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

REPLY BRIEF FOR PETITIONER

DANIEL M. WALL
ALFRED C. PFEIFFER, JR.
CHRISTOPHER S. YATES
LATHAM & WATKINS LLP
505 Montgomery Street
Suite 2000
San Francisco, CA 94111

SAMIR DEGER-SEN
LATHAM & WATKINS LLP
1271 Avenue of the
Americas
New York, NY 10020

GREGORY G. GARRE
Counsel of Record
PETER E. DAVIS
CHRISTINE C. SMITH
JOSEPH E. SITZMANN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

INTRODUCTION

This case presents two critically important questions about the lawfulness of pro-consumer joint ventures in the face of increasingly aggressive antitrust enforcement. In recent years, enforcers have pushed a shift from the long-dominant consumer-welfare standard toward a nebulous "competitive process" standard that dooms any collaboration among major competitors, even if it benefits consumers through reduced prices or increased output. The Department of Justice (DOJ) and the States aggressively argued in favor of this standard below. In this Court, however, the Solicitor General offers no serious defense of the First Circuit's expansive vision of the antitrust laws and instead tries to recast the decision below; by contrast, the States forthrightly defend that decision, but have to resort to a distinguishable, and long-discredited, 50-year-old decision to justify it.

As to the first question presented, the First Circuit held that the NEA had sufficient anticompetitive effects to satisfy step one of the rule of reason solely because, on a handful of routes, there was less service from American and/or JetBlue—the NEA's participants. Contrary to the Solicitor General, the First Circuit did not base its ruling on any *marketwide* reduction of output. Indeed, it could not have done so because the Government's own experts admitted they did not analyze any "actual NEA schedules" and thus did not find any "reductions of output" caused by such schedules, or the higher prices that would result from a meaningful output restriction. 2-JA717; *see* 2-JA699.

The States know this. So in defense of the First Circuit's legal conclusion, they argue—based on outdated precedent—that, "[t]o 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." States BIO 22 (alteration in original) (citation omitted). But modern antitrust law does not prevent "[]substantial" competitors from forming procompetitive collaborations. *Id.* It demands proof that there is meaningful consumer harm (i.e., reduced marketwide output or increased prices, which are absent here)—and, later, proof that such harms outweigh consumer benefits. The First Circuit lost sight of that critical principle, contrary to every other circuit to consider these issues in modern times.

As to the second question presented, neither the Solicitor General's efforts to recast the opinion nor the States' efforts to wave away the split can mask what happened below. After the NEA was approved by the Department of Transportation and went into effect, American and JetBlue's capacity at NEA airports increased by over 200%, with nearly 50 new nonstop routes and increased frequencies on more than 130 routes, leading rivals to describe the NEA as a "seismic change" that "create[ed] one relevant competitor out of two weak ones." 2-JA1268; *see* 2-JA1293; 2-JA1367-68; 2-JA1011.

The courts below held that all of that—and more—failed to meet the defendants' burden at step two of the rule of reason, all because of a gauntlet of causation and cognizability barriers that no other circuit imposes. It is impossible that a joint venture like the NEA so lacks "a procompetitive rationale," *NCAA v. Alston*, 594 U.S. 69, 98 (2021), that the

analysis stops at step two. A decision that permits that conclusion is a grave threat to all kinds of procompetitive collaborations.

Certiorari is warranted.

ARGUMENT

I. THE FIRST CIRCUIT'S STEP-ONE ANALYSIS WARRANTS CERTIORARI

The Solicitor General does not deny that if the First Circuit invalidated the NEA based on a reduction in competition between American and JetBlue, that decision would split with the decisions of five other circuits. Rather than address that split, the Solicitor General tries to paper over it by recasting the First Circuit's opinion. That is wrong, and the States' full-throated defense of the First Circuit's outlier holding only underscores how important it is to every plaintiff looking to defeat collaborations between significant competitors, regardless of their impact on consumers.

A. The Solicitor General's Defense Of The First Circuit Depends On Miscasting It

The First Circuit's holding that a reduction in competition between the parties to a joint venture—without a marketwide reduction in output—is sufficient to establish anticompetitive effects at step one is so indefensible that the Solicitor General actually declines to defend it on its terms. Instead, he suggests the First Circuit did not reach this remarkable holding. *See* SG BIO 11-12.

