International
Center for
Law & Economics

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Hearing of the House Judiciary Subcommittee on Administrative State, Regulatory Reform, and Antitrust

"The 30,000-Foot View: Competition and Regulation in the U.S. Airline Industry"

June 24, 2026
2141 Rayburn House Office Building
Washington, D.C.

I. Introduction and Summary

Chairman, Ranking Member, and Members of the Subcommittee, thank you for the opportunity to submit this statement.

This hearing raises two closely related questions: How should policymakers understand competition in the airline industry, and how do government regulations either promote or impede that competition? The answer to both points in the same direction. The current regulatory framework creates both antitrust pressure and regulation-induced scarcity. It makes it difficult for large airlines to earn sustainable returns in a low-margin business and even more difficult for smaller, budget-focused carriers to survive.

Too often, policymakers rely on static snapshots of market structure to identify an ideal number of competitors without fully accounting for the economic realities those firms face. At the same time, government policies place regulators in the role of allocating scarce inputs, including takeoff and landing rights, gate access, airspace capacity, and access to capital. Those inputs are critical in an industry characterized by high fixed costs. When government controls access to them, it can systematically disadvantage smaller competitors and impede the growth of new entrants.

As a high-fixed-cost, low-margin network industry, commercial aviation will not necessarily support a large number of viable competitors.[1] Economies of scale and scope naturally favor firms that can spread substantial fixed costs across extensive networks.[2] Today, the four largest U.S. airlines account for roughly three-quarters of domestic capacity, while hub dominance, frequent-flyer programs, and corporate-contracting relationships provide additional advantages to incumbent carriers.[3]

Recognizing concentration, however, is not the same as identifying competitive harm or crafting remedies tailored to that harm. Recent events—most notably the collapse of Spirit Airlines—underscore the fragility of smaller competitors and highlight a broader point: the most significant constraints on airline competition are overwhelmingly governmental in origin. As a result, the most valuable reforms available to Congress involve removing or disciplining those constraints, rather than layering additional interventions on top of them.

This testimony proceeds as follows. Part II places today's debate in the historical context of airline deregulation and explains the importance of matching regulatory tools to genuine market problems. Part III examines the JetBlue-Spirit merger litigation and what Spirit's subsequent liquidation reveals about the limits of contemporary merger doctrine. Part IV addresses airport slots, the clearest

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[1] *See, e.g.*, Thomas W. Hazlett & Robert Crandall, *Competitive Effects of T-Mobile/Sprint: Analysis of a "4-to-3" Merger*, TPRC 2024 Paper (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4736059 (explaining how economies of scale and scope in capital-intensive telecommunications networks can produce both relatively high concentration and consumer-welfare gains); *see also* Eric Fruits, Gus Hurwitz, Geoffrey A. Manne, Julian Morris & Alec Stapp, *A Review of the Empirical Evidence on the Effects of Market Concentration and Mergers in the Wireless Telecommunications Industry*, INT'L CTR. FOR L. & ECON. (Sept. 17, 2019), https://laweconcenter.org/resources/a-review-of-the-empirical-evidence-on-the-effects-of-market-concentration-and-mergers-in-the-wireless-telecommunications-industry-2.

[2] Hazlett & Crandall, *supra* note 1, at 4.

[3] Alden Abbott, *The Case of the Vanishing Competitor*, TRUTH ON THE MKT. (May 22, 2026), https://truthonthemarket.com/2026/05/22/the-case-of-the-vanishing-competitor (collecting recent antitrust enforcement statements concerning airline concentration).

example of a government-rationed input that entrenches incumbents. Part V discusses cabotage and foreign-ownership restrictions. Part VI examines how environmental-review requirements constrain airport and airspace expansion, contributing to the scarcity often used to justify slot controls. Part VII explains how an expanding body of consumer-protection mandates erodes the operational flexibility on which a high-fixed-cost, low-margin industry depends, and why those burdens fall most heavily on the low-cost carriers that discipline fares. Part VIII offers recommendations.

II. Lessons from Airline Deregulation

Any assessment of airline competition should begin with the Airline Deregulation Act of 1978. It remains the closest thing economics has to a controlled experiment in this industry. For roughly four decades before deregulation, the Civil Aeronautics Board regulated fares and controlled entry through cost-of-service ratemaking and route licensing—tools developed for natural monopolies.[4] Commercial aviation did not exhibit those characteristics. Entry barriers were relatively low, and nothing inherent to the industry prevented multiple carriers from serving routes profitably.

Stephen Breyer, then a judge and former special counsel to the Senate Judiciary Committee during the deregulation debates, described airline regulation as the paradigmatic case of regulatory "mismatch"—the application of a regulatory tool to a problem it was not designed to solve.[5] Regulators justified the regime as necessary to prevent "excessive" or "destructive" competition, a rationale Breyer famously characterized as an "empty box" that collapsed under scrutiny.[6]

That justification also sat uneasily alongside federal competition policy. As the Supreme Court has repeatedly recognized, the federal antitrust laws embody the nation's commitment to free enterprise and economic competition.[7] By suppressing price competition, regulation redirected rivalry into costly non-price dimensions. Airlines competed through the "capacity wars" and "lounge wars" of the regulated era, flying half-empty aircraft and expanding amenities while charging fares above competitive levels. Subsequent research found that deregulation generated billions of dollars in annual consumer savings through lower fares and expanded service.[8]

Three lessons from that experience bear directly on the issues before this Subcommittee.

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[4] Eric Fruits, *'Regulation and Its Reform' by Stephen Breyer and 'Contrived Competition' by Richard Vietor*, TRUTH ON THE MKT. (Oct. 28, 2025), https://truthonthemarket.com/2025/10/28/regulation-and-its-reform-by-stephen-breyer-and-contrived-competition-by-richard-vietor (summarizing STEPHEN BREYER, REGULATION AND ITS REFORM (1982), and RICHARD H.K. VIETOR, CONTRIVED COMPETITION (1994)); *see also* Richard H.K. Vietor, *Contrived Competition: Airline Regulation and Deregulation, 1925–1988*, 64 BUS. HIST. REV. 61 (1990); Sam Peltzman, Michael E. Levine & Roger G. Noll, *The Economic Theory of Regulation After a Decade of Deregulation*, BROOKINGS PAPERS ON ECON. ACTIVITY: MICROECONOMICS 1 (1989); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974).

