Written Testimony of William J. McGee
Senior Fellow for Aviation and Travel
American Economic Liberties Project

Before the

U.S. Senate Committee on Commerce, Science, & Transportation Hearing:
"Enhancing Consumer Protections and Connectivity in Air Transportation"

Thank you, Chairperson Cantwell, Ranking Member Cruz, Chairperson Duckworth, Ranking Member Moran, and Members of the Committee. My name is William J. McGee, and I am the Senior Fellow for Aviation and Travel at the American Economic Liberties Project, a nonprofit organization dedicated to addressing the problem of concentrated economic power in America today. Starting in 1985, I spent seven years in airline flight operations management, and I am licensed by the Federal Aviation Administration (FAA) as an Aircraft Dispatcher. I then became an aviation investigative journalist, columnist, and author, writing extensively about the industry. For the last 20 years I have been an airline passenger advocate, testifying on consumer rights, competition, consolidation, safety, and security issues, and serving as the lone consumer advocate on Transportation Secretary LaHood's Future of Aviation Advisory Committee.

The nation's airline industry is broken, and it has found us all lurching from crisis to crisis, meltdown to meltdown, as the interests of consumers, workers, and entire regions of the country are subjugated to the interests of a virtual handful of institutional investors, lobbyists, and senior executives. Every day passengers are faced with fewer choices, higher fares, and a plethora of junk fees added onto airfares. Flight disruptions have become the norm rather than the exception, and when things go wrong–as they so often do now–we are at the mercy of the airlines' own Contracts of Carriage, rules written by and most assuredly for the airlines. American Airlines is about to launch "New Distribution Capability," which will make airfares more opaque than ever.[1] Despite the industry notching record consumer complaints in recent years, Frontier Airlines may well have been speaking for all US airlines last November when it permanently shut down its telephone call centers; the message was clear: don't bother calling, because we don't want to hear from you.[2]

We have seen new lows in customer service, despite a $54 billion taxpayer bailout during Covid-19. Over the last two years alone we have seen record numbers of flight delays and cancellations, $10 billion in unpaid refunds, tighter and tighter seats that pose health and safety threats not just to the disabled but to all passengers, and ubiquitous junk fees that President Biden referenced in his recent State of the Union address, including the nefarious practice of charging families with young children to sit together. Airfares have never been more confusing, more opaque, and less tied to the cost of operation. Every day some 303 million fares are uploaded worldwide. We see significant threats to the nation's stellar aviation safety record overlooked, particularly with FAA oversight of outsourced aircraft maintenance to foreign repair stations and oversight of manufacturers, as exemplified by the Boeing 737 MAX debacle; efforts to weaken pilot standards; and a refusal to mandate restraints for children under 2. The industry shows tremendous regional inequities, with entire sections of the country denied fair access to air travel, as only larger cities and population centers have frequent and nonstop flights at reasonable cost. Overall, passengers have never been more dissatisfied, airline labor has been decimated by layoffs and outsourcing, and major cities have lost the airport hubs and frequent service that incite corporations to move headquarters. At

[1] American Airlines Newsroom, "A Modern Retailing Experience: American Airlines Signs New Agreements With All Three Major Global Distribution Systems," October 24, 2022, https://news.aa.com/news/news-details/2022/A-Modern-Retailing-Experience-American-Airlines-Signs-New-Agreements-With-All-Three-Major-Global-Distribution-Systems-MKG-OTH-10/default.aspx.

[2] Ed Markey, Press Release, "In Wake of Holiday Travel Chaos, Senators Markey, Blumenthal, Reps. Cohen, Garcia, Khanna Reintroduce Legislation to Groun Airlines' Skyrocketing Fees," January 31, 2023, www.markey.senate.gov/news/press-releases/in-wake-of-holiday-travel-chaos-senators-markey-blumenthal-reps-cohen-garcia-khanna-reintroduce-legislation-to-ground-airlines-skyrocketing-fees; Department of Transportation, Air Travel Consumer Report, February 2021, www.transportation.gov/sites/dot.gov/files/2021-02/February_%202021%20ATCR.pdf; Giulia Heyward, "Frontier Airlines drops its customer service line," NPR, November 26, 2022, www.npr.org/2022/11/26/1139291958/frontier-airlines-drops-its-customer-service-line.

no time in the industry's 109-year-old history have Americans had fewer choices in commercial air service, and at no time have the adverse effects on consolidation been so harmful.[3]

In recent months AELP has been very vocal on a variety of airline consumer issues, including:
* fighting to provide basic passenger rights (such as those that are mandatory in the European Union, Canada, and other nations) so that passengers are guaranteed compensation for flight delays, flight cancellations, and involuntary bumping, and ensuring that aircraft seat sizes meet minimum size dimensions
* fighting to ensure that airlines are prohibited from charging unreasonable "junk fees"
* fighting to prevent airlines from charging fees for families with children under 13 to sit together inflight
* fighting to ensure consumers are given full cash refunds when their flights are canceled

