January 9, 2019

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
U.S. House of Representatives

Dear Chairman Nadler:

On behalf of the Open Markets Institute, we write to congratulate you on your leadership in the Committee on the Judiciary and to offer our recommendations for how to approach the problem of monopoly in this Congressional session.

By way of background, the Open Markets Institute is a non-profit research institution dedicated to exposing the role of monopoly power in the range of challenges facing America's economy and democracy. Since the development of a Reagan-era consensus that rolled back the enforcement of antitrust law, an extreme concentration of corporate power in America's markets has severely strained our democratic systems of politics and commerce. Open Markets' mission is to develop the intellectual capital needed to fully overturn the Reagan-era consensus and to lay the foundation for rebuilding an open and democratic economic system in America.

From candy to coffin markets and search engines to airlines, a small group of monopolies controls the industrial and commercial arteries of the United States.[i] This concentration of power leads to lower wages, higher prices, fewer opportunities to launch and grow small businesses, and less innovation, effectively strip mining the business and wealth from entire regions of our nation. It also destabilizes our democracy as monopolists concentrate control over political leaders and entire communities.

Americans are fed up with this situation. According to polling conducted in September 2018, 65 percent of American voters believe the government "should do more to break up corporate monopolies," compared with a mere 19 percent who believe it to be a non-issue. When political power comes into the equation, the numbers are shocking. Roughly 97 percent of Americans are concerned corporations have too much power over politicians.[ii]

You are following in the footsteps of one of the greatest Members of Congress during the 20th century, Emanuel Celler of New York. As Chair of the Subcommittee on the Study of Monopoly Power and the Committee on the Judiciary, Celler conducted in-depth studies of a variety of industries in the early 1950s. Chairman Celler believed that congressional oversight and investigations into monopoly power are foundational to our democratic system of governance and vital to protecting American political liberties. Celler worked closely with the Truman

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Administration, the Department of Justice, the military, government financing and procurement agencies, other committees in Congress, and the Federal Trade Commission.

With Congressman Celler's precedent in mind, Open Markets proposes four basic principles on how the Committee should operate to uncover and begin fixing America's monopoly problem:

1. **Investigations**. The Committee should conduct investigations to shine a light on what is actually going on within our industrial systems, through a thorough and empirically driven study of market concentration in our country. Such studies are essential for drafting smart policy. Further, simply collecting and publishing data and learning how markets work often leads to immediate changes in behavior by executives, investors, and the public. The committee should focus its oversight work on sector-by-sector analysis to demonstrate how the strategies and methods of monopolists differ from one market to the next, depending on the technologies in use, capital structures, and regulatory contexts.

2. **Oversight**. The Committee should, in all its activities, explore the relationship between concentrated industrial structures and political corruption. Woodrow Wilson argued that policy could not be made on behalf of the public so long as "monopolies are the chief counselors at Washington," and this observation remains true today. As the Committee conducts its business, it should seek to highlight how corporate concentration and political corruption go hand in hand.

3. **Education**. The Committee should seek to teach the public about America's monopoly crisis. This means high-profile hearings on areas the public will understand, with the committee serving as an instructional forum for citizens on how to organize markets and regulate corporations to ensure business serves the public interest.

4. **Advocacy**. The Committee should strive to work with other committees in Congress in joint oversight hearings and investigations. Anti-monopoly policy is premised on restructuring markets and corporate behavior, and this restructuring often requires the use not just of antitrust law but a suite of tools embedded across government agencies. Restoring this tradition of using the entire administrative apparatus to promote open and competitive markets was the goal of the Obama Administration's executive order in April 2016.[iii] It should be a primary goal of this Committee.

Additionally, we suggest the following legislative priorities to restructure the legal foundations of antitrust law:

1. **Overrule Conservative Judicial Precedent that has Eroded the Antitrust Laws**. In the area of antitrust doctrine, we encourage the Committee to consider undoing Supreme Court precedents that have reinterpreted the antitrust laws in favor of monopolists and

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other powerful corporations. Attached is a memo with a list of court decisions that have undermined the antitrust laws and thereby helped create and protect concentrated market structures across the economy.

