No. 23-1802

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

UNITED STATES; STATE OF ARIZONA; STATE OF CALIFORNIA; DISTRICT OF COLUMBIA; STATE OF FLORIDA; COMMONWEALTH OF MASSACHUSETTS; COMMONWEALTH OF PENNSYLVANIA; COMMONWEALTH OF VIRGINIA,

Plaintiffs-Appellees,

v.

AMERICAN AIRLINES GROUP INC.,

Defendant-Appellant,

JETBLUE AIRWAYS CORPORATION,

Defendant.

On Appeal from the United States District Court for the District of Massachusetts in Case No. 1:21-cv-11558-LTS, Judge Leo T. Sorokin

BRIEF FOR AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT AND REVERSAL

TYLER S. BADGLEY
KEVIN R. PALMER
U.S. CHAMBER OF COMMERCE
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

LEON B. GREENFIELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 663-6000
Leon.Greenfield@wilmerhale.com

MARK C. FLEMING
NATALIE M. MORRISSEY
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Mark.Fleming@wilmerhale.com
Natalie.Morrissey@wilmerhale.com

December 13, 2023

Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. JOINT VENTURES—INCLUDING THOSE THAT ELIMINATE COMPETITION BETWEEN PARTNERS—OFTEN BRING PROCOMPETITIVE BENEFITS 4

II. JOINT VENTURES ARE ENTITLED TO RIGOROUS AND CAREFUL RULE-OF-REASON REVIEW 6

III. THE DISTRICT COURT'S UNDUE SKEPTICISM TOWARD JOINT VENTURES THAT ELIMINATE COMPETITION BETWEEN COMPETITORS LED TO AN ERRONEOUS LEGAL ASSESSMENT 8

A. The Court Was Improperly Skeptical Of Joint Ventures That Eliminate Competition Between Partners......................................8

B. The Court Erred In Its Analysis Of Purported Direct Evidence of Anticompetitive Effects 10

C. The Court Erred In Its Analysis Of Purported Indirect Evidence Of Anticompetitive Effects 14

IV. IF LEFT IN PLACE, THE DISTRICT COURT'S DECISION WILL CHILL FORMATION OF PROCOMPETITIVE JOINT VENTURES 16

CONCLUSION 20

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

Page(s)

American Steel Erectors, Inc. v. Local Union No. 7,
536 F.3d 68 (1st Cir. 2008)....................17

Augusta News Co. v. Hudson News Co.,
269 F.3d 41 (1st Cir. 2001).................... 4-5, 6

Aya Healthcare Services, Inc. v. AMN Healthcare, Inc.,
9 F.4th 1102 (9th Cir. 2021) 14

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007).................... 17-18, 19

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,
441 U.S. 1 (1979)....................5, 13

Copperweld Corp v. Independence Tube Corp.,
467 U.S. 752 (1984)....................4, 7, 19

MacDermid Printing Solutions LLC v. Cortron Corp.,
833 F.3d 172 (2d Cir. 2016) 14

Major League Baseball Properties, Inc. v. Salvino, Inc.,
542 F.3d 290 (2d Cir. 2008) 5

National Collegiate Athletic Association v. Alston,
141 S. Ct. 2141 (2021)....................4, 6, 7

National Collegiate Athletic Association v. Board of Regents of University of Oklahoma,
468 U.S. 85 (1984)....................8

Northwest Wholesalers Stationers, Inc. v. Pacific Stationery & Printing Co.,
472 U.S. 284 (195)....................4

Ohio v. American Express Co.,
138 S. Ct. 2274 (2018)....................*passim*

Polk Brothers, Inc. v. Forest City Enterprises, Inc.,
776 F.2d 185 (7th Cir. 1985) 6, 8, 11, 16

Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of Rhode Island,
373 F.3d 57 (1st Cir. 2004)....................7, 13

Texaco Inc. v. Dagher,
547 U.S. 1 (2006)....................6, 7, 11, 16

United States v. Visa U.S.A., Inc.,
344 F.3d 229 (2d Cir. 2003) 14, 16

STATUTES

15 U.S.C. § 15 18

OTHER AUTHORITIES

Areeda, Philip E. & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (May 2023 online) 20

