No. 23-1802

In the United States Court of Appeals for the First Circuit

UNITED STATES, *et al.*, *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
No. 1:21-cv-11558-LTS (The Honorable Leo T. Sorokin)

MOTION OF INTERNATIONAL CENTER FOR LAW & ECONOMICS AND ANTITRUST SCHOLARS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT AND REVERSAL

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December 13, 2023

Pursuant to Federal Rule of Appellate Procedure 29(a), the International Center for Law & Economics ("ICLE") and antitrust scholars listed in the Addendum to the attached brief respectfully move this Court for leave to file the accompanying *amicus* brief in support of Defendant-Appellant's appeal. As this motion explains, ICLE and the antitrust scholars have a strong interest in this case, and the proposed brief will facilitate this Court's consideration of the appeal. *See* Fed. R. App. P. 29(a)(3). All parties consent to this request.

I. ICLE AND THE ANTITRUST SCHOLARS HAVE A STRONG INTEREST IN THIS CASE.

ICLE is a nonprofit, non-partisan global research and policy center aimed at building the intellectual foundations for sensible, economically grounded policy. ICLE promotes the use of law & 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 promotes the public interest by remaining grounded in sensible legal rules informed by sound economic analysis.

Amici also include five scholars of antitrust, law, and economics. Their names, titles, and academic affiliations are listed in the Addendum. All have longstanding expertise and experience in the fields of antitrust law and economics.

Amici have an interest in ensuring that antitrust law remains grounded in clear rules, established precedent, record evidence, and sound economic analysis. The district court's decision erodes such foundations by focusing narrowly on the

number of competitors rather than on the actual impact on competition. Overall, *amici* have a profound interest in an intellectually coherent antitrust policy focused upon safeguarding competition itself.

II. THIS BRIEF IS DESIRABLE AND RELEVANT TO DISPOSITION OF THE APPEAL.

The attached *amicus* brief is desirable and relevant because it will aid in the Court's consideration of the petition. *See* Fed. R. App. P. 29(a)(3). The *amicus* brief provides additional legal and economic arguments outlining how in condemning the Northeast Alliance ("NEA") the judgment of the district court departed from binding precedent and established antitrust and economic principles. Specifically, the *amicus* brief draws on the *amici*'s years of experience in and scholarship regarding the policy goals of the U.S. antitrust laws, economic foundations of merger control, and the application of different review standards, including the rule-of-reason analysis.

As the attached brief explains, the Opinion erroneously equates competition to the number of competitors, disregarding that the protection of consumer welfare, not competitors, is the primary goal of antitrust laws. The attached brief also addresses how the Opinion then scrutinizes the NEA as an effective horizonal merger rather than a procompetitive joint venture between American Airlines and JetBlue that allows the parties to maintain their independence. Finally, the attached brief addresses the manner in which the Opinion ignores or minimizes decades of binding precedent that requires district courts to review competitor collaborations

under the rule-of-reason standard and instead conducts a "quick look" analysis that inappropriately dispenses with numerous established pro-consumer efficiencies generated by the NEA.

Throughout, to aid the Court, the attached brief provides legal and economic analysis of how such partial collaborations as joint ventures are treated under both U.S. antitrust laws and fundamental economic competition principles.

III. CONCLUSION

ICLE and the antitrust scholars respectfully request that this Court grant the motion for leave to file the attached *amicus* brief.

Dated: December 13, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Motion complies with the word limit of Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure. This Motion contains 546 words (as calculated by the automatic word count function of Microsoft Word), excluding the parts of the Motion exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

This Motion complies with the typeface requirements of Rule 32(a)(5)(A) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this Motion has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point, Times New Roman font.

Dated: December 13, 2023

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CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of December, 2023, caused to be electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system. Participants that are registered CM/ECF users will be served by the CM/ECF system. On December 13, 2023, I also caused Adam Gitlin, who is not registered with CMECF, to be served by electronic transfer at adam.gitlin@dc.gov.

/s/ Peter J. Carney
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BRIEF OF INTERNATIONAL CENTER FOR LAW & ECONOMICS AND ANTITRUST SCHOLARS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the International Center for Law & Economics ("ICLE") states that it is a nonprofit corporation organized under § 501(c)(3) of the Internal Revenue Code. ICLE does not have a parent corporation, nor has it issued any stock owned by a publicly held company.