According to the Solicitor General, the First Circuit invalidated the NEA based on a conventional finding that it resulted in "reduced output." *Id.* The Solicitor General repeats that finding again and

again. But all of the First Circuit's references to "reduced output" concern *American and/or JetBlue's* output—specifically, that there was less American and/or JetBlue service on a few routes. Not a single reference, nor any finding by the district court, is about the output of the market as a whole. Pet. 25-27.

The Solicitor General's implicit suggestion is that any reduction of service is an "output reduction" satisfying step one. Not so. A company's output reduction is significant only if "by cutting its own output," the company can "reduce *marketwide* output" and "thereby raise marketwide prices above competitive levels." *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.,* 7 F.3d 986, 995-96 (11th Cir. 1993) (emphasis added). We know that did not happen here because the Government's own expert admitted he found no output changes leading to fare increases or anything "adverse to customers." 2-JA699; *see* 1-JA601; 2-JA717. Indeed, because the Government's case at trial was based on future, not extant, anticompetitive effects, its expert did not even look for "reductions of output." 2-JA717.

The Solicitor General's argument is thus semantics. What he labels "output reduction" is just reduced service from American and/or JetBlue on a handful of routes, never assessed for its effects on consumer welfare. This is just another way of saying that competition *between* JetBlue and American decreased. And the States' brief gives away the game, admitting that the First Circuit "relied on factual findings that the NEA . . . eliminated competition between major market players." States BIO 17; *see also id.* at 17-19, 22-23 (defending that holding).

The Solicitor General's own recitation of the facts further confirms that the First Circuit's "reduced

output" finding was based on an asserted reduction of competition between American and JetBlue. He emphasizes, for instance, that "for multiple routes, 'the NEA allocated the route to one carrier and caused the other to exit.'" SG BIO 11 (quoting Pet. App. 18a). But that one carrier exited a route does not mean that marketwide output decreased, since—as happened here—the other NEA carrier may have increased service on that route. *See, e.g.*, 1-JA480-81 (JetBlue used planes with more than 100 seats, whereas American had used 50-seat planes, at LGA). It further says nothing about whether non-NEA carriers, such as Delta and United, responded by entering or expanding their service.

Nor is the First Circuit's statement that "'the NEA in fact "reduced the *total* frequencies or capacity in certain NEA markets,"'" SG BIO 11 (emphasis added) (quoting Pet. App. 18a)—which the Solicitor General repeatedly invokes, *see id.* at 5, 8, 13—a finding of any marketwide reduction of output. As the opinion itself makes clear, "total frequencies or capacity" refers to *American and JetBlue's* collective frequencies or capacity, not those of the *market as a whole*. Indeed, the full quotation states: "American and JetBlue allocated certain routes to one or the other carrier in at least thirteen markets touching LGA (including Boston-LGA, from which American exited), *which reduced the total frequencies or capacity* in certain NEA markets." Pet. App. 10a (emphasis added); *see id.* at 18a (citing same finding). This statement necessarily refers to the output of the *parties to the*

joint venture, not the total output in the relevant markets by all carriers.[1]

In short, the Solicitor General's attempt to recast the First Circuit's decision fails. The First Circuit, like the district court, failed to make any finding of a *marketwide* reduction in output.

B. The Circuits Are Split Over Whether The Elimination Of Competition, Absent A Marketwide Reduction Of Output, Satisfies Step One

The Solicitor General does not dispute that if the First Circuit's decision is based solely on a finding of reduced competition between American and JetBlue without a finding of reduced marketwide output, it would split from the Second, Sixth, Ninth, Tenth, and Eleventh Circuits. SG BIO 15-17. The Solicitor General thus all but admits the split exists.

The States, for their part, wholeheartedly embrace that "it is 'enough that the two [firms] competed, that their competition was not insubstantial and that the combination put an end to it.'" States BIO 22 (alteration in original) (citation omitted). They then attempt to distinguish cases on the other side of the split as involving vertical, instead of horizontal, restraints. But the States do not explain why that matters, and even if they did, several of the cases cited in the petition involve horizontal restraints. *See, e.g.*, *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir. 1983); *Procaps S.A. v.*

---

[1] Even assuming there was a marketwide reduction, it begs the question of whether that reduction was substantial enough to allow American and JetBlue to exercise market power, and the Government never proved that it did.

