Letter for the Record of

Carl Szabo

Vice President & General Counsel

NetChoice

before

U.S. House of Representatives Judiciary Subcommittee on

Antitrust, Commercial, and Administrative

Hearing on *Online Platforms and Market Power, Part 3: The Role of Data and Privacy in Competition.*

October 18, 2019

We thank the Subcommittee for holding this important hearing on *Online Platforms and Market Power, Part 3: The Role of Data and Privacy in Competition.*

NetChoice[1] is a trade association of businesses who share the goal of promoting free speech and free enterprise on the net. We are significantly engaged in the states, in Washington, and in international internet governance organizations.

New developments in markets and in business-to-business and business-to-consumer relationships show robust competition and innovation

The online environment is robust, healthy, and market players are numerous. For consumers, prices are low. For small businesses, opportunity and entrepreneurship are growing. And these results are because competition is robust.

Today, American consumers have more choices and more information than ever. Historically, consumers had to rely upon only a handful of nearby businesses from which to purchase products and services. These businesses could set prices higher than competitors located further away, and customers had a difficult time researching the comparative value and quality of options.

Today, thanks to the internet, consumers have access to a smorgasbord of products, businesses, and information about pricing. With a couple of clicks customers can find the lowest prices for goods they want. No longer limited to just nearby stores, the internet enables customers to buy from hundreds of thousands of stores across the country.

Online services have evolved to help consumers find the lowest prices. Websites such as Slickdeals[2] help consumers find active discounts. Services such as Honey[3] enable real-time price comparison and coupon testing at checkout. Today, customers can easily find the products they want at the lowest prices.

For businesses, the internet has reduced barriers to entry and increased their potential marketplace. Now an art student can easily sell paintings from her studio to anyone around the world, without first obtaining access to dealers and conceding markups to galleries. A parent can sell their childrens' old toys in a large market rather than relying on a one-day neighborhood yard sale. Anyone can compete with any business, big or small.

There is no dearth of competition. The marketplace has never been more competitive.

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[1] NetChoice is a trade association of e-Commerce and online businesses, at www.netchoice.org The views expressed here do not necessarily represent the views of every NetChoice member company.
[2] Slickdeals.net
[3] JoinHoney.com

Large platforms help small businesses

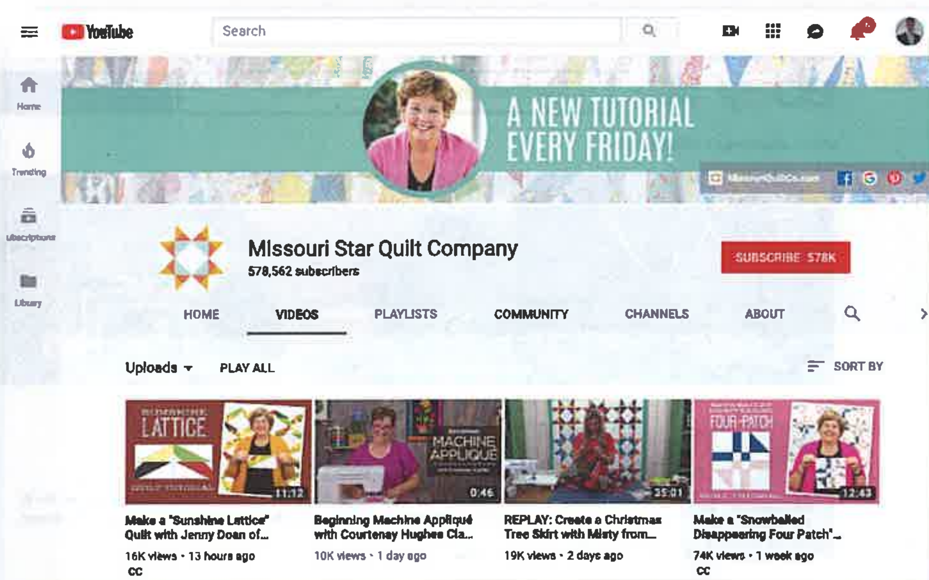
Anti-business advocates claim that "big is bad." But for America's small and mid-size businesses, the bigger the platform the better for reaching larger audiences.

