

# United States Senate

WASHINGTON, DC 20510

July 25, 2022

The Honorable Pete Buttigieg  
Secretary  
U.S. Department of Transportation  
1200 New Jersey Avenue SE  
Washington, DC 20590

John Putnam  
General Counsel  
U.S. Department of Transportation  
1200 New Jersey Avenue SE  
Washington, DC 20590

Dear Secretary Buttigieg and Mr. Putnam,

As airline prices skyrocket, cancellations worsen, and delays grow for Americans flying everywhere,<sup>1</sup> we write to urge the Department of Transportation (the Department) to fully utilize its statutory authority to protect consumers and promote competition in the airline industry.

Over the past year, Americans' air travel experiences have grown steadily worse. One in five flights has arrived behind schedule this year, while airlines have canceled flights four times as often during high-travel weekends as they did in 2019.<sup>2</sup> Airlines have already canceled nearly 122,000 flights in 2022—more cancellations than occurred during all of 2021.<sup>3</sup> Airline consumer complaints to the Department have increased threefold relative to pre-pandemic levels.<sup>4</sup> Airlines have also increased flight overbookings, causing passengers to be involuntarily denied boarding nearly three times as often in the first quarter of 2022 compared to the first quarter of 2018.<sup>5</sup> Unions are sounding the alarm that airlines are selling tickets for flights they know they will not be able to staff.<sup>6</sup>

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<sup>1</sup> New York Times, "Understanding the Summer Air Travel Mess," Heather Murphy, July 1, 2022, <https://www.nytimes.com/2022/07/01/travel/summer-travel-flight-delays-cancellations.html>.

<sup>2</sup> *Id.*

<sup>3</sup> Simple Flying, "2022 Already Has More Flight Cancellations Than the Whole of 2021," Devansh Mehta, July 5, 2022, <https://simpleflying.com/2022-more-flight-cancellations-than-2021>.

<sup>4</sup> U.S. Department of Transportation, "Air Travel Consumer Report: Consumer Complaints Against Airlines Rise More Than 300 Percent Above Pre-Pandemic Levels," press release June 23, 2022, <https://www.transportation.gov/briefing-room/air-travel-consumer-report-consumer-complaints-against-airlines-rise-more-300-percent>.

<sup>5</sup> U.S. Department of Transportation, "Air Travel Consumer Report," June 2019, p. 41, <https://www.transportation.gov/sites/dot.gov/files/2020-06/June%202019%20ATCR%20revised%206-30-2020.pdf>; U.S. Department of Transportation, "Air Travel Consumer Report," June 2022, p. 41, <https://www.transportation.gov/sites/dot.gov/files/2022-06/June%202022%20ATCR.pdf>.

<sup>6</sup> NPR, "A scheduling glitch temporarily canceled thousands of American Airlines flights," Emma Bowman, July 2, 2022, <https://www.npr.org/2022/07/02/1109592782/american-airlines-flights-canceled-glitch>.

Meanwhile, prices for domestic flights have shot up 47 percent since January 2022 and 30 percent compared to pre-pandemic levels.<sup>7</sup> And even after receiving \$50 billion in government assistance, airlines have failed to issue at least \$10 billion in refunds for flight cancellations throughout the coronavirus disease 2019 (COVID-19) pandemic, despite being required to do so by federal law.<sup>8</sup> Put another way, Americans are spending far more money for a substandard travel experience—and sometimes to not fly at all.

In the face of these challenges, the Department of Transportation has the authority to take meaningful actions to hold airlines accountable for avoidable delays and cancellations and stem the tide of airline consolidation. By utilizing its existing licensing and rulemaking authority, the Department can improve experiences for travelers and help bring down exorbitant ticket prices driven in part by anticompetitive mergers. We write to highlight several of these authorities.

