



DEPARTMENT OF JUSTICE

Antitrust Enforcement and Media Industries: Competition and Beyond

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Thank you for inviting me to this important workshop on Civil Liberties and Competition Policy. I am especially pleased to participate on this panel focusing on competition issues as they relate to modern media, as this is an area of interest to the Antitrust Division. The media sector is an important part of our nation's politics, economy, and culture. Consequently, governmental actors of all sorts should consider appropriate ways to promote competition, innovation, vibrancy, and editorial diversity in that sector.¹

Today, I want to discuss how the Division's enforcement activity can foster competition. It is apparent, at least to my fellow antitrust lawyers in the room, how enforcement of the antitrust laws in the media sector promotes competition and innovation in those markets: it is their *raison d'être* to halt practices that lessen competition, increase prices, reduce quality or service, or dampen innovation.

Less obviously, perhaps, enforcement of the antitrust laws also can promote the dissemination of ideas, diversity of opinion, and creative expression. For example, a practice that reduces competition in a media market can dull incentives for participants to develop and bring to market new information or new and creative content. Similarly, a practice that eliminates or hamstring a competitor in a media market (e.g., a merger of two local newspapers) not only can raise prices for readers, viewers, or advertisers (e.g., producing higher subscription prices and higher advertising rates), but also can eliminate an

¹ In many cases, of course, the appropriate governmental role is inaction. *Cf. W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

independent source of information, opinion, ideas, or expression (e.g., leaving only a single editorial voice and a single source of reporting in the local area).

The antitrust laws rest on the “assumption that competition is the best method of allocating resources in a free market.”² In my time today, I hope to show how our efforts to protect competition have contributed to our free market and, however modestly, to our free society.

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Let me start with the newspaper industry, a bulwark of our system of government. The United States, James Madison famously observed, “owe much of the lights which conducted them to the ranks of a free and independent nation” to the press.³ And, as the Supreme Court observed last century, the growing complexity of government “emphasizes the primary need of a vigilant and courageous press.”⁴ Newspapers remain a primary source of news about government and civic affairs.⁵ Appropriately, then, the Division long has stood vigilant against practices that threaten the competitive dynamic in this vital area.⁶

Most recently, the Division thwarted an effort to eliminate one of only two local daily newspapers serving Charleston, West Virginia. Prior to this scheme, the papers competed vigorously for readers. Each paper sought to capture readers by breaking stories

² Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 695 (1978).

³ Near v. Minnesota, 283 U.S. 697, 718 (1931) (quoting Report on the Virginia Resolutions, Madison’s Works, vol. IV, 544).

⁴ *Id.*

⁵ *How People Learn About Their Local Community*, PEW RESEARCH CTR. (Pew Project for Excellence in Journalism and Pew Internet & American Life Project, Washington, DC), Sept. 2011, at 14-16, available at <http://pewinternet.org/~media/Files/Reports/2011/Pew%20Knight%20Local%20News%20Report%20FINAL.pdf>.

⁶ *See, e.g.*, Citizen Publ’g Co. v. United States, 394 U.S. 131 (1969); *Lorain Journal v. United States*, 342 U.S. 143 (1951); *Associated Press v. United States*, 326 U.S. 1 (1945).

first, covering local news with greater depth and accuracy, and offering the most attractive mix of news, features, editorials, and other content. Reporters and editors from each paper monitored the other on a daily basis and reacted directly to news coverage appearing in the competing paper. In brief, competition between the papers benefited readers by affording them a choice between two local papers with unique content at lower prices than would have prevailed had there been only one newspaper in the market.⁷ This competition, one can speculate, left readers better informed about important events in their community.

