UNITED STATES OF AMERICA
Federal Trade Commission

Prepared Remarks of Commissioner Noah Joshua Phillips[1]

How (Not) to Regulate Technology

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Introduction

Thank you, Harold for that introduction. And thanks to the Hudson Institute for inviting me to speak. Hudson has a proud legacy of influential thought leadership, on technology policy and other issues. Earlier this week, the House passed the Foreign Merger Subsidy Disclosure Act, the idea for which you and I first discussed here at Hudson in December 2020.[2] It's an honor to be back. I do have to start with my standard disclaimer that the views I express today are my own and do not represent those of the Federal Trade Commission or any Commissioner.

As I near the end of my tenure on the Commission, I've been thinking a little more systematically about the policy conversation that has surrounded the FTC over the last four and a half years. Consistent with a political zeitgeist deeply suspicious of a handful of enormous technology companies, politicians, regulators, commentators, and academics are in lockstep that the United States needs to "rein in Big Tech". The FTC has a dual antitrust and consumer protection mission, including data privacy, so the agency naturally finds itself in the middle of that conversation. Today, I want to talk with you about what I fear the conversation all too often lacks; and why that deficit is a prescription for failing to address real issues that many associate with large technology companies.

How to Regulate

How should we regulate, technology, or anything else? I want to start by laying out some elementary steps I believe must be followed to adopt sensible regulations for pretty much anything. *First*, define a problem. *Second*, propose a solution calibrated to address that problem. *Third*, recognize that all policy involves tradeoffs, and grapple honestly with the tradeoffs

[1] The views I express today are my own and do not necessarily represent those of the Commission or any Commissioner.

[2] Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, *Championing Competition: The Role of National Security in Antitrust Enforcement*, Remarks at The Hudson Institute (Virtual) (Dec. 8, 2020), https://www.ftc.gov/system/files/documents/public_statements/1584378/championing_competition_final_12-8-20_for_posting.pdf.

(intended and otherwise) that flow from our proposed solution. All of this may sound obvious; but I do think it needs to be said, because too much of the policy conversation surrounding technology lacks even that much.

On a podcast earlier this year, Yuval Levin described the difference between the Right and the Left on economics as the Right believing that the short term is the function of long term conditions and the Left believing that the long term is the function of short term policy.[3] Progressives will spot what they believe is a problem and react with policy in an attempt to solve it, while conservatives will look to create the conditions for growth. You can quibble with the contrast Levin draws, but it resonates with me. In thinking about how to regulate technology, one thing I have always tried to keep in mind is the long term. If you ban acquisitions, what will that mean for exit by entrepreneurs and venture capitalists? And what will that mean for the investment and innovation that have driven the American economy, and our soft power around the world?

Defining the Problem(s)

Before we get to tradeoffs, though, let's examine how "rein in Big Tech" fares on our regulatory flow chart. The frequency of the use of the phrase "Big Tech" seems inversely proportional to its utility. We hear it all the time, but it is just not a useful descriptor.

Sometimes, as in proposed legislation to modify the antitrust laws to bar Alphabet, Amazon, Apple, Meta, and Microsoft from engaging in conduct their competitors can, "Big Tech" is defined by the number of users and market capitalization that characterize a company. In substantial part, however, these are very different companies. That is, they do different things. So why we talk about them in the same breath and propose the same solutions to the problems they purportedly cause is far from clear. Microsoft's business is very different from Meta's; and Alphabet's from Amazon's. Some sell ads; some sell devices; some cloud services.

One often hears other companies described as "Big Tech", for example TikTok and Twitter. Those companies derive revenue from advertising, like Alphabet and Meta and to a lesser extent Amazon and Apple, although the FTC claims in court that these companies do not compete. But is Twitter really "Big Tech"? It's much smaller, for one thing, both by user number and by market capitalization; and the argument that it is a monopoly seems very difficult to make. I also sometimes hear "gatekeeper" or "platform", as if those terms apply only to the largest tech companies. That is not true, not even close. Many businesses, online and off, are gatekeepers and platforms.

More often than not, "Big Tech" just means "apparently ubiquitous technology companies I don't like", with definitions like in the proposed bills looking more like gerrymanders to capture as many as you dislike without capturing too many you like. The problem with that is that it addresses companies, not conduct. We know who, but not what, we would regulate. That is not a recipe for sensible regulation.

