Testimony of

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Testimony before

The Ohio Senate Judiciary Committee

Presentations on Antitrust Issues

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Cincinnati, Ohio

Chairman Eklund and members of the committee, I am pleased to submit this testimony for your hearing on antitrust issues.

I'm Vice President of NetChoice,[1] a trade association of businesses who share the goal of making the internet safe for free enterprise and for free expression. We work to promote the integrity and availability of the global internet and are significantly engaged in issues 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

Markets for online services are robust and feature multiple competitors. For consumers, these services are often free or significantly subsidized by advertisers. For small businesses, opportunities to target new customers has never been as easy, efficient, and affordable as it is today.

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 profusion of products and providers. No longer limited to just nearby stores, the internet enables customers to buy from thousands of sellers 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 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 currying favor from dealers and conceding markups to galleries. An Ohio parent can sell their childrens' old toys in a large online marketplace rather than relying on a one-day neighborhood yard sale.

Large online platforms help America's small businesses

Anti-business advocates claim that "big is bad," but that claim doesn't match the experience of consumers and advertisers using today's leading tech platforms and marketplaces.

America's largest tech companies are also our largest spenders on research and development. In 2018 Google spent over $21 billion in R&D, including on Artificial Intelligence and machine learning for medical applications that can save lives and save billions in health care costs through earlier detection.

Those same American tech leaders have spent billions on data centers in Ohio, creating tech jobs and generating incremental tax revenue for the state and for local governments. Tech hubs like New Albany, Ohio have also seen increases in ancillary employment in areas such as education, medical, construction, plumbing, electrical, and HVAC.

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[1] NetChoice is a trade association of leading 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

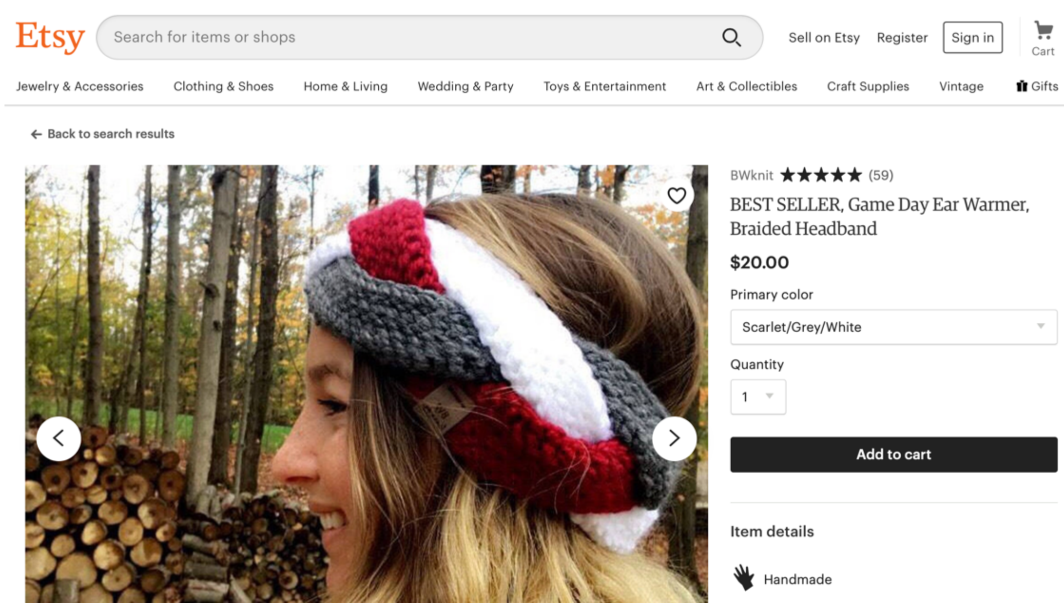
[3] JoinHoney.com

To build on Ohio's tech industry, Lt. Governor Husted launched the *TechCred* program to help Ohioans gain tech credentials, and public universities across the state joined an initiative to boost research and technology commercialization in Ohio.[4] However, Ohio's growing embrace of tech is being undermined by the Attorney General's antitrust attacks on large tech businesses.