Cavanagh, Edward D., *Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?*, 40 Vand. L Rev. 1277 (1987)....................19

Cavanagh, Edward D., *The Private Antitrust Remedy: Lessons from the American Experience*, 41 Loy. U. Chi. L.J. 629 (2010)....................18

Herr, David F., *Annotated Manual for Complex Litigation* (4th ed., updated May 2022) 18

McAfee, R. Preston & Nicholas V. Vakkur, *The Strategic Abuse of the Antitrust Laws*, 1 J. Strategic Mgmt. Educ. (2004) 18

Meyers, Roger P., *Risky Ventures: The Impact of IRS Health Care Joint Venture Policy*, 42 U. Mich. J.L. Reform 481 (2009)....................17

Mukai, Jonathan A., *Joint Ventures and the Online Distribution of Digital Content*, 20 Berkeley Tech. L.J. 781 (2005) 17

Sanga, Sarath, *A Theory of Corporate Joint Ventures*, 106 Cal. L. Rev. 1437 (2018) 17

U.S. Department of Justice & Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors* (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf........................5

U.S. Department of Justice & Federal Trade Commission, *Joint Antitrust Statement Regarding COVID-19* (2020), *available at* https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19 5

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases of concern to the Nation's business community.

This is such a case. Joint ventures often bring procompetitive efficiencies that benefit consumers in many ways. The district court incorrectly held that the mere fact that a joint venture eliminates competition between its partners makes the joint venture unentitled to a robust assessment under the rule of reason regarding real-world competitive effects. This issue is crucial to the Chamber's members, which have an interest in forming joint ventures that benefit consumers by promoting efficiency, enabling or improving products, increasing output, and achieving other procompetitive benefits.

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

SUMMARY OF THE ARGUMENT

In early 2020, American Airlines and JetBlue formed the Northeast Alliance (NEA) to enable them to compete more effectively and better serve travelers arriving or departing from airports in Boston and New York City. Through this venture, the two airlines optimized flight routes, times, and frequencies, pooled airport infrastructure, and provided reciprocal loyalty benefits for customers.

In assessing the joint venture under Section 1 of the Sherman Act, the district court began by opining that the goals of the Sherman Act are "generally undermined, rather than promoted, by agreements among horizontal competitors" to cooperate rather than compete. ADD10.[2] The court went on to express skepticism that joint ventures that eliminate competition between their partners can ever be procompetitive and to condemn the NEA under a cursory and flawed application of the rule of reason.

That was error. The mere fact that a joint venture eliminates competition between its partners does not exempt it from a full and rigorous assessment under the rule of reason. Yet, without citing genuine direct or indirect evidence that the NEA harmed competition in any relevant antitrust market, the district court held that the joint venture had substantial anticompetitive effects at the first step of its rule-of-reason assessment. The court based its finding of direct evidence of

[2] Citations to ADD are to the addendum to the Appellant's brief.

anticompetitive effects on its determination that the NEA ended competition between former competitors, and thus was "in and of itself" a "fundamental assault on competition." ADD77. But the fact that a joint venture eliminates competition between its partners is not evidence of direct harm to competition. Rather, it may well increase competition, for example where two small players, previously unable to compete with larger rivals, create a joint venture that is capable of providing a meaningful alternative, and therefore competitor, to those larger rivals. Antitrust plaintiffs must provide real-world evidence of competitive harm in the form of higher prices, lower output, or lower quality to meet their burden of proof. The district court found none of that.

The court's undue skepticism towards joint ventures that eliminate competition between their partners also led it to err in finding indirect evidence of substantial competitive harm. The court found relevant markets consisting of "scheduled air passenger service" on origins and destinations "in which Defendants compete or would likely compete absent the NEA." ADD84. But it did not find that the NEA had power in any of those relevant markets.

Unless overturned, the district court's erroneous analysis will chill formation of procompetitive joint ventures. Many joint ventures promote competition and benefit consumers by creating substantial efficiencies, even though they eliminate competition between their partners. Under the court's misapplication of the first step

of the rule of reason, whenever a joint venture eliminates competition between its partners, a plaintiff need not prove direct or indirect evidence of substantial anticompetitive effects. Businesses will incur enormous costs defending antitrust litigation that improperly proceeds beyond the motion to dismiss stage based on this errant theory. And parties contemplating possible joint ventures will have strong disincentives to proceed and expose themselves to potentially enormous treble-damage awards if their venture will be deprived of a rigorous evaluation under step one of the rule of reason.