Consider the local custom furniture store. Just fifteen years ago businesses like this could barely afford to place an ad in a local newspaper, let alone on TV or radio. ***Thanks to large online platforms, for less than ten dollars a small business can reach thousands of potential customers and target them more accurately than ever.***

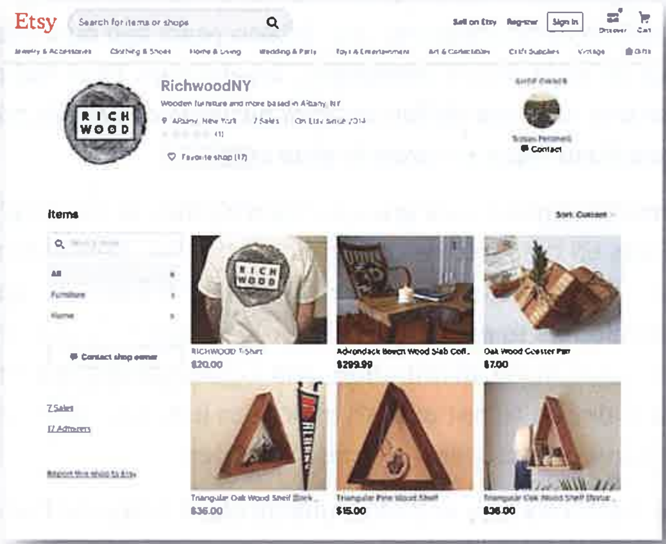
Large online platforms have given new growth opportunities to America's small businesses. Consider the app stores on the Apple and Android platforms. Developers can reach markets of millions of customers. And the costs for a developer to distribute an app are intentionally low, to empower small developers to compete. Fifteen years ago, this was only possible through significant outlays for advertising, distribution, and logistics to move software to customers. And even if developers decide to not publish their apps in the Android or Apple marketplaces, they can make their services available via device websites.

Or consider how the platforms Etsy and eBay enable small sellers to find customers across the country and even around the world.

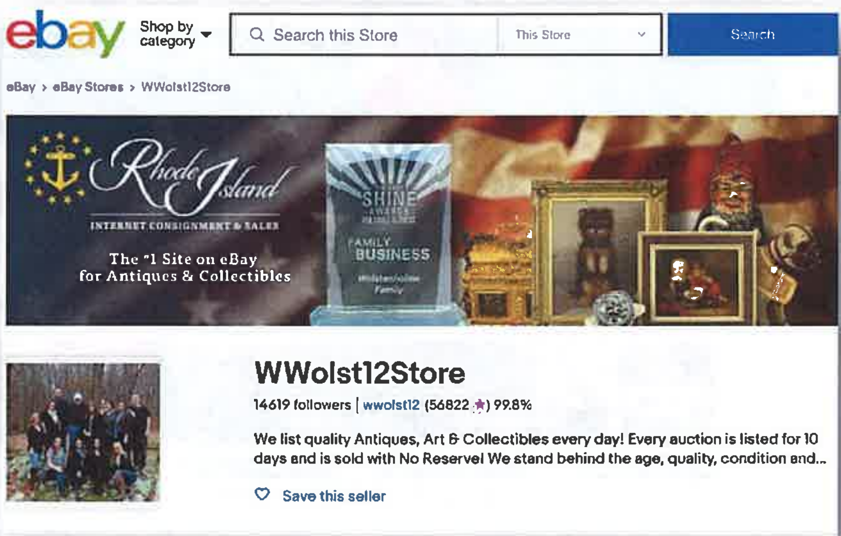
These benefits are the result of allowing online platforms to grow and flourish because America's antitrust law has relied upon the consumer welfare standard to regulate that growth.



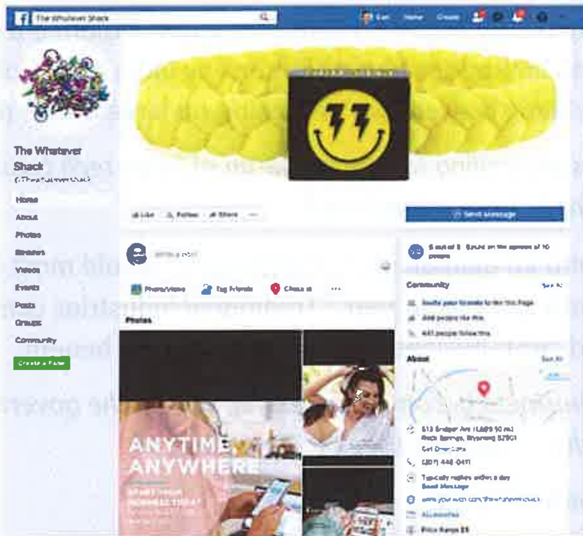
Missouri Star Quilt Company in Hamilton, MO uses YouTube to advertise to customers across the country.