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INTERESTS OF *AMICUS CURIAE*[1]

The International Center for Law & Economics ("ICLE") is a nonprofit, non-partisan global research and policy center aimed at building the intellectual foundations for sensible, economically grounded policy. ICLE promotes the use of law & 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 promotes the public interest by remaining grounded in sensible legal rules informed by sound economic analysis.

Amici also include five scholars of antitrust, law, and economics. Their names, titles, and academic affiliations are listed in the Addendum. All have longstanding expertise in, and have done extensive research in, the fields of antitrust law and economics.

Amici have an interest in ensuring that antitrust law remains grounded in clear rules, established precedent, record evidence, and sound economic analysis. The district court's decision erodes such foundations by focusing on the number of competitors rather than the impact on competition. Overall, *amici* have a profound

[1] Under Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *amici* certify that (i) no party's counsel authored the brief in-whole or in-part; (ii) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (iii) no person, other than amici or its counsel, contributed money that was intended to fund preparing or submitting the brief.

interest in an intellectually coherent antitrust policy focused upon safeguarding competition itself.[2]

[2] All parties have consented to the filing of this brief.

INTRODUCTION

Over a century ago, the Supreme Court wisely recognized that "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918). Echoing that foundational insight, the district court opinion (the "Opinion") opened by posing, "This case turns on what 'competition' means," only to proceed by applying a flawed analysis of the Sherman Act and governing authority. ADD10.[3]

The Opinion launches its scrutiny of the NEA by positing as an aim of federal antitrust law the fostering of "participation by a diverse array of competitors." *Id.* But the Opinion provides no citation or clarification for this proposition, which is at odds with the Opinion's later recognition that the antitrust laws are concerned with competition, not the specific competitors. *See* ADD68 ("[T]he Sherman Act 'unequivocally' establishes a policy favoring and protecting competition."). The Opinion further leaves out that "consumer welfare" is the touchstone of antitrust analysis, not the health of any particular array of competitors. *See Concord v. Bos. Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990); *see also Apex Hosiery Co. v. Leader*, 310 U.S. 469, 500-01 (1940).

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[3] "ADD" refers to the Addendum attached to the Appellant's Brief. "JA" refers to the Joint Appendix filed with the Appellant's Brief.

This amicus brief addresses three fundamental failings of the Opinion, each of which requires reversal: First, the Opinion equates the simple reduction in the number of competitors by one with a fatal (and illegal) reduction in competition. Second, the Opinion analyzes the Northeast Alliance ("NEA"), involving specific operations focused on New York, New Jersey, and Boston, as a horizontal merger. Finally, the Opinion subjected the NEA to an inappropriate, truncated review rather than a full rule of reason analysis.

This Court should reverse the district court's faulty application of key competition law principles. A counting exercise tallying autonomous rivals is not what matters under the Sherman Act; rather, the focus is on an economic process that assesses impacts on "material progress." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). Getting the competition definition right matters greatly, as everything else follows from that foundation. An opportunity to reiterate and cement proper understandings seldom appears; seizing this occasion is imperative.

ARGUMENT

I. ALLIANCES ARE NOT OF THEMSELVES SYNONYMOUS WITH ANTICOMPETITIVE HARM

Inherent in any joint venture is some degree of restraint on the direct competition between the joint venture parties themselves as they create a single venture with the goal of greater competition against other competitors and better results for consumers, usually through increased output or improved products or

services at competitive prices. *See* Fed. Trade Comm'n & Dep't of Justice, Antitrust Guidelines for Collaboration Among Competitors (April 2000) at 2 (hereinafter "*Collaboration Guidelines*") ("[P]articipants in a collaboration typically remain potential competitors, *even if they are not actual competitors for certain purposes* (*e.g.*, R&D) during the collaboration.") (emphasis added). As Appellant's brief summarizes, through the NEA, the two airlines here achieved exactly those goals of increasing output and enhancing the quality of services without any demonstrated price increases, such that consumer welfare was greatly enhanced in a procompetitive fashion, notwithstanding that on certain routes they were no longer direct competitors. App. Br. 6-14.

