No. 24-938

In the Supreme Court of the United States

AMERICAN AIRLINES GROUP INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner and JetBlue Airways entered into the Northeast Alliance (NEA), a joint venture in which the two airlines agreed to allocate capacity and share revenues on certain flight routes in the northeast region. After a lengthy trial, the district court applied the rule of reason and determined that the NEA violated Section 1 of the Sherman Act, 15 U.S.C. 1. The court of appeals affirmed. The questions presented are as follows:

1. Whether the court of appeals correctly held that respondents had established anticompetitive effects at step one of the rule-of-reason analysis by proving that the NEA had reduced output in multiple air-travel markets.

2. Whether the court of appeals correctly held that the airlines had failed to meet their burden at step two of the analysis because they had not adequately proved that the NEA yielded procompetitive benefits.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Mass.):

United States v. *American Airlines Grp. Inc.*, No. 21-cv-11558 (July 28, 2023)

United States Court of Appeals (1st Cir.):

United States v. *American Airlines Grp. Inc.*, No. 23-1802 (Nov. 8, 2024)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 121 F.4th 209. The opinion of the district court (Pet. App. 30a-149a) is reported at 675 F. Supp. 3d 65.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2024. On January 29, 2025, Justice Jackson extended the time within which to file a petition for a writ of certiorari to and including February 27, 2025, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 2020, petitioner and JetBlue Airways entered into the Northeast Alliance (NEA), a "first-of-its-kind alliance" in which the two airlines "effectively agreed to operate as a single airline with respect to most of

their routes in and out of Boston and New York City." Pet. App. 1a, 31a. Petitioner is "one of the most powerful airlines in the world." *Id.* at 46a. JetBlue is smaller than petitioner, but it is also a "formidable and influential player in the air travel market" that "aggressively competes with older legacy carriers." *Id.* at 2a-3a, 30a. Together, petitioner and JetBlue are two of the four largest airlines in New York and two of the largest three in Boston. *Id.* at 3a.

Until 2020, petitioner and JetBlue "were fierce and frequent head-to-head competitors" in the northeast. Pet. App. 31a. They directly competed to provide nonstop service on 29 routes touching Boston and New York, including 23 routes on which their combined market share was between 30%-96%. *Id.* at 3a. And they relentlessly pressured each other to offer more seats, serve new routes, improve quality for travelers, and reduce their fares. *Id.* at 45a-46a.

In 2020, however, petitioner and JetBlue "decided to stop competing" in the northeast by forming the NEA. Pet. App. 67a. Under the NEA, the two airlines functioned "like a single airline" at Boston's Logan Airport and at New York's LaGuardia, John F. Kennedy, and Newark Airports. *Id.* at 66a. They did so in two important ways.

First, the two airlines jointly set schedules and capacity on most routes touching the NEA airports. Pet. App. 56a. They "act[ed] as one airline in the northeast when choosing which routes to fly, when to fly them, and which aircraft (and which [airline]) will do so." *Id.* at 66a. In their jointly-set schedule, the airlines allocated "various routes to either American or JetBlue." *Id.* at 122a. In New York alone, petitioner "exited more than a dozen routes that both defendants served before the

NEA." *Ibid.* The parties' "ultimate objective" was to have "one [NEA] carrier per market wherever possible." *Ibid.* And even on routes that both airlines continued to serve, they eliminated "wing tip" flights, which are competing flights that travel the same route at approximately the same time. *Id.* at 73a.

Second, the two airlines shared their revenues from NEA flights. Pet. App. 6a-7a. The stated goal of this revenue sharing was to "achieve 'metal neutrality,' meaning an indifference as to whether a passenger within the NEA region flies on a JetBlue or American plane." *Id.* at 6a. To facilitate this revenue-sharing agreement, one carrier would make an "annual 'transfer payment' of excess revenue due to the other under the terms of the agreement." *Id.* at 7a.

