No. 24-938

IN THE
Supreme Court of the United States

AMERICAN AIRLINES GROUP INC.,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the First Circuit

BRIEF OF THE INTERNATIONAL CENTER FOR LAW & ECONOMICS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The International Center for Law & Economics ("ICLE") is a nonprofit, nonpartisan global research and policy center aimed at building the intellectual foundations for sensible, economically grounded policy. ICLE promotes the use of law and economics methodologies to inform public-policy debates and has longstanding expertise in the evaluation of antitrust law and policy. ICLE has an interest in ensuring that antitrust law promotes the public interest by remaining grounded in sensible legal rules informed by sound economic analysis.

The First Circuit's decision in this case strays from settled legal principles and an evidence-based approach. In analyzing the joint venture in question—the Northeast Alliance ("NEA")—the decision deviated from this Court's precedent, misapplied the antitrust rule of reason, and mistakenly condemned a business arrangement that served the interests of consumers and competition. Worse, the uncertainty that the decision created about the antitrust analysis of joint ventures will discourage businesses from entering into them. ICLE submits this brief to urge the Court to grant the petition and correct the First Circuit's departure from economically grounded antitrust principles.

[1] No counsel for any party authored this brief in whole or in part, and no entity or person other than *amicus* and its counsel made any monetary contribution toward the preparation or submission of this brief. *Amicus* timely notified all parties of its intent to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case turns on the application of Section 1 of the Sherman Act "to an important and increasingly popular form of business organization, the joint venture." *See Texaco v. Dagher*, 547 U.S. 1, 5 (2006). The First Circuit started off on the right foot. Like the district court, it agreed that the default mode of competitive analysis under the Sherman Act—the "rule of reason" framework—applied to the NEA, a joint venture between American Airlines and JetBlue. App. 12a-13a. But instead of running through this Court's standard-operating procedure for rule-of-reason cases, the First Circuit improvised. It applied a mode of analysis that bears little resemblance to the rule of reason as this Court frames it. In so doing, it seeded uncertainty about the legality of joint ventures that pool their resources, compete more effectively in the marketplace, and thereby promote consumers' interests.

First, the First Circuit deviated from the settled rule-of-reason framework from the very beginning—it never identified evidence that the NEA produced "a substantial anticompetitive effect that harm[ed] consumers in the relevant market." *See Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018). It improperly defined "output" to encompass the capacity and scheduling decisions of the co-venturers alone, ignoring every other airline in the market. And it otherwise talked itself into substituting analogy for "proof of actual detrimental effects." *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) (quotations omitted). The NEA looked to the First Circuit like a *per se* unlawful market allocation, so the First Circuit concluded that the NEA probably caused anticompetitive effects.

Second, the First Circuit reformulated the second step of the rule-of-reason framework to skew it against the co-venturers. In *American Express*, this Court explained that defendants need only "show a procompetitive rationale for [a] restraint," at which point "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." 585 U.S. at 541-42. The First Circuit turned that showing on its head. It required the co-venturers to *prove* that the NEA generated procompetitive effects, to disprove other potential causes of those effects, and to rule out the possibility that the NEA might cause competitive dislocations in other, non-relevant markets. That was wrong on each count.

Third, left uncorrected, the First Circuit's decision will chill competitors who wish to enter into joint ventures to enhance efficiency, lower costs, or "compete more effectively" in the marketplace. *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984). "[T]he fact that joint ventures can have such procompetitive benefits surely stands as a caution against condemning their arrangements too reflexively." *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 88 (2021). But the First Circuit's decision creates uncertainty where there was none. It flirted with applying the *per se* rule and invoked the ancillary-restraints doctrine, all in a case in which *nobody*—not the parties, the district court, nor the First Circuit itself—disputed that plenary rule-of-reason analysis applied.