### **Consumer Protection**

First, the Department of Transportation is empowered to act as a consumer-protection watchdog. Under 49 U.S.C. § 41712(a), the Secretary of Transportation has the authority to independently investigate whether airlines are engaged in “unfair or deceptive practice[s]” or “unfair method[s] of competition.”<sup>9</sup> The Secretary may order airlines and ticket agents to stop such practices and may issue fines of up to \$37,377 per violation pursuant to 49 U.S.C. § 46301.<sup>10</sup> This authority could be utilized to protect consumers from a wide range of rampant unfair practices in the airline industry, including:

- **Delays.** Some delays are inevitable, but consistently delaying flights for reasons within an airline’s control is an unfair and deceptive practice. This year, 41 percent of flight delays have been for reasons within airlines’ control, and an additional 37 percent of delays have been caused by late-arriving flights, which themselves are “mostly attributable” to airlines’ own failures.<sup>11</sup> The Department has the authority to tackle this problem by issuing a rule under § 41712 that imposes fines on airlines for the delays they cause. The Department could also issue more concrete rules requiring airlines to offer refunds to passengers whose flights are delayed. Currently, passengers are entitled to a refund for “significantly delayed” flights, but that term is not defined, and the Department makes refund decisions only on a case-by-case basis, a significant barrier to large-scale enforcement of these important consumer protections.<sup>12</sup>

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<sup>7</sup> Adobe Blog, “Adobe Analytics: Domestic flight prices increased 47 percent since January — demand remains above pre-pandemic levels,” June 14, 2022, <https://blog.adobe.com/en/publish/2022/06/14/adobe-analytics-domestic-flight-prices-increased-47-percent-since-january-demand-remains-above-pre-pandemic-levels>.

<sup>8</sup> CBS News, “Airlines still owe travelers billions in refunds for flights canceled in 2020,” Kate Gibson, December 2, 2021, <https://www.cbsnews.com/news/airlines-owe-billions-refunds-cancelled-flights-2020/>; 14 C.F.R. §§ 250–259.

<sup>9</sup> 49 U.S.C. § 41712(a).

<sup>10</sup> 49 U.S.C. § 41712(a); 49 U.S.C. § 46301; 14 CFR Parts 13 and 406.

<sup>11</sup> Washington Post, “Airlines tried shifting blame, but they’re the biggest cause of delays,” Ian Duncan and Lori Aratani, July 23, 2022, <https://www.washingtonpost.com/transportation/2022/07/23/airline-delays-summer-cancellations>.

<sup>12</sup> U.S. Department of Transportation, “Refunds,” <https://www.transportation.gov/individuals/aviation-consumer-protection/refunds>.

- **Cancellations.** When airlines cancel flights—whether due to their own poor operations and staffing practices or through intentional schemes to offer flights they know they can’t staff in order to later cancel the least-profitable flights<sup>13</sup>—they should be held accountable. For airlines, flight cancellations may just be business as usual. For air travelers and employees, however, they represent huge disruptions to lives and livelihoods. The Department’s consumer protection authorities are meant for exactly these kinds of practices, and it should use that authority to impose fines designed to change airlines’ calculus about harming consumers to pad their own profits.
- **Involuntary re-bookings.** For decades, airlines have systematically oversold their flights, offering tickets they know they can’t fulfill.<sup>14</sup> When this gamble fails, it should be airlines—not consumers—that pay the price. Under the Department’s current policy, airlines’ responsibility is only to “ensure that the smallest practicable number of persons holding confirmed reserved space on that flight are denied boarding involuntarily.”<sup>15</sup> But with passengers being booted off flights more and more frequently,<sup>16</sup> the Department could use its authority to end this practice altogether. Airlines should know that when they overbook flights, they should be prepared to compensate passengers enough to encourage voluntary re-bookings or else pay a hefty fine (in addition to compensating the passenger).

We were encouraged by the Department’s announcements of proposed rulemakings aimed at refunds for tickets, checked bags, and ancillary services.<sup>17</sup> Strong refund rules are long overdue, and we appreciate the Department’s ongoing efforts in that area.

### **Market Competition**

The Department also has the authority to effectively block airline mergers that would stifle competition. Under 49 U.S.C. § 41102, airlines must receive a certificate from the Department that authorizes them to operate (whether domestically or internationally).<sup>18</sup> The Secretary of Transportation must grant these airlines the “economic authority” to operate and must approve any transfer of operating certificates to another carrier, authority that gives the

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<sup>13</sup> NBC News, “American Airlines pilot calls on FAA to monitor airlines he says are scheduling more flights than they can staff,” Elisha Fieldstadt, June 23, 2022, <https://www.nbcnews.com/news/us-news/american-airlines-pilot-calls-faa-monitor-airlines-says-are-scheduling-rcna34978>.