2. a. After the airlines announced the NEA in July 2020, the Department of Transportation (DOT) conducted an informal review of the joint venture pursuant to its authority under 49 U.S.C. 41720. See Pet. App. 62a. DOT closed its review based on a series of commitments made by the airlines to address competitive issues. *Ibid.* Although the airlines' commitments "did not address all of [DOT]'s concerns," DOT accepted them because it intended "to defer to [the Department of Justice (DOJ)], as the primary enforcer of Federal antitrust laws, to resolve antitrust concerns with respect to the NEA." C.A. App. 1776, 1779. DOJ conducted its own evaluation of the NEA under the Sherman Act, 15 U.S.C. 1 *et seq.*, and it ultimately concluded that the airlines' commitments would not eliminate competitive harms from the joint venture. Pet. App. 97a.

b. In September 2021, respondents—the United States, six States (Arizona, California, Florida, Massachusetts, Pennsylvania, and Virginia), and the District

of Columbia—sued the airlines, alleging that the NEA violated Section 1 of the Sherman Act. Pet. App. 7a-8a. The case proceeded to a "month-long bench trial," at which the parties presented a "tidal wave of evidence." *Id.* at 32a. That evidence included live "testimony by two dozen witnesses," thousands of pages of deposition transcripts from 17 additional witnesses, and more than a thousand trial exhibits. *Ibid.*

3. a. In May 2023, the district court issued a 94-page decision holding the NEA unlawful. Pet. App. 30a-149a.

To decide whether the NEA constituted an unreasonable restraint of trade in violation of the Sherman Act, the district court applied the "rule of reason." Pet. App. 109a-112a. Under that framework, the plaintiff must make an initial showing, directly or indirectly, that the challenged agreement has a substantial anticompetitive effect in a relevant antitrust market. *Ohio* v. *American Express Co.*, 585 U.S. 529, 540 (2018). If the plaintiff succeeds at step one, "the burden shifts to the defendant to show a procompetitive rationale for the restraint." *Id.* at 541. If the defendant makes that showing, the burden returns to the plaintiff, who can prevail by establishing that "the procompetitive efficiencies could be reasonably achieved through less anticompetitive means" or that, on balance, the restraint "unduly harms competition." *NCAA* v. *Alston*, 594 U.S. 69, 97 (2021) (citation omitted).

Here, the district court found at step one that respondents had proved substantial anticompetitive harm both directly and indirectly. Pet. App. 114a-130a. The court held that respondents had provided direct evidence of several forms of anticompetitive harm caused by the NEA. First, the court found that the NEA had

eliminated head-to-head competition within the northeast between petitioner and JetBlue, effectively reducing "the number of market participants—and the number of distinct choices for consumers—by one." *Id.* at 116a. Second, by aligning JetBlue's interests with a large legacy carrier's, the NEA had "weakened [JetBlue's] status as an important 'maverick' competitor in the industry." *Id.* at 119a. Third, the airlines' "assignment of various routes to either American or JetBlue" was a "straightforward example of market allocation," which is ordinarily per se illegal. *Id.* at 122a. The court did not apply the per se rule because respondents had not brought a per se challenge, but the court found that "the deliberate market allocation inherent in the NEA is strong evidence of its actual anticompetitive effect." *Id.* at 123a. The district court further found that this market allocation had directly affected output in multiple markets by "reduc[ing] total frequencies or capacity in certain NEA markets that the defendants have allocated." *Id.* at 74a.

In the alternative, the district court held that respondents had satisfied their step-one burden indirectly, through evidence of anticompetitive effect and the airlines' market power in the relevant geographic markets. Pet. App. 124a-130a.

At step two, the district court found that the airlines had failed to meet their burden to establish procompetitive benefits of the NEA. Pet. App. 130a-143a. The court rejected several of the airlines' asserted justifications for the alliance as either not cognizable or unsupported by the evidence. As relevant here, the court rejected the airlines' "claims that the NEA has led to growth and increases in capacity." *Id.* at 139a. The court explained that the evidence showed that any

growth within the NEA "comes at the expense of resources and output by the defendants elsewhere." *Ibid.* It also showed that the airlines "each would have pursued at least some of this growth with or without the partnership." *Ibid.* While acknowledging evidence that the airlines had begun to offer some new services after the NEA was formed, the court explained that this evidence did not establish that those services had "been launched 'because of' the NEA," rather than for independent reasons. *Id.* at 141a. For example, the airlines' evidence did not explain whether the airlines had "served the routes before 2019, whether the routes were included in long-term plans the defendants independently developed and would have pursued without the NEA, or whether they arose from the substantial shift in flying patterns occurring during and after the pandemic." *Ibid.*

Although the district court found that the NEA "fails after the first two steps of a rule-of-reason analysis," the court nevertheless briefly addressed step three of the inquiry. Pet. App. 144a. The court determined that the NEA's objectives could have been achieved by less restrictive means, including by a more limited arrangement similar to one between petitioner and Alaska Airlines. *Id.* at 145a. The court also concluded that, even if no less restrictive alternative existed, the balance of the NEA's harms and benefits would "tip overwhelmingly in [respondents'] favor." *Id.* at 146a.