[5] Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547 (1979); STEPHEN BREYER, REGULATION AND ITS REFORM (1982) (using airline regulation as the paradigmatic example of a mismatch between regulatory tools and market problems).

[6] Breyer, *Analyzing Regulatory Failure*, *supra* note 5, at 556.

[7] *Fed. Trade Comm'n v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013) (citing *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)); *see also Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 101, 106 (1980).

[8] *See, e.g.*, Clifford Winston, *Economic Deregulation: Days of Reckoning for Microeconomists*, 31 J. ECON. LITERATURE 1263 (1993).

First, policymakers should match regulatory interventions to demonstrated market failures or other identifiable consumer harms. Regulation is most defensible when it addresses a specific problem that markets cannot adequately solve on their own.

Second, when intervention is warranted, policymakers should consider less-restrictive alternatives before resorting to prescriptive regulation. Those alternatives include laws of general application, such as the federal antitrust laws, which can address competitive concerns without imposing detailed operational mandates.

Third, regulation often outlives the conditions that originally justified it. As economists have long observed, regulatory regimes frequently create concentrated benefits for organized interests while dispersing costs across consumers.[9] The beneficiaries therefore have strong incentives to preserve existing rules even after their rationale has disappeared. For that reason, policymakers should regularly review legacy regulations to determine whether they remain fit for purpose and whether they continue to achieve their objectives efficiently.

The history of regulation within the deregulated airline industry illustrates this dynamic. In 1984, after concerns arose about "display bias" in airline-owned computer reservation systems, the Department of Transportation (DOT) adopted prescriptive regulations governing those systems. The rules failed to achieve their principal objective. No new reservation system entered the market, and innovation slowed under mandatory oversight. The regulations ultimately became obsolete and were repealed in 2004, after competition emerged from an unexpected source: the open internet.[10]

The broader lesson extends well beyond aviation. Prescriptive rules that entrench existing market structures often prove poorly suited to technological and competitive change. Markets evolve, business models adapt, and new forms of competition emerge. Regulatory frameworks that assume current conditions will persist indefinitely rarely age well.

III. The JetBlue-Spirit Case and the Limits of Static Merger Analysis

No recent episode better illustrates the gap between merger-enforcement theory and market reality than the JetBlue-Spirit litigation.

The chronology is straightforward. Spirit agreed to merge with Frontier in February 2022. JetBlue subsequently made an unsolicited offer and, after increasing its bid, signed a merger agreement with Spirit in July 2022.[11] The U.S. Department of Justice (DOJ) sued to block the transaction in March

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[9] *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (developing the capture theory of regulation); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965) (explaining how small, organized groups secure concentrated benefits while dispersing costs across an unorganized public); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); *see also* Posner, *supra* note 4.

[10] Joshua D. Wright, *Searching for Antitrust Remedies, Part II*, TRUTH ON THE MKT. (July 13, 2011), https://truthonthemarket.com/2011/07/13/searching-for-antitrust-remedies-part-ii (describing the history of computerized reservation system regulation, its failure to spur entry, and its repeal in 2004).

[11] Addison Schonland, *Spirit, Frontier: Another Merger Attempt*, AIRINSIGHT (Dec. 19, 2025), https://airinsight.com/spirit-frontier-another-merger-attempt.

2023, and on Jan. 16, 2024, Judge William G. Young permanently enjoined the merger.[12] The parties terminated the agreement two months later.[13]

Spirit then entered Chapter 11 bankruptcy in November 2024 and emerged in March 2025. It filed for bankruptcy a second time in August 2025 and ceased operations entirely on May 2, 2026. A 34-year-old airline disappeared, taking with it the very low-fare competitor that the enforcement action sought to preserve.[14] The government won the case, but consumers lost the carrier. So, too, disappeared the "Spirit Effect"—the tendency of Spirit's presence to discipline fares across a market.[15]

It would be too simplistic, and almost certainly incorrect, to conclude that the DOJ "caused" Spirit's collapse. The airline's failure had multiple causes. A Pratt & Whitney engine-inspection crisis grounded a substantial share of its fleet.[16] Legacy carriers increasingly competed for Spirit's customers through basic-economy offerings.[17] Fuel costs rose.[18] Spirit's effort to reposition itself as a more premium carrier failed to gain traction.[19] The company accumulated roughly $2 billion in losses after 2020.[20]

The lesson is not that the merger necessarily should have been approved. Rather, it is that the doctrinal framework applied to the case was too static to evaluate a visibly fragile firm operating in a capital-intensive network industry.

Two features of current merger doctrine deserve the Subcommittee's attention.

The first is the failing-firm defense. As traditionally formulated under *Citizen Publishing Co. v. United States*, the doctrine asks a binary question: Is the firm on the verge of failure, with no alternative

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[12] *United States v. JetBlue Airways Corp.*, 712 F. Supp. 3d 109 (D. Mass. 2024).

[13] Dirk Auer & Ian Adams, *Nonstop to Nowhere: Spirit, JetBlue, and the Limits of Merger Doctrine*, TRUTH ON THE MKT. (May 7, 2026), https://truthonthemarket.com/2026/05/07/nonstop-to-nowhere-spirit-jetblue-and-the-limits-of-merger-doctrine (detailing the transaction's chronology and analyzing the district court's opinion).