Throughout, the Opinion's analysis is skewed by the notion that "the number of competitors has literally decreased by one," which the Opinion treats as an intrinsically intolerable "assault on competition." ADD43, ADD92. Simply put, the Opinion improperly conflates "competition" with "number of competitors," effectively ignoring established legal authority and economics confirming that safeguarding the overall competitive process is the paramount means for maximizing consumer welfare—not preserving an existing market structure with a particular number of rivals. As this Court has long held:

> [T]he Court recognizes that the antitrust laws exist to protect the competitive process itself, not individual firms. [citations omitted] And the antitrust laws protect the competitive process in order to help individual consumers by

> bringing them the benefits of low, economically efficient prices, efficient production methods, and innovation.

Grappone, Inc. v. Subaru of New Eng., 858 F.2d 792, 794 (1st Cir. 1988) (Breyer, J.) (collecting cases, including *Brown Shoe* and *Broad. Music, Inc.*).

The Opinion's treatment of the mere reduction of competitors by one on NEA routes in favor of a limited, regional collaboration as an "assault on competition" infected all of the Opinion's analysis of the impact of the collaboration, and this error independently requires reversal. Economics and binding precedent caution that static market shares and a mere reduction in the number of competitors do not constitute a basis for condemnation absent proof that prices increased, output decreased, or quality suffered. *See, e.g.*, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2288 (2018) ("This Court will 'not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level.'" (citing *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993))).

A. Joint Ventures Depend On Collaboration To Increase Consumer Welfare

The Opinion concludes that there will be future competitive harm based on a minor reduction in competitors without requiring a showing—despite the "tidal wave of evidence" (ADD12)—that output diminished or prices increased. Such a showing is an essential prerequisite to render concentration economically

meaningful. *See Am. Express Co.*, 138 S. Ct. 2274 at 2284 ("Direct evidence of anticompetitive effects would be 'proof of actual detrimental effects' . . . such as reduced output, increased prices, or decreased quality . . .") (citations omitted). The Opinion is rife with statements demonstrating that the loss of one competitor on regional routes was dispositive here—the ultimate thumb on the scales:

- "First, the NEA has eliminated the once vigorous competition between two of the four largest domestic carriers in the northeast . . ." ADD76 (underlining in original).
- "This, in and of itself, is a fundamental assault on competition and an actual harm the Sherman Act is designed to prevent . . . ." ADD77.
- "Eliminating potential competition is, by definition, anticompetitive." *Id.* (quoting *Impax* out of context).
- "As explained already, the overarching purpose of the NEA is anticompetitive. Through the NEA, American and JetBlue cease to compete and, instead, operate as a single carrier in the northeast. That it is the core of the relationship, and it is a naked assault on competition." ADD92.

Such quick and premature condemnation of business collaborations on flimsy theories of concentration and alleged loss of independent decision-makers contravenes the precedent of this Court and of other circuit courts. *See, e.g.*, *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 47 (1st Cir. 2001) (under rule of reason, "adverse effects on consumer welfare are an important part of the equation" and that "it is hard to imagine a rule of reason violation absent a potential threat to the public"); *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 377 (5th Cir. 2014) ("A restraint should not be deemed unlawful, *even if it eliminates*

a competitor from the market, so long as sufficient competitors remain to ensure that competitive prices, quality, and service persist.") (emphasis added); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995) ("reduction of competition does not invoke the Sherman Act until it harms consumer welfare"). Such summary disposition virtually assures penalizing or prohibiting beneficial alliances that advantage consumers and enhance consumer choice.

As the *Collaboration Guidelines* have recognized for over two decades, "collaborations often are not only benign, but procompetitive." *Collaboration Guidelines* at 2. Further, the *Collaboration Guidelines* emphasize, in the first sentence of the preamble, that "[i]n order to compete in modern markets, competitors sometimes need to collaborate." *Id*. at 1; *see also id.* at 6 ("A collaboration may allow its participants to better use existing assets, or may provide incentives for them to make output-enhancing investments that would not occur absent the collaboration. The potential efficiencies from competitor collaborations may be achieved through a variety of contractual arrangements including joint ventures . . . ."). Notably, the Opinion largely ignores the *Collaboration Guidelines* and their explication of the benefits of joint ventures, citing them only in passing as a "*see also*" for the proposition that "some collaborations" should be treated like "complete or partial merger[s]." ADD69. In the Opinion's take on the *Collaboration Guidelines*, the tail wags the dog.