ARGUMENT

I. JOINT VENTURES—INCLUDING THOSE THAT ELIMINATE COMPETITION BETWEEN PARTNERS—OFTEN BRING PROCOMPETITIVE BENEFITS

It is well established that joint ventures commonly bring procompetitive benefits that their partners could not have obtained without collaboration. Among other things, joint ventures may "enable firms to do something more cheaply or better than they did it before," *National Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2155 (2021), "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively," *Copperweld Corp v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984), enable firms "to achieve economies of scale … that would otherwise be unavailable to them," *Northwest Wholesalers Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 286-87 (1985), or allow two companies to provide offerings that "none could as easily provide by itself," *Augusta*

News Co. v. Hudson News Co., 269 F.3d 41, 48 (1st Cir. 2001); *see also Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 337 (2d Cir. 2008) (Sotomayor, J., concurring) (finding joint venture "offer[ed] substantial efficiency-enhancing benefits … including decreased transaction costs …, lower enforcement and monitoring costs, and the ability to one-stop shop"); U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors* (2000), Section 2.1 (recognizing multiple ways in which joint ventures can enable firms to obtain efficiencies they could not have obtained by themselves and benefit consumers), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf; U.S. Dep't of Justice & Fed. Trade Comm'n, *Joint Antitrust Statement Regarding COVID-19* (2020), *available at* https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19 (recognizing that "joint ventures may be necessary for businesses to bring goods to communities in need, to expand existing capacity, or to develop new products or services").

That a joint venture may eliminate competition between its partners does not mean it cannot enhance competition by enabling these same substantial efficiencies and benefits to consumers. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 23 (1979) (upholding joint venture against *per se* challenge and observing that "[n]ot all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even

unreasonable restraints"); *Texaco Inc. v. Dagher*, 547 U.S. 1, 8 (2006) (upholding pricing decisions of joint venture between former competitors against antitrust challenge); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188, 190 (7th Cir. 1985) (holding that a joint venture that eliminated competition between partners was "productive cooperation" and therefore procompetitive).

II. JOINT VENTURES ARE ENTITLED TO RIGOROUS AND CAREFUL RULE-OF-REASON REVIEW

The Supreme Court has made clear that "[t]he fact that joint ventures can have such procompetitive benefits surely stands as a caution against condemning their arrangements too reflexively." *Alston*, 141 S. Ct. at 2155. Given their strong potential to benefit consumers, the Supreme Court and this Court have directed that joint ventures be evaluated through a robust application of the rule of reason—even when they "end[] competition between … two companies." *Dagher*, 547 U.S. at 4, 8 (holding price-setting activities of joint venture between two former competitors should be analyzed under rule of reason); *see also Augusta News,* 269 F.3d at 48 (rejecting argument that a joint venture between local competitors was *per se* illegal). Indeed, joint ventures are evaluated under a robust rule-of-reason assessment even where (unlike here) the joint venture enjoys monopoly power in the relevant antitrust market. *Alston*, 141 S. Ct. at 2154, 2157.

Moreover, "[r]ecognizing the inherent limits on a court's ability to master an entire industry—and aware that there are often hard-to-see efficiencies attendant to

complex business arrangements," the Supreme Court has instructed that courts should "take special care not to deploy" either the *per se* rule or a "quick look" under the rule of reason (rather than a full rule-of-reason assessment) until they "have amassed 'considerable experience with the type of restraint at issue' and 'can predict with confidence that it would be invalidated in all or almost all instances.'" *Alston*, 141 S. Ct. at 2156. For restraints that do not fall into that category, but are instead in the "great in-between," courts must apply a full and robust rule-of-reason analysis. *Id.* at 2155; *see also Dagher*, 547 U.S. at 7 n.3 (holding that the "quick look" approach was inappropriate to evaluate joint venture that eliminated competition between partners).

