JENNIFER ZACHARY
EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL

CONFIDENTIAL

January 12, 2024

Merck & Co., Inc.
PO Box 2000
126 East Lincoln Avenue
Rahway, NJ 07065

merck.com

The Honorable Bernard Sanders
Chairman

Senate Committee on Health, Education,
Labor, and Pensions
United States Senate
428 Dirksen Senate Office Building
Washington, DC 20510

Re: Response to November 21, 2023, Letter to Robert M. Davis

Dear Chairman Sanders:

I write in response to your letter of November 21, 2023, inviting Robert M. Davis, Chief Executive Officer and Chairman of Merck & Co., Inc. ("Merck") to testify at a hearing before the Senate Committee on Health, Education, Labor, and Pensions ("HELP Committee") on January 25, 2024. In your letter and related letters sent to Bristol Myers Squibb and Johnson & Johnson, the HELP Committee expressed interest in better understanding how prescription drug prices are set in the United States, the effects that drug prices may have on the public health, and what relationship might exist between the costs of pharmaceuticals and business practices and profitability within the pharmaceutical industry. We appreciate the Committee's interest in these important subjects.

Ensuring that our prescription drug system provides access to affordable medicines without discouraging the development of innovative and lifesaving prescription drugs like those discovered and produced by our respective companies is an essential means of promoting the health and wellbeing of the American public, a goal that we share with the HELP Committee. Merck is committed to working with the U.S. government to enable patient-focused innovation, value and access. That is why, for example, we recently supported the Medicare Part D reforms to reduce out-of-pocket costs for prescription drugs. We also remain committed to addressing devastating diseases like cancer, but we need to make sure innovation is supported and encouraged by creating a policy environment conducive to the kind of sustained investment that leads to new treatments and lifesaving and life-improving breakthroughs for patients.

We are prepared to assist the HELP Committee in better understanding these subjects and exploring ways to promote public health. That said, the decision to invite only the three companies you have selected to testify at a January 25 hearing raises serious questions about whether the hearing is being planned in service of a valid legislative purpose and consistent with the First Amendment. As the HELP Committee is aware, Merck, J&J, and BMS (the "Companies") have filed lawsuits challenging on constitutional grounds the provisions of the Inflation Reduction Act ("IRA") of 2022 that created the "Drug Price Negotiation Program." The structure and operation of that Program are inconsistent with basic constitutional norms, and the Companies are entitled to air and seek resolution of their constitutional objections before an Article III court.

We appreciate that many Committee members have expressed their disagreement with our lawsuit, and we respect their good-faith views. That said, your public criticisms of the Companies for challenging the IRA and comments regarding hearing witnesses indicate that the invitations to testify have been extended as retaliation for the Companies' exercise of their constitutional right to seek relief in court.

Retaliation may be a way to chill disfavored speech, but it is not a valid basis upon which to hold a constructive hearing.

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Corporations have a right under the First Amendment to express their views on important subjects and to petition the government for redress. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010) ("First Amendment protection extends to corporations."). "[A]n aspect of the First Amendment right to petition the Government for redress of grievances" is the "right of access to the courts." *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983). It is in the exercise of that right that the Companies are litigating their constitutional challenges to the IRA's "Drug Price Negotiation Program."

The protections of the First Amendment bar "government officials from subjecting an individual to retaliatory actions for" exercising his constitutional rights. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (quotation omitted). For that reason, an official may not "take[] adverse action against someone based on" that person's protected activity, such as the filing of a lawsuit. *Id.* This prohibition on First Amendment retaliation applies to Congress when it acts in its investigative capacity just as it does, and to the same degree, as when Congress legislates. *See Quinn v. United States*, 349 U.S. 155, 161 (1955) ("[L]imitations on [Congress's] power to investigate are found in the specific individual guarantees of the Bill of Rights.").

Congress certainly has authority to "investigate matters and conditions relating to contemplated legislation," and the Companies respect the vital role that the HELP Committee plays in shaping public health policy. *Quinn*, 349 U.S. at 160. But the Committee may not exercise its investigative power to "'punish' those investigated." *Watkins v. U.S.*, 354 U.S. 178, 187 (1957). Such "[a]buses of the oversight process may imperceptibly lead to abridgment of protected freedoms," including the right to petition the government guaranteed by the First Amendment. *Id.* at 197.

Guided by these constitutional considerations, the HELP Committee's invitation for the Companies to appear at the Committee's January 25 hearing cannot be viewed in isolation. Critical statements, the timing of the invitation, and the identity of the witnesses you have chosen to invite all support an inference of retaliation. The hearing and invitation to testify appear intended to single out and punish the Companies for their decision to challenge the "Drug Price Negotiation Program" in court, and to dissuade other companies from similarly seeking a judicial resolution of the important constitutional questions that have been raised about the Program's legality.

