No. 08-515

In the Supreme Court of the United States

NORTH TEXAS SPECIALTY PHYSICIANS, PETITIONER

v.

FEDERAL TRADE COMMISSION

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

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the Federal Trade Commission's decision that activities of an association composed of and controlled by competing physicians constituted unlawful horizontal price fixing in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A52) is reported at 528 F.3d 346. The opinion of the Federal Trade Commission (Pet. App. A53-A130) is reported at 140 F.T.C. 715.[1] The initial decision of the administrative law judge (Pet. App. A131-A297) is reported at 140 F.T.C. 805.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2008. A petition for rehearing was denied on

[1] Some electronic databases may have an earlier version of the Commission's opinion. The correct verison of the Commission's opinion, as modified, is available on its website at http://ftc.gov/os/adjpro/d9312/051201opinion.pdf.

July 18, 2008 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on October 16, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In September 2003, the Federal Trade Commission (Commission or FTC) issued an administrative complaint against petitioner. The complaint alleged that petitioner had restrained competition among its physicians in violation of Section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45, by, *inter alia*, orchestrating price competition among its member physicians, negotiating price terms in payor contracts on behalf of its member physicians, and refusing to deal with payors except on collectively agreed-upon terms. After an administrative trial, an administrative law judge (ALJ) ruled that petitioner had engaged in unlawful horizontal price fixing. The Commission, reviewing *de novo*, affirmed. The court of appeals affirmed the FTC's decision that petitioner's conduct constituted horizontal price fixing not plausibly related to any procompetitive efficiencies, but remanded to the Commission to reconsider its remedial order. Pet. App. A3-A52.

1. Petitioner is an association of independent, competing physicians and physician groups, predominantly specialists, who practice in and around Fort Worth, Texas. Pet. App. A4. Its size has ranged from approximately 480 to 650 participating physicians. *Id.* at A4, A146. In Tarrant County, which includes the city of Fort Worth, petitioner's member physicians make up a substantial percentage of practitioners in certain medical specialties, including 80% in pulmonary disease, 69% in urology, and 59% in cardiovascular disease. *Id.* at A4-A5.

Petitioner is controlled by its member physicians, who elect representatives from among their ranks to serve on its eight-member Board of Directors. It was founded in 1995 by a group of doctors principally for the purpose of negotiating risk-sharing (risk) contracts with payors, including insurance companies and health plans. Risk contracts typically pay a group of physicians a fixed fee per patient, regardless of the quantity of services provided, and the physicians share the risk of profit and loss based on how efficiently they provide medical care to those patients. Payors' interest in risk contracts declined, however, and petitioner's focus shifted to assisting its members in negotiating non-risk-sharing (non-risk) contracts, which typically reimburse physicians on a fee-for-service basis. At the time of the administrative trial in this case, petitioner had only one risk contract and 20 non-risk contracts, and half of petitioner's members did not participate in its risk contract. Pet. App. A5.

Only petitioner's activities with respect to non-risk contracts are at issue in this case. Pet. App. A5. In this context, petitioner does not provide medical services, assemble teams of physicians, or employ any of the utilization management programs that it employs under its risk contract. Rather, its activities in question are directed solely at coordinating the contractual arrangements between the member physicians who provide services and the persons who pay for them. *Id.* at A225-A227.

Petitioner's physician members enter into a Physician Participation Agreement (PPA). The PPA grants petitioner the right to receive all payor offers and imposes on the physicians a duty to forward to petitioner all payor offers they receive. Under the terms of the

PPA, the member physicians agree that they will not independently pursue a payor offer unless and until petitioner notifies them that it has permanently discontinued negotiations with the payor. Petitioner establishes minimum rates for its physicians' services by conducting an annual poll of its membership, asking the physicians to indicate the minimum reimbursement rates that they would accept. Petitioner calculates the averages of the indicated rates and reports those averages back to its physicians as the minimum rates that petitioner will use when negotiating with payors on their behalf. Pet. App. A6-A7.

2. The Commission issued an administrative complaint alleging that petitioner, acting as a combination of competing physicians, had unreasonably restrained competition in the provision of physician services in the Fort Worth area. The FTC's complaint alleged that petitioner had orchestrated price coordination among its member physicians, had negotiated price terms in payor contracts for those physicians, had refused to submit payor offers to its member physicians unless petitioner's price terms had been met, and had refused or threatened to refuse to deal with payors except on collectively agreed-upon terms. Pet. App. A134-A135. The complaint alleged that those practices constituted unfair methods of competition in violation of Section 5 of the FTC Act. *Id.* at A135.