[14] *Id.*

[15] Abbott, *supra* note 3 (describing Spirit's shutdown and the resulting loss of the "Spirit Effect"). The magnitude of the Spirit Effect remains disputed but consistently substantial. Relying on the airlines' internal documents, the U.S. Department of Justice estimated that Spirit's entry into a market reduced average fares by roughly 17%, while its exit increased fares by roughly 30%. Because those figures come from litigation filings, they warrant comparison with independent academic research. *See* Steven A. Morrison, *Actual, Adjacent, and Potential Competition: Estimating the Full Effect of Southwest Airlines*, 35 J. TRANSP. ECON. & POL'Y 239 (2001) (finding that low-cost carriers constrain fares well beyond their own routes and estimating approximately $12.9 billion in passenger savings in 1998, most of which stemmed from competitive spillovers rather than Southwest's own fares).

[16] *Spirit Cuts Aircraft Fleet in Half*, AIRWAYS MAG. (Oct. 4, 2025), https://www.airwaysmag.com/new-post/spirit-cuts-aircraft-fleet-half.

[17] Rajesh Kumar Singh & Doyinsola Oladipo, *Spirit's Troubles Expose Limits of Premium Strategy for Low-Cost Carriers*, REUTERS (Oct. 10, 2025), https://www.reuters.com/legal/litigation/spirits-troubles-expose-limits-premium-strategy-low-cost-carriers-2025-10-10.

[18] Bureau of Transp. Stat., *Fuel Consumption*, https://data.bts.gov/stories/s/Fuel-Consumption/bwcv-dxgx; Robert Silk, *IATA Downwardly Revises Airline Profit Forecast*, TRAVEL WEEKLY (June 8, 2026), https://www.travelweekly.com/Travel-News/Airline-News/IATA-downwardly-revises-airline-profit-forecast-2026.

[19] Singh & Oladipo, *supra* note 17.

[20] Auer & Adams, *supra* note 13 (cataloguing the causes of Spirit's decline and its cumulative losses since 2020).

purchaser available?[21] If the answer is no, courts often proceed as though the firm will remain a vigorous competitor indefinitely, regardless of contrary evidence.

That all-or-nothing framework fits poorly in industries characterized by high fixed costs and vulnerability to large external shocks. In such industries, the relevant competitive question is not whether a firm has already crossed the threshold into failure, but the likelihood that it will remain a meaningful competitive constraint over the next 5 to 10 years.

Judge Young acknowledged Spirit's financial distress. Having concluded that the failing-firm defense did not formally apply, however, the court effectively treated Spirit as a durable competitive constraint.[22] That assumption was questionable at the time and was later contradicted by events.[23] Importantly, this conclusion does not depend on hindsight. The trial record showed projected losses of $467 million in 2023, following more than $1 billion in prior losses, and no annual profit since 2019.[24] Within days of the decision, industry analysts warned that liquidation had become a more likely outcome than Spirit's continued operation as a vigorous competitor.[25]

The second issue is the treatment of out-of-market efficiencies. The court expressly recognized that a combined JetBlue-Spirit carrier likely would have exerted stronger competitive pressure on the four largest airlines, benefiting a broader population of travelers than Spirit's traditional ultra-low-cost customer base:

> The Defendant Airlines have demonstrated that an expansion of all aspects of JetBlue's business -- including network, fleet, and loyalty program -- would allow for more vigorous competition with the Big Four, which carry most passengers in the country ... were JetBlue to become more relevant, it would immediately place more pressure on its greatest competitors, the Big Four. This pressure would benefit consumers [.][26]

Under the "in any market" approach associated with *United States v. Philadelphia National Bank* and *United States v. Topco Associates*,[27] however, localized harms to the most price-sensitive travelers on particular routes controlled the analysis, regardless of the magnitude of broader competitive benefits.

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[21] *Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969).

[22] *United States v. JetBlue Airways Corp.*, No. 1:23-cv-10511-WGY, ECF No. 461, at 98 (D. Mass. Jan. 16, 2024) ("Numerous Spirit witnesses explained at trial that Spirit is struggling financially—including that Spirit anticipates a $467,000,000 loss for 2023 (on top of prior losses over $1,000,000,000) and has not been profitable since 2019. These losses, though significant, do not, on their own, provide an affirmative defense to the Government's prima facie case.").

[23] Auer & Adams, *supra* note 13 (analyzing the binary nature of the failing-firm inquiry and the "durability assumption" embedded in the government's theory of competitive harm).

[24] *JetBlue*, *supra* note 22, at 98.

[25] *See, e.g.*, Chris Isidore, *Spirit Airlines Could Be Forced Out of Business After JetBlue Deal Is Blocked, Analyst Says*, CNN BUS. (Jan. 18, 2024), https://www.cnn.com/2024/01/18/business/spirit-airlines-jetblue-ruling-bankruptcy (reporting that, two days after Judge William Young's ruling, TD Cowen analysts viewed liquidation of Spirit's assets as more likely than a standalone recovery).

[26] *JetBlue*, *supra* note 22, at 102-03.

[27] *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972).

Because each route constituted a separate market, the prospect of harm within any one of those markets outweighed gains elsewhere.[28]

The result was a merger that the court appeared to regard as beneficial on balance at the national level, but that it nevertheless blocked to preserve route-level competition that the market itself subsequently eliminated.

Empirical evidence from completed airline mergers is consistent with a more dynamic approach. In a retrospective study of five U.S. airline mergers, Jeffrey Prince and Daniel Simon found that merging carriers' on-time performance improved over the long run, suggesting efficiency gains rather than quality degradation.[29] Their findings align with a broader body of structural and quasi-experimental research supporting a more dynamic approach to airline merger analysis.[30]

At the same time, the policy implications should not be overstated. When a properly grounded analysis identifies genuine anticompetitive harm, the antitrust laws can and should address it. Courts routinely evaluate allegations of anticompetitive conduct in the airline industry,[31] demonstrating that case-specific enforcement remains a viable tool for protecting competition.