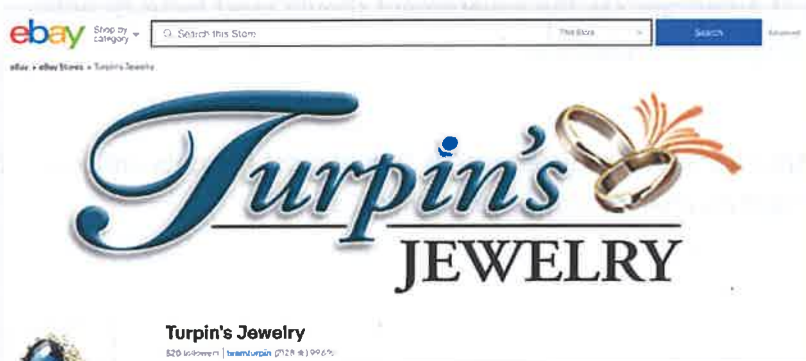
In Albany, NY, woodworker RichwoodNY uses Etsy to find customers from across the country.



William Wolstenholme in Cumberland, RI uses eBay to sell consignment to customers across the country.



The Whatever Shack in Rock Springs, WY uses
Facebook Marketplace to find customers from across the country.



Turpin's Jewelry in Dillard, GA uses
eBay to find customers from across the country.

Polling shows that Americans oppose government limitations on business acquisitions and Americans do not see consumers as the chief beneficiaries of big-tech breakups

Polling of Americans conducted by Zogby Analytics and commissioned by NetChoice found overwhelming opposition to limitations on acquisitions by large online platforms.[4] Moreover, this polling found overwhelming concern with breaking-up large online platforms.

Question: *Some groups are calling for the break-up of large tech businesses. Who do you believe would most benefit from a break-up?*

- 28% of those with an opinion said, "Consumers" would most benefit.
- 53% of those with an opinion said, "Traditional industries competing with tech businesses" and "Anti-business groups" would most benefit.

Question: *If an online business becomes successful, should the government prevent them from acquiring any tech startups that seek to be acquired?*

- 86% of those with an opinion said "No"

That same polling shows that:

- Only 10% of Americans think the government should prevent successful online businesses from acquiring other companies.

Americans said that the government should most focus its anticompetitive resources on sectors *other than tech.*

When asked:

- Only 5% of Americans say the government should most focus its anticompetitive enforcement on tech platforms.[5]

To compare:

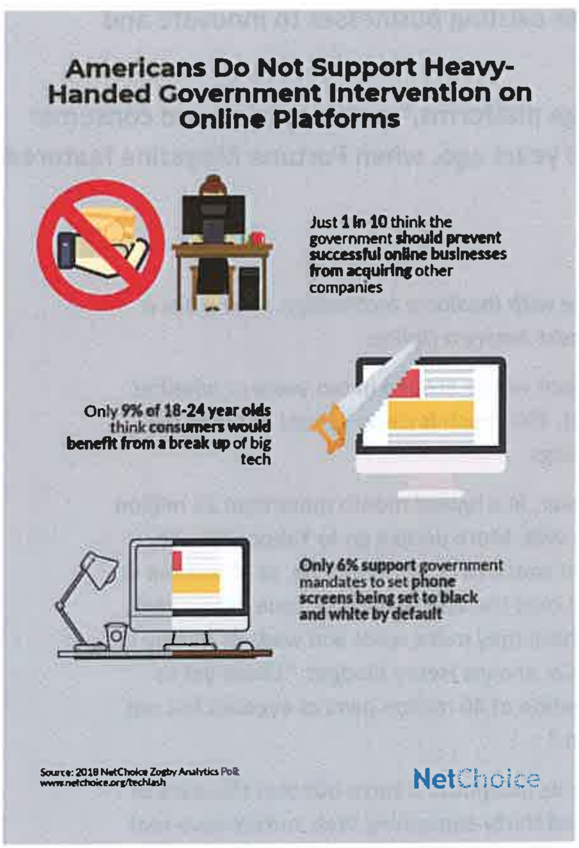
- 29% of Americans say the government should most focus its anticompetitive enforcement on pharmaceutical companies, and

