

September 15, 2022

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

Dear Secretary Buttigieg,

I write to ask the Department of Transportation (DOT) to use its full statutory authority to address consolidation in the airline industry and to express my serious concerns about the proposed merger between JetBlue and Spirit Airlines announced in July.¹ DOT has significant and historically underutilized authorities to protect competition in the domestic air travel market to ensure any route transfers are “consistent with the public interest,”² and I urge you to consider utilizing these authorities as you continue your commendable consumer-protection efforts.

DOT Must Fully Utilize Its Competition Authorities Going Forward.

Title 49 explicitly grants DOT the authority to block any transfer of a route-operating certificate if such a transfer would not be “consistent with the public interest.”³ Among the factors the Secretary of Transportation is required to consider when making this assessment is the effect of the transfer on “competition in the domestic airline industry.”⁴ DOT, however, has historically interpreted its authorities under 49 U.S.C. §41102 as only authorizing it to block *international* route transfers.⁵ This reading of the statute is incorrect. 49 U.S.C. §41102(a) refers to both domestic and foreign route certificates as “certificate[s] of public convenience and necessity.”⁶ §41102(b)(2) goes on to require that transfers involving international routes are “consistent with public convenience and necessity,” but this is an additional and separate

¹ Wall Street Journal, “JetBlue-Spirit Airlines Deal: What It Could Mean for Travelers, Prices, Fees,” Dawn Gilbertson, July 28, 2022, <https://www.wsj.com/articles/spirit-jetblue-merger-travelers-bag-fees-free-11659014587>.

² 49 U.S.C. 41105(a).

³ 49 U.S.C. 41105(a).

⁴ 49 U.S.C. 41105(b).

⁵ U.S. Department of Transportation, “Statement of Susan L. Kurland, Assistant Secretary for Aviation & International Affairs, before the Senate Committee on Commerce, Science, and Transportation,” June 19, 2013, <https://www.transportation.gov/testimony/role-dot-review-proposed-american-airlines-us-airways-merger>; U.S. Department of Transportation, “Mergers and Acquisitions,” February 23, 2015, <https://www.transportation.gov/policy/aviation-policy/competition-data-analysis/mergers-acquisitions>.

⁶ 49 U.S.C. 41102(a).

requirement. Put simply, DOT’s transfer-blocking authority applies to the transfer of *any* “certificate issued under section 41102”⁷—whether the relevant routes are domestic or international.

Moreover, in determining whether a transfer is consistent with the public interest, DOT is required to consider whether an action “prevent[s]...anticompetitive practices” and “avoid[s] unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would tend to allow at least one air carrier or foreign air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation.”⁸ By interpreting its authority narrowly—more narrowly than the statute supports—DOT has, in the past, significantly hindered its ability to promote open competition in the airline industry, but you are not bound by that faulty interpretation.

Going forward, DOT should instead use its full statutory authority under 49 U.S.C. §41102, §41105, §41712, and §40101 to (i) promulgate rules clarifying that the approval of operating certificate modifications and transfers must be consistent with the public interest, (ii) promulgate rules defining standards for how DOT will assess impacts on the public interest, including bright lines for the competition considerations required by statute and when a transfer is presumptively illegal, and (iii) disapprove any transfers inconsistent with the public interest, effectively blocking anticompetitive or harmful mergers. These actions would allow DOT to ensure that M&A activity in the airline industry is not stifling competition.

The JetBlue-Spirit Deal Is Likely to Reduce Airline Competition and Harm the Public Interest.

DOT does not need to wait for this rulemaking to conclude before taking action in individual cases, including the JetBlue-Spirit merger. Through administrative processes, you can assess immediately whether any certificate transfer required for this transaction is inconsistent with the public interest (including by harming domestic airline competition) and block the deal if so by withholding your approval. As we describe below, there is ample evidence that yet another huge airline merger would likely harm American consumers.

Airline industry competitiveness is in free fall, and consumers are feeling the consequences. Today, the four largest airlines—American, Southwest, Delta, and United—control 80% of the domestic market, more than at any point in the modern history of commercial aviation.⁹ This dominance has been achieved *not* primarily by offering better, more reliable service to passengers at lower fares but instead through a series of airline mega-mergers that have reduced service quality and increased fares. Delta, for example, acquired Northwest in

⁷ 49 U.S.C. 41105(a).

⁸ 49 U.S.C. 40101(a).

