DAVID N. CICILLINE
1ST DISTRICT, RHODE ISLAND

2233 RAYBURN BUILDING
WASHINGTON, D.C. 20515
(202) 225-4911
(202) 225-3290 (FAX)

1070 MAIN STREET, SUITE 300
PAWTUCKET, RI 02860
(401) 729-5600
(401) 729-5608 (FAX)

Congress of the United States
House of Representatives
Washington, DC 20515

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May 22, 2019

The Honorable Makan Delrahim
Assistant Attorney General
Antitrust Division
U.S. Dep't of Justice

Dear Assistant Attorney General Delrahim:

I write to convey deep concerns about the Antitrust Division's recent activity involving its competition advocacy program.

Over the last year, the Division has significantly increased the number of statements of interest and amicus briefs it is filing in cases where the United States is not a party. Upon first glance this heightened activity may appear to serve the public interest. But a closer look reveals that several of the Division's briefs advance positions that would hamper robust enforcement of the antitrust laws. In some cases, the Division's decision to intervene has risked undermining enforcement efforts by state attorneys general and the Federal Trade Commission, raising serious questions about the Division's motives and judgment. Notably, the Division's heightened amicus activity stands in stark contrast with its meager enforcement activity, prompting concerns that the Division is prioritizing side projects over its main job: vigorous enforcement of the antitrust laws. Weighing in on matters is no substitute for this obligation.

Several of the Antitrust Division's amicus briefs have taken positions that risk undermining strong enforcement.[1] For example, in *Viamedia v. Comcast*, the Division recommended that the Seventh Circuit adopt a standard that would further narrow the grounds on which a monopoly can be held liable under section 2 for its refusal to deal.[2] Notably, the "no economic sense" test that the Division supports has not formally been adopted by the Supreme

[1] Matthew Buck & Sandeep Vaheesan, *Trump's Big Tech Bluster*, N.Y. TIMES (Mar. 6, 2019), https://www.nytimes.com/2019/03/06/opinion/trump-antitrust-laws.html.

[2] Brief for the United States as Amicus Curiae in Support of Neither Party, Viamedia, Inc. v. Comcast Corp., No. 18-2852 (7th Cir. filed Nov. 8, 2018).

Court, despite previous advocacy by the Division supporting the test.[3] Among federal appellate courts, moreover, the "no economic sense" test appears only in a single Tenth Circuit decision.[4] At a time when markets are highly concentrated, market power is rampant, and Section 2 cases are virtually nonexistent, that the Division would choose to devote its resources to aid monopolists raises serious questions about whose interests the Division seeks to protect.

Earlier this year the Antitrust Division also intervened in a private action in the State of Washington to advocate for a standard that would make it more difficult for enforcers to target no-poach agreements among franchises.[5] By decreasing the mobility and economic liberty of workers, no-poach agreements disempower employees and suppress labor market competition. As the Justice Department has previously noted, "Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws."[6]

In its recent brief, however, the Antitrust Division carves out an exception for no-poach agreements in franchising contracts, arguing that these restraints should instead be analyzed under the rule of reason. The Division's reasoning—that franchisor-franchisee restraints may have pro-competitive effects, thereby warranting more permissive review—has been rejected by numerous experts and scholars.[7] Indeed, the Division's position contradicts prior statements you

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[3] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Brief for the United States and the Federal Trade Commission as Amicus Curiae Supporting Petitioner, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (No. 02-682).

[4] Novell, Inc. v. Microsoft Corp., 731 F.3d 1064 (10th Cir. 2013).

[5] Corrected Statement of Interest of the United States of America, Stigar v. Dough Dough, Inc., No. 2:18-cv-00244-SAB (E.D. Wash. filed Mar. 8, 2019).

[6] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016).

[7] *See, e.g.*, José Azar, Ioana Marinescu, & Marshall Steinbaum, *Antitrust and Labor Market Power*, ECONOMISTS FOR INCLUSIVE PROSPERITY POL'Y BRIEF (forthcoming June 2019) ("What the DOJ overlooks in making the case against the automatic illegality of franchising no-poach agreements is that the reasons for weaker enforcement against vertical restraints derive from their ostensible benefits *for consumers*. There's no plausible benefit to *workers* whose employment options are limited by contractual restrictions on franchisees against hiring them elsewhere in the network where they work . . . ."); Alan B. Krueger & Eric A. Posner, *A Proposal for Protecting Low-Income Workers from Monopoly and Collusion*, THE HAMILTON PROJECT (Feb. 2018), http://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf ("Accordingly, we propose a per se rule against no-poaching agreements regardless of whether they are used outside or within franchises."); Letter from Diana Moss, President, Am. Antitrust Inst., & Randy Stutz, Vice President of Legal Advocacy, Am. Antitrust Inst., to Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, & Michael Murray, Deputy Assistant Att'y Gen., U.S. Dep't of Justice (May 2, 2019) [hereinafter American Antitrust Institute Letter to the Dep't of Justice], https://www.antitrustinstitute.org/wp-content/uploads/2019/05/AAI-No-Poach-Letter-w-Abstract.pdf ("No-poaching agreements that have no plausible, legitimate justification, no cognizable efficiencies, and make no economic sense on their face are exceedingly unlikely to be ancillary and need not be reviewed under the full-blown rule of reason on that basis . . . The Division should not have advised the district court to apply the full rule of reason to these agreements.").

