No. 24-938

IN THE

Supreme Court of the United States

AMERICAN AIRLINES GROUP INC.,
Petitioner,
v.
UNITED STATES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE STATE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

In 2020, American Airlines Group Inc. (American) and JetBlue Airways Corporation (JetBlue) entered a "first-of-its-kind" arrangement called the Northeast Alliance (NEA). Under the NEA, the once-vigorous competitors agreed to coordinate flight schedules, share revenues, and make joint capacity-allocation decisions at airports in Boston and the New York area. Pet. App. 31a-32a, 55a-56a. The United States and a bipartisan coalition of States sued, alleging that the NEA was an unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. After a monthlong bench trial, the district court enjoined the NEA, finding the arrangement invalid under the rule of reason, and the First Circuit affirmed. The question presented is:

Whether the First Circuit properly affirmed the district court's trial verdict, which was based on factual findings that (1) the NEA caused significant anticompetitive harm, (2) the arrangement had no meaningful procompetitive benefits, and (3) any benefits the arrangement had were achievable through less anticompetitive means and were far outweighed by its harms.

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INTRODUCTION

Under Section 1 of the Sherman Act, 15 U.S.C. § 1, an agreement among rivals to stop competing is a horizontal restraint of trade, plain and simple. Horizontal restraints are especially likely to stifle competition and harm consumers, even when they are not *per se* illegal. The courts below analyzed a horizontal restraint engineered by two of the country's largest airlines—the Northeast Alliance (NEA). Applying the rule of reason, the courts unsurprisingly found that the NEA warped the market for commercial passenger flights in the Northeast. Nothing about that careful and factbound analysis warrants this Court's review.

The NEA was an "unprecedented" arrangement, Pet. App. 33a, in which American and JetBlue agreed to coordinate their flight schedules, jointly determine flight capacity, and pool revenue at four major airports where they were among the largest few competitors. Put simply, the NEA ended competition between those rival airlines in highly concentrated markets where each wielded substantial market power. *See, e.g.*, Pet. App. 3a, 33a, 44a, 85a, 93a (finding that the NEA aligned roughly 75% of JetBlue's operations with American).

The United States and a bipartisan group of States sued to enjoin the NEA's operation under Section 1. Subsequently, every judge to evaluate the NEA found that it flunked the rule of reason. Pet. App. 7a-8a, 32a-33a. The district court found after a monthlong bench trial that the NEA had substantial anticompetitive effects, that it had only one minor procompetitive benefit, and that the airlines could

have achieved that de minimis benefit through less anticompetitive means. The First Circuit agreed.

American insists that the First Circuit "flout[ed] basic antitrust principles" and exuded "an outdated hostility to collaborations," Pet. 2, 36—creating an alleged conflict with other courts, Pet. 17-21, 30-33. But American is wrong on every score. The First Circuit's holdings simply reflect the factbound application of well-established law to a highly unusual (and highly pernicious) horizontal restraint. And American has not remotely shown that any other court would view this case differently.

To begin, American says the First Circuit erred at step one of the rule of reason when it found that the NEA had substantial anticompetitive effects. But the NEA diminished output, reduced consumer choice, and eliminated competition between major market players, all of which are recognized anticompetitive impacts. As to American's purported circuit split, cases from other courts upholding vertical restraints and other quotidian arrangements say nothing about the NEA's unprecedented restriction of competition. American's remaining argument, which critiques the *per se* rule, is beside the point because the First Circuit did not apply a *per se* analysis to the NEA.

American next contends that, at step two, it needed only a procompetitive "rationale," not actual *evidence* of the NEA's procompetitive benefits. That is incorrect, and American cites no case absolving a defendant of the burden to show that its conduct *caused* the relevant procompetitive benefit. It thus fails to establish a circuit split. In the main,

American appears to believe that the First Circuit's step-two analysis really belonged at step three. That is both wrong and irrelevant: wrong because steps two and three are not isolated inquiries, and irrelevant because the First Circuit proceeded to a step-three analysis in any event.

American believes that labeling the NEA a "joint venture" changes the antitrust analysis. Not so. The First Circuit was correct to set aside labels and look to the operation and effect of the NEA instead. And its effect was clear: the NEA led to "decreased capacity, lower frequencies, or reduced consumer choices on multiple routes." Pet. App. 72a. By contrast, any marketwide expansion in the Northeast was caused by other factors, such as airlines' burgeoning recovery from the COVID-19 pandemic. On the whole, the NEA overwhelmingly harmed consumers and competition. It was properly enjoined.

This Court could deny review simply because the questions presented are splitless and the First Circuit's analysis was correct. But review is particularly unwarranted because a decision by this Court would have little practical effect. The NEA has been abandoned: JetBlue withdrew from the deal. The district court's verdict was also premised on numerous alternative findings that would amply support the judgment even if this Court agreed with American on both questions presented. For those reasons, this case is a poor vehicle to review even the factbound disputes that American presents.

STATEMENT

A. Legal Background.

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Courts have construed that language to prohibit concerted action among independent entities that unreasonably restrains trade. *NCAA v. Alston*, 594 U.S. 69, 97 (2021). "The central message of the Sherman Act," this Court has explained, "is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 (1985) (internal quotation marks omitted); *see United States v. Union Pac. R.R. Co.*, 226 U.S. 61, 84 (1912) (noting that, under the Sherman Act, "competition[,] not combination, should be the law of trade" (internal quotation marks omitted)).