The upshot: even businesses that secure the blessing of their regulator to form a joint venture—as American and JetBlue did here—cannot reasonably predict the legality of such arrangements. And that uncertainty jeopardizes a major driver of economic development and consumer benefits. Economic research has long recognized the significant consumer and competitive benefits that joint ventures can achieve by enabling companies to share risks, combine complementary assets, and realize economies of scale and scope in ways individual companies often cannot. *See* Carl Shapiro & Robert D. Willig, *On the Antitrust Treatment of Production Joint Ventures*, 4 J. Econ. Persp. 113, 114-117 (1990). There is every reason for the Court to dispel the confusion, grant the petition, reverse the judgment below, and repudiate the First Circuit's gloss on the rule of reason as it applies to joint ventures.

ARGUMENT

A. The First Circuit Mangled this Court's Rule of Reason Precedents.

From the very beginning, the parties, the district court, and the First Circuit agreed that the rule of reason—"the accepted standard for testing whether a practice restrains trade in violation of § 1," *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007)—applied to the NEA. App. 20a-22a, 122a-123a. A "three-step, burden shifting framework" governs that analysis. *Am. Express*, 585 U.S. at 541. "[T]he plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Id.* "If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint." *Id.* "If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.* at 542. The First Circuit bent that framework out of shape at the first two steps of the process.

1. The First Circuit Broke with Precedent at the First Step of the Rule of Reason Analysis.

The trouble started at the first step. In a direct-evidence case like this one, the plaintiff must present "proof of actual detrimental effects on competition … such as reduced output, increased prices, or decreased quality in the relevant market." *Id.* (cleaned up).[2] The First Circuit declined to endorse most of the district court's work on that score. It did not hold that "the NEA's reduction in the number of competitors itself, or its [asserted] effects on JetBlue's 'maverick' status, constituted standalone anticompetitive harms." App. 22a n.8. Rather, it homed in on what it characterized as the district court's finding that the NEA restricted output, and its intuition that the NEA looked like a *per se* unlawful market allocation. App. 16a-22a. It was wrong on both counts.

1. Start with the output argument. In the eyes of the First Circuit, less JetBlue or American service on

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[2] The First Circuit declined to affirm the district court's "alternative step-one finding that plaintiffs established actual competitive harms indirectly based on American and JetBlue's 'market power.'" App. 22a n.8.

any particular NEA route leads ineluctably to a finding of competitive harm that satisfies step one. Specifically, the First Circuit pointed to "markets that American and JetBlue both previously served," in which "the NEA allocated the route to one carrier and caused the other to exit[.]" App. 18a. It ended its analysis there. App. 17a ("[W]hether there are other available routes to show anticompetitive harm matters not at all in this case because the district court expressly found output reduced.").

The First Circuit missed the forest for the trees. In adopting a myopic focus on the co-venturers' operational decisions, it forgot to ask the critical question about the NEA: did it produce "anticompetitive effects on the [relevant] market as a whole?" *See Am. Express*, 585 U.S. at 547. Had the First Circuit faithfully applied *American Express*, it would have had to say "no."

In *American Express*, itself a government challenge under Section 1 of the Sherman Act, this Court corrected a remarkably similar error. To carry their burden at step one, the government enforcers argued that American Express's anti-steering arrangements enabled it to charge supracompetitive credit-card fees to merchants on a per-transaction basis. *Id.* But this Court refused to review those arrangements through the prism of American Express's fees alone. Rather, it required the enforcers "[t]o demonstrate anticompetitive effects on the [relevant] market as a whole" by "prov[ing] that Amex's anti-steering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market." *Id.*

The enforcers couldn't, so they lost. Noting the enforcers' inability to "prove that Amex's anti-steering provisions … stifled competition among credit-card companies," the Court explained that "while [Amex's] agreements ha[d] been in place, the credit-card market experienced expanding output and improved quality." *Id.* at 549. Specifically with respect to output, the Court underscored that "[t]he output of credit-card transactions"—*not* just American Express's transactions—"grew dramatically from 2008 to 2013, increasing 30%." *Id.* And the Court pointedly refused to "infer competitive injury from price and output data absent some evidence that tend[ed] to prove that output was restricted or prices were above *a competitive level*." *Id.* (emphasis added and quotations omitted).