The *Collaboration Guidelines* are consistent with established Supreme Court precedent recognizing the common benefits of competitor collaborations, even as they require specific, limited collaboration rather than competition between enterprises that are otherwise competitors. *See Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2155 (2021) ("[M]any joint ventures are calculated to enable firms to do something more cheaply or better than they did it before. And the fact that joint ventures can have such procompetitive benefits surely stands as a caution against condemning their arrangements too reflexively.") (citation omitted); *Texaco Inc. v. Dagher*, 547 U.S. 1, 6 n.1 (2006) (recognizing the "economic justifications," "numerous synergies and cost efficiencies" resulting from a joint venture).

And this Court has recognized that "bona fide joint ventures"—like the U.S.-Department-of-Transportation-approved NEA here—allow two competitors to pool their resources to "provide offerings" that neither "could easily provide by itself." *Augusta News*, 269 F.3d at 48. This Court's articulation in *Augusta News* of the joint venture providing offerings that neither partner "could *easily* provide by itself" is a more permissive standard than the Opinion's jaded view requiring a joint venture to pool "complementary assets." ADD93; *see also id.* ("[T]he defendants have not established their pooled assets are 'complementary,' . . . such that they enable the defendants to create an innovative product").

The Opinion seems to hold that for a joint venture to overcome its intrinsic "assault on competition" it must produce something novel, as opposed to enhancing competition (through better service or greater output) against other competitors. Rejecting the NEA's plaintiffs-conceded, pro-competitive benefits, the Opinion notes that "other firms (Delta and United), acting independently, already offer 'products' comparable to the one they claim their collaboration will enable . . ." ADD92; *see also id*. ("Collaboration between the defendants is not required in order to create a new product or market that could not otherwise exist."). But under the Sherman Act and the *Collaboration Guidelines*, horizontal joint ventures are not held to a "Eureka!" novel-creation standard.

Notably, the DOJ's *Collaboration Guidelines* expressly contemplate a similar asset-collaboration. *Collaboration Guidelines* at 31. In Example 6, two major software producers—neither of which was a "major competitor" of the two dominant firms in the word-processing software market—joined forces "to develop a markedly better word-processing program together than either [could] produce on its own." *Id*. This combination was "an efficiency-enhancing integration of economic activity that promotes procompetitive benefits." *Id*. So too with the NEA.

Indeed, if combinations were held to a novel-creation standard, the joint venture analyzed by the Supreme Court in *Dagher* for refining and selling gasoline in the western states (where Texaco and Shell previously competed) could not have

survived scrutiny. 547 U.S. at 4 (describing Texaco and Shell Oil joint venture agreement as "ending competition between the two companies in the domestic refining and marketing of gasoline"). The Supreme Court not only accepted as lawful a joint venture between two companies that were previously direct competitors (547 U.S. at 4 n1.), but also ruled that even the joint venture's price-setting was not subject to *per se* treatment, citing the combination's overall procompetitive benefits. *Id.* at 8 ("[T]he pricing decisions of a legitimate joint venture do not fall within the narrow category of activity that is *per se* unlawful.").

In insisting that American and JetBlue create something novel, i.e., not offered by competitors like Delta or United, or contribute only "complementary" assets to the NEA to do something each could not have done on its own, the Opinion is unsupported by legal authority and should be reversed.

B. The Proof Is In The Pudding, Not In The Number Of Rivals

By enshrining the mere independence of competitors above actual competitive performance and by failing to examine the NEA's actual consumer welfare effects, the Opinion unjustifiably penalized the NEA's consumer-enhancing aspects. *See* ADD94-ADD95 (recognizing that NEA allowed for certain benefits, such as better route scheduling, but faulting parties because such benefits occurred through parties "cooperat[ing] in ways that horizontal competitors normally would not"). Indeed, the Opinion sharply (and repeatedly) minimizes or ignores altogether tangible

evidence regarding NEA-generated network expansions, connectivity optimization, increased service frequencies to underserved airports, enhanced schedule optionality, reciprocal loyalty benefits, and codesharing conveniences enhancing routing choices. *See* ADD30 (noting, without further acknowledging, that the NEA-generated services and benefits "extend to most of the carriers' flights to and from Logan, JFK, LaGuardia, and Newark").