[3] The Commentary Magazine Podcast, *The Liberal Economic Panic* (Mar. 30, 2022).

And "rein in" how? The antitrust bills certainly would have the effect of limiting the ability of the companies in question to compete on a level playing field with their peers, but when it comes to regulation I tend to think less of entities and more of conduct, or its effects. We want to reduce mercury emissions and so we pass the Clean Air Act.[4] It's not that we want to "rein in Valero or Chevron". The question isn't whether to "rein" – although that's a question, too – but how.

Rather than being preoccupied with targeting a group of companies, policymakers should first identify what we perceive the problems to be. Is the problem restraints on competition? (Or even efficiency that undermines an aesthetic preference for small businesses? I think there are problems with that argument, but it is an argument.) Is the problem the collection and sharing of sensitive personal information? Is it content moderation policies that result in discrimination against unpopular viewpoints? These are different things, and different problems warrant different solutions. If we identify multiple problems (and that's ok), there is no reason to believe one solution will solve all of them.

To some extent, part of the definition problem is a grand rhetorical expansion of antitrust undertaken by those who see big corporations at the heart of nearly every problem. Big is not bad. But even when big gets bad, while antitrust is a powerful tool, the laws are not designed to address every problem we might associate with bigness. Even perfect competition cannot solve every problem. We've heard "anti-monopoly" warriors promise that antitrust can solve everything from the political power of large corporations[5] to privacy[6] to labor rights[7] to racial inequality[8]. Does competition help address social problems? Without a doubt. When companies compete to lower prices, for example, people with fewer means have access to more products. That is good for distributional equity. But antitrust will not solve every problem; and it is not, and should not be, a regulatory catch-all.

Tailoring Solutions to Problems

Let's go back to Levin's dichotomy, between Conservatives focused on long-term growth and Progressives identifying problems and responding with solutions. When it comes to tech policy today, many would-be conservatives sound a great deal like Progressives, identifying problems and responding with solutions. Fair enough, but let's marinate a bit on the problem identified most often.

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[4] 42 U.S.C. § 7401 et seq.

[5] *See e.g.,* Sandeep Vaheesan, *Imagining a Democratic Amazon,* DEMOCRACY (July 16, 2020), https://democracyjournal.org/arguments/imagining-a-democratic-amazon/.

[6] *See e.g.,* Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, *Should We Block This Merger? Some Thoughts in Converging Antitrust and Privacy*, Remarks at Center for Internet and Society, Stanford Law School (Jan. 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1565039/phillips_-_stanford_speech_10-30-20.pdf.

[7] *See, e.g.,* Marshall Steinbaum, *A Missing Link: The Role of Antitrust Law in Rectifying Employer Power in Our High-Profit, Low-Wage Economy*, ROOSEVELT INST. (Apr. 16, 2018), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Missing-Link-Monopsony-brief-201804.pdf.

[8] *See e.g.,* Barry Lynn & Kevin Carty, *To Address Inequality, Let's Take on Monopolies*, OPEN MARKETS INST. (Sept. 22, 2017), https://www.openmarketsinstitute.org/learn/income-inequality-monopoly.

Content Moderation

Conservatives are concerned that technology platforms are censoring them, specifically de-platforming, tagging, de-monetizing, and otherwise quieting voices with which the companies or their employees disagree. I personally find it hard to explain some of the editorial choices I have seen, especially in light of some of the other speech not subject to similar treatment. I get the complaints. Above all, this cuts to the deeply problematic issue of how to moderate content at scale. More commonly on the political Left, we hear moderation concerns, but in the opposite direction. These are calls not for more content, but for less: concerns about the spread of hate or misinformation or the like.

The complaints here, not enough content and too much content, are diametrically opposed. But we often hear agreement on the solution. How can that be? Whatever it is and however it works, no solution can solve both problems.

Take repealing Section 230 of the Communication Decency Act, which the President of the United States recently endorsed.[9] I am no Section 230 scholar, and the FTC does not administer the provision; but at core it limits liability for hosting speech. Liability is a tax. When we increase liability, we get less of something. When we limit liability, we get more. That is how liability functions in the legal system. If you repeal Section 230 and increase liability, you will see less speech. So how does repeal result in less censorship? The argument makes little sense. That you might cudgel some companies that have made decisions you don't like seems, on some level, beside the point. How will the solution address the problem?