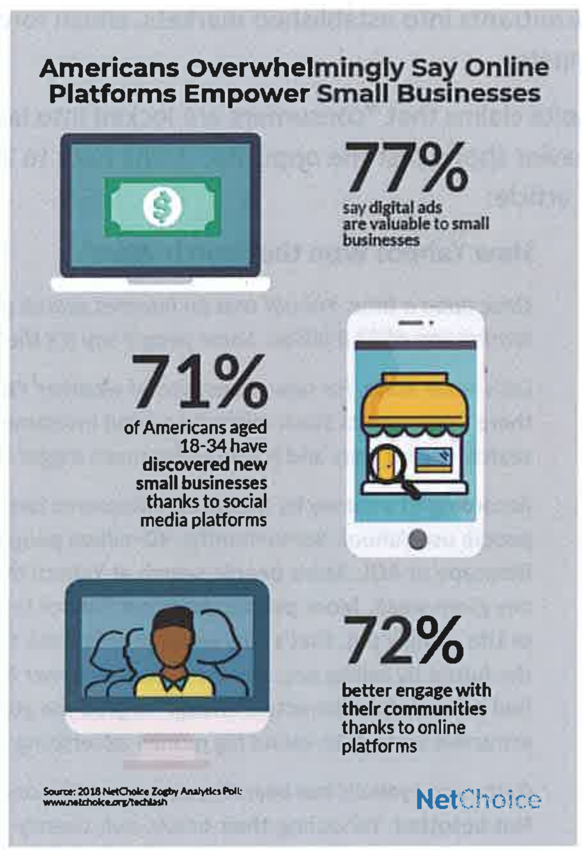
[4] NetChoice.org/TechlashPoll.
[5] *Id*

- 11% of Americans say the government should most focus on the electricity and gas industry.

These findings are also seen in an NBC poll, *"**By a more emphatic 68% to 28%, respondents said such decisions [about big-tech breakups] should be left to the free market rather than government**."*[6]

While a *Wall Street Journal* - NBC poll shows that a majority of users have privacy concerns, there are other findings that are far more relevant to today's hearing. For example, their polling shows that Americans have very positive feelings about the large platforms (see image below).[7]





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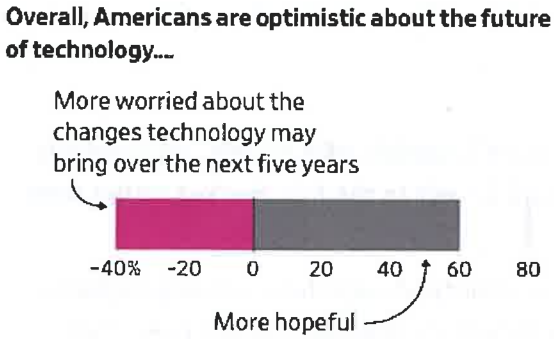
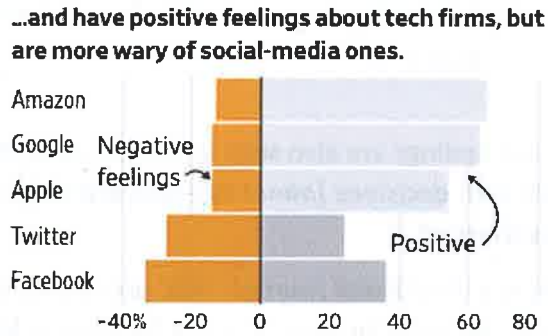
[6] John Harwood, *Americans don't support Sen. Elizabeth Warren's plan to break up big tech: Poll*, CNBC (Apr. 5, 2019)

[7] John D. McKinnon and Danny Dougherty, *Americans Hate Social Media but Can't Give It Up, WSJ/NBC News Poll Finds*, Wall St. Jo. (Apr. 5, 2019).





Disruptive and generational changes in technology provide new avenues for competition

With rapid innovation and growth of online platforms, we've seen a breakdown of barriers for new entrants into established markets, which forces existing businesses to innovate and compete.