2. **Restore the Judicial Rights of Workers, Small Businesses, and Consumers**. We encourage the Committee to introduce bills to restore the ability of injured workers, businesses, and consumers to vindicate their rights under the antitrust laws. The Courts have issued a series of decisions over the past 40 years that have subverted private antitrust enforcement, a pillar of the federal antitrust system. The Supreme Court has allowed corporations to use mandatory arbitration clauses to block lawsuits, including class action lawsuits, brought by victims of antitrust violations (as well as other corporate lawbreaking). It has also unjustifiably raised pleading, summary judgment, and class certification standards, frustrating injured parties' attempts to obtain compensation and deter future antitrust violations.

Finally, we also encourage the following oversight priorities for sectors of the economy to investigate:

1. **Pharmaceuticals.** The Committee should investigate not only how concentration in this sector drives up drug prices, but also how it leads to drug shortages and reduction of research budgets. Areas to explore include not only the influence of private equity and hedge funds in reducing competition through mergers and acquisitions, but also the role played by the abuse of patent monopolies. As revealed by such landmark litigation as *FTC v. Actavis*, brand manufacturers maintain prices far above competitive levels and earn monopoly profits on them by excluding generic products from the markets for their brand products. Experts estimate that the cost of brand drugs is substantially higher (perhaps by 50 percent) than it otherwise would be under competitive conditions.[iv]

2. **Hospital Pricing**. An even larger factor in driving up the overall cost of health care is the rapid monopolization of medical services. This includes round after round of hospital mergers, as well as the purchase of independent doctors' practices and increasing vertical integration into insurance markets. Study after study shows that this mounting concentration means that most Americans covered by private insurance pay monopoly prices for health care. Simply requiring that monopolistic hospitals charge the same prices paid by Medicare would reduce the cost of health care for the median family by one third in the first year, without having to pass any new taxes and without forcing anyone to change their health care plan.[v]

3. **Dominant Platforms, the Free Press, and Advertising**. We encourage the Committee to do a deep examination of the role of tech platforms in monopolizing the advertising market and eroding the financial sustainability of the free press in America. Facebook

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and Google control 63 percent of the domestic digital ad market, which is the largest part of the advertising industry.[vi] As a result, journalism as a whole is dying across the country. In 2006, newspaper ad revenue was at $48 billion. In 2016, it was $18 billion. Roughly 1,800 local newspapers in America have disappeared since 2004.[vii] Facebook and Google control the flow of information over key essential facilities like general search, maps, and social networks, and they use this control to reinforce their market power. The roll-up of power over advertising revenue in the hands of Google and Facebook is the single most serious threat to free speech in America today, as well as in many of our most important democratic allies, and it deserves critical examination by the Committee. Additionally, we encourage the Committee to explore the power of Amazon, which has a fast-growing advertising business and also penetrates many key sectors of our political economy.

4. **Labor**. In the area of antitrust and workers, we encourage the Committee to conduct research into anti-competitive practices that restrict the ability of workers and professionals to organize and engage in traditionally protected forms of association. This includes the extent and impact of non-compete clauses and the impact of mergers on labor markets, wages, and employment. In addition, the Committee should examine the legal rationale for judicial narrowing of the Clayton Antitrust Act's broad antitrust exemption for labor, potentially also clarifying that it applies to all workers and professionals, regardless of whether they are classified as "employees" or "independent contractors" under federal labor law. Finally, the Committee should investigate whether the present structure of the human resources industry – in which consulting firms like Equifax provide broad industry-wide data about what individuals earn – enables unlawful cartel behavior by employers.

5. **Inequality**. The Committee should consider investigating the fast-growing economic and political divide among different regions in America. According to the Economic Innovation Group, in the 2010-2014 recovery, the creation of net new businesses in just five metro areas was equal to the net creation of new businesses in all the rest of America combined.[viii] This concentration of new investment is very likely a function of concentration of economic power. After all, small community banks are disappearing, the farm economy is becoming increasingly concentrated, local media is seeing advertising revenue dry up due to monopolization of the ad market, and giant hospital chains are shutting down rural hospitals. Even when investors want to locate new business in Heartland America, airline and railroad consolidation have made it much more expensive to move people and goods in and out of medium and small metro areas.[ix]

6. **Agriculture**. In the area of food and agriculture policy, we encourage the Committee to investigate abuses by concentrated meatpackers. This includes revisiting the Trump administration's recent de facto abolition of the Grain Inspection, Packers and Stockyards

