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Mr. Richard Powers
Acting Assistant Attorney General Antitrust Division
Department of Justice
950 Pennsylvania Ave NW Ste. 3109
Washington, DC 20530

January 29, 2021

Dear Acting Assistant Attorney General Powers:

The Open Markets Institute and the Authors Guild¹ write to urge the Department of Justice and the Biden Administration to block a plan by the private German conglomerate Bertelsmann to buy the book publisher Simon & Schuster for \$2.2 billion and merge it with another Bertelsmann-owned publisher, Penguin Random House.² The deal would bring well more than half of key U.S. book markets under the control of a single corporation, which poses a variety of potential threats to freedom of speech and democracy in the United States. The takeover falls clearly within the standard of illegality set by the Clayton Act and should be summarily rejected.³

Power over the purchasing decisions of America's readers, the livelihood and liberty of expression of America's authors, and the viability of America's independent bookstores is already far too concentrated. In 1978, the five largest publishers accounted for less than one-third of all trade book sales,⁴ and the four largest book publishing chains accounted for less than 12% of combined trade book sales. Today, by contrast, book publishing is dominated by five corporations, with Bertelsmann already in a dominant, position, with twice the U.S. sales of the next largest publisher Harper Collins.⁵ We understand that if the

¹ The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

² Douglas Busvine & Klaus Lauer, *Bertelsmann Buys Simon & Schuster for \$2.2 billion in U.S. Publishing Play*, REUTERS (Nov. 25, 2020), <https://www.reuters.com/article/us-viacombcs-m-a-bertelsmann/bertelsmann-buys-simon-schuster-for-2-2-billion-in-u-s-publishing-play-idUSKBN2851E6>.

³ 15 U.S.C. § 18.

⁴ *Concentration in the Book-Publishing and Bookselling Industry: Hearings on Monopolization of the Publishing Industry Before the S. Subcomm. on Antitrust, Monopoly and Business Rights*, 96th Cong. 95-56 (1980), <https://books.google.com/books?id=1prHt28AtasC>.

⁵ <https://www.publishersweekly.com/pw/by-topic/industry-news/industry-deals/article/84937-news-corp-ceo-sees-antitrust-concerns-in-prh-buy-of-s-s.html> ("HC, with estimated U.S. sales of about \$1.1 billion, is a distant second to PRH in the American book market. PRH's U.S. sales are about \$2.2 billion.")



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acquisition of Simon & Schuster goes through, the combined company potentially will have more U.S. revenues than the next three largest publishers in the U.S.—Harper Collins, Hachette, and Macmillan—combined. At the same time, the retail end of book sales has been all but monopolized by a single corporation, Amazon.

The problem is not new, but the rate of consolidation within the publishing industry has dramatically increased since 2014. Between 2009 and 2013, an average of a dozen peer-to-peer acquisitions (i.e., a publisher, usually a large firm, buying another publisher, usually smaller firm) were recorded. The number of transactions almost doubled in 2014 with a peak of 24 acquisitions, and remained high, leading to an average of 20 transactions per year between 2014 and 2019. During the same period, there were 120 total acquisitions within the publishing industry with Rowman and Littlefield acquiring ten firms, Penguin Random House acquiring five firms, and Hachette acquiring four firms as the top three most-active buyers. The acquisitions have ranged from consolidation of small and mid-size players by bigger publishers to notable high-value transactions, such as Harper Collins' \$415 million acquisition of Harlequin Enterprises in 2014.⁶ The high rate of acquisitions in the publishing industry is expected to continue.

On the retail end, it has been some years since authors, publishers, and journalists started raising alarms about Amazon's increasing stronghold on sales and the harm it has caused to publishers, authors, readers, and the public as a whole. Almost nine years have passed since the Open Markets Institute first warned that Amazon's power over authors and readers gives that corporation a de facto license to manipulate what is published and read in the United States.⁷ More than five years have passed since Open Markets, along with Authors United and the American Booksellers Association, directly asked the Department of Justice to address Amazon's power, in letters that were covered as a lead business story in the *New York Times*. Both times we made clear that the book publishing business itself was also already consolidated in too few hands.⁸

Other parts of this relatively low profit business have also moved toward consolidation, in a manner the benefits the behemoths. In 2019, the Department of Justice took an important step to prevent this crisis

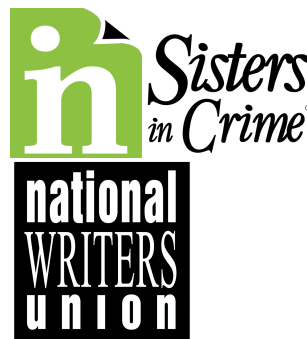
⁶ David Lamb, *Trends in U.S. Trade Book Publisher Mergers and Acquisitions*, Publishing Research Quarterly (June 2020), <https://link.springer.com/article/10.1007/s12109-020-09738-w>

⁷ Barry C. Lynn, *Killing the Competition*, *HARPERS MAGAZINE* (Feb. 2012), <https://harpers.org/archive/2012/02/killing-the-competition/>.