Challenges to joint ventures under the Sherman Act therefore require "a fact-specific assessment of 'market power and market structure … to assess the [restraint]'s *actual effect*' on competition." *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018) (emphasis added) (citing *Copperweld*, 467 U.S. at 768); *see also Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 61 (1st Cir. 2004) (requiring a showing of "anti-competitive consequences" in the relevant economic market as part of the "rule of reason calculus").

III. The District Court's Undue Skepticism Toward Joint Ventures That Eliminate Competition Between Competitors Led To An Erroneous Legal Assessment

A. The Court Was Improperly Skeptical Of Joint Ventures That Eliminate Competition Between Partners

The district court began its opinion by observing that the aims of federal antitrust law "are generally undermined, rather than promoted, by agreements among horizontal competitors to dispense with competition and cooperate instead," ADD10; it elsewhere described the NEA as a "naked agreement not to compete with one another … just the sort of 'unreasonable restraint on trade' the Sherman Act was designed to prevent," ADD13. Through those sweeping statements, the court ignored that "[a]ntitrust law is designed to ensure an appropriate *blend* of cooperation and competition, not to require all economic actors to compete full tilt at every moment." *Polk Bros.,* 776 F.2d at 188 (emphasis added); *see also National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85, 103 (1984) ("[A] restraint in a limited aspect of a market may actually enhance marketwide competition.").

Using its erroneous framing, the court treated as nearly determinative its findings that "American and JetBlue no longer compete with one another within the scope of the NEA," ADD38, and that, therefore, "the number of competitors has literally decreased by one," ADD43. But as explained (at pp. 5-6), the mere fact that a joint venture eliminates competition between its partners does not make it an

invariably illegal restraint. To the contrary, courts have consistently recognized that joint ventures that eliminate competition between their partners are often procompetitive, and therefore must be assessed under a rigorous rule-of-reason assessment. Plaintiffs were thus required to satisfy a higher burden than the district court set for them.

The district court relied on its finding that the NEA eliminated competition between JetBlue and American Airlines to hold that the NEA is "situated at [one] end[] of the competitive spectrum," and therefore, that "no deep and searching analysis is required in order to discern its unlawfulness." ADD76; *see also id.* (relying on cases where "some form of abbreviated review" was appropriate due to the agreement's "obviously anticompetitive features"). Applying its abbreviated review, the court found that Plaintiffs-Appellees established significant anticompetitive harms at step one of the rule of reason—and in fact, that Plaintiffs established that the harms of the NEA were "considerable and obvious," ADD76—primarily because the joint venture eliminated competition between its partners. But the court cited no actual direct evidence of anticompetitive effects resulting from the joint venture, such as increased prices, reduced output or quality, or any other sort of actual anticompetitive effect. Nor did it find any indirect evidence of anticompetitive effects, such as a finding that the NEA gave the joint venture market power in a properly-defined antitrust market.

B. The Court Erred In Its Analysis Of Purported Direct Evidence of Anticompetitive Effects

To assess a restraint under the rule of reason, courts apply a "three-step, burden-shifting framework." *American Express*, 138 S. Ct. at 2284. At step one, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Id.* A plaintiff may make this showing with direct or indirect evidence of anticompetitive effects. *Id.*

The Supreme Court has explained that "direct evidence" of anticompetitive effects "would be 'proof of actual detrimental effects [on competition],'" such as "reduced output, increased prices, or decreased quality in the relevant market." *American Express*, 138 S. Ct. at 2284 (citations omitted). In *American Express*, the Court held that the plaintiff failed to prove anticompetitive effects through direct evidence, because it did not offer "any evidence that the price" was higher than the price that would prevail in a competitive market. *Id.* at 2288.

Here, in its analysis of "direct evidence" at step one of the rule of reason, the district court made no findings that the joint venture led to higher prices, reduced output or quality, or other anticompetitive effects in the real world. The court identified categories of purported "direct evidence," but none is the sort of evidence of actual anticompetitive effects that the Supreme Court directed district courts to consider in *American Express*.

