Enhancing Consumer Protections
and Connectivity in Air Transportation

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Thank you Chair Cantwell, Ranking Member Cruz, and Members of the Committee. It is an honor to be here today to lend the American Antitrust Institute's (AAI's) perspective to consumer protection and connectivity in the U.S. air transportation system. AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society.[1] We serve the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI has advocated for strong antitrust enforcement and competition policy in passenger air transportation for more than two decades. This is supported by research and education on the competition, consumer, and labor implications of airline mergers, joint ventures, slot allocation, antitrust immunity for alliances, and the distribution of airfare and schedule information.[2]

I. Summary of Major Issues

My testimony addresses the following major issues:

- **A loss of competition in passenger air transportation markets affects airfares and ancillary fees and quality of service**. As an important non-price metric of competition, the quality of products and services has only recently gained attention by antitrust enforcers. More attention should be paid to how consolidation in the U.S. passenger air transportation markets reduces competitive pressure to maintain and enhance quality of service.

- **Airline mergers and joint ventures are unlikely to produce enhanced "connectivity" for travelers.** U.S. air carriers have long justified proposed mergers and joint ventures on the basis of enhanced consumer benefits, or the ability of merged

[1] *See* https://www.antitrustinstitute.org.
[2] *See* https://www.antitrustinstitute.org/issues/airlines/.

carriers to offer new or more frequent service on combined networks. But analysis shows these claims do not always materialize and, in fact, some mergers actually create inefficiency.

- **Competition is essential for consumer choice and the stability and resiliency of the passenger air transportation system.** Consolidation in U.S. passenger air transportation markets has reduced choice for consumers. This means fewer options for consumers who want to purchase service that meets their needs. An air transportation system that features fewer rivals is also less likely to withstand shocks such as pandemic and extreme weather and to recover quickly from them.

- **Promoting competition and protecting consumers requires strong antitrust enforcement and coordinated regulatory oversight.** Historically, there has been less coordination on airline competition matters such as mergers, joint ventures, and slot allocation between the U.S. Department of Justice (DOJ) and Department of Transportation (DOT). Coordination across these two prongs of government is essential for promoting competition and protecting consumers.

II. Introduction

The trend toward concentration in U.S. airline markets continues. There have been almost 20 mergers involving domestic carriers in the last two decades, six of which have involved mergers of major legacy or low-cost carriers (LCCs) or ultra-low-cost carriers (ULCCs).[3] This period of time has been marked by the sequential elimination of competing airlines, mounting antitrust concerns in passenger air transportation markets, and no meaningful greenfield entry of new carriers. Today, the U.S. passenger airline system is dominated by a tight oligopoly of carriers, with a small fringe of LCCs and ULCCs.

A common justification for airline mergers and joint ventures is to bulk up to compete better against other large competitors.[4] This has never been a valid legal or economic rationale for allowing any merger under U.S. antitrust law. Moreover, it puts passenger air service markets on the slippery slope of ever-rising concentration and erects barriers to entry to new, smaller rivals. Recent proposed mergers and joint venture agreements, including the mergers of Frontier-Spirit and JetBlue-Spirit, and the American-JetBlue codeshare (the "Northeast Alliance") would further erode competition, to the detriment of consumers and workers.

These deals threaten higher airfares and ancillary fees, lower quality of service and less innovation, and less choice for consumers; and lower wages and less bargaining power for airline workforces. The further loss of competition through mergers and joint venture agreements is also likely to reduce the stability and resiliency of the air transportation system by eliminating redundancy and diversity of carriers.

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[3] *U.S. Airline Mergers and Acquisitions*, AIRLINES FOR AMERICA (Jan. 17, 2023), https://www.airlines.org/dataset/u-s-airline-mergers-and-acquisitions/.
[4] *See, e.g., JetBlue Releases Analysis Further Demonstrating Procompetitive Benefits of Combination with Spirit,* JETBLUE (Mar. 6, 2023), https://news.jetblue.com/latest-news/press-release-details/2023/JetBlue-Releases-Analysis-Further-Demonstrating-Procompetitive-Benefits-of-Combination-with-Spirit/default.aspx.

