Prepared Statement of

James C. Cooper
Associate Professor
Antonin Scalia Law School
George Mason University

Joshua D. Wright
University Professor
Antonin Scalia Law School
George Mason University

John M. Yun
Associate Professor
Antonin Scalia Law School
George Mason University

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Investigation into the State of Competition in the Digital Marketplace

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EXECUTIVE SUMMARY

Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Subcommittee, thank you for offering us the opportunity to submit our written testimony on key antitrust questions involving the digital economy.

The extraordinary success of the digital sector of the domestic economy is indisputable. Digital platforms represent the top companies traded on the United States stock market, with trillions of dollars in aggregate market capitalization. With this level of market success, growth, and influence, it is inevitable that these businesses are increasingly in the forefront of public policy discussions. Most relevant for our purposes are the now-common claims that monopoly power is widespread in the digital economy, that these firms have systematically engaged in anticompetitive conduct, and that digital platforms' exercise of monopoly power has remained unchecked due to gaps in our antitrust laws or lax enforcement of existing laws.

The antitrust laws have a rich history, characterized by their flexibility and ability to adapt over time to changes in the structure of the economy, business models, and consumer preferences. Courts, antitrust scholars, and policymakers broadly agree that the antitrust laws should be interpreted and enforced to serve a uniform purpose: consumer welfare. The modern consumer welfare standard continues to provide a sound and stable intellectual foundation to guide the enforcement of the antitrust laws, including the digital marketplace, and leads us to several important conclusions.

First, the current body of doctrine regarding monopolization is more than sufficient to address the digital marketplace. As such, it is unnecessary to import the European concept of "abuse of dominance" into American antitrust doctrine. Doing so would penalize successful firms and directly harm the competitive process and thereby consumers. Additionally, present-day antitrust doctrine also adequately addresses concerns with platform self-preferencing, which can generate both procompetitive and anticompetitive effects. Finally, conflation of antitrust and privacy policy should be

avoided because the extent to which privacy serves as a dimension of competition is unclear and data collection can support higher quality products benefitting consumers.

Second, the existing antitrust laws are more than adequate to address horizontal mergers, vertical mergers, and the acquisition of nascent and potential competitors. Trends in rising national concentration do not equate to increases in market power. Those trends often obfuscate decreases in local market concentration and increased efficiency. A knee-jerk reaction to fears of increasing national concentration would be premature and possibly misguided. Specifically, more aggressive scrutiny toward vertical mergers is unwarranted by the evidence. The empirical literature to date simply does not support a presumption that vertical mergers are likely to harm consumers. Similarly, as it relates to nascent and potential competition, the evidence does not suggest that so-called "killer acquisitions," or enforcement involving nascent and potential competition, are blind spots for the agencies. Further, current law offers antitrust enforcers the tools they need to protect the competitive process.

Third, the institutional structure of antitrust enforcement is generally sound, and consequently, does not require any sweeping structural changes. For example, we do not believe that adding additional operating units comprising non-antitrust specialists (e.g., a "technology group") is warranted. Nonetheless, we do recommend some changes within the existing institutional structure that we believe would improve capabilities and transparency. Specifically, we believe that Congress should (1) expand the size and role of Ph.D. economists at both agencies; (2) eliminate the FTC Act's common carrier and non-profit exemptions; (3) formalize clearance agreements between the agencies to provide parties more transparency on which agency is likely to handle a merger or conduct an investigation; and (4) potentially consider dividing enforcement responsibilities between the two agencies to avoid duplication and allow for gains from specialization.