Despite claims that "consumers are locked into large platforms," public opinion and consumer behavior shows just the opposite. Think back to 20 years ago, when Fortune Magazine featured this article:

> **How Yahoo! Won the Search Wars**[8]
>
> *Once upon a time, Yahoo! was an Internet search site with mediocre technology. Now it has a market cap of $2.8 billion. Some people say it's the next America Online.*
>
> Let's leave aside, for now, questions of whether Yahoo! will be around in ten years or whether there's any way its stock might be a good investment. This much is clear: Yahoo! has won the search-engine wars and is poised for much bigger things.
>
> According to a survey by Mediamark Research last year, in a typical month more than 25 million people use Yahoo!. Some months, 40 million people visit. More people go to Yahoo! than to Netscape or AOL. More people search at Yahoo! than watch MTV, Nickelodeon, or Showtime in any given week. More people check out Yahoo! than read the typical issue of Time, Newsweek, or Life. Simply put, that's why some people think Yahoo! may make wads and wads of money in the future by selling ads. Observes Oppenheimer & Co. analyst Henry Blodget: "I have yet to find a flat surface attractive enough to grab the attention of 40 million pairs of eyeballs but not attractive enough to spend big money advertising on."
>
> Gathering eyeballs has been the company plan since its inception. It turns out that this pack of Net-besotted, Yahoo!ing-their-brains-out, twenty- and thirty-something Web surfers have real business savvy, and **their near-flawless execution and brilliant marketing have eviscerated the competition.** (emphasis added)

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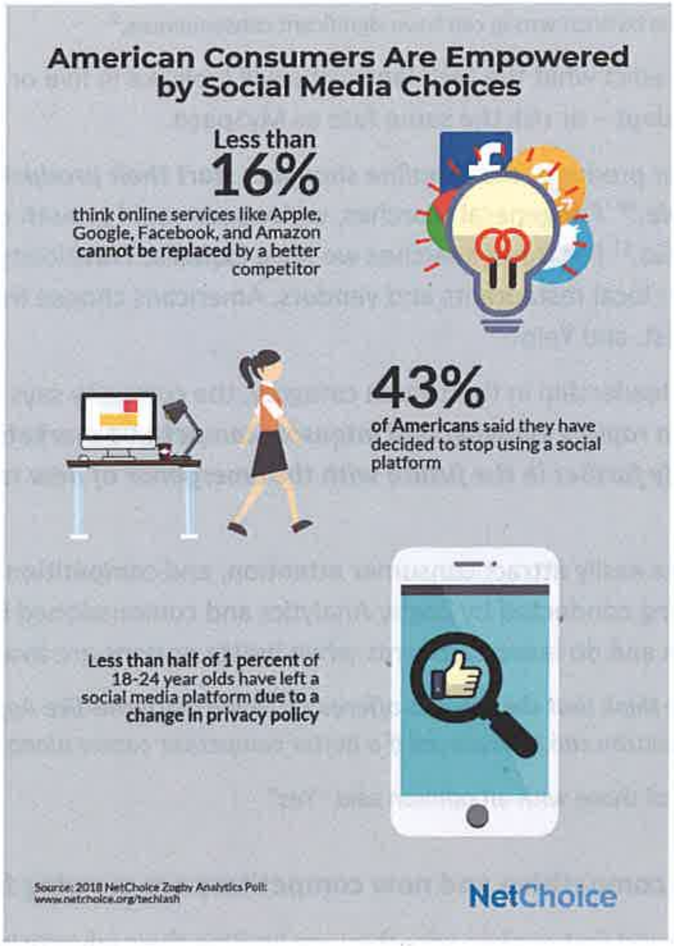
[8] Stross, Randall, *How Yahoo! Won the Search Wars*, in Fortune Magazine, at https://archive.fortune.com/magazines/fortune/fortune_archive/1998/03/02/238576/index.htm (Mar 2, 1998)



It's hard to believe now, but online search was dominated by Yahoo when Google arrived as the 8th search competitor in the late 1990s.

In 2006, MySpace had more daily visitors than Google — but was later overtaken by Facebook. As stated by Ryan Bourne in Cato Policy Analysis:

> "Will Myspace ever lose its monopoly?" asked Victor Keegan in the *Guardian*'s technology section in early 2007. The journalist was riffing off a TechNewsWorld article by John Barrett that claimed Myspace was not just a monopoly, but a natural one.
>
> The arguments for such claims were similar to those made about Facebook today
>
> Importantly, the Myspace history shows that the very network effects that lead to massive growth can also lead to a rapid demise when a superior product comes along. All social networks face a difficult balancing act between providing an attractive and innovative user experience, on the one hand, and monetizing the platform by competing for the real "customers"—digital

> advertisers—on the other. The Myspace example shows the degree of interdependence between the two. Getting the balance wrong can have significant consequences.[9]

Truth is, nobody can predict what the tech landscape will look like in five or ten years, and today's leaders must adapt – or risk the same fate as MySpace.

