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Exhaustless opposes the DOT's proposed administrative allocation of airspace reservations at Newark Liberty International Airport; 86 Fed. Reg. 52285, Docket DOT-OST-2021-0103 (Sep. 20, 2021)

This DOT proposal is an illegal subsidy of scarce, renewable public resources.

The DOT wants a carrier to deliver to EWR the "Southwest Effect" – that Southwest itself couldn't deliver. Their plan: the DOT will unlawfully grant 'squatters rights' to 16 airspace reservations to one DOT-chosen carrier to balance its recurring unlawful grant of 'squatters rights' to over 900 airspace reservations to United Airlines.[1]

No carrier holds exclusive rights to use U.S. airspace. No regulator has the authority to grant exclusive rights to the commercial use of the U.S. airspace, for any flight volume at any price. The Airline Deregulation Act expressly terminated any regulatory authority over carrier origin/destination and schedules. Yet, the DOT proposes an unlawful administrative allocation of exclusive airspace reservations under the International Air Transport Association Worldwide Slot Guidelines (IATA WSG) — an anticompetitive agreement by a conspiracy of a global carrier cartel to restrain trade in airspace reservations.[2]

The only decision before the DOT is whether to voluntarily continue to violate the law – at the margin and at the center of the market.

A. The DOT Regulatory Shell Game

In this proceeding, the DOT appears to sternly "discipline" United over its market share at EWR. In other proceedings, the DOT grants and enforces United's market share at EWR.

In dockets hosting "unlawful regulation[s]"[3] that limit carrier operations,[4] the DOT happily reallocates the dominant market share to United every season according to the grandfathering policy of the IATA WSG.

Every carrier scheduling season, in dockets hosting the "routine scheduling notice,"[5] the DOT notifies United and other members of the cartel of air carriers that the DOT slot administrators will enforce the past market allocation and production quota of the IATA WSG.[6] In another docket, the DOT seeks permission from the White House to gather information about the past 'slot holdings' from United and other cartel members — information needed by the DOT to enforce the *de facto* right to exclude competitors granted by the rules of the IATA WSG.[7] In multiple shadow dockets, the DOT protects and defends United's global market share, accessed from EWR, by enforcing the IATA WSG across 'immunized' alliances.[8] And in yet another docket, the DOT waives the IATA WSG production quota to protect United's pre-pandemic market share.[9]

The shell game also extends to word play; Congress calls a reservation for a takeoff or landing a "slot" (*see* 49 U.S.C. § 41714(h)). But the DOT simultaneously calls a reservation: (a) a "reservation," see 14 C.F.R. § 93.123; (b) an "operational authority," see 14 C.F.R. § 93.213; and (c) *in this five-page proposal alone*, (i) "schedule plans", (ii) "runway timings," (iii) "take-off and landing rights," (iv) "FAA-allocated slot," (v) "schedule priority," (vi) "schedule approvals," (vii) "Southwest's capacity," and (viii) carrier "networks." United also refers to the reservations as part of their "route authorities."[10] (Note that the certificated route authorities that had been issued by the CAB were terminated on December 31, 1981,[11] and "carriers holding domestic certificates received authority to serve any domestic or territorial point."[12])

The violation of 49 U.S.C. § 41101(c) by the DOT's unlawful conferment of a right-to-exclude-other-competitors based on past use of airspace also takes on many names, *inter alia*: IATA Worldwide Slot Guidelines or Worldwide Airport Slot Guidelines (WSG or WASG) (formerly the Airline Scheduling Committee rules); High Density Rule (HDR); Orders limiting operations; and "schedule review process" or "schedule facilitation."[13] The DOT relies on the IATA WSG at Newark.[14]

Other double-speak in the proposal:

- "This would allow some higher levels of operations in certain periods (not to exceed the hourly limits) and some recovery from lower demand in adjacent periods." <u>Translation:</u> 'We will allow carriers to schedule a higher volume of reservations during this hour than can be accommodated by the airspace capacity, so some of the aircraft and its occupants will have to be stowed at the gate or on the tarmac until later in the day to actually depart[15] — even though passenger airfare stated a departure during this hour.' (Note that the reservations do not allow more actual operations (takeoffs and landings) as they do not affect the airspace capacity.)