However, in 2004, the Daily Gazette Company, owner of the *Charleston Gazette*, one of the papers, acquired the *Charleston Daily Mail*, the other, and then took steps to shut it down. Among other actions, the Daily Gazette Company reduced *Daily Mail* newsroom staff by almost half and transferred several of the best *Daily Mail* reporters to the *Gazette*. It cut the *Daily Mail's* budget, removed sections and editions from the paper, and left the *Daily Mail* with so little content and staff that, at times, the *Daily Mail* had to copy stories verbatim from the *Gazette*. It stopped promotions and discounts to *Daily Mail* subscribers, eliminated home delivery and single copy routes, refused to accept new subscriptions on many routes that remained, and attempted to convert numerous *Daily Mail* readers to the *Gazette*.⁸ Had the plan succeeded, readers would have been deprived of a choice of local daily newspapers and likely would have paid higher prices for a newspaper with less content and lower quality.⁹

⁷ Competitive Impact Statement at 4-7, *United States v. Daily Gazette Co.*, No. 07-0329 (S.D. W. Va. Jan. 20, 2010).

⁸ *Id.* at 9-10.

⁹ *Id.* at 11-12.

In 2007, the Division filed a lawsuit challenging the scheme,¹⁰ and, after more than two years of litigation, the case was settled. The consent decree provides the *Daily Mail* with the means and incentive to compete against the *Gazette*. Along with other provisions, it provides the *Daily Mail* with representation on the board overseeing joint operations of the newspapers and protects the *Daily Mail's* budget by requiring a super-majority vote. It enshrines the *Daily Mail* newsroom's independence and control over its content and its staff. To remedy past harm, the decree created a discount window of at least six months where only the *Daily Mail* and not the *Charleston Gazette* could offer discounts of at least 50 percent off its regular price. Finally, the management of the *Daily Mail* was provided financial incentives linked to its performance.¹¹

Following the decree, the *Daily Mail's* outlook has stabilized and improved relative to the *Gazette*. In a period where newspaper circulation nationally and locally has been in steady decline, the *Daily Mail* saw two consecutive quarters of circulation growth after the court entered its final judgment. By December 31, 2010, the *Daily Mail* saw its circulation grow to 51 percent of the *Gazette's*, up from 45 percent in 2007, the year the Division filed suit. The *Daily Mail's* market share has held steady through September 30, 2011, according to the most recently available data.¹² While the ultimate path of the Charleston newspaper market in a challenging industry remains unknown, the *Daily Mail* remains an active market participant, competing with the *Gazette* to bring news, information, and opinion to the citizens of Charleston.

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¹⁰ Complaint, *Daily Gazette Co.*, No. 07-0329 (S.D. W. Va. May 22, 2010).

¹¹ *United States v. Daily Gazette Co.*, 2010 Trade Cas. (CCH) ¶ 77,105 (S.D. W. Va. July 19, 2010).

¹² Audit Bureau of Circulations, *Audit Report for The Charleston Gazette and Charleston Daily Mail for 12 Months Ended September 30, 2011*, at 5, available at <http://cnpapers.com/093011%20Audit%20Report.pdf>.

Next, I'd like to turn to the distribution of video programming. Many Americans get their news and entertainment from television, movies, and other sources of video content. Increasingly, viewers are turning to online video distributors (or OVDs) to access this programming.¹³ OVDs, like Netflix and Hulu, deliver professional full-length video over the Internet, enabling viewers to get programming when they want, where they want. Many viewers have decided to “cut the cord” entirely, abandoning traditional distributors like cable, satellite, or telephone companies and instead relying entirely on Internet sources for their viewing needs.¹⁴

This emerging competitive dynamic figured prominently in the Division's recent challenge to a joint venture involving Comcast Corporation, the largest cable television and Internet service provider in the United States, and NBC Universal, Inc., the owner of television networks and studios.¹⁵ The transaction would have given Comcast control of NBC Universal's assets, including the NBC and Telemundo broadcast television networks, cable television networks (including CNBC, MSNBC, Bravo, and USA), studios producing popular news, sports, and entertainment programming, and a 32-percent ownership stake in Hulu, one of the most successful OVDs. Comcast would have had the incentive to use its control of these assets to disadvantage its competitors, both traditional distributors and OVDs, by raising the licensing fees for NBC Universal content, by denying competitors a license outright, or by steering online traffic away from services Comcast does not manage.¹⁶

¹³ See, e.g., *Premium Video Makes Inroads Across Devices and Platforms*, EMARKETER, Dec. 23, 2011, <http://www.emarketer.com/Article.aspx?R=1008749>; *Reaching Online Video Viewers with Long-Form Content*, EMARKETER, July 26, 2010, <http://www.emarketer.com/Article.aspx?R=1007830>.

