BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Joint Application of **DELTA AIR LINES, INC. and** **AEROVIAS DE MEXICO, S.A. DE C.V.** **Under 49 U.S.C. §§ 41308 and 41309 for Approval of and Antitrust Immunity for Alliance Agreements**	)	**Docket DOT-OST-2015-0070**

OBJECTION OF THE JCA PARTNERS TO
SUPPLEMENTAL SHOW CAUSE ORDER 2025-7-12

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I. EXECUTIVE SUMMARY

The Delta-Aeromexico joint venture is unquestionably proconsumer, procompetitive, and pro-American. It unlocks hundreds of millions of dollars annually in benefits for U.S. citizens who travel to Mexico on a U.S. airline (Delta) and another airline with significant U.S. ownership (Aeromexico). The joint venture generates nearly 4,000 U.S. jobs, more than $310 million of U.S. GDP, and more than $200 million of annual tourism spending in the United States. If Delta and Aeromexico's Joint Cooperation Agreement ("JCA") is unwound, those economic benefits for the United States will evaporate and the market will be captured by the airlines' competitors. For these reasons, the JCA Partners, Delta and Aeromexico, strongly object to the Department's tentative decision to withdraw the approval and grant of antitrust immunity ("ATI") for their joint venture.[1]

Delta applauds the Department and this Administration for pursuing measures designed to hold other nations to their trade agreements—in this case, initiating

[1] *See* Supplemental Show Cause Order 2025-7-12 (the "Supplemental SCO").

countermeasures to redress the Government of Mexico's ("GOM") alleged noncompliance with the U.S.-Mexico Air Transport Agreement.[2] But the Department's recent Show Cause Order—like the 2024 Biden/Buttigieg predecessor order that it follows[3]—would punish a U.S. company and U.S. consumers, not the GOM. Other, superior measures are available to remedy the situation with the GOM without harming the U.S. economy; the Department should pursue those alternatives instead.

The recent Show Cause Order is antithetical to the Trump Administration's America First agenda. The Delta-Aeromexico joint venture is itself an American enterprise, comprising a U.S. airline and a Mexican airline with significant U.S. ownership. And the venture primarily benefits U.S. consumers, with 60% of tickets sold to passengers in the United States. The JCA provides those American travelers with a higher-quality network and schedule, new and expanded service, more convenient flight options, and lower fares. And the venture fosters enhanced competition with other U.S. and Mexican carriers too, with Delta and Aeromexico together holding 20% of the highly competitive U.S.-Mexican market (measured by seat shares)—compared with 21% for American, 16% for United, and 16% for Volaris.[4]

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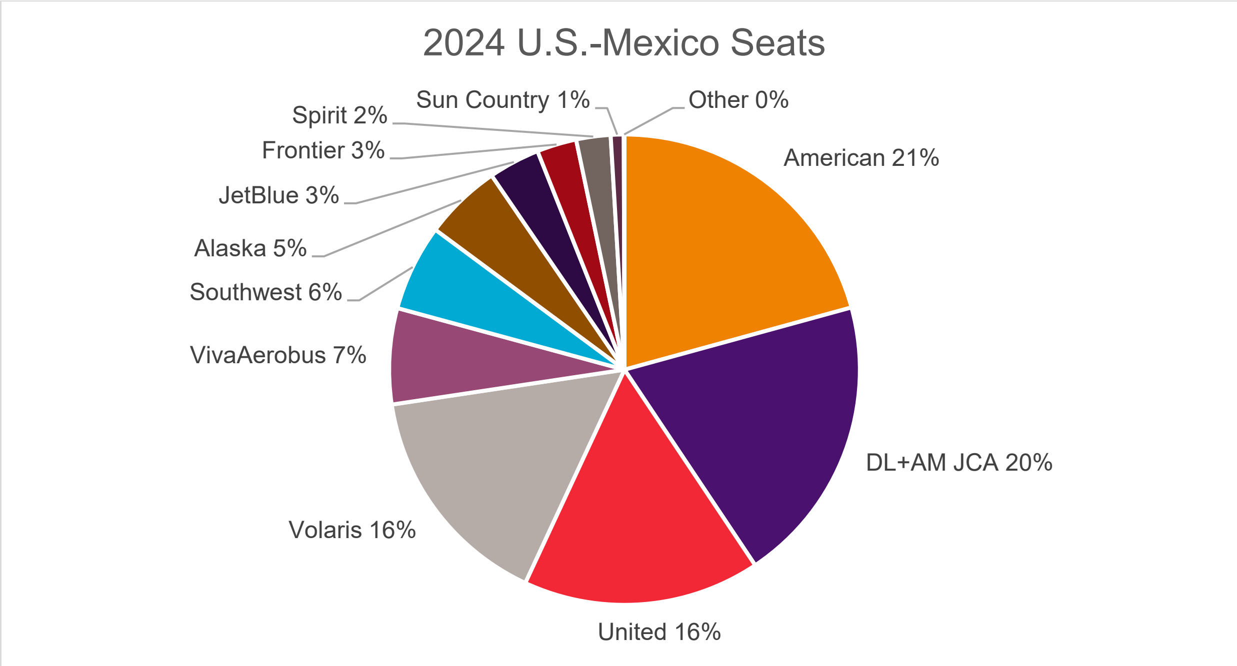
[2] Air Transport Agreement Between the Government of the United States of America and the Government of the United Mexican States, Dec. 18, 2015 ("Agreement").