⁹ CNN Business, “This is a great time to be an airline. It’s the worst time to be a passenger,” Chris Isidore, August 4, 2022, <https://www.cnn.com/2022/08/04/business/airlines-gain-passengers-pain/index.html>.

2008, United acquired Continental in 2010, and American merged with US Airways in 2013.¹⁰ This increased consolidation has contributed to the increase in delays,¹¹ cancellations,¹² and involuntary rebookings¹³ that airline passengers experience today. Consumer complaints to DOT have increased more than 300 percent from pre-pandemic levels,¹⁴ and air fares have outpaced inflation.¹⁵

The proposed JetBlue-Spirit merger is just the latest threat to consumers in this long string of mergers. Spirit and Frontier are currently the two largest ultra-low cost carriers (ULCCs) in the country.¹⁶ JetBlue, by contrast, is not a ULCC and competes more directly with high-cost legacy carriers than it does with ULCCs like Spirit.¹⁷ If the JetBlue-Spirit merger proceeds, it could pull Spirit out of the ULCC market altogether, leaving Frontier as the dominant market player at that price point.¹⁸ This elimination of ULCC competition in most domestic routes would be disastrous for consumers. When a ULCC enters a route market, air fares across all flights in that market fall by 21%.¹⁹ Rather than creating a low-cost competitor to legacy carriers, as JetBlue claims,²⁰ the merger could simply bring the country's largest ULCC into a significantly higher price tier—to the detriment of consumers.

¹⁰ 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>.

¹¹ Washington Post, “Taxpayers spent billions bailing out airlines. Did the industry hold up its end of the deal?” Michael Laris and Lori Aratani, December 14, 2021, <https://www.washingtonpost.com/transportation/2021/12/14/airline-bailout-covid-flights>.

¹² *Id.*

¹³ 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%2006-30-2020.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>.

¹⁴ U.S. Department of Transportation, “Air Travel Consumer Report: Consumer Complaints Against Airlines Rise More Than 300 Percent Above Pre-Pandemic Levels,” June 23, 2022, <https://www.transportation.gov/briefing-room/air-travel-consumer-report-consumer-complaints-against-airlines-rise-more-300-percent>.

¹⁵ Measured from January 1989 to June 2022; Federal Reserve Bank of St. Louis, “Consumer Price Index for All Urban Consumers: Airline Fares in U.S. City Average,” <https://fred.stlouisfed.org/series/CUSR0000SETG01>; CNBC, “Airline ticket prices are up 25%, outpacing inflation — here are the ways you can still save,” Brett Holzhauer, June 2, 2022, <https://www.cnbc.com/select/airline-ticket-prices-are-up-25-percent-why-and-how-to-save>.

¹⁶ CNBC, “Frontier and Spirit to Merge, Creating Fifth-Largest Airline in U.S. in \$6.6 Billion Deal,” Phil LeBeau and Leslie Josephs, February 7, 2022, <https://www.cnbc.com/2022/02/07/frontier-and-spirit-to-merge-creating-5th-largest-airline-in-us.html>.

¹⁷ USA Today, “JetBlue agrees to buy Spirit for \$3.8 billion, 'but for now nothing is changing,’” Zach Wichter, July 28, 2022, <https://www.usatoday.com/story/travel/airline-news/2022/07/28/jetblue-spirit-merger-bid/10171563002>.

¹⁸ NPR, “JetBlue wins the bidding war for Spirit Airlines,” July 28, 2022, <https://www.npr.org/transcripts/1114335468>.

¹⁹ “The emergence and effects of the ultra-low cost carrier (ULCC) business model in the U.S. airline industry,” Journal of Air Transport Management, Alexander R. Bachwich and Michael D. Wittman, July 2017, <https://doi.org/10.1016/j.jairtraman.2017.03.012>.

²⁰ JetBlue, “JetBlue and Spirit to Create a National Low-Fare Challenger to the Dominant Big Four Airlines,” July 28, 2022, <http://mediaroom.jetblue.com/investor-relations/press-releases/2022/07-28-2022-113040248>.