Antitrust concerns over the harmful effects of consolidation are on the rise. For example, the DOJ filed suit against United and Delta in 2015, alleging the illegal acquisition of takeoff and landing slots at Newark's Liberty International Airport.[5] The DOJ also filed suit against American and JetBlue in 2021, alleging that the carriers' Northeast Alliance codeshare agreement violated Section 1 of the Sherman Act.[6] Finally, the DOJ filed suit in March 2023 to block the merger of JetBlue and Spirit, alleging that the merger would eliminate head-to-head competition, facilitate anticompetitive coordination, and reduce consumer choice.[7] Private antitrust class actions have also been brought against U.S. carriers, including the 2010 case involving anticompetitive collusion on baggage fees between then low-cost-carriers Southwest and AirTran.[8]

High and rising market concentration is the root of the competitive concerns in the foregoing antitrust cases. Dominant carriers and oligopolies of carriers have strong incentives to protect their dominant positions and to coordinate to keep capacity tight and airfares and fees high, respectively. Preventing further increases in market concentration that hurts consumers and workers, and jeopardizes the stability and resiliency of the passenger air transportation system will require a coordinated response by legislators, enforcers, and regulators. Such a response, which should have been implemented years ago, should be a high priority for federal and state governments.

III. A Loss of Competition in Passenger Air Transportation Markets Affects Airfares and Ancillary Fees and Quality of Service

Airline mergers and joint ventures affect competition in two major ways. One is the elimination of head-to-head competition between merging or joint venture carriers. A second is stronger incentives for the remaining carriers in the market to coordinate, rather that compete. Both of these competitive effects result in a range of adverse price and non-price effects. For example, on routes where mergers and joint ventures eliminate a head-to-head competitor or result in a smaller number of carriers on the routes, airfares are likely to rise. For mergers involving ULCs or ULCCs, which use a bundled model with separate ancillary fees for baggage, priority boarding, and other services, eliminating competition will put upward pressure on those fees.[9]

The stepwise elimination of competition in passenger air transportation markets over the last two decades has also raised questions around the degradation in quality of service. Adverse

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5 U.S. v. United Continental Holdings, Inc. and Delta Air Lines, Inc., Verified Compliant, Case No. 2:33-av-00002 (D.N.J., filed Nov. 10, 2015).

6 U.S., et al., v. American Airlines Group Inc. and JetBlue Airways Corporation, Complaint, Case No. 1:21-cv-11558 (D. Mass., filed Sept. 21, 2021).

7 U.S., et al., v. JetBlue Airways Corp. and Spirit Airlines, Inc., Complaint, Case No. 1:23-cv-10511 (D. Mass., filed Mar. 7, 2023).

8 In Re Delta/AirTran Baggage Fee Antitrust Litigation, Case No. 1:09-cv-01391-TCB, (N.D. Ga., filed Aug. 2, 2010).

9 *See, e.g.,* Letter from the American Antitrust Institute to the Honorable Jonathan Kanter, Re: Antitrust Review of the Spirit Airlines-Frontier Airlines Merger, AMERICAN ANTITRUST INST. (Apr. 5, 2022), at § IV.A., https://www.antitrustinstitute.org/wp-content/uploads/2022/04/AAI_Spirit_Frontier_Letter-to-DOJ_4.5.22.pdf.

effects result from, for example, less competitive pressure to quickly and smoothly integrate the systems of merging carriers, including information technology, labor workforces, frequent flyer programs, and aircraft configurations. Evidence from previous airline mergers indicates that combining airline systems post-merger has been expensive and protracted. For example, US Airways explained in 2006 that "*The integration of US Airways Group and America West Holdings has been and will continue to be costly, complex and time consuming, and management will continue to devote substantial effort to that integration and may have its attention diverted from ongoing operational matters or other strategic opportunities."*[21] United-Continental also struggled with system integration post-merger, problems that directly affected quality of service and caused significant public backlash.

