve the
12 balance of my time for rebuttal.

13 QUESTION: May I ask you one question, though?

14 MR. SFIKAS: Yes.

15 QUESTION: When -- when you say they didn't go
16 to the second prong and do the pro-competitive analysis,
17 is -- is it your claim that they did not -- they refused
18 to receive evidence that -- that indicated a pro-
19 competitive effect or their -- their analytical treatment
20 at the end of the case simply did not deal specifically
21 with such evidence as there was?

22 MR. SFIKAS: The analytical treatment, Your
23 Honor. They simply dismissed the pro-competitive aspect
24 of this case.

25 QUESTION: Very well, Mr. Sfikas.

1 Mr. Wallace, we'll hear from you.

2 ORAL ARGUMENT OF LAWRENCE G. WALLACE

3 ON BEHALF OF THE RESPONDENT

4 MR. WALLACE: Thank you, Mr. Chief Justice, and
5 may it please the Court:

6 The provision conferring jurisdiction on the
7 commission, section 4 of the Federal Trade Commission Act,
8 is set forth in full in the commission's opinion which is
9 on page 48a of the petition appendix, the light covered
10 document. It's -- it's the latter part of this definition
11 that is pertinent here.

12 Section 4 uses expansive language in conferring
13 jurisdiction. It extends the ordinary meaning of
14 corporation to include any organization associated --
15 organized to carry on business for its own profit or -- or
16 that of its members, even if it is unincorporated and even
17 if it lacks hallmarks of a profit-making enterprise, such
18 as shares of capital or capital stock or certificates of
19 interest. So long as it is carrying on its activities for
20 the profit of its members, it comes within the definition.

21 And under any --

22 QUESTION: Really, it says carrying on business.

23 MR. WALLACE: Carrying on business, that is
24 correct.

25 QUESTION: And you think carrying on business

1 embraces carrying on any activities.

2 MR. WALLACE: Well, certainly in one sense, the
3 activities or an organization are its business. Those are
4 the purposes for which it is organized and what it is
5 authorized to do under its certificate of incorporation.
6 It is hard to see what else is involved there.

7 QUESTION: If you had a -- a not-for-profit
8 corporation of doctors that does nothing but meet once a
9 month to discuss innovations in surgery, that association
10 would be carrying on business in your definition of the
11 term here.

12 MR. WALLACE: If -- if it were an organization
13 organized within the meaning of this act and -- and I
14 wouldn't hesitate to say that it would come within the
15 jurisdiction of the commission, although as you posed the
16 hypothetical, there would be no reason to think that
17 there's any violation of law.

18 But if they should add to that some deceptive
19 misrepresentations to the public in the form of paid
20 advertising, it's only section 5 of the Federal Trade
21 Commission Act that protects the public against that kind
22 of activity which is just as a small organization that
23 broke away from the Indiana Dental Association, the
24 Indiana Federation of Dentists, might have, in the three
25 communities in which their membership was concentrated,

1 engaged in deceptive practices that -- that should have
2 been of concern to the commission.

3 The mere fact that they're within the
4 jurisdiction of the agency doesn't mean that the agency is
5 going to prevent them from carrying on lawful activities,
6 but while petitioner says they're not exempt from the
7 antitrust laws, they are seeking an exemption from the --
8 the Federal statute that protects the public against
9 deceptive practices.

10 QUESTION: Well, one of the things they point to
11 is that the Clayton Act -- the trade -- any trade
12 association. So, they have to fit at least that. But
13 here they say there's this formula that they don't fit
14 under.

15 Can you tell us what is excluded from the FTC
16 jurisdiction?

17 MR. WALLACE: Well, I -- I -- the commission's
18 own interpretation explains that in some detail as they
19 have formulated their interpretation, which is a
20 reasonable interpretation of -- of the language. As long
21 as the pecuniary benefit that they're engendering for
22 their members is a substantial part of the organization's
23 total activities rather than incidental to some
24 noncommercial activity, so they're not trying to reach
25 purely charitable organizations.