Patheon, Inc., 845 F.3d 1072 (11th Cir. 2016); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994). The fact that the States spend most of their energy defending the First Circuit's decision on the merits just underscores that their hand-waving about the split's nonexistence is a pretense.

C. The First Circuit's Analysis Is Wrong

It is telling that to defend the First Circuit's actual reasoning the States try to resuscitate a decades-old merger decision that was decried by Justice Harlan even when it was first decided as resting on an already "discarded theory of anti-trust law." *United States v. First Nat'l Bank & Tr. Co. of Lexington* (*Lexington Bank*), 376 U.S. 665, 673 (1964) (Harlan, J., dissenting); *see* States BIO 18, 22. The States (and DOJ below) cite this case for the proposition that "the elimination of significant competition" between "major competitive factors" satisfies step one. States BIO 22 (quoting 376 U.S. at 671-73).

But *Lexington Bank* is both distinguishable and outdated. That case addressed a *merger* of two banks who together "held 94.82% of all trust assets" in the market, 376 U.S. at 669, thereby creating a monopoly. That is nothing like this case, which Delta aptly described as "creating one relevant competitor out of two weak ones." 2-JA1268. Furthermore, *Lexington Bank*'s reasoning has been overcome by modern precedents such as *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006). There, this Court rejected the Ninth Circuit's holding that a joint venture "ending competition" between two major companies was for that reason alone unlawful. *Id.* at 4. Yet the First Circuit here made essentially the same mistake—declaring the NEA invalid based on the elimination of competition

between the venturers, regardless of the impact on the market as a whole.

Finally, the First Circuit's step-one error is reinforced by its misunderstanding of the ancillary-restraints doctrine—another blatant mistake the Solicitor General declines to defend. SG BIO 14-15. The First Circuit concluded that because "JetBlue and American's agreement to 'optimiz[e]' their route schedules and thereby allocate markets within the NEA region was *central* . . . to the NEA," it was not ancillary. Pet. App. 21a-22a (alteration in original) (emphasis added) (citation omitted). That is the same error identified in *Dagher*. 547 U.S. at 7-8; Pet. 28.

II. THE FIRST CIRCUIT'S STEP-TWO ANALYSIS WARRANTS CERTIORARI

The circuits are also divided over the extent of a defendant's burden at step two. Pet. 30-33. While the First Circuit demanded a nearly impossible showing that the challenged restraint was the sole cause of the undisputed benefits and that those benefits were not associated with any reductions in output anywhere else in the world, the Third and Ninth Circuits require only a valid procompetitive rationale at step two. *See Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 986 (9th Cir. 2023); *United States v. Brown Univ.*, 5 F.3d 658, 676, 679 (3d Cir. 1993).

The latter are correct. As this Court has explained, the defendant's burden at step two is a light one: to "muster a procompetitive rationale" for the "restraint[]." *Alston*, 594 U.S. at 98. The First Circuit's efforts to impose multiple, additional hurdles run afoul of this Court's precedent and would render step two virtually impossible to satisfy,

meaning pro-consumer collaborations would almost never get to step three.

The Solicitor General begrudgingly acknowledges that it would be problematic if the First Circuit had required American to "conclusively refute every possible alternative cause" for the output increases associated with the NEA. SG BIO 19 (citation omitted). But that concession avoids the critical question of how the burden of proof is allocated when there are substantial benefits but also questions about causation. It is clear that the First Circuit declined to credit the NEA's benefits because the *defendants* could not prove that other factors did *not* contribute to them. *See* Pet. App. 26a-27a (affirming the district court's decision to discount *all* evidence of capacity growth because "the defendants each would have pursued at least *some* of this growth with or without the [NEA]") (emphasis added) (citation omitted). Indeed, the States again acknowledge and defend the First Circuit's actual reasoning, arguing that there should be a "'heavy burden'" on the defendant to refute any and all concerns that other "factors independent of the challenged restraint" may have caused those benefits. States BIO 29 (citations omitted).

