

BEFORE THE DEPARTMENT OF JUSTICE  
AND THE FEDERAL TRADE COMMISSION  
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COMMENTS CONCERNING THE U.S. AIRLINE INDUSTRY  
RESPONSE TO "REQUEST FOR INFORMATION ON MERGER  
ENFORCEMENT"

PREPARED BY WILLIAM J. MCGEE  
ON BEHALF OF THE AMERICAN ECONOMIC LIBERTIES PROJECT  
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## Overview

The American Economic Liberties Project (AELP) commends the Antitrust Division of the U.S. Department of Justice (DOJ) and the U.S. Federal Trade Commission (FTC) for seeking public comment on "how the agencies can modernize enforcement of the antitrust laws regarding mergers."<sup>1</sup> We believe this effort is long overdue, and we offer these comments in regard to the domestic airline industry, which in recent decades has devolved into an ever-shrinking oligopoly that offers diminished flight options throughout the country, higher fares in markets not served by low-cost carriers, incessant fees, and an overall degradation in customer service.

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<sup>1</sup> U.S. Department of Justice, U.S. Federal Trade Commission; "Request for Information on Merger Enforcement"; January 18, 2022; ([www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers](https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers))

We also were heartened in July 2021 by President Biden’s Executive Order on “Promoting Competition in the American Economy,” particularly because this document specifically referenced the airline industry. The EO cited “reduced competition” and its effects on service, fees, and refunds.<sup>2</sup>

It’s past time for the DOJ and the FTC to recognize and address the pernicious effects of rubber-stamping merger after merger in the airline sector. Three decades ago, there were 11 legacy network airlines in the United States, whereas today more than 80% of the domestic market is dominated by the “Big Three”—American Airlines, Delta Air Lines, and United Airlines—alongside Southwest Airlines, which increasingly is failing to operate as the low-fare leader it once was. The series of mergers, acquisitions, and shutdowns that eliminated US Airways, Continental Airlines, Northwest Airlines, America West Airlines, Trans World Airlines, Pan American World Airways, Midway Airlines, and Eastern Air Lines have harmed millions of Americans. This has been compounded by the acquisitions of dozens of smaller carriers in recent years, including Virgin America by Alaska Airlines, AirTran Airways and American Trans Air by Southwest, and a three-way consolidation between Republic Airways, Midwest Airlines, and Frontier Airlines. Additionally, there have been multiple mergers among regional airlines contracted to operate on behalf of major airlines.<sup>3</sup> Such harm hasn’t been limited just to air travelers, but also to communities affected by cessations of service, downsizing and elimination of airport hubs, massive lay-offs, and the loss of corporate headquarters that have damaged entire cities and even regions.

We remain concerned that the criteria used by the DOJ and other government agencies to evaluate and approve airline mergers and

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<sup>2</sup> The White House; “Executive Order on Promoting Competition in the American Economy”; July 9, 2021; ([www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/](https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/))

<sup>3</sup> Airlines for America; “U.S. Airline Mergers and Acquisitions”; updated April 12, 2002; ([www.airlines.org/dataset/u-s-airline-mergers-and-acquisitions/](https://www.airlines.org/dataset/u-s-airline-mergers-and-acquisitions/))

acquisitions in recent years have fallen short in key ways, which we detail below. However, the need to revamp the criteria is more critical than ever; such measures are currently being put to the test by two competing efforts to acquire ultra low cost carrier (ULCC) Spirit Airlines. A bid was first announced by ULCC Frontier Airlines in February, quickly followed by a higher bid from low cost carrier (LCC) JetBlue Airways in April.

As AELP stated in March in a joint letter to the DOJ and the U.S. Department of Transportation (DOT), co-signed by eight other organizations, concerning the Frontier offer: "This merger will likely lessen competition in the airline industry, and thus violates the Clayton Act."<sup>4</sup> The counter action by JetBlue is even more problematic, given JetBlue's larger command of the domestic market.

It is incumbent upon the DOJ and the FTC to recognize that the consumer, labor, and societal harms caused by airline consolidation are not always anticipated or captured by the existing narrow methodologies. What follows are specific responses to key questions posed in the Request for Information.

### Purpose, Harms, and Scope

The Clayton Act's purpose is to prevent mergers and acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly."<sup>5</sup> Further, the Act's language specifically addresses "interlocking directorates," described as "the same person making business decisions for competing companies." This raises two critical issues in viewing the domestic airline industry:

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<sup>4</sup> American Economic Liberties Project, et al.; "Letter to Secretary Buttigieg and Assistant Attorney General Kanter"; March 10, 2022; ([www.economicliberties.us/wp-content/uploads/2022/03/Spirit-Frontier-Letter-Final\\_3.10.pdf](http://www.economicliberties.us/wp-content/uploads/2022/03/Spirit-Frontier-Letter-Final_3.10.pdf))

<sup>5</sup> U.S. Federal Trade Commission; "The Antitrust Laws"; ([www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws](http://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws))

\* First, it must be recognized that the Big Three are in effect an oligopoly; their actions on fare increases, fee introductions and increases, products, customer policies, procedures, and service enhancements are more often than not in lockstep. These three airlines also *fail* to lower fares, lower or eliminate fees, or introduce service enhancements in virtual lockstep.