After a full administrative trial at which nearly 1500 exhibits were admitted and 17 witnesses testified (Pet. App. A136), the ALJ issued an initial decision containing findings of fact and conclusions of law. *Id.* at A131-A297. The ALJ concluded that petitioner's challenged conduct constituted unlawful horizontal price fixing,

unrelated to any procompetitive justifications. *Id.* at A285.

3. After conducting a *de novo* review of the facts, the Commission affirmed the decision of the ALJ. Pet. App. A53-A130. The Commission adopted the ALJ's findings of fact, *id.* at A56, and found that petitioner's conduct constituted a restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pet. App. A67 n.10; see generally *FTC* v. *Cement Inst.*, 333 U.S. 683, 689-693 (1948) (holding that Sherman Act violations may be redressed as violations of Section 5 of the FTC Act). The Commission determined that petitioner "was able to orchestrate price agreements among its physicians" through a variety of mechanisms. Pet. App. A129. Those mechanisms included the PPA, which grants petitioner a right of first negotiation with payors (*id.* at A90-A92); petitioner's annual polling of its physicians to establish minimum reimbursement rates for its negotiations with payors, and its communication of those minimum rates back to its physicians (*id.* at A84-A89); petitioner's use of powers of attorney obtained from its physicians (*id.* at A92-A93); and petitioner's termination of, and threats to terminate, its members' participation in a health plan to secure payors' agreement to petitioner's minimum rates (*id.* at A94-A97).

The Commission first examined whether petitioner's operations involved an "agreement" between independent actors. Pet. App. A67, A79-A84. The Commission held that such an agreement existed, based on longstanding precedents holding that an action nominally taken by a single entity may be regarded for antitrust purposes as the product of agreement when the entity is controlled by a group of competitors and serves as the agent for those competitors. *Id.* at A79-A80. The Com-

mission rejected petitioner's argument that there could be no finding of collective action absent a showing of direct agreement between the physicians on price. *Id.* at A82-A83. "[I]t is enough," the Commission held, "that participating physicians authorized [petitioner] to take certain actions on their behalf, knowing that other members were doing the same thing." *Id.* at A83.

The Commission observed that petitioner's conduct was substantially similar to conduct that this Court condemned as per se unlawful price fixing in *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982). Pet. App. A69-A70. Nonetheless, the Commission declined to apply the per se rule here, explaining that this Court has urged caution in the application of the per se label to conduct in a professional setting, and that the Commission wishes to encourage efficiency-enhancing collaborative activity among heath-care providers. *Id.* at A71-A73. The FTC further emphasized that it would consider any proffered justifications for petitioner's conduct. *Id.* at A73. The Commission accordingly analyzed the challenged conduct under an abbreviated rule of reason analysis, following the guidance provided by this Court in *California Dental Ass'n* v. *FTC*, 526 U.S. 756 (1999). Pet. App. A67-A77, A101-A104.

The Commission analyzed the competitive impact of petitioner's activities and found that petitioner's conduct was highly likely, absent countervailing procompetitive efficiencies, to suppress competition. Pet. App. A101. The Commission found that petitioner's practices enabled it "to collectively set prices and present its physicians as a unified and strong force within Fort Worth," thereby "reduc[ing] the risk that payors would be able to contract around [petitioner]." *Id.* at A102. The Commission further found that because petitioner's members

constitute a large percentage of physicians in key specialties in Fort Worth, petitioner's practices hindered the ability of payors to assemble a marketable physician network in the Fort Worth area without bargaining with petitioner, and made payors "more willing to pay [petitioner's member] physicians' consensus price because of the threat to their physician networks." *Ibid.*

The Commission next considered whether petitioner had advanced a plausible procompetitive justification for its conduct that would warrant a more searching examination of competitive effects. After careful consideration of each of petitioner's proffered justifications, the Commission concluded that petitioner had "failed to articulate any logical nexus" between its challenged activities and the claimed efficiencies, and that petitioner's proffered justifications were contradicted by the record. Pet. App. A104-A112.

The Commission found, *inter alia*, that petitioner's principal justification—that its polling and its establishment of minimum rates served to promote "spillover" benefits from its risk contract by identifying which non-risk offers would be of interest to a majority of its risk panel physicians—was undermined by the fact that petitioner polled all of its members, risk and non-risk alike, and did not distinguish between the prices indicated by its risk and non-risk member physicians. Pet. App. A106. The Commission also noted that petitioner had offered no explanation as to "how [member] physicians who only enter into non-risk contracts could achieve spillover efficiencies from [petitioner's] single risk contract"—"a non-trivial point, because non-risk physicians make up half of [petitioner's] members." *Id.* at A108. Because petitioner had failed to articulate any plausible justification for its inherently suspect activities, the

Commission concluded that its conduct could be condemned without further analysis of competitive effects, such as proof of a relevant market and market power. *Id.* at A118-A121.

