

The Honorable Paul Ryan  
Speaker of the House of Representatives  
United States House of Representatives  
Washington, DC 20515

The Honorable Nancy Pelosi  
Democratic Leader  
233 Cannon House Office Building  
United States House of Representatives  
Washington, DC 20515

Dear Speaker Ryan and Leader Pelosi,

We write to express concern about H.R. 5645—Standard Merger and Acquisition Reviews Through Equal Rules Act of 2018. After close review, the Open Markets Institute has concluded that the bill would dangerously reduce the Federal Trade Commission’s ability to protect American citizens from concentrations of power that threaten them politically and economically. Worse, it would do so exactly at a moment when we need a stronger and more active FTC.

A broad, bi-partisan consensus acknowledges that America has a big monopoly problem. Both the Republican and Democratic Party platforms in 2016 call for more strenuous antitrust enforcement.<sup>1</sup> All the commissioners recently confirmed to the FTC, Democrats and Republicans alike, similarly agree that growing market concentration must be checked by vigorous public policy. Increasing monopolization is a main driver of destructive trends ranging from increasing regional and personal inequality to the loss of privacy and the erosion of institutions essential to democracy.

Consolidation and monopolization affect every aspect of our political economy. This includes:

- **Healthcare.** Monopoly is a major factor in driving up healthcare prices.<sup>2</sup> Due to consolidation among health care providers, prices for certain hospital treatments can be 12 times higher in one area of the country than another and can even vary within a single city by a factor of nine.<sup>3</sup>
- **Entrepreneurship.** Monopoly erodes opportunities for starting new businesses. The rate of independent business ownership has been falling since the 1970s with the total share of self-employed Americans dropping from 663 per 10,000 working-age Americans to 606, an 8.5 percent decline.<sup>4</sup> The fall has especially hurt minority groups.<sup>5</sup> Tech giants contribute to stifling competition by acquiring innovative new firms before they have a chance to grow into rivals.<sup>6</sup>
- **Work and wages.** Monopoly erodes the bargaining power of workers. More than 30 million Americans are restricted from selling their labor freely in the market by “non-compete” agreements.<sup>7</sup> A large fraction of local job markets are so highly concentrated

that economists estimate that wages are more than 20 percent lower than they would be in a competitive market.<sup>8</sup>

- **Capital markets.** Monopoly empowers financiers at the expense of productive enterprise. Roughly 50 percent of publicly traded firms have disappeared from Wall Street over the last 30 years, largely due to mergers.<sup>9</sup>

In the case of markets for specific products and services, the figures are often even more dramatic:

- One company, Amazon, controls two-thirds of all (print and e-) book sales and 43 percent of total online sales *of all products*.<sup>10</sup>
- One company, Google, controls more than 90 percent of all Internet searches.<sup>11</sup>
- Forty percent of Americans – 129 million people – have access only one broadband service provider as of December 2017.<sup>12</sup>
- Most cities in the U.S. are dominated by one or two airlines. Across America, four airlines control more than three out of four seats on domestic flights.<sup>13</sup>
- As of 2015, two companies, CVS and Walgreens, control between 50 and 75 percent of the drugstore market in each of the country's 14 largest metro-areas.<sup>14</sup>
- Two companies, AB InBev and MillerCoors control roughly two-thirds of the U.S. beer market.<sup>15</sup>
- Sixty percent of all hospital stays take place in cities where one or two corporations control all hospitals.<sup>16</sup>
- One company, Bayer-Monsanto, controls the genetic traits of 80 percent of the corn and more than 90 percent of the soybeans grown in the United States.<sup>17</sup>
- Four companies, Verizon, T-Mobile, AT&T, and Sprint, control almost all U.S. cell phone service. Two of them just announced they plan to merge.<sup>18</sup>

America has been here before. After the Sherman Antitrust Act of 1890 failed to rein in monopolization, Congress made a conscious choice both to strengthen antitrust laws and to create a second antitrust agency with the power to stop and prevent “unfair methods of competition.”<sup>19</sup> In 1914 Congress passed the Clayton Antitrust Act, which empowers regulators to stop monopolies in their incipiency. Congress also passed the Federal Trade Commission Act that year, which created the Federal Trade Commission and granted the agency even more powerful investigatory and adjudicatory authority than enjoyed by the Justice Department under the Clayton Act.<sup>20</sup>

