Competition in the Digital Advertising Ecosystem

Before the Senate Judiciary Committee
Subcommittee on Competition Policy, Antitrust, and Consumer Rights

Roger P. Alford
Professor of Law, Notre Dame Law School
Former Deputy Assistant Attorney General, U.S. Department of Justice

May 3, 2023

Chairman Klobuchar, Ranking Member Lee, and Members of the Subcommittee, thank you for inviting me to testify today. I look forward to discussing with you the topic of proposed guidelines to address the digital advertising display market. As a conservative antitrust scholar at Notre Dame Law School and a former Deputy Assistant Attorney General for the Department of Justice's Antitrust Division in the previous administration, I am deeply concerned about Big Tech's abuse of power. These technology companies control how personal information about every American is shared, how online public discourse is conducted, and how each day billions of digital ads are delivered. I strongly support the AMERICA Act[1] and I urge members of the United States Senate and House to do the same.

Everything about Online Display Advertising is Enormous

Let me begin by underscoring just how significant the digital display ad market is to the internet economy. The opening paragraph in the Department of Justice's complaint against Google underscores this point.

> Today's internet would not exist without the digital advertising revenue that, as a practical matter, funds its creation and expansion. The internet provides the public with unprecedented access to ideas, artistic expression, news, commerce, and services. Content creators span every conceivable industry; they publish diverse material on countless websites that inform, entertain, and connect society in vital ways. Yet the viability of many of these websites depends on their ability to sell digital advertising space.[2]

According to the Department of Justice, "website publishers in the United States sell more than five trillion digital display advertisements on the open web each year—or more than thirteen billion advertisements *every day*. To put these numbers in perspective, the daily volume of digital display advertisements grossly outnumbers (by several multiples) the average number of stocks traded each day on the New York Stock Exchange."[3] We live in an age of attention markets, with attention brokers earning billions in revenue from trading in the scarce commodity of our time.

[1] AMERICA Act, S.1073, 118th Cong. (Mar 30, 2023).
[2] Complaint, United States v. Google, LLC, at 1, Civil Action No.: 1:23-cv-108 (Jan. 24, 2023) ("DOJ Complaint").
[3] *Id.* at 1.

While in the 1970s, the average American saw between 500 and 1600 ads per day, today we encounter an estimated 6,000 and 10,000 ads per day.[4]

The volumes of ads are not the only aspect of display advertising that are enormous. The margins are also staggering. While the NYSE makes less than 1 percent (or less than $5.00) on a $100,000 stock trade, Google intermediaries make approximately forty percent (or $40,000) on a $100,000 ad campaign. With such enormous volumes and margins, it is not surprising that Google has a market cap of approximately $1.364 trillion, and revenue of approximately $280 billion per year, which amounts to $767 million per day, or $32 million per hour.[5] By way of comparison, as a result of its abuse of monopoly power, Google makes more revenue from digital ads in one week than Twitter makes from all sources in one year.

A third aspect about online display advertising is the enormity of the problem. It is almost a completely unregulated market, with neither litigation nor legislation curbing the opportunities for the abuse of market power. Unlike the financial markets, which are subject to significant regulatory oversight and litigation risk, the online display advertising markets have no laws that impose best interest duties on market actors or curb perverse practices such as insider trading or front running. Nearly identical practices that in financial markets would result in severe fines, and even criminal sanctions, are completely unregulated in the online display market.

It is helpful to analogize the history of the financial markets with the history of digital advertising markets. In many respects with online display advertising, we are today where the financial markets were at the dawn of the 20th century. In the early 20th century, the NYSE was a purely self-regulatory organization, and the threat of regulation was necessary to force the exchange to tighten its listing standards.[6] That approach lasted for decades, and it wasn't until the 1960s that the SEC formally established rules to address the problem of insider trading. Just as the financial markets were completely unregulated a century ago, so too are the digital advertising markets are almost completely unregulated today. Just as insider trading in the early 20th century was commonplace "taken as a matter of course, without indignation, without even passing comment,"[7] today in the display advertising market practices such as insider trading, front running, steering and similar conduct are commonplace, taken as a matter of course, without indignation or even passing comment. These ad tech brokers are, as with stock jobbers trading on inside information a century ago, "gamblers using loaded dice … who consider any means … justifiable in the achievement of the … end of making money."[8]