Moving beyond the reduction of competitors on certain routes, the proof was in the pudding of the extensive trial record. The evidence demonstrated that the NEA (1) increased capacity by more than 200% at NEA airports (2-JA1293), (2) offered almost 50 new nonstop routes, (3) increased their frequency on over 130 routes, and (4) increased their capacity on 45 New York City flights (2-JA1367-68). In fact, the record shows that the NEA well-exceeded the growth commitments for 2022 and beyond to which American and JetBlue had agreed with the Department of Transportation to obtain its blessing. *See* 2-JA821.

But the Opinion rejected all of these procompetitive, consumer-friendly benefits because, in its view, they were the result of the "unlawful" reduction of competitors by one. The Opinion's rejection of these benefits was erroneous and in contravention to settled authority. *See United States v. Interstate Commerce Comm'n*, 396 U.S. 491, 523 (1970) (affirming dismissal of complaint challenging railroad merger where "the long-run effect of the merger would be to benefit

communities . . . , and that the brief and transitory dislocations the merger would occasion were not sufficient to outweigh the merger's benefits"); *Penn-Central Merger & N & W Inclusion Cases*, 389 U.S. 486, 500-01 (1968) (affirming dismissal of competitor suits opposing merger, noting that evidence showed merger would benefit general public, allowing "the unified company to 'accelerate investments in transportation property and continually modernize plant and equipment . . . and provide more and better service'"). The Opinion's singular focus was also contrary to the *Collaboration Guidelines*, which state that, even in cases where the number of competitors drops, "the evaluating Agency would take account of . . . any procompetitive benefits . . . under present circumstances, along with other factors." *Collaboration Guidelines* at 29-30.

This Court has the opportunity to underscore that, under federal antitrust law, efficiency assertions deserve a balanced assessment in calculating net effects, rather than the cramped disposal through summary scapegoating of innovative integration models that occurred in the Opinion (ADD88-ADD99). *See Cont'l T.V. v. GTE Sylvania*, 433 U.S. 36, 49 (1977) (under rule of reason, "the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition"); *see also Am. Express Co.*, 138 S. Ct. at 2290 (affirming judgment for defendants where plaintiffs could not show anticompetitive effects and thus "failed to satisfy the first step of the

rule of reason"); *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) ("In its design and function the rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.").

II. THE DISTRICT COURT ERRED BY TREATING THE NEA'S LIMITED REGIONAL COLLABORATION LIKE A FULL-ON HORIZONTAL MERGER

One of the core flaws permeating the Opinion's analysis is its effective adoption of the plaintiffs' view that the NEA should be analyzed as a *merger*—comprehensively eliminating the rivalry between American and JetBlue—instead of a *joint venture*. *See* ADD37 ("Nevertheless, as implemented by the parties, its effects resemble those of a merger of the parties' operations within the northeast . . . ."), ADD38 ("[T]hey function like a single airline in the NEA region, as much as possible."), ADD40 (faulting airlines for adjusting certain nationwide priorities, including American's deprioritizing Philadelphia for New York and JetBlue pausing plans for growth in Fort Lauderdale); ADD46 (faulting JetBlue for supposedly increasing its operating costs). But contrary to the Opinion's suggestion (ADD69), not even the *Collaboration Guidelines* support the Opinion's analysis. *See, e.g.*, *Collaboration Guidelines* at 5 ("The competitive effects from competitor collaborations may differ from those of mergers due to a number of factors.").

A. The NEA Is A Limited Regional Joint Venture That Preserved Each Participant's Pricing Decisions Even Within the Region

The Opinion's merger-like view of the regional collaboration ignored or downplayed important distinctions between the NEA's operation and those of a national merger of competitors, not the least of which was that American and JetBlue maintained independent pricing. *See* ADD77 ("American and JetBlue do not discuss the fares they will set . . . ."). More generally, the NEA is structured like the archetypical limited joint venture, including (1) a fixed scope and duration, (2) no asset transfer, (3) no price coordination, and (4) separate management and business strategies, even in the NEA's market. *See* ADD27-ADD37; *see also id.* at ADD37 ("Both [American and JetBlue] have operations that fall beyond the NEA's reach, and the agreement does not formally embody a complete combination of the partners' operations even within the NEA region.").