Given the severity of the concentration problem in America today, and its economic and political consequences, Congress should be looking to enhance the powers of all of America’s antimonopoly agencies. To restore competitive market structures across the economy, Congress should evaluate statutory changes that would strengthen the agencies’ abilities to stop and undo consolidation. At a minimum, Congress should preserve the agencies’ existing statutory powers. This is especially true of Sections 5 and 13(b) of the FTC Act, which were intentionally crafted to give the FTC powers beyond those of the Clayton Act.<sup>21</sup>

H.R. 5645 would be a major step in the wrong direction. It would curtail the FTC's ability to address such consolidation just when this authority is most essential.

The proponents of H.R. 5645 allege that merger review standards are unfairly inconsistent between the Department of Justice and the FTC.<sup>22</sup> The FTC seeks preliminary injunctions against proposed mergers under a nominally easier statutory standard than the DOJ and has the option of pursuing administrative litigation against mergers, unlike the DOJ. On these grounds, proponents of H.R. 5645 argue that merging parties face less favorable treatment when the FTC reviews their transaction. They assert that H.R. 5645 is necessary to correct this supposed disparate treatment and establish identical merger review processes between the two agencies.<sup>23</sup>

The case for H.R. 5645 is fundamentally flawed, is not founded in fact, and blatantly disregards deliberate policy choices made by Congress when it created the FTC. Supporters of H.R. 5645 can point to no evidence that the shared merger review authority leads to arbitrary or unfair outcomes for merging parties. Rather than enjoy an allegedly unjustified advantage over the DOJ in merger matters, the FTC is required to present "rigorous proof to block a proposed merger or acquisition" in court.<sup>24</sup>

The fear of the FTC somehow misusing administrative adjudication in merger cases is similarly baseless. In 1995, the FTC published a policy statement that identified when administrative adjudication would be undertaken in the event the FTC was unsuccessful in stopping a proposed merger in court.<sup>25</sup> This policy statement appears to have established an effective prohibition on administrative adjudication in these circumstances. A former commissioner on the Antitrust Modernization Commission observed in 2015 that, since the adoption of the policy statement on administrative litigation in 1995, the FTC had *never* pursued administrative litigation following the denial of a preliminary injunction against a proposed merger.<sup>26</sup> If anything, Congress should be discussing whether the FTC should revise its 1995 policy statement in ways that restore the agency's ability to use administrative adjudication even in cases where the FTC was unsuccessful in court.

In short, in the name of addressing an entirely hypothetical problem, H.R. 5645 would further severely restrict the FTC's ability to protect the public from dangerous consolidations of economic and political power. As former American Antitrust Institute president Bert Foer proposed in a 2015 hearing in the House: If the Senate wants to guarantee perfect harmony in merger review processes and standards of the DOJ and the FTC in the future, it should strengthen the anti-merger authority of the DOJ under the Clayton Act, not weaken the anti-merger authority of the FTC under the FTC Act.<sup>27</sup>

Last month, the Senate confirmed five new commissioners to the FTC. Several commissioners, including the new Chairman, are considering a reevaluation of the merger and enforcement policies of the FTC. This reevaluation was reinforced by a high-profile hearing in the House Energy and Commerce Committee last month with Facebook CEO Mark Zuckerberg, in which members on both sides of the aisle expressed concern about a lack of policing by enforcement agencies in the various markets Facebook serves. The passage of H.R. 5645 by the House would contradict this important and bold new thinking. We believe Congress would be better served to

reevaluate this legislation rather than sending to the Senate a bill that undermines the House's clear statement of concern about the misuse of market power.