The district court issued a permanent injunction barring the two airlines from continuing or implementing the NEA. Pet. App. 148a. In its final judgment, the court further ordered that, for the next ten years, the two airlines were prohibited from entering into any new agreement with each other that "provides for revenue

sharing, or for coordination of routes or capacity, in a manner substantially similar to the NEA." D. Ct. Doc. 375, at 6 (July 28, 2023).

b. Before the district court finalized the terms of the permanent injunction, JetBlue terminated the NEA. See D. Ct. Doc. 373, at 1 (July 26, 2023). JetBlue announced that it would not appeal the injunction and would instead begin winding down the alliance in order to turn its focus to a proposed merger with a different airline. Press Release, JetBlue, JetBlue Issues Statement on Its Northeast Alliance with American Airlines (July 5, 2023), https://news.jetblue.com/latest-news/press-release-details/2023/JetBlue-Issues-Statement-on-Its-Northeast-Alliance-with-American-Airlines/default.aspx. Petitioner alone pursued an appeal.

4. The court of appeals affirmed the district court's judgment. Pet. App. 1a-29a.

The court of appeals observed that the district court had "made extensive and reasoned findings regarding the NEA's effects on competition after conducting a monthlong bench trial and reviewing a mountainous record." Pet. App. 17a. The court noted that petitioner had chosen not to argue that any of those "factual findings were clearly erroneous." *Id.* at 15a. Instead, petitioner had raised only claims of legal error, each of which the court rejected. *Ibid.*

First, the court of appeals rejected petitioner's argument that the district court had erred at step one of the rule-of-reason analysis. Pet. App. 17a-22a. Petitioner had argued that the only way for a plaintiff to prove anticompetitive harm at step one is through evidence of higher prices or lower output, *id.* at 17a, but the court found no occasion to address whether other step-one showings could suffice. The court explained that, "even

assuming arguendo that a showing of reduced [output] was required to find anticompetitive harm, the district court made the requisite findings here." *Id.* at 18a-19a. The court of appeals detailed the district court's many findings of reduced output, including its finding "that the NEA in fact 'reduced total frequencies or capacity in certain NEA markets.'" *Id.* at 18a (quoting *id.* at 74a). The court of appeals rejected petitioner's efforts to undermine those factual findings with evidence that was "not in the trial record" or that the district court had "expressly rejected as unreliable." *Id.* at 18a n.5, 19a. The court reiterated that petitioner had disavowed any argument that "the district court committed clear error" in those "output-related factual findings." *Id.* at 19a.

Also at step one, the court of appeals rejected petitioner's argument that the district court's finding of anticompetitive harm had been based on "outdated case law" that focused on "'the protection of rivalry,' as opposed to consumer welfare." Pet. App. 21a. The court of appeals explained that the district court's legal conclusions were "buttresse[d]" by the "similarity between the NEA and naked market allocation," which has "generally been treated as per se illegal." *Id.* at 21a-22a. The court of appeals distinguished such naked market allocation from market allocation that is "'ancillary' to an otherwise procompetitive joint venture," which is not unlawful per se. *Id.* at 21a. The court did not reach the district court's alternative holding that respondents had established harm to competition through indirect evidence. *Id.* at 22a n.8.

Turning to step two of the rule-of-reason analysis, the court of appeals agreed with the district court that petitioner had failed to establish procompetitive bene-

fits of the NEA. Pet. App. 22a-27a. And it dismissed petitioner's "perfunctory claims" that the NEA had the procompetitive effect of increasing output, which the court of appeals explained were based on evidence that the district court had found "to provide 'no objective or helpful corroboration' of the carriers' claims regarding the NEA's successes." *Id.* at 26a (citing *id.* at 141a-142a).