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Administration, as well as the rule changes to the Packers and Stockyards Act proposed during the Obama Administration's 2010 investigation of the industry.[x] It should also include reforming corrupt and opaque allocations of funds from the government's agricultural "checkoff" tax program. Additionally, we encourage the Committee to review rising agricultural input prices and the decline in seed variety as a result of consolidation such as the recent purchase of Monsanto by Bayer. We also strongly urge the Committee to examine concentrated ownership of farming data, as well as aftermarket equipment repair monopolies and farmers' Right to Repair computerized equipment. Finally, the Committee should examine anti-competitive practices among powerful retailers and food distributors that foreclose market access to small companies, put local groceries out of business, and result in the exercise of extreme monopsony power over farmers, ranchers and other producers of the food Americans eat. These practices include slotting fees, volume-based rebates, and loss leading, and "category captain" cartel enforcement programs.

7. **Structural Enforcement Reforms.** The Committee should do an in-depth investigation of the Federal Trade Commission, which is one of two key enforcement bodies for our anti-monopoly laws. In recent years, the Commission has wielded its power in ways that have served largely to reinforce, rather than check, the power of large concentrated capital. For example, the FTC has attacked the forms of association and cooperation that workers, professionals, and small businesses have relied on since the 19th century to promote their common interests. Meanwhile, it has failed to enforce its consent decrees against Google and Facebook. The FTC has allowed corporate concentration to go largely unchecked, even in cases such as the Linde-Praxair merger (a transaction in which the second and third largest industrial gas makers in the world merged) where it faced no litigation risk.[xi]

   The Committee should also expand oversight of the Department of Justice Antitrust Division, especially to ensure that its decisions are not in any way shaped by partisan motivations of the White House. In addition, the Committee should look into the total collapse of all Sherman Act Section 2 monopolization enforcement by the Antitrust Division.

8. **Trade and National Security**: We encourage the Committee to consider the relationship between trade, monopolization, and national security. The Competition chapter of the revised United States–Mexico–Canada Agreement includes dangerous language restructuring the intent of antitrust law, while the Digital Trade chapter irresponsibly extends protections for dominant tech platforms in the form of intermediary liability. Neither is appropriate for trade law. More fundamentally, the nascent trade war between China and the United States has highlighted the international dimensions of our

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monopoly problem. The number of inputs solely available in China, or solely available by one provider outside of China, illustrates how concentration has unwittingly generated dependencies and vulnerabilities. The systemic risk induced by concentrated supply chains is not simply a function of geopolitical risk with China. Natural disasters in Puerto Rico, North Carolina, and Texas revealed how monopolized supply chains have created shortages in key chemicals and medical supplies. Until recently, trade policy was understood to be simply an extension of the government's anti-monopoly powers. The time to restore that understanding is now.

We appreciate the Committee's interest in taking up the mantle of the great Emanuel Celler and we look forward to your stewardship of this critical institution.

Respectfully,

The Open Markets Institute

cc: The Honorable Doug Collins
The Honorable David Cicilline

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Congress Should Overturn Pro-Monopoly and Pro-Merger Supreme Court Decisions and Agency Policy Documents

The Supreme Court and federal antitrust agencies have together weakened the antitrust laws over the past 40 years. In a series of decisions, the Court has revised antitrust doctrines to protect monopolists and other dominant firms and undermine the ability of the government and private parties to challenge exclusionary, predatory, and restrictive business practices. The Court has also rewritten procedural rules to handicap the enforcement of consumer protection, employment, and other public interest laws, including antitrust.

Along with the Court's evisceration of the substance and effective enforcement of the antitrust laws, the Department of Justice and Federal Trade Commission have rewritten merger policy through their Horizontal Merger Guidelines. In developing these guidelines, the federal antitrust agencies have ignored controlling Supreme Court precedent on mergers and adopted increasingly permissive standards for evaluating corporate consolidations.

In addition to restoring the expansive legislative purpose of the antitrust laws,[xii] Congress should target specific pro-monopoly and pro-merger Supreme Court decisions and agency policies to help resurrect the antitrust laws as "the Magna Carta of free enterprise."[xiii] The following decisions and guidance documents should be the highest priority for legislative repeal.