Sincerely,

The Open Markets Institute

cc: Members of the House of Representatives

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<sup>1</sup> 2016 Democratic Party platform, <https://www.democrats.org/party-platform#promoting-competition>; 2016 Republican Party platform, [https://prod-cdn-static.gop.com/media/documents/DRAFT\\_12\\_FINAL\[1\]-ben\\_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf). The Democratic Party platform directly addressed antitrust, and the Republican Party platform addressed antitrust in health insurance markets, as well as the use of Big Data by large agricultural businesses to prey on private farmers and ranchers.

<sup>2</sup> Paul S. Hewitt and Phillip Longman, "The Case for Single Price Health Care," *Washington Monthly*, April/May/June 2018.

<sup>3</sup> Zack Cooper, Stuart V. Craig, Martin Gaynor, John Van Reenen, "The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured," NBER Working Paper 21815, (December 2015), [http://www.healthcarepricingproject.org/sites/default/files/pricing\\_variation\\_manuscript\\_0.pdf](http://www.healthcarepricingproject.org/sites/default/files/pricing_variation_manuscript_0.pdf).

<sup>4</sup> Barry C. Lynn and Lina Khan, "The Slow-Motion Collapse of American Entrepreneurship," *Washington Monthly*, July/August 2012, <https://washingtonmonthly.com/magazine/julyaugust-2012/the-slow-motion-collapse-of-american-entrepreneurship/#>.

<sup>5</sup> Brian S. Feldman, "The Decline of Black Business," *Washington Monthly*, March/April/May 2017, <https://washingtonmonthly.com/magazine/marchaprilmay-2017/the-decline-of-black-business/>.

<sup>6</sup> Barry Lynn and Matt Stoller, "How to stop Google and Facebook from becoming even more powerful," *The Guardian*, November 2, 2017, <https://www.theguardian.com/commentisfree/2017/nov/02/facebook-google-monopoly-companies>

<sup>7</sup> Evan Starr, J.J. Prescott, and Norman Bishara, "Noncompetes in the U.S. Labor Force," U of Michigan Law & Econ Research Paper No. 18-013, <http://dx.doi.org/10.2139/ssrn.2625714>.

<sup>8</sup> Jordan Weissmann, "Why Is It So Hard for Americans to Get a Decent Raise?" *Slate*, January 16, 2018, <https://slate.com/business/2018/01/a-new-theory-for-why-americans-cant-get-a-raise.html>.

<sup>9</sup> Caroline Rasmussen, "Where have all the public companies gone?" *CNBC*, October 25, 2017, <https://www.cnbc.com/2017/10/25/where-have-all-the-public-companies-gone.html>.

<sup>10</sup> Polly Mosendz, "Amazon Has Basically No Competition Among Online Booksellers," *The Atlantic*, May 30, 2014, <https://www.theatlantic.com/business/archive/2014/05/amazon-has-basically-no-competition-among-online-booksellers/371917/>; Business Insider Intelligence, "Amazon accounts for 43% of US online retail sales," *Business Insider*, February 3, 2017, <http://www.businessinsider.com/amazon-accounts-for-43-of-us-online-retail-sales-2017-2>.

<sup>11</sup> Jeff Desjardins, "How Google retains more than 90% of market share," *Business Insider*, April 23, 2018, <http://www.businessinsider.com/how-google-retains-more-than-90-of-market-share-2018-4?r=UK&IR=T>.

<sup>12</sup> Kaleigh Rogers, "More than 100 Million Americans Can Only Get Internet Service from Companies That Have Violated Net Neutrality," *Vice*, December 11, 2017.

<sup>13</sup> Julie Creswell and Sapna Maheshwari, "United Grapples with PR Crisis Over Videos of Man Being Dragged Off Plane," *The New York Times*, April 11, 2017, <https://www.nytimes.com/2017/04/11/business/united-airline-passenger-overbooked-flights.html>; Leslie Josephs, "'We wanted to go first.' Here's what's different in the decade