The court of appeals also rejected petitioner's argument that at step two the district court was required to "take [the] asserted procompetitive benefits" as claimed, rather than assessing whether the asserted benefits "actually flowed from the NEA." Pet. App. 27a. The court of appeals approved the district court's determination that any increase in output here was attributable to a host of other factors—including the reallocation of planes from other locations to the northeast; growth plans that had already existed when the NEA was formed; and the "fact that airline capacity overall increased between 2021 and 2022," as "the industry began to recover from the Covid-19 pandemic." *Id.* at 19a-20a, 27a.

Finally, the court of appeals rejected petitioner's challenge to the district court's step-three analysis. Pet. App. 27a-28a. The court of appeals upheld the district court's determination that the only cognizable procompetitive benefit of the NEA that was supported by evidence—more flexible loyalty benefits—"could 'plainly be achieved through less restrictive means.'" *Id.* at 27a (brackets and citation omitted).

ARGUMENT

Petitioner contends (Pet. 17-29) that, to satisfy the first step of the rule-of-reason analysis, an antitrust plaintiff must prove that a joint venture lowered marketwide

output or raised prices, not merely that it reduced competition between the collaborators. But the court of appeals did not hold otherwise. On the contrary, the court expressly declined to decide whether reduction in competition between petitioner and JetBlue would suffice at step one, and instead rested on the district court's finding that the NEA would reduce marketwide output—exactly the approach that petitioner advocates. The First Circuit's application of uncontroversial antitrust principles to the district court's unchallenged factual findings does not conflict with any decision of another court of appeals or otherwise warrant this Court's review.

Petitioner also contends (Pet. 29-35) that, at step two of the rule-of-reason analysis, a court cannot require the defendant to establish that the asserted procompetitive benefits of the venture are actually attributable to the venture rather than to some other cause. The court of appeals correctly rejected that argument and required petitioner to prove that procompetitive benefits actually flowed from the NEA. That holding likewise does not conflict with any decision of this Court or another court of appeals, and it does not warrant further review.

In any event, this case is a poor vehicle to resolve either question presented, since petitioner likely would derive no practical benefit even if it prevailed on the questions presented here. That is so both because the district court's judgment ultimately could be affirmed on alternative grounds, and because JetBlue terminated the NEA nearly two years ago. The Court should deny the petition.

1. The court of appeals' application of step one of the rule-of-reason analysis was correct and does not warrant this Court's review.

a. At the first step of the rule-of-reason inquiry, a plaintiff must prove, either directly or indirectly, that the challenged agreement has "an anticompetitive effect." *Ohio* v. *American Express Co.*, 585 U.S. 529, 542 (2018) (*Amex*). This Court has identified several nonexhaustive examples of the types of direct evidence that suffice. These include evidence of "reduced output, increased prices, or decreased quality in the relevant market." *Ibid.*

Here, the court of appeals appropriately rested its step-one decision on the district court's uncontested finding that the NEA had "reduced output." Pet. App. 16a; see *Amex*, 585 U.S. at 542. The court of appeals explained that the district court had "expressly found that the NEA 'led to decreased capacity, lower frequencies, or reduced consumer choices on multiple routes.'" Pet. App. 18a (citation omitted). For example, the district court had found that for multiple routes, "the NEA allocated the route to one carrier and caused the other to exit." *Ibid.* And the court had found "that the NEA in fact 'reduced total frequencies or capacity in certain NEA markets.'" *Ibid.* (citation omitted). Based on those undisputed "output-related factual findings," the court of appeals correctly determined that respondents had presented sufficient direct evidence of anticompetitive harm to satisfy the rule of reason's first step. *Id.* at 19a.

b. Petitioner's contrary arguments lack merit. Petitioner contends (Pet. 36) that the court of appeals erroneously rested its step-one decision "solely on findings concerning a supposed reduction in competition

between members of the joint venture themselves," instead of harms to consumers such as reduced output. The First Circuit did no such thing. The First Circuit specifically *declined* to "reach the issue of whether the NEA's reduction in the number of competitors itself * * * constituted standalone anticompetitive harm[]." Pet. App. 22a n.8. That issue "matters not at all in this case," the court of appeals explained, "because the district court expressly found output reduced." *Id.* at 17a. In other words, the court of appeals relied exclusively on the type of evidence that petitioner insists was required, rather than on the type of evidence that petitioner deems insufficient. This case thus does not implicate the first question presented in the petition. See Pet. i.