Certain arrangements are "unreasonable *per se* because they always or almost always tend to restrict competition and decrease output." *Ohio v. Am. Express Co.*, 585 U.S. 529, 540 (2018) (internal quotation marks omitted). Chief among these are "horizontal" agreements between direct rivals to fix prices or allocate markets. *Id.* at 540-41; *see Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49 (1990) ("[A]greements between competitors to allocate territories to minimize competition are illegal."). Section 1 categorically prohibits such restraints

unless they are necessary to create a new product or facilitate a procompetitive venture. *See, e.g.*, *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 106-20 (1984).

Other restraints are analyzed under "the rule of reason." *Alston*, 594 U.S. at 81 (internal quotation marks omitted); *see Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). Although there is no "rote checklist," a rule-of-reason analysis generally entails "a three-step, burden-shifting framework" to guide courts in distinguishing between "restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Alston*, 594 U.S. at 81, 96-97 (internal quotation marks omitted). At bottom, the rule of reason requires "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *Cal. Dental Ass'n v. FTC*, 526 U.S. 765, 781 (1999); *see FTC v. Actavis, Inc.*, 570 U.S. 136, 159 (2013) (noting that "there is always something of a sliding scale in appraising reasonableness," and "the quality of proof required should vary with the circumstances" (cleaned up)).

Step one. At the first step of the rule-of-reason analysis, plaintiffs must show that the challenged "restraint has a substantial anticompetitive effect." *Alston*, 594 U.S. at 96 (internal quotation marks omitted). This showing can be made directly or indirectly. *Am. Express*, 585 U.S. at 542. The direct approach involves "proof of actual detrimental effects on competition," often in the form of "reduced output,

increased prices, or decreased quality in the relevant market." *Id.* The indirect approach involves a showing of "market power plus some evidence that the challenged restraint harms competition." *Id.* Under either approach, step one is satisfied where a restraint renders price or output "unresponsive to consumer preference," *Bd. of Regents*, 468 U.S. at 106-07, or otherwise "imped[es] the 'ordinary give and take of the market place,'" *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (quoting *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

Step two. If plaintiffs show an anticompetitive effect at step one, the burden "shifts to the defendant to show a procompetitive rationale for the restraint." *Alston*, 594 U.S. at 96 (internal quotation marks omitted). At this step, defendants have "a heavy burden" to "competitively justif[y]" their "apparent deviation from the operations of a free market." *Bd. of Regents*, 468 U.S. at 113; *see Cal. Dental Ass'n*, 526 U.S. at 775 n.12 (requiring "empirical evidence of procompetitive effects"). While defendants need not show that their restraints are "the *least* restrictive means" available, they must show that their arrangements "yield a procompetitive benefit" for consumers by, for example, creating a new product or market, lowering prices, increasing output, or improving quality. *Alston*, 594 U.S. at 97-101 (requiring defendants to establish a "direct connection" between the restraints and their procompetitive effects).

Step three. If defendants satisfy step two, "the burden shifts back to the plaintiff" to show that any "procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Alston*, 594 U.S. at 97 (internal quotation marks omitted). The purpose of this inquiry is to ensure that the challenged restraint is "tailored to serve" its purported justifications. *Bd. of Regents*, 468 U.S. at 119. As a result, "deficiencies in the [defendant's] proof of procompetitive benefits at the second step" may properly "influence[] the analysis at the third." *Alston*, 594 U.S. at 100; *see Bd. of Regents*, 468 U.S. at 113-20. If the factfinder concludes that the restraints are "stricter than is necessary to achieve" their "procompetitive benefits," the court can "declare a violation of the Sherman Act." *Alston*, 594 U.S. at 100-01 (internal quotation marks omitted).

B. Factual Background.[1]

The domestic-airline industry is "closely regulated, highly concentrated, and often volatile." Pet. App. 32a. Over the past few decades, "market share and capacity in the industry" have become "concentrated among a relatively small number of domestic carriers." Pet. App. 36a. Two of those carriers are American and JetBlue, each of which "is a formidable and influential player in the air travel market in this country." Pet. App. 30a.

[1] This section relies primarily on the district court's detailed factual findings, which American does not challenge, *see, e.g.*, Pet. 25.

American is the largest airline in the world. Pet. App. 30a, 46a. It has an extensive network of hubs across the United States, including in the Northeast. Pet. App. 46a-47a. American has expanded its operations through limited partnerships with other carriers, including an alliance on the West Coast with Alaska Airlines. Pet. App. 47a-51a.

JetBlue is the sixth-largest airline in the United States. Pet. App. 31a, 44a. It principally operates as a lower-cost "maverick" in "the highly concentrated airline markets in New York and Boston, where opportunities to enter or expand are vanishingly rare." Pet. App. 31a, 33a. In those markets, JetBlue has "stood largely alone as the only low-cost airline with a significant presence in a domestic market dominated by larger, higher-cost network carriers." Pet. App. 33a.

"Until 2020, American and JetBlue were fierce and frequent head-to-head competitors," particularly in the Northeast. Pet. App. 31a; *see* Pet. App. 44a. In New York, they were "two of the four largest carriers." Pet. App. 31a. In Boston, they were "two of the largest three." Pet. App. 31a. Given the significant barriers to entry in the domestic-airline industry, American and JetBlue's "positions at or near the top of these constrained markets had proven relatively robust and durable over the decade or so preceding the onset of the COVID-19 pandemic." Pet. App. 31a. Their vigorous competition produced benefits for consumers. *See, e.g.*, Pet. App. 44a-46a (explaining that competition with JetBlue caused larger carriers, including American, to reduce their fares).