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.

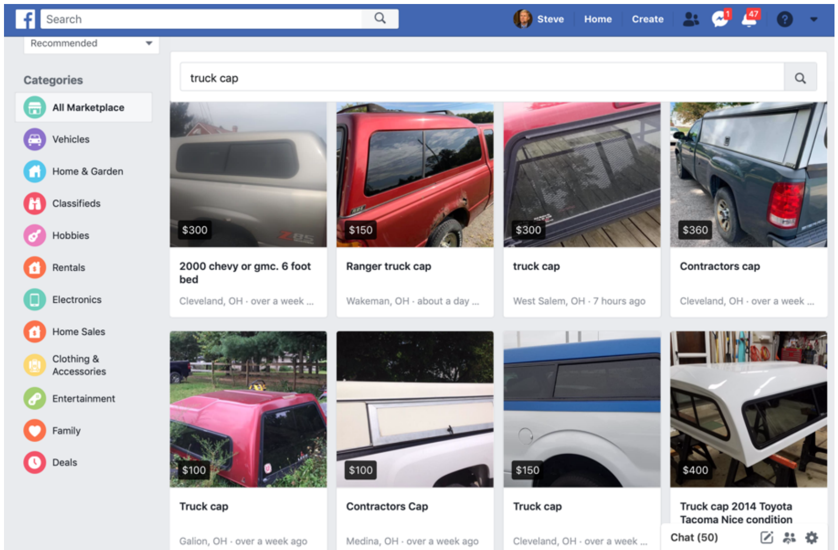
Large online platforms have given new growth opportunities to America's small businesses via app stores on the Apple and Android platforms. Software distribution used to require significant outlays for advertising, marketing, and logistics. But app stores allow even small software developers to reach millions of customers at minimal investment.

And consider how the platforms Etsy and eBay enable small Ohio sellers to find customers across the country and even around the world. For example, hand-knitted headbands made in Chagrin Falls are selling on Etsy, just in time for cooler weather:



[4] TechCred, at https://www.nfib.com/content/nfib-in-my-state/staffing/ohio-launches-techcred-to-help-employees-earn-technology-skills/ and Ohio IP Promise, at https://news.osu.edu/ohio-state-joins-statewide-effort-to-foster-innovation-and-economic-growth/

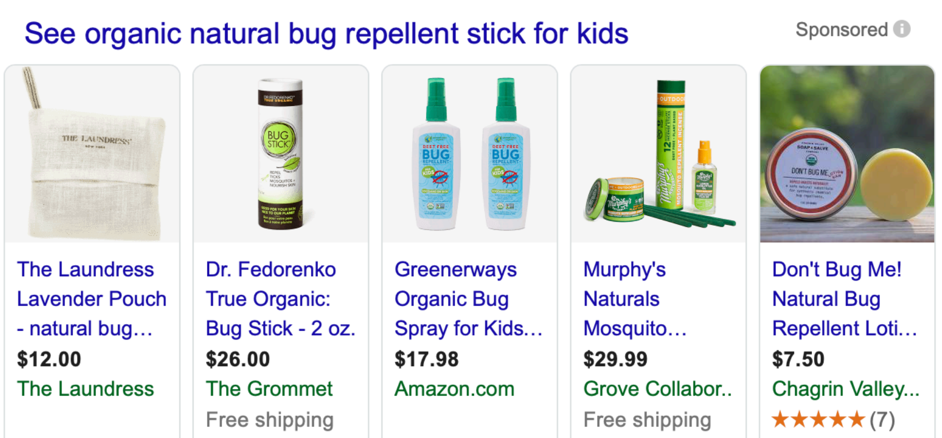
Marketplace platforms work well for Ohio buyers as well as small sellers. A search on Facebook marketplace shows over 200 used *pickup truck caps* for sale – *just within 100 miles of this hearing room*.