Having found that petitioner's activities violated Section 5 of the FTC Act, the Commission entered a cease and desist order that prohibits petitioner from engaging in the type of conduct found to be unlawful. Pet. App. A121-A129.

4. The court of appeals affirmed. Pet. App. A3-A52. The court agreed with the Commission that "[petitioner's] participating physicians have taken collective action to obtain higher fees from payors." *Id.* at A13. The court observed that "[w]hen an organization is controlled by a group of competitors, it is considered to be a conspiracy of its members." *Id.* at A15 (citing *United States* v. *Sealy, Inc.* 388 U.S. 350, 352-354 (1967)). The court agreed with the Commission that collective action could occur without direct communication among the member physicians. *Id.* at A16.

Like the Commission, the court of appeals declined to "decide whether [petitioner's] challenged practices constituted a per se violation" of the antitrust laws. Pet. App. A28. The court agreed with the FTC, however, that petitioner's challenged practices "bear a very close resemblance to horizontal price-fixing, generally deemed a per se violation." *Ibid.* The court reviewed the Commission's abbreviated rule of reason analysis and found that the FTC's "articulation of the shifting burdens" comported with the framework established in *California Dental* and in other decisions of this Court. *Id.* at A26. The court held that "a quick-look analysis was appropriate in this case" because "the net anticom-

petitive effects of certain of [petitioner's] practices were obvious." *Id.* at A29.

The court of appeals upheld, as "logical and supported by the record," the Commission's finding that petitioner's challenged practices "foreclosed or delayed" payor negotiations with physicians who otherwise would have been willing to accept a fee lower than the minimum rates established by petitioner. Pet. App. A31-A32. The court also agreed with the Commission that "proof of higher fees for [petitioner's member] physicians is not necessary" to establish an antitrust violation. *Id.* at A40. The court explained that, "if a practice 'is likely enough to disrupt the proper functioning of the price-setting mechanism of the market . . . it may be condemned even absent proof that it resulted in higher prices.'" *Ibid.* (quoting *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 461-462 (1986)).

While acknowledging that petitioner's claim of "spillover benefits" had "some facial plausibility," the court of appeals found that "closer examination of the underpinnings of the justification reveals significant gaps in logic." Pet. App. A41. The court explained in particular that petitioner had failed to "address how [its] nebulous 'teamwork' efficiencies are dependent on its price-fixing activities." *Id.* at A44 (brackets in original). The court concluded that petitioner had not shown that its activities "might plausibly be thought to have a net procompetitive effect, or possibly no effect on competition." *Id.* at A46-A47 (quoting *California Dental*, 526 U.S. at 781).

The court of appeals concluded that "'the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency' of [petitioner's] challenged practices follows from the 'look' the FTC conducted in this case, even though that

'look' was less than a fullblown market analysis." Pet. App. A46 (quoting *California Dental*, 526 U.S. at 781). The court accordingly affirmed, as "supported by the law and substantial evidence," the FTC's determination that petitioner's activities, "taken as a whole, amounted to horizontal price-fixing that is unrelated to procompetitive efficiencies." *Id.* at A47. The court held, however, that one provision of the FTC's remedial order was "overly broad and internally inconsistent," *id.* at A50, and it remanded the case to the Commission for modification of that provision, see *id.* at A52.

ARGUMENT

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

1. Petitioner argues (Pet. 20) that the court of appeals' decision "equate[s] to a ruling that [petitioner] violated Section 1 of the Sherman Act by encouraging or attempting collusion." That contention is incorrect. Neither the Commission nor the court of appeals based its liability determination on a finding of encouraged or attempted collusion. Rather, both the FTC and the court of appeals found that collective action had occurred because the member physicians agreed, as a term of their participation in petitioner, to use petitioner as their agent to negotiate with payors on behalf of the overall membership in order to obtain a collectively-determined minimum price. Pet. App. A16-A17, A31-A34, A58, A79-A84. That agreement was carried out through actual payor negotiations; through the member physicians' execution of powers of attorney designating petitioner as their bargaining agent; through the physicians' subsequent refusals to deal individually with payors; and

through petitioner's actual and threatened termination of payor contracts to secure payors' agreement to petitioner's poll-derived minimum rates. *Id.* at A34, A38-A39, A85-A97.