That all changed in 2020 when American and JetBlue formed the NEA, "a first-of-its kind alliance[]" in which they agreed to stop competing on most of their northeastern flights. Pet. App. 31a. Under the NEA, American and JetBlue agreed to coordinate their schedules and services at four critical "NEA airports": Boston's Logan International Airport, New York's LaGuardia and John F. Kennedy International Airports, and Newark's Liberty International Airport. Pet. App. 55a-56a. The NEA covered both airlines' "short-haul services to and from the NEA airports" and American's "long-haul services" at the NEA airports. Pet. App. 55a-56a. And it coordinated various functions, including "codesharing," "reciprocal loyalty benefits," and "joint corporate customer benefits." Pet. App. 55a; *see* Pet. App. 57a; Pet. App. 68a (noting that "competition between" American and JetBlue "effectively ceased" in the NEA region).

A "core feature" of the NEA was the airlines' so-called "schedule optimization." Pet. App. 56a-57a. "Schedule optimization" meant that American and JetBlue jointly decided which airline would fly each route at the NEA airports, on what schedule, and with how many seats. Pet. App. 33a. This process required "cooperation and joint decisions by the [airlines] regarding capacity allocation, both within the NEA generally and on individual NEA routes specifically." Pet. App. 56a. The NEA also required the airlines to monitor each other's compliance with the optimized schedule and to "pool[]" their "airport infrastructure,

such as takeoff and landing slots" and "airport gates." Pet. App. 56a-57a (internal quotation marks omitted).

Another "cornerstone of the NEA" was its "revenue-sharing mechanism." Pet. App. 57a. The airlines agreed to "align" their "incentives" by sharing revenues so that they became "indifferent to whether a passenger fl[ew] a particular NEA route on an American plane or a JetBlue plane." Pet. App. 57a. The airlines called this competitively agnostic position "metal neutrality," which they hoped to achieve "within the NEA region—that is, on flights to or from the four NEA airports." Pet. App. 57a; *see* Pet. App. 58a-59a.

The NEA effected "a sea change" in the airlines' relationship. Pet. App. 32a. It took two airlines that had been "direct and aggressive competitors with decidedly different business models and cost structures" and "transformed them[]" into "collaborators." Pet. App. 32a-33a. And it inflicted serious market harms: the NEA's "schedule optimization and capacity coordination process . . . led to decreased capacity, lower frequencies, or reduced consumer choices on multiple routes." Pet. App. 72a. The NEA also increased JetBlue's operating costs and limited its opportunities for growth, "diminish[ing] JetBlue's ability to provide disruptive, low-cost competition to the [global network carriers] in the northeast." Pet. App. 79a. The NEA also diminished American's and JetBlue's incentives to compete even outside the region the agreement covered. Pet. App. 81a.

C. Prior Proceedings.

In 2021, the United States, Arizona, California, the District of Columbia, Florida, Massachusetts, Pennsylvania, and Virginia sued to enjoin the NEA's continued operation. Pet. App. 7a-8a, 32a-33a. They alleged that the NEA was an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. Pet. App. 7a-8a, 32a-33a. All parties agreed that the NEA should be analyzed under the rule of reason. Pet. App. 107a.

1. The district court held a monthlong bench trial on plaintiffs' claims. During those proceedings, the court heard testimony from 24 expert and lay witnesses, and it reviewed more than a thousand exhibits and 2,700 pages of deposition excerpts from 17 additional witnesses. Pet. App. 32a, 98a-101a. After a "deep and searching review" of that "voluminous record," the district court found that "plaintiffs had convincingly established that the NEA violate[d] Section 1" under the rule of reason. Pet. App. 35a, 102a, 114a, 148a.

At step one of the rule-of-reason analysis, the district court found that plaintiffs had adduced substantial evidence of harm to consumers. First, the court found that the NEA "eliminated the once vigorous competition between two of the four largest domestic carriers in the northeast," pooling "resources that the defendants once used to directly compete with one another," "fortifying barriers to outside competition," and reducing "the number of distinct choices for consumers . . . by one." Pet. App. 115a-118a. Second, the NEA "amplifie[d]" these harms by

"weaken[ing]" JetBlue's "status as an important 'maverick' competitor": the NEA "skew[ed]" JetBlue's "motivation to compete aggressively," eliminated its opportunities to "secure greater access to busy, constrained markets where it[] . . . would otherwise operate as an important competitive check," and "diminish[ed]" both airlines' "incentives to compete with one another" "within the NEA and beyond." Pet. App. 119a-122a & n.84. Third, the district court noted that a "core feature" of the NEA "closely resemble[d]" naked market allocation: "American and JetBlue are horizontal competitors who . . . agreed to make network decisions" about "which routes to serve, and which partner should operate the planes serving them." Pet. App. 122a-123a.[2]

At step two, the district court found the NEA's purported benefits inadequate, both "independently [and] collectively." Pet. App. 130a. The court found that the NEA did not "create a new product or market" or allow the airlines to pool "complementary" assets and fuel innovation. Pet. App. 134a-136a. Addressing the airlines' claim that the NEA helped them compete against Delta, the court explained that