1 And in the commission's own holding in the
2 College Football Association case, which we cite on page
3 26 of our brief, they determined that they lacked
4 jurisdiction over a nonprofit organization engaged in
5 commercial activity for its members' benefits because its
6 members were themselves not-for-profit organizations.
7 So --

8 QUESTION: But you say pecuniary benefit is all
9 that's necessary. I -- I think most -- most fraternal
10 organizations, Knights of Columbus, the Elk, and so forth,
11 provide insurance for their members at -- at reduced rates
12 because they negotiate good contracts. That's certainly
13 for the pecuniary benefits of all of the members, and I
14 think it's a substantial incentive to join if that is --
15 if that correlates with a substantial part of the
16 activities of the corporation. Do you think they're
17 covered?

18 MR. WALLACE: And some of -- and some of the
19 members might use that insurance for business insurance.

20 QUESTION: Well, let's assume they don't use it
21 for business insurance. I'm just assuming they use it for
22 -- for personal -- life insurance, personal life
23 insurance. It's certainly a pecuniary benefit to me that
24 I get life insurance at a lower rate.

25 MR. WALLACE: Well, in that sense, it would be

1 for the profit of the members. I don't know of a case in
2 which the commission has concerned itself with such an
3 organization.

4 QUESTION: Just out of its general benevolence
5 it has decided not to move against them, although it
6 could.

7 MR. WALLACE: Well, your hypothetical doesn't
8 suggest any violation of law --

9 QUESTION: But you think -- you think they're
10 subject to the jurisdiction of the -- I really find it
11 hard to see what -- what the exemption was put in for if
12 the Knights of Columbus and the Elk are covered.

13 MR. WALLACE: Well, the commission has -- has
14 not quarreled with what we always thought to be the
15 holding in Community Blood Bank, that purely charitable
16 organizations are not covered, and that might include
17 other eleemosynary organizations. And as a matter of
18 fact, in 1977, they sought a change in the law for that
19 purpose.

20 But what --

21 QUESTION: When you use the word profit, don't
22 you think the word profit means not just pecuniary
23 benefit, but pecuniary benefit that comes from some
24 commercial enterprise, either investing or an actual
25 business?

1 MR. WALLACE: Well, that -- that is certainly --

2 QUESTION: So that the -- so that pecuniary
3 benefit to individuals, like the individual members of the
4 Knights of Columbus, wouldn't count?

5 MR. WALLACE: That may --

6 QUESTION: Whereas business insurance for -- for
7 dentists might count.

8 MR. WALLACE: Well, that is all we would need to
9 cover this case, and so the Court doesn't really have to
10 address that issue. And it's certainly --

11 QUESTION: Well, you had --

12 MR. WALLACE: -- a plausible way of looking at
13 profit --

14 QUESTION: Mr. Wallace, may I seek this
15 clarification? You are trying to get some kind of a
16 handle on pecuniary benefits by using the word
17 substantiality.

18 MR. WALLACE: Yes.

19 QUESTION: But you've used that to modify
20 activities. Perhaps what it should modify is the business
21 benefits not -- you said it shouldn't be incidental. It
22 should be substantial. So, maybe the substantiality
23 belongs with what is the benefit to the business of the
24 dentists rather than the activity. Or doesn't it matter?

25 MR. WALLACE: Well, I -- I did not choose the

1 formulation that I used. I was quoting the commission's
2 formulation and --

3 QUESTION: A problem counsel is often faced
4 with, yes.

5 (Laughter.)

6 MR. WALLACE: And -- and -- I think the
7 commission was concerned principally with trying to avoid
8 charitable organizations which might incidentally engender
9 something of pecuniary benefit to member organizations
10 that use the blood and are charging for surgery and might,
11 for example, be said to be deriving some pecuniary
12 benefit.

13 But -- but I don't think this case is close to
14 the borderline of those definitional questions because
15 these are entrepreneurs engaged in profit-making business.
16 And it's quite clear from the legislative history that the
17 conference committee deliberately changed the statutory
18 text because they were warned that a trade association
19 could become the vehicle, as it was put in the legislative
20 history, for the imposition of horizontal trade restraints
21 among the competing members, which is exactly the problem
22 we're faced with here. And the enforcement history of the
23 Federal Trade Commission Act is replete with examples of
24 the commission's exercise of jurisdiction over trade
25 associations of various kinds, all on the assumption that

1 the jurisdiction extends that far.