⁸ David Streitfeld, *Accusing Amazon of Antitrust Violations, Authors and Booksellers Demand Inquiry*, *N.Y. TIMES* (July 13, 2015), <https://www.nytimes.com/2015/07/14/technology/accusing-amazon-of-antitrust-violations-authors-and-booksellers-demand-us-inquiry.html>.



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from getting even worse, when it blocked a plan to merge the two dominant U.S.-based book printing corporations – Quad/Graphics and LSC.

In moving to summarily reject Bertelsmann's effort to take control of Simon & Schuster, the Justice Department will stand on very firm ground. There are at least five arguments that easily justify such an action.

First, Bertelsmann's proposal to merge the operations of Penguin Random House and Simon & Schuster represents a horizontal expansion of power. Horizontal mergers, by augmenting a firm's power over customers, distributors, and suppliers, were of such concern to Congress that the Supreme Court established a structural presumption against any merger above a 30% threshold.⁹ And that 30% level was, in fact, on the far extreme end of the spectrum. For most of the 20th century, the government routinely blocked mergers that would have combined 7.5% or less of a market under the control of a single corporation.¹⁰

The merger between Penguin Random House and Simon & Schuster would grossly violate these limits.¹¹ The new corporate entity would combine the largest book publisher in the United States with the third largest publisher.¹² The takeover would, for instance, result in Bertelsmann controlling an incredible 70% market share in the literary and general fiction market in the United States. Bertelsmann would also control 70% of the Action & Adventure, Horror, Political, Legal, Medical, Erotica, and Coming of Age submarkets, and 60% of biography.¹³

Second, this takeover would reinforce Bertelsmann's recent vertical expansion into activities that reinforce its horizontal power over book publishing. Just this November, for instance, Bertelsmann acquired the last two of Quad/Graphics book manufacturing facilities, leaving independent publishers with only one potential printer for their books. That action clearly violated the DOJ's obvious intent to preserve the level of competition in the market for printing services that existed before Quad/Graphics'

⁹ United States v. Philadelphia Nat. Bank, 374 U.S. 321, 366–68 (1963)

¹⁰ United States v. Von's Grocery Co., 384 U.S. 270, 277 (1966); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

¹¹ Benjamin Mullin & Jeffrey A. Trachtenberg, *Penguin Random House Parent to Buy Simon & Schuster From ViacomCBS*, WALL ST. J. (Nov. 25, 2020), <https://www.wsj.com/articles/penguin-random-house-parent-near-deal-to-buy-simon-schuster-from-viacomcbs-11606268232> (stating Simon & Schuster has a market share of 9.1%).

¹² Alexandra Alter & Edmund Lee, *Penguin Random House to Buy Simon & Schuster*, N.Y. TIMES (Nov. 25, 2020), <https://www.nytimes.com/2020/11/25/books/simon-schuster-penguin-random-house.html>.

¹³ Christi Carras & Ryan Faughnder, *Penguin Random House to Purchase Simon & Schuster in Massive Publishing Deal*, L.A. TIMES (Nov. 25, 2020), <https://www.latimes.com/entertainment-arts/books/story/2020-11-25/penguin-random-house-buys-simon-and-schuster>; Keith J. Kelly, *Penguin Random House, Simon & Schuster Propose \$2.2B Mega-Merger*, N.Y. POST (Nov. 25, 2020), <https://nypost.com/2020/11/25/penguin-random-house-and-simon-schuster-propose-2-1b-mega-merger/>.



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effort to take over LSC in 2019.¹⁴ Bertelsmann's proposed takeover of Simon & Schuster would only worsen the problem.