Under the current legal environment Google and other online display ad intermediaries perceive no ethical or legal obligation to act in the best of their clients or avoid practices that raise fundamental concerns about conflicts of interest and the lack of transparency. Because of Google's involvement and dominance on the buy-side, sell-side, and the exchanges in the middle, it has information advantages, and exploits those advantages for its own benefit and to the detriment of its own clients. In short, Google makes billions in revenue from its dominance at every level of

[4] Emilia Kirk, *The Attention Economy: Standing Out Among the Noise*, FORBES (Mar. 23, 2022); Mark Melvin, *How Brands Can Use Relevant Moments and Technology to Engage with Consumers*, ADVERTISING WEEK (Nov. 16, 2021); History: 1970s Ad Age (Sept. 15, 2003).
[5] According to publicly available sources, over eighty percent of Google's revenue is from online advertising.
[6] Michael A. Perino, *The Lost History of Insider Trading,* 2019 ILLINOIS L. REV. 951, 995-98.
[7] Edwin Lefevre, *Use and Abuse of Inside Information,* SATURDAY EVENING POST, at 2 (Dec. 31, 1904); Perino, supra note 6, at 967-68.
[8] Lefevre, supra note 7, at 1.

the ad tech stack, which it then uses to manipulate auctions and trade on inside information it obtains across the stack, and then hides and/or deceives its own clients about what it is doing.

Google will tell you that these markets are competitive because they are vertically integrated. But vertical integration can be beneficial if it eliminates double marginalization. Here Google is *enhancing* triple marginalization, with high margins on the sell-side, the buy-side and the exchange in the middle.

Structural Separation is Necessary

As introduced, the AMERICA Act prohibits entities with significant digital advertising revenue from owning and operating entities across the ad tech stack. In essence, large digital advertising companies with over $20 billion in ad tech revenue must make a choice regarding which segment of the ad tech stack they would like to operate. They can either be a buyer or seller of digital advertising space, they can own a digital advertising exchange, they can own a sell-side brokerage, or they can own a buy-side brokerage.[9] This is surest way to avoid conflicts of interest, promote transparency, and restore competition in the digital ad tech markets.

In the digital ad tech market, there are several advantages to structural separation of the ad tech markets. First, structural separation of dominant market actors with the power and incentive to foreclose competition recognizes the limits of regulatory behavioral obligations that are difficult to devise, implement, monitor, and enforce. Second, structural separation of dominant market actors eliminates or minimizes the conflicts of interest that are endemic in the ad tech market. Third, structural separation eliminates or reduces the risk of dominant market actors' cross-subsidizing and steering from less or non-competitive segments to competitive segments of the ad tech stack. Fourth, structural separation improves transparency and information flows across the ad tech stack, enhancing consumer choice, new entry, and the competitive process. Fifth, structural separation, unlike behavioral commitments, eliminates or reduces dominant market actors' incentives to restrict competition. Sixth, regulatory structural separation of dominant market actors may be faster, more effective, less expensive, and more pro-competitive than a similar remedy pursued through antitrust litigation, particularly when combined with regulatory behavioral obligations on other competitors.

Conservatives Should Support the AMERICA Act

I want to emphasize that this legislation is consistent with conservative values regarding antitrust enforcement. The fact that it is sponsored by Senators Lee and co-sponsored by Senators Cruz, Rubio, Schmitt, Hawley, Kennedy, Graham, and Vance underscores that point. Senator Lee has succinctly summarized the nature of the problem at an earlier hearing on this same topic. In that hearing he stated that, "It is hard to me to imagine a circumstance in which one can own the exchange platform and also be a buyer [or] seller broker/dealer . . . and maintain all of those positions without something anticompetitive going on in purpose and effect."[10] And in introducing this legislation on March 30, 2023, Senator Lee stated that the "lack of competition in digital advertising means that monopoly rents are being imposed upon every website that is ad-supported

---

[9] S.1073 at § 2b.

[10] *Senate Hearing on the Impact of Corporate Monopolies on Innovation*, C-SPAN, at 58:00 (Dec. 15, 2021), https://www.c-span.org/video/?516757-1/senate-hearing-impact-corporate-monopolies-innovation.

and every company—small, medium, or large—that relies on internet advertising to grow its business. It is essentially a tax on thousands of American businesses, and thus a tax on millions of American consumers."[11] That is about as simple and succinct as one can describe the problem.