\* Second, it must also be recognized that Wall Street investors are in effect violating the interlocking directorate clause by denying start-up capital to new-entrant airlines that will disrupt the marketplace, provide lower fares, and take market share (and subsequently profits) from major airlines. The proof lies in the 14-year dearth of new scheduled airline service in the United States (see below), broken only because both Breeze Airways and Avelo Airlines obtained outside financing for their respective start-ups in 2021.

The Clayton Act's concern that mergers "may" substantially lessen competition is not in question; recent history has amply demonstrated that it's not a question of "may" but rather a question of "when" instead. AELP believes that all airline mergers "lessen competition" and this has already occurred—repeatedly and exponentially—with each successive merger and acquisition that has been approved in recent decades. This was particularly apparent when the "Big Six" major network carriers became the Big Three with the rapid, reactive, and defensive mergers of Delta and Northwest in 2008, United and Continental in 2010, and American and US Airways in 2013.

Consider the harms already inflicted on consumers and communities by the multi-tiered mergers that formed the current Big Three, viewed through the prism of the contraction of route networks, particularly the "fortress hubs" that generate the bulk of passenger traffic for network hub-and-spoke airlines.

As consolidation expanded, major hubs were closed in St. Louis (formerly TWA); Las Vegas (formerly America West); Boston, Nashville, and Raleigh-Durham (American); Memphis (formerly Northwest); Cincinnati (Delta); Cleveland (formerly Continental); Pittsburgh and Dayton (formerly US Airways); and many other metropolitan areas nationwide. A 2020 study by the DOT's Office of Inspector General (DOT-IG) stated: "For example, five medium-sized communities—Cincinnati, which saw a 77.1% decline; Pittsburgh; Greensboro; Cleveland; and Milwaukee—lost over half of their departures, often resulting from an airline shifting the focus of its network away from an airport after a merger."<sup>6</sup>

Many of these facilities were closed despite considerable public investment via capital projects and tax breaks. In the case of the St. Louis closure, American's daily flights plunged from 200 to 36. In 2011, one journalist noted that mega-hubs continue to serve the largest markets, "But smaller cities face a tougher future." And the economic effects on labor have been dramatic, including direct layoffs by airlines and aviation companies, as well as downsizing and closures of regional offices by corporations requiring multiple flight frequencies, nonstop routes, and jet service not outsourced to regional aircraft. Additionally, the loss of a hub can deter other corporations from opening new facilities in such regions. These hardships urgently require further economic analysis, and they fit the DOJ's definition of "not the kind of question which is susceptible of a ready and precise answer in most cases."<sup>7</sup>

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<sup>6</sup> U.S. Department of Transportation, Office of Inspector General; "Changes in Airline Service Differ Significantly for Smaller Communities, but Limited Data on Ancillary Fees Hinders Further Analysis"; May 27, 2020; ([www.oig.dot.gov/sites/default/files/Airline%20Service%20to%20Small%20Communities%20Final%20Report\\_0.pdf](http://www.oig.dot.gov/sites/default/files/Airline%20Service%20to%20Small%20Communities%20Final%20Report_0.pdf))

<sup>7</sup> Reynolds National Center for Business Journalism; "The Economic Toll on Former Airline Hubs"; November 14, 2014; ([businessjournalism.org/2014/11/the-economic-toll-on-former-airline-hubs/](http://businessjournalism.org/2014/11/the-economic-toll-on-former-airline-hubs/)); CNN.com; "Fewer Hubs Mean Fewer Options for Fliers"; May 16, 2011; ([www.cnn.com/2011/TRAVEL/05/16/fewer.airline.hubs/index.html](http://www.cnn.com/2011/TRAVEL/05/16/fewer.airline.hubs/index.html))

## Types and Sources of Evidence

AELP strongly believes the current guidelines' framework has been interpreted unduly narrowly by focusing on the predicted price outcomes of mergers. The Big Three's oligopoly has had deleterious yet unexamined effects on the airline passenger experience. Simply put, the nation's major airlines no longer compete on customer service or product enhancements for passengers in economy or coach classes. And the degradation in airline service is made possible by a lack of choice, particularly in the many regions of the country where there are no ULCC or LCC options.