The First Circuit repudiated that approach. It never required the government "[t]o demonstrate anticompetitive effects on the [relevant] market as a whole" by proving that the NEA increased fares above or suppressed flights below a competitive level. *See id.* at 547. Instead, it declared itself satisfied on the basis of effects evidence that pertained to American's and JetBlue's flights alone. App. 17a-18a. The government enforcers re-ran their *American Express* playbook and adduced the very same type of incomplete proof that this Court rejected at step one. And the First Circuit simply endorsed it. Standing on its own, that foundational error deserves review and reversal.[3]

2. The First Circuit compounded the problem by invoking the asserted "similarity between the NEA and naked market allocation" as a basis for holding that the government met its step-one burden to prove substantial anticompetitive effects. App. 22a. It cited no law in support of its core proposition—that a perceived "similarity" between the restraint at issue and a different one governed by the *per se* rule can substitute for effects evidence at step one. That omission is not surprising.

Step one calls for "a fact-specific assessment of market power and market structure aimed at assessing the challenged restraint's actual effect on competition—especially its capacity to reduce output and increase price." *Alston*, 594 U.S. at 88 (quotations omitted). It does *not* call for courts to analogize to *per se* unlawful restraints and assume that the arrangement at issue will produce similar effects. Indeed, this Court has warned against categorizing joint ventures as *per se* unlawful on that basis. *See Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979) ("When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act.").

[3] Not only does the First Circuit's redefinition of anticompetitive effects contravene *American Express*, it makes the First Circuit an outlier among its sister Circuits. The Second, Sixth, Ninth, Tenth, and Eleventh Circuits hold that a plaintiff must present evidence of an injury to competition in the market *as a whole* to satisfy step one of the rule of reason. *See* Pet. 17-21.

The First Circuit's contrary approach is a relic of a bygone era in antitrust enforcement. As the Fourth Circuit recently explained, "[p]reviously, the *per se* rule was extended to new categories of restraints largely because they resembled other *per se* restraints," but "the Supreme Court has since cautioned courts against over-analogizing in the antitrust context[.]"). *United States v. Brewbaker*, 87 F.4th 563, 574 (4th Cir. 2023). The Court has expressed particular concern about lower courts applying *per se* analysis (or something like it) to "cooperative activity involving a restraint or exclusion," where there are even "plausible arguments that [the activities] were intended to enhance overall efficiency and make markets more competitive." *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294-96 (1985); *accord Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 771 (1999).

With its classification exercise, the First Circuit turned back the clock. And it forgot "[t]he whole point of the rule of reason," which is not to analyze arrangements on the basis of judicial comparison to *per se* restraints, but "to furnish an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint to ensure that it unduly harms competition before a court declares it unlawful." *See Alston*, 594 U.S. at 97 (quotations omitted).

Having driven into a ditch, the First Circuit just kept going. To rationalize its departure from settled step-one analysis, it invoked the ancillary-restraints doctrine. App. 21a (asserting that "JetBlue and American's agreement to optimize their route schedules and thereby allocate markets within the NEA region was central, not ancillary, to the NEA") (cleaned up). Courts apply that doctrine to choose the appropriate legal framework for a given arrangement—the *per se* rule or the rule of reason. *E.g.*, *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021) ("Under the 'ancillary restraints' doctrine, a horizontal agreement is 'exempt from the per se rule,' and analyzed under the rule-of-reason, if it meets [certain] requirements."); *accord Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986).

But the First Circuit had *already* decided by that point that the rule of reason applied to the NEA. App. 15a-17a. It could do no less given this Court's precedent. *See Dagher*, 547 U.S. at 6 n.1 ("We presume for purposes of these cases that Equilon is a lawful joint venture .... Had respondents challenged Equilon itself, they would have been required to show that its creation was anticompetitive under the rule of reason."). So its decision to revisit that choice under the auspices of the first step of the rule-of-reason analysis is both incoherent and wrong. *See* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 140 (2018) ("The ancillary restraints doctrine is not a comprehensive method for applying the rule of reason, but rather an early stage decision about which mode of analysis should be applied.").