There have been numerous opportunities to address the problem of Big Tech abuse of power in the ad tech market in the past, but those efforts have all failed. Challenging Google's acquisition of DoubleClick in 2007 was the first missed opportunity. Four FTC Commissioners—two Democrats (FTC Chair Deborah Majoras and Jon Leibowitz) and two Republicans (William Kovacic and Thomas Rosch) approved the merger, concluding that "this transaction is not likely to cause competitive harm by eliminating significant current competition between Google and DoubleClick" and that "the elimination of DoubleClick as a protentional competitor is not likely to have a meaningful impact on competition in the ad intermediation market."[12] Only one Commissioner, Pamela Harbour, dissented because "I make alternate predictions about where this market is heading, and the transformative role the combined Google/DoubleClick will play if the proposed acquisition is consummated."[13] The FTC imposed no conditions on the merger but warned Google that it "will closely watch these markets and, should Google engage in unlawful tying or other anticompetitive conduct, the Commission intends to act quickly."[14] Years later, William Kovacic admitted his mistake, stating that "If I knew in 2007 what I know now, I would have voted to challenge the DoubleClick acquisition."[15] And as Judge Brinkema noted in the DOJ/Google hearing this past Friday, the Department of Justice also admits that the government made a mistake in clearing the DoubleClick merger and the Department of Justice is now seeking to undo that merger.[16]

We are fortunate to be addressing this proposed legislation within the context of vigorous litigation against Google for its abuse of its monopoly power in the ad tech market. Two lawsuits are particularly noteworthy. The 2020 Texas lawsuit against Google, for which I consult for the state of Texas, is joined by a bipartisan group of sixteen other state attorneys general and the 2023 DOJ lawsuit against Google, joined by a bipartisan group of seventeen state attorneys general. These lawsuits underscore the fundamental concern that government enforcers share about Google's abuse of power. We can hope and expect that the outcome of those cases will correct at least some of the core problems in the ad tech market. It is noteworthy that in response to Google's motions to dismiss, in the Texas-led case against Google and in the DOJ-led case against Google judges in both cases have held that Google is violating existing antitrust law, if the facts alleged by the government enforcers, who had the benefit of pre-complaint discovery are true. As Judge Brinkema emphasized in the Virginia hearing this past Friday, Google may have begun "benignly" but it became "too big for their own good," "crushing" competition through "rapacious conduct with rivals, [destroying] rivals for no good economic reason."[17]

---

[11] Mike Lee, The AMERICA Act: Lee Introduces Bill to Protect Digital Advertising Competition, (Mar. 30, 2023), available at https://www.lee.senate.gov/2023/3/the-america-act.
[12] In the Matter of Google/DoubleClick, FTC File No. 071-0170, at 8, available at https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-federal-trade-commission-concerning-googledoubleclick.
[13] In the Matter of Google/DoubleClick, FTC File No. 071-0170, available at https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-harbour-matter-googledoubleclick.
[14] In the Matter of Google/DoubleClick, FTC File No. 071-0170, available at https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-federal-trade-commission-concerning-googledoubleclick.
[15] Steve Lohr, *This Deal Helped Turn Google Into an Ad Powerhouse. Is that a Problem?* NEW YORK TIMES, Sept. 21, 2020, available at https://www.nytimes.com/2020/09/21/technology/google-doubleclick-antitrust-ads.html.
[16] Transcript, United States v. Google, Civil Action No.: 1:23-cv-108, at 9, 25-26 (Apr. 28, 2023); DOJ Complaint, supra note 2, at 140.
[17] Transcript, United States v. Google, Civil Action No.: 1:23-cv-108, at 7, 29-30 (Apr. 28, 2023)

While litigation is appropriate and necessary to curb Big Tech abuse of power, it is not sufficient. Attorney General William Barr has written forcefully on the merits of regulating Big Tech platforms. During my tenure at the Department of Justice, it was clear that Barr took the problem of Big Tech monopoly practices seriously. That is reflected most notably in the DOJ filing the first major Big Tech antitrust case against Google in October 2020. But Barr was the first to concede that "unlike regulatory power—which allows proactive supervision of, and setting rules for, an entire market—antitrust addresses only wrongdoing by particular actors."[18] Successful litigation against Google will only solve part of the problem. In his memoir, Barr cited two reasons why targeted regulation of Big Tech is important as a complement to antitrust litigation. First, these markets are subject to powerful network effects and naturally prone to monopolization. Second, these digital markets impact not only competition but also other fundamental concerns such as the collection of personal data and the free flow of information and public discourse. According to Barr,

> For these reasons, relying solely on ad hoc, judge-imposed remedies against individual players for specific misconduct on a case-by-case basis will not result in a rational, coherent approach to the multifaceted problems caused by the unchallenged supremacy of a few tech giants. I have natural reservations about imposing a regulatory framework on market activities, as most conservatives do, but the reality is that some markets, or market conditions, require a degree of regulatory intervention. In the case of Big Tech's major platforms, it is hard to see how the challenges they pose to competition, privacy, and the free flow of information can be addressed in the absence of a regulatory framework.[19]