- "That will not change unless we introduce the LCC services and at the same time, seek necessary adjustments by incumbent carriers to mitigate the potential delays." But then also, "The FAA will seek to work in coordination with the awarded carrier to adjust schedules within the peak afternoon and evening period, including minor changes between adjacent half hours, in the interest of optimizing efficiency and accommodating the carrier's schedule plans, consistent with the usual Level 2 process." (emphasis added).
- "Following this change, FAA approved flights above the 79/hour limit only if operated in the previous corresponding season by the same carrier and dating back to the higher limit." Translation: 'The hourly scheduling limit does not apply to United.'

B. The Proposal Violates the Constitution

Under its Constitutional authority to regulate interstate and foreign commerce,[16] and to regulate the use of the national airspace,[17] the only property that Congress authorizes the DOT to confer to carriers is either a certificate if the carrier is a U.S. citizen or a permit if the carrier is a citizen of a foreign country. The certificate "does not confer a proprietary or exclusive right to use airspace," 49 U.S.C. § 41101(c).

In 1978, Congress determined that the public interest requires market competition to determine price, route, and service quality in the interstate and foreign commerce of air transportation, 49 U.S.C. § 40101(a)(12). The Court upheld the law as unambiguous.[18] The Court has also recognized that the free flow of market information is vital to a functioning market and is protected speech under the First Amendment.[19]

In a 2010 ruling on a "case involv[ing] delays caused by excess demand for airport takeoff and landing capacity," the U.S. Court of Appeals for the D.C. Circuit explained, "Excess demand arises when demand for a good or service at the prevailing price exceeds the supply, which results in would-be buyers having to queue. . . . The delays in landing are manifestations of there being a queue. In an ordinary market, supply and price adjust to eliminate excess demand, but this is no ordinary market."[20]

Exhaustless Inc. developed a private sector market-clearing service that makes air transportation an ordinary market. Administratively allocating these 16 "coveted" (*i.e.*, valuable) airspace reservations to carriers for free violates Exhaustless' First

Amendment right to discover and broadcast both the supplier and consumer market price of exclusive — or congestion-free — airspace reservations, and the First Amendment rights of both the supplier and the potential consumer to hear the market price of exclusive airspace reservations.

Under the Constitution, the DOT must enforce the property rights declared by Congress — not the self-declared entitlements by United and other carrier members of IATA.[21]

C. The Proposal Violates the Airline Deregulation Act of 1978

To allow market competition to set price, route, and service, Congress terminated the regulatory declaration of the route designs, the setting of the frequency of service of those routes, and the assignment of the route to a carrier.[22] Yet, forty-three years later, the DOT plans to regulate the routes at EWR by holding a Carrier Beauty Pageant: the DOT will (a) select the traits to qualify as a contestant;[23] (b) judge the contestants business plans;[24] and (c) award the winner an exclusive right to a terminal point (an airspace reservation) for 16 daily flights.[25]

In 1978, Congress provided carriers transitional, annual grandfathering rights of limited routes, which terminated after 1981.[26] Yet the DOT intends to continue to confer to the 'chosen' carrier *future seasonal reservations for free and in perpetuity* — pursuant to the IATA WSG, which states that an air carrier is "entitled" to airspace reservations it used last season.[27]

D. The Proposal Violates Air Transport Agreements

This conferment of exclusive access based on competition among airlines in a regulator-judged beauty pageant violates air transport agreements adopted under the Open Skies policy:

> [D]esiring to "maximiz[e] competition among airlines in the marketplace, including operations behind and beyond the territory of the Parties, with minimum government interference and regulations; and . . . allow a fair and equal opportunity for the airlines of both Parties to compete in providing the international air transportation governed by this Agreement."[28]

The subsequent intended perpetual conferment of the exclusive access by grandfathering violates air transport agreements to "apply their respective competition regimes to protect and enhance overall competition and not individual competitors."[29]