The First Circuit's analysis is all the more inexplicable given this Court's admonition that "the ancillary restraints doctrine has no application … where the business practice being challenged involves the core activity of the joint venture itself[.]" *Dagher*, 547 U.S. at 7. That is *exactly* the case here, and the First

Circuit acknowledged as much. App. 21a ("JetBlue and American's agreement to optimize their route schedules and thereby allocate markets within the NEA region was central, not ancillary, to the NEA." (cleaned up)) But it flouted *Dagher* and applied the ancillary-restraints doctrine anyways. That error alone warrants this Court's review.

2. The First Circuit Muddled the Proof Requirements and Evidentiary Burdens That Apply at the Second Step of the Rule of Reason Analysis.

The First Circuit largely washed its hands of the rule of reason analysis after step one, but not before it reframed the proof requirements and evidentiary burdens that apply at the second step. This Court has explained that a defendant carries its burden at that stage by "show[ing] a procompetitive rationale for the restraint," at which point "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means" at the third step. *Am. Express*, 585 U.S. at 541-42. The First Circuit pivoted away from that framework in at least three principal ways.

First, the First Circuit required the co-venturers to *prove* procompetitive effects rather than "show a procompetitive rationale," as *American Express* requires. *See id.* The First Circuit demanded that American and JetBlue affirmatively demonstrate the NEA's procompetitive "effects on consumers and the competitive process itself." App. 25a (quotations omitted). And when the co-venturers attempted to do so—and to show how the NEA enabled them to compete more effectively against industry heavyweight Delta—the First Circuit rejected that rationale as "not cognizable." App. 23a-24a (rejecting argument that "the NEA generated a procompetitive benefit for the purposes of step two in the sense that it better allowed the carriers to compete with Delta—the NEA's principal purpose"). That holding finds little support in this Court's precedent. *See Copperweld*, 467 U.S. at 768 (recognizing that "joint ventures … hold the promise of increasing a firm's efficiency and *enabling it to compete more effectively*" (emphasis added)). And it would come as quite a surprise to Delta, whose executives insisted that it "[wa]s imperative" to mount a "commercial response" to the NEA at the time. Pet. 11.

Second, the First Circuit ratcheted up that burden by grafting a causation requirement on to its newly fashioned effects test. Not only did the co-venturers need to prove procompetitive effects, it held, but they also needed to definitively establish that it was the NEA that caused them. App. 26a-27a (criticizing American for asserted failure to show that co-venturers launched new routes "because of the NEA itself") (quotations omitted).

Joint venturers, particularly airlines, make operational decisions for a constellation of different reasons. To require them to present evidence that definitively links any and all positive outcomes to the joint venture itself would hold them to an impossible standard. *See Alston*, 594 U.S. at 101 ("Firms deserve substantial latitude to fashion agreements that serve legitimate business interest—agreements that may include efforts aimed at introducing a new product into the marketplace."); *see also Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 986 (9th Cir. 2023) ("A procompetitive rationale is a [1] nonpretextual claim that the defendant's conduct is [2] indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal.") (cleaned up).

Third, and finally, the First Circuit required the co-venturers to prove a negative: that the capacity and output enhancements on NEA routes—benefits that each side's experts appeared to acknowledge, Pet. 29—didn't come at the expense of countervailing effects in other, non-relevant markets. But as the Ninth Circuit has explained, economic harms that manifest outside the relevant antitrust markets, "even if real, are not 'anticompetitive' in the antitrust sense—at least not directly—because they do not involve restraints on trade or exclusionary conduct in 'the area of effective competition.'" *FTC v. Qualcomm Inc.*, 969 F.3d 974, 992 (9th Cir. 2020) (quoting *Am. Express*, 585 U.S. at 543 & n.7). "[A]ctual or alleged harms to customers and consumers outside the relevant markets are beyond the scope of antitrust law," *see id.* at 993, and they are certainly not a basis upon which to reject a showing of procompetitive effects at step two.

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"Of all the procedural issues involved in antitrust litigation under the rule of reason, none are more critical than questions about assignment of the burden of proof and production, and the quality of the evidence that must be presented at each stage." Hovenkamp, *supra*, 70 FLA. L. REV. at 101. The First Circuit fundamentally erred in answering these "critical" questions. Its decision evinces a disregard for this Court's precedent and the proper analysis of joint ventures under the rule of reason, and therefore warrants review.