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[3] Bureau of Transportation Statistics, On-Time Performance - Reporting Operating Carrier Flight Delays at a Glance, www.transtats.bts.gov/homedrillchart.asp; Senator Markey, Press Release, "Senators Markey and Blumenthal Blast Airlines' Inadequate Response to their Request to Eliminate Expiration Dates for All Pandemic-Related Flight Costs," June 1, 2021, www.markey.senate.gov/news/press-releases/senators-markey-and-blumenthal-blast-airlines-inadequate-response-to-their-request-to-eliminate-expiration-dates-for-all-pandemic-related-flight-credits; Comments of American Economic Liberties Project, Consumer Action, Consumer Federation of America, Ed Perkins on Travel, National Consumers League, and U.S. PIRG, Docket No. FAA-2022-1001, November 1, 2022, nclnet.org/wp-content/uploads/2022/11/NCL-et-al-SS-RFC-Comments-FINAL-AS-FILED.pdf; American Economic Liberties Project, "Congress and DOT Must Permanently End Family Seating Fees," Press Release, February 21, 2023, www.economicliberties.us/press-release/congress-and-dot-must-permanently-end-family-seating-fees/; Transport Workers Union Local 514, "Aircraft Maintenance Outsourcing," June 6, 2019, twu514.org/aircraft-maintenance-outsourcing-summit-video/; Department of Transportation Office of Inspector General, Boeing 737 MAX, www.oig.dot.gov/related-library-items-tags/boeing-737-max; Department of Transportation, The Future of Aviation Advisory Committee Final Report, April 11, 2011, www.transportation.gov/sites/dot.gov/files/docs/faac-final-report-for-web.pdf; Department of Transportation, Domestic Airline Consumer Airfare Report, www.transportation.gov/office-policy/aviation-policy/domestic-airline-consumer-airfare-report-pdf; Alana Semuels, "Airlines Are Terrible. Small Cities Are Still Paying Them Millions of Dollars to Stick Around," Time Magazine, January 17, 2023, time.com/6247052/airlines-deregulation-american-inequality/.

The United States has not had a national discussion about the state of our commercial aviation system for 45 years, and the problems that have arisen since the 1970s grow more acute month after month. We are long overdue for such a broad discussion, a discussion which transcends the latest crisis du jour–unpaid refunds during the pandemic, flight cancellations due to crew shortages, Southwest Airlines' holiday IT meltdown, the FAA's NOTAM outage. These are the symptoms, not the causes, of much larger difficulties. The airlines are broken, and the regulatory model overseeing the airlines is just as broken.

The Failures of Deregulation

We in the United States often tell ourselves a story about airline deregulation, and it goes something like this. The airline industry used to be regulated by a cumbersome, slow bureaucracy called the Civil Aeronautics Board, which set the routes that airlines could fly, set the fares that they were allowed to charge consumers, and became captured by the big airlines such that no new-entrants were allowed. In 1978, we passed the Airline Deregulation Act which allowed new airlines to enter the market and charge whatever prices the market would bear, promising to introduce competition, lower fares, and expand access to flying for millions of Americans. The airlines and the defenders of deregulation will tell you that deregulation generated three great improvements in air travel: 1) more Americans started flying; 2) fares started dropping; and 3) the safety record started improving.[4]

This story can be compelling. However, in the 45 years since the Airline Deregulation Act was passed in 1978, one by one the central promises of more competition and better service have been broken. What they fail to note is that ALL THREE of these trends started long before deregulation, and in

[4] S. 2493, Airline Deregulation Act, 95th Congress, 1978 https://www.congress.gov/bill/95th-congress/senate-bill/2493/text; Edward M. Kennedy, "Airline Regulation by the Civil Aeronautics Board," Journal of Air Law and Commerce, 1975, scholar.smu.edu/cgi/viewcontent.cgi?article=2106&context=jalc.

all three cases the improvements were greater prior to 1978. The decline in passenger fares, in particular, actually slowed down post-deregulation.[5]

Consolidation

Deregulation was based on faulty premises–that eliminating government oversight would introduce competition, lower prices, and better customer experience–and ignoring the positive role that government regulation had played in stabilizing the industry. In the 1980s, when deregulation led to a series of price wars between major airlines and put many of them out of business by the 1990s, proponents of deregulation saw these developments as positive. Competition was at work to bring prices down for flyers. However, without any oversight to stabilize the industry from price wars of this sort, the industry faced stark choices to either risk bankruptcy or to consolidate into larger airlines.