Consider the following:

- Aircraft seating has shrunk on all domestic fleets from the Big Three to the ULCCs. In recent decades seat pitch (i.e. legroom) has decreased, in some cases by 2" to 5", and seat width has decreased by up to 2". Such squeezing is exacerbated by two conflicting trends. First, airline passenger load factors are at all-time highs not seen since World War II, with the virtual elimination of empty middle seats between strangers on most flights. A Boeing engineer calculated an unoccupied adjacent seat provides an addition 4.25" in width. Second, in 2018 the Centers for Disease Control and Prevention confirmed that average Americans have grown larger in recent decades. Those higher load factors also have put the squeeze on redemption of frequent flyer miles and points. Each successive merger worsens this scenario, as twice the number of "elite" members are fighting for half as many available seats.<sup>8</sup>

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<sup>8</sup> USA Today, Bill McGee; "Think Airline Seats Have Gotten Smaller? They Have"; September 24, 2014; ([www.usatoday.com/story/travel/columnist/mcgee/2014/09/24/airplane-reclining-seat-pitch-width/16105491/](http://www.usatoday.com/story/travel/columnist/mcgee/2014/09/24/airplane-reclining-seat-pitch-width/16105491/)); Centers for Disease Control and Prevention, National Center for Health Statistics; "Mean Body Weight, Height, Waist Circumference, and Body Mass Index Among Adults: United States, 1999-2000 Through 2015-2016"; December 20, 2018; ([www.cdc.gov/nchs/data/nhsr/nhsr122-508.pdf](http://www.cdc.gov/nchs/data/nhsr/nhsr122-508.pdf))

- Rather than introducing improvements to inflight service, in recent years the Big Three have actually downgraded the experience by introducing bare-bones “Basic Economy” service designed to compete with the ULCCs. Unwitting consumers booking on American, Delta, and United continually discover that Basic Economy can mean even tighter seats, restrictions on carry-on baggage and early boarding, and the inability to select seat assignments. It’s also been documented that Basic Economy was designed as a low fare bait-and-switch, since analysts note the Big Three actually discourage the purchase in an effort to upsell to higher classes of service.<sup>9</sup>

- The mistreatment of passengers and the indifference to customer service by airlines that have cut costs and outsourced passenger interfacing jobs has become the new normal, and no objective source can argue that commercial flying has not degraded in the United States over the last two decades. This phenomenon was spectacularly highlighted in April 2017, when paying passenger Dr. David Dao was beaten and then involuntarily dragged from an aircraft because United Express oversold the flight. In a subsequent House Transportation Committee hearing in May 2017, Consumer Reports testified: “A lack of competition and consumer choice allows carriers to disregard the interests and concerns of their passengers in ways that would have been unthinkable when there were 12 or 10 or even 8 major airlines in the United States competing for customers.” The proof that consumers were unable to “book away” from United came a month later, when—despite persistent, high-profile condemnation from Congress, major media, social media, and the American public—United’s stock price actually rose.<sup>10</sup>

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<sup>9</sup> Bloomberg, “Why Airlines Don’t Want You to Fly Basic Economy”; November 16, 2018; ([www.bloomberg.com/news/articles/2018-11-16/why-airlines-don-t-want-you-to-fly-basic-economy](http://www.bloomberg.com/news/articles/2018-11-16/why-airlines-don-t-want-you-to-fly-basic-economy))

<sup>10</sup> Consumer Reports/Consumers Union; “Testimony of William J. McGee, Aviation Consultant, Consumers Union, Before the House Committee on Transportation and Infrastructure”; May 2, 2017; (<https://advocacy.consumerreports.org/wp-content/uploads/2017/05/Consumers-Union->

- By any unbiased measure, airline service has deteriorated. DOT statistics on canceled flights have reached unprecedented levels in the last year, and this has been exacerbated by extremely lengthy average wait times to reach outsourced airline call centers. The DOT's monthly Air Travel Consumer Reports quantify the misery: There were 102,550 consumer complaints in 2020, the highest number on record in the 35 years the DOT has tracked such data, and a 568.4% annual increase. In 2021, complaints receded to 49,958, which was still an increase of 225.9% over pre-Covid 2019.<sup>11</sup>
- All domestic airlines—with only one exception—followed Spirit's nickel-and-diming lead in 2007 by charging for first checked bags. Only Southwest does not charge for first and second checked bags. With most "ancillary fees," there is tremendous duplication in the U.S. airline market.<sup>12</sup>
- All domestic airlines—without exception—have operated in unison by defying a Congressional mandate to avoid charging fees to families with children under 13 to sit together inflight. Not one carrier has attempted to differentiate itself by eliminating such fees.<sup>13</sup>
- All domestic airlines—without exception—collectively withheld at least \$10 billion in flight refunds for passengers unable to fly during

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[McGee-05-02-2017-House-airline-hearing.pdf](#)); United Airlines; "Historical Price Lookup"; Weeks of May 8-June 8, 2017; (<https://ir.united.com/investor-resources/historical-price-lookup>)

