

Written Statement of Professor Ryan M. Rodenberg
Hearings on Competition and Consumer Protection in the 21st Century
Federal Trade Commission
Washington, DC, USA
January 2, 2019

Thank you for the opportunity to submit this written statement in connection with the public comment period following the Federal Trade Commission (FTC) hearings held November 6-8, 2018 in Washington, DC. The sixth session of the FTC's hearings pertained to "the role that data play in competition and innovation." Such session also involved "the antitrust analysis of mergers and firm conduct where data [are] a key asset or product." I am appreciative of the chance to provide my views on this important matter. I work as an academic researcher and submit this statement in an individual capacity. This prepared statement includes only my personal views and does not necessarily reflect the views of my employer or any of the outlets for whom I have written articles as a freelance author. My university affiliation is provided for reference purposes only.

My statement highlights data-related issues in a discrete context—sports betting—that the FTC may soon address in light of the Supreme Court's May 14, 2018 ruling that found the Professional and Amateur Sports Protection Act of 1992 ("PASPA") to be unconstitutional.¹ Data are critically important in the sports betting industry for at least three reasons.² First, data are used to determine the outcome of wagers, including real-time bets that are made and graded almost instantaneously. Second, data are analyzed for statistical fingerprints indicative of possible integrity issues about the underlying sporting event and the tethered gambling markets.³ Third, the extent to which sports betting data are available raises a host of complex legal matters that impact competition and consumer protection issues potentially within the FTC's purview.

Since the Supreme Court's ruling last year, more than two dozen states have seen some level of legislative activity regarding sports betting. At the federal level, Sen. Orrin Hatch (R-Utah) and Sen. Charles Schumer (D-NY) co-introduced new sports betting legislation last month. The new Congressional bill—entitled the "Sports Wagering Market Integrity Act of 2018"—included an "authorized data" mandate with a sunset provision.⁴ In a December 19, 2018 statement on the Senate floor, Sen. Hatch introduced the draft legislation and described

¹ For a summary of the Supreme Court's decision and the resulting regulatory issues, see Rodenberg, *Due Process, Private Nondelegation Doctrine, and the Regulation of Sports Betting*, forthcoming UNLV GAMING LAW J. (2019).

² Indeed, when testifying before Congress in 2016, I described data as the "fuel" for the sports betting industry. See "Written Statement of Ryan M. Rodenberg for the Hearing Entitled 'Daily Fantasy Sports: Issues and Perspectives' Before the Subcommittee on Commerce, Manufacturing, and Trade of the Committee on Energy and Commerce, House of Representatives, United States Congress," Washington, DC (May 11, 2016).

³ See Rodenberg and Kerr, *Fake News, Manipulated Data, and the Future of Betting Fraud*, ESPN.COM, June 28, 2017.

⁴ "Sports Wagering Market Integrity Act of 2018," 115th Congress—Second Session, December 19, 2018. Statutory language pertaining to the treatment of sports betting data has also been considered at the state level. See Rodenberg, *State-by-State Sports Betting Bill Tracker*, ESPN.COM, November 26, 2018.

sports betting data as “one of the difficult issues to be considered as part of the sports wagering discussion.”⁵ In relevant part, the data-focused clause in the new Congressional bill is excerpted below:

(5) AUTHORIZED DATA.—

(A) RESULT OF A SPORTS WAGER.—

(i) MARKET TRANSITION PERIOD.—

With respect to any sports wager accepted on or before December 31, 2024, provide that a sports wagering operator shall determine the result of a sports wager only with data that is licensed and provided by—

(I) the applicable sports organization; or

(II) an entity expressly authorized by the applicable sports organization to provide such information.

In the course of inviting public comment on data-related issues as part of its hearings, the FTC asked: “Are there policy recommendations that would facilitate competition in markets involving data or personal or commercial information that the FTC should consider?” The FTC’s inquiry is well-placed in the sports betting realm, as policy issues pertaining to data will be prevalent in the coming months and years. For example, in a 2015 academic article, my co-authors and I flagged how efforts to “monetize real-time data [for sports wagering purposes] may give rise to an antitrust issue.”⁶ Likewise, in the course of testifying during a 2016 Congressional hearing, I pinpointed how sports gambling implicates “consumer protection-related policies within the realm of the Federal Trade Commission.”⁷ More generally, federal efforts to legislate in the area of sports betting data—by creating a *sui generis* property right via statute or otherwise—raise potential constitutional issues under the Intellectual Property Clause, Tenth Amendment, Takings Clause, and First Amendment.⁸

Thank you again for opportunity to submit this post-hearing statement about how policy issues surrounding sports betting data may be of interest to the FTC given the foci of the recent hearings.

⁵ “Statement by Sen. Orrin Hatch (for himself and for Sen. Charles Schumer),” Congressional Record, 115th Congress—Second Session, Vol. 164—No. 200, December 19, 2018, S7930 (mentioning “the basis for requiring the use of so-called official league data”).

⁶ Rodenberg, et al., *Real-Time Sports Data and the First Amendment*, 11(2) WASHINGTON J. OF LAW, TECH. & ARTS 63, 82, n. 74 (2015).

⁷ “Response to Additional Questions for the Record of Ryan M. Rodenberg for the Hearing Entitled ‘Daily Fantasy Sports: Issues and Perspectives’ Before the Subcommittee on Commerce, Manufacturing, and Trade of the Committee on Energy and Commerce, House of Representatives, United States Congress,” Washington, DC (June 16, 2016).

⁸ See generally Rodenberg and Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 DUKE LAW J. ONLINE 1 (2017). See also Rodenberg, et al., *Whose Game Is It? Sports Wagering and Intellectual Property*, 60 VILLANOVA LAW REV. ONLINE 1 (2014).