These pressures eliminated many airlines through either bankruptcy or merger activity. We have seen more than 100 bankruptcies in the last four decades, many due to major carriers driving out smaller, Low Cost Carriers (LCCs). As a result:

- We currently have fewer domestic scheduled passenger airlines than we have had since the 1910s, and the dozens of former carriers include such iconic brands as Pan Am, Eastern, TWA, America West, ATA, Midwest, Northwest, Continental, AirTran, US Airways, and Virgin America.
- We currently have fewer major carriers than at any time, with an oligopoly of four major carriers and their partners–American, Delta, Southwest, and United–controlling 80% of the domestic market.

[5] Airlines for America, "Air Travelers in America: Annual Survey," June 23, 2022, www.airlines.org/dataset/air-travelers-in-america-annual-survey/; william C. Goodman, "Transportation by air: job growth moderates from stellar rates," Bureau of Labor Statistics, March 2000, www.bls.gov/opub/mlr/2000/03/art3full.pdf; Boeing, "Statistical Summary of Commercial Jet Airplane Accidents: Worldwide Operations 1959-2021," August 2022, www.boeing.com/resources/boeingdotcom/company/about_bca/pdf/statsum.pdf.

- We recently had the longest drought in airline history, from 2007 to 2021, of no new-entrant scheduled airlines for 14 years.[6]

Making this situation worse, under deregulation we have seen a weaker DOJ on antitrust and merger enforcement. Dozens of mergers and acquisitions have been rubber-stamped by the US Departments of Justice (DOJ) and Transportation (DOT) in recent decades, including the "mega-mergers" of Delta-Northwest, United-Continental, and American-US Airways that morphed the Big Six network hub-and-spoke airlines into the Big Three. For context, Airlines for America reports that in the 60 years from 1930 to 1990 there were 28 mergers & acquisitions among US airlines, but in the next 30 years through 2020–half that span–there were 29. Third, Wall Street investors engage in "common ownership" practices by simultaneously investing in all of the four largest airlines, thereby discouraging true competition, and providing a higher barrier to entry for low fare competitors than ever existed during the regulated era.[7]

And despite all of this consolidation, the industry is still not stable or consistently profitable, as seen by its need for a specific bailout from the federal government every time there is a significant economic crisis. This is an industry that socializes the losses and privatizes the profits. American taxpayers provided the airlines with a $54 billion bailout during Covid, but that has not stopped the industry from prioritizing stock dividends, buybacks, and executive bonuses.[8]

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[6] Airlines for America, U.S. Airline Bankruptcies, August 24, 2022, www.airlines.org/dataset/u-s-bankruptcies-and-services-cessations/; Airlines for America, U.S. Airline Mergers and Acquisitions, January 17,2023, www.airlines.org/dataset/u-s-airline-mergers-and-acquisitions/;
Statista, Leading airlines in the U.S. by domestic market share 2021, February 3, 2023, www.statista.com/statistics/250577/domestic-market-share-of-leading-us-airlines/; William J. McGee, Comments Concerning the U.S. Airline Industry, Response to Request for Information on Merger Enforcement, April 2022, www.economicliberties.us/wp-content/uploads/2022/04/2022-04-20-AELP-DOJ-FTC-Airlines-McGee.pdf.

[7] Airlines for America, "U.S. Airline Bankruptcies," August 24, 2022, www.airlines.org/dataset/u-s-bankruptcies-and-services-cessations/;
Mergers and Acquisitions, January 17,2023, www.airlines.org/dataset/u-s-airline-mergers-and-acquisitions/; William J. McGee and Lee Hepner, "How to Address the Air Travel Crisis: Eliminating The Airlines' Legal Liability Shield," American Economic Liberties Project, September 2022, www.economicliberties.us/wp-content/uploads/2022/09/2022-9-07-AirTravelCrisis_Quick-Take-FINAL.pdf.

[8] Consumer Reports, "CU to Testify on Dangers of United/Continental Merger at House Hearing," June 15, 2010,

What to Do Now

We find this industry in dire straits, and no one simple answer will resolve all of the problems, but there are several actions that the executive and legislative branches could take.

First, AELP urges the Members of the Senate Commerce Committee to consider the pro-consumer legislation we have supported in recent months. This includes:

• The "Airline Passengers' Bill of Rights," which among other provisions includes compensating passengers for flight delays and cancellations, mandating minimum seat size standards, and providing compensation for involuntary denied boarding: www.markey.senate.gov/news/press-releases/senators-markey-blumenthal-lead-in-introducing-legislation-to-bolster-airline-passenger-protections#:~:text=Among%20a%20host%20of%20key,%241%2C350%20to%20passengers%20denied%20boarding

• The "Forbidding Airlines from Imposing Ridiculous (FAIR) Fees Act," which would prohibit airlines from charging unreasonable fees: www.markey.senate.gov/news/press-releases/in-wake-of-holiday-travel-chaos-senators-markey-blumenthal-reps-cohen-garcia-khanna-reintroduce-legislation-to-ground-airlines-skyrocketing-fees