The Spirit episode nonetheless highlights the need for a more dynamic merger framework. Rather than forcing courts to choose between the strict failing-firm defense and the assumption that a distressed carrier will remain an effective competitor indefinitely, merger analysis should incorporate a probability-weighted assessment of competitive durability. Courts should likewise give consistent weight to out-of-market efficiencies that benefit consumers, even when those benefits arise outside the narrow markets identified in litigation.

Such an approach would better reflect the realities of competition in a high-fixed-cost, low-margin network industry.

IV. Airport Slots: Government-Created Barriers to Entry

If the DOJ was correct to worry that concentration in the airline industry poses competitive concerns, some of the most durable barriers to reducing that concentration arise not from airline conduct, but from government restrictions on airport capacity.

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[28] *JetBlue*, *supra* note 22, at 66-67; *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963); *id.* at 610-11; *see also* Abbott, *supra* note 3 (discussing the selective application of the "any-market" principle to out-of-market efficiencies).

[29] Jeffrey T. Prince & Daniel H. Simon, *The Impact of Mergers on Quality Provision: Evidence from the Airline Industry*, KELLEY SCH. OF BUS. RSCH. PAPER NO. 2014-03 (2014), https://ssrn.com/abstract=2419611.

[30] *See* Myongjin Kim et al., *When Control Markets Are Treated: Potential Competition and Merger Retrospectives* (2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4275346 (finding that, across four U.S. airline mergers, a 10-percentage-point increase in entry threat reduced average peripheral-route fares by 2.4% to 4.2%); C. Lanier Benkard, Aaron Bodoh-Creed & John Lazarev, *Simulating the Dynamic Effects of Horizontal Mergers* (2010), https://sticerd.lse.ac.uk/seminarpapers/ei24052010.pdf (finding that hub mergers tend to induce offsetting entry by rival and low-cost carriers).

[31] *See, e.g.*, *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003); *see also Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005).

At the nation's most congested airports, the Federal Aviation Administration (FAA) allocates access through "slots"—reservations for individual takeoffs and landings.[32] The system traces its origins to the High Density Rule of 1969. Today, John F. Kennedy International Airport, LaGuardia Airport, and Ronald Reagan Washington National Airport remain formally slot-controlled, while the FAA manages scheduling at other major airports, including O'Hare, Newark, Los Angeles, and San Francisco.[33] Reagan National operates under an additional statutory perimeter rule layered atop a cap of roughly 67 operations per hour.[34]

In economic terms, slots function as property rights. Airlines lease them, use them as collateral, and buy and sell them in secondary markets. At London Heathrow Airport, a single slot pair has sold for tens of millions of dollars.[35] Yet in the United States, regulators originally distributed slots to incumbent carriers at no cost and continue to protect them through grandfather rights and minimum-use requirements.

The Government Accountability Office (GAO) highlighted the tension in this arrangement when it observed that the FAA's own treatment of slots as property effectively suggests that the government has spent decades transferring potentially valuable federal assets without compensation.[36]

This system creates two significant barriers to competition.

First, it advantages incumbent airlines that already control the scarce combination of slots, gates, and operating positions needed to serve congested airports. Entry therefore depends not merely on a carrier's willingness to add service, but on its ability to acquire access to assets that government policy has made artificially scarce.

Second, minimum-use—or "use-it-or-lose-it"—rules can encourage airlines to operate uneconomic "ghost flights" primarily to preserve their slot holdings. Those flights consume fuel, labor, and airport capacity without corresponding consumer benefits. They exist because airlines possess only conditional rights to use slots, rather than secure ownership interests.[37]

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[32] Fed. Aviation Admin., *Slot Administration*, https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/perf_analysis/slot_administration.

[33] 14 C.F.R. pt. 93, subpt. K, https://www.ecfr.gov/current/title-14/chapter-I/subchapter-F/part-93/subpart-K.

[34] Rachel Y. Tang, *Reagan National Airport Slot and Perimeter Rules and Exemptions Authorized in 2024*, CONG. RSCH. SERV., No. IN12504 (Feb. 6, 2025), https://www.congress.gov/crs-product/IN12504.

[35] Alex Macheras, *Why London Heathrow Has Some of the Most Expensive Airport Slots on Earth*, THE POINTS GUY (May 15, 2019), https://thepointsguy.com/news/why-london-heathrow-has-some-of-the-most-expensive-airport-slots-on-earth (noting that a statutory rule generally limits nonstop flights from Ronald Reagan Washington National Airport to destinations within a 1,250-mile perimeter absent a statutory exemption).

[36] Gary L. Kepplinger, Gen. Couns., U.S. Gov't Accountability Off., *Subject: Federal Aviation Administration—Authority to Auction Airport Arrival and Departure Slots and to Retain and Use Auction Proceeds* (Sept. 30, 2008), https://www.gao.gov/assets/b-316796.pdf.

[37] Brent Skorup, *COVID-19, Ghost Flights, and Emerging Property Rights in Airport Slots*, TRUTH ON THE MKT. (Mar. 25, 2020), https://truthonthemarket.com/2020/03/25/covid-19-ghost-flights-and-emerging-property-rights-in-airport-slots.

The competitive stakes are substantial. Research finds that low-fare entry reduces average fares by roughly 17% and increases flight frequencies by roughly 30%.[38] Other studies estimate that entry by low-cost carriers reduces fares by approximately 38% to 53%. In many cases, more than half of the fare reduction occurs before the entrant begins service, as the mere threat of entry disciplines incumbent carriers.[39]

Two facts demonstrate that the current allocation system reflects policy choices, not technological necessity.

First, when the FAA approved a major slot transaction between Delta Air Lines and US Airways in 2011, it required the parties to divest two dozen slots. The agency then auctioned those slots to new entrants. Low-fare carriers collectively bid roughly $90 million, demonstrating both the economic value of the slots and the demand from challengers seeking access to constrained airports.[40]

Second, in 2025, the FAA extended waivers of minimum-use requirements at Reagan National, John F. Kennedy, and LaGuardia through the summer of 2026. That decision confirms that the agency already treats slot-use requirements as a matter of administrative discretion.[41] If regulators can suspend those rules when circumstances warrant, they can also redesign them to facilitate entry through transparent and predictable criteria.

