STATEMENT OF

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BEFORE THE

UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

HEARING ON

"UNDERSTANDING THE DIGITAL ADVERTISING ECOSYSTEM AND THE IMPACT OF
DATA PRIVACY AND COMPETITION POLICY"

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Chairman Graham, Ranking Member Feinstein, and Members of the Committee, thank you for offering me the opportunity to appear before you today. My name is Jan Rybnicek. I am an attorney in the antitrust, competition, and trade practice at the law firm Freshfields Bruckhaus Deringer in Washington, DC. I also am an adjunct professor and senior fellow at the Global Antitrust Institute at the Antonin Scalia Law School at George Mason University. I previously had the privilege of serving at one of our nation's two antitrust agencies—the Federal Trade Commission—as an attorney advisor to then-Commissioner Josh Wright. Before getting into the substance of my remarks, and to avoid any doubt, I want to say that the views I express here today are my own and do not necessarily reflect the views of my firm or any client.

The topic of today's hearing—"Understanding the Digital Advertising Ecosystem and the Impact of Data Privacy and Competition Policy"—is important and I hope our panel can contribute positively to the ongoing debate about the appropriate role of digital platforms within our society. I will focus my comments today on the competition policy issues raised by digital platforms and advertising. I want to use my opening remarks to make three points:

- **First**, antitrust law has developed into a coherent body of jurisprudence over the last 50 years and today contributes positively to American society. This has not always been the case and we should be careful not to repeat the failures of antitrust's past as we consider new proposals. In my view, modern antitrust is up to the task of protecting competition in the digital economy, including with respect to digital advertising.

- **Second**, calls to reform the antitrust laws often echo a "Big is Bad" slogan reminiscent of antitrust's Stone Age. Digital platforms unsurprisingly have been frequent targets for increased antitrust enforcement given their size. In reality, these tech companies face

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vigorous competition for user attention and advertising dollars, and this competition has benefited consumers and businesses in the form of better products and services.

- ***Third***, breaking up the largest platforms to address a perceived competition problem ultimately only will harm consumers. Not only is this proposal putting the cart before the horse as no clear market failure has yet been identified, but the solution itself is unworkable. The proposal may sound simple in theory but it is anything but that in practice. For one, it is not clear exactly what these companies would be broken up into and how they would operate afterwards. What is clear, however, is that consumers would suffer considerable harm in the form of inferior products and services.

I will use the remainder of my time to touch on each of these points in more detail.

1. Modern Antitrust Law is Coherent and Focuses on Enhancing Consumer Welfare

In recent years there have been calls to dramatically reshape the antitrust laws to address what critics perceive to be an under-enforcement problem, including with respect to digital platforms and digital advertising.[1] The proposals vary widely, but include enacting new legislation to undo key and longstanding Supreme Court precedent, creating new presumptions of illegality and removing burdens of proof to ease prosecution, and employing a new "public interest" standard that gives broad discretion to the government and courts to identify antitrust violations. While healthy debate about the appropriate application of the antitrust laws at the margins has long existed, many of these new proposals now seek to abandon well-

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[1] For a detailed critique of recent proposals to dramatically change antitrust, see Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 Ariz. St. L.J. 293 (2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524; Elyse Dorsey, Jan M. Rybnicek & Joshua D. Wright, *Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent Seeking*, CPI Antitrust Chron. (Apr. 2018).

developed, bipartisan principles in order to create shortcuts that allow for enforcement actions even in the absence of evidence showing harm to competition. In doing so, these reforms would increase the risk of erroneous prosecutions, which will have a chilling effect on procompetitive conduct. Most importantly, these changes are unnecessary. Antitrust law is robust, incorporates new learning, and can address issues raised by the new digital economy, including digital advertising.

It is impossible to have a discussion about the appropriate contours of the antitrust laws and their effectiveness without understanding the antitrust laws' history. For more than 130 years, the antitrust laws have developed primarily through a common law process in the US courts. A tremendous amount of thinking and debate has gone into developing the substantive rules, standards, presumptions, and economic methods that are used today to distinguish procompetitive and anticompetitive conduct. Born out of this debate was the "consumer welfare standard," which offered antitrust a disciplined method for analyzing competition that is grounded in economics. The consumer welfare test funnels antitrust analysis into a simple and elegant question: "Is the conduct at issue likely to make consumers better or worse off?"

This, however, had not always been the case. The antitrust laws initially were interpreted to prevent "bigness" and to serve various socio-political ends that often conflicted. This led to an antitrust doctrine that was incoherent in application and inconsistent in outcome. For instance, antitrust would punish a large company that offered lower-priced goods because it might cause less efficient and smaller rivals to go out of business. In other words, antitrust was preventing precisely the type of competition it was established to protect. After considerable debate and discussion, starting in the 1970s, antitrust began to undergo a

revolution that tethered antitrust analysis more tightly to economics and to the concept of consumer welfare. The modern approach to antitrust seeks to apply a rich set of tools and the latest economic learning to the available evidence to determine whether the conduct in question enhances or harms consumer welfare. This focus on consumers has made the law more predictable and given antitrust law the ability to adapt to changes in technology, consumer preferences, and economic learning.

Modern antitrust law is fully capable of addressing the competition issues raised by digital platforms and digital advertising. In fact, many of the characteristics associated with digital platforms are similar to those of companies in other industries that have long been the subject of antitrust review. It would be a mistake to forget the lessons of antitrust's past to seek either to use antitrust to address a variety of perceived societal harms unrelated to competition or to circumvent the systematically developed, bipartisan analytical framework used today.