• The "Families Fly Together Act," to ensure that passengers do not have to pay fees to ensure children under 13 are seated with their families:

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www.consumerreports.org/media-room/press-releases/2010/06/cu-to-testify-on-dangers-of-unitedcontinental-merger-at-house-hearing/; William J. McGee, "It's Time to Finally Fix Air Travel," New York Times, January 13, 2023, www.nytimes.com/2023/01/13/opinion/faa-air-travel-regulation-outage.html; Southwest Airlines Investor Relations, "Southwest Airlines Reinstates Quarterly Dividend," December 7, 2022, www.southwestairlinesinvestorrelations.com/news-and-events/news-releases/2022/12-07-2022-114528327; Rajesh Kumar Singh, "CU to Testify on Dangers of United/Continental Merger at House Hearing," Reuters, August 18, 2022, www.reuters.com/business/aerospace-defense/airline-unions-launch-campaign-against-stock-buybacks-2022-08-18/.

www.markey.senate.gov/news/press-releases/as-president-targets-junk-fees-and-airlines-fail-flyers-senator-markey-introduces-families-fly-together-act-so-parents-dont-pay-to-sit-with-their-children

• The "Cash Refunds for Flight Cancellations Act," which would force airlines to pay cash refunds when they cancel flights: https://raskin.house.gov/2023/2/raskin-markey-blumenthal-and-cohen-reintroduce-cash-refunds-for-flight-cancellations-act-to-protect-rights-of-airline-passengers

Second, any further consolidation of the industry should be halted. AELP strongly opposes the proposed merger of JetBlue Airways and Spirit Airlines, because it will eradicate the nation's largest Ultra Low Cost Carrier (ULCC), drive up fares nationwide, and position JetBlue not to fight the Big Four but to expand the oligopoly into the Big Five. We applaud the Department of Justice and the Department of Transportation for opposing this harmful acquisition. According to the DOJ: "Spirit estimates that when it starts flying a route, average fares fall by 17%; JetBlue estimates that when Spirit stops flying a route, average fares go up by 30%." In fact, last year AELP called for the DOJ and Federal Trade Commission to impose a moratorium on ALL airline mergers until the widespread negative effects of all this consolidation can finally be examined by the DOJ and DOT.[9]

Third, state governments and citizens should be given greater rights to police the industry. One of the most harmful byproducts of deregulation was the inclusion of a federal preemption clause, which effectively gave only Congress and the US Department of Transportation authority to oversee the airlines. For 45 years this has meant that state courts, state attorneys general, and state legislatures have been largely powerless in reigning in the

[9] Complaint, United States v. Jetblue Airways Corporation, Case 1:23-cv-10511, March 7, 2023, https://www.justice.gov/opa/press-release/file/1572461/download; American Economic Liberties Project, "Economic Liberties Applauds DOJ for Blocking JetBlue-Spirit Merger, Urges DOT to Join in Protecting Passengers, Workers & Communities," March 7, 2023, www.economicliberties.us/press-release/economic-liberties-applauds-doj-for-blocking-jetblue-spirit-merger-urges-dot-to-join-in-protecting-passengers-workers-communities/; William J. McGee, Comments Concerning the U.S. Airline Industry, Response to Request for Information on Merger Enforcement, April 2022, www.economicliberties.us/wp-content/uploads/2022/04/2022-04-20-AELP-DOJ-FTC-Airlines-McGee.pdf.

excesses of the industry's anti-competitive greed and mistreatment of passengers, and consumers have had fewer rights when interacting with airlines than they have with virtually any other consumer industry. AELP has drafted model legislation calling for the elimination of preemption, and we're working with Members to see that it will soon be introduced as part of this year's FAA Reauthorization Act.[10]

Fourth, we need to fundamentally reconsider our approach to regulating the airline industry. Blocking further consolidation in the industry and providing passengers with greater legal recourse are certainly improvements, but they do not attack the root causes of the problem. The airline industry faces such immense incentives for consolidation that blocking a single merger, or five mergers, will not solve. And airlines likewise exist in an unstable market environment that gives them strong incentives to take advantage of, abuse, and rip off consumers. Any farsighted policy solution needs to eliminate these underlying incentives in the industry, rather than put a Band-Aid on the problems that they cause. This means seriously reconsidering options to more comprehensively regulate the industry once again.

Thank you very much. AELP will be happy to respond to any questions from the Committee.

[10] William J. McGee and Lee Hepner, "How to Address the Air Travel Crisis: Eliminating The Airlines' Legal Liability Shield," American Economic Liberties Project, September 2022, www.economicliberties.us/wp-content/uploads/2022/09/2022-9-07-AirTravelCrisis_Quick-Take-FINAL.pdf.