[3] *See* Show Cause Order 2024-01-17 ("2024 SCO").

[4] OAG Schedules for 2024 via Cirium Diio Mi.



These market shares indicate a dynamic, competitive transborder market where the JCA is vigorously competing to customers' benefit. Delta and Aeromexico have nothing approaching the sort of market share that would allow them to dominate their rivals, unfairly influence prices, or impede competition. To the contrary, the JCA enables Delta and Aeromexico to deliver the JCA's mostly U.S. customers high-quality, convenient service and lower fares.

If Delta and Aeromexico are forced to unravel their joint venture, those benefits will vanish. Up to two dozen routes between the United States and Mexico could be cancelled, with smaller aircraft replacing large narrowbody aircraft on many other routes. Fares on the joint venture's routes would increase. Up to $800 million in annual consumer benefits could evaporate. The competitive landscape in the U.S.-Mexico market would erode substantially, reverting to the structural imbalance that existed prior to the joint venture's implementation. And communities across the United States and Mexico would be directly harmed through reduced and cancelled service and job losses. For example, the JCA Partners estimate that eliminating the JCA would place at risk 23 nonstop frequencies on 21 U.S.-Mexico routes and threaten tens of thousands of jobs ranging from pilots to customer service staff. *See infra*, at 29–32.

Delta credits the Department for implementing responsive measures against the GOM for any violations of the 2015 Open Skies Agreement. Delta fully supports holding any treaty partner accountable when they take actions that harm U.S. aviation interests and American consumers, just as the Administration is now doing with U.S. trade partners around the globe. But the recent Show Cause Order is not the way to accomplish that goal. Instead of imposing costs on the GOM for any Open Skies issues, the Show Cause Order would make U.S. companies, U.S. investors, and U.S. consumers pay the price for the GOM's alleged infidelity to the Agreement.

Instead of terminating its approval of the immunized joint venture, the Department should continue taking other measures to address its concerns regarding the GOM's compliance with the Agreement. For example, Delta commends the Department for invoking Part 213 to impose schedule filing requirements on all Mexican carriers serving the United States and, if necessary, restrictions on their schedules.[5] Delta further commends the Department for activating advance authorization requirements under Part 212 for charter flights. Parts 212 and 213, working concurrently, are a powerful tandem of countermeasures to apply against the GOM without needlessly harming the procompetitive and proconsumer JCA. Delta encourages the Department to aggressively deploy these tools to achieve its policy goals and vindicate American interests, and to do so prior to undertaking any adverse action against the JCA, in order to allow sufficient time to evaluate their efficacy. Given the Administration's recent string of successes in

[5] *See* Request of Delta for Departmental Action Under Part 213, Docket DOT-OST-2024-0019 (Feb. 9, 2024).

reaching strong trade agreements with foreign governments, Delta is confident in the Administration's ability to remediate the GOM's perceived noncompliance with the Agreement without harming U.S. companies and consumers.