[2] The district court held that plaintiffs had alternatively satisfied their step-one burden through indirect evidence. Pet. App. 124a-125a. As the court found, the airlines "plainly" possessed and "wielded" power in the relevant markets, which were "highly concentrated" and plagued by "significant barriers to entry," and the NEA had "already harmed competition by reducing the number of participants in the market, diminishing JetBlue's independence and incentive to pursue disruptive strategies (at least vis-à-vis American), and allocating markets between the defendants." Pet. App. 126a-128a.

it is not "procompetitive" to use horizontal restraints to "prop up inefficient market participants." Pet. App. 133a-134a, 137a-138a (punctuation omitted). And the court found that the airlines failed to substantiate the NEA's other purported benefits, like the creation of a better-connected network, improved flight schedules, or expanded fleets. Pet. App. 137a-144a. At most, the court concluded, the NEA may have provided consumers with "more flexible loyalty benefits." Pet. App. 143a-144a.

At step three, the court found that the NEA's only potentially cognizable asserted benefit, improved loyalty benefits, could be "achieved by one or more less restrictive alternative arrangements." Pet. App. 144a-146a. Indeed, the airlines could have provided that benefit through an arrangement like one that American formed with Alaska Airlines around the same time, in which the airlines did not coordinate "scheduling, network, or capacity decisions" or "share revenue on any markets where they provide competing nonstop service." Pet. App. 145a. The court further noted that, given its "lopsided findings at steps one and two," "the scales would tip overwhelmingly in the plaintiffs' favor" if the competitive harms and benefits were weighed against each other. Pet. App. 146a.

Based on its conclusion that the NEA violated Section 1, the district court issued a permanent injunction requiring American and JetBlue to terminate the NEA. Pet. App. 148a; *see* D. Ct. Doc. 375 (July 28, 2023) (final judgment and order entering permanent injunction).

2. Shortly after the injunction was issued, JetBlue exited the NEA. Pet. App. 14a. American appealed by itself, and a unanimous panel of the First Circuit affirmed. Noting that American had not contested any of the district court's "extensive and reasoned" factual findings, the court of appeals agreed that the NEA violated Section 1 under the rule of reason. Pet. App. 15a-17a.

The First Circuit held at step one that plaintiffs had shown actual anticompetitive effects, relying on the district court's finding that "the NEA 'led to decreased capacity, lower frequencies, or reduced customer choices on multiple routes, including some that are heavily traveled.'" Pet. App. 18a (quoting Pet. App. 72a). Without disputing those factual findings, American asserted that the NEA had actually *expanded* airline capacity. Pet. App. 19a. But the district court had "expressly rejected as unreliable" the evidence American offered on that point, the First Circuit explained, and American provided no reason to second-guess that evidentiary decision. Pet. App. 19a-21a. American also "misconstrue[d]" the district court's findings in contending that the court had found anticompetitive harm solely because American and JetBlue "'were no longer fully independent competitors'" under the NEA. Pet. App. 20a-21a. As the First Circuit explained, the district court correctly found that, even "in markets the carriers both continued to serve" independently outside the NEA, the NEA still "caused American and JetBlue to cease directly competing on 'wing tip[]' flights," and it further found that the NEA

"would diminish competition between them outside the NEA region," which "undermined any claim that the carriers would continue to compete on the routes the NEA 'carved out' from its joint schedule." Pet. App. 18a (quoting Pet. App. 73a, 81a (cleaned up)).

The First Circuit also affirmed the district court's finding at step two that the "only colorable 'procompetitive rationale'" for the NEA was "more flexible loyalty benefits." Pet. App. 22a. American's other theories either were not legally cognizable (because they presumed that "competition itself is inefficient") or were factually unsupported. Pet. App. 23a-27a (internal quotation marks omitted). American did not challenge the district court's finding that the NEA "was not necessary to create a new product," nor did it "directly challenge" the district court's rejection of the theory that American and JetBlue were "'small companies'" joining forces to take on Delta. Pet. App. 24a-25a. American likewise did not challenge the district court's findings that any evidence of a procompetitive response by Delta or United was "'milquetoast, at best," and that Delta's actions during the NEA period reflected previously planned moves and general post-pandemic recovery trends. Pet. App. 24a-26a (internal quotation marks omitted). The First Circuit also concluded that American had no persuasive challenge to the district court's finding that the NEA did not increase capacity at the airports it covered. Pet. App. 26a-27a; *see* Pet. App. 20a (noting that "airline capacity overall increased" during the relevant period "as the industry began to recover from the Covid-19 pandemic").

In addition, the First Circuit rejected American's challenge to the district court's analysis at step three. The court explained that American "ignore[d] the district court's conclusion that the procompetitive benefit achieved by the NEA—more flexible loyalty benefits—could 'plainly [be achieved] through less restrictive means.'" Pet. App. 27a (quoting Pet. App. 143a-144a & n.112). Indeed, American did not dispute that a more limited agreement, like the one it entered with Alaska Airlines, "would have sufficed." Pet. App. 27a-28a.

In sum, the First Circuit explained, the district court was "[p]resented with an arrangement that had many of the essential attributes of an agreement between two powerful competitors sharing revenues and divvying up highly concentrated markets." Pet. App. 28a. The court nonetheless "conducted a monthlong proceeding, after which it made detailed findings of fact, many key ones of which were unfavorable to American." Pet. App. 28a. Because the First Circuit saw "no clear error in those findings" and "no error of law in the [district] court's application of the rule of reason," the court affirmed. Pet. App. 28a-29a.