The more durable solution, as many transportation economists have argued, is to move away from administrative rationing altogether. Transparent slot markets, secondary trading, and congestion pricing would allocate scarce runway capacity through market mechanisms rather than regulatory discretion.[42] Such reforms would not eliminate airport scarcity, but they would make access to scarce capacity more contestable and reduce one of the most significant government-created barriers to airline competition.

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[38] *See* Scott McCartney, *How Sly Travelers Cut Their Airfares in Half*, WALL ST. J. (Dec. 4, 2019), https://www.wsj.com/articles/how-sly-travelers-cut-their-airfares-in-half-11575455400 (reporting that low-fare entry reduced average fares by roughly 17% and increased flight frequencies by roughly 30%); *see also* Morrison, *supra* note 15 (estimating that Southwest's actual, adjacent, and potential competitive effects accounted for a substantial share of fare savings following airline deregulation).

[39] *See* Martin Dresner, Jiun-Sheng Chris Lin & Robert Windle, *The Impact of Low-Cost Carriers on Airport and Route Competition*, 30 J. TRANSP. ECON. & POL'Y 309 (1996) (estimating fare reductions of roughly 38% to 53% on routes entered by low-cost carriers); Austan Goolsbee & Chad Syverson, *How Do Incumbents Respond to the Threat of Entry? Evidence from the Major Airlines*, 123 Q.J. ECON. 1611 (2008) (finding that incumbent airlines reduced fares on routes Southwest merely threatened to enter, with more than half of Southwest's total fare effect occurring before service began); *see also* McCartney, *supra* note 38; Morrison, *supra* note 15.

[40] Jerry Limone, *JetBlue and WestJet Win Airport Slots at LaGuardia and Reagan National*, TRAVEL WEEKLY (Dec. 1, 2011), https://www.travelweekly.com/Travel-News/Airline-News/JetBlue-and-WestJet-win-airport-slots-at-LaGuardia-and-Reagan-National.

[41] Fed. Aviation Admin., *Limited Waiver of the Slot Usage Requirement at DCA, JFK, and LGA* (extending slot-usage waivers from July 2025 through Summer 2026), https://www.faa.gov/newsroom/limited-waiver-slot-usage-requirement-dca-jfk-and-lga.

[42] *See* Marc Scribner, *Airline Deregulation: Past Experience and Future Reforms*, REASON FOUND. (2023) (recommending that regulators replace administratively allocated historic slots with secondary trading, auctions, or runway-congestion pricing), https://reason.org/wp-content/uploads/airline-deregulation-past-experience-future-reforms.pdf; *see also* Jaap de Wit & Guillaume Burghouwt, *Slot Allocation and Use at Hub Airports: Perspectives for Secondary Trading*, 8 EUR. J. TRANSP. & INFRASTRUCTURE RSCH. 147 (2008).

V. Cabotage and Foreign-Investment Restrictions

Two additional legal regimes suppress competition before any merger occurs by limiting both who may compete and who may provide capital.

The first is the federal cabotage prohibition, which bars foreign airlines from transporting passengers or cargo for hire between two points within the United States.[43] As a result, some of the world's most efficient low-cost carriers cannot serve domestic routes that airlines such as Spirit have abandoned, regardless of the benefits their entry might provide to consumers.

The second is the citizenship requirement for U.S. air carriers. Current law limits foreign investors to 25% of voting equity and 49% of total equity, while requiring U.S. citizens to retain actual control of the carrier, including the presidency and two-thirds of the board of directors.[44] Whatever their original justification, these restrictions operate today as a form of protectionism. They reduce both the pool of potential entrants and the capital available to recapitalize distressed airlines. In Spirit's case, additional access to foreign capital might have supported restructuring rather than liquidation.

This is not a novel or fringe view. In 2003, the DOT proposed increasing the foreign voting-equity limit to 49%, concluding that greater access to capital would benefit consumers and strengthen the industry's financial health.[45]

A further point deserves emphasis because it explains why domestic legislation alone cannot fully address the issue. These ownership restrictions operate through what scholars describe as a "double-bolted lock."[46]

The first lock is domestic law: the statutory citizenship and control requirements. The second is international. The principle that an airline must be "substantially owned and effectively controlled" by nationals of its home country—the so-called nationality rule—appears not only in domestic statutes, but throughout the network of bilateral air-services agreements that governs international aviation.[47]

Those agreements generally permit each country to suspend or revoke a foreign carrier's operating rights if the carrier is no longer substantially owned and effectively controlled by nationals of the country that designated it. The purpose is to prevent "treaty shopping," whereby airlines seek to exploit favorable regulatory regimes while retaining access to international traffic rights.[48]

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[43] 49 U.S.C. § 41703 (prohibiting air cabotage).

[44] 49 U.S.C. § 40102(a)(15); *see* U.S. Gov't Accountability Off., *U.S. Airlines: Information on DOT's Oversight of Foreign Ownership*, No. GAO-19-540R (2019), https://www.gao.gov/products/gao-19-540r; *see also* Jae Woon Lee & Umakanth Varottil, *Against Aviation Orthodoxy: India's Foreign Investment Regime for the Airline Industry*, 44 BROOK. J. INT'L L. 1 (2018) (documenting how incumbent carriers lobby to raise entry barriers and how "substantial ownership and effective control" requirements complicate liberalization).

[45] U.S. Gov't Accountability Off., *supra* note 44 (recounting the U.S. Department of Transportation's 2003 proposal to raise the foreign voting-equity ceiling to 49%).

[46] Lee & Varottil, *supra* note 44, at 58.

[47] *Id.* at 59.