For the same reason, petitioner is wrong to contend (Pet. 21-23) that the decision below conflicts with this Court's decisions in *Amex*, *supra*, and *Texaco Inc.* v. *Dagher*, 547 U.S. 1 (2006). Petitioner reads those decisions to foreclose courts from relying, at step one of the rule-of-reason analysis, on reduction in competition between joint venturers. Nothing in the decision below, however, is inconsistent with the rule that petitioner attributes to *Amex* and *Dagher*.

To be sure, respondents argued below that petitioner had misread this Court's decisions in *Amex* and *Dagher*. Respondents argued that, at step one of the rule-of-reason analysis, the court of appeals *could* find it sufficient that the NEA eliminated all competition between two of the largest air carriers in the northeast. See Resp. C.A. Br. 34-38. As respondents explained, the Court in *Amex* recognized that the plaintiffs in that case could have satisfied their initial burden by showing that the challenged restraint had "ended competition between

credit-card networks with respect to merchant fees." *Amex*, 585 U.S. at 550. And *Dagher* involved a challenge to a joint venture's conduct after the venture had been formed; the Court distinguished the case before it from one involving a challenge to the "creation" of a joint venture. 547 U.S. at 6 n.1. But again, the court of appeals in this case declined to decide whether a plaintiff can satisfy its step-one burden with evidence of a reduction in competition between joint venturers. See Pet. App. 17a-18a, 22a n.8. The decision below thus does not conflict with *Amex* or *Dagher* even on petitioner's reading of those decisions.

Petitioner acknowledges that the court of appeals "repeatedly invoked" the "district court's finding of 'reduced output.'" Pet. 25 (citation omitted). Petitioner posits (Pet. 25-27), however, that the court of appeals was actually talking about the wrong type of output. In petitioner's view, the court of appeals erroneously focused only on the output collectively produced *by petitioner and JetBlue*, and instead should have focused on "*marketwide* output" that "accounts for other airlines' competitive response to the NEA." Pet. 25-26. Again, petitioner misreads the decisions below. The court of appeals relied on the district court's express finding "that the NEA in fact 'reduced *total* frequencies or capacity in certain NEA markets.'" Pet. App. 18a (emphasis added) (quoting *id.* at 74a).

Petitioner appears to dispute (Pet. 26) the correctness of that finding, arguing that the reduction in output from petitioner and JetBlue did not result in a marketwide output reduction because output from other airlines increased. Petitioner asserts (*ibid.*) that a government database showed that across all airlines, total "capacity actually *grew* on those routes." The court of

appeals properly rejected that argument, because the cited database was not in the trial record and the calculation was mentioned for the first time in petitioner's appellate reply brief. Pet. App. 18a n.5. But in all events, petitioner's disagreement with the lower courts' finding that "total" output was reduced "in certain NEA markets" is a factbound contention that does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). This Court does "not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Petitioner is also wrong in contending (Pet. 27-29) that the court of appeals' discussion of the ancillary-restraints doctrine "underscores the need for review." The court explained that its conclusion as to the adequacy of petitioner's step-one showing was "further buttress[ed]" by the similarity between the NEA and the type of market-allocation agreement that is ordinarily deemed per se illegal. Pet. App. 22a; see *id.* at 21a (citing *Palmer* v. *BRG of Ga., Inc.*, 498 U.S. 46, 49 (1990) (per curiam)). The court recognized that such restraints may be permissible if they are "'ancillary' to an otherwise procompetitive joint venture." *Id.* at 21a. The court explained, however, that the district court had found the market allocation here to be "central, not ancillary, to the NEA." *Ibid.* (citing *id.* at 134a-136a).

Petitioner takes issue with the court of appeals' phrasing, and specifically with the dichotomy between "central" and "ancillary" restraints of trade. See Pet. 27-28. But in context, the court appears simply to have been suggesting that the NEA's anticompetitive market

allocation was the essence of the parties' agreement—not a means of effectuating some *other* procompetitive collaborative undertaking. That was the thrust of the district court's ancillarity analysis, which the court of appeals cited with approval. See Pet. App. 134a ("The NEA is not a venture with an overarching legitimate purpose under the Sherman Act, to which certain restraints with anticompetitive features are ancillary"; rather, "the overarching purpose of the NEA is anticompetitive."); *id.* at 136a (explaining that the NEA's "anticompetitive features are at its core, ancillary to no overarching legitimate objective"). And in any event, the court of appeals drew an analogy to per se unlawful restraints of trade only to "further buttress[]" the "already well-supported conclusion" that respondents had met their step-one burden. *Id.* at 22a.