When looking online for products, ***more online shoppers start their product searches on Amazon than on Google***.[10] For general searches, we've seen rapid growth of new search engines like DuckDuckGo.[11] For travel searches we have Expedia, Travelocity, Orbitz, and Kayak. And when searching for local restaurants and vendors, Americans choose from TripAdvisor, UrbanSpoon, Angie's List, and Yelp.

Despite Yelp's present leadership in this search category, the company says in its latest earnings report, "***We compete in rapidly evolving and intensely competitive markets, and we expect competition to intensify further in the future with the emergence of new technologies and market entrants***."[12]

Innovative new features easily attract consumer attention, and competition is truly only a click away. Nationwide polling conducted by Zogby Analytics and commissioned by NetChoice[13] showed consumers can and do leave platforms when better options are available.

> *Question: Do you think that the services offered by online platforms like Apple, Google, Facebook, and Amazon can be replaced if a better competitor comes along?*
>
> - 70% of those with an opinion said "Yes"

Online advertising is competitive and new competitors are growing fast

Antitrust regulators should first explain why they are limiting their advertising market analysis to an "online environment." Rather than look only at the *online* market, regulators should expand their analysis and market definition to cover *all* advertising – including television, radio, and newspapers.

Regulators need to look at consumers as multi-taskers – surfing the web on their phones while watching a sporting event, for example. In that scenario there is overlap in online and offline advertising markets.

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[9]Bourne, Ryan, *Is This Time Different? Schumpeter, the Tech Giants, and Monopoly Fatalism*, in Cato Policy Analysis, at https://www.cato.org/publications/policy-analysis/time-different-schumpeter-tech-giants-monopoly-fatalism (Jun 17, 2019)

[10] Krista Garcia, *More Product Searches Start on Amazon*, eMarketer (Sept. 7, 2018) ("Nearly half (46.7%) of US internet users started product searches on Amazon compared with 34.6% who went to Google first, according.").

[11] Matt Southern, *DuckDuckGo Traffic Up 50% from Last Year, Hits New Record of 30M Daily Searches*, Search Engine Journal (oct. 11, 2018).

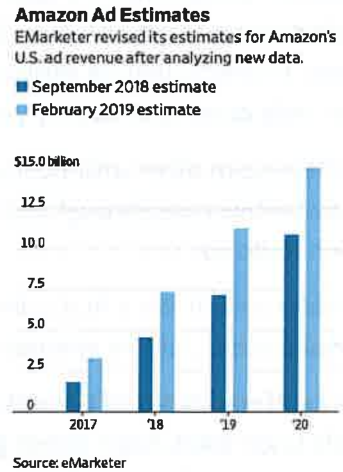
[12] Yelp Inc., 10-Q, May 2019.

[13] *See* Zogby Analytics survey of 1222 adults in the United States conducted from August 6, 2018 to August 8, 2018.

However, if regulators incorrectly limit their antitrust analysis to only *online* advertising, they will readily discover that the online market is competitive and open to new entrants. While Google and Facebook remain the two largest online advertising platforms, neither has anywhere near a monopoly share of ad dollars. According to eMarketer, Google has 32% share of US ad revenue while Facebook has 20%.

Moreover, Amazon's service is catching up fast. From the Wall Street Journal:[14]

> Amazon's ad revenue is expected to increase to $15 billion in 2020, or just under 10% of the digital ad market share in the U.S., from $11.3 billion in 2019 and an 8.8% share, according to the latest forecast.



Wall St. Journal, Amazon's Ad Business May Be Growing Faster Than Thought

With such prolific diversity among advertising platforms, ad exchanges, and ad networks, it is clear that competition is robust. And using Amazon as an example, growth for new competitors is happening.

Big Tech critics have failed to make their case

Proponents of breaking-up tech companies via new theories of antitrust have failed to substantiate their allegations – even though the burden of proof rests with these accusers.