<sup>11</sup> U.S. Department of Transportation; "Air Travel Consumer Report: December 2020, Full Year 2020 Numbers"; February 25, 2021; ([www.transportation.gov/briefing-room/air-travel-consumer-report-december-2020-full-year-2020-numbers](http://www.transportation.gov/briefing-room/air-travel-consumer-report-december-2020-full-year-2020-numbers)); U.S. Department of Transportation; "Air Travel Consumer Report: December 2021, Full Year 2021 Numbers"; February 28, 2022; ([www.transportation.gov/briefing-room/air-travel-consumer-report-december-2021-full-year-2021-numbers](http://www.transportation.gov/briefing-room/air-travel-consumer-report-december-2021-full-year-2021-numbers))

<sup>12</sup> FareCompare.com; "History of Airline Fees: Bags, Food & More"; August 23, 2017; ([www.bloomberg.com/news/articles/2018-11-16/why-airlines-don-t-want-you-to-fly-basic-economy](http://www.bloomberg.com/news/articles/2018-11-16/why-airlines-don-t-want-you-to-fly-basic-economy))

<sup>13</sup> Consumer Reports; "Consumer Reports Urges Airlines To Let Kids Sit With Parents Without Extra Fees"; March 2, 2021; ([https://advocacy.consumerreports.org/press\\_release/consumer-reports-urges-major-airlines-to-let-kids-sit-with-parents-without-extra-fees/](https://advocacy.consumerreports.org/press_release/consumer-reports-urges-major-airlines-to-let-kids-sit-with-parents-without-extra-fees/))



the Covid-19 pandemic in 2020 and 2021. Not one carrier stepped up and defied industry behavior, even though millions of passengers were restricted from flying by medical experts and international, federal, state, and local restrictions. Airline indifference is apparent not just with customers, but even with lawmakers. Sen. Ed Markey (D-Mass.) “blasted” carriers for brazenly refusing to respond to Congressional queries and stated: “Seven airlines accounting for more than 70 percent of the domestic market have refused to individually respond to our questions.”<sup>14</sup>

### Coordinated Effects

Competition and consumer advocates have long voiced apprehension over the airline industry allegedly colluding on issues such as fixing prices, introducing ancillary fees, and cutting travel agency commissions. The “conscious parallelism” concerns raised in the Request for Information are particularly acute with airlines, since their schedules, fares, and fees are often shared by third-party ticket sellers such as online travel agencies. (Note: This is *not* to suggest that there are not independent, long-standing, and systemic issues with airline pricing transparency, particularly in regard to the opaqueness of many ancillary fees.)

However, proving such allegations has been difficult. For example, a class action lawsuit filed against Delta and AirTran in 2009 charged that they had colluded on baggage fees. The court dismissed the case, but stated: “[U]nlawful conspiracies may be inferred when collusive communications among competitors precede

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<sup>14</sup> Senator Ed Markey; “Senators Markey and Blumenthal Blast Airlines’ Inadequate Response to Their Request to Eliminate Expiration Dates for All Pandemic-Related Flight Credits”; 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](http://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))

changed/responsive business practices, such as new pricing practices.”<sup>15</sup>

It’s imperative that such actions be thoroughly investigated, particularly since airlines offer consumers one of the most complex pricing models in the free market, with some 7 billion airfares constantly changing daily.

### Presumptions

As noted above, there has been an exponential factor at play in the rapid corporate concentration of the U.S. airline industry. Each subsequent merger has caused greater harm than the merger preceding it, as the market has shrunk and the remaining players have grown stronger. Yet conversely—and shockingly—government approvals have become easier rather than harder.

This was made apparent in the five-year period between 2008 and 2013, when the Big Six devolved into the Big Three, each jockeying for greater market share and the title of “largest airline in the world.” Remarkably, after the Delta-Northwest merger in 2008, the executives advocating for the United-Continental merger in 2010 and then the American-US Airways merger in 2013 actually pointed to earlier mergers as justification for increasing consolidation further.

As Chairman James Oberstar said to United and Continental executives at a House Transportation Committee hearing in 2010: “What we saw just recently was a further step in that consolidation, when the previous Justice Department looked the other way, sort of brushed aside my objections that approval of Delta and Northwest

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<sup>15</sup> McGill University, Institute of Air & Space Law; “Competition and the Antitrust Laws”; 2013; ([www.mcgill.ca/iasl/files/iasl/aspl614-competition\\_and\\_antitrust-laws.pdf](http://www.mcgill.ca/iasl/files/iasl/aspl614-competition_and_antitrust-laws.pdf)); Atlanta Journal-Constitution; “Judge Dismisses Lawsuit Over Airline Baggage Fees”; March 30, 2017; ([www.ajc.com/business/judge-dismisses-lawsuit-over-airline-baggage-fees/BNwFA7MJXRgjjZ57egdnbl/](http://www.ajc.com/business/judge-dismisses-lawsuit-over-airline-baggage-fees/BNwFA7MJXRgjjZ57egdnbl/))

would result in a cascade of mergers. That has happened. You have proposed one. You did not object to Delta-Northwest because you were waiting in line with your own hat in hand.”<sup>16</sup>