B. The First Circuit's Decision Will Chill Procompetitive Joint Ventures.

Setting aside its flawed legal analysis, the First Circuit's decision threatens to profoundly impair the formation of joint ventures. Courts typically tread carefully in antitrust cases. "[E]ven under the best of circumstances, applying the antitrust laws can be difficult—and mistaken condemnations of legitimate business arrangements are especially costly, because they chill the very procompetitive conduct the antitrust laws are designed to protect." *Alston*, 594 U.S. at 99 (cleaned up). "To know that the Sherman Act prohibits only unreasonable restraints of trade," this Court has remarked, "is thus to know that attempts to meter small deviations is not an appropriate antitrust function." *Id.* (cleaned up).

But the First Circuit jettisoned that careful approach here. And it took the position that the NEA was inherently more worthy of scrutiny and condemnation because it did not revolutionize the airline industry. App. 25a ("American does not meaningfully dispute the district court's finding that the NEA in no way revolutionized the 'product' American and JetBlue provide: flights from one place to another."); *id.* (noting that the NEA did not "create a new product or market that could not otherwise exist"). If that's the standard by which joint ventures are to be judged, very few will be able to meet it.

Who will lose if the Court does not curb the First Circuit's approach? Consumers and competition. Joint ventures like the NEA offer unique benefits for both. Within the economics literature, "[t]here is widespread agreement that collaborative activities can generate significant private benefits for the parents that correspond to genuine social benefits ... [such as] synergies arising when venturers share complementary skills or assets ... [and] economies of scale and scope." Shapiro, *supra*, 4 J. Econ. Persp. at 114-15.

Joint ventures enable companies to "pool a portion of their resources within a common legal organization" through partnership, while still operating as independent entities. *See* Bruce Kogut, *Joint Ventures: Theoretical and Empirical Perspectives*, 9 Strategic Mgmt. J. 319, 319 (1988). They afford the venturers greater flexibility to negotiate, reconfigure, or unwind collaborations than do mergers, which entail a permanent, fully integrated transaction that may be costly to reverse. *See* Srinivasan Balakrishnan & Mitchell P. Koza, *Information Asymmetry, Adverse Selection and Joint-Ventures: Theory and Evidence*, 20 J. Econ. Behav. & Org. 99, 103 (1993). And joint ventures routinely benefit consumers and communities, even when they fall short of revolutionizing industries. *See* Dep't of Justice, Antitrust Div. & Fed. Trade Comm'n, *Joint Antitrust Statement Regarding COVID-19* (Mar. 2020), https://tinyurl.com/45pp24d2 ("[J]oint ventures may be necessary for businesses to bring goods to communities in need, to expand existing capacity, or to develop new products or services[.]").

Under the aegis of the NEA, American and JetBlue strived to boost service frequencies to underserved airports, enhance schedule optionality in the face of tight FAA slot regulations and limited gate availability, and offer reciprocal loyalty benefits in one geographic location. App. 13a, 71a, 74a. And the joint venture served as the vehicle by which the coventurers could realize productive efficiencies for consumers via collaboration, asset pooling, and knowledge sharing. Even the First Circuit grudgingly acknowledged that it achieved many of those goals. The NEA resulted in greater and more efficient utilization of takeoff and landing slots at two congested airports—JFK and LGA—and it succeeded in affording frequent fliers and corporate travelers benefits and discounts. App. 9a-11a. It also prompted an entrenched incumbent to make plans to mount a commercial response, even one that the First Circuit derided as "milquetoast, at best." App. 25a. So the NEA may not have revolutionized the industry, but it made important progress in many respects.

Left uncorrected, the First Circuit's decision will impede the formation of joint ventures that aim for incremental but concrete improvements. The decision hopelessly confuses the rule of reason analysis as it applies to joint ventures, flirts with the application of the *per se* rule, and otherwise expresses a hostility to creative solutions to persistent problems—like underutilized slots and gates at congested airports in the Northeast. It is a textbook example of a costly and "mistaken condemnation[] of legitimate business arrangements," and it deserves correction. *See Alston*, 594 U.S. at 99. This Court should grant the petition and reverse the First Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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