A loss of competition also reduces competitive pressure on carriers to maintain or enhance quality post-merger. This increases consumer search costs and inconvenience and degrades the passenger experience. Mergers and joint ventures that combine: (1) ULCCs with poor-quality records, or (2) mixed models such as a ULCC and full-service carrier, increase the risk that quality deteriorate post-consolidation. For example, AAI examined the service quality records of Spirit and Frontier from 2015 to 2021 and found that Spirit ranked, on average, in the bottom twentieth percentile for on-time arrivals while Frontier ranked in the bottom sixth percentile [10] Spirit ranked, on average, in the top twentieth percentile for the most customer complaints while Frontier ranked in the top thirty-fifth percentile.[11]

The elimination of competition between Spirit and Frontier, should the carriers have merged, would likely have exacerbated their history of poor service quality performance, to the detriment of consumers. It is vital, therefore, that antitrust enforcement and sector regulation look carefully at how airline competition affects the price and non-price dimensions of competition.

IV. Airline Mergers and Joint Ventures Are Unlikely to Produce Enhanced "Connectivity" for Travelers

There are two categories of benefits or "efficiencies" that are typically offered by airlines seeking to justify mergers, joint ventures, and requests for antitrust immunity for alliances. One category is cost savings that are projected to result from integrating information systems, better utilization of gate space and other facilities such as hangars and leaseholds, and increased operational efficiency. A second category of efficiencies is network benefits from post-merger capacity management and enhanced connectivity for consumers. There are a number of potential sources of network benefits: adding destinations to the combined network, offering more round-trip options on existing routes, converting interline service into single line service, optimizing the combined fleet of aircraft across a larger network, and scheduling improvements.

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[10] *Id.* Citing Air Travel Consumer Reports, U.S. Dep't. of Transportation, Office of Aviation Consumer Protection, June 2015, June 2018, and June 2021 reports, https://www.transportation.gov/individuals/aviation-consumer-protection/air-travel-consumer-reports.

[11] AAI research shows that ULCs have historically had the most delays. For example, over the period 2004-2013, regional carriers saw a slight decline in delays, hub-and-spoke carriers showed an 11% increase in delays, but low-cost carriers showed a 47% increase in delays. *See,* Diana L. Moss, *Delivering the Benefits? Efficiencies and Airline Mergers*, American Antitrust Inst. (Nov. 21, 2013), at 15-16, https://www.antitrustinstitute.org/wp-content/uploads/2013/12/AAI_USAir-AA_Efficiencies-1.pdf.

Efficiencies from airline consolidation have been the focus of considerable analysis and growing skepticism. As one expert summed up a decade ago: *"It is pretty difficult looking at the U.S. airline industry [to believe] that mergers are actually going to lower costs. There is no evidence that they deliver more cost-efficiency.*"[12] Claims of network benefits are viewed even more skeptically. A number of factors create a highly fluid landscape, against which efficiencies claims become highly uncertain. These include: (1) different economics of hub-and-spoke networks operated by the legacy network carriers and the point-to-point networks operated by ULCs and ULCCs, (2) entry and exit into route-level markets, (3) strategic pricing by other carriers, and (4) profitability of routes.

There are three major examples that undercut claims that airline consolidation improves connectivity and benefits consumers. First, analysis of past airline mergers reveals that network benefits from increased connectivity after the Delta-Northwest, United-Continental, and Southwest-AirTran mergers did not fully materialize. Indeed, airlines cut airport-pairs from their systems post-merger and ULCs cut a substantially higher percentage than did legacy airlines.[13] More recently, AAI analyzed claims of network benefits from combining the Spirit and Frontier networks. Changes in entry and exit on routes between 2015 and 2021 showed that the carriers exited more than 50% of routes and entered only 35-40% of routes.[14] This high rate of churn in the Spirit and Frontier route systems strongly suggests that the carriers would still have engaged in rapid entry and exit from route-level markets had they merged, undercutting claims of long-term enhanced connectivity.