First, the district court found that the NEA "effectively reduce[d] the number of market participants—and the number of distinct choices for consumers—by one." ADD77. Replacing a competitive relationship between JetBlue and American with "broad cooperation in pursuit of [their] shared interests" was, the court concluded, "*in and of itself*, [] a fundamental assault on competition and an actual harm the Sherman Act is designed to prevent." ADD76-77. And it held that this reduction in competition alone constituted "real and substantial harm" to competition. ADD79. But as explained, that a joint venture eliminates competition between its partners does not demonstrate that the joint venture is anticompetitive in any respect, *see Dagher*, 547 U.S. at 4, 8, *Polk Bros.*, 776 F.2d at 188, much less constitute direct evidence of anticompetitive effects, *American Express*, 138 S. Ct. at 2289 (declining to accept "stifled competition" as direct evidence of anticompetitive effects where the market "experienced expanding output and improved quality").

Second, the district court cited as further purported direct evidence of anticompetitive effects JetBlue's purported "weakened [] status as an important 'maverick' competitor in the industry," which the court found "amplifie[d]" the harm of the loss of a competitor. ADD80. But the elimination of a "maverick" competitor is not direct evidence of real-world anticompetitive effects any more than the elimination of competition between joint venture partners: It does not

demonstrate higher prices, reduced output or quality, or any other actual harm to the relevant market.

The court also cited two implications for JetBlue: (1) that, as a result of the NEA, UK regulators determined that JetBlue was ineligible for certain available takeoff and landing slots at London's Heathrow Airport; and (2) the FAA awarded Spirit (rather than JetBlue) spots at Newark earmarked for a low-cost competitor. ADD80. But the court identified no evidence that these incidents resulted in actual harm to competition on any dimension. As to the first, the court did not find that the UK decision had any effect on competition at all, for good or ill. And as to the second, the only effect the court cited was that another low-cost airline (Spirit) was awarded the slots that JetBlue might have obtained. That another low-cost carrier, rather than JetBlue, obtained the slots is not direct evidence that the NEA resulted in actual anticompetitive harm; even under the district court's erroneous assumption that reduction in the number of competitors constitutes a violation, the substitution of Spirit for JetBlue would amount to no harm. The court's concern that the NEA "diminish[ed] JetBlue's ability to provide disruptive, low-cost competition" in the Northeast, ADD48, moreover, was not accompanied by any citation to evidence that any such effect actually occurred, much less that it resulted in actual anticompetitive effects in any relevant market.

Third, the court found that the NEA's assignments of particular routes to either American or JetBlue "resemble[d] a restraint that is per se illegal," namely a market allocation, ADD82—which the court held is "strong evidence of its actual anticompetitive effect," ADD83. This too is not direct evidence of harm to competition, and the court ignored that the supposed market allocation was in the context of a broader joint venture. As the Supreme Court and this Court have held, a restraint that might be deemed "naked" and *per se* illegal outside the context of a broader collaboration is not *per se* illegal in the joint venture context. *See, e.g., Broadcast Music*, 441 U.S. at 23 (holding price-fixing restraint in context of joint venture not *per se* illegal); *Stop & Shop*, 373 F.3d at 64 ("[E]very joint venture among competitors that limits membership fits the lay definition of 'an agreement not to deal,' and … the Supreme Court has flatly rejected the per se label for those that have some efficiency achieving benefits."). And the district court identified no evidence suggesting that the purported market allocation actually harmed competition by increasing prices, by reducing output or quality, or on any other dimension. To the contrary, the court recognized that JetBlue was able to add routes and use American's takeoff and landing slots "more heavily and efficiently," and that American and JetBlue both began using larger aircraft to add capacity and increase output—effects that are procompetitive. ADD42.

C. The Court Erred In Its Analysis Of Purported Indirect Evidence Of Anticompetitive Effects

The court also erred in holding that Plaintiffs-Appellees had shown sufficient indirect evidence of harm to competition. ADD84-88. The court recognized that plaintiffs "must identify the relevant market, offer proof that the defendants have power in that market, and supply 'some evidence that the challenged restraint harms competition.'" ADD84 (citing *American Express*, 138 S. Ct. at 2284); *see also MacDermid Printing Sols. LLC v. Cortron Corp.*, 833 F.3d 172, 182 (2d Cir. 2016) (holding a showing of indirect effects requires that defendants had "sufficient 'market power' to cause an adverse effect," and a showing of "actual harm to consumers in the relevant market"). In determining whether defendants have market power based on indirect evidence, courts must first "define the relevant market," and then show that defendants have power "in those markets." *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1112-13 (9th Cir. 2021).