Critically, each airline retained control over routes not covered, with flexibility in responding through tactical fare adjustments even within the Northeast region. *See* 1-JA572 ("Q. And do you ever discuss capacity outside the Northeast Alliance with American. A. Absolutely not.")); ADD30 (noting that each partner "will continue to make independent decisions regarding pricing, capacity, and network management").

These characteristics, among many others, make it inappropriate and legal error for the Opinion to analyze the NEA effectively as a horizontal merger. *See,*

e.g., *Addamax Corp. v. Open Software Found.*, 152 F.3d 48, 52 (1st Cir. 1998) (when "there is patently a potential for a productive contribution to the economy, [] conduct that is strictly ancillary to this productive effort (*e.g.*, the joint venture's decision as to the price at which it will purchase inputs) is evaluated under the rule of reason").

B. Joint Ventures Offer Unique, Pro-Competitive Benefits

The Opinion's treatment of the NEA as a merger and not a limited joint venture was error, particularly given that joint ventures such as the NEA offer unique benefits, often superior both to firms operating independently and to a merger. Joint ventures and mergers differ substantially in structure, scope, competitive impacts, and efficiency gains. Whereas mergers combine entire firms under common ownership and control, joint ventures allow 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). The remaining independence is what distinguishes joint ventures from mergers. *See* Herbert Hovenkamp & Phillip E. Areeda, Antitrust Law: An Analysis of Antitrust Principles and Their Application, ¶2100c (5th ed. 2022) ("[J]oint ventures are calculated to enable firms to do something more cheaply or better than they did it before" making them "presumably efficient."). This allows greater flexibility to renegotiate or unwind collaborations without the permanence of an acquisition. Joint ventures

allow valuable collaboration and access to partners' knowledge without requiring a permanent, fully integrated merger 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).

Joint ventures also frequently have a narrower objective than mergers, focusing on specific areas rather than seeking complete integration across all business functions. In the case of the NEA, the focus areas were increased service frequencies to underserved airports, enhanced schedule optionality in the face of tight FAA regulations and limited gate availability, and reciprocal loyalty benefits in one geographic location. ADD30. And by maintaining separate pricing decisions (ADD77), the NEA could realize productive efficiencies for the parties and consumers from collaboration, asset pooling, and knowledge sharing without the potential anticompetitive effects of an outright merger.

Economic theory and experience suggest that joint ventures pose fewer anticompetitive concerns because they do not reduce the number of independent competitors in a market, contrary to the Opinion. For example, Gugler & Siebert find that mergers and joint ventures in the semiconductor industry increased participating firms' market shares on average, identifying net efficiency gains allowing the participating firms to win more of the market. As such, joint ventures represent desirable alternatives to mergers from a consumer welfare perspective. *See*

Klaus Gugler & Ralph Siebert, *Market Power Versus Efficiency Effects of Mergers and Research Joint Ventures: Evidence from the Semiconductor Industry*, 89 Rev. Econ. Stat. 645, 646 (2007). By maintaining separate ownership and pricing control, joint ventures allow firms to pool assets and improve productivity while preserving more market participants. Thus, the structure enables collaboration without the consolidated market power of an outright merger. This further highlights the key differences between joint ventures and full integration through acquisition, which the Opinion misses entirely.

III. JOINT VENTURES LIKE THE NEA REQUIRE FULL RULE OF REASON ANALYSIS—NOT QUICK LOOK OR SHORT CUTS

Finally, the Opinion incorrectly concluded that agreements between competitors that reduce the number of market participants was "especially harmful." ADD83. The Opinion then subjected the NEA to an inappropriate truncated style of review, tantamount to the "quick look" approach the Opinion claimed to recognize was not in fact permitted here. *See* ADD75. Rather than conduct a full rule of reason analysis, the Opinion holds that as to the NEA, "no deep and searching analysis is required in order to discern its unlawfulness." ADD76 (going so far as to state that "the NEA is situated 'at one end of the competitive spectrum'")); *see also* ADD87 (indicating that NEA could be deemed unreasonable "in the twinkling of an eye"). Nowhere does the Opinion conduct the required weighing of the competitive benefits identified by Appellant against presumed, long-run risks alleged by the

plaintiffs. *See Dagher*, 547 U.S. at 5 (rule of reason "presumptively applies" absent *per se* violations).