The economic reality is that airlines will only enter and remain in markets when they are profitable. Otherwise, they will exit routes. This fact casts significant doubt on claims that post-merger, carriers will increase long-term connectivity for consumers. Southwest Airlines confirmed this in 2011 at a Senate Judiciary Committee hearing on the Southwest-AirTran merger. There, Senator Kohl asked Southwest's CEO Gary Kelly: "*Would you at this time commit to maintaining AirTran's service and its growth plans at Mitchell Airport after this merger takes place?* Mr. Kelly responded: "*Mr. Chairman, we are very enthused about Milwaukee. We are very enthused about continuing to grow Southwest Airlines...I just cannot guarantee that we will have the fiscal ability to do that."*[15]

Second, past airline consolidation has resulted in the "de-hubbing" of cities in the hub-and-spoke networks of the legacy airlines. High profile examples of hub cutbacks include Cincinnati (Delta) where scheduled departures between 2007 and 2021 declined by 63%, Cleveland (Continental) with a 25% decrease, Memphis (Northwest), with a 35% decrease, Pittsburgh (US Airways), with a 40% decrease, and St. Louis (American), with a 25% decrease.[16] The de-hubbing of the Midwest has had material impacts on the accessibility of passenger air

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[12] Kristen Leigh Painter, *United Airlines is one big company, but not yet one happy family*, DENVERPOST.COM (Sept. 8, 2013), http://www.denverpost.com/business/ci_24036565/united-airlines- is-one-big-company-but-not.
[13] *Delivering the Benefits? Efficiencies and Airline Mergers*, *supra* note 11, at § VI.
[14] AAI Letter to DOJ on Spirit-Frontier, *supra* note 9, at § III.C.
15 The Southwest/AirTran Merger and its Impact On M-7 Businesses, Consumers, and the Local Economy, Hearing Before the Subcommittee On Antitrust, Competition Policy And Consumer Rights of the Committee on the Judiciary, United States Senate, 112th Congress (Feb. 25, 2011).
[16] *Delivering the Benefits? Efficiencies and Airline Mergers*, *supra* note 11, at § VI.

service for a major segment of the U.S., with outsized effects on smaller communities where consumers are forced to travel greater distances to access airports.

Third, the DOT has approved numerous airline joint venture alliances involving carrier cooperation on activities such as: interlining with carrier partners, sharing frequent flyer programs, codesharing, coordinating pricing and schedules, and fully integrated, immunized revenue and profit-sharing joint-venture type coordination.[17] Immunity for airline alliances is a form of express statutory immunity that is granted by DOT under its public interest standard, pursuant to 49 U.S.C. § 41308-309. There are currently 25 active immunized alliances.[18] Alliance carriers support requests for immunity by asserting, among other things, that passengers benefit from integrating itineraries on connecting routes, thus enhancing competition in behind- or beyond-the-gateway segments and lowering fares.

However, recent economic studies of the benefits cast doubt on the benefits of immunity.[19] For example, immunity may lead to less competition—on non-stop and one-stop routes—in transatlantic markets.[20] Moreover, while immunized JVs may increase capacity at hubs, it comes at the expense of services elsewhere in the network.[21] When alliance carriers compete with a non-alliance interlining carrier, the latter are foreclosed, increasing disparities in market share and decreasing interlining traffic.[22] The evidence on the costs and benefits of immunity highlights how consolidation and coordination can decrease connectivity for consumers and why DOT should take a more cautious approach to granting immunity.

V. Competition is Essential for Consumer Choice and the Stability and Resiliency of the Passenger Air Transportation System

Competition is essential to enable consumers to choose air service that meets their needs and pocketbooks, as well as for promoting the stability and resiliency of the passenger air transportation system. Past consolidation has eroded these important features of competition in the passenger air transportation system. As air travel has become more accessible to different segments of consumers, the industry has satisfied different types of demand with different business models and pricing structures. The legacy airlines still adhere primarily to a full-service model, with integrated pricing for air service and ancillary services. The ULCC model (e.g., Spirit and Frontier) features unbundling of ancillary fees (e.g., baggage, boarding, seat selection, etc.) from fares as part of a "fare+fee" model. JetBlue offers a hybrid, LLC and full-service, model.