¹⁴ See TUNA N. AMOBI, STANDARD & POOR'S INDUSTRY SURVEYS: BROADCASTING, CABLE & SATELLITE 9-11 (2012).

¹⁵ Competitive Impact Statement, *United States v. Comcast Corp.*, No. 11-cv-00106 (D.D.C. Jan. 18, 2011).

¹⁶ See *id.* at 23-27.

These tactics likely would have rendered other traditional distributors less effective competitors and delayed, or impeded substantially, the development of OVDs as alternatives to traditional distributors. Consumers likely would have paid more for video programming, as rival distributors passed on any higher fees for NBC Universal's programming and as reduced competitive pressure on Comcast enabled it to increase its prices. Similarly, consumers likely would have suffered lower quality programming and service, as Comcast's rivals would have lacked the incentive or ability to invest in improvements and as the weakened state of competition would have allowed Comcast to decrease investment in its own offerings. (In recent years, competition has spurred traditional distributors to upgrade their systems, increase the number of channels available, and introduce further innovations like digital video recorders and video-on-demand service.) Finally, the transaction likely would have depressed the level of innovation, including experimentation with new models of content delivery.

On January 18, 2011, the Division¹⁷ filed its complaint and a proposed settlement, which the court approved on September 1, 2011. The consent decree contains a number of remedies designed to prevent Comcast from using its control of NBC Universal's assets to disadvantage its rivals in anticompetitive ways. For example, the decree requires the joint venture to license NBC Universal's content to OVDs under certain conditions,¹⁸ and, if an OVD and the joint venture reach an impasse in negotiating a license, the OVD may apply to the Division for permission to submit the dispute to commercial arbitration.¹⁹ Additionally, the decree prohibits Comcast from imposing upon content owners a variety of contractual terms that unduly limit their ability to freely negotiate creative arrangements with Comcast

¹⁷ The states of California, Florida, Missouri, Texas, and Washington were co-plaintiffs.

¹⁸ See Final Judgment §§ IV.A-B, *Comcast Corp.*, No. 11-cv-00106 (D.D.C. Sept. 1, 2011).

¹⁹ See *id.* § IV.C.

competitors. Further, the joint venture must relinquish management rights in Hulu and must license NBC Universal content to Hulu on certain terms, preventing Comcast from diminishing Hulu's competitive significance. Finally, the settlement requires that NBC Universal adhere to the Open Internet provisions recently enacted by the Federal Communications Commission (the FCC).

It bears emphasis that the *Comcast* decree works in tandem with relief obtained by the FCC, a regulatory body with authority to review the transaction under a public-interest standard. As I suggested at the outset, although the Division has an important role in fostering a competitive media sector, it is far from the only governmental actor in this area. Other governmental actors bring different expertise and different legal or regulatory tools to those issues meriting public solutions. Cooperation across the branches and levels of government is imperative in this area, as in others, and the Division takes this obligation seriously.

In the *Comcast* matter, the Division worked closely with the FCC, sharing expertise and insight and working toward a common end of protecting competition and consumers. Following its review, the FCC approved the transaction subject to certain conditions, including a requirement that the joint venture license all of its programming to traditional distributors, enhancements to its existing process for commercial arbitration for licensing disputes involving traditional distributors, and a requirement that the joint venture license content to OVDs on reasonable terms, along with an arbitration mechanism for resolution of any resulting disputes.

The Division's decree accounts for the terms of the FCC order. The order protects the access of traditional distributors to the joint venture's programming, making it unnecessary for the Division to include similar terms in its decree. As noted above, the Division's decree permits an OVD to apply to the Division for permission to submit a licensing dispute to commercial arbitration. In this matter, as in others, close cooperation with the expert regulator served the public interest.

The Division's efforts, it appears, have diminished a threat to competition and innovation in this sector. For example, since DOJ submitted the proposed consent decree, OVDs have continued to sign deals for NBC Universal content,²⁰ and they continue to experiment with subscription models and other initiatives. To meet these competitive challenges, Comcast and other traditional video distributors are experimenting with their own online video distribution services.²¹ As this dynamic sector evolves, it is critical that anticompetitive conduct not distort the competitive process, and the Division will continue to monitor the sector to ensure that competition and innovation continue to improve viewers' access to programming.