And likewise antitrust. It is not clear to me how breaking up big tech companies would result in the desired content moderation outcome when we have little social consensus around what level of moderation is optimal. Why anyone assumes that a market functioning without whatever impediment they perceive would yield the moderation decisions they want is just not clear. How to moderate content at scale is a terrifically difficult problem, with most regulatory responses fraught with First Amendment peril. But ultimately, is it a competition problem? People have a lot of issues with Twitter's moderation calls, but how exactly do they stem from monopoly power? And why does anyone think that, were Meta to sell Instagram and WhatsApp, conservatives would get more favorable treatment? And if competition is not the problem, then antitrust is not the solution.

New Agency?

The "Big Tech" conversation has also given us an odd variation on the old Washington joke that, when you don't want to deal with an issue, you create a task force. Every few months, there is a proposal to create a new agency to regulate "Big Tech." [10] That may sound good to

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[9] *See* Steve Nelson, *Biden announces push to end Big Tech immunity - 2 years after Trump attempt*, NY POST (Sept. 15, 2022), https://nypost.com/2022/09/15/biden-announces-push-to-end-big-tech-immunity-2-years-after-trump-attempt/.

[10] *See, e.g.,* Ramsey Touchberry, *Lindsey Graham says social media may need to be licensed amid whistleblower allegations*, WASH. TIMES (Sept. 14, 2022), https://www.washingtontimes.com/news/2022/sep/14/lindsey-graham-

some, but it simply punts the critical set of questions we've been discussing. What problem would a new regulator solve? A new set of authorities might solve problems the law today cannot reach. That is a fair discussion to have. But a new entity, in and of itself, solves nothing.

Privacy

Another problem we hear about is privacy. And to be clear: I do see a problem. But one thing I hear a lot about that doesn't seem like a solution is antitrust. I like competition, and I like privacy. But the argument that antitrust will get us the privacy we want is, as I have said repeatedly, wrong for several reasons.[11]

Antitrust and privacy have different goals, and are often at odds. Antitrust is focused on protecting competition, and privacy is about protecting information about people. Advancing privacy interests can decrease competition, by limiting access to an asset from which value can be derived. When companies like Apple or Google restrict third parties access to data they have about customers, that might enhance consumer privacy, but it stops companies from being able to use that data to build applications and services that benefit consumers. That likely decreases competition. I'm not saying that's bad, not at all: sometimes we want to displace competition in favor of other values. But it is a choice, between two mostly competing goals.

Would greater competition yield better privacy? It might, if the competition is over privacy; but that ain't necessarily so. TikTok (the most downloaded app in the world)[12] appears to offer less privacy than Meta or YouTube.[13] It's competing along different lines. And, if popularity is any indication, it's not clear that many consumers care as much about what TikTok does with their data as other features. Some do, to be sure. I think they should care more. And I certainly think the government should care. But privacy does not appear to be an offshoot of competition.

Privacy concerns are a kind of externality, a byproduct of market forces; and to address them what we need is privacy regulation. Congress is currently working on developing baseline consumer privacy legislation, most notably the negotiations concerning the American Data

says-social-media-may-need-be-licen/; Sara Morrison, *Sen. Kirsten Gillibrand wants to create a new agency to deal with data privacy*, VOX (June 17, 2021), https://www.vox.com/recode/2021/6/17/22536907/gillibrand-data-protection-act-privacy; Press Release Rep. Lofgren, *Eshoo & Lofgren Introduce the Online Privacy Act* (Nov. 5, 2019), https://lofgren.house.gov/media/press-releases/eshoo-lofgren-introduce-online-privacy-act.

[11] *See* Noah Joshua Phillips, *Should We Block This Merger? Some Thoughts in Converging Antitrust and Privacy*, Remarks at Center for Internet and Society, Stanford Law School (Jan. 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1565039/phillips_-_stanford_speech_10-30-20.pdf.

[12] *See* Lauren Forristal, *TikTok was the top app by worldwide downloads in Q1 2022*, TECHCRUNCH (Apr. 26, 2022), https://techcrunch.com/2022/04/26/tiktok-was-the-top-app-by-worldwide-downloads-in-q1-2022/.

[13] *See* Emily Baker White, *Leaked Audio From 80 Internal TikTok Meetings Shows That US User Data Has Been Repeatedly Accessed From China*, BUZZFEED NEWS (June 17, 2022), https://www.buzzfeednews.com/article/emilybakerwhite/tiktok-tapes-us-user-data-china-bytedance-access.