REASONS FOR DENYING THE PETITION

American asks this Court to review a factbound decision invalidating the NEA, an unprecedented arrangement in which two major airlines agreed to cease competing in the Northeast. Review is unwarranted for several reasons.

First, American is wrong to contend that the First Circuit created a lopsided split with other circuits' decisions at step one of the rule of reason. The district court found that the NEA reduced output and consumer choice and eliminated competition between two of the biggest airlines in the Northeast. None of the cases American cites involved similar harms or remotely similar restraints. And the First Circuit's step-one analysis of the NEA is fully consistent with this Court's precedent. The First Circuit relied on factual findings that the NEA diminished output, reduced consumer choice, and eliminated competition between major market players, all of which are recognized anticompetitive impacts. And, contrary to American's contentions, the NEA warped competition throughout the relevant market.

Second, the shallow split that American alleges over step two is also illusory. This Court requires proof of a procompetitive effect caused by the relevant restraint at step two, and neither case cited by American says otherwise. Plus, the First Circuit's holdings at steps two and three—that the procompetitive benefits of the NEA were minimal, that other causes triggered any market expansion, and that the NEA's benefits could have been achieved through less restrictive means—were correct.

Finally, this Court's review is particularly unwarranted because the NEA has been abandoned and the trial verdict rested on multiple alternative bases that a ruling in American's favor would not disturb. Put simply, this case has nothing to do with American's imagined trend of "hostility" to joint

ventures and would be a poor vehicle for a deep-dive into joint ventures in any event.

I. The First Circuit's Factbound Step-One Analysis Does Not Merit Review.

The First Circuit correctly held that the NEA had substantial anticompetitive effects at step one. "[T]he district court expressly found output reduced": the NEA limited capacity, flight frequency, and consumer choice, and it caused one of the two airlines to exit more than a dozen markets, while also "caus[ing] American and JetBlue to cease directly competing" on certain flights "in markets the carriers both continued to serve." Pet. App. 17a-18a. In finding that those anticompetitive effects satisfied step one, the First Circuit created no circuit split and committed no error.

A. The First Circuit's holding does not implicate any circuit split.

American contends that the First Circuit created a lopsided circuit split by viewing "a reduction in competition between JetBlue and American themselves" as a cognizable harm at step one. Pet. 17. But American cites no case holding otherwise, because such a rule would contravene this Court's decisions holding that "the elimination of significant competition" between "close competitors" with "a large share of the relevant market" does in fact adversely affect competition under Section 1. *United States v. First Nat'l Bank & Tr. Co. of Lexington*, 376 U.S. 665, 667-73 (1964) (collecting cases); *see Bd. of Regents*, 468 U.S. at 110 n.40 (similar).

Indeed, the cases American cites reached different outcomes because they addressed entirely different restraints. Many of those cases, for example, involved *vertical* agreements between firms at different distribution levels, rather than horizontal agreements between competitors. *See In re Jan. 2021 Short Squeeze Trading Litig.*, 105 F.4th 1346 (11th Cir. 2024) (trader and market-maker); *E&L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23 (2d Cir. 2006) (producer and distributor); *Care Heating & Cooling, Inc. v. Am. Standard, Inc.*, 427 F.3d 1008 (6th Cir. 2005) (dealer and manufacturer); *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90 (2d Cir. 1998) (supermarket and real-estate developer); *K.M.B. Warehouse Distrib., Inc. v. Walker Mfg. Co.*, 61 F.3d 123 (2d Cir. 1995) (distributors and manufacturer). The "appreciated differences in economic effect between vertical and horizontal agreements" often make a difference as a matter of federal antitrust law. *Leegin*, 551 U.S. at 888.

The vertical-restraint cases also addressed fundamentally different issues. In one of them, the plaintiffs identified anticompetitive effects in the wrong market. *Trading Litig.*, 105 F.4th at 1355-58. In another, the plaintiffs failed to show that the alleged harms were "caused by" the restraint. *E&L Consulting*, 472 F.3d at 29-31. And in others, the courts found no "adverse effect on the market" because the challenged conduct harmed only the plaintiff competitor, not consumers. *Care Heating*, 427 F.3d at 1011-14 (finding no anticompetitive effects where defendants merely prevented plaintiff

from expanding its business and securing a contract); *see Tops Markets*, 142 F.3d at 93-96 (finding no "detrimental effect on competition" where defendants harmed "only" plaintiff); *K.M.B. Warehouse*, 61 F.3d at 126-28 (finding no "adverse effect on competition" where defendants simply cost plaintiff "a potentially lucrative contract").

Other cases American cites are even further afield. The Ninth Circuit did not address the rule of reason in *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir. 1983)—it simply declined to apply the *per se* rule to a "novel" "Government prompted" arrangement between two defense contractors. *Id.* at 1036-38, 1050-54. Similarly, *Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072 (11th Cir. 2016), was "essentially a breach of contract case" between joint venturers, in which the plaintiff tried to prove "actual anticompetitive effects" with testimony about "theoretical effects." *Id.* at 1076-78, 1085-87. And *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994), just held that a joint venture's ability to create membership rules did not prove "market power." *Id.* at 966-69.