- since Delta’s merger with Northwest upended the airline industry,” *CNBC*, April 7, 2018, <https://www.cnbc.com/2018/04/07/a-decade-after-deltas-northwest-merger-upended-the-airline-industry.html>.
- <sup>14</sup> Corey Stern, “CVS and Walgreens are completely dominating the US drugstore industry,” *Business Insider*, July 29, 2015, <http://www.businessinsider.com/cvs-and-walgreens-us-drugstore-market-share-2015-7>. Walgreens (and its Duane Reade subsidiary) alone controls more than half the market in Chicago, St. Louis, Milwaukee and Memphis, CVS does the same in Washington DC, Boston, Providence and Honolulu — where the chain has more than 75 percent of the market.
- <sup>15</sup> Christopher Doering, “Big Beer struggles to tap into shifting consumer trends,” *Food Dive*, April 26, 2018, <https://www.fooddive.com/news/big-beer-struggles-to-tap-into-shifting-consumer-trends/522213/>.
- <sup>16</sup> Phillip Longman, “Time to Fight Health-Care Monopolization,” *Democracy* 42 (Fall 2016).
- <sup>17</sup> Colin Todhunter, “Bayer-Monsanto Deal Hints At Dark Future Of Corporate Monopolies,” *HuffPost*, September 16, 2016, [https://www.huffingtonpost.ca/colin-todhunter/bayer-monsanto-monopoly\\_b\\_12025918.html](https://www.huffingtonpost.ca/colin-todhunter/bayer-monsanto-monopoly_b_12025918.html).
- <sup>18</sup> Michael J. de la Merced and Alan Rappeport, “Sprint and T-Mobile C.E.O.s Are in Washington to Sell Their Merger. Here’s What They’ll Confront,” *The New York Times*, May 1, 2018, <https://www.nytimes.com/2018/05/01/business/dealbook/sprint-tmobile-merger-regulatory-approval.html>.
- <sup>19</sup> *Federal Trade Commission Act*, U.S. Code 15 (1914), § 45.
- <sup>20</sup> Marc Winerman, “The Origins of the FTC: Concentration, Cooperation, Control, and Competition,” *Antitrust Law Journal* 71, no. 1 (2003): 1-97, <https://www.ftc.gov/sites/default/files/attachments/federal-trade-commission-history/origins.pdf>.
- <sup>21</sup> *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); Sandeep Vaheesan, “Resurrecting ‘A Comprehensive Charter of Economic Liberty’: The Latent Power of the Federal Trade Commission,” *University of Pennsylvania Journal of Business Law* 19, no. 3 (2017): 645-699, <https://papers.ssrn.com/abstract=2830702>; Averitt, “The Meaning of Unfair Competition,” 246-47.
- <sup>22</sup> U.S. House of Representatives Committee on the Judiciary, “Goodlatte Statement at Markup of the SMARTER Act,” April 5, 2017, <https://judiciary.house.gov/press-release/goodlatte-statement-markup-smarter-act/>.
- <sup>23</sup> House Judiciary Committee, “Goodlatte Statement.”
- <sup>24</sup> *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 23 (D.D.C. 2015).
- <sup>25</sup> Federal Trade Commission, Statement, “Commission Statement to Accompany Statement of Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction,” *Federal Register* 60, no. 149 (August 3, 1995): 39742, <https://www.ftc.gov/sites/default/files/attachments/merger-review/950803administrativelitigation.pdf>.
- <sup>26</sup> U.S. Congress, Senate, Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights, *Hearing on “S. 2102: the Standard Merger and Acquisition Review Through Equal Rules Act of 2015,”* 114<sup>th</sup> Cong. 47, October 7, 2015, 1-2, <https://www.judiciary.senate.gov/imo/media/doc/Jacobson%20Responses%20to%20Klobuchar.pdf> for responses to questions for the record from Jonathan Jacobson, former commissioner of the Antitrust Modernization Commission.
- <sup>27</sup> U.S. Congress, House of Representatives, Judiciary Committee, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, *Testimony of Albert A. Foer On Behalf of The American Antitrust Institute, Re: H.R. 2745, “Standard Merger and Acquisition Review Through Equal Rules Act of 2015,”* 114<sup>th</sup> Cong. 47 (June 16, 2015), <http://www.antitrustinstitute.org/sites/default/files/Foer%20Testimony%20SMARTER%20ACT.pdf>.