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²⁰ See, e.g., Julianne Pepitone, *Netflix Renews Contract for NBC Universal Movies and TV*, CNNMONEY.COM, July 13, 2011, http://money.cnn.com/2011/07/13/technology/netflix_nbc/index.htm; Brian Stelter, *In Deal with NBC, Amazon Seeks to Widen Its Video Streaming Service*, N.Y. TIMES, July 29, 2011, <http://www.nytimes.com/2011/07/29/business/media/in-deal-with-nbc-amazon-seeks-to-widen-its-video-streaming-service.html>.

²¹ See, e.g., Ben Fritz & Meg James, *Comcast and Netflix Escalate Fight for Viewers*, L.A. TIMES, Feb. 21, 2012, <http://articles.latimes.com/2012/feb/21/business/la-fi-ct-comcast-vod-20120222>; Francis Shammo, CFO, Verizon Commc'ns Inc., Remarks at Deutsche Bank Media and Telecommunications Conference 10 (Feb. 27, 2012), available at http://www22.verizon.com/idc/groups/public/documents/adacct/db_vz_transcript_2012.pdf; Julianne Pepitone, *Blockbuster Launches Netflix Streaming Rival—Sort Of*, CNNMONEY.COM, Sept. 23, 2011, http://money.cnn.com/2011/09/23/technology/blockbuster_streaming/.

Next, I'd like to address a timely topic: electronic books or "e-books." E-books are becoming an increasingly important part of our literary landscape, now constituting, by conservative measures, ten percent of general-interest fiction and non-fiction books sold in the United States and widely predicted to reach at least 25 percent of those sales within two to three years.²² Readers value e-books for their ease of use, their accessibility, enhanced features, and, when competition has prevailed, lower prices.²³ In fact, studies have indicated that e-readers fuel book consumption overall.²⁴ E-books also provide opportunities for many publishers, allowing them, among other things, to bring books to market more quickly and potentially save costs,²⁵ and for many authors, who are experimenting with new forms, like short, non-fiction books on current topics, and are able to self-publish their work.²⁶

Just two months ago, the Division filed a civil antitrust suit to preserve competition and innovation in the e-book sector. In its complaint, the Division alleges that five major book publishers and Apple, Inc. conspired to restrain competition in the sale of electronic books in violation of section 1 of the Sherman Act.²⁷ The publishers, the Division alleges, agreed among themselves and with Apple to raise retail prices of e-books by taking control of e-book pricing from retailers. This collusive agreement has harmed competition and e-book readers in a number of ways, including yielding higher prices for e-books than would have prevailed absent collusion and preventing retailers from experimenting with innovative

²² Competitive Impact Statement at 3, *United States v. Apple, Inc.*, No. 12-cv-02826 (S.D.N.Y. Apr. 11, 2012).

²³ *Id.*

²⁴ Cecilia Kang, *Survey Finds E-Reader Devices Fuel Book Consumption Overall*, WASH. POST, Apr. 5, 2012, at A11.

²⁵ See, e.g., Eduardo Porter, *Competition Needs Protection*, N.Y. TIMES, Apr. 18, 2012, at B1; *Great Digital Expectations*, ECONOMIST, Sept. 10, 2011, at 69.

²⁶ See, e.g., Deidre Donahue, *Self-Published Authors Find E-Success*, USA TODAY, Dec. 13, 2011, <http://www.usatoday.com/life/books/news/story/2011-12-14/self-published-authors-ebooks/51851058/1>; Laurel Saville, *Embracing New Opportunities*, ROOM FOR DEBATE, N.Y. TIMES (Nov. 17, 2011); Dwight Gardner, *Miniature E-Books Let Journalists Stretch Legs*, N.Y. TIMES, Mar. 7, 2012, at A1; Edward Jay Epstein, *Can E-Books Pay Off for Writers*, ATLANTIC, Aug. 8, 2011, <http://www.theatlanticwire.com/business/2011/08/can-e-books-pay-writers/40975/>.