American is thus wrong to contend that courts have found "reduction in competition between members" of a horizontal restraint inadequate at step one. *Cf.* Pet. 17-18. The language American cites—referring to "market-wide injury," *Care Heating*, 427 F.3d at 1014, or "adverse effect on competition as a whole," *Tops Markets*, 142 F.3d at 96—distinguishes "[i]ndividual injury" to a *competitor* from cognizable harm to *consumers*. *Care Heating*, 427 F.3d at 1014;

see Tops Markets, 142 F.3d at 93-96 (same); *SCFC*, 36 F.3d at 963 ("[A] practice ultimately judged anticompetitive is one which harms competition, not a particular competitor."). That is not the issue here.

True, other circuits have not held that "market allocation within the scope of a venture is" by "itself sufficient to condemn the venture under Section 1." Pet. 20 (emphasis omitted). But neither did the First Circuit. That is why it analyzed the NEA at steps two and three before affirming the district court's finding of a Section 1 violation. *See* Pet. App. 22a-28a, 130a-146a. Because American has offered no reason to think any other court would have viewed differently the "mountainous record" in this case, Pet. App. 17a, the decision below implicates no circuit split warranting review.

B. In any event, the First Circuit's analysis was correct.

American errs in asserting that the First Circuit "rested its step-one analysis on one—and only one—consideration: a reduction in competition between JetBlue and American themselves." Pet. 17. That is not what the First Circuit held, for one thing, and the court's findings of reduced output, limited consumer choice, and impaired competitive process established anticompetitive effects by any measure. *See, e.g.*, Pet. App. 18a. Regardless of whether such effects *must* be felt marketwide in every Section 1 case, the First Circuit and district court's findings *did* include marketwide impacts. American's contrary assertion is simply a quibble over how to characterize the

courts' factual findings—and that record-related dispute is certainly not cert-worthy.

The First Circuit and district court identified several textbook anticompetitive harms that the NEA caused in the relevant markets. Reduced output—which the district court found in this case and American "d[id] not claim to be clearly wrong," Pet. App. 16a—is a quintessential anticompetitive effect. *See, e.g.*, *Bd. of Regents*, 468 U.S. at 99. "[T]he elimination of significant competition" between "major competitive factors in a relevant market" is also a recognized harm. *Lexington Bank*, 376 U.S. at 671-73. And a restraint can also have anticompetitive effects simply by rendering output or price "unresponsive to consumer preference," such that they are not what "they would otherwise be" "in a competitive market." *Bd. of Regents*, 468 U.S. at 106-07. Horizontal restraints get no special treatment in the step-one analysis simply because they are labeled a joint venture or merger. *See Broad. Music, Inc. v. CBS*, 441 U.S. 1, 23-24 (1979) (recognizing that "[m]ergers among competitors eliminate competition," and requiring "discriminating examination under the rule of reason" for "[j]oint ventures"). To find harm at step one, it is "enough that the two [firms] competed, that their competition was not insubstantial and that the combination put an end to it." *Lexington Bank*, 376 U.S. at 670.

The First Circuit correctly applied these concepts in holding that plaintiffs satisfied step one. As the court explained, "the district court expressly found" based on an extensive factual record that the NEA

reduced "output" and "reduced total frequencies or capacity in certain NEA markets." Pet. App. 17a-18a (quoting Pet. App. 74a). That is unsurprising, as the NEA entailed an agreement between two of the nation's largest airlines to stop competing in "highly concentrated markets" with "significant—and in some instances insurmountable—barriers to entry." Pet. App. 28a, 118a. Through the NEA, American and JetBlue agreed to coordinate their schedules, pool their resources, allocate markets, and fix capacity in ways that both limited consumer choice and diminished incentives to compete within the NEA region and elsewhere. Pet. App. 17a-22a, 73a & n.45, 119a n.81. That elimination of competition plainly satisfies step one, as do the accompanying decreases in output and consumer choice. *See, e.g.*, *Am. Express*, 585 U.S. at 542, 547 (explaining that conduct has anticompetitive impact where it "reduce[s] output" or "otherwise stifle[s] competition").

American speculates that the NEA might not have harmed competition on net because *marketwide* output might have increased. *See, e.g.*, Pet. 24. But the district court "expressly rejected as unreliable the evidence American offers in support of these claims." Pet. App. 19a; *see* Pet. App. 138a-139a & n.101. It found that "the evidence of any competitive response to the NEA by Delta (or United) was 'milquetoast, at best.'" Pet. App. 25a (quoting Pet. App. 139a). And it further "declined to attribute various capacity increases to the NEA itself." Pet. App. 19a. As the First Circuit noted, "the mere fact that airline capacity overall increased between 2021 and 2022—

just as the industry began to recover from the Covid-19 pandemic—did little to" diminish the NEA's harms. Pet. App. 20a. The court thus correctly held that the NEA demanded further analysis at steps two and three, and factbound questions about the output effects in this case do not warrant review.

Texaco Inc. v. Dagher, 547 U.S. 1 (2006), proves the point. In holding that the "pricing decisions" of a lawful joint venture were not "*per se* unlawful," *Dagher* made clear that even the "price unification policy" of a joint venture may be found "anticompetitive" "pursuant to the rule of reason," just as the venture's "creation" may be deemed "anticompetitive under the rule of reason." *Id.* at 6-7 & n.1. *Dagher* thus refutes American's theory that "a reduction in competition between the joint venture participants" is *never* "sufficient to find direct anticompetitive effects." Pet. 23, 25.