<sup>14</sup> Government Accountability Office, “Information on Airlines’ Denied Boarding Practices,” December 2019, <https://www.gao.gov/assets/gao-20-191.pdf>.

<sup>15</sup> 14 CFR 250.2a.

<sup>16</sup> U.S. Department of Transportation, “Air Travel Consumer Report,” June 2019, p. 41, <https://www.transportation.gov/sites/dot.gov/files/2020-06/June%202019%20ATCR%20revised%206-30-2020.pdf>;

U.S. Department of Transportation, “Air Travel Consumer Report,” June 2022, p. 41, <https://www.transportation.gov/sites/dot.gov/files/2022-06/June%202022%20ATCR.pdf>.

<sup>17</sup> U.S. Department of Transportation, “View Rule: Airline Ticket Refunds,” March 2022, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=2105-AF04>; U.S. Department of Transportation, Federal Register Notice, “Refunding Fees for Delayed Checked Bags and Ancillary Services That Are Not Provided,” July 21, 2021, <https://www.federalregister.gov/documents/2021/07/21/2021-13736/refunding-fees-for-delayed-checked-bags-and-ancillary-services-that-are-not-provided>.

<sup>18</sup> 49 U.S.C. § 41102.

Secretary *de facto* merger-blocking power.<sup>19</sup> Certificate transfers are only permitted when the Secretary determines that a transfer would be “consistent with the public interest.”<sup>20</sup> If a transfer is approved, the Secretary must include a report that discusses the effects of the transfer on, among other areas, “competition in the domestic airline industry.”<sup>21</sup> Airlines can be exempted from these requirements, but this exemption must also be “consistent with the public interest.”<sup>22</sup> The Department has already promulgated regulations under these authorities specifying that it can suspend or revoke certain air carrier authorizations upon a determination that it is “in the public interest to do so.”<sup>23</sup>

The Department must use its full statutory authority more vigorously to address increasing consolidation and dwindling competition in our airline industry, which represent serious harms to the public interest. Before the deregulation of the industry in 1978, more than 400 airlines offered flights to millions of consumers in the United States.<sup>24</sup> Today, four airlines — American, Southwest, Delta, and United — control about 80 percent of the domestic market,<sup>25</sup> cementing their dominance through numerous mergers including Delta-Northwest in 2008, United-Continental in 2010, and American-US Airways in 2013.<sup>26</sup> This excessive consolidation has been a consistent driver of price hikes for consumers.<sup>27</sup> Even the airlines admit as much behind closed doors: American Airlines CEO Scott Kirby said during an internal presentation that his airline was “able to pass along [three fare hikes] to customers because of consolidation.”<sup>28</sup>

Beyond national market shares, the Department should consider the competitive impacts of proposed mergers on individual routes. A given airport may offer slots to several airlines; however, the competitive set is often much smaller for any particular destination, leaving customers with less choice than the full array of airlines serving their local areas.<sup>29</sup> A study by the Government Accountability Office found that when competitiveness was assessed at the

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<sup>19</sup> 49 U.S.C. § 41105; U.S. Department of Transportation, “HOW TO BECOME A CERTIFICATED AIR CARRIER,” September 2012, p. 28,

[https://www.transportation.gov/sites/dot.gov/files/docs/Certificated\\_Packet\\_2012\\_final.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/Certificated_Packet_2012_final.pdf)

<sup>20</sup> 49 U.S.C. § 41105(a).

<sup>21</sup> 49 U.S.C. § 41105(b)(2).

<sup>22</sup> 49 U.S.C. § 40109(c).

<sup>23</sup> 14 C.F.R. § 298.53.

<sup>24</sup> Dallas Business Journal, “How mergers have driven consolidation of the airline industry,” Bill Hethcock, April 6, 2017, <https://www.bizjournals.com/dallas/news/2017/04/06/how-mergers-have-driven-consolidation-of-the.html>.