E. The Proposal is Arbitrary and Capricious

An air carrier challenged the DOT's 2019 decision to reduce the number of daily regularly scheduled airspace reservations allowed at Newark. This DOT proposal cites that court ruling as one of the reasons it must administratively allocate these 16 airspace reservations.[30] But the D.C. Circuit Court's ruling merely remanded the matter to the DOT to articulate a "reasoned explanation" for its decision.[31] Yet here, the DOT proposal continues to "ignor[e] information about the competitive situation at Newark."[32]

i. Exhaustless Can Collect Market-Clearing Premiums

In 2019, Exhaustless sought judicial review of the FAA's continued regulation of airspace reservations. While the court denied us standing to overturn the FAA's orders without the carrier cartel present, it did recognize Exhaustless' rights to operate its market-clearing service:

> Petitioner Exhaustless, Inc., as noted, has developed a patent-pending product called Aviation 2.0 Operating Standard for allocating airline slots at airports. Using Aviation 2.0, carriers would compete in semi-annual auctions to purchase slots for a six-month period, with the total number of slots determined by Exhaustless using its proprietary technology. Passengers would then pay demand-calibrated congestion premiums (on top of their airfare) when purchasing tickets. Both the congestion premiums and the auction proceeds would go to Exhaustless.[33]

The ruling stated that, "because the interim rules are revocable at will, the orders challenged by Exhaustless in this proceeding do not stand in the way of the company's attempting to persuade the FAA to adopt its technology via a rulemaking."[34] But shortly before the ruling, the FAA denied Exhaustless' petition for rulemaking, stating "your petition does not address an immediate safety concern and therefore does not meet the criteria to pursue rulemaking at this time. However, your petition will be placed in a database, which we will examine when we consider future rulemaking."[35]

Yet this proposal does not explain why the DOT has chosen an administrative allocation of these 16 reservations over Exhaustless' patent-pending competitive market.

ii. Encourage Efficient Carriers to Earn Adequate Profits

In late 2019, Southwest Airlines — the fourth largest carrier in the country — ceased operations at Newark because they couldn't make an adequate profit on those flights.[36]

Congressional policy requires the DOT to place "maximum reliance on . . . actual and potential competition . . . to encourage efficient and well-managed air carriers to earn adequate profits," § 40101(a)(6)(B). Yet this proposal does not explain how it improves the environment at Newark for the future 'chosen' carrier to earn an adequate profit.

iii. Prevent Anticompetitive Practices

Congressional policy requires the DOT to prevent "unfair, deceptive, predatory, or anticompetitive practices in air transportation" and to avoid "unreasonable industry concentration and conditions that would allow a carrier to exclude competition", § 40101(a)(9), (10). Yet this proposal is silent on United's agreement with other carriers to restrain trade in airspace reservations, and the DOT's role in enforcing that agreement.

iv. Rely on the Market to Provide the Air Transportation System

Congressional policy requires the DOT to place "maximum reliance on competitive market forces and on actual and potential competition to provide the needed air transportation system," § 40101(a)(6)(A). In 1985, when the DOT first intervened in the allocation of the airspace reservation market, they believed "that an unrestricted slot market may represent the most effective opportunity for new entry at high density airports."[37] Yet this DOT proposal relies on regulators to provide the airspace reservation system, rather than on the unrestricted airspace reservation market provided by Exhaustless' market-clearing service. The DOT has no authority to exclude competition.

v. Executive Order 14036

The DOT proposal states that:

> [P]otential savings to consumers are important objectives of the President's Executive Order on competition, particularly in a concentrated market. There are many

> benefits of competition, including lower fares, more throughput, higher utilization of scarce assets, more opportunities to develop flexible or common use airport facilities, and reduced opportunities for exclusionary behavior such as "babysitting." That will not change unless we introduce the LCC services and at the same time, seek necessary adjustments by incumbent carriers to mitigate the potential delays.[38]