In short, litigation against Google is narrow and targeted to address the monopoly abuses of one company. The AMERICA Act legislation is also narrow and targeted, particularly in comparison to other antitrust legislation proposed in the last congressional session. But the legislation attempts to future proof the online digital advertising industry by imposing reasonable guard rails on the behavior of all medium and large online advertising brokers. And it does so but borrowing concepts relating to conflicts of interest and transparency that have been applied in other contexts so that government enforcers and courts can rely upon the standards established in those other industries to establish standards for this industry.

Conclusion

There is a growing bipartisan consensus that Big Tech companies have abused their market power and that something must be done about it.[20] That is reflected in lawsuits filed and prosecuted by the Trump and Biden Administrations and almost every State Attorney General, as well as salutary legislation such as the AMERICA Act.[21]

---

[18] WILLIAM P. BARR, ONE DAMN THING AFTER ANOTHER: MEMOIRS OF AN ATTORNEY GENERAL, 441 (2022).
[19] Id.; see also Chris Strohm, *Beyond Trump, Barr Takes on China and Big Tech in New Memoir,* BLOOMBERG, (Mar. 7, 2022).
[20] Roger P. Alford, *The Bipartisan Consensus on Big Tech,* 71 EMORY L. J. 893 (2022).
[21] AMERICA Act, S.1073, 118th Cong. (Mar 30, 2023).

Trade associations, lobbyists, and academics funded by Big Tech are paid to deride these developments as enforcers bending the knee to antitrust populism.[22] But the groundswell of bipartisan concern belies such easy accusations. The stakes are enormous, and Big Tech companies know it. There is every reason to believe that substantive antitrust legislation would have had a good chance of passage in the last congressional session but for over $250 million spent by Big Tech lobbyists to block such measures from even coming to the floor for a vote.[23] More lobbying money was spent in the last congressional session to block antitrust reforms than was spent lobbying Obamacare or Dodd-Frank.[24] And even still, Congress passed legislation to update merger filing fees and enhance the ability of State Attorneys General to sue and remain in the forum of their choice.[25]

One need not be a progressive or a "hipster antitrust"[26] advocate to be deeply concerned about Big Tech's abuse of power. As Senator Lee recently noted in a speech to the right-leaning tech trade group NetChoice, "Conservative anger at Big Tech is real, and it's entirely justified…. No business would treat its customers with the prejudice and disdain shown towards conservatives by Big Tech unless that business were confident that it was the only game in town…. The only people who still argue that there's no reason to be concerned about competition in Big Tech are the ones paid by Big Tech to say so."[27]

I look forward to taking your questions. Thank you.

---

[22] Trace Mitchell, *The Dangers of the Populist Antitrust Movement,* THE DISPATCH, (Apr. 23, 2021), https://thedispatch.com/p/the-dangers-of-the-populist-antitrust; Anna Edgerton & David McLaughlin, *GOP Faction Wields Antitrust Threats, Echoing Trump's Populism,* BLOOMBERG, (Apr. 21, 2021), https://www.bnnbloomberg.ca/gop-faction-wields-antitrust-threats-echoing-trump-s-populism-1.1593086;

[23] Rebecca Klar and Karl Evers-Hillstrom, *How Big Tech Fought Antitrust Reform—and Won*, THE HILL, (Dec. 23, 2022).

[24] Leah Nylen, Bloomberg, Chair's Showcase, ABA Antitrust Spring Meeting (Mar. 30, 2023).

[25] Roger P. Alford, *Antitrust Accountability Delayed: State Antitrust Enforcement and Multidistrict Litigation,* 26 SMU SCIENCE & TECH. L. REV. ___ (2023) (forthcoming)

[26] Joshua D. Wright, Elyse Dorsey, Jonathan Klick, Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust,* 51 ARIZ. ST. L. J. 293 (2019).

[27] *See also* Ben Brody, *Republican Senator Slams Conservative Tech Lobbyists to Their Faces,* PROTOCOL (June 22, 2021), https://www.protocol.com/mike-lee-netchoice-antitrust; *American Antitrust: Reforms to Create Further Innovations and Opportunities*, at 5:30, 7:30, 9:50, YOUTUBE (June 22, 2021), https://www.youtube.com/watch?v=pToFy8BY5C4.