Petitioner does not directly challenge those critical factual findings. Instead, it argues that the court of appeals and the Commission principally relied on the fact that petitioner "conducted a poll as to what rates its participating physicians would accept and then published the averages of those responses." Pet. 3; see Pet. 7, 9, 13. Both the Commission and the court of appeals made clear, however, that their liability determinations were premised on the overarching agreement among petitioner's physicians to coordinate their marketplace behavior. The poll was simply the mechanism by which the physicians shared price information and established a consensus price for negotiations with payors. See Pet. App. A30-A31, A84-A86.[2]

Petitioner further contends (Pet. 22) that the court of appeals necessarily based liability only on petitioner's "'encouragement' of price-fixing collusion" because there was no evidence of direct communications between physicians on price, and no showing that petitioner's conduct actually resulted in prices higher than those that other physician groups received.[3] Both the Com-

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[2] Petitioner also disregards the court of appeals' finding that petitioner's challenged conduct is properly deemed collective action by its competing member physicians because the physicians control petitioner through its board of directors. Pet. App. A14-A15; see, *e.g.*, *Sealy, Inc.*, 388 U.S. at 352-354 (marketing association controlled by competing distributors held to be a horizontal combination).

[3] Petitioner contends (Pet. 9) that the ALJ (and the Commission, which adopted the ALJ's findings of fact) found that petitioner did not receive higher rates than did other physician groups. That is incorrect.

mission and the court of appeals, however, expressly rejected petitioner's argument that the absence of evidence of direct communications among petitioner's member physicians negated the existence of a price-fixing agreement. The court of appeals found that the record supported the Commission's finding of collective action because each member physician, knowing that other members were doing the same thing, designated petitioner as his or her agent to negotiate with payors on price and other material terms for the collective benefit of the membership. Pet. App. A16-A17. That is a finding of actual collective action to restrict price competition, not of mere attempted collusion.

In contending that proof of actual higher prices was required in order to establish the existence of a price-fixing agreement, petitioner conflates two distinct issues. The first is whether an agreement regarding price exists; the second is whether that agreement is anticompetitive. In sustaining the Commission's findings on both those questions, the court of appeals correctly held that proof of higher prices was not required because the challenged conduct was "likely enough to disrupt the proper functioning of the price-setting mechanism of the market." Pet. App. A40 (quoting *Indiana Fed'n of Dentists*, 476 U.S. at 461-462).

As this Court recognized in *NYNEX* v. *Discon*, 525 U.S. 128, 135 (1998), conduct may be anticompetitive if it harms "the competitive process." Petitioner interposed itself into the negotiation of agreements for the provision of its member physicians' services, thereby impeding the buyers' ability to negotiate with individual

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The ALJ found only that there was "insufficient evidence" that the rates negotiated by petitioner were "uniformly higher" than the rates other physician groups obtained. Pet. App. A272.

physicians. Evidence of that conduct established the requisite harm to the competitive process, cf. Pet. App. A102 (Commission explains that "[c]onduct that confers on competitors a collective power over price falls within the classic definition of price fixing."), even without proof that petitioner ultimately negotiated higher prices than non-member physicians received.[4]

2. Petitioner's contention that the court of appeals erred by applying a "quick look" rule of reason analysis likewise rests on its mischaracterization of the decision below as imposing antitrust liability for mere attempt to collude. See Pet. 25 (The Commission and the court "rel[ied] primarily on the hypothetical effects of [petitioner's] board's actions in encouraging physician collusion."); Pet. 26, 27. Neither the Commission nor the court of appeals posited anticompetitive effects from a mere "possibility" of collusion. Instead, the Commission found that competitive harm resulted from actual collec-

[4] The court of appeals explained that, because petitioner based its minimum fees on the average minimum fees identified by the member physicians who responded to its polls, "it is logical to conclude that the fees to which [petitioner] agreed would be higher than the minimum fees that many of its participating physicians * * * had indicated in their polling responses they were willing to accept." Pet. App. A31. The court also noted with approval the FTC's reliance on an expert's view that "negotiation of a minimum price has the effect of raising the prices that 'low end' physicians would otherwise earn, without reducing the price that 'high end' physicians would receive because the 'high end' physicians could 'opt out'" by declining to contract with a particular payor. *Id.* at A31-A32. Petitioner's activities thus had a natural tendency to cause its member physicians, as a group, to charge higher fees than those physicians would otherwise have charged. As the Commission observed, evidence as to the rates received by *other* physician groups is not particularly revealing because those rates may be associated with higher quality of care or different competitive conditions. *Id.* at A121.

tive action by petitioner's physicians to obtain higher prices from payors, and the court of appeals sustained that finding as reasonable and supported by the evidence.