The important policy of Congress on competition is for "an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices", 49 U.S.C. § 40101(a)(12)(A). The DOT does not have the authority to undermine this policy because they believe the benefits of competition would be better provided by regulators picking the winners and losers, rather than allowing the market competition in airspace reservations — provided by Exhaustless market-clearing service — to decide. As the Court has said:

> The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.[39]

The DOT claims that its proposal is "in furtherance of the whole of government approach to competition embodied in the President's Executive Order 14036."[40] This Executive Order stated that:

> This order reasserts as United States policy that the answer to the rising power of foreign monopolies and cartels is not the tolerance of domestic monopolization, but rather the promotion of competition and innovation[.] . . . This order recognizes that a whole-of-government approach is necessary to address overconcentration, monopolization, and unfair competition in the American economy. Such an approach is supported by existing statutory mandates. Agencies can and should further the polices set forth in section 1 of this order by, among other

> things, . . . rescinding regulations that create unnecessary barriers to entry that stifle competition.[41]

The DOT's proposal is antithetical to the Executive Order, in that it: a) facilitates the carrier cartel, of which United Airlines is a member; b) ignores all of Exhaustless' innovations – our market-clearing service and our increased-throughput technologies; c) neglects the existing statutory mandates in regulating carrier certificates and permits, as outlined in the public interest policies of Congress; and d) retains its regulations that prevent a functioning market in air transportation.

vi. Unreasoned Decision

The DOT concludes that its proposal "best satisfies the public interest,"[42] without addressing any of these current issues or the Congressional public interest policies. Instead, the DOT's conclusion relies solely on a remedy that the DOJ fashioned in 2010 based on the limited tools that it had available at the time. To rely on that remedy while ignoring competitive innovations that are readily available in 2021 — and that address the underlying allocation and congestion problems — is arbitrary and capricious.

F. The DOT has No Authority to Allocate Schedules

The DOT cites 49 U.S.C. § 40101 — Policy which was established predominantly in the Airline Deregulation Act of 1978— as its authority to allocate schedules at EWR. Yet this statute does not confer authority; rather, it establishes the Congressional public interest policies that the DOT is to follow when carrying out its authority to: (i) enforce economic regulations through approvals of air carrier certificates and foreign air carrier permits, see § 40101(a) and (b); (ii) enforce safety regulations through approvals such as aircraft certificates, airman certificates, air carrier operating certificates, and airport operating certificates, see § 40101 (d); (iii) formulate international air transportation policy, see § 40101(e); and (iv) select an air carrier to provide foreign air transportation. This proposal is not related to any of those authorities; it is related to the administrative conferment of *de facto* exclusive rights to a 'chosen' carrier to use the airspace at an airport.

The DOT also cites 49 U.S.C. § 40103 — Sovereignty and use of airspace — as its authority to allocate schedules at EWR. Yet this statute, which was enacted in 1958, relates to the allocation of airspace between civilian and military use. For the airspace that the FAA allocates to civilian use, Congress requires carriers to compete for schedules by "relying on actual and potential competition . . . to decide on the variety and quality of . . . air transportation services." 49 U.S.C. § 40101(a)(12).

And *most absurdly*, the DOT cites 49 U.S.C. § 41712 — Unfair and deceptive practices and unfair methods of competition — as its authority to allocate schedules at EWR. Yet the DOT has a mandate to *prevent* "unfair, deceptive, predatory, or anticompetitive practices," 49 U.S.C. § 40101(a)(9), in its administration of carrier economic certificates. Instead, the DOT is *facilitating* the cartel's anticompetitive practice of grandfathering access and its restriction of trade in airspace reservations.