²⁷ Complaint, *Apple, Inc.*, No. 12-cv-02826 (S.D.N.Y. Apr. 11, 2012).

pricing strategies and promotions, for example, an “all-you-can-read” subscription model where a reader pays a flat monthly fee.²⁸

On April 11, 2012, the Division filed its suit, and, at the same time, a proposed settlement with three of the publishers. The settlement would require the publishers to grant retailers the freedom to compete away their margins to reduce e-book prices. This remedy will benefit readers by ensuring that they will see competitive prices and reap the benefits of innovation in this sector. The Division continues to litigate its case against the other two publishers and Apple.

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Finally, I want to touch on our successful challenge to AT&T Inc.’s proposed acquisition of T-Mobile USA, Inc. Americans increasingly rely on cell phones, smart phones, and other mobile wireless devices in their personal and business lives. These devices not only enable Americans to remain connected, but also empower them to access information wherever they are.

The proposed merger threatened to reduce competition in the provision of wireless service, competition that has democratized and revolutionized mobile wireless service. AT&T and T-Mobile are two of only four providers of mobile wireless service with national networks and presence. Together, the four nationwide firms provide more than 90 percent of service connections to wireless devices in the United States, with smaller regional carriers providing the balance. Historically and currently, T-Mobile has competed aggressively, positioning itself as a value provider with low prices, bringing to market innovative products

²⁸ Competitive Impact Statement at 8-9, *Apple, Inc.*, No. 12-cv-02826 (S.D.N.Y. Apr. 11, 2012).

and services, and making investments in network infrastructure. Although T-Mobile had recently experienced some disappointing results, by the time of the proposed merger, T-Mobile had already brought in new management and launched plans to revitalize itself as an industry value and innovation leader.²⁹

On August 31, 2011, the Division, joined by a number of states, filed suit to block the acquisition.³⁰ The merger, the Division alleged, would have eliminated T-Mobile as an important competitive factor in the wireless marketplace. T-Mobile's aggressive tactics spurred competition with other providers across a variety of dimensions, including price, plan structure, network coverage, quality, speed, devices, and operating systems. The merger would have lessened competition by eliminating head-to-head competition between AT&T and T-Mobile and by enhancing the risk of coordination among the remaining nationwide providers. Wireless customers, the Division alleged, likely would have suffered in the form of higher prices, less product variety and innovation, diminished investment, and poorer quality service. On December 19, 2011, after nearly four months of litigation, AT&T announced it was abandoning the proposed acquisition.³¹

Developments since AT&T abandoned the acquisition seemingly confirm the Division's view that T-Mobile represents an important competitive factor in the wireless space. Already, T-Mobile has recommitted itself to its "challenger strategy." In late February 2012, just two months after AT&T abandoned its acquisition, T-Mobile announced

²⁹ For example, months before the merger agreement, T-Mobile's leadership boasted that the company's "heritage and future is as a challenger brand" and that it would "attack incumbents," launching a "disruptive" rate plan that will "make smart phones affordable for the average U.S. consumer." Complaint ¶¶ 31-32, *United States v. AT&T, Inc.*, No 1:11-cv-01560-ESH (D.D.C. Sept. 30, 2011) (internal quotations omitted).

³⁰ Complaint, *AT&T, Inc.*, No 1:11-cv-01560-ESH (D.D.C. Sept. 30, 2011).

³¹ See Press Release, U.S. Dep't of Justice, Justice Department Issues Statements Regarding AT&T Inc.'s Abandonment of its Proposed Acquisition of T-Mobile USA Inc. (Dec. 19, 2011), http://www.justice.gov/atr/public/press_releases/2011/278406.htm.

a \$4 billion investment to modernize its network and deploy 4G LTE service. Additionally, T-Mobile plans to pursue business customers aggressively, to target small-business customers, to expand its sales force, ramp up its advertising spending, and remodel its retail stores, among other initiatives.³²

T-Mobile's efforts to reinvigorate its brand will not necessarily be easy. T-Mobile put strategic plans on hold and lost customers while AT&T's acquisition was pending, and analysts have pointed out that T-Mobile faces a number of additional challenges.³³ Since the merger was abandoned, AT&T and other carriers are also forcefully competing.