c. Because petitioner misreads the decision below, the circuit conflicts it asserts are illusory. Petitioner contends (Pet. 17-20) that decisions of the Second, Sixth, Ninth, Tenth, and Eleventh Circuits "recognize that a reduction in competition between members of a collaboration alone is *not* sufficient to prove direct anticompetitive effects at step one." But again, the First Circuit did not hold otherwise here. None of those cases involved the unchallenged evidence of a marketwide reduction in output that is present in this case. And none of those out-of-circuit decisions suggests that evidence of such marketwide output reduction would be insufficient to satisfy an antitrust plaintiff's step-one burden.

In *SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958 (1994), cert. denied, 515 U.S. 1152 (1995), for example, the Tenth Circuit held that plaintiffs challenging a joint venture between Visa and Discover Card had failed to provide sufficient evidence of anticompetitive harm

where "there was no evidence that price had been increased, output had decreased, or other indicia of anticompetitive activity had occurred." *Id.* at 968.

In *Procaps S.A.* v. *Patheon, Inc.*, 845 F.3d 1072 (2016), the Eleventh Circuit reached a similar result. During the district court proceedings there, the plaintiff "had bound itself to proceed only on" a direct showing of anticompetitive harm. *Id.* at 1084. The Eleventh Circuit affirmed the district court's conclusion that expert testimony regarding "the likely effect of removing a competitor"—in other words, *predictive* evidence—was not enough to carry the plaintiff's burden under the direct approach. *Id.* at 1085. The court of appeals explained that the plaintiff had not shown "*actual* detrimental effects" on competition, such as "an actual reduction in output." *Ibid.* (emphasis added). That is nothing like this case, where the district court found that respondents had submitted evidence of actual output reductions in several markets. See Pet. App. 74a.

In several of the other decisions that petitioner invokes, the plaintiff's evidence showed only harm to itself, which is insufficient for antitrust liability. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (explaining that the antitrust laws "were enacted for 'the protection of competition, not competitors'") (citation and emphases omitted). Those cases thus did not involve the uncontested findings of marketwide output reduction that the district court made here.

For example, in *Tops Markets, Inc.* v. *Quality Markets, Inc.*, 142 F.3d 90 (2d Cir. 1998), the plaintiff's evidence did not establish any "actual detrimental effect on competition" in the relevant grocery market, but instead showed only that the plaintiff itself had been

excluded from the supermarket site of its choice. *Id.* at 96. The court in *K.M.B. Warehouse Distributors, Inc.* v. *Walker Manufacturing Co.*, 61 F.3d 123, 127 (2d Cir. 1995), likewise held that the plaintiff had demonstrated only that it had "lost a potentially lucrative contract." And in *Care Heating & Cooling, Inc.* v. *American Standard, Inc.*, 427 F.3d 1008, 1014 (6th Cir. 2005), the plaintiff had shown only that it was unable to get business. The court held that "[i]ndividual injury, without accompanying market-wide injury, does not fall within the protections of the Sherman Act." *Ibid.*

The remaining case that petitioner invokes, *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir.), cert. denied, 464 U.S. 849 (1983), is particularly far afield. The court in *Northrop* held that an agreement between two joint venturers, allocating to each venturer responsibility for selling one type of F-18 aircraft that the two had jointly developed, was not per se illegal. *Id.* at 1052-1053. The court did not address what kind of joint-venture restraints should be found anticompetitive at step one of the rule of reason. And whereas the agreement there concerned only the products that the venture itself had created, petitioner and JetBlue agreed to reduce output of, and competition between, products and services that predated the venture.

In short, there is no conflict on the first question presented. Petitioner has not identified any court of appeals that would reach a different result on the facts of this case.

2. The court of appeals' step-two analysis likewise does not warrant this Court's review.

a. At step two of the rule-of-reason analysis, "the burden shifts" from the plaintiff "to the defendant to show a procompetitive rationale for the restraint."