This can best be described as the legal argument offered by young children who plead with their parents by pointing to their older siblings: “But you let them do it so now you have to let me!” Remarkably, this faulty argument worked for airlines. Indeed, in testimony before the Senate Judiciary Committee, Douglas Parker—then Chairman of US Airways and currently Chairman of American—stated: “Although it will be the largest airline in the United States, the new American Airlines will have less than 25% of domestic available seat miles and will compete against the nationwide networks of Delta, with 21% share; United, with 19%; and Southwest, with 19%.”<sup>17</sup>

### Market Definition

The Request for Information specifically references potential harm to competition through means other than price increases, “but instead from other longer-term of non-price factors such as a loss of innovation, changes to product quality or variety, or creation of new entry barriers.” The loss of innovation and changes to product quality were addressed above. But the harm caused by new entry barriers is tremendous, even though it remains one of the least examined side effects of airline industry consolidation.

One of the primary tenets of the Airline Deregulation Act of 1978 was that it would usher in more competition and more new-entrant airlines that would compete on service and fares, thus benefiting

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<sup>16</sup> U.S. House of Representatives, Committee on Transportation and Infrastructure; Hearing on “The Proposed United-Continental Merger: Potential Effects for Consumers and Industry”; June 16, 2010; ([www.congress.gov/event/111th-congress/house-event/LC6802/text?s=1&r=13](http://www.congress.gov/event/111th-congress/house-event/LC6802/text?s=1&r=13))

<sup>17</sup> U.S. Senate, Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights; Hearing on “The American Airlines/US Airways Merger: Consolidation, Competition, and Consumers”; March 19, 2013; ([www.govinfo.gov/content/pkg/CHRG-113shrg98440/html/CHRG-113shrg98440.htm](http://www.govinfo.gov/content/pkg/CHRG-113shrg98440/html/CHRG-113shrg98440.htm))

American air travelers and communities nationwide. This is clearly stated in the opening paragraph of the Act's conference report, directing the Civil Aeronautics Board to consider "the encouragement of entry into air transportation markets by new air carriers."<sup>18</sup>

For a short time in the 1980s, that pledge was fulfilled. But there has been a steady decline for more than three decades now, even among smaller, non-scheduled, and air taxi carriers; there were 96 commercial air carriers in 1995, and that number fell to 61 in 2021.<sup>19</sup> Subsequently, competition has been stifled and consumers have suffered. The architects of airline deregulation would be horrified to realize there are fewer domestic carriers in 2022 than in 1978. Furthermore, between 2007 and 2021 there was not a single new-entrant scheduled passenger airline launched in the U.S., the longest stretch since the industry was founded in 1914, including during the regulated era. Both Breeze and Avelo began flying in 2021 amid pent-up demand due to Covid-19. Former Spirit CEO Ben Baldanza—the inventor of airline ancillary fees in the United States—stated: "In a strong economy, big airlines are good at putting pressure on new carriers by both lowering their prices and adding capacity. But in the current environment, especially after taking a lot of taxpayer money, the largest U.S. airlines will have to be more careful about how hard they try to snuff out these two new airlines."<sup>20</sup>

Ironically, the barriers to entry that the framers of deregulation sought to erase have been replaced by even higher barriers to entry in 2022—only now they are erected by the market, not by the federal government. This is because while the DOJ and other government agencies carefully scrutinize *how* domestic airlines spend capital, not

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<sup>18</sup> U.S. Congress; "S.2493, Airline Deregulation Act"; October 24, 1978; ([www.congress.gov/bill/95th-congress/senate-bill/2493](http://www.congress.gov/bill/95th-congress/senate-bill/2493))

<sup>19</sup> Statista.com; "Number of Air Carriers in the United States from 1995 to 2021"; March 28, 2022; ([www.statista.com/statistics/183428/number-of-us-air-carriers-since-1995/](http://www.statista.com/statistics/183428/number-of-us-air-carriers-since-1995/))

<sup>20</sup> Forbes.com; Ben Baldanza; "What the New Airlines Avelo and Breeze Mean for U.S. Aviation"; May 21, 2021; ([www.forbes.com/sites/benbaldanza/2021/05/21/what-two-new-airlines-avelo-and-breeze-mean-for-us-aviation/?sh=31510c9323ba](http://www.forbes.com/sites/benbaldanza/2021/05/21/what-two-new-airlines-avelo-and-breeze-mean-for-us-aviation/?sh=31510c9323ba))

enough attention is paid to *where* such capital is derived. The plain truth is that major financial investors own numerous shares in airlines that ostensibly compete with each other. This leads to two irrefutable conclusions:

- \* Investors don't want major airlines to compete with each other, particularly when it involves cutting fares.
- \* Investors don't want major airlines to be challenged by new-entrant carriers, especially ULCCs and LCCs, which undoubtedly will drive down fares for consumers—and therefore drive down profits for Wall Street.