2. Digital Platforms Compete Vigorously for Attention, Content, and Advertisers

Much of the recent criticism related to digital platforms and digital advertising assumes without discussion a highly concentrated industry in which there are inherent competition problems. In reality there exists significant competition. Over the last two decades we have seen rapid innovation and technological change that has altered how individuals consume news and entertainment content and how businesses connect with customers. These changes have been driven by competition for consumer attention and for advertising dollars, which has fueled benefits to consumers and businesses in the form of improved products and services.

The business model at issue is relatively straightforward and the underlying economics are well understood. Digital platforms connect distinct groups of people with each other and

with news, entertainment, and other content. Ad-supported platforms depend on the presence of active users to attract media content and advertisers. Advertisers benefit from the availability of user data to better target their ad placements and improve their return on investment. The more users there are on a platform the more attractive that platform is for advertisers. The advertising revenue generated by the platforms is then used by the platforms to develop new and improved products and services to attract and retain users. By attracting and retaining users, the platforms, again, are better able to attract content and advertisers.

Platform competition therefore is not based only on price but rather primarily upon providing a better product or service in order to attract more users.[2] If a platform fails to innovate or to react to consumer preferences, it will suffer losses in users, which in turn will result in losses in media content and advertiser dollars. This drives significant research and development by platforms to continuously improve their products. Facebook and Google are two of the most popular ad-supported platforms but they compete against many other platforms for user attention, including Amazon, LinkedIn, Twitter, Pinterest, SnapChat, Yelp, Yahoo!, and others. These services need not necessarily provide perfectly substitutable products, but each service provides a way for users to connect to the world around them and competes for user's attention. This is the key metric of analysis from a competition standpoint because user attention drives advertising revenue. If a platform improves its product and offers a better experience that draws additional attention to the platform it will do so at the expense of another platform. Today it is relatively easy to download and switch between these different

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[2] *See, e.g.*, Geoffrey A. Manne & William Rinehart, *The Market Realities that Undermined the FTC's Antitrust Case Against Google*, 2013 Harv. J. L. & Tech. 1 (Online Paper Series, July 2013), *available at* https://jolt.law.harvard.edu/assets/misc/ManneRinehart.pdf.

applications and users may use several services over the course of a day. Ad-supported platforms therefore seek to create the best products, services, and overall user experience to increase the time the user spends on the platform, which makes the platform more attractive to content distributors and advertisers.

For advertising to be effective people need to view it. The intense competition for user attention that occurs between different types of platforms and other advertising channels is evidenced by the prevalence of tools and services that allow advertisers to monitor and adjust their advertising spend from less effective advertising channels to those that will provide a higher return on investment. Today there are many options for these types of cross-channel marketing services, and their prevalence demonstrates that digital advertising is dynamic.

3. **Breaking Up "Big Tech" Would Be Difficult and Ultimately Would Harm Consumers**

Growing concerns about the size and influence of digital platforms has led some critics to propose the most drastic remedy: using antitrust law to break up the largest US tech companies. In the absence of any serious evidence of market failure, this proposal is premature. On its surface, this option may seem simple and elegant, but in reality it is anything but that. Breaking up the largest tech companies would be incredibly disruptive to the companies and destroy important economies of scope and scale that benefit consumers. It also will send the wrong message to entrepreneurs and start-ups that will see that the reward for successfully developing an innovative new product is government-mandated break-up.

It also is not entirely clear what the digital platforms would be broken up into and how the government would determine the businesses' new structure and business model. This does not seem like a task the government is well-suited to undertake. If the tech companies were

broken up into small versions of themselves (e.g., five Facebooks), it also may be that the industry would eventually gravitate again to a single platform because users benefit from all being on the same platform. If instead the companies were disintegrated vertically, for example by separating the data that supports the ad business from the platform service, consumers likely would face significant harm in the form of lost innovation. Indeed, the economic literature suggests that vertical integration typically is good for consumers and separation tends to harm consumers. For instance, if the benefit arising from improving a platform's products and services are captured by a separate data business in the form of additional users, that would significantly reduce the incentive to invest into making the core platform better.

Recent studies have shown that consumers benefit greatly from the free services these platforms provide. One recent study shows what it would cost for a median consumer to give up various types of free platform services. To name a few, a user would need to be compensated: $581 a year to give up Facebook; $3,648 a year to give up digital map services; and $8,414 a year to give up email services.[3] This consumer value would almost certainly be eroded or completely lost by any plan to break up the big tech platforms. To justify giving up such a large amount of consumer surplus there should be substantial evidence in the historical or economic record that doing so would make us better off. There is not.

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To close, I want to re-emphasize that modern antitrust law has been a source of enormous good for consumers and the American economy. The adoption of the consumer welfare standard and an analytical framework more closely tied to economic analysis has aided

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[3] Erik Brynjolfsson et al., *Accounting for the Value of New and Free Goods in the Digital Economy* (Working Paper, March 2019), *available at* https://www.nber.org/papers/w25695?sy=695.

enforcement agencies and courts in distinguishing between truly anticompetitive conduct and conduct that is procompetitive. Of course there is room for improvement, but changes should be based on actual evidence rather than supposition and fear of "bigness." It is important that we remember the lessons from antitrust's history as we consider the role of antitrust in protecting competition in the digital economy and, in particular, digital advertising.

I look forward to answering any questions.