Compounding these concerns is the fact that Spirit and JetBlue operate highly overlapping routes. Both Spirit and JetBlue have operating bases at Orlando International Airport and Fort Lauderdale–Hollywood International Airport. In Orlando, the nation’s seventh busiest airport by passenger volume,²¹ a combined JetBlue-Spirit entity would have the largest market share of any airline (barring significant capacity reductions).²² In Fort Lauderdale, the nation’s fifteenth busiest airport,²³ Spirit and JetBlue combined make up nearly *half* of the airport’s market share.²⁴ Any merger that could result in half of a major regional hub’s market share being controlled by a single airline should receive the most stringent scrutiny by regulators. Spirit also operates dozens of overlapping routes from other JetBlue operating hubs, including Boston Logan International Airport and Los Angeles International Airport.²⁵ The large degree of overlap between the two airlines’ routes and operating hubs means the greatest impacts on competition and fares will be felt in precisely the places where travelers currently rely on competition between Spirit and JetBlue the most.

According to Spirit’s own analysis, which it presented to its shareholders in a bid to prevent a hostile JetBlue merger from being approved, “a JetBlue transaction would substantially raise fares for consumers.”²⁶ Because of significant “antitrust risk” from a JetBlue-Spirit merger, Spirit assessed that regulatory approval was “highly unlikely.”²⁷ At its core, the airline argued, “JetBlue is a high-fare airline trying to buy a low-fare airline and raise fares.”²⁸ Such a frank assessment that a merger is anticompetitive from one of the parties to that merger should put regulators on notice.

The potential harm to consumers if this merger is allowed to proceed is not limited to higher fares. Spirit is the nation’s worst airline across a range of operational metrics. It often has the highest rate of flight cancellations and lowest on-time rate of any marketing carrier.²⁹ Spirit, along with Frontier, has the least distance between seats (28”) of any carrier, a figure Spirit’s CEO describes as “a tremendous amount of legroom.”³⁰ The Federal Aviation Administration

²¹ Federal Aviation Administration, “CY2021 Enplanements at all Commercial Service Airports (by Rank Order),” August 4, 2022, https://www.faa.gov/sites/faa.gov/files/2022-08/cy21-commercial-service-enplanements_0.pdf.

²² Greater Orlando Aviation Authority, “Passenger Market Share - Ranked By Passengers,” <https://orlandoairports.net/site/uploads/pshrfy2020.pdf>; Greater Orlando Aviation Authority, “Passenger Market Share - Ranked By Passengers,” November 16, 2021, <https://orlandoairports.net/site/uploads/pshrfy2021.pdf>.

²³ Federal Aviation Administration, “CY2021 Enplanements at all Commercial Service Airports (by Rank Order),” August 4, 2022, https://www.faa.gov/sites/faa.gov/files/2022-08/cy21-commercial-service-enplanements_0.pdf.

²⁴ Broward County Aviation Department, “FLL Annual Report 2019-2020: A Two-Year Review,” pg. 14, https://www.broward.org/Airport/Business/about/Documents/FLL_annual_report_2019_2020_ada.pdf.

²⁵ Spirit Airlines, “Route Map,” accessed on August 3, 2022 at 6:00pm ET, <https://www.spirit.com/en/route-map>.

²⁶ Spirit Airlines, “Investor Presentation,” May 25, 2022, pg. 16, https://s24.q4cdn.com/507316502/files/doc_downloads/2022/05/Investor-Presentation-5.25.22.pdf.

²⁷ *Id. at 1.*

²⁸ *Id. at 22.*

²⁹ U.S. Department of Transportation, “Air Travel Consumer Report: Consumer Complaints Against Airlines Rise More Than 300 Percent Above Pre-Pandemic Levels,” June 23, 2022, <https://www.transportation.gov/briefing-room/air-travel-consumer-report-consumer-complaints-against-airlines-rise-more-300-percent>.

³⁰ USA Today, “Spirit Airlines adds comfier seats, even in the middle,” Dawn Gilbertson, September 9, 2019,

(FAA) is now looking into whether seats of this size impede passengers' ability to safely evacuate in the case of an emergency.³¹ Flight attendants unions have accused Spirit of being grossly unprepared to handle weather-related cancellation events, which have often resulted in "operational meltdowns" that left passengers and workers "stranded without answers."³² Spirit's practices are sparking operational concerns, and a merger with JetBlue could expand those practices to more planes and more travelers.

DOT should carefully weigh all of these factors as it analyzes the effects of this potential transfer involving JetBlue and Spirit on competition in the domestic airline industry and assesses whether to ultimately approve the deal.

DOT Must Take a Proactive Role in Airline Competition Matters—Not Defer to DOJ.