Thus, the court of appeals explained that petitioner's practices "foreclosed or delayed negotiations between those payors and physicians who were willing to accept a fee lower than the minimum fee determined by [petitioner] and used in its negotiations with payors." Pet. App. A31. The court further observed that petitioner's activities "added significant transaction costs to offers below [petitioner's] minimum" because "[a] payor wishing to achieve a contract below that minimum would have to submit its offer to [petitioner], negotiate with [petitioner], and wait until [petitioner] communicated to physicians that negotiations were unsuccessful, before being able to negotiate with physicians directly." *Id.* at A36. Petitioner's activities also "narrowed patients' choices of physicians," *ibid.*; "erect[ed] barriers between payors and physicians who would otherwise be willing to negotiate directly with those payors," *id.* at A41; and created "obstacles to price communications between payors and physicians," *ibid.* The Commission further explained that its "ultimate conclusions in this case do not stand or fall on [the Commission's] assessment of separate actions" but instead are "predicated on the likely effects of the actions taken together." *Id.* at A84.

3. In light of the court of appeals' determination that petitioner failed to show any plausible procompetitive justifications for its challenged practices, the anticompetitive effects described above fully justify the Commission's condemnation of petitioner's conduct under an abbreviated rule of reason. As this Court explained in *California Dental*, "quick-look analysis carries the day

when the great likelihood of anticompetitive effects can easily be ascertained." 526 U.S. at 770. In that case, the Court held that further analysis of competitive effects was required because, *inter alia*, the defendant association had identified plausible procompetitive justifications for its rules governing its members' advertising. *Id.* at 774-778. Those circumstances are not present here. See Pet. App. A41-A47.

Petitioner contends (Pet. 30-35) that the court of appeals should not have applied a quick look rule of reason analysis without first identifying a relevant market, market power, or actual market effects. Even if petitioner had advanced a procompetitive justification that had any logical connection to the restraints at issue (which it did not), that argument would be unavailing. In *California Dental*, this Court made clear that, even when plausible justifications are advanced, the "fullest" market analysis is not necessarily required. 526 U.S. at 779. Rather, the Court explained, the applicable "categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear." *Ibid.* The Court emphasized that rule of reason analysis should be flexible:

> What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.

Id. at 781.

As explained above, the Commission and the court of appeals concluded, based on extensive evidence that included expert testimony, payor testimony, and petitioner's own assessment of the impact of its practices, that petitioner's activities constituted a serious restraint on independent price-setting by competitors. "[B]ased on the record in this case," the court of appeals explained that "'the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency' of [petitioner's] challenged practices follows from the 'look' the FTC conducted in this case, even though that 'look' was less than a fullblown market analysis." Pet. App. A46 (quoting *California Dental*, 526 U.S. at 781); see *id.* at A85, A88-A89, A93-A94, A97. That analysis is fully consistent with this Court's precedents.

4. Contrary to petitioner's contention (Pet. 29-35), the court of appeals' ruling does not conflict with the Sixth Circuit's decision in *Worldwide Basketball & Sports Tours, Inc.* v. *NCAA*, 388 F.3d 955 (2004), cert. denied, 546 U.S. 813 (2005). The Sixth Circuit did not, as petitioner argues, hold that a quick look analysis always requires extensive market analysis, including defining the relevant market. Rather, the Sixth Circuit recognized that "[w]hat is required * * * is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *Id.* at 960 (quoting *California Dental*, 526 U.S. at 780-781). The court in *Worldwide Basketball* explained that, because the conduct at issue in that case "d[id] not have * * * obvious anticompetitive effects," further analysis of the contours and dynamics of the market was required. *Id.* at 960-961 (internal quotation marks omitted). Here, by contrast, the court of appeals found that petitioner's challenged prac-

tices *did* have "obvious" anticompetitive effects. Pet. App. A29.

5. Petitioner asserts (Pet. 35) that this Court's review is warranted because "this case presents an issue of importance to the health care industry." That contention is based on petitioner's reiteration of its earlier arguments that the court of appeals imposed liability for mere attempted collusion; that the court of appeals' quick look analysis was premised on the theoretical effects of attempted collusion; and that the Fifth Circuit's decision conflicts with the Sixth Circuit's ruling in *Worldwide Basketball*. As explained above, those arguments are without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

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