2 In -- in -- in a very early court of appeals
3 decision, quoted on page 20 of our brief, the National
4 Harness Manufacturers against FTC case, the Sixth Circuit
5 in 1920 picked up on the very point made in the
6 legislative history in saying that the language of the act
7 affords no support for the thought that individuals,
8 partnerships, and corporations can escape restraint under
9 the act from combining together in the use of unfair
10 methods of competition merely because they employ as a
11 medium an unincorporated, voluntary association without
12 capital and not itself engaged in commercial business.

13 And in footnote 12 of our brief, we cite three
14 examples from volume 1 of the Federal Trade Commission
15 Reports in 1917 and 1918 of trade associations that the
16 Federal Trade Commission took action against --

17 QUESTION: Mr. Wallace, am I right that in 1917
18 and 1918, Congress for the people generally were not
19 thinking about the professions as trades or businesses --

20 MR. WALLACE: That certainly is the case, and
21 what I was leading up to is that then some of this Court's
22 leading decisions also involved trade associations not
23 involving the -- the learned professions, FTC against
24 Cement Institute, Fashion Originators' Guild against the
25 Federal Trade Commission.

1 But then more recently, there have been at least
2 two cases on the merits in this Court that -- that did
3 involve associations and the learned professions where it
4 was just assumed that they too fell within the
5 jurisdiction: FTC against Indiana Federation of Dentists,
6 and FTC against the Superior Court Trial Lawyers
7 Association.

8 QUESTION: Mr. Wallace, if I -- if I assume the
9 jurisdictional question and say, yes, at one time we
10 didn't think of these things as trades, now we do. But
11 still it's also a professional organization, and this is
12 its ethics guide.

13 Does the commission and the Court owe any
14 respect to the medical association, the dental association
15 when they say this is a matter of ethics, not business and
16 profit?

17 MR. WALLACE: Well, they certainly owe respect
18 to any litigant before the commission to take seriously a
19 pro-competitive or other legitimate business justification
20 that the organization puts forward for a restraint that it
21 is imposing and to see whether that justifies a restraint
22 that otherwise would be a violation --

23 QUESTION: You're speaking generally.

24 MR. WALLACE: -- an unfair method of
25 competition.

1 QUESTION: I'm asking you specifically about
2 professions. Are they different from people who make --
3 what was it -- maple floors or hats or -- does that
4 professional -- is there that much carryover from the days
5 when weren't considered commerce at all?

6 MR. WALLACE: Well, I think that this Court's
7 decisions in Goldfarb and Bates say that, for the most
8 part, this distinction has become an anachronism. There
9 are many industries that affect the public where people
10 have a high degree of training in -- in supplying
11 foodstuffs for the consumption of the public and the like.

12 QUESTION: Well, is it up to us or is it up to
13 Congress to -- to declare when things have become an
14 anachronism? I mean, if Congress -- you think Congress
15 clearly thought, when this statute was enacted, that
16 dentists associations and doctors associations and lawyers
17 associations were not covered by it.

18 MR. WALLACE: Well, that is precisely the
19 argument that this Court unanimously rejected in
20 Goldfarb --

21 QUESTION: I know. Well --

22 MR. WALLACE: -- with respect to the application
23 of the antitrust laws themselves --

24 QUESTION: I understand. I understand that.

25 MR. WALLACE: And -- and rejected in Bates.

1 And --

2 QUESTION: But you acknowledge that Congress did
3 not think that this applied to the professions when it was
4 enacted, but it -- but you say it does today, without
5 Congress having changed its mind.

6 MR. WALLACE: Well, Congress didn't focus on
7 that question in -- in enacting this jurisdictional
8 provision.

9 QUESTION: Well, the language they adopted was
10 language which was understood not to include the
11 professions at the time.

12 MR. WALLACE: Well, I think --

13 QUESTION: But it covers the professions today
14 because what? Because we say it covers the professions.

15 MR. WALLACE: Well, this -- this Court's
16 decisions. Since Congress did not exclude their coverage
17 and Congress was adopting a generally applicable
18 principle --

19 QUESTION: But, Mr. Wallace --

20 MR. WALLACE: -- this Court's decisions say that
21 unanticipated applications are within -- that are within
22 the language Congress adopted --

23 QUESTION: But was the assumption of Congress
24 that the statute might not apply because they were
25 professions or because there was doubt as to whether they

1 were insurance? You make the same argument about the
2 insurance industry. Whether they were in commerce I mean.