Ohio's small businesses rely on online ads to reach potential customers who'd otherwise never even know the business existed. Body Boss in Cincinnati has been a big buyer of Google Ads for over 3 years, and their Account Manager Daniel Wulker says:

> Digital ads are an inexpensive way to effectively reach customers. Without these tools, we may not exist. We'd have to go door to door for sales. It would completely change our business. Congress needs to pay attention to the good that has come from big tech.

Another local example is Chagrin Valley Soap & Salve, based in Solon and with a store in downtown Cleveland, and the subject of a recent article in *The Atlantic*.[5] They have been a Google AdWords and Analytics customer for years, placing their products in the paid results and showing up 4th in the organic results on a search for "organic natural bug repellent for kids":



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[5] *Local Business, Global Following,* in *The Atlantic*, at https://www.theatlantic.com/sponsored/grow-google-2019/local-business-global-following/3187/

These benefits for small businesses and consumers are enabled by letting online platforms and marketplaces grow to achieve scale, reach, and unprecedented efficiencies.

And America's antitrust law has no quarrel with large enterprises that benefit consumers, according to the long-standing 'consumer welfare standard'.

The Supreme Court has used the consumer welfare standard as the touchstone for competition enforcement. American tech companies have led the world in improving consumer experience, offering access to content from music to medical research; Algebra help to business classes; driving direction to flight booking; and alerts for weather and traffic.

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

Polling shows that Americans oppose government limits 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 limits on acquisitions by large online platforms.[6] 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?*

- Only 28% of those with an opinion said that "Consumers" would most benefit.
- 53% of those with an opinion said that "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"

Americans said government should most focus its anticompetitive resources on sectors *other than tech*:

- Only 5% say government should most focus its anticompetitive enforcement on tech platforms.[7]

By comparison, far more Americans are concerned about competition in other areas :

- 29% say government should focus anticompetitive enforcement on pharmaceutical companies
- 11% say the government should most focus on the electricity and gas industry.

These polling results are supported by results obtained by the Wall Street Journal and NBC News, too: "***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***."[8]

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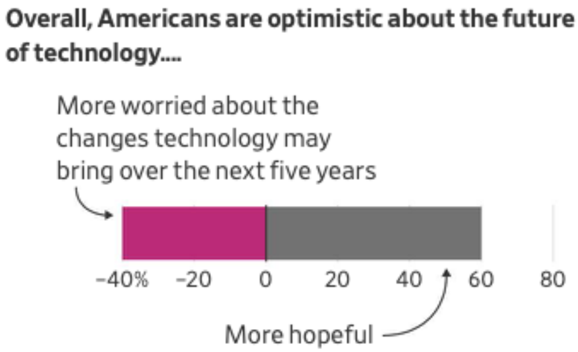
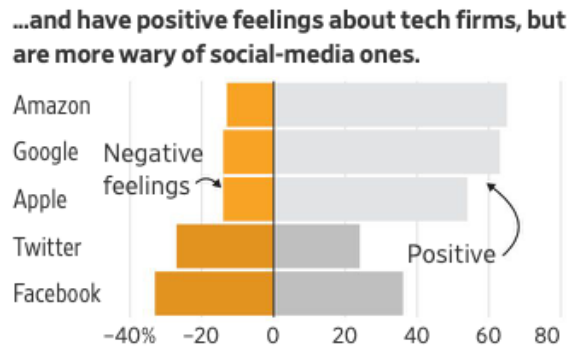
[6] NetChoice.org/TechlashPoll.