But, at least in the short term, T-Mobile looks to be an aggressive presence in the wireless market, and consumers can only benefit from the competition that T-Mobile's efforts engender. Competition in this sector will continue to enable Americans to remain connected to colleagues, friends, and family, and to access information wherever they are.³⁴

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I hope that my overview of these recent cases has illustrated how the Division protects competition and innovation in the media sector. We halted a plan that likely would have left the citizens of Charleston, West Virginia, with a single local daily newspaper that

³² See Press Release, T-Mobile USA, Inc., T-Mobile USA Announces Reinvigorated Challenger Strategy (Feb. 23, 2012), <http://newsroom.t-mobile.com/articles/ReinvigoratedChallengerStrategy>; Tess Stynes, *Leap Wireless, T-Mobile Reach Spectrum-Exchange Deal*, WALL ST. J., Apr. 9, 2012.

³³ See, e.g., Greg Bensinger & Shara Tibken, *T-Mobile Struggles to Stem Customer Losses*, WALL ST. J., May 11, 2012, at B5; Greg Bensinger, *T-Mobile Prepares \$4 Billion Upgrade*, WALL ST. J., Feb. 24, 2012, at B3.

³⁴ Similarly, the Division's consent decree resolving its concerns about Google, Inc.'s acquisition of ITA Software, Inc. preserved competition in the comparative flight-search market. ITA marketed a leading piece of software used in online search for air travel, and the merger would have given Google the incentive and ability to foreclose rivals from the comparative flight-search market. See Complaint, *United States v. Google, Inc.*, No. 1:11-cv-00688 (D.D.C. Apr. 8, 2011). The decree was designed to ensure that Google's competitors will have continued access to the software, while at the same time allowing Google to use ITA's talent and resources as a platform for developing new and innovative flight-search services. See Competitive Impact Statement, *Google, Inc.*, No. 11-cv-00688 (D.D.C. Apr. 8, 2011). Continued rivalry in the marketplace likely will bring new features, better performance, and other benefits to users of flight-search sites.

would have cost more and provided lower quality content. We obtained remedies designed to prevent Comcast from using its control of NBC Universal's programming and other assets to hamstring its rivals and thereby increase price and lower quality in the distribution of video programming. Our current case against Apple and certain book publishers seeks to end a conspiracy that has inflated e-book prices. And, finally, our successful challenge to AT&T's proposed acquisition of T-Mobile kept an important competitive factor in the marketplace and likely spared wireless customers higher prices and reduced product variety, among other harms.

Additionally, the citizens of Charleston still have two sources of news and opinion, perhaps leaving them better informed and more engaged than if they had only one local daily newspaper. The *Comcast* decree is designed to forestall a lessening of competition in video-programming distribution, possibly facilitating cheaper and more convenient access to news and entertainment. Similarly, eliminating anticompetitive conduct in the e-book sector possibly could make it cheaper and easier for readers to get books and create new ways for authors to reach readers. Finally, competition may allow more and more citizens to purchase wireless devices that enable them to access information wherever they are (e.g., getting more information about a particular painting while touring a museum, or finding that crucial fact while debating friends spiritedly) and may improve the functionality of those devices.

Our focus, though, is squarely on competition and the competitive process. The antitrust laws stand as “a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade,”³⁵ establishing “a regime of competition as

³⁵ *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

the fundamental principle governing commerce in [the United States].”³⁶ A court or an antitrust enforcer “focuses directly on the challenged restraint’s impact on competitive conditions,” and the law “does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason.”³⁷ However, vigilant enforcement practices that protect the competitive process comfortably reside adjacent to the goal of promoting the widest possible dissemination of information from diverse sources.

³⁶ *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 398 (1978).

³⁷ *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978); *see also* *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 462-63 (1986) (concluding that a group of dentists who agreed not to provide dental x-rays to insurers, and thereby restrained competition with respect to services provided to their customers, could not defend this restraint on the ground that it was necessary to protect the welfare of patients).