have made about treating labor market restraints symmetrically with product market restraints.[8] By focusing its brief on the purported countervailing efficiencies of no-poach agreements, the Division instead suggests that anti-competitive restraints on workers can be justified through benefits to consumers.[9]

Even more questionable than the Antitrust Division's substantive position in this case was its choice to interfere in the first place. The Washington Attorney General has led the national fight against no-poach agreements, having successfully pressured over 60 corporate chains to drop no-poach clauses from their franchise agreements.[10] Notably, the defendants in the consolidated case in which the Division intervened had already entered legally binding agreements with the Washington AG to eliminate these clauses, demonstrating that—contrary to the Division's speculation[11]—the no-poach provisions were not essential to the broader franchise agreement.[12]

The Division's position, moreover, has risked undermining enforcement efforts by the Washington Attorney General, who—in line with growing expert consensus—holds that these no-poach clauses must be analyzed as a *per se* restraint under state law.[13] Defendants subject to lawsuits for franchise no-poach agreements are already citing the Antitrust Division's statement

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[8] Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Stand By Me: The Consumer Welfare Standard and the First Amendment (June 12, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-open-markets-institute-event ("Likewise, the antitrust laws protect competition even in markets that are not end-consumer facing, such as the labor markets alleged in our recent and on-going actions against employer no-poach agreements.").

[9] Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 LAW & CONTEMP. PROBS. (forthcoming 2019) (manuscript at 7), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371155##.

[10] Press Release, Washington State Office of the Attorney General, AG Ferguson's Initiative Ends No-Poach Clauses at Five More Corporate Chains Nationwide (May 14, 2019), https://www.atg.wa.gov/news/news-releases/ag-ferguson-s-initiative-ends-no-poach-clauses-five-more-corporate-chains.

[11] Corrected Statement of Interest of the United States of America, Stigar v. Dough Dough, *supra* note 5, at 16 ("No-poach agreements would thus qualify as ancillary restraints if they are reasonably necessary to the legitimate franchise collaboration and not overbroad.").

[12] The defendants were Arby's, Auntie Anne's, and Carl's Jr. All three had already entered into an "assurance of discontinuance." Press Release, Washington State Office of the Attorney General, AG Ferguson Announces Fast-Food Chains Will End Restrictions on Low-Wage Workers Nationwide, (July 12, 2018), https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers. *See also* Amicus Brief by the Attorney General of Washington, Stigar v. Dough Dough, Inc., No. 2:18-cv-00246-SAB (E.D. Wash. filed Mar. 11, 2019) (noting that the lack of evidence on the extent to which franchisors have enforced no-poach clauses raises "significant question as to their utility and importance to the franchisor's system."); American Antitrust Institute Letter to the Dep't of Justice, *supra* note 7, at 12.

[13] Amicus Brief by the Attorney General of Washington, Stigar v. Dough Dough, Inc., *supra* note 12, at 6-7. Notably, the AG's efforts have yielded a state court ruling that allows no-poach provisions in franchise agreements to be subject to *per se* liability. State of Washington v. Jersey Mike's Franchise Systems, Inc., et al., No. 18-2-25822-7-SEA, Order Den. Def.'s Mot. to Dismiss (Jan. 25, 2019).

in their briefing.[14] The Division's decision to interfere in order to win greater protection for corporate franchisors that restrict labor market competition, in a context where state enforcers have proved immensely successful at targeting these restraints—and to do so at the earliest stage of litigation in a district court—reflects grossly misshapen priorities.[15]

Similarly, the Antitrust Division's recent statement of interest in the *Qualcomm* case is troubling.[16] The Federal Trade Commission has been litigating the case for over two years, the agency did not request the Division's interference, and the Division's statement—a recommendation that, if the court finds liability, the presiding judge hold an evidentiary hearing and request additional briefing—reflected striking ignorance of both the court's previous orders and the parties' briefing.[17] Although the Division's statement offers no position on the underlying merits of the FTC's case, it is impossible to miss the Division's skepticism—or that it maps neatly onto the views you have expressed in other settings.[18] Given that your position on patent holdup is sufficiently at odds with longstanding legal and economic consensus that it prompted 77 former government enforcement officials and scholars to write a letter expressing their disagreement,[19] it is especially striking that the Division would think it appropriate to broadly channel this view through unprecedented interference in a sister agency's case. The fact that the defendant in the Commission's case is a former client of yours also raises a serious ethics question about the degree of your involvement in the decision to file this statement.