No less a figure than Warren Buffet, Chairman of Berkshire Hathaway, reversed himself on airline investing in 2016. Many years earlier he had lost a large sum in airline shares and famously commented on the Wright Brothers: "Indeed, if a farsighted capitalist had been present at Kitty Hawk, he would have done his successors a huge favor by shooting Orville down." So what happened to change his mind about investing in an airline? Actually, he decided to invest in not one, not two, not three, but *all* of the four largest airlines in America—American, Delta, Southwest, and United.<sup>21</sup>

Furthermore, Wall Street investors punish airlines for pro-consumer initiatives. Take the case of Southwest, the only carrier in the nation not charging fees for first and second checked bags, as well as ticket changes. In 2014, JetBlue was the penultimate carrier in the country not charging fees for first checked bags, but it succumbed to pressure from investors, leaving Southwest the lone holdout on bag fees. As Tim Wu noted shortly after in "Why Airlines Want to Make You Suffer" in *The New Yorker*: "Wall Street analysts, however, accused JetBlue of being 'overly brand-conscious and customer-focused.'"<sup>22</sup> Analysis of industry consolidation is ineffective if it does not take into account

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<sup>21</sup> CNBC; "Buffett's Berkshire Takes Stake in Four Major Airlines"; November 14, 2016; ([www.cnbc.com/2016/11/14/buffetts-berkshire-takes-stakes-in-four-major-airlines.html](http://www.cnbc.com/2016/11/14/buffetts-berkshire-takes-stakes-in-four-major-airlines.html))

<sup>22</sup> *The New Yorker*; Tim Wu; "Why Airlines Want to Make You Suffer"; December 26, 2014; ([www.newyorker.com/business/currency/airlines-want-you-to-suffer](http://www.newyorker.com/business/currency/airlines-want-you-to-suffer))

the unbearable pressure of those providing the operating capital, while also recognizing that the interests of investors are diametrically opposed to the best interests of the very customers that this customer service industry is theoretically serving.

Wall Street also punishes airlines for pro-labor actions. When American gave its workforce a raise in 2017—primarily to achieve parity with Delta and United employees—investors immediately devalued American’s stock, and made it clear this was unacceptable behavior. JPMorgan airline analyst Jamie Baker stated: “We are troubled by AAL’s wealth transfer of nearly \$1 billion to its labor groups...American’s agreement with its labor stakeholders establishes a worrying precedent, in our view, both for American and the industry.” Left out of this narrow equation is that airline wage increases might actually 1) improve service and the customer experience for paying passengers and 2) help stimulate the national economy so that more middle class workers can pay for discretionary items such as...air travel.<sup>23</sup>

That said, even if securing capital was not an issue, there are still many other competitive barriers to entry for new airlines, especially as consolidation has strengthened the majors. As Dr. Diana Moss, President of the American Antitrust Institute, told the Senate in reference to airline mergers in 2013: “Rather the relevant consideration is whether existing participants in the industry find it more difficult with higher concentration and hub dominance to access the inputs (e.g., hubs, slots, gates, etc.) needed to enter and compete on airport-pair or city-pair routes that are adversely affected by the US Airways-American merger.”<sup>24</sup>

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<sup>23</sup> Vox; “American Airlines Gave its Workers a Raise; Wall Street Freaked Out”; April 29, 2017; ([www.vox.com/new-money/2017/4/29/15471634/american-airlines-raise](http://www.vox.com/new-money/2017/4/29/15471634/american-airlines-raise))

<sup>24</sup> U.S. Senate, Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights; Follow-up Questions on “The American Airlines/US Airways Merger: Consolidation, Competition, and Consumers”; March 19, 2013; ([www.judiciary.senate.gov/imo/media/doc/031913QFRs-Moss.pdf](http://www.judiciary.senate.gov/imo/media/doc/031913QFRs-Moss.pdf))

## Potential and Nascent Competition

The issue of a “nascent competitor” evolving into a “competitive force” is particularly relevant in light of the announced merger bids for Spirit by Frontier and JetBlue. Frontier’s analysis repeatedly states that a combined Frontier-Spirit will “deliver \$1 billion in annual consumer savings” to passengers.<sup>25</sup> Even if the math here is correct—a *very* big “if”—it’s absurd to assume that any cost cutting from this merger would flow unimpeded to consumers. The only beneficiaries of airline mergers are executives and investors.