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[17] *See* Paul Stephen Dempsey, *Airline Alliances* 13 (Institute of Air & Space Law, 2011), https://www.mcgill.ca/iasl/files/iasl/ASPL614-Alliances.pdf.

[18] *Airline Alliances Operating With Active Antitrust Immunity*, U.S. DEP'T. OF TRANS. (updated Apr. 3, 2019), https://www.transportation.gov/office-policy/aviation-policy/airline-alliances-operating-active-antitrust-immunity.

[19] *See, e.g.*, William Gillespie & Oliver M. Richard, *Antitrust Immunity Grants to Joint Venture Agreements: Evidence from International Airline Alliances* at 7 (Economic Analysis Group Discussion Paper, EAG 11-1, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1764083.

[20] W. Tom Whalen, *A Panel Data Analysis of Code-Sharing, Antitrust Immunity, and Open Skies Treaties in International Aviation Markets*, 30 REV. INDUS. ORG. 39 (2007).

[21] Volodymyr Bilotkach & Kai Hüschelrath, *Balancing Competition and Cooperation: Evidence from Transatlantic Airline Markets* (Discussion Paper No. 15-059, August 2015), http://ftp.zew.de/pub/zew-docs/dp/dp15059.pdf.

[22] Volodymyr Bilotkach & Kai Hüschelrath, *Airline Alliances, Antitrust Immunity, and Market Foreclosure* at 8-10 (ZEW Discussion Paper No. 10-083, 2012), ftp://ftp.zew.de/pub/zew-docs/dp/dp10083.pdf.

The DOJ's recent lawsuit challenging the merger of JetBlue and Spirit focuses on effects that are central to the importance of maintaining a diverse system of carriers. For example, the complaint alleges that the elimination of Spirit—one of two national ULCCs—would make it easier for remaining rivals to coordinate on price and capacity.[23] But the complaint also alleged that the elimination of Spirit reduces important choice for consumers. In its letter to the DOJ on the proposed merger of Spirit and Frontier, AAI emphasized that the merger would lessen pressure on the merging parties to compete on ancillary fees under their fare+fee model, harming consumers that are particularly price sensitive.[24]

It is also clear that competition is necessary for the stability and resiliency of the passenger air service system. For example, early in the COVID-19 pandemic, disruption threatened and immobilized critical supply chains and systems. Many of these supply chains were marked by a lack of competition, creating bottlenecks and a lack of stability in the system that had serious consequences for consumer welfare, safety, and security.[25] Supply chains that feature robust competition at various levels are far more likely to ensure the reliable and stable distribution of products and services because there are more competitors working to fill the void.

The wave of consolidation that fundamentally reshaped the passenger air system in the U.S. over the last two decades has likely reduced the ability of the system to withstand external shocks. For example, the COVID-19 pandemic created shortages of pilots, crews, and other workforces while the industry struggled with plummeting demand and lower revenues. Fewer carriers, loss of competitive redundancy on routes, and higher barriers to entry for smaller entrants contribute to less resiliency in the system to withstand disruption. And in late December 2022, extreme weather created a cascading failure on the Southwest Airlines system.[26] The airline cancelled a significant percentage of flights, relative to other legacy, ULC, and ULCC carriers, stranding travelers and creating wider system disruption.[27]

These examples of disruption to the passenger air transportation system highlight the importance of maintaining a diversity of carriers *and* competition between carriers. Mergers that eliminate competition between carriers with similar business models (e.g., legacy or ULCC) or between carriers with similar network models (e.g., hub-and-spoke or point to point) eliminate important diversity and competition that is essential for maintaining stability and resiliency in the passenger air system.