Third, this new consolidation will also lead to increased leverage and price squeezing over authors, increased concentration of power over independent retailers, and a sharp curtailing of the "diversity and quality of carefully written, well-edited books available to the public."¹⁵ This is exactly what already happened, for instance, after Bertelsmann acquired the book publisher Penguin in 2013 and merged it with the Random House division it already controlled. In the days after that deal, Bertelsmann shut down entire imprint divisions¹⁶ and fired hundreds of employees.¹⁷ The trend of closing and imprints and laying off editorial staff continued after the merger with the shuttering of the Blue Rider imprint in 2017 and Spiegel & Grau in 2019.¹⁸

Fourth, Bertelsmann justifies its acquisition of Simon & Schuster on the basis that the book publisher is a "natural complement" to its Penguin Random House division.¹⁹ This statement is simply another way of claiming the takeover will result in increased efficiencies for Bertelsmann. But controlling case law interpreting the Clayton Act does not recognize an efficiencies defense for otherwise illegal mergers.²⁰ On the contrary, the Supreme Court has explicitly stated three times that efficiencies have no bearing in antitrust merger analysis.²¹ For example, in *Philadelphia National Bank* the Supreme Court stated that

¹⁴ Jim Milliot, *Bertelsmann Buys Quad's Book Printing Plants*, PUBLISHERS WEEKLY (Nov. 3, 2020), <https://www.publishersweekly.com/pw/by-topic/industry-news/industry-deals/article/84784-bertelsmann-buys-quad-s-book-printing-plants.html>.

¹⁵ Streitfeld, *supra* note 8.

¹⁶ Alexandra Alter, *Penguin Random House Closes the Prestigious Imprint Spiegel & Grau*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/2019/01/25/books/spiegel-grau-close-penguin-random-house.html>.

¹⁷ Jeff Platsky, *Penguin Random House to Lay off 286 Workers*, PRESS CONNECTS (Dec. 5, 2014), <https://www.pressconnects.com/story/news/local/2014/12/05/penguin-closing-affects/19957679/>.

¹⁸ <https://www.nytimes.com/2019/01/25/books/spiegel-grau-close-penguin-random-house.html#:~:text=The%20publisher%20Spiegel%20%26%20Grau%2C%20a,and%20Random%20House%20in%202013;> <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/74105-prh-closing-the-blue-rider-imprint.html>

¹⁹ Christi Carras & Ryan Faughnder, *Penguin Random House to Purchase Simon & Schuster in Massive Publishing Deal*, L.A. TIMES (Nov. 25, 2020), <https://www.latimes.com/entertainment-arts/books/story/2020-11-25/penguin-random-house-buys-simon-and-schuster>.

²⁰ Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CAL. L. REV. 1580, 1589 (1983).

²¹ *Brown Shoe*, 370 U.S. at 344 ("occasional higher costs and prices might result from the maintenance of fragmented industries and markets"); *FTC v. Procter & Gamble Co.* 386 U.S. 568, 580 (1967) ("possible economies cannot be used as a defense to illegality").



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illegal mergers should not be saved “on some ultimate reckoning of social or economic debits and credits” even if the merger is “benign.”²²

Fifth, and most important, the book publishing industry plays a uniquely important role in protecting freedom of speech and expression, and democracy, which in turn makes antimonopoly enforcement of the utmost importance.

With their ability to transmit and disseminate ideas and knowledge, books can have profound implications for the advancement of humankind, the exchange of ideas, civic discourse, and the maintenance of democracy. For example, the Founders of the American Republic were significantly influenced by books authored by John Locke, Charles de Montesquieu, Jean Jacques-Rousseau, and Adam Smith. The Revolution itself was inspired to a large degree by the publication of Tom Paine’s *Common Sense*.²³ Recently, the Black Lives Matter movement was greatly influenced by a number of books addressing racism in the U.S.

The Supreme Court has repeatedly cited the free flow and unrestricted transmission of knowledge as essential to the vitality of democracy. The Supreme Court has stated that the First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.” The Court made clear that this applies to private monopoly as well as state monopoly. “Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.”²⁴

In 2000, then Federal Trade Commission Chairman Robert Pitofsky made the point in simple language, after the FTC moved to block an effort by book retailer Barnes & Noble to purchase the book distributor Ingram. “[I]f somebody monopolizes the cosmetics fields, they’re going to take money out of consumers’ pockets, but the implications for democratic values are zero. On the other hand, if they monopolize books, you’re talking about implications that go way beyond what the wholesale price of the books might be.”²⁵

Perhaps no one has made the case better than the poet and political journalist John Milton, in *Areopagitica*, his foundational argument against concentration of power over the press, almost 400 years

²² *Philadelphia Nat. Bank*, 374 U.S. at 371.

²³ See generally GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969)

²⁴ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

²⁵ Alec Klein, *A Hard Look at Media Mergers*, WASH. POST (Nov. 29, 2000), <https://www.washingtonpost.com/archive/business/2000/11/29/a-hard-look-at-media-mergers/d8380c2d-92ee-4b1b-8ffd-f43893ab0055/>.