[48] *Id.*

The result is a form of prisoner's dilemma. A country that unilaterally liberalizes its domestic ownership rules risks having its airlines' access to foreign markets restricted under existing bilateral agreements. For that reason, Congress should pursue ownership and cabotage liberalization on a reciprocal basis, paired with negotiated amendments to relevant air-services agreements, rather than assume that removing domestic restrictions alone will unlock additional competition and investment.

Liberalization in this area is one of the rare procompetitive reforms that requires removing a restriction rather than imposing a new one. The proposal also finds support in the economics of international aviation. Empirical research suggests that inefficiencies in airline pricing arise primarily from private information about passenger demand, rather than from an insufficient number of carriers. That finding points toward facilitating entry and investment, rather than further restricting the firms already operating in the market.[49]

At a minimum, Congress should direct a comprehensive study of phased ownership liberalization and reciprocal cabotage arrangements with trusted aviation partners.

VI. Environmental Review as a Barrier to Capacity Expansion

The scarcity that makes slot rationing appear necessary is, at bottom, a scarcity of runway and airspace capacity. The speed and predictability of capacity expansion therefore matter for competition. New runways, terminals, and airspace redesigns that could relieve congestion typically must undergo review under the National Environmental Policy Act (NEPA). The cost, delay, and litigation risk associated with that process can discourage or postpone the very investments that would expand access for new entrants and reduce the need for administrative rationing. Too often, competition debates treat airport-capacity constraints as a fixed feature of the industry. In reality, many of those constraints reflect policy choices about how quickly new capacity can be approved and brought online.

Recent legal developments have created an opportunity for more durable reform. In *Seven County Infrastructure Coalition v. Eagle County*, the Supreme Court clarified that courts owe agencies substantial deference in defining the scope of environmental review. The Court further held that NEPA does not require agencies to analyze the effects of separate upstream or downstream projects.[50] Instead, NEPA requires agencies to prepare a "detailed" environmental impact statement, while leaving substantial discretion to agencies to determine which effects warrant analysis and how that analysis should proceed.[51]

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[49] Gaurab Aryal, Charles Murry & Jonathan W. Williams, *Price Discrimination in International Airline Markets*, 91 REV. ECON. STUD. 641 (2024) (finding that prevailing airline pricing captures roughly 77% of first-best welfare, with most remaining inefficiency attributable to private information); *see also* Joanna Stavins, *Price Discrimination in the Airline Market: The Effect of Market Concentration*, 83 REV. ECON. & STAT. 200 (2001) (finding that price discrimination intensifies as airline markets become more competitive).

[50] *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 605 U.S. 168 (2025).

[51] *Seven Cnty. Infrastructure Coal.*, slip op. at 9-10.

The FAA subsequently revised its NEPA procedures through Order 1050.1G. The new framework emphasizes enforceable review deadlines, narrows the range of effects that require analysis, and expands categorical exclusions for certain airport-specific actions.[52]

Congress should build on these developments. Codifying firm review deadlines, expanding categorical exclusions for capacity-enhancing projects at slot-constrained airports, and limiting the period for judicial challenges would help ensure that capacity expansion can keep pace with demand. Put differently, the cure for congestion should not remain slower than the policies designed to manage congestion's consequences.

VII. Consumer-Protection Regulation and Competitive Viability

A final category of regulation affects competition not by restricting entry, but by imposing recurring costs on carriers already operating in the market. To understand its competitive significance, one must begin with the economics of the airline business.

Airlines are capital-intensive enterprises characterized by high fixed and sunk costs, thin margins, and significant exposure to unexpected disruptions. In that environment, operational flexibility serves as a critical shock absorber. The ability to cancel, consolidate, re-bank schedules, swap aircraft and crews, and re-accommodate passengers allows carriers to respond to weather events, air-traffic-control constraints, mechanical failures, and other disruptions without exhausting their cash reserves.

Each regulatory mandate that converts a discretionary operational decision into a legal obligation reduces that flexibility. In economic terms, such mandates can transform manageable and variable risks into recurring fixed costs.[53] In an industry already burdened by substantial fixed costs, those additional obligations matter.

This point is neither novel nor ideological. More than a decade ago, when the DOT required airlines to permit cost-free booking changes within 24 hours of purchase, Spirit Airlines responded by

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[52] FAA Env't Pol'y & Operations Div. (AEE-400), FAA Order 1050.1G, *FAA National Environmental Policy Act Implementing Procedures* (June 30, 2025), https://www.faa.gov/regulations_policies/orders_notices/index.cfm/go/document.current/documentnumber/1050.1; U.S. Dep't of Transp., Order 5610.1D (eff. June 30, 2025), https://www.transportation.gov/sites/dot.gov/files/2025-07/DOT_Order_5610.1D_OST-P-250627-001_508_Compliant.pdf; *see also* Kaplan Kirsch LLP, *Significant Changes to NEPA Affecting Airport Projects*, https://www.kaplankirsch.com/resources-and-news/significant-changes-to-the-national-environmental-policy-act-affecting-airport-projects.

[53] These industry characteristics are well documented. *See* Severin Borenstein, *On the Persistent Financial Losses of U.S. Airlines: A Preliminary Exploration*, NAT'L BUREAU OF ECON. RSCH., Working Paper No. 16744 (2011) (documenting the chronic difficulty U.S. airlines face in earning stable economic profits across business cycles); Steven Berry & Panle Jia, *Tracing the Woes: An Empirical Analysis of the Airline Industry*, 2 AM. ECON. J.: MICROECONOMICS 1 (2010) (attributing more than 80% of the decline in legacy-carrier variable profits between 1999 and 2006 to increased price sensitivity, stronger consumer preferences for nonstop service, and expansion by low-cost carriers); Jaap H. Abbring & Jeffrey R. Campbell, *Last-In First-Out Oligopoly Dynamics*, NAT'L BUREAU OF ECON. RSCH., Working Paper No. 14674 (2009) (finding that sunk entry costs and demand uncertainty shorten expected survival for newer entrants and can induce the asymmetric exit of otherwise efficient firms following adverse shocks); *see also* Robert S. Pindyck, *Sunk Costs and Risk-Based Barriers to Entry*, NAT'L BUREAU OF ECON. RSCH., Working Paper No. 14755 (2009) (arguing that irreversibility and uncertainty increase the effective cost of committing capital).

itemizing the cost as a "Department of Transportation Unintended Consequences Fee."[54] The episode was instructive precisely because the underlying regulation was popular. A no-cost option to change one's mind has value to consumers, but providing that option also imposes a real cost on the carrier, which must reserve inventory that it might otherwise sell.[55] Recognizing those costs is not hostility to consumers. It is a prerequisite for sound rulemaking.

