

Responses to Written Questions from Subcommittee on Competition Policy, Antitrust, and Consumer Rights

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Senator Thom Tillis

1. *The AMERICA Act would prohibit large digital advertising companies from owning more than one part of the digital ad ecosystem. In your opinion, should this take effect today do you see any unintended consequences?*

I do not foresee unintended consequences. The bill addresses a legitimate concern that certain tech platforms are dominant and reinforce their market power by requiring use of their proprietary advertising technology by sellers and advertisers. I note that there are pending antitrust enforcement challenges by certain state attorneys general and by the U.S. Department of Justice seeking to address these concerns as they relate to Google.

2. *Development of AI will only continue to grow and as a result more and more sophisticated AI tools will become available and the use of AI tools more prevalent. What can Congress do now to better plan for the impact of competition, without stifling AI innovation?*

As I discuss in my written testimony, Congress should consider legislation that addresses the growing anticompetitive risks posed by the misuse of price-setting algorithms—either as part of broader legislation establishing guardrails for AI or by enacting antitrust-specific legislation that holds competitors responsible for the use of pricing algorithms that they know or should know will result in tacit collusion. I hope the courts will come to recognize that proof of knowing use of pricing algorithms by competitors to suppress price competition constitutes an anticompetitive agreement in violation of Section 1 of the Sherman Act. If not, action by Congress to update the Sherman Act may be essential.

3. *Can algorithms be manipulated by bad actors to censor free speech, specifically during an election cycle? And if so, how?*

My expertise – and therefore my testimony – focuses on antitrust and competition. But I appreciate that the increased use of AI tools does have implications for elections, particularly regarding the spread of disinformation. My colleagues at the Brookings Institution, Darrell West and Elaine Kamarck, have discussed some of the risks that the proliferation of AI tools poses to our electoral process.¹ A recent report from the Center on Technology Policy at UNC Chapel Hill identified a variety of risks that generative AI poses for political advertisements specifically, such as facilitating an increase in the scale, believability, and personalization of deceptive content, as well as bias and discrimination in political ads.²

¹ Darrell M. West and Elaine Kamarck, “How AI Will Affect the 2024 Elections,” TechTank, The Brookings Institution, November 6, 2023 <https://www.brookings.edu/articles/ai-will-affect-the-2024-elections-the-techtank-podcast/>.

² Scott Babwah Brennan and Matt Perault, The new political ad machine: Policy frameworks for political ads in an age of AI, Center on Technology Policy at the University of North Carolina at Chapel Hill, November 2023 <https://techpolicy.unc.edu/wp-content/uploads/2023/11/GAI-and-political-ads.pdf>.

4. *Groups with different viewpoints have weighed in on algorithms. Some suggest that more transparency is needed, while others want more privacy. Can you provide your perspective on whether more or less transparency is needed when it comes to algorithms?*

While questions regarding AI regulation are often reduced to a simple trade-off between protections for privacy and transparency, the focus should be on its misuse. Last October, my former Brookings colleague Alex Engler and his coauthor Sylvia Brown published a report on automated valuation models (AVMs)—another example of AI tools used in the housing market—in which they suggested that transparency requirements could help combat algorithmic discrimination in AVMs.³

5. *Do you believe that large companies and platforms can use algorithms to stifle innovation or small businesses?*

I agree there is a risk that AI tools can be used by large companies to suppress competition and injure smaller companies. For example, last June, the FTC raised concerns that incumbents in the generative AI market that control “key inputs or adjacent markets” could entrench their dominance of the market using unlawful bundling, tying, or exclusive dealing practices.⁴ In September, the FTC sued Amazon for illegally maintaining monopoly power through practices such as biasing Amazon’s search results to preference their own products and removing the “Buy Box” for products sold by competitors offering discounts on other websites.⁵

6. *What do you believe is the role of government in regulating algorithms? What, if any, unintended consequences would there be if Congress gets involved?*

I do not claim the expertise to offer a comprehensive solution to the challenge of regulating artificial intelligence. But I certainly believe it appropriate – indeed necessary – for the government to prevent the misuse of AI tools to facilitate anticompetitive outcomes. As I discuss in my written testimony, courts should read Section 1 of the Sherman Act to prevent such misuse; the FTC’s “unfair methods of competition” authority under Section 5 of the FTC Act empowers it to challenge the use of AI that results in anticompetitive outcomes; and the FTC should also use its investigatory powers under Section 6(b) to examine the prevalence and real-world impact of algorithmic pricing in different industries. Congress also has a responsibility to ensure that our antitrust laws are up-to-date and able to prevent the use of AI tools to facilitate collusion.

³ Sylvia Brown and Alex C. Engler, *Governing the Ascendancy of Automated Valuation Models: Regulating AI in Residential Property Valuation*, The Brookings Institution, October 12, 2023 https://www.brookings.edu/wp-content/uploads/2023/10/BR-AVM_report_Finalx2.pdf.

⁴ Staff in the Bureau of Competition & Office of Technology, “Generative AI Raises Competition Concerns,” FTC – Technology Blog, June 29, 2023 <https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/06/generative-ai-raises-competition-concerns>.

⁵ FTC, “FTC Sues Amazon for Illegally Maintaining Monopoly Power,” September 26, 2023 <https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power>; Karen Weise, “Here Are the 2 Tactics Amazon Used to Undermine Competition, the F.T.C. Says,” *The New York Times*, September 26, 2023 <https://www.nytimes.com/2023/09/26/technology/amazon-ftc-lawsuit-antitrust.html>.