<sup>25</sup> New York Times, “Frontier and Spirit Airlines Plan to Merge,” Niraj Chokshi, February 7, 2022, <https://www.nytimes.com/2022/02/07/business/frontier-spirit-airlines-merger.html>.

<sup>26</sup> Business Insider, “The past 2 decades saw the number of major airlines in the US cut in half. See how consolidation in the 2000s left customers with fewer options as profits soared.,” Thomas Pallini, March 21, 2020, <https://www.businessinsider.com/airline-mergers-and-acquisitions-in-the-us-since-2000-2020-3>.

<sup>27</sup> The Journal of Industrial Economics, “THE PRICE EFFECT OF ELIMINATING POTENTIAL COMPETITION: EVIDENCE FROM AN AIRLINE MERGER,” John Kwoka and Evgenia Shumilkina, December 2010, [https://www.jstor.org/stable/40985720#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/40985720#metadata_info_tab_contents).

<sup>28</sup> ProPublica, “The American Way,” Justin Elliott, October 11, 2016, <https://www.propublica.org/article/airline-consolidation-democratic-lobbying-antitrust>.

<sup>29</sup> Government Accountability Office, “Airline Competition,” June 2014, <https://www.gao.gov/assets/gao-14-515.pdf>.

route level, every market segment analyzed—from the largest cities to the smallest—was “highly concentrated.”<sup>30</sup> At 40 of the 100 largest airports, a single airline controls a majority of the market.<sup>31</sup> At 93 of the top 100 airports, one or two airlines control a majority of the seats.<sup>32</sup> Airlines often indirectly coordinate to avoid competing along a given route.<sup>33</sup>

Furthermore, mergers allow airlines to box out potential new entrants to routes they currently dominate, and they facilitate coordinated behavior among legacy airlines. For example, large airlines often “lead” ticket prices by briefly lowering air ticket costs for a particular flight to see if other airlines follow suit, and then raising the price again if they do not.<sup>34</sup> This strategy can only succeed when there are few players in the first place. Accordingly, the Department must view the possible effects of any merger or acquisition through a dynamic lens, focusing on the structure of any particular market and on the anticompetitive practices like price fixing or capacity reduction that a deal may incentivize.

This year, Spirit Airlines has been in talks with both Frontier and JetBlue about a potential merger, which could significantly reduce competition among the lowest cost carriers. If Spirit ultimately merges with Frontier, the new company would be the only remaining major ultra-low-cost carrier.<sup>35</sup> Absent real competition at that price point in most of Spirit-Frontier’s routes, consumers would likely soon see higher fares. JetBlue meanwhile is already the subject of a Department of Justice antitrust suit over its anticompetitive alliance with American Airlines.<sup>36</sup> A merger with Spirit could allow it to raise fares in routes with limited low-cost carrier competition and would leave Frontier as the only large ultra-low-cost carrier.

We urge the Department to strongly consider the impacts these transactions would have on the routes where these airlines operate. By using its statutory authority to block transfers that are inconsistent with the public interest and that would harm domestic competition, the Department could stop anticompetitive airline mergers altogether.

### **Conclusion**

Decades of deregulation and consolidation have created an airline industry that routinely heaps inconvenience and abuse on consumers. After receiving tens of billions of dollars in

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<sup>30</sup> *Id.* at p. 27.

<sup>31</sup> USA Today, “U.S. airports increasingly dominated by 1 or 2 carriers,” David Koenig and Scott Mayerowitz, July 15, 2015, <https://www.usatoday.com/story/todayinthesky/2015/07/15/us-airports-increasingly-dominated-by-1-or-2-carriers/30152927>.

<sup>32</sup> *Id.*

<sup>33</sup> Washington Post, “How the big U.S. airlines try to avoid competing with each other,” Brad Plumer, August 14, 2013, <https://www.washingtonpost.com/news/wonk/wp/2013/08/14/heres-how-the-big-u-s-airlines-try-to-avoid-competing-with-each-other>.

<sup>34</sup> U.S., et al. v. US Airways Group, Inc. and AMR Corporation, 1:13-cv-01236, Complaint, August 13, 2013, pp. 15-16, <https://www.justice.gov/atr/case-document/file/514531/download>.