Amex, 585 U.S. at 541. The defendant bears "a heavy burden of establishing an affirmative defense which completely justifies" the "apparent deviation from the operations of a free market." *NCAA* v. *Board of Regents*, 468 U.S. 85, 113 (1984). To do so, the defendant must present "proof" that the challenged agreement "yield[s] a procompetitive benefit" for consumers, such as decreasing the price or improving the quality of a product. *NCAA* v. *Alston*, 594 U.S. 69, 99 (2021).

Establishing that a challenged practice "yield[s]" a procompetitive benefit necessarily requires the defendant not only to identify procompetitive events that have occurred since the practice began, but also to establish that those events resulted from the challenged restraint and not from some independent cause. *Board of Regents* and *Alston* illustrate that point. In *Board of Regents*, the NCAA attempted to justify a restrictive television plan for college football games on the ground that the plan "assist[ed] in the marketing of broadcast rights." 468 U.S. at 113. The Court rejected that proffered justification, based on the district court's finding that "NCAA football could be marketed just as effectively without the television plan." *Id.* at 114. That finding logically implied that the asserted benefits lacked an adequate causal nexus to the restriction at issue.

Alston is of a piece. There, the NCAA had attempted to justify restrictions on compensation for student-athletes by showing that those restrictions "play a role in consumer demand" for college sports. *Alston*, 594 U.S. at 83. But this Court held that the NCAA had not satisfied its step-two burden because it could not show a "direct connection" between the challenged restrictions and the asserted consumer-demand benefit. *Id.* at 99 (citation omitted).

In this case, the court of appeals faithfully applied those principles to hold that the airlines had not met their step-two burden. Pet. App. 22a-27a. The court correctly rejected petitioner's claims that the NEA would result in beneficial "capacity growth," because the district court had found "'evidence the defendants each would have pursued at least some of this growth with or without the NEA.'" *Id.* at 27a (brackets and citation omitted). Consistent with *Board of Regents* and *Alston*, the court of appeals required petitioner to show that the asserted "benefits actually flowed from the NEA" rather than from some other source. *Ibid.* Petitioner did not make that showing. *Ibid.*

b. Petitioner contends (Pet. 33-35) that the court of appeals erroneously applied a more demanding causation standard than *Alston* contemplates. That argument largely rests on a misreading of the decision below. The court did not require that petitioner "conclusively refute every possible alternative cause" for its claimed capacity growth, as petitioner contends (Pet. 29). Instead, the court held only that the district court was permitted to consider other exogenous factors, such as the industry's post-Covid behavior and the airlines' pre-NEA growth plans, to "contextualiz[e] defendants' asserted capacity effects" and determine whether the NEA had actually contributed to increased capacity. Pet. App. 27a. That analysis was consistent with *Alston*'s requirement of a "direct connection." 594 U.S. at 99 (citation omitted).

The court of appeals likewise did not hold that the airlines were required to refute the "possibility" that their claimed benefits were "counterbalanced by out-of-market adverse effects," as petitioner asserts (Pet. 29-30). At step two, the court did not weigh harm in one

market against benefits in another. Rather, the court held that within the relevant markets, the airlines had not established that the NEA—as opposed to some other factor—had "yield[ed] a procompetitive benefit." *Alston*, 594 U.S. at 99; see Pet. App. 27a.

c. Petitioner's assertion of a circuit conflict (Pet. 30-33) is similarly misplaced. Neither of the decisions petitioner cites questioned the need for a causal link between the restriction at issue and the claimed procompetitive benefits.

In *Epic Games, Inc.* v. *Apple, Inc.*, 67 F.4th 946 (2023), cert. denied, 144 S. Ct. 681, and 144 S. Ct. 682 (2024), the Ninth Circuit held that Apple had provided sufficient procompetitive justifications for certain restraints on app distribution. *Id.* at 985. The district court had found that Apple satisfied step two even though a certain asserted procompetitive benefit applied to some components of the challenged restraint, but not to all of them. *Ibid.* The Ninth Circuit agreed, holding that a district court may "partially credit a rationale" at step two of the rule-of-reason analysis and proceed to step three. *Id.* at 986. In reaching that conclusion, the court in *Epic Games* did not excuse defendants at step two from establishing a causal relationship between the restraint and the procompetitive justification. The court merely emphasized that, when a procompetitive benefit applies to only certain components of a restraint, a court may take that fact into account at step three.