Here, although the district court identified relevant markets, it cited no evidence that the joint venture had market power in those markets, such as evidence of the NEA's market share in those markets. *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239-40 (2d Cir. 2003). The court found that the relevant markets at issue were "scheduled air passenger service" in origins and destinations ("O&Ds") that include (1) Boston Logan airport as an endpoint, and (2) a New York airport as an endpoint. ADD84-85. But it cited no evidence that the NEA had market power

in either of *those identified markets*. The court referenced Defendants' relative market shares compared to that of other carriers "operating in Boston and New York," ADD85-86, found that "American and JetBlue command at least a quarter of the market in the northeast *generally*," ADD87 (emphasis added), and ultimately concluded that NEA was an alignment of competitors in a "unique and congested region," ADD86-87. But it did not identify any evidence that the NEA actually enjoyed market power in any identified O&D route.[3]

At bottom, the court relied on a theoretical anticompetitive harm based on elimination of competition between American and JetBlue in an undefined "highly congested market with significant barriers to entry," rather than actual indirect evidence of harm to competition based on a finding that the NEA had market power in any relevant market. ADD86-87 (citing the Northeast's status as a "unique and congested *region*" as a factor making the NEA similar to agreements that can be condemned "in the twinkling of an eye" (emphasis added)). Accordingly, the court failed to ground its finding that Plaintiffs had met their burden at step one of the rule of reason on any genuine indirect evidence of anticompetitive harm. *American*

[3] For example, the court cited evidence of American and JetBlue's "seat capacity" in three New York airports, ADD86, and the fact that American and JetBlue both "have commanding shares of the available [take-off and landing] slots at the two slot-constrained airports in New York," ADD86 n.88—but the relevant market was not seat capacity or take-off and landing slots in New York, but instead air passenger service on O&D routes with specific geographic endpoints.

Express, 138 S. Ct. at 2285 ("[C]ourts usually cannot properly apply the rule of reason without an accurate definition of the relevant market"); *Visa*, 344 F.3d at 238 (requiring showing that defendants "have 'market power' in a *particular market* for goods or services" (emphasis added)).

IV. If Left In Place, The District Court's Decision Will Chill Formation Of Procompetitive Joint Ventures

If not overturned, the district court's decision will chill formation of procompetitive joint ventures and other horizontal collaborations merely because they eliminate competition between their partners. The decision will cause potential joint venturers to fear that an antitrust challenge to their venture will be allowed to proceed to discovery based merely on an allegation that the venture eliminates competition between its partners. They will also be forced to worry that their venture will ultimately be reflexively condemned—and they will be exposed to enormous treble damages—based on a mere finding of elimination of competition between the partners. Because many joint ventures eliminate competition between their partners, *see, e.g., Polk Bros.,* 776 F.2d at 188 (describing the "extensive cooperation" that may be required by former competitors in a joint venture), this chilling effect will be widespread.

Joint ventures—including those involving companies that would "otherwise be competitors"—are "an important and increasingly popular form of business organization." *Dagher*, 547 U.S. at 5, 6. Horizontal competitors have formed joint

ventures in industries such as aerospace, food and beverage, pharmaceuticals, retail investment, and many others. *See* Sanga, *A Theory of Corporate Joint Ventures*, 106 Cal. L. Rev. 1437, 1440 & n.7 (2018); *see also id.* (identifying other joint ventures in integrated circuits, toys, watches, tires, and industrial equipment). Joint ventures have also grown more relevant in the healthcare industry, Meyers, *Risky Ventures: The Impact of IRS Health Care Joint Venture Policy*, 42 U. Mich. J.L. Reform 481, 483 (2009) (observing "virtual necessity" of joint ventures in healthcare), and the entertainment industry, including for content delivery of music and film, Mukai, *Joint Ventures and the Online Distribution of Digital Content*, 20 Berkeley Tech. L.J. 781, 796-97 (2005). The court's decision risks chilling formation of these and other types of ventures by suggesting that a court will not apply a full and robust assessment under step one of the rule of reason to determine whether the venture has substantially harmed competition.