A. In *Dagher*, The Supreme Court Confirmed The Presumptive Application Of Rule Of Reason To Joint Ventures

In *Dagher*—under similar facts to here—the Supreme Court overturned a decision by the Ninth Circuit condemning the practices of a gasoline refining and sales joint venture, Equilon Enterprises, set up by oil giants Shell and Texaco in the western region of the United States. As the Supreme Court explained, the district court had rejected plaintiffs' request to apply quick look, and at summary judgment had upheld the joint venture's challenged activities procompetitive. 547 U.S. at 4. The Ninth Circuit reversed, characterizing the position of the petitioners as seeking an exception to the *per se* prohibition on price fixing. *Id.*

In confirming that the rule of reason applied to the joint venture's challenged activities, the Supreme Court unambiguously stated that "this Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination *is in fact* unreasonable and anticompetitive before it will be found unlawful." *Id*. at 5 (emphasis added). The Court specifically rejected applying *per se* or anything other than full, rule of reason scrutiny to Equilon, effectively rejecting any sort of *Topco*-like suggestion that there should be "an especially heavy burden on the collaborators to justify what otherwise would be obviously unlawful collusion." ADD14; *see also Dagher*, 547 U.S. at 5 ("These

cases do not present such an agreement, however, because Texaco and Shell oil did not compete with one another in the relevant market—namely, the sale of gasoline to service stations in the western United States—but instead participated in the market jointly through their investments in Equilon."). The Court was also clear that any challenge to the formation of the joint venture itself would need to prove that "its creation was anticompetitive under the rule of reason." *Id*. at 6 n.1.

Here, the district court transgressed the fundamentals of *Dagher* and other Supreme Court authority on joint ventures by dispensing with the NEA based on a truncated analysis. *See Alston*, 141 S. Ct. at 2155 (rejecting a "quick look" analysis for the challenged joint venture and affirming that "[m]ost restraints challenged under the Sherman Act—including most joint venture restrictions—are subject to the rule of reason"); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) (*per se* rule does not apply to all agreements between competitors, "[j]oint ventures and other cooperative arrangements are also not usually unlawful"). Only by insisting on disciplined economic welfare-based analysis—not conclusory structural shortcuts—can this Court correct methodological shortfalls and realign doctrine in this Circuit to safeguard innovative joint ventures that enhance consumer choice and welfare.

B. "Quick Look" Analysis Applies Only To A Narrow Category Of Agreements That Does Not Include The NEA

Beyond *Dagher* and other Supreme Court authority, since at least 1978 the Supreme Court, in decisions like *Professional Engineers*, has carefully confined the application of truncated "quick look" analysis. "Quick look" analysis is reserved for that limited category of restraints where genuinely anticompetitive effects are so intuitively obvious that "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Nat'l Soc'y of Prof'l Eng'rs. v. United States*, 435 U.S. 679, 692 (1978); *see Alston*, 141 S. Ct. at 2155 (noting that joint venture restrictions are subject to rule of reason).

Such cases typically feature overt, horizontal output restrictions, price agreements, or naked market divisions devoid of cognizable efficiencies. In *Professional Engineers*, it was a bidding agreement that "operates as an absolute ban on competitive bidding." 435 U.S. at 692. The NEA—with its established output expansion and consumer choices—falls far outside such restrictions.

And it remains equally settled that where defendants provide plausible justifications that a practice enhances overall efficiency and makes markets more competitive, *per se* and quick look approaches must end and full rule of reason procedures must begin. As the Supreme Court has explained, "*per se* rules are appropriate only for 'conduct that is manifestly anticompetitive,' . . . that is, conduct 'that would always or almost always tend to restrict competition and decrease

output.'" *Bus. Elecs. v. Sharp Elecs.*, 485 U.S. 717, 723 (1988) (internal citation omitted) (citing cases); *see also Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458-59 (1986) ("[W]e have been slow . . . to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious."). Numerous decisions underscore that quick-look bypassing of comprehensive balancing is permissible only for "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692.