This case is nothing like *Epic Games*. Here, the courts below did not find that petitioner's asserted growth benefits resulted from some but not other components of the NEA. Instead, petitioner failed to prove that "*any* such asserted benefits actually flowed from the

NEA." Pet. App. 27a (emphasis added). There is thus no basis to think that the Ninth Circuit would treat this case differently than did the First Circuit. To the contrary, *Epic Games* underscores the fact that even if petitioner could carry its burden at step two of the rule-of-reason analysis, it would lose at step three. See p. 22, *infra*.

There is also no conflict between the decision below and *United States* v. *Brown University*, 5 F.3d 658 (3d Cir. 1993). In *Brown University*, the district court rejected the defendant universities' proffered justification for standardizing their financial-aid practices, because the court believed that the universities were merely pointing to "social welfare values" rather than to cognizable benefits to competition. *Id.* at 676. The Third Circuit reversed, holding that the district court should have "more fully investigate[d]" the procompetitive benefits asserted by the defendants. *Id.* at 678; see *ibid.* ("The nature of higher education, and the asserted procompetitive and pro-consumer features of the [challenged restraint], convince us that a full rule of reason analysis is in order here."). But contrary to petitioner's characterization (Pet. 31), the Third Circuit did not excuse the defendants from having to establish a causal link between the proffered justification and the challenged restraint. On the contrary, the Third Circuit's statement of the step-two burden accords with the decision below: the court explained that a defendant must "show that the challenged conduct"—not some other factor—"promotes a sufficiently pro-competitive objective." *Brown Univ.*, 5 F.3d at 669. There is thus no conflict warranting this Court's review.

3. This case is an unsuitable vehicle to address the questions presented, since petitioner would not likely

derive any ultimate practical benefit even if the Court granted review and decided those questions in petitioner's favor.

a. Even if this Court granted review and resolved the questions presented in petitioner's favor, the district court's injunction might ultimately be affirmed on alternative grounds that the court of appeals did not address. With respect to step one of the rule-of-reason analysis, the petition for a writ of certiorari concerns only the district court's finding that respondents had established anticompetitive harms with *direct* evidence. But the district court also held that respondents had met their step-one burden with *indirect* evidence, through proof of the airlines' market power and evidence that the NEA tended to harm competition in a number of ways. Pet. App. 89a, 124a-130a.

In addition to concluding that the NEA "fail[ed] after the first two steps of a rule-of-reason analysis," Pet. App. 144a, the district court also determined that the NEA failed at step three. The court found that "the objectives [the airlines] sought to realize via the NEA could have been achieved by one or more less restrictive alternative arrangements." *Id.* at 144a-145a. The court further held that, even if no less restrictive alternative had been identified, the NEA's anticompetitive harms would "overwhelmingly" outweigh its procompetitive benefits. *Id.* at 146a. Those alternative grounds for holding the NEA to be unlawful underscore the largely theoretical significance of the questions presented here.

b. Even if petitioner surmounted all those obstacles and obtained a final judgment in its favor, that judgment would not revive the NEA, because JetBlue pulled out of the joint venture nearly two years ago. Pet. App. 14a. Petitioner argued below that the court of appeals

could still provide meaningful relief by vacating the ten-year injunction against petitioner's entering into "another NEA-like arrangement" with JetBlue. *Id.* at 14a n.4; see D. Ct. Doc. 375, at 6. Petitioner indicated below that it "intends" to enter into another NEA-type alliance with JetBlue if it is allowed to do so. Pet. App. 14a n.4. But petitioner's ability to achieve that objective depends not only on vacatur of the district court's injunction, but also on JetBlue's willingness to enter into such an alliance.* In addition to raising at least a potential question of mootness, cf. *Bennett* v. *Spear*, 520 U.S. 154, 167 (1997) (Article III injury cannot be "the result of the independent action of some third party not before the court."), JetBlue's withdrawal from the joint venture reinforces the conclusion that this case is an unsuitable vehicle for resolution of the questions presented.

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* Recent events indicate that JetBlue might not share petitioner's intent to enter into a new alliance even if the district court's injunction were dissolved. A new plan for a partnership between the two airlines fell apart mere weeks ago, apparently because "JetBlue was focused on different business priorities." Press Release, American Airlines, Response to reports about discussions with JetBlue (Apr. 28, 2025), https://news.aa.com/news/news-details/2025/Response-to-reports-about-discussions-with-JetBlue-NET-ALP-04/default.aspx.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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