Accordingly, the Department should defer action on the recent Show Cause Order and, instead, execute the countermeasures under Parts 212 and 213, as well as those available under the International Air Transportation Fair Competitive Practices Act ("IATFCPA") and under the Agreement itself. Those remedies, not the Show Cause Order, are designed to change the GOM's behavior without harming U.S. interests. Conversely, if the Department were to proceed with the course proposed in the Show Cause Order, it would culminate in an order that harms American businesses and American travelers and that is plagued by multiple violations of the Administrative Procedure Act ("APA")—ranging from internally inconsistent analysis and unreasoned discrimination against the JCA Partners to ignoring key parts of the problem and bypassing sounder alternatives.

II. THE DELTA-AEROMEXICO JOINT VENTURE IS PROCONSUMER AND PROCOMPETITIVE, AND EASILY MEETS THE STANDARDS FOR APPROVAL AND ANTITRUST IMMUNITY.

Delta and Aeromexico's joint venture has generated substantial public benefits in the form of new nonstop transborder routes, expansion of the joint network offerings of the JCA Partners, improved connectivity between the United States and Mexico, more convenient schedule offerings for the traveling public, superior frequent flyer benefits, and more. It therefore is squarely in the public interest and satisfies the applicable statutory test for approval under 49 U.S.C. § 41309, as well as the further test for antitrust immunity under 49 U.S.C. § 41308. The JCA has also generated substantial competitive benefits, providing meaningful competitive discipline to the predominant individual carriers in the

U.S.-Mexico market—American and United—and an array of low cost carriers ("LCCs"). The Department's suggestion to the contrary is unsupported.

A. THE JCA HAS PRODUCED SUBSTANTIAL PUBLIC BENEFITS.

The Supplemental SCO reaches the tentative conclusion—following 16 months of dormancy in the docket—that the JCA no longer serves the public interest. This conclusion is factually unsupported. The JCA has launched 37 new routes and increased capacity by 22%[6] over a turbulent eight-year period laden with multiple exogenous obstacles in the marketplace; the Department has not explained how a venture with this track record of performance is adverse to the public interest. Nor does it explain how a JCA between Delta and Aeromexico—each of which, individually, was a significantly smaller competitor in the U.S.-Mexico market than American and United—has substantially reduced competition. The public benefits generated by the JCA are substantial and irrefutable.

Contrary to the Department's tentative, unsubstantiated findings in the Supplemental SCO, the JCA decisively satisfies the applicable statutory test for approval of an alliance agreement. In 49 U.S.C. § 41309, Congress directs the Department to approve an alliance agreement between a U.S. and foreign carrier when the Secretary finds the *agreement* "is not adverse to the public interest." The extent to which a foreign government's policies contribute to the competitive dynamics in a particular market may be relevant to this analysis, but it cannot be the primary focus. Rather, Section 41309 explicitly prescribes that the cooperative agreement itself is the focus of the public-interest

[6] Reflects a comparison of flight capacity between 2016 and flights loaded in the JCA Partners' transborder schedules through the end of 2025.

test. In fact, the agreement need not even be affirmatively in the public interest to secure approval; it need only be "not adverse" to the public interest.

The JCA easily meets this statutory standard. As explained below, the JCA has delivered substantial and well-documented public benefits over the past eight years in the form of new routes, expanded capacity, enhanced products, and more convenient service offerings between the United States and Mexico than existed prior to the JCA's implementation in May 2017. The JCA has enhanced competition in U.S.-Mexico transborder markets and has not adversely affected competition in Mexico City.