G. Recommendations

1. Update Terms of Certificates

Exhaustless recommends that the DOT updates the terms of the air carrier certificates and foreign air carrier permits, 14 C.F.R. § 201.7, to conform to 49 U.S.C. § 41101(c) by ordering that the certificate or permit "does not confer an exclusive or proprietary right to use airspace, an airway of the United States, or an air navigation facility."[43]

2. Enjoin the Use of Grandfathering

Exhaustless recommends that the DOT modifies the Policies Relating to Enforcement, 14 C.F.R. Part 399 Subpart G, to conform to 49 U.S.C. § 40101(a)(12) by ordering that "The allocation of access to any market (including airspace reservations, airspace schedules, airport terminals, and airport gates) based on a practice that excludes market competition — such as by recognizing historical precedence, historical investments, incumbency, protected status, legacy status, or grandfathered rights — is an unfair practice and an unfair method of competition within the meaning of 49 U.S.C. §41712. Any violation will be deemed to be an intentional violation of 49 U.S.C. § 41101(c), and shall be sufficient grounds for revocation of the carrier certificate or permit."[44]

3. Amend Orders Limiting Operations

Exhaustless recommends that the FAA amend the regulations limiting operations to a) remove regulators from the market allocation of airspace reservations, b) remove the scheduling limit set to reduce excess demand, and c) set a scheduling limit for each large hub airport to ensure safety.[45] The Exhaustless market-clearing service will then lawfully clear market excess.

4. Seek Judicial Review

If the DOT chooses not to adopt the above recommendations, Exhaustless *implores* Secretary Buttigieg or Administrator Dickson to seek judicial review regarding the legality of the administrative allocation of these 16 airspace reservations prior to finalizing this rule. Otherwise, the DOT risks extending the regulatory taking of Exhaustless' proprietary right to operate its market-clearing service.

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[1] *See* 86 Fed. Reg. 52285 ("[T]he Department proposes to approve, as a package to an eligible LCC or ULCC, schedule plans to operate in the 16 peak-hour runway timings[.]") *See also*, U.S.A. v United Continental Holdings, Inc. *et al*, Case No: 2:15-cv-07992-WHW-CLW, Verified Complaint (D.N.J. Nov. 10, 2015) at 2 (United "controls 902 (73%) of the 1,233 slots the FAA has allocated to airlines."). *See also*, The Port Authority of New York and New Jersey, December 2019 Traffic Report (United serviced 66% of passenger traffic at EWR in 2019).

[2] *See* IATA Worldwide Slot Guidelines (WSG), 9th Edition (Effective Jan. 1, 2019) (at Docket FAA-2020-0862, Dec. 17, 2020). *See also,* the IATA Resolution on Slot Policy, 75th Annual General Meeting (Jun. 2, 2019) — the unanimous agreement by member carriers to use the IATA WSG — at https://www.iata.org/contentassets/dd4e3c33eecc45fbafb3324af2252a60/resolution-slot-policy-agm-2019.pdf.

[3] See *Exhaustless, Inc. v FAA*, 931 F. 3d. 1209, 1212 (D.C. Cir. 2019) ("[W]hen a petitioner's injury arises from an agency's unlawful regulation (or lack of regulation) of someone else, causation often is substantially more difficult to establish because the petitioner must demonstrate that the injury does not result from the independent action of some third party not before the court." (emphasis and internal quotations omitted)).

[4] *See* Docket FAA-2006-25755 for orders limiting operations at LaGuardia; Docket FAA-2007-29320 for orders limiting operations at JFK; and Docket FAA-2013-0259 for regulations limiting operations (called "Notice of Schedule Submission Deadline") at Newark Liberty, Los Angeles, San Francisco, and Chicago O'Hare airports. *See* Docket FAA-1999-4971, codified at 14 C.F.R. Part 93, Subparts K and S, for regulations limiting operations at Reagan National Airport.

[5] 86 Fed. Reg. 52285, 52286.

[6] *See* Docket FAA-2013-0259 for the Notice of Schedule Submission Deadline announced prior to each winter and summer carrier scheduling season, most recently 86 Fed. Reg. 24428 (May 6, 2021).

[7] *See* Docket FAA-2021-0067: 86 Fed. Reg. 14515 (Mar. 16, 2021); Exhaustless objection to the information collection (May 6, 2021); Exhaustless announcement of an auction for Summer 2022 airspace reservations, (Aug. 20, 2021); 86 Fed. Reg. 48466 (Aug. 30, 2021).