[7] *Id*

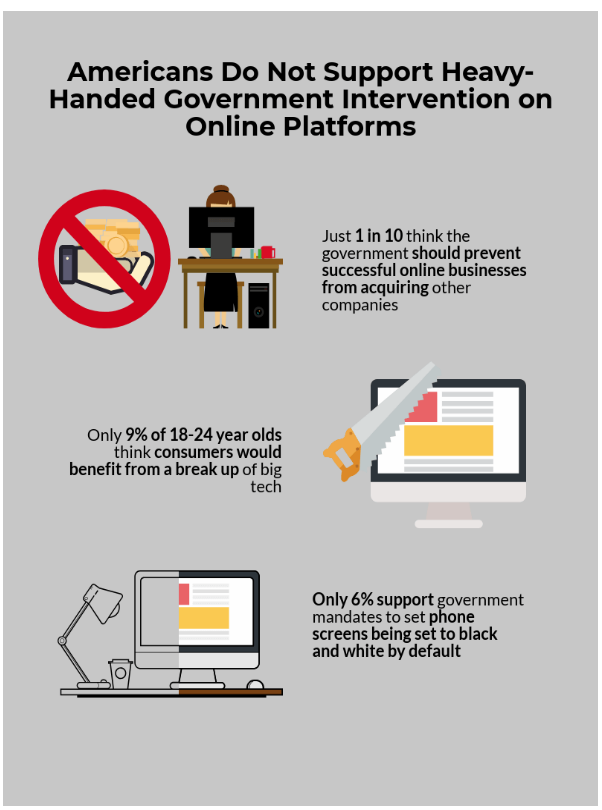
[8] John Harwood, *Americans don't support Sen. Elizabeth Warren's plan to break up big tech: Poll*, CNBC (Apr. 5, 2019)

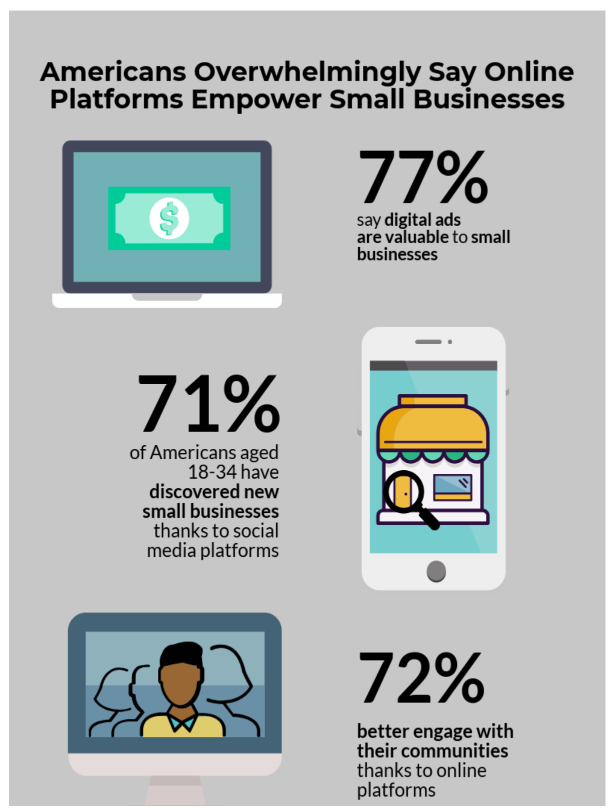
The *Wall Street Journal* - NBC poll found that most users have online privacy concerns, but their other findings are directly relevant to today's hearing. For example, their polling shows that Americans have very positive feelings about large tech platforms:[9]





Clearly, American consumers and voters have different priorities than legacy newspapers and broadcast media, who are actively stoking anti-tech sentiments with headlines that often blame social media for awful things that people do.   It seems as if traditional media is consciously trying to defame social media in order to convince advertisers and audiences to come back to their websites and stations.





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[9] 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**[10]
>
> *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)

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.[11]

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.

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[10] 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)

[11] 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)

When looking online for products, ***more online shoppers start their product searches on Amazon than on Google***.[12] For general searches, we've seen rapid growth of new search engines like DuckDuckGo.[13] 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***."[14]

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[15] 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

In the online advertising market it is clear that there is robust competition for advertisers' dollars.