C. The Opinion Erred By Not Applying Full Rule Of Reason Review

While the Opinion stated it "declines to apply per se analysis," the Opinion intimates that its approach was effectively *per se*. *See* ADD83 ("deliberate market allocation inherent in the NEA is strong evidence of its actual anticompetitive effect"). Given the wide gap between the NEA and *per se* agreements, the Opinion was without legal basis "to conclude that the NEA is situated 'at [one] end[] of the competitive spectrum" such "that no deep and searching analysis is required in order to discern its unlawfulness." ADD76 (citing *Alston*, 141 S. Ct. at 2155).

Instead, when business collaborations between competitors incorporate sets of tradeoffs, immediate condemnation remains wholly improper without balanced vetting. The default rule of *Dagher* requires a full rule of reason analysis, given

intrinsic efficiency possibilities. 547 U.S. at 5. Reasoned scrutiny becomes imperative for collaborations with facially plausible claims of providing new products, penetrating untreated geographic segments, optimizing scheduling, capturing scale economies, or administering loyalty programs more seamlessly than individual participants could achieve alone. *See* ADD30 (noting such NEA arrangements).

The airline context poses heightened calls for caution before neutralizing innovative business formats with a quick look, because alliances there can generate acknowledged consumer value through coordinated flight timing, codesharing, reciprocal lounge privileges, baggage handling, and enhanced network connectivity. *See* ADD100 (competing domestic carriers "commonly" make arrangements for codesharing and loyalty reciprocity to benefits consumers); ADD25 (the West Coast International Alliance includes codesharing and reciprocal benefits); *see also* ADD27 (no other domestic airline joint venture has received antitrust scrutiny).

In no sense does the NEA fit into the category of agreements that are so facially anticompetitive that they merit a presumption of illegality. Rather, the NEA reflects efforts to construct integrated national networks—responding in part to consumer choice expansion pressures from low-cost carrier growth, and in part to competitive pressures from other major carriers in the region. *See* ADD21 ("It is against this backdrop of industry consolidation, in this competitive landscape . . .

that the agreement at issue here arose."). The NEA established intricate revenue-sharing calculations, reciprocal loyalty programs, coordinated scheduling committees, and joint corporate customer arrangements—all premised on maximizing efficiency and reducing operational costs. *See* 1-JA342, 1-JA348, 2-JA1224-25.

These provisions aimed at forging a unified domestic connector system warrant more than a quick look before abandoning them as hopeless. Indeed, the Opinion accepted that the NEA generated capacity increases at slot-constrained airports in the Northeast region, while expressing concern "that capacity growth within the NEA comes at the expense of resources and output by the defendants elsewhere, *as well as* evidence the defendants each would have pursued at least some of this growth with or without the partnership." ADD95-ADD96. Neither theoretically nor actually did the NEA reflect a naked restraint on output or pricing. The important point is not to settle whether there was a net capacity increase or a reallocation that increased consumer welfare. The important point is that, at minimum, such contractual complexities command a balanced rule of reason review rather than a truncated analysis through thinly substantiated assumptions.

By dispensing with the NEA with an abbreviated analysis, the Opinion departed from binding case-law. *See Alston*, 141 S. Ct. at 2155 (joint ventures "are subject to the rule of reason, which (again) we have described as 'a fact-specific

assessment of market power and market structure' aimed at assessing the challenged restraint's 'actual effect on competition'") (citing *Am. Express Co.*, 138 S. Ct. at 2284); *Augusta News*, 269 F.3d at 48 ("[I]t is commonly understood today that *per se* condemnation is limited to 'naked' market division agreements, that is, to those that are not part of a larger pro-competitive joint venture.").

CONCLUSION

Because the district court equated competition to the number of competitors, effectively treated the NEA erroneously as a horizontal merger, and applied an improper, truncated analysis far short of a full rule of reason analysis, this Court should reverse the judgment of the district court and vacate the permanent injunction.

Dated: December 13, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Brief complies with the word limit of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This Brief contains 5,612 words (as calculated by the automatic word count function of Microsoft Word), excluding the parts of the Brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

This Brief complies with the typeface requirements of Rule 32(a)(5)(A) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point, Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of December, 2023, caused to be electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system. Participants that are registered CM/ECF users will be served by the CM/ECF system. On December 13, 2023, I also caused Adam Gitlin, who is not registered with CMECF, to be served by electronic transfer at adam.gitlin@dc.gov.

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