[8] See, *e.g.*, Docket DOT-OST-2008-0234. See also, https://www.transportation.gov/office-policy/aviation-policy/dot-aviation-anti-trust-immunity-cases for the full list of dockets related to immunized alliances.

[9] *See* Dockets FAA-2020-0862 and FAA-2013-0259.

[10] United Airlines, Inc., Form 8-K, Item 1.01 at 2 (Sep. 30, 2020).

[11] *See* Airline Deregulation Act of 1978, Pub. L. 95-504, §40(a), adding §1601(a)(1)(C), 92 Stat. 1705, 1744 ("The following provisions of this Act (to the extent such provisions relate to interstate and overseas air transportation of persons) and the authority of the Board with respect to such provisions (to the same extent) shall cease to be in effect on December 31, 1981: Section 401(e)(1) of this Act (insofar as such section permits the Board to specify terminal and intermediate points).")

[12] Civil Aeronautics Board Fiscal Year 1981/1982 Reports to Congress, page 1.

[13] *See* OMB Control No. 2120-0524, ICR No. 202108-2120-002, DOT/FAA Supporting Statement A, (Aug. 26, 2021).

[14] *See* 86 Fed. Reg. 52285, 52288 (Sep. 20, 2021) ("[T]he Department notes that . . . usual policies and procedures for Level 2 schedule facilitation at EWR continue to apply.") *See also* 86 Fed. Reg. 24428 (May 6, 2021) ("As stated in the WSG, schedule facilitation at a Level 2 airport is based on . . . giving priority to approved services that plan to operate unchanged from the previous equivalent season[.]").

[15] Once the aircraft leaves the gate, a regulator in the FAA's Air Traffic Control group decides which aircraft are allowed access to the airspace and which are stowed, and the location and duration of stowage.

[16] *See* U.S. Const. art. I § 8, cl. 3.

[17] *See* U.S. Const. art. IV § 3, cl. 2.

[18] See *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992) ("Congress, determining that maximum reliance on competitive market forces would best further efficiency, innovation, and low prices as well as variety and quality . . . of air transportation services, enacted the Airline Deregulation Act (ADA). To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision, prohibiting the States from enforcing any law relating to rates, routes, or services of any air carrier." (internal quotation marks and citations omitted)).

[19] See *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (1976) ("[I]n the commercial advertisement, we may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment. . . As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. . . . So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.")

[20] *Air Transport Association of America, Inc. v DOT*, No. 08-1293, 4 (D.C. Cir. 2010).

[21] *See* 49 U.S.C. § 40103(a); Airlines have been on notice that there is no authority delegated by Congress to grant title to U.S. airspace. For example, in 2016, the FAA changed the rules of the administrative allocation of airspace reservations at Newark from an unlawful perpetual exclusive-and-proprietary-right to just an unlawful perpetual exclusive-right. United then wrote-off the entire $412 Million book value of its 'permanent' reservations because it could no longer trade them, even though it could still use the reservations. No lien was perfected against the reservations, nor did any title change hands. *See* United Airlines, Inc. Form 10-K for fiscal year ended Dec. 31, 2016.

[22] *See* Airline Deregulation Act of 1978, Pub. L. 95-504, §40(a), adding §1601(a)(1)(C), 92 Stat. 1705, 1744 (1978). Note that in this context, "service" means the service of the air transportation over the route, such as size of plane, the required number and place of stops, and whether the service needed to be regularly scheduled. "Route" means the origin, destination, and intermediate airports, as opposed to a physical route traversed by a pilot following air traffic. In short, the *economic route* refers to the *ends*, and the *physical route* refers to the *means*.

[23] 86 Fed. Reg. 52285, 52288 ("As such, the Department proposes to evaluate proposals from eligible carriers that can effectively carry out the goals of that [2010] competition remedy, namely to provide price and service competition to United, the dominant hub carrier at EWR, and for FAA to approve the peak-hour schedule plans of the carrier chosen based on that evaluation. . . . In determining which LCC or ULCC would provide the maximum competition, the Department tentatively proposes to consider, among other factors, carriers' business model and track record to ensure that they have the ability and stamina to provide the level of competition required. The business model and track record will be determined by analysis of revenue, traffic, and schedule data.") Translation: The 'chosen' carrier must operate the same routes (the same origin/destination) as United with these 16 flights.