Monopolization

The Supreme Court over the past three decades has given large businesses free reign to control and dominate markets through predatory pricing and predatory bidding and refusing to deal with rivals. To ensure that plaintiffs can challenge exclusionary and predatory practices by dominant businesses, Congress should overturn the following Supreme Court rulings:

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Predatory pricing

- Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) (requirement of below-cost pricing and dangerous probability of recoupment in predatory pricing cases)
- Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (skepticism toward predatory pricing claims)
- Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007) (*Brooke Group* test extended to predatory bidding claims)

Refusal to deal

- Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (no refusal to deal claims when regulator can mandate duty to deal and skepticism toward all refusal to deal claims)
- Pacific Bell Telephone Co. v. LinkLine Communications, Inc., 555 U.S. 438 (2009) (price squeezing claims recognized only when antitrust duty to deal exists)

<u>Exclusionary and restrictive trade practices</u>

In the following decisions, the Supreme Court has also raised the legal burden on parties challenging exclusionary and restrictive trade practices in general.

- Ohio v. American Express Co., 138 S.Ct. 2274 (2018) (adoption of two-sided markets construct, potentially relevant to all rule of reason cases)
- Continental TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (non-price vertical restraints subject to rule of reason)
- Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477 (1977) (creation of antitrust injury doctrine)

<u>Private antitrust enforcement</u>

Along with rewriting substantive antitrust law to favor monopolies and other powerful corporations, the Supreme Court has revised procedural rules to favor corporate

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defendants at the expense of consumers, workers, and small businesses injured by the violations of antitrust, consumer protection, employment, and other laws.

Arbitration

- Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018) (arbitration clauses with class action waivers enforceable against workers, despite National Labor Relations Act's protection of concerted conduct by workers)
- American Express v. Italian Colors, 570 U.S. 228 (2013) (arbitration clauses enforceable even when they prevent effective vindication of federal statutory claims)
- AT&T Mobility v. Concepcion, 563 U.S. 333 (2011) (preemption of state law limits on mandatory arbitration)

Class certification standards

- Comcast v. Behrend, 569 U.S. 27 (2013) (heightened class certification standards)

Pleading standards and summary judgment

- Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (heightened quantum of evidence needed to survive motion to dismiss)
- Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (heightened quantum of evidence needed to survive motion for summary judgment)

Standing for consumer plaintiffs in antitrust cases

- Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (no standing for indirect purchasers to obtain antitrust damages under federal law)

<u>Mergers</u>

- 2010 Horizontal Merger Guidelines (continuation of effects-based approach and efficiencies defense) [xiv]

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[i] America's Concentration Crisis: An Open Markets Institute Report (link: https://concentrationcrisis.openmarketsinstitute.org/)
[ii] Attacking Monopoly Power Can Be Stunningly Good Politics, Survey Finds, by David Dayen, The Intercept (https://theintercept.com/2018/11/28/monopoly-power-corporate-concentration/), November 28 2018
[iii] Executive Order -- Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy, The White House, Office of the Press Secretary, April 15, 2016
[iv] Interview with Dan Berger of Berger Montague.
[v] The Case for Single-Price Health Care by by Paul S. Hewitt and Phillip Longman, Washington Monthly, April/May/June 2018
[vi] Google and Facebook Tighten Grip on US Digital Ad Market, eMarketer, September 21, 2017
[vii] About 1,300 U.S. communities have totally lost news coverage, UNC news desert study finds, Poynter, October 15, 2018
[viii] Dynamism in Retreat: Consequences for Regions, Markets, and Workers, Economic Innovation Group, February, 2017
[ix] Bloom and Bust: Regional inequality is out of control. Here's how to reverse it. by Phil Longman, Washington Monthly November/December 2015
[x] GIPSA is Dead; the Fight for Producer Protections Continues, Organization for Competitive Markets, November 29, 2018
[xi] Open Markets Institute Reacts to FTC Approval of $80 Billion Linde-Praxair Merger, Open Markets Institute, October 31, 2018
[xii] *See* N. Pac. R. Co. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.").
[xiii] United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972).
[xiv] *Contra* United States v. Philadelphia National Bank, 374 U.S. 321, 363 (1963) ("[W]e think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.").

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