Furthermore, Frontier asserts that merging with Spirit will “deliver even more reliable service.” Given their record number of flight cancellations and consumer complaints recently, this claim is laughable. In the latest DOT Air Travel Consumer Report for March 2022, among the 17 U.S. carriers ranked on consumer complaints, the nation’s three ULCCs finished dead last—Spirit at 15<sup>th</sup>, Allegiant at 16<sup>th</sup>, and Frontier at 17<sup>th</sup>.<sup>26</sup>

It’s imperative that the DOJ and the FTC fully analyze and estimate not only the untapped potential due to mergers, but also the bogus and inflated claims of unrealistic potential benefits due to mergers.

## Special Characteristics Markets

There are two key questions raised here, the first concerning past mergers and the second concerning price discrimination.

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<sup>25</sup> Frontier Airlines; “Everyone Wins With Even More Ultra-Low Fares”; February 2022; (<https://evenmoreultralowfares.com/wp-content/uploads/2022/02/Frontier-Spirit-Transaction-Infographic.pdf>)

<sup>26</sup> U.S. Department of Transportation; “Air Travel Consumer Report”; March 2022; ([www.transportation.gov/sites/dot.gov/files/2022-04/March%202022%20ATCR.pdf](http://www.transportation.gov/sites/dot.gov/files/2022-04/March%202022%20ATCR.pdf))

- Past mergers. The question about “consummated mergers” and “post-merger evidence” is absolutely critical, and AELP is grateful that the DOJ and the FTC are considering this issue. As our comments have made clear, the path toward unsustainable airline industry consolidation has been strewn with inflated estimates, half-truths, and broken promises.

AELP strongly urges the DOJ and the FTC to place a moratorium on all future airline mergers and acquisitions until a thorough examination has been conducted of the mergers that have taken place since 2001, particularly the “mega-mergers” that consolidated the Big Six into the Big Three—Delta-Northwest, United-Continental, and American-US Airways. The author of these comments testified multiple times in both the House and the Senate against these mergers, and witnessed first-hand how airline executives offered vague answers, and even vaguer promises, to direct questions about cutting service, laying off employees, closing hubs, and raising fares.

- Price discrimination. The airline pricing model is broken in the United States. First, there is the opacity and confusion of the booking process, as consumers struggle to obtain bottom-line fares inclusive of both mandatory and “optional” ancillary fees. Second, there is the cost of flying itself.

Airlines and their lobbyists repeatedly assert that airfares are falling. As Airlines for America often asserts, “average domestic round-trip airfares” are lower now when adjusted for inflation.<sup>27</sup> This conclusion obscures two key factors:

- \* Comparisons of base fares from years past fail to account for the many ancillary fees that airlines have “unbundled” from ticket prices, so apples-to-apples comparisons are nearly impossible for consumers to calculate.

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<sup>27</sup> Airlines for America; Data & Statistics; “Domestic Round-Trip Fares and Fees”; April 9, 2020; ([www.airlines.org/dataset/annual-round-trip-fares-and-fees-domestic/](http://www.airlines.org/dataset/annual-round-trip-fares-and-fees-domestic/))



\* The key word in “average airfares” is *average*. In fact, the differential in average fares across the United States is considerable.

Since 1996, the DOT has published the quarterly Domestic Airline Fares Consumer Report.<sup>28</sup> The report details actual fares paid in the 1,000 largest domestic city-pair markets, roughly half of all domestic passenger traffic. For years now these reports have demonstrated not only the complexity of airline pricing, but the broad range between lowest and highest fares.

Consider the most recent report, detailing the 3Q of 2021. The fluctuations in fares paid by passengers on the same route can be considerable. Between Atlanta and Charlotte, 52% of passengers on Delta paid more than three times the minimum fare. Between Washington, DC and Huntsville, it was 42% of passengers on United. Between Salt Lake City and Spokane, it was 35% of passengers on Delta. Between Chicago and Greenville, it was 23% on United.<sup>29</sup> Few other industries offer such wide pricing disparities for identical products.