[24] *Id.*, at 52289 ("The Department tentatively proposes to evaluate eligible carriers based on the above criteria.").

[25] *Id.*, at 52288 ("[T]he Department proposes to approve, as a package to an eligible LCC or ULCC, schedule plans to operate in the 16 peak-hour runway timings previously approved for operation by Southwest.").

[26] *See* Airline Deregulation Act of 1978, Pub. L. 95-504, §12, amending §401(d)(7)(C), 92 Stat. 1705, 1718 (1978) (A carrier with prior route authority "which wants to preclude any other air carrier from obtaining authority. . . to engage in nonstop service between such pair of points during such calendar year may . . . file written notice to the Board which sets forth such pair of points . . . [for no] more than one pair of points" for calendar years 1979 to 1981.").

[27] IATA Worldwide Slot Guidelines (WSG), 9th Edition, §8.1.1(f) at 35 (Effective Jan. 1, 2019).

[28] Air Transport Agreement Between the Government of the United States of America and the Government of Canada, T.I.A.S. No. 07-312, Preamble and Art. 5 § 1 (Mar. 12, 2007).

[29] U.S. – E.U. Air Transport Agreement, Art. 20 §1 (Apr. 30, 2007).

[30] 86 Fed. Reg. 52285 ("This notice and the [proposal] are in response to the Court of Appeals for the D.C. Circuit's decision in *Spirit Airlines v. DOT, et al*[.]")

[31] See *Spirit Airlines Inc. v. DOT et al.*, 997 F.3d 1247 (D.C. Cir. 2021).

[32] 86 Fed. Reg. 52285, 52287, citing *Spirit Airlines Inc. v. DOT et al.*, 997 F.3d 1247, 1255 (D.C. Cir. 2021).

[33] *Exhaustless, Inc. v FAA*, 931 F. 3d. 1209, 1212 (D.C. Cir. 2019).

[34] *Id.*, at 1213.

[35] Decision (Closeout), Docket FAA-2018-0481 (posted Jun. 4, 2019).

[36] "Southwest Reports Record Second Quarter Revenues And Earnings Per Share", Southwest Airlines Press Release, July 25, 2019 ("The financial results at Newark have been below expectations, despite the efforts of our excellent Team at Newark.")

https://www.swamedia.com/releases/release-424146113c6f2a2eebe84fb61d59a4ff-southwest-reports-record-second-quarter-revenues-and-earnings-per-share?query=newark

37 50 Fed. Reg. 52180, 52185 Final rule, request for comments: High Density Traffic Airports; Slot Allocation and Transfer Methods (Dec. 20, 1985).

38 86 Fed. Reg. 52285, 52287.

39 *National Soc'y of Prof. Engineers v. United States*, 435 U.S. 679, 695 (1978).

40 86 Fed. Reg. 52285, 52286.

41 86 Fed. Reg. 36987, 36988 and 36989 (Jul. 14, 2021).

42 86 Fed. Reg. 52285, 52288.

43 *See* 49 U.S.C. § 41109(b)(2), which mandates the Secretary to maintain terms that are consistent with the statutes. See, *e.g.*, Order 2021-7-1, Docket DOT-OST-2021-0074 (Jul. 6, 2021) (amending the certificate to prohibit air transportation to Belarus).

44 A show cause order is unnecessary since Congress has already prohibited grandfathering. Also, the CAB found the grandfathering practices of the airline scheduling committees (which were consolidated into the IATA WSG) to be anticompetitive. *See* Order 83-6-43; National Commuter-Carrier Agreement, Agreement CAB 29016 (June 15, 1983)

45 See 49 U.S.C. § 106(g)(1)(C) ("The Administrator shall carry out the following [d]uties and powers of the Secretary of Transportation . . . related to aviation safety . . . and stated in . . . 40103(b).")