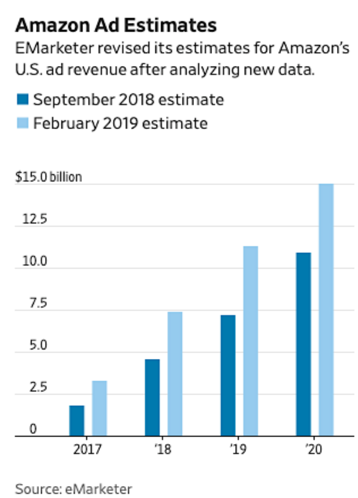
Antitrust regulators should first explain why they are limiting their advertising market analysis to an "online environment." Rather than look only at the *online* market, regulators should expand their analysis and market definition to cover *all* advertising – including television, radio, and newspapers.

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.

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 ad service is catching up fast. From the Wall Street Journal:[16]

> 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

[12] 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.").

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

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

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

[16] Alexandra Bruell, *Amazon's Ad Business May Be Growing Faster Than Thought*, Wall St. Jo. (Feb. 20, 2019).

With such diversity and choice among advertising platforms, ad exchanges, and ad networks, it is clear that competition is robust. And using Amazon as an example, new competitors can enter this market.

Big Tech critics have failed to make their case

Proponents of breaking-up tech companies via new theories of antitrust have failed to show how consumers have been harmed by large tech platforms and marketplaces.

For an antitrust case, prosecutors must:

1. *Establish the relevant market*

   This means identifying who should be considered a competitor to the subject of the investigation.

2. *Show the defendant has "market power"*

   This usually requires proving that the defendant controls so much of the market (ideally over 80%) it can raise prices above the market rate without losing sales.[17] For example, in a town with only one store, if that store can sell milk above its market rate, then there is market power.

3. *Show defendant is abusing their market power in this specific market*

   This is usually shown through efforts of preventing new market entrants or driving competitors out of the market. It comes in the form of exclusive dealings, excessive prices, exclusive dealings contracts, tying, and predatory pricing.

4. *After showing all of the above, prosecutors must then show consumer harm*

   This requires showing that consumers have been harmed as a result of an abuse of market power by the defendant.

Consider Sen. Elizabeth Warren's *Medium* post,[18] where she proclaims Facebook and Google as "monopolies" while ignoring their individual market shares 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 new social media competitor, 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[19] and Google competes with tailored search like Yelp for restaurants and AngiesList for services.

America's current tech titans are not consumer-harming monopolies as some claim. They are social networking and marketplace services that have earned global success in a competitive market. 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

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[17] *Glossary of Industrial Organisation Economics and Competition Law*, compiled by R. S. Khemani and D. M. Shapiro, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD, 1993.

[18] Sen. Elizabeth Warren, *Here's how we can break up Big Tech*, Medium (Mar. 8 2019).

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

sharing services, these platforms allow individuals to connect with the world in ways only dreamt of twenty years ago.

Indexes show fewer large firms as evidence of consolidation, and a leading index shows a 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.[20] 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.[21] This shows the inherent danger in making snap-decisions that ignore market changes over time.

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 become, the more customers a small business can reach with better targeting and lower costs.

To America's entrepreneurs looking to maximize their advertising dollars, bigger is better. 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.[22]

We should attend to President Teddy Roosevelt's apprehension about the break-up of big oil in the early 1900s. Roosevelt lamented, "I do not see what good can come from dissolving the Standard Oil Company into 40 separate companies."[23] 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.[24]

Back in 2010, economist Tim Wu complained[25] 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, Sen. Warren complains 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.

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

[21] 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

[22] NetChoice.org/TechlashPoll

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

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

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

Conclusion

Ohio’s legislature should proceed carefully when hearing calls to “break-up” America’s leading technology businesses – no matter how loudly a few are complaining. Instead, we should retain the model on which consumers and business have relied – the consumer welfare standard for antitrust.

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

We thank you for your consideration and look forward to your questions.