3 You make the same point about the insurance
4 industry. It's pretty clear from National -- Southeastern
5 Underwriters they didn't think it was covered, but
6 nevertheless it is now. Why is this any different?

7 MR. WALLACE: Of course, that was the basis for
8 doubt that the -- the learned professions, so-called,
9 would be covered because of doubt that the scope of the
10 Commerce Clause extended that far.

11 But if anything, the situation today is even
12 more pronounced in trying to make a meaningful distinction
13 between the learned professions than it was at the time
14 Goldfarb and Bates were decided. We have so much of the
15 economy devoted to high tech industry and sophisticated
16 service industries that involve persons with high degrees
17 of training and skills, other professions are including
18 paralegals, medical technicians --

19 QUESTION: Cosmetologists.

20 MR. WALLACE: It -- it becomes quite difficult
21 to think that there is a meaningful line to be drawn
22 between the sorts of enterprises we're talking about here
23 in our modern society. And -- and it -- there was no hint
24 in this Court's opinions in the Superior Trial Court
25 Lawyers case or in California Federation of Dentists of

1 any concern about that. Of course, it wasn't an issue
2 that was raised, but that's because the general assumption
3 has been that trade associations that operate for the
4 benefit, the pecuniary benefit, the profit, of their
5 members are covered by the Federal Trade Commission Act.

6 Now, if I may turn to the merits. The court of
7 appeals correctly applied -- and the commission here --
8 the rule of reason in accordance with this Court's modern
9 jurisprudence which approves a flexible inquiry under the
10 rule of reasons that is appropriate to the circumstances
11 of each case. As I said in connection with jurisdiction,
12 but it's very important to the merits, this Court
13 recognized in the Professional Engineers case that
14 agreements among members of a professional association
15 that govern the way those members compete with one another
16 are horizontal restraints of trade.

17 QUESTION: Isn't that consistent with the
18 petitioner's argument that the way we can tell that an
19 abbreviated analysis is necessary is by looking at the
20 kind of restraint and that is very close to a per se rule?
21 Isn't he right about that?

22 MR. WALLACE: Well, the restraints involved in
23 this case are very close to the kind of horizontal
24 restraints that have been found to be per se violations,
25 and that is one --

1 QUESTION: Well, so this is sort of a quasi per
2 se category I suppose.

3 MR. WALLACE: Well, I -- I -- we -- we've gotten
4 away from proliferation of categories in modern antitrust
5 thinking.

6 QUESTION: Well, then how -- how are we supposed
7 to know then when the abbreviated rule of reason analysis
8 is appropriate? If we don't have categories, what else do
9 we have?

10 MR. WALLACE: Well, in this -- in this instance,
11 we have findings by the commission, which addressed the
12 pertinent considerations and which sufficed for the
13 purpose. And the most important part of the commission's
14 inquiry was to find that there were actual substantial
15 anti-competitive effects of these restraints.

16 QUESTION: What were the exact findings? I'm
17 just not clear on that. The -- the restriction I don't
18 have any problem with. I -- I mean, I understand the
19 restrictions that they found. What were the findings
20 about the effects?

21 MR. WALLACE: Well, I think they're summarized
22 quite well by the court of appeals, which reviewed the
23 substantiality of the evidence, and summarizes them on --
24 if I may turn to that, on page -- pages 22a and 23a of the
25 joint appendix, that as the commission found, petitioner

1 was at the hub of this agreement among the competitors
2 that involved 75 percent of the dentists in California.
3 And vast categories of advertising were totally banned.
4 The court of appeals recognized that there was some
5 confusion in the way this was applied.

6 QUESTION: Right. That's the restriction, but
7 what -- what do we have for effect?

8 MR. WALLACE: I'm sorry?

9 QUESTION: I mean, I have no question about the
10 restriction, e.g., the across-the-board advertising. I
11 will assume the commission is absolutely right. Across-
12 the-board discount advertising is prohibited. You can't
13 run ads saying the waiting room is comfortable and I'm
14 progressive and so on.