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23 DOJ Complaint in JetBlue-Spirit, *supra* note 7.
24 AAI letter to DOJ on Spirit-Frontier, *supra* note 9.
25 Diana L. Moss and Laura Alexander, *When COVID-19 is the Symptom and Not the Disease: Consolidation, Competition, and Breakdowns in Food Supply Chains*, AMERICAN ANTITRUST INST. (May 7, 2020), https://www.antitrustinstitute.org/work-product/when-covid-19-is-the-symptom-and-not-the-disease-consolidation-competition-and-breakdowns-in-food-supply-chains/#_ftn4.
26 *Delays, cancellations continue for Southwest Airlines at Denver airport, days after freezing weather passes*, CPR NEWS (Dec. 26, 2022), https://www.cpr.org/2022/12/26/delays-cancellations-continue-for-southwest-airlines-at-denver-airport-days-after-freezing-weather-passes/.
27 On-Time Performance – Reporting Operating Carrier Flight Delays at a Glance. U.S. DEP'T. OF TRANS., BUREAU OF TRANS. STATS., queried for December 2022, https://www.transtats.bts.gov/HomeDrillChart_Month.asp?5ry_lrn4=FDFF&N44_Qry=E&5ry_Pn44vr4=DDD&5ry_Nv42146=DDD&heY_fryrp6lrn4=FDFF&heY_fryrp6Z106u=EF.

VI. Promoting Competition and Protecting Consumers Requires Strong Antitrust Enforcement and Coordinated Regulatory Oversight

While antitrust enforcement in the U.S. airline industry appears to be on the uptick, regulatory policy has not kept up with promoting competition. With a looser and often liberally interpreted public interest standard, the DOT has approved dozens of joint ventures that eliminate competition, blessing many of them with antitrust immunity so carriers engage, without impunity, in anticompetitive coordination, to the detriment of consumers. Nor has DOT stepped in to block airline mergers. It is, therefore, more important than ever for the two prongs of a public policy approach to promoting competition in airline markets to work together.

AAI has advocated for major regulatory overhauls at DOT to create coherent competition policy that bootstraps stronger antitrust enforcement in the airline sector. First, DOT's policy approach to approving joint venture agreements should be re-evaluated.[28] AAI has advocated for measures that recognize the increasingly high hurdle for justifying grants of antitrust immunity for joint ventures that eliminate head-to-head competition in exchange for amorphous benefits elsewhere in alliance networks. This higher level of scrutiny and vigilance should also extend to cooperative service agreements and codeshares. AAI urges DOT to consider a more robust process and specific criteria for making its public interest determinations in these cases.

Second, federal regulatory policy should focus on approaches that recognize the reality of the oligopoly of carriers that dominates the U.S. landscape. While the Federal Aviation Administration's initiatives on the slot allocation program is a move in the right direction, the difficulty faced by smaller carriers in securing slots at congested airports, which facilitate entry and competitive discipline, indicates the need to overhaul the slot administration system. AAI encourages DOT to consider a rulemaking to develop a new model and market design for slot allocation that will result in more efficient outcomes and control for market power. Common use gates at airports also increase ease of access by smaller rivals, and prevent hoarding of critical inputs by dominant players or tight oligopolies of carriers. AAI thus encourages the DOT to consider initiatives that create more access through such a program.

VII. Conclusions

AAI appreciates the opportunity to testify at this important hearing. We stand ready to assist the Committee members, DOT, DOJ, and state-level agencies in crafting ways to improve inter-agency coordination to promote competition in the passenger air transportation markets, for the benefit of consumers.

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[28] Letter to Honorable Pete Buttigieg and AAG Richard Powers, Re: Airline Joint Ventures in the Era of Oligopoly: Realigning Regulatory Policy with Tougher Antitrust Enforcement, AMERICAN ANTITRUST INST. (Oct. 13, 2021), https://www.antitrustinstitute.org/wp-content/uploads/2021/10/AAI-Ltr-on-NEA_10.13.21_Final.pdf.