Then there are the effects of how competition—as well as a virtual *lack* of competition—affects airfares. The same 3Q 2021 report also highlights the largest year-over-year price increases and decreases on routes throughout the country. Not surprisingly, the highest price gouging occurred between cities not served by LCCs and/or ULCCs last year. The worst case was Milwaukee-New York, a route where

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<sup>28</sup> U.S. Department of Transportation; Domestic Airline Fares Consumer Report; 1996-2021; ([www.transportation.gov/office-policy/aviation-policy/domestic-airline-consumer-airfare-report-pdf](http://www.transportation.gov/office-policy/aviation-policy/domestic-airline-consumer-airfare-report-pdf))

<sup>29</sup> U.S. Department of Transportation; Domestic Airline Fares Consumer Report; Third Quarter 2021; ([www.transportation.gov/sites/dot.gov/files/2022-01/Domestic%20Airline%20Fares%20Consumer%20Report%202021\\_Q3.pdf](http://www.transportation.gov/sites/dot.gov/files/2022-01/Domestic%20Airline%20Fares%20Consumer%20Report%202021_Q3.pdf))

average fares rose 482%, prior to LCC JetBlue entering this year.<sup>30</sup> And conversely, the largest decrease occurred between Santa Barbara and Las Vegas, which in 3Q 2021 saw average fares fall by a whopping 41,640%! Why? Because in April 2021 LCC Southwest launched the first nonstop flights on this route.<sup>31</sup>

As the DOT reports prove every single quarter, it simply cannot be overstated how critical the effects of ULCCs and LCCs are on pricing. A 2016 MIT study asserted a ULCC presence reduces base airfares by 21% by all airlines serving that route, and an LCC presence reduces all fares by 8%.<sup>32</sup> The unarguable fact is that the Big Three hike fares when there is no ULCC or LCC head-to-head competition, and lower fares when there is such competition. This is yet another malevolent effect of airline consolidation, particularly when the Big Six merged into the Big Three. The odds of a major carrier introducing lower fares—as they once did when there were more major airlines and therefore competition was much more spirited—have disappeared through these mergers.

This was documented by the U.S. Government Accountability Office in 2013: “At the same time, capacity reductions in certain markets from a merger or acquisition could also serve to generate additional revenue through increased fares on some routes. Some studies of airline mergers and acquisitions during the 1980s showed that prices were

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<sup>30</sup> Milwaukee Business Journal; “JetBlue Airways Will Begin Milwaukee Service March 27”; February 2, 2022; ([www.bizjournals.com/milwaukee/news/2022/02/02/jetblue-airways-will-begin-milwaukee-service-march.html](http://www.bizjournals.com/milwaukee/news/2022/02/02/jetblue-airways-will-begin-milwaukee-service-march.html))

<sup>31</sup> Visit Santa Barbara; “New Southwest Airlines Flights to Santa Barbara Take Off in April 2021”; January 21, 2021; ([https://santabarbaraca.com/press\\_releases/new-southwest-airlines-flights-to-santa-barbara-take-off-in-april-2021/](https://santabarbaraca.com/press_releases/new-southwest-airlines-flights-to-santa-barbara-take-off-in-april-2021/))

<sup>32</sup> Massachusetts Institute of Technology; “The Emergence and Effects of the Ultra-Low Cost Carrier (ULCC) Business Model in the U.S. Airline Industry”; October 17, 2016; (<https://dspace.mit.edu/bitstream/handle/1721.1/104869/ulcc-paper-draft-revFINAL.pdf;jsessionid=B0775022ED165FAFDF3A9F0809460539?sequence=1>)

higher on some routes from the airline's hubs soon after the combination was completed."<sup>33</sup>

## Conclusion

At one time more than a decade ago, many competition and consumer advocates warned Congress and the DOJ that the U.S. airline industry was quickly approaching "Too Big To Fail" status. That day has already arrived, as witnessed by the government assistance and bailouts the industry requested from Congress and received from taxpayers in the wake of the 9/11 terror attacks, economic and fuel crises, and the Covid-19 pandemic.

Taxpayer relief was not even in question in 2020. The only question was how much, which turned out to be a record \$54 billion. Yet despite only one caveat—maintain staffing levels throughout the pandemic—several domestic airlines defiantly trimmed staff, while refusing to provide customer refunds despite DOT guidance *and* canceling thousands of flights due to staffing shortages.<sup>34</sup> The airlines' open insolence of consumers, Congress, and the DOT is in large measure the result of uncontrolled industry consolidation.

We urge the DOJ and the FTC to consider and act upon the issues AELP has raised above. And we urge these agencies to strengthen the merger enforcement and policy guidance that previously allowed such consolidation to take hold. We thank you for your consideration.

—William J. McGee

On Behalf of the American Economic Liberties Project

18 April 2022

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<sup>33</sup> U.S. Government Accountability Office; "Airline Mergers: Issues Raised by the Proposed Merger of American Airlines and US Airways"; June 19, 2013; ([www.gao.gov/assets/gao-13-403t.pdf](http://www.gao.gov/assets/gao-13-403t.pdf))

<sup>34</sup> Washington Post; "Taxpayers Spent Billions Bailing Out Airlines; Did the Industry Hold Up its End of the Deal?"; December 14, 2021; ([www.washingtonpost.com/transportation/2021/12/14/airline-bailout-covid-flights/](http://www.washingtonpost.com/transportation/2021/12/14/airline-bailout-covid-flights/))