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ago. He who “destroys a good book, destroys reason itself,” Milton said.²⁶ Concentration of power over authors, he added, threatens to “bring a famine upon our minds.”

With decisions about what gets published and marketed widely (and so becomes discoverable) in the hands of so few, there is no doubt that many important books won’t get published, or even written. Every time a publisher is acquired by another, we ensure there will be less diversity in the kinds of books read and the ideas exchanged. Every publisher has different tastes, sensibilities, political interests, and levels of risk averseness. A diversity of publishers is the only way to ensure that well curated books representing the fullest variety of interests, perspectives and taste will be made available to the public.

Such a diversity is also vital to the protection of our democracy. It is widely accepted in the industry that some publishers have a greater appetite than others for the risk of publishing books that cover sensitive topics that might expose them to a lawsuit. Simon & Schuster is an example of a publisher that has been especially willing to publish books that expose the company to a high degree of risk. Just last year this included bestsellers such as Mary L. Trump’s memoir “Too Much and Never Enough,” Sean Hannity’s “Live Free or Die,” former national security adviser John Bolton’s “The Room Where It Happened: A White House Memoir,” and Bob Woodward’s “Rage.” In the words of the *Wall Street Journal*, these Simon & Schuster books “dominated the political conversation in 2020.”

It is questionable whether Simon & Schuster will continue to publish books such as these once the company is under Bertelsmann’s control.²⁷

In making its case to take over Simon & Schuster, Bertelsmann cites various threats to its business posed by Amazon’s monopoly over book sales, and Amazon’s increasing power over book publishing, printing, warehousing and many other activities. The undersigned organizations agree with Bertelsmann that Amazon’s monopoly poses a variety of threats to authors, publishers, independent booksellers, and readers, and to American democracy itself. But we absolutely disagree that the way to address Amazon’s threats is to allow Bertelsmann to further consolidate its own power over authors, readers, independent retailers, and the American public.

²⁶ JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND (Judith Boss & David Widger ed., 2006) (1644) (stating “Should ye suppress all this flowry crop of knowledge and new light... springing daily in this City, should ye set an Olgarchy of twenty ingrossers over it, to bring a famin upon our minds again, when we should know nothing but what is measur’d to us by their bushel? Beleeeve it, Lords and Commons, they who counsel ye to such a suppressing, doe as good as bid ye suppress your selves.”), <https://www.gutenberg.org/files/608/608-h/608-h.htm>.

²⁷ Mullin & Trachtenberg, *supra* note 11.



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Attempting to address dangerous monopolies by building countervailing monopolies does not work. The Department adopted precisely such an approach in 2013 when it approved Bertelsmann's takeover of Penguin – even though that deal reduced the ranks of top-tier trade publishers from six to five. The fact that Bertelsmann is now proposing another giant deal clearly proves that the previous concentration of power was not sufficient to counterbalance Amazon's monopoly and create a more level playing field.

What a Bertelsmann acquisition of Simon & Schuster would do, however, is increase the already huge pressures on the remaining larger publishers to compete with the outsized company on manuscripts, distribution, printing, and procurement. Many predict that the remaining three of the current "Big 5" will be forced to merge with each other to stay in the game, leaving the United States – a powerful and diverse nation of 330 million people – with two dominant publishers.

As was true last year when the Department blocked Quad/Graphics takeover of LSC, Bertelsmann's acquisition of Simon & Schuster is a threat to democracy and must be stopped.

But the time has also come to recognize that simply blocking takeovers is no longer sufficient. The Department of Justice must begin today to proactively restructure the entire U.S. market for books in ways that also deal with the danger posed by Amazon. In this way alone will the Department fulfill its mission of protecting the interest of the public as a whole, and of every reader and author in the United States, from dangerous concentrations of power and control over America's authors, editors, booksellers, and readers, and over public debate itself.

Sincerely,

Barry Lynn
Executive Director, Open Markets Institute

Mary Rasenberger
CEO, The Authors Guild

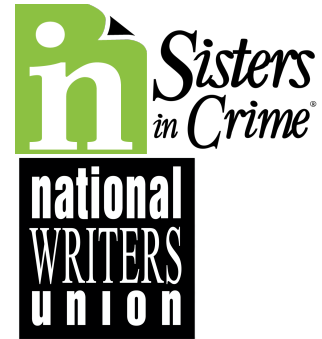
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