The Antitrust Division's recent zeal for filing amicus briefs stands in stark contrast with the paucity of enforcement actions.[20] With the exception of the AT&T-Time Warner case, the

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[14] *See, e.g.*, Defendant Jiffy Lube International, Inc.'s Memorandum of Law in Support of Its Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6), Victor Fuentes v. Royal Dutch Shell, PLC., et al., No. 2:18-cv-05174-AB (E.D. Pa. filed Apr. 15, 2019).

[15] Strikingly, the Antitrust Division filed its notice of intent to file a statement of interest during the government shutdown—reinforcing the impression that the Division is squandering precious resources. Notice of Intent to File a Statement of Interest of the United States of America, Stigar v. Dough Dough, Inc., No. 2:18-cv-00246-SAB (E.D. Wash. filed Jan. 25, 2019).

[16] Statement of Interest of the United States of America, Fed. Trade Comm'n v. Qualcomm, Inc., No. 5:17-cv-00220-LHK (N.D. Cal. filed May 2, 2019).

[17] Plaintiff Federal Trade Commission's Response to Statement of Interest Filed by United States Department of Justice Antitrust Division, Fed. Trade Comm'n v. Qualcomm, Inc., No. 5:17-cv-00220-LHK (N.D. Cal. filed May 9, 2019).

[18] *See, e.g.*, Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The "New Madison" Approach to Antitrust and Intellectual Property Law (Mar. 16, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university.

[19] Letter from Michael A. Carrier, Professor, Rutgers Law School, et al., to Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice (May 18, 2018), https://law.rutgers.edu/f/mc-05-18-2018.pdf.

[20] According to the Antitrust Division website, since 2017 the Antitrust Division has brought 68 enforcement actions. Between 2015 and 2017, by contrast, the Antitrust Division brought 132 cases. Antitrust Div., U.S. Dep't of Justice, *Antitrust Case Filings*, https://www.justice.gov/atr/antitrust-case-filings (last visited on May 22, 2019).

Antitrust Division's enforcement record has been weak. It has brought no section 2 cases, even as heightened market power across the economy makes abuse of monopoly power all the more likely. The Division's misguided allocation of resources suggests Congress should reconsider how to allocate the Division's budget.

In light of these concerns, we request that you provide responses to the following questions by June 22, 2019:

1. Please identify, to the nearest 10-hours, the number of attorney hours that the Antitrust Division has devoted since January 2017 to statements of interests and amicus briefs in cases where the United States is not a party and where its participation has not been requested by a court.

2. Please identify, to the nearest 10-hours, the number of attorney hours that the Antitrust Division has devoted since January 2017 to its own enforcement actions.

3. Please identify, to the nearest 10-hours, the number of attorney hours that the Antitrust Division has devoted since January 2017 to any section 2 investigations.

4. Since 1999, the Antitrust Division has filed only one enforcement action alleging a violation of section 2. Does this lack of enforcement reflect the Division's view that since 1999 there has been only one section 2 violation worthy of the Division's attention?

5. Since 1948, the Antitrust Division and the Federal Trade Commission have relied on a formal clearance process to allocate primary areas of enforcement responsibility and to avoid overlapping activity. In light of the Division's recent filing in *FTC v. Qualcomm*, what is the current status and scope of the clearance process? If certain types of activity or certain types of cases are not governed by the clearance process, please identify those instances.

6. What involvement did you have with the Division's decision to file its statement of interest in *FTC v. Qualcomm*?

7. In light of its view that no-poach provisions in franchising agreements should be governed by the rule of reason, does the Antitrust Division believe that anticompetitive restraints on workers that deliver some consumer benefits are permissible under the antitrust laws?

8. Please identify any outside parties that the Antitrust Division has consulted in selecting the cases in which it has filed statements of interests or amicus briefs or in drafting them.

9. What effect has the Division's amicus program had on its ability to fulfill its obligation to enforce the antitrust laws?

Thank you for your attention to this matter.

Sincerely,

David N. Cicilline
Chairman
Subcommittee on Antitrust, Commercial,
and Administrative Law
Committee on the Judiciary
U.S. House of Representatives

cc: The Honorable Jerrold Nadler, Chairman, Committee on the Judiciary

The Honorable Doug Collins, Ranking Member, Committee on the Judiciary

The Honorable F. James Sensenbrenner, Ranking Member, Subcommittee on Antitrust, Commercial, and Administrative Law of the House Committee on the Judiciary