Nothing in the First Circuit's one-paragraph discussion of "ancillary restraints" warrants review, either. *Cf.* Pet. 27-29; Pet. App. 21a-22a. The ancillary-restraints doctrine rescues certain arrangements from *per se* invalidity when they are "subordinate and collateral to a separate, legitimate transaction" and "reasonably necessary" to achieve the venture's efficiencies. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224, 227 (D.C. Cir. 1986); *see Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 187-91 (7th Cir. 1985). The First Circuit analyzed the NEA under the rule of reason—without deeming it *per se* unlawful—and American never denied that the NEA's anticompetitive route-

allocation scheme was its "central" feature. Pet. App. 21a-22a, 25a (internal quotation marks omitted). It is therefore unclear what American thinks the First Circuit got "backwards," Pet. 27, or why the court's passing reference to ancillary restraints even matters, since the court applied the rule of reason.

II. The First Circuit's Factbound Analyses At Steps Two And Three Also Do Not Warrant Review.

American's second question presented—which addresses whether a defendant can satisfy its step-two burden by relying on procompetitive benefits that the challenged restraint did not actually create—also does not warrant review. The shallow split that American alleges is again illusory, and the First Circuit rightly discounted output increases that had nothing to do with the NEA. In any event, the question has little significance given the undisputed centrality of causation at step three.

A. There is no division of authority over the step-two burden.

American errs in contending (Pet. 30-33) that the First Circuit created a circuit conflict when it held that the NEA had no cognizable procompetitive benefits, save perhaps for a "de minimis" improvement in loyalty benefits. Pet. App. 13a, 22a-27a. According to American, the court of appeals departed from the decisions of other circuits at step two by improperly demanding "a heavy showing" that the NEA "directly caused" its asserted benefits, and by failing to credit the NEA for output increases that

the district court found were caused by the waning of the COVID-19 pandemic, among other factors. *See* Pet. 29-30. American is wrong. The decision below correctly applied this Court's precedents imposing "a heavy burden" on defendants at step two, *Bd. of Regents*, 468 U.S. at 113, to establish a "*direct connection*" between their restraint and the procompetitive effects attributed to it, *Alston*, 594 U.S. at 97-101 (emphasis added). That American failed to make that showing does not mean the First Circuit's decision conflicts with the Third and Ninth Circuit cases American cites.

Contrary to American's claim, *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946 (9th Cir. 2023), did not "light[en]" defendants' burden or otherwise eschew the need to show "a causal connection" between a challenged restraint and claimed procompetitive justifications at step two, *cf.* Pet. 30. The question there was whether a procompetitive rationale could satisfy step two even though it did not apply to one component of the challenged restraint (a 30% commission rate). *See* 67 F.4th at 986. The Ninth Circuit held that the rationale passed step two but made clear that its "deficiencies" with respect to the 30% commission rate would "influence[] the analysis at" step three. *Id.* (quoting *Alston*, 594 U.S. at 100). That reasoning does not help American here, where the evidence simply did not support American's claim that the NEA, as opposed to the waning pandemic and other factors, generated any increases in flight

capacity during the relevant period.[3] And indeed, *Epic Games* underscores that American would lose at step three even if its weak step-two showing were somehow accepted. *See infra* pp. 30-31.

Similarly, *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993), did not hold that it is "too high a burden" to require "a persuasive procompetitive justification" at step two. *Cf.* Pet. 31 (internal quotation marks omitted). Quite the opposite. In remanding for a "full[er] investigat[ion]" under the rule of reason, the Third Circuit emphasized that defendants must "proffer[] a persuasive justification" at step two and "demonstrate[] that [their] conduct promote[d] a legitimate goal." *Brown Univ.*, 5 F.3d at 674-75, 678-79 (reversing because the district court misunderstood defendants to offer only "non-economic social welfare justifications," rather than any "procompetitive virtue"). *Brown University* is thus consistent with the First Circuit's analysis.

American's reliance on *FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020), is especially misplaced. While American suggests (Pet. 31-32) that *Qualcomm* foreclosed consideration of "out-of-market" effects, the language American quotes was not discussing step two, 969 F.3d at 992. Indeed, the Ninth Circuit itself noted in *Epic Games*—three years after *Qualcomm*—

[3] *See* Peter C. Carstensen, *Function Versus Consequence in Restraint of Trade Analysis*, 53 U. Balt. L. Rev. 387, 395 n.57 (2024) (recognizing that *Epic Games* and this case "end[ed] in contrasting outcomes due to the particulars of the conduct and industries involved").

that it had "previously considered cross-market rationales" at step two "when applying the Rule of Reason." 67 F.4th at 989. In any event, the First Circuit's principal rationale for rejecting the NEA's purported capacity increases was not American's failure to disprove out-of-market harms, it was American's failure to present objective "primary source" evidence to prove *in-market* benefits. Pet. App. 26a. The court referred to "out-of-market effects" only in the alternative to determine whether, assuming American had shown capacity increases, those benefits were due to the NEA's virtues or the siphoning off of "resources and output" elsewhere. Pet. App. 27a. Far from requiring American to "prove the absence of out-of-market harms," Pet. 32, the First Circuit was properly "contextualizing defendants' asserted capacity effects" to determine "whether any such asserted benefits *actually flowed* from the NEA." Pet. App. 27a (emphasis added). That is exactly the sort of "direct connection" that step two requires, *see Alston*, 594 U.S. at 99, and American simply failed to make that showing here.