15 What do we know about the effects of that
16 restriction?

17 MR. WALLACE: Well, we know that when individual
18 dentists engaged in advertising of this sort, it attracted
19 a large number of new patients and then they refrained
20 from engaging in it.

21 QUESTION: Do -- do we have specific commission
22 findings to that effect? I have not been through the
23 commission findings.

24 MR. WALLACE: Yes. We do --

25 QUESTION: Well, let me -- while you're looking

1 for that --

2 MR. WALLACE: Well, I'm referred to page 78a of
3 the petition appendix. The -- and we refer to this on
4 page 37 of our brief in the latter part of the page.

5 What the commission found, in summary, was that
6 advertising of this kind was of value to consumers who
7 rely on advertising in helping --

8 QUESTION: My problem I think is just this. I
9 -- I'm -- I'm aware of summaries, but I'm not aware of
10 anything very specific. Do we have anything more specific
11 than this kind of summary, conclusory --

12 MR. WALLACE: Well, that is the most specific
13 point about consumer response to the particular ads. The
14 commission did say it interfered with healthy competition
15 for their patronage.

16 QUESTION: I mean, that's just conclusion. That
17 -- that to me is -- that -- the existence of that kind of
18 conclusion is -- is the basis for -- for the commission's
19 determination here is what seems to me to give edge to
20 Justice Kennedy's question. We are so close to a per se
21 analysis, that unless I'm going to accept it as per se,
22 there's nothing intuitively persuasive about what the
23 commission says it is so conclusory.

24 MR. WALLACE: Well, the court of appeals
25 accepted it as a valid application of the rule of reason,

1 did not think it should reach the per se issue or approve
2 of a per se --

3 QUESTION: Well, if those conclusions are -- if
4 those conclusory statements are sound, I don't have any
5 problem with the ultimate result.

6 MR. WALLACE: Well, all --

7 QUESTION: They're not intuitively sound.
8 That's my problem.

9 MR. WALLACE: All of the findings by the
10 commission in this case -- and they are -- are numerous --
11 are -- are based on a detailed record that was compiled
12 through extensive discovery, followed by a 2-week trial.

13 And the central thing in the record is an
14 analysis of petitioner's challenges to advertisements by
15 393 dentists from 1982 to 1993 that showed the nature of
16 the restraints being imposed.

17 Then there was testimony, both --

18 QUESTION: What the commission significantly
19 didn't find and what the court of appeals didn't find was
20 that dentists are more -- are -- are willing to -- to be
21 constrained in their advertising rather than resign from
22 the association. All the court of appeals said is -- it
23 puts the burden on the other side. The record does not
24 show that dentists are willing to forego CDA membership
25 rather than give up their advertisements.

1 It seems to me that if you want to establish
2 that something is happening in the market to restrain
3 competition, it is the opposite that has to be proved by
4 the Government, namely that dentists would rather forego
5 advertising than be bounced out of this association. And
6 that's never established anywhere. The court of appeals
7 acknowledges it.

8 It's sort of an intermediate per se rule where
9 we don't say it's per se, but we're going to shift the
10 burden to the other side to show that it isn't okay, you
11 know.

12 MR. WALLACE: As a matter of fact, members of
13 the associations and of the local associations testified,
14 quote, no one gives up membership, unquote, in petitioner
15 to avoid its restrictions on advertising. That is on page
16 84a of the appendix to the petition. There was -- and
17 they --

18 QUESTION: You say there is such a finding, and
19 -- and it's supported by the record?

20 MR. WALLACE: Well, there -- there is, yes.

21 QUESTION: The court of appeals didn't find that
22 anyway.

23 MR. WALLACE: There is -- there is evidence to
24 that effect, and -- and the commission did rely on -- on
25 testimony and on the fact that in many of these case

1 studies that were followed, the applicant for membership
2 or the member gave up the ad rather than risk his
3 membership. This was --

4 QUESTION: Are you aware --

5 MR. WALLACE: -- a survey of 393 examples in
6 which the commission imposed discipline on advertising --
7 which the -- the petitioner imposed discipline on
8 advertising. And in no instance of all of those case
9 studies did the dentists choose to stay with the ads and
10 give up membership because membership has many values that
11 the petitioner has touted and that we summarize on pages 2
12 and 3 of our brief, including a finding that Justice
13 Kennedy referred to earlier by the commission that
14 petitioner -- the petitioner -- represented the value to
15 be anywhere from \$22,000 to \$65,000 a year to members,
16 depending on the array of services that they chose to call
17 upon.