Privacy Protection Act (ADPPA).[14] There are a lot of thorny issues involved and there are important tradeoffs that must be made. Any legislation that restricts the collection, use, or sharing of data is necessarily going to have effects on competition by raising barriers to entry and increasing costs. This is likely to entrench larger companies that can handle these additional costs and could result in fewer product offerings and innovation. That is why any decisions this consequential properly belong to Congress, [15] and I appreciate its continued work in this area.

One thing the ADPPA reflects is the recognition that privacy concerns are not just about "Big Tech". There are big technology companies that raise privacy concerns, but there are also small ones. This is evident even from a quick perusal of the privacy docket at the FTC over my tenure.[16] The big fish get in trouble, but that should not distract attention from the smaller ones, which can cause some real privacy harms. The legislative discussion about privacy is about business practices, not individual companies. It takes a set of concerns – privacy – and fashions solutions calibrated to addressing them. There is debate about the particulars, but there should be no debate about whether the basic approach to policymaking is sound.

Tradeoffs

I am less impressed with the Commission's legislative foray into privacy, our August Advance Notice of Proposed Rulemaking on Commercial Surveillance and Data Security

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[14] *See* Rebecca Klar, *House panel advances landmark federal data privacy bill*, THE HILL (July 20, 2022), https://thehill.com/policy/technology/3567822-house-panel-advances-landmark-federal-data-privacy-bill/; Press Release, House Committee on Energy and Commerce, *House and Senate Leaders Release Bipartisan Discussion Draft of Comprehensive Data Privacy Bill* (June 3, 2022), https://energycommerce.house.gov/newsroom/press-releases/house-and-senate-leaders-release-bipartisan-discussion-draft-of.

[15] *See, e.g.*, Statement of Commissioner Noah Joshua Phillips Regarding the Report to Congress on Privacy and Security (Oct. 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597020/commissioner_phillips_dissent_to_privacy_report_to_congress_updated_final_93021_for_posting.pdf; Sen. Roger Wicker, Rep. Cathy McMorris Rodgers & Noah Phillips, *FTC must leave privacy legislating to Congress*, WASH. EXAM'R (Sept. 29, 2021), https://www.washingtonexaminer.com/opinion/op-eds/ftc-must-leave-privacy-legislating-to-congress; Prepared Oral Statement of Commissioner Noah Joshua Phillips Before the House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce, Hearing on "Transforming the FTC: Legislation to Modernize Consumer Protection" (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592981/prepared_statement_0728_house_ec_hearing_72821_for_posting.pdf.

[16] *See, e.g.*, *U.S. v. Twitter, Inc.*, Case No. 3:22-cv-3070 (N.D. Cal. 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/2023062-twitter-inc-us-v; *In the Matter of CafePress*, FTC File No. 1923209 (2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/1923209-cafepress-matter; *In the matter of Flo Health, Inc.*, FTC File No. 1923133 (2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/192-3133-flo-health-inc; *In the Matter of Zoom Video Communications*, Inc., FTC File No. 1923167 (Feb. 1, 2021), https://www.ftc.gov/system/files/documents/cases/1923167_c-4731_zoom_final_order.pdf; *In the Matter of Support King, LLC (SpyFone.com)*, FTC File No. 1923003 (2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/192-3003-support-king-llc-spyfonecom-matter; *U.S. v. Facebook*, Case No. 1:19-cv-02184 (D.D.C. July 24, 2019), https://www.ftc.gov/system/files/documents/cases/182_3109_facebook_order_filed_7-24-19.pdf.

("ANPR").[17] I dissented, for a variety of reasons including legal and philosophical ones.[18] But one big concern for me is that the ANPR reads as if there is such a thing as a free lunch. There isn't, which is to say that regulation necessarily results in tradeoffs, a fact the ANPR fails adequately to recognize. It paints common business practices in an entirely negative light, and never recognizes any of their benefits, or concedes that there might be costs to banning or limiting them. For example, the ANPR evidences a real hostility toward targeted advertising, but is essentially devoid of any acknowledgment of its potential benefits. Advertising is the economic engine of the online economy. Instagram and Gmail are free because the companies that offer them sell ads. Some consumers probably like that they are free and want them to remain so.[19]