Several recent regulatory initiatives illustrate how such costs can accumulate.

In April 2024, the DOT adopted a final rule, reinforced by the FAA Reauthorization Act of 2024, requiring automatic cash refunds in the original form of payment whenever a flight is canceled or "significantly changed." The rule defines significant changes through bright-line thresholds, including delays of at least three hours on domestic itineraries and six hours on international itineraries, among other criteria.[56] Because passengers may reject rebooking or travel credits and instead demand cash refunds, the rule limits carriers' ability to rely on their least costly recovery mechanism: re-accommodating passengers on later flights within their own networks. It therefore requires cash outflows precisely when operations and revenues are already under stress.

The DOT went further in a December 2024 advance notice of proposed rulemaking that contemplated a European-style compensation regime for "controllable" delays and cancellations. The proposal would have required cash payments ranging from approximately $200 to $775, depending on the length of the disruption, in addition to meals, lodging, ground transportation, and rebooking obligations.[57] Such a framework would attach a fixed per-passenger cost to operational disruptions and substantially reduce carriers' flexibility in responding to them. Although the proposal was withdrawn in November 2025, it remains a readily available template for future regulatory action.[58]

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[54] Mark Johanson, *Spirit Airlines' '2 Unintended Consequences Fee'*, INT'L BUS. TIMES (Feb. 2, 2012), https://www.ibtimes.com/spirit-airlines-2-unintended-consequences-fee-404714.

[55] The point follows directly from real-options theory: an option has value to its holder and therefore imposes a corresponding cost on its writer. *See* AVINASH K. DIXIT & ROBERT S. PINDYCK, INVESTMENT UNDER UNCERTAINTY ch. 1 (Princeton Univ. Press 1994). On the underlying airline capacity-allocation tradeoff, *see* James D. Dana, Jr., *Advance-Purchase Discounts and Price Discrimination in Competitive Markets*, 106 J. POL. ECON. 395 (1998); Ian L. Gale & Thomas J. Holmes, *Advance-Purchase Discounts and Monopoly Allocation of Capacity*, 83 AM. ECON. REV. 135 (1993); Michael E. Sykuta, *Options Have Value, Even If DOT Doesn't Get It*, TRUTH ON THE MKT. (Feb. 2, 2012), https://laweconcenter.org/resources/options-have-value-even-if-dot-doesnt-get-it; Howard Beales, Richard Craswell & Steven C. Salop, *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491 (1981) (favoring disclosure-based and other less-restrictive alternatives to prescriptive mandates); James Bailey & Diana Thomas, *Regulating Away Competition: The Effect of Regulation on Entrepreneurship and Employment*, MERCATUS CTR., Working Paper (2015) (finding that regulatory-compliance burdens fall disproportionately on smaller firms and deter entry).

[56] U.S. Dep't of Transp., *Final Rule Requiring Automatic Refunds of Airline Tickets and Ancillary Service Fees* (Apr. 24, 2024); Refunds and Other Consumer Protections, 89 FED. REG. 32,760 (Apr. 26, 2024), https://www.transportation.gov/briefing-room/biden-harris-administration-announces-final-rule-requiring-automatic-refunds-airline.

[57] U.S. Dep't of Transp., *Airline Passenger Rights*, Advance Notice of Proposed Rulemaking, 89 FED. REG. 99,952 (Dec. 11, 2024); *see also* Eckert Seamans, *DOT Launches Rulemaking on Cash Compensation and Related Consumer Protection Requirements* (Jan. 6, 2025), https://www.eckertseamans.com/stay-informed/blogs/aviation/dot-launches-rulemaking-on-cash-compensation-and-related-consumer-protection-requirements.

[58] U.S. Dep't of Transp., *Airline Passenger Rights; Withdrawal*, 90 FED. REG. 51,230 (Nov. 17, 2025), https://www.federalregister.gov/documents/2025/11/17/2025-20042/airline-passenger-rights-withdrawal. The European Union's analogous regime, Regulation (EC) No. 261/2004, illustrates both the tendency of passenger-rights mandates to expand beyond their original scope and the administrative burdens they impose. In *Sturgeon v. Condor*, the Court of Justice of the European Union extended cash-compensation requirements to long delays, not merely cancellations and denied boarding. *See Sturgeon v. Condor Flugdienst GmbH*, Joined Cases C-402/07 & C-432/07 (C.J.E.U. 2009). Subsequent

Two related initiatives would fall particularly heavily on low-cost carriers.

First, the DOT's April 2024 ancillary-fee disclosure rule required airlines to display baggage and change fees at the point of sale. The 5th U.S. Circuit Court of Appeals stayed the rule, finding that the airlines had made "a strong showing that the Rule exceeds DOT's authority" and would suffer irreparable harm, including compliance costs that the industry estimated at between $5 million and $10 million. The court later affirmed the agency's authority while remanding the rule for further proceedings.[59]

Second, the DOT proposed in August 2024 to require fee-free adjacent family seating and prohibit airlines from structuring basic-economy products to avoid that requirement.[60] Like the ancillary-fee initiatives, the proposal would directly affect the unbundled business model that underlies many ultra-low-cost carriers by converting optional paid services into mandatory free services.[61]

Viewed individually, any one of these measures may appear modest. Viewed collectively, they impose meaningful costs on the carriers least able to absorb them.