18 So, we do have findings of harm to competition
19 from the particular restraints, and the fact that they
20 didn't result from a more detailed inquiry I think is
21 justified by the fact that the restraints themselves are
22 in such a sensitive area of horizontal restraint with
23 respect to advertising discounts, they come -- at least
24 they're akin to tampering with price competition itself.
25 When the competitors agree not to advertise discounts,

1 that rather takes the incentive out of giving them
2 discounts.

3 QUESTION: I don't see why -- why would that --
4 have you come across something in writing that goes into a
5 question I've never seen answered? I have no problem this
6 was a rule of reason. They applied, of course,
7 justification before deciding it was illegal. It's not a
8 per se rule, but when you look to see whether you're going
9 to do a thorough market effects test in trying to figure
10 out whether something is competitive or not competitive,
11 there can be an infinite number of situations. Sometimes
12 you have to do it in order to see if you have any anti-
13 competitive agreement; sometimes you don't. Sometimes you
14 have to do it to see how serious the agreement is;
15 sometimes you don't. You're using the rule of reason in
16 any case.

17 But have you come across something that tries to
18 categorize when you'd have to do a thorough economic
19 analysis to see if you have an anti-competitive effect,
20 when you'd have to do it to see how serious the anti-
21 competitive effect that appears from the face agreement
22 is, when you'd have to do neither? I've never seen such a
23 thing, but maybe there is --

24 MR. WALLACE: Well, one -- one source of this is
25 the Court's opinion in Indiana Federation of Dentists

1 which approvingly quotes Professor Areeda as saying that
2 market power is but a surrogate for actual anti-
3 competitive effects. So, if -- if a finding is made of
4 actual anti-competitive effects, it isn't necessary to
5 have a detailed inquiry into whether there's market power.
6 The fact that the anti-competitive effects were -- were
7 effectuated is itself a showing of market power. Market
8 power is not what the antitrust law prohibits. What the
9 antitrust law prohibits is anti-competitive effects.

10 QUESTION: You might have to go into the details
11 in order to decide whether it's serious enough in its
12 effect to overcome a justification.

13 MR. WALLACE: Well, that's right. And -- and in
14 this case, the particular kinds of restraints and the
15 anti-competitive effects were ones at the most sensitive
16 area of the Sherman Act, the other being an agreement to
17 refrain from the kinds of advertising that were bringing
18 in large numbers of new customers, such as quality claims.
19 This is like restricting one's --

20 QUESTION: Excuse me. I do not understand this.

21 MR. WALLACE: -- own output of services.

22 QUESTION: Could you give me -- just take one
23 pause between sentences.

24 I don't understand how there can be an anti-
25 competitive effect when there is no market power. Do you

1 assert that that can be the case?

2 MR. WALLACE: Well, the commission recognized
3 that the market was -- that the market was for dental
4 services and that it's a localized market. But it isn't
5 -- the Court itself has said that it isn't necessary to
6 define and inquire into market power when you have
7 evidence and -- and justified findings of actual anti-
8 competitive effects because the inquiry into market power
9 is but a surrogate for whether there were anti-competitive
10 effects of the restraints.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
12 Wallace.

13 The case is submitted.

14 (Whereupon, at 12:08 p.m., the case in the
15 above-entitled matter was submitted.)

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CERTIFICATION

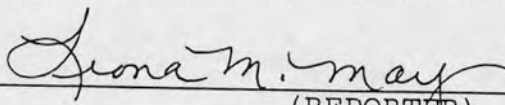
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CALIFORNIA DENTAL ASSOCIATION, Petitioner v. FEDERAL TRADE COMMISSION.

CASE NO: 97-1625

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

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