Consider Sen. Elizabeth Warren's *Medium* post,[15] where she proclaims Facebook and Google as "monopolies" while ignoring their actual market share and growing competition in every market they serve.

With less than 20 million U.S. users, Facebook's messaging tool WhatsApp is much smaller than Apple's iMessage, which connects over 90 million American consumers.

TikTok, a fairly new competitor in the social media market, has over half a billion users worldwide.

And in search, Google's competition is a click away as we see the rapid ascent of new general search engines like DuckDuckGo[16] and Google competes with tailored search like Yelp for restaurants and AngiesList for services.

> The consumer welfare standard looks to overall consumer welfare and economic efficiency as the main factors when engaging in antitrust analysis.

[14] Alexandra Bruell, *Amazon's Ad Business May Be Growing Faster Than Thought*, Wall St. Jo. (Feb. 20, 2019).
[15] Sen. Elizabeth Warren, *Here's how we can break up Big Tech*, Medium (Mar. 8 2019).
[16] Matt Southern, *DuckDuckGo Traffic Up 50% from Last Year, Hits New Record of 30M Daily Searches*, Search Engine Journal (oct. 11, 2018)

These American businesses are not consumer-harming monopolies as some claim but are social networking services that have earned global success in a competitive marketplace.

American success stories, such as Google, Apple, and Facebook, empower small businesses to reach new customers all over the world like never before. From online marketplaces, to app stores, to photo sharing services, these platforms allow individuals to connect with the world in ways only dreamt of twenty years ago.

We have seen other anti-business proclamations without facts from Tim Wu, who fails to make a substantive case throughout his book, *The Curse of Bigness*, despite having 300 pages in which to do so.

Consider one of Wu's first points. He cites indexes showing fewer large firms as evidence of consolidation. But Wu ignores similar indexes showing the resurgence in *small* firms.

The Kauffman Index of Growth Entrepreneurship shows that entrepreneurship is at its highest levels since 2008. Main street growth and startup activity are likewise up.[17] The US Bureau of Labor Statistics found self-employment is up since 2014 and is projected to grow at 7.9% — faster than the projected rate for all workers.[18] This shows the inherent danger in making snap-decisions that ignore market changes over time.

In essence, there is a direct correlation between the growth of small entrepreneurs and online platforms like eBay, Facebook, and Google. These platforms are helping small businesses the same way a large retailer operates as an anchor for a shopping center or mall.

The larger these platforms grow means the more customers small businesses can reach with better targeting and lower costs. ***To America's entrepreneurs, bigger is better when finding a platform for the most effective advertising.*** 58% of Americans, and 73% of those between 18 and 24 years old, say online platforms helped them discover a small business they had not previously known.[19]

Tim Wu sees a world where one business controls the market and once it has dominance, it raises prices on consumers and businesses. Take for example the oil industry, the example around which Wu bases his theory.

But under the existing consumer welfare standard, if big oil uses market power to raise prices, that would violate our existing antitrust standards. Moreover, Wu ignores President Teddy Roosevelt's apprehension about the break-up. Roosevelt lamented, "I do not see what good can come from dissolving the Standard Oil Company into 40 separate companies."[20]

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[17] Kauffman Indicators of Entrepreneurship, *available at* https://indicators.kauffman.org

[18] Bureau of Labor and Statistics, *Small-business options: Occupational outlook for self-employed workers, available at* https://www.bls.gov/careeroutlook/2018/article/self-employment.htm

[19] NetChoice.org/TechlashPoll

[20] Crane, *All I Really Need to Know About Antitrust I Learned in 1912*, Iowa Law Review Vol. 100:2025, 2030.

Biographer Ron Chernow captured Roosevelt's conflicting instincts about breaking up America's largest oil company:

> In retrospect, it seems clear that the ambiguous signals from the White House reflected more than duplicity on Roosevelt's part, for he was genuinely reluctant to wield the big stick against Standard Oil. He preferred compromise to antitrust cases, which were slow, time-consuming, and fiendishly difficult to win. He wanted to supervise the trusts, not break them up and sacrifice their efficiency, and he was searching for some conciliatory overture from his adversaries, a suggestion that they would accept government oversight and voluntarily mend their ways.[21]

Wu also cites actions against AT&T and IBM as evidence of antitrust failures. So, while Wu thinks he has found a slam-dunk argument against the consumer welfare standard, he actually shows that the current antitrust system and standards work effectively.