The Companies repeatedly have been singled out for harsh criticism because of the lawsuits they have filed, and you have expressly tied the lawsuits to the January 25 hearing. In early November, a news report indicated that you "said [you] want[ed] executives of companies that have sued" Medicare over the "Drug Price Negotiation Program" "to be among the witnesses at an upcoming hearing on drug prices." Sarah Owermohle, *Sen. Sanders moves toward another hearing with pharma CEOs*, STAT+ (Nov. 7, 2021). Two weeks later, the invitations to appear before the Committee were sent, and, as it turned out, the three Companies that were asked to testify are the same three U.S.-based companies that are challenging the "Drug Price Negotiation Program". *See* U.S. Senator Bernard Sanders, Press Release: Chairman Sanders and All Democratic Members of the HELP Committee Invite Big Pharma CEOs to Testify at Hearing on Outrageously High Drug Prices (Nov. 21, 2023). No other U.S.-based company has litigation against the Program pending, and no other company was asked to testify.

The invitations' transmittal came on the heels of substantial media coverage of both Merck's IRA lawsuit (the first to be filed) as well as media coverage of the briefing in BMS's and J&J's IRA lawsuits, which was completed days before your letters issued. *See Janssen Pharmaceuticals, Inc., v. Becerra*, No. 3:23-cv-03818 Dkt. 71 (D. N.J. Nov. 24, 2023); *Bristol Myers Squibb Co. v. Becerra*, No. 3:23-cv-03335 (D. N.J. Nov. 24, 2023). These circumstances, considered alongside the statements mentioned, reinforce the inference that the invitation is the product of retaliatory animus. *Cf. Reyes-Orta v. Puerto Rico Highway &*

Transp. Auth., 811 F.3d 67, 78 (1st Cir. 2016) (holding that unusual "timing" of government action may demonstrate improper "politicized" motivation).

Given the Committee's stated interest in examining profits and executive compensation in the pharmaceutical industry, the choice of witnesses for the January 25 hearing is puzzling. Among major U.S. pharmaceutical companies, none of the three Companies had the highest profits in 2022, and the compensation paid to the Companies' chief executive officers is *lower* than the compensation of the chief executive officers at many other peer firms. It is apparent that many other large pharmaceutical companies would have been able to address the Committee's stated concerns just as well, if not better, than Merck, J&J, and BMS. But the only companies that were called to testify were the three that had filed lawsuits–lawsuits that you have roundly criticized. That fact says much about the likelihood of retaliatory motives. *See Nieves*, 139 S. Ct. at 1727 (holding that retaliation may be demonstrated where "otherwise similarly situated individuals not engaged in the same sort of protected speech" were not subjected to the adverse action).[1]

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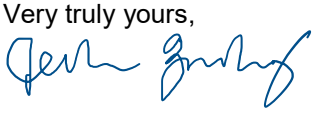
Notwithstanding these concerns, we proposed a variety of ways in which we would be willing to provide to the Committee information that could help further a valid legislative purpose. These included offering testimony from a witness well-suited to addressing substantive questions on U.S. pricing and commercialization issues, responding to written questions, and providing briefings to you and/or your staff. Your insistence on CEOs appearing at a public hearing serves only to underscore the concerns we have raised. You have opted not for the most effective way of securing information relevant to the Committee's important work on drug prices, but for a broad-ranging public spectacle, with witnesses you can question on pending litigation you disagree with. On that you are so focused that you are willing to threaten to issue the HELP Committee's first *ever* subpoenas to compel testimony.

We are willing, as always, to discuss how we could assist the Committee with valid, legislative inquiries, including through the various options we have offered to this point. But it is neither lawful nor appropriate for you to try to use the Committee's investigative powers to chill pending litigation or to punish the Companies for exercising their First Amendment right to raise constitutional challenges to congressional enactments. A hearing conducted in these circumstances would not serve a valid legislative purpose, and would be to the detriment of both the Companies and the Committee.

Very truly yours,



Jennifer Zachary
Executive Vice President and General Counsel

cc: Dr. William Cassidy, MD, Ranking Member

[1] Separate from its infringement on the Companies' First Amendment rights, the proposed hearing is also inappropriate to the extent that it would produce questions and exchanges about the IRA lawsuits that could affect the course of that litigation. A congressional hearing should not be used to influence judicial proceedings. But that is very likely what would occur at the January 25 hearing.