DOT can play an important role in antitrust enforcement and in shaping the enforcement decisions of the Department of Justice (DOJ). Although DOT has clear relevant expertise regarding airline competition and has its own statutory role in competition enforcement, DOT has historically declined to play that role in cases where DOJ is already involved.³³ For the JetBlue-American Northeast Alliance (NEA), for example, DOT adopted the position that it would "defer to DOJ, as the primary enforcer of Federal antitrust laws, to resolve the antitrust concerns [about the alliance]."³⁴ Though DOT did require the alliance to adhere to certain restrictions, it admitted that these restrictions "did not address all of [DOT]'s concerns resulting from the NEA's impacts on competition."³⁵ Instead, DOT argued that, it merely "sought concessions from the carriers that were *intended to mitigate some of the anticompetitive harm*" (emphasis added).³⁶ JetBlue and American seized on DOT's deferral and are claiming the alliance has been "authorized by the U.S. Department of Transportation" after "an exhaustive months-long review."³⁷

DOT must make its own independent competition assessments and take its own actions accordingly without deferring to DOJ. Congress explicitly granted DOT a role in ensuring robust competition in the airline industry for a reason: DOT is the primary repository of expertise on the

<https://www.usatoday.com/story/travel/airline-news/2019/09/09/spirit-airlines-new-seats-more-legroom-real-tray-table/2263126001>.

³¹ Federal Aviation Administration, "Request for Comments in Minimum Seat Dimensions Necessary for Safety of Air Passengers (Emergency Evacuation)," August 3, 2022, <https://www.faa.gov/seat-size-comments>.

³² Association of Flight Attendants-CWA, "Spirit AFA Pickets Across the Country After Repeated Mass Cancellations Strand Flight Attendants," April 15, 2022, https://www.afacwa.org/spirit_afa_pickets_across_the_country_after_repeated_mass_cancellations_strand_flight_attendants.

³³ U.S. Department of Transportation, "Clarification of Departmental Position on American Airlines – JetBlue Airways Northeast Alliance Joint Venture," September 21, 2021, <https://www.transportation.gov/sites/dot.gov/files/2021-09/NEA%20Notice%20Sept%2021%202021.pdf>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ JetBlue and American Airlines, "The Case for NEA," <https://neafly.com>.


airline industry. While DOJ is a capable agency, it is limited by budget and by statute. DOJ’s Antitrust Division has a budget of only \$184.5 million, and it employs only 363 attorneys,³⁸ a staff that, along with the Federal Trade Commission, must enforce antitrust laws across the entire U.S. economy. Critically, DOJ must bring enforcement actions in federal court to block mergers that violate antitrust law, which is timely, costly, and incredibly difficult due to decades of awful case law handed down by business-friendly judges. On the other hand, as noted above, DOT has the statutory authority to block mergers that it determines are inconsistent with the public interest *at the agency level without having to go to court*—a significant advantage over DOJ—and you have an enormous opportunity to protect consumers nationwide by using this authority aggressively.

* * *

After decades of uncontested airline mergers, there is little runway left for regulators to safeguard competition in the industry. I was encouraged to see that DOT is planning to use its consumer protection-authority to issue rules that would require airlines to provide passengers refunds when their flights are cancelled or delayed.³⁹ These important steps are necessary for protecting passengers from harmful airline practices and come on the heels of other laudable actions DOT has taken in recent months, including the codification of an Airline Passengers with Disabilities Bill of Rights.⁴⁰ I believe DOT should take similarly bold steps to address market competition issues.

Thank you for your continued leadership on consumer-protections efforts and for your attention to this matter.

Sincerely,


United States Senator
Elizabeth Warren

³⁸ U.S. Department of Justice, “Antitrust Division (ATR),” <https://www.justice.gov/jmd/page/file/1398981/download>.

³⁹ U.S. Department of Transportation, “As Part of Ongoing Airline Consumer Protections Efforts, USDOT Announces New Rulemaking That Would Strengthen Protections for Consumers Seeking Refunds of Airline Tickets,” August 3, 2022, <https://www.transportation.gov/briefing-room/part-ongoing-airline-consumer-protections-efforts-usdot-announces-new-rulemaking>.

⁴⁰ 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.

CC: Mr. Jonathan Kanter, Assistant Attorney General, Department of Justice – Antitrust
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Chair Lina M. Khan, Federal Trade Commission

Ms. Patricia S. Hu, Director of the Bureau of Transportation Statistics

Mr. John Putnam, General Counsel, U.S. Department of Transportation