<sup>35</sup> Letter from Senator Elizabeth Warren to Assistant Attorney General Jonathan Kanter and Secretary Pete Buttigieg, March 9, 2022, <https://www.warren.senate.gov/imo/media/doc/2022.03.09%20Letter%20to%20DOJ%20and%20DOT%20on%20Spirit-Frontier%20Merger.pdf>.

<sup>36</sup> New York Times, “American Airlines and JetBlue Face Antitrust Suit Over Alliance,” Peter Eavis, September 21, 2021, <https://www.nytimes.com/2021/09/21/business/american-airlines-jetblue-antitrust.html>.

assistance from American taxpayers, major airlines have reciprocated by dramatically increasing ticket prices and reaching new lows in their treatment of travelers. To put an end to these harmful consumer practices and safeguard competition in the industry, the Department must play a leading role by aggressively using the authority it has been given by Congress.

Last year, President Biden issued a groundbreaking executive order directing agencies like the Department of Transportation to do exactly that.<sup>37</sup> The order directs the Department to develop and enforce guidance and rules related to delays, cancellations, and fees.<sup>38</sup> It also directs the Department to further define “unfair” and “deceptive” practices and to coordinate with the Department of Justice to ensure competition in air transportation.<sup>39</sup> As the Transportation Secretary and a member of the White House Competition Council,<sup>40</sup> you are uniquely positioned to ensure these directives are carried out to their fullest extent. The recently announced Airline Passengers with Disabilities Bill of Rights is a shining example of the meaningful progress the Department can make toward improving air travel for Americans.<sup>41</sup> That effort produced a comprehensive set of protections for individuals with disabilities — including rights to information, accessibility standards, airport assistance, and seating accommodations — and appropriate implementing regulations to make sure these rights become a reality.<sup>42</sup>

We urge the Department to take a similarly bold and thoughtful approach to additional consumer and market safeguards. We appreciate your continued attention to and leadership on this important matter.

To better understand how the Department has used its statutory tools to protect consumers and promote competition, we ask that you submit answers to the following questions by August 9, 2022:

*Consumer protection*

1. During the Biden Administration, how many hearings has the Department held to assess whether an air carrier is engaged in an unfair or deceptive practice or unfair method of competition?
2. During the Biden Administration, how many orders has the Department issued enjoining any unfair or deceptive practices or unfair methods of competition? Please identify any such orders.
3. Please describe the status of all rulemakings pertaining to airline consumer protections currently under way and any proposed rulemakings the Department is currently considering.

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<sup>37</sup> The White House, “Executive Order on Promoting Competition in the American Economy,” July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> U.S. Department of Transportation, “Airline Passengers with Disabilities Bill of Rights,” July 2022, [https://www.transportation.gov/sites/dot.gov/files/2022-07/508\\_Airline\\_Passengers\\_with\\_Disabilities\\_Bill\\_of\\_Rights\\_07072022\\_ADA.pdf](https://www.transportation.gov/sites/dot.gov/files/2022-07/508_Airline_Passengers_with_Disabilities_Bill_of_Rights_07072022_ADA.pdf).

<sup>42</sup> *Id.*

*Market competition*

4. Since 2000, how many certificate transfers has the Department declined to approve? Please identify any such instances.
5. What factors does the Department consider when assessing whether a certificate transfer, suspension, or revocation is consistent with the public interest?
6. Since 2000, how many times has the Department suspended or revoked an air carrier's economic authority? Please identify any such instances.
7. Since 2000, how many times has the Department referred a merger or airline practice to the Department of Justice or another competition or consumer protection enforcement agency? Please identify any such instances.
8. What impacts on competition in the domestic airline industry does the Department consider inconsistent with the public interest?
9. Please describe the status of all rulemakings pertaining to airline industry competition currently under way and any proposed rulemakings the Department is currently considering.
10. What additional competition authorities would aid the Department in its efforts to ensure a robust, competitive domestic airline industry?

Sincerely,



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Elizabeth Warren  
United States Senator



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Alex Padilla  
United States Senator