Allowing proven benefits to be disregarded at step two simply because there is some uncertainty about causation or countervailing effects is manifestly contrary to the decisions of the Third and Ninth Circuit. In *Epic Games*, the Ninth Circuit rejected the plaintiff's argument that the district court should have "resolve[d] the case at step two" because the defendant failed to establish a sufficient causal connection between the procompetitive rationale and the challenged restraint. 67 F.4th at 986. Instead,

the court explained, any "deficiencies in the [defendant's] proof of procompetitive benefits at the second step" should be considered at the "third step." *Id.* (alteration and citation omitted). That different legal rule mattered, as the Ninth Circuit ultimately *upheld* the practice at issue despite finding "shaky proof" (*id.*) at step two because the plaintiff failed to establish any "substantially less restrictive alternative" at step three. *Id.* at 990-93. Similarly, in *Brown*, the Third Circuit emphasized that the defendant's burden at step two is relatively light and the defendant need not show that the challenged restraint is "necess[ary]" to the procompetitive justification. 5 F.3d at 676. The First Circuit's decision splits with these decisions.

The First Circuit's decision further splits with the Ninth Circuit by requiring American to refute the Government's speculation that the NEA's in-market benefits (output increases in the Northeast) came at the expense of other hypothetical, out-of-market harms (output decreases elsewhere). *See FTC v. Qualcomm, Inc.*, 969 F.3d 974, 992 (9th Cir. 2020) ("[C]ourts must focus on anticompetitive effects 'in the market where competition is [allegedly] being restrained.'" (alteration in original) (citation omitted)).

Once again, the Solicitor General declines to defend the First Circuit, insisting that the court did not "weigh harm in one market against benefits in another." SG BIO 19-20. But American's argument does not have to do with weighing anything. The problem is the First Circuit's express holding that it was not "error for the district court to consider 'out-of-market effects'" in assessing the NEA's in-market benefits. Pet. App. 27a. That was error because out-

of-market effects should be irrelevant, and at minimum, the defendant should not bear the burden to rule out out-of-market effects.

Finally, the States contend that even if the First Circuit erred at step two, it was harmless because "American would [still] lose at step three." States BIO 30. That is speculative—and wrong. Had the First Circuit credited the NEA's output increases, American would have prevailed at step three because the Government would have then needed to show its proposed less restrictive alternatives produced those benefits. *See, e.g.*, *Epic Games*, 67 F.4th at 986. In any event, that would be an issue for remand. It provides no basis to deny review.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND WARRANT REVIEW

Respondents contend that this case is a poor vehicle because the decision below "might" be affirmed on alternative grounds. SG BIO 22; *see also* States BIO 31. But the fact that an alternative ground might exist on remand is no basis to deny review of an important question decided below. That is especially true here, given that the First Circuit expressly declined to reach most of the alternative grounds Respondents now lean on. Pet. App. 22a n.8.

Nor is the fact that the NEA is no longer operative a basis for denying review. SG Br. 22. Indeed, that is a direct product of the erroneous decisions below. And the district court entered an injunction that remains in place against any similar arrangement for ten years. Reversal by this Court would ensure that American and other companies—including JetBlue—can enter into new agreements that would

significantly benefit consumers.[2] By contrast, allowing this decision to stand would indefinitely chill such procompetitive joint ventures in the First Circuit involving airlines and other businesses. *See* International Center for Law & Economics Amicus Br. 3-4, 14-17.

CONCLUSION

The petition should be granted.

Respectfully submitted,

GREGORY G. GARRE
Counsel of Record
PETER E. DAVIS
CHRISTINE C. SMITH
JOSEPH E. SITZMANN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

DANIEL M. WALL
ALFRED C. PFEIFFER, JR.
CHRISTOPHER S. YATES
LATHAM & WATKINS LLP
505 Montgomery Street
Suite 2000
San Francisco, CA 94111

SAMIR DEGER-SEN
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020

Counsel for Petitioner

June 10, 2025

---

[2] To the extent the Solicitor General argues that JetBlue's recent rejection of a new arrangement *moots* this case, he is wrong. The injunction prevents similar agreements for a decade and thus still restrains American. Moreover, there is no basis to speculate about what JetBlue might do if that injunction were reversed. But, if he is right, the appropriate remedy would be to vacate the decision. *See Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 72-73 (1983); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).