Back in 2010, Tim Wu complained[22] that Facebook's size alone precludes new entrants. Yet Wu's prognostications missed emerging Facebook competitors Twitter, Snapchat, Reddit, YouTube, and LinkedIn. And since 2010, we've seen the rise of additional social media competitors like Twitch, TikTok, Pinterest, and Tumblr.

Likewise, Tim Wu and Sen. Warren complain about businesses giving preference to their own products ahead of others. But it's become expected for retailers – online and off – to offer their own brands to consumers seeking lower cost alternatives from a producer they trust.

For example, Costco features its Kirkland brand in stores. Safeway features its O Organics and Signature Cafe brands. Kohl's is known for its Tony Hawk brand while Macy's has over 20 of its own private label brands. Trader Joe's and Aldi markets prominently feature their proprietary products.

If the prosecutor fails to prove their case, as Sen. Warren, Tim Wu, and their allies have, then governmental action cannot be justified.

Reviewing merger consent decrees

When the termination date of a merger or acquisition consent decree is approaching, that is a prime opportunity to do a second review of market conditions and company conduct. The overseeing agency should review the current market and identify whether the concerns that gave rise to the earlier consent decree remain relevant. If those concerns are no longer relevant, the consent decree should be allowed to expire.

However, if pre-acquisition or pre-merger concerns remain, or the company shows evidence of anti-competitive behavior, then the consent decree should be extended.

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[21] Chernow, Ron, Titan, page 522.

[22] Tim Wu, *In the Grip of the New Monopolists*, Wall St. Jo (Nov. 13, 2010).

For example, the approved merger of Ticketmaster and Live Nation was subject to a 10-year consent decree that expires in 2020.[23] This approved vertical merger allowed the dominant ticketing platform to merge with the largest promoter of concerts.

When reviewing the Ticketmaster-Live Nation transaction in 2010, the Department of Justice raised concerns that "This loss of competition likely would result in higher prices for and less innovation in primary ticketing services."[24] The DoJ was prescient: in the decade since that merger, Ticketmaster continues to maintain a market share of 70-80% in primary ticket sales.[25]

Ticketmaster and Live Nation are now expanding efforts to control event ticketing transactions, by restricting how fans sell or give away their tickets. They are preventing resale of tickets on non-Ticketmaster platforms, using their dominance in primary ticket sales to prohibit competition with respect to ticket resales.

In addition to using terms and conditions, technology, and business conditions with their partners to restrict transferability of tickets amongst consumers,[26] Ticketmaster-Live Nation also uses threats of retaliation to dominate the ticket market and impede competition.[27]

Any objective review of Ticketmaster-Live Nation would conclude that the consent decree is not working. This is a prime example of where oversight agencies should use their merger review powers to maintain a competitive marketplace that serves consumer interests and institute remedies that will ensure competition in the ticket industry.

Congress should proceed carefully when hearing calls to "break-up" technology businesses – no matter how loudly a few are complaining. Instead, Congress should retain and protect the model on which consumers and business have relied and it has and will continue to work – the consumer welfare standard for antitrust

We thank you for your consideration.

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[23] *U.S. v. Ticketmaster Entertainment, Inc.*, Case: 1:10-cv-00139 (U.S.D.C. 2010).
[24] *Id.*
[25] *Id.*
[26] *See*, Ticketmaster Credit Card Entry, *available at* https://www.ticketmaster.com/h/credit-card-entry.html ("Can I sell Credit Card Entry tickets? That's up to the artist, team, or venue! If they give the green light you'll see a Sell button when you click the order number under Order History in My Account.").
[27] *See, e.g.*, Jem Aswad, *Department of Justice 'Looking Into Accusations' Against Live Nation, Report Claims*, Variety (Apr. 1, 2018) (""They have been reviewing complaints that Live Nation, which manages 500 artists, including U2 and Miley Cyrus, has used its control over concert tours to pressure venues into contracting with'").

Subject: 230c
Date: Friday, October 18, 2019 at 9:38:54 AM Eastern Daylight Time
From: Murphy, Devin
To: Andrews, Jessica

(c) Protection for "Good Samaritan" blocking and screening of offensive material
(1) Treatment of publisher or speaker
No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
(2) Civil liability No provider or user of an interactive computer service shall be held liable on account of—
(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[1]

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