Consider also the businesses that buy the ads. Targeted ads are some of the most lucrative, and rules reducing or eliminating them will impose economic costs. In the wake of Apple's implementation of its App Tracking Transparency technology, companies like Meta and Snap have reported substantial revenue losses.[20] That means fewer businesses are investing in advertising, which they do in substantial part to reach customers and generate growth. The ANPR's failure seriously to grapple with these facts is a legal one. For the FTC to ban or limit the practice, it would have to prove that targeted advertising causes substantial injury to consumers that is not reasonably avoidable, and that is not outweighed by any countervailing benefits to consumers or competition.[21] But it is also a failed approach to tech policymaking, because it does not seriously recognize tradeoffs.

Our recent AI Report to Congress was regrettably similar.[22] Congress tasked the FTC with conducting a study and reporting on whether and how artificial intelligence ("AI") could be

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[17] Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273 (Aug. 22, 2022), https://www.federalregister.gov/documents/2022/08/22/2022-17752/trade-regulation-rule-on-commercial-surveillance-and-data-security.

[18] Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking (Aug. 11, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner%20Phillips%20Dissent%20to%20Commercial%20Surveillance%20ANPR%2008112022.pdf.

[19] *See* Ashley Johnson, *Banning Targeted Ads Would Sink the Internet Economy*, Information Technology & Innovation Foundation (Jan. 20, 2022), https://itif.org/publications/2022/01/20/banning-targeted-ads-would-sink-internet-economy.

[20] *See* Caitlin McCabe and Caitlin Ostroff, *Facebook Parent Meta's Stock Plunges, Loses More than $200 Billion in Value*, WALL ST. J. (Feb. 3, 2022), https://www.wsj.com/articles/facebook-owner-metas-stock-price-plunges-premarket-jolting-tech-investors-11643887542; Kalley Huang, *Snap reports its slowest quarterly growth and a wider loss in the second quarter*, N.Y. TIMES (July 21, 2022), https://www.nytimes.com/2022/07/21/business/snap-earnings.html.

[21] 15 U.S.C. 45(n).

[22] Fed. Trade Comm'n, *Combatting Online Harms Through Innovation Report to Congress* (June 2022), https://www.ftc.gov/reports/combatting-online-harms-through-innovation.

used to identify, remove, or take other appropriate action to address a variety of online harms.[23] The report merely catalogued criticisms of AI and focused on its shortcomings. Consider its discussion of the use of AI to identify and remove fake reviews. The Report notes that fake reviews are still on the internet, and concluded that, therefore, AI technology is "still not good enough."[24] Compared to what? There is no analysis of how many fake reviews are found and taken down by human reviewers, and no attempt at balancing whether the costs of some fake reviews going undetected by AI is outweighed by the speed and cost savings over having humans do this work. It is folly to take such a one-sided view of practices and use that jaundiced view as the basis for sweeping regulation. Regulators should aim to avoid unintended consequences, and that's only possible if they have a complete picture of technology and practices—the good and the bad—before they embark on regulation.

My friend and colleague, Commissioner Christine Wilson, reminds us of some of our nation's regulatory misadventures, when we have tried to displace competition with other "public interest" values in the past.[25] The railroad and airline regulations once administered by the Interstate Commerce Commission (ICC) and the Civil Aeronautics Board (CAB), both now defunct agencies, are warning signs. Those regulations caused enormous harm to consumers in the form of stifled innovation, decreased output, higher prices, lower quality, and decreased efficiency.

The history of antitrust legislation includes many unintended consequences of short term policy changes. The 1950 Amendments to the Clayton Act, which are good and which we use today, were followed by a two-decade merger wave. Their result was not the diminishment of powerful corporations, but rather the rise of gargantuan, unwieldy conglomerates. The Robinson-Patman Act sought to protect small, retail business from larger, more efficient chain stores. The unfortunate result was that American consumers paid more money for the groceries and household products they use every day. At a time when inflation is at a 40+ year high, I am especially wary of legislation (or regulation) that would take money out of the pockets of American consumers. Whether its legislation or regulation, we need to take these costs into account.

The same holds true for the difficult antitrust cases, a fact I have tried to make clear in from Day 1. Take the thorny interplay between antitrust intellectual property protection, which supports innovation by displacing competition for a limited time. I issued my first dissenting

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[23] Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020), https://www.congress.gov/116/plaws/publ260/PLAW-116publ260.pdf.