For a large legacy carrier with diversified revenue streams from premium products and loyalty programs, an individual mandate may amount to little more than operational friction. For an ultra-low-cost carrier that relies heavily on ancillary revenue and operates on exceptionally thin margins, mandated refunds, potential compensation payments, mandatory services, and limits on pricing flexibility can erode the economics that make very low base fares possible.

The broader point is cumulative. Layered on top of slot scarcity, equipment shortages, constrained access to capital, and other barriers discussed above, regulatory inflexibility becomes one more factor pushing low-cost carriers from marginal viability toward unprofitability. Spirit's collapse illustrates the broader concern. In a high-fixed-cost, low-margin, shock-prone industry, competitive viability often depends less on any single regulatory burden than on the accumulation of many small burdens

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evaluations found wide disparities in enforcement across member states: the share of complaints resolved in passengers' favor ranged from roughly 6% to more than 90%; only 14 of the then-27 member states had imposed sanctions for noncompliance; and nearly half had never imposed a sanction at all. The European Commission further found that many member states had not fully complied with the Regulation's requirement that sanctions be "effective, proportionate and dissuasive," and that in some jurisdictions maximum penalties fell below the costs carriers could avoid through noncompliance. *See* Eur. Comm'n, *Evaluation of Regulation (EC) No. 261/2004: Final Report* (Steer Davies Gleave 2010).

[59] *Airlines for Am. v. Dep't of Transp.*, No. 24-60231 (5th Cir. 2024) (granting stay); *see also* Pete Muntean, *Airlines Sue DOT Over New Rules Requiring Disclosure of Fees*, CNN (May 13, 2024), https://www.cnn.com/2024/05/13/business/airlines-sue-dot-over-new-rules-requiring-disclosure-of-fees. The 5th U.S. Circuit Court of Appeals, sitting *en banc*, subsequently vacated the rule. *Airlines for Am. v. Dep't of Transp.*, No. 24-60231 (5th Cir. Feb. 3, 2026).

[60] U.S. Dep't of Transp., *Notice of Proposed Rulemaking on Family Seating* (Aug. 1, 2024); *see also* Gregory Speier, *DOT Proposes Rule to Ban Family Seating Fees*, REED SMITH (Aug. 2, 2024), https://www.reedsmith.com/our-insights/blogs/viewpoints/102jfav/dot-proposes-rule-to-ban-family-seating-fees.

[61] The importance of ancillary revenue helps explain why these measures fall most heavily on the unbundled-carrier business model. The Government Accountability Office reports that U.S. airline baggage and reservation-change fees—the only optional-service fees reported separately to the Department of Transportation—increased from approximately $6.3 billion in 2010 to $7.1 billion in 2016 (in constant 2016 dollars). Those revenues play a significant role in the profitability of ultra-low-cost carriers and help subsidize lower base fares. *See* U.S. Gov't Accountability Off., *Commercial Aviation: Information on Airline Fees for Optional Services*, No. GAO-17-756 (2017), https://www.gao.gov/products/gao-17-756.

over time. The carriers serving the most price-sensitive travelers generally have the least margin for error.

The 5th Circuit's conclusion that one of these rules likely exceeded the DOT's statutory authority also raises a question squarely within this Subcommittee's jurisdiction: how much of this regulatory apparatus Congress has authorized the Department of Transportation to impose in the first place.

VIII. Recommendations and Conclusion

Consistent with the foregoing analysis, I respectfully offer the following recommendations for the Subcommittee's consideration:

- **Modernize merger analysis for network industries.** Encourage courts and enforcement agencies to adopt a probability-weighted assessment of competitive durability for financially distressed firms. Such an approach would provide a middle ground between the strict failing-firm defense and the assumption that a distressed carrier will remain an effective competitor indefinitely. Merger analysis should also give consistent weight to out-of-market efficiencies that benefit consumers.
- **Reform airport-slot allocation.** Direct the FAA to facilitate entry by making chronically underused slots available through transparent, rules-based criteria. Congress should also study market-oriented alternatives to administrative grandfathering, including transparent slot markets and runway-congestion pricing.
- **Liberalize foreign investment and study cabotage reform.** Commission a study of phased liberalization of foreign-ownership restrictions, building on the DOT's 2003 proposal, and evaluate reciprocal cabotage arrangements with countries that maintain comparable aviation-safety and regulatory standards.
- **Codify environmental-review reform for capacity projects.** Enact enforceable NEPA review deadlines, expand categorical exclusions for capacity-enhancing projects at slot-constrained airports, and limit the period for judicial challenges. Such reforms would build on the Supreme Court's decision in *Seven County Infrastructure Coalition v. Eagle County* and the FAA's recent procedural reforms.
- **Subject consumer-protection mandates to rigorous cost-benefit review.** Require agencies to identify a demonstrated market failure before imposing operational mandates, account for the value of operational flexibility and the cumulative burden on low-cost carriers, and adopt the least-restrictive effective alternative. Congress should also clarify the limits of the DOT's statutory authority in this area.

The impulse to address airline concentration primarily through more aggressive merger enforcement is unlikely to produce the competitive outcomes policymakers seek. The most significant constraints on airline competition arise not from a shortage of antitrust enforcement, but from barriers that restrict entry, expansion, and adaptation before competition can occur.

Much of the competition that never materializes in this industry is foreclosed upstream: by airport capacity the government rations, by capital it restricts, by infrastructure expansion it delays, and by operational mandates that fall most heavily on the carriers least able to absorb them. If policymakers are concerned about concentration, those constraints should be the first place they look.

The most procompetitive course available to Congress is not to preserve competitors on paper, but to make competition easier in practice. That requires removing government-created bottlenecks, regularly reassessing legacy regulations, and exercising discipline before imposing new ones. Spirit's empty gates offer a cautionary reminder that protecting a competitor is not the same as protecting competition.

I thank the Subcommittee for its attention and welcome any questions.