The risk of chilling procompetitive joint ventures by allowing antitrust challenges to proceed to discovery based merely on allegations of elimination of competition between joint venture partners is especially severe because antitrust cases are extremely costly for defendants. Courts have consistently recognized the exorbitant costs of antitrust litigation. *American Steel Erectors, Inc. v. Local Union No. 7*, 536 F.3d 68, 77 n.7 (1st Cir. 2008) ("[A]ntitrust suits ordinarily entail massive discovery and are expensive to defend"); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,

558 (2007) (recognizing costs of proceeding to antitrust discovery). Antitrust litigation remains notoriously expensive to this day. *See, e.g.*, Herr, *Annotated Manual for Complex Litigation* § 30 (4th ed., updated May 2022) (noting that antitrust litigation "involve[s] voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money"). Moreover, in antitrust litigation, it "can be much more expensive to defend against a lawsuit than to bring a suit," a dynamic that enables strategic use of antitrust litigation to extract settlements for unmeritorious claims from defendants facing oppressive defense costs. McAfee & Vakkur, *The Strategic Abuse of the Antitrust Laws*, 1 J. Strategic Mgmt. Educ. 3, 5-7 (2004).

The chilling effects are exacerbated by the outsized threat of antitrust *liability* based on misapplication of the rule of reason to joint ventures that eliminate competition between their partners. By statute, antitrust defendants must pay treble damages if they are found liable. *See* 15 U.S.C. § 15. That figure often amounts to billions of dollars. The consequences for antitrust defendants can be "economically devastating." Cavanagh, *The Private Antitrust Remedy: Lessons from the American Experience*, 41 Loy. U. Chi. L.J. 629, 633-34 (2010). And as a result, there is intense pressure to settle antitrust cases. Indeed, antitrust "[d]efendants frequently face a Hobson's choice: either pay some amount to settle, even though they believe in their

innocence, or try the matter and risk uncapped liability." Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?*, 40 Vand. L Rev. 1277, 1284 (1987); *see also Twombly*, 550 U.S. at 559 ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment and trial] proceedings"). These inherent features of antitrust litigation and liability magnify the potential harms that would flow from failing to overturn the district court's erroneous approach to assessing joint ventures.

The chilling effects of the district court's decision could also extend from joint ventures to horizontal mergers. ADD37 (observing that the effects of the NEA "resemble those of a merger"), ADD68 (recognizing that analysis of joint ventures can involve tools of merger analysis). By definition, horizontal mergers eliminate competition between their parties, while typically also bringing procompetitive benefits. *Copperweld*, 467 U.S. at 768 (recognizing that mergers, like other agreements involving horizontal competitors, often increase efficiencies and benefit consumers). If the court's reasoning were extended to the horizontal merger context, merging parties would be deprived of a robust determination of whether their transaction harms competition, because the mere fact that the merger eliminated competition between them would create a presumption of illegality. That would contravene long-settled law: "the mere fact that a merger eliminates competition

between the firms concerned has never been a sufficient basis for illegality," and courts "cannot escape the necessity of assessing anticompetitive effects" of such mergers. Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 901a (May 2023 online).

CONCLUSION

The Court should reverse the district court's judgment based on its misapplication of the rule of reason.

Respectfully submitted,

/s/ Mark C. Fleming

MARK C. FLEMING
NATALIE M. MORRISSEY
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Mark.Fleming@wilmerhale.com
Natalie.Morrissey@wilmerhale.com

LEON B. GREENFIELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 663-6000
Leon.Greenfield@wilmerhale.com

TYLER S. BADGLEY
KEVIN R. PALMER
U.S. CHAMBER OF COMMERCE
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Attorneys for Amicus Curiae Chamber of Commerce of the United States of America

December 13, 2023

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 4,515 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Mark C. Fleming
MARK C. FLEMING
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Mark.Fleming@wilmerhale.com

December 13, 2023

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the Clerk of the United States Court of Appeals for the First Circuit via the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users this 13th day of December, 2023.

/s/ Mark C. Fleming
MARK C. FLEMING
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Mark.Fleming@wilmerhale.com

December 13, 2023