[24] *Combatting Online Harms Through Innovation* at 17.

[25] Christine S. Wilson, Comm'r, Fed. Trade Comm'n, *Remembering Regulatory Misadventures: Taking a Page from Edmund Burke to Inform Our Approach to Big Tech*, Address at the British Institute of International and Comparative Law (June 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1531816/wilson_remarks_biicl_6-28-19.pdf.

statement in *1-800 Contacts*, just six months into my tenure.[26] 1-800 Contacts sued rival contact lens sellers for trademark infringement when the other sellers' online advertising appeared in response to consumers' internet searches for "1-800 Contacts". The resulting trademark settlements required, among other things, that 1-800 Contacts' competitors would not bid on the company's name as a keyword in online search advertising. The FTC sued 1-800 Contacts, challenging the trademark settlements. The FTC administrative law judge ruled for the agency, and the Commission agreed. But I thought we had it wrong.

I thought that settlements of trademark suits should be analyzed under the "rule of reason" framework, not the "inherently suspect" analysis the Commission used. That presumptive liability standard applies only to behavior that past judicial experience and current economic learning show warrant summary condemnation. But this was intellectual property, and I was concerned that condemning these trademark settlements under the antitrust laws would undermine the incentives to invest in costly innovation that intellectual property rights are designed to protect. And innovation is clearly procompetitive. The U.S. Court of Appeals for the Second Circuit vindicated my position two and a half years later.[27] It held that a rule of reason analysis was necessary because this type of restraint had not been "widely condemned" and that the protection of trademarks constitutes a valid procompetitive justification. The "inherently suspect" framework is reserved for agreements well known to result in anticompetitive effects; it is not and should not be a shortcut to liability for antitrust enforcers.

But neither should IP be a complete shield to liability. In the *Impax* case, I joined my fellow commissioners in condemning a reverse payment settlement, under a full rule of reason analysis.[28] In January 2017, the FTC charged that Impax and branded drug manufacturer Endo Pharmaceuticals for illegally agreeing that Impax would delay launching its generic version of Endo's branded extended-release opioid pain reliever Opana ER. In exchange, Endo paid Impax more than $112 million. Our unanimous Commission applied the rule of reason analysis the Supreme Court articulated in *Actavis.*[29] We found proof of a large, unjustified payment made in exchange for deferring entry into the market or for abandoning a patent suit, taking into account all value that the branded manufacturer transferred to Impax, the generic, through the settlement. Further, we found that Impax failed to show the settlement had any procompetitive effects because the purported benefits of the settlement could have been achieved by settling without a reverse payment for delayed entry. Impax appealed, but the U.S. Court of Appeals for the Fifth Circuit affirmed our ruling.[30]

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[26] Dissenting Statement of Commissioner Noah Joshua Phillips in the Matter of 1-800 Contacts, Inc. (Nov. 14, 2018), https://www.ftc.gov/system/files/documents/public_statements/1421309/docket_no_9372_dissenting_statement_of_commissioner_phillips_redacted_public_version.pdf.

[27] *1-800 Contacts, Inc. v. FTC*, 1 F.4th 102 (2d Cir. 2021).

[28] Opinion of the Commission In the Matter of Impax Laboratories, Inc., by Commissioner Noah Joshua Phillips, For the Commission (Apr. 3, 2019), https://www.ftc.gov/system/files/documents/cases/d09373_impax_laboratories_opinion_of_the_commission_-_public_redacted_version_redacted_0.pdf).

[29] *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013).

[30] *Impax Laboratories, Inc. v. FTC*, 994 F.3d 484 (5th Cir. 2021).

Antitrust and consumer protection unfairness law command us to recognize tradeoffs. Prudence also dictates that we do. My firm belief is that, when we do, we get the right result. My concern is that, when we fail to do so, we get the wrong one.

Conclusion

Technological development disrupts, improving lives but often also presenting challenges. That is generally true, and particularly notable with the development of communications media. Some of those challenges warrant regulation, but regulatory efforts must be thoughtful. Much of today's conversation around regulating "Big Tech" falls short. Sensible regulation is not a headline. It requires more than 280 characters. If we want to get it right, we need to consider clearly articulated problems, tailor solutions, and recognize tradeoffs.

Thank you again for inviting me. I look forward to our discussion.