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Statement of the American Antitrust Institute on the District Court's Ruling in United States v. Google

Score one for David. Civil servants in the Antitrust Division of the U.S. Department of Justice (DOJ) have just defeated Google and an army of the nation's best defense lawyers at trial in the first of five era-defining monopolization cases challenging the wealthiest technology firms in the United States. Now comes the hard part.

AAI congratulates the Antitrust Division, Assistant Attorney General Jonathan Kanter, and the DOJ trial team, along with the 11 State Attorneys General who joined the original complaint and 38 who joined a parallel action led by the State of Colorado, on what U.S. Attorney General Merrick Garland aptly described as an historic victory. Because of a 2021 bifurcation order entered at both parties' request, the trial focused solely on liability. Next comes a remedy phase, and, as Google has already pledged, an appeal.

This case began in October 2020 during the Trump Administration. Kenneth Dintzer, a Senior Trial Counsel and Deputy Branch Manager with over 30 years of litigation experience, was detailed from the Civil Division to the Antitrust Division to lead the trial team. Mr. Dintzer signed the original complaint and has stuck with it ever since. The Biden Administration gets credit for overseeing all the trial work, which began in earnest when the DOJ filed an amended complaint just days before the 2021 inauguration.

The government's case focused heavily on exclusionary distribution agreements Google struck with browser developers and mobile device manufacturers. It paid billions of dollars annually to Apple and Mozilla to preload Google as the default search engine on iPhones and Macs running Safari and Firefox browsers, and to smartphone manufacturers such as Samsung and Motorola running the Android operating system. Google has maintained at least an 80% market share in general search since 2009, so why was it giving away the GDP of a small country to lock-in default status when browser developers and device manufacturers seemingly had every incentive to select it on their own *for free*?

District Judge Amit Mehta, a 2014 appointee who received a crash course in antitrust law in 2015 when he presided over the Sysco-U.S. Foods merger and drew praise for a careful, well-reasoned decision, issued a meticulous 277-page opinion giving the key answer the government sought: "Google is a monopolist, and it has

acted as one to maintain its monopoly." The court held that Google's anticompetitive exclusive dealing contracts caused substantial foreclosure that thwarted investment and created market "stasis." And Google failed to establish valid procompetitive justifications that offset these anticompetitive effects.

The government has earned a well-deserved victory lap. By investing in years of exhaustive preparation, skillful lawyering and economic analysis, and scrupulous attention to market facts, it has brought and won a major public monopolization case for only the second time in more than two decades. It persuaded a careful, dispassionate Article III judge to find Google liable for a Section 2 violation and, in the process, humbled ideological critics who castigated the agency for daring to enforce the nation's anti-monopoly law against a successful technology firm.

Make no mistake, however: The road ahead is grueling. Numerous successful monopolization cases have been undone at the remedy stage, which often involves more discovery, more expert witness reports, and more hearings. In the *Microsoft* litigation, a changeover from the Clinton to the Bush Administration between the liability and remedy phases led to the demise of the government's ability to obtain structural relief. Behavioral relief, meanwhile, has often proven ineffective. In both Europe and the United States, attempts to force dominant platforms to offer customers a menu of choices to select their own defaults have faltered. No behavioral remedy has managed to move a platform market from monopoly to competition when the platform owner is a monopolist protected by network effects.

Then there is the appeal. As we saw during the government's last major successful monopolization case, when the FTC defeated Qualcomm at trial in 2019 before an exceedingly well qualified district judge, the wrong appellate panel can quickly turn a positive into not just a negative, but a blight on antitrust law.

The government will be helped enormously on appeal by Judge Mehta's findings of fact. Those findings, which heavily informed the fact-bound determination that Google possesses monopoly power in a relevant market, will be reviewed on appeal under a very deferential abuse-of-discretion standard. However, Google's appellate lawyers doubtless helped inform the agency's trial strategy, and its sophisticated counsel worked hard to tee up several complex legal issues on appeal. Judge Mehta's legal conclusions will be reviewed *de novo*.

The DOJ's victory is a game changer and a watershed. The battle is won and congratulations are in order, but the war is not over. As the case enters a perhaps lengthy new phase, the next administration will have to rededicate the agency to what has been a bipartisan commitment to restoring competition in search.

American Antitrust Institute
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