B. The First Circuit's fact-intensive analysis was correct.

Review of the First Circuit's step-two analysis is also unwarranted because it was correct. The court of appeals correctly held that the airlines had shown only one "colorable 'procompetitive rationale' for the NEA's restraints": "more flexible loyalty benefits." Pet. App. 22a (quoting *Alston*, 594 U.S. at 96). American does not contest the First Circuit's conclusion that most of its claimed benefits were

either legally noncognizable or factually unsupported. *See* Pet. App. 23a-26a. American now claims that the First Circuit erred in requiring it to show that the sole benefit it cites before this Court—an asserted increase in output—was actually "caused by" the NEA. Pet. 30. But the First Circuit rightly rejected American's "perfunctory claims" about output, which "wither[ed] under even the slightest scrutiny." Pet. App. 26a.

This Court has made clear that a defendant shoulders "a heavy burden" at step two to "competitively justif[y]" its restraints, *Bd. of Regents*, 468 U.S. at 113, with "proof" that the restraints produce "procompetitive benefits," *Alston*, 594 U.S. at 100; *see Cal. Dental Ass'n*, 526 U.S. at 775 n.12. A leading treatise therefore explains that step two requires defendants to show that "the *real effect* of the restraint is to increase output (or decrease price)." 11 Herbert Hovenkamp, *Antitrust Law* ¶ 1914c, at 409 (4th ed. 2018) (emphasis added). And that showing cannot be made if the asserted procompetitive benefits are actually attributable to factors independent of the challenged restraint. *See Alston*, 594 U.S. at 99 (requiring defendants to "show[]" that their restraint "*yield[s]* a competitive benefit" (emphasis added)).

The First Circuit correctly applied these principles in rejecting American's assertions at step two. The court explained that American's claims of increased capacity and new routes were supported only by "defendants' own internal slide decks and charts," which were "bereft of any primary source support."

Pet. App. 26a. Although American tried to fault the district court for evaluating whether output shifts were actually attributable to the NEA, as opposed to "pre-NEA incentives" or other market changes, the First Circuit correctly rejected that line of argument, holding that these considerations "properly figured into the court's ultimate analysis of whether any [of American's] asserted benefits actually flowed from the NEA." Pet. App. 27a.

In any event, the question has little practical significance: even if American's justifications were accepted at step two, American would lose at step three. As this Court explained in *Alston*, steps two and three are not hermetically sealed. "[H]owever framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits." 594 U.S. at 100. "[A] 'legitimate objective that is not promoted by the challenged restraint can be equally served by simply abandoning the restraint, which is surely a less restrictive alternative.'" *Id.* (quoting 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1505, at 428 (4th ed. 2017)). In other words, the output increases that the district court found were not caused by the NEA—and were instead caused by the decline of the COVID-19 pandemic and other factors—could have been achieved by a far less restrictive alternative. That is, they would have occurred without the NEA. American would therefore lose at the third step even if it prevailed at the second.

However the analysis is formally framed, the basic point is that the NEA created *no* consumer benefits that could not have been achieved through significantly less anticompetitive means.

III. No Other Factor Warrants Certiorari.

Even had American raised issues that might otherwise warrant review, there are numerous reasons that this case would present a poor vehicle to resolve them.

First, the NEA has been abandoned. Shortly after the district court entered its judgment, JetBlue withdrew from the arrangement. *See* Pet. App. 14a. Any decision by this Court regarding the "fact-specific" validity, Pet. App. 12a, of a now-terminated joint venture would have little real-world significance.

Second, a ruling in American's favor on the questions presented would not change the ultimate outcome of the suit. At step one, the district court found numerous alternative forms of anticompetitive harm, including the NEA's reduction in the number of competing airlines, its impairment of JetBlue's "maverick" status, and the fact that the airlines "wield[ed]" market power "in a highly concentrated market with significant barriers to entry." Pet. App. 115a-130a (internal quotation marks omitted). While the First Circuit found it unnecessary to address those alternative grounds, Pet. App. 22a n.8, nothing in the record suggests that the court of appeals on remand would second-guess the district court's well-supported factual findings on those matters. And as

explained above, even if the Court accepted American's invitation to erase the causation requirement from step two, American would lose at step three. *See supra* pp. 30-31. Accordingly, even if this Court thought the First Circuit had erred, the result would be a remand where plaintiffs would again prevail.

Third, this case presents no opportunity to address American's asserted "trend" of "hostility to collaborations" in antitrust law. *Cf.* Pet. 35-36. The First Circuit and the district court in this case explicitly noted that collaboration among market participants can be procompetitive, and they expressed no hostility toward American's more limited partnership with Alaska Airlines. *See* Pet. App. 27a-28a, 49a-51a, 82a-85a, 145a. But the NEA was an unusual arrangement that inflicted real and substantial harms on the consumers that the States have a duty to protect. American's inability to prevail under the rule-of-reason framework does not evince any "hostility" to procompetitive collaboration. It simply reflects that the NEA—"an arrangement that had many of the essential attributes of an agreement between two powerful competitors sharing revenues and divvying up highly concentrated markets," Pet. App. 28a—was unlawful on its facts.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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