1. THE JCA HAS PRODUCED SUBSTANTIAL CONSUMER BENEFITS.

When the Department approved and granted ATI for the JCA, it found that the JCA had the potential to unlock valuable public benefits, including "broader connectivity between the United States and Mexico, improved network coordination, reduced travel times, and improved efficiency."[7] The Department further concluded that the JCA would result in "increased transborder capacity, enhanced price and service options, expanded reach of Delta's existing network into smaller, regional Mexican markets, and enhanced efficiency of both carriers' transborder services."[8] The Department predicted that these virtues of the JCA would deliver "net benefits to consumers."[9] It was correct.

As the Department foresaw, the JCA has delivered substantial benefits to consumers traveling between the United States and Mexico—60% of whom purchase their tickets in the United States. It has done so, moreover, in the context of a competitive market in which no single carrier is dominant and multiple airlines hold market shares

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[7] Order 2016-12-13, at 1.

[8] *Id*.

[9] Order 2016-11-2, at 2.

comparable in size to the joint venture's. Since implementation, the JCA Partners have deepened and expanded their cooperation in numerous areas and unlocked significant benefits to consumers through network expansion and other product and service enhancements. The JCA generates hundreds of millions of dollars annually in benefits for travelers in the U.S.-Mexico market through lower fares, a higher-quality network and schedule, new and expanded service, more convenient flight options between the two countries, and enhanced competition with other U.S. and Mexican air carriers.

In just the first year of operation of the JCA, Delta and Aeromexico launched new or significantly expanded capacity on 26 U.S.-Mexico routes, and launched entirely new service on six routes (which account for more than 4,300 passenger flights a year).[10] These benefits and many others were neither mentioned nor analyzed in the Supplemental SCO, even though they had been detailed extensively in the JCA Partners' 2022 renewal application as well as their objections to the 2024 SCO. Additionally, since the JCA's inception, Delta and Aeromexico have carried more than 56 million passengers in the transborder market; over that same period, Delta-operated seats in the market have increased by 46%. Together, the JCA Partners compete with other airlines to serve more than 99% of U.S.-Mexico demand.

The JCA Partners' capacity growth in recent years has remained strong and steady. Overall, the JCA grew seat capacity 15% in Winter 2023/2024, 15% in Summer 2024, 12% in Winter 2024/2025, and 5-10% in Summer 2025. Since September 2023, JCA capacity at MEX has grown 26%, with capacity up over 38% on non-MEX, non-beach routes. In 2025, the JCA has or will add service on 30 routes that neither Delta nor Aeromexico operated in 2015. Currently, the JCA propels over 150 daily flights between

[10] Source: OAG data for May 2016-June 2018.

the United States and Mexico across nearly 60 routes. The JCA's service offerings reinforce the vital partnership between Delta and Aeromexico as well as the JCA's powerful role as an engine for travel and trade between the United States and Mexico. It is a vibrant, essential player in this important and competitive market.

2. THE JCA HAS PRODUCED SUBSTANTIAL COMPETITIVE BENEFITS.

When the Department approved and granted ATI for the JCA, it concluded that the JCA "will not substantially reduce or eliminate competition" as conditioned, emphasizing that one of the "number of valuable public benefits" justifying the approval was that it would enhance competition by creating "a third network competitor on par with the current first and second largest competitors"—American and United—both of which were nearly double the size of either Delta or Aeromexico in the transborder market before the JCA was implemented.[11] Experience over the past eight years demonstrates that the JCA has not substantially reduced or eliminated competition in any market. Contrary to the Department's tentative findings in the Supplemental SCO, the JCA has significantly *enhanced* competition in the U.S.-Mexico transborder market—particularly with respect to network rivals American and United, but also with respect to the rapidly growing LCCs.

In rendering its tentative determination that the JCA should be disapproved and stripped of ATI, the Department overlooks the fact that, prior to the implementation of the JCA, competition in the U.S.-Mexico transborder market was lackluster. American and United were the predominant players in the market, serving an array of destinations in Mexico from their proximate Texas mega-hubs with a collective 43% seat share. Aeromexico and Delta trailed at distant 14% and 12% shares, respectively, with LCCs

[11] Order 2016-11-2, at 2.

each lagging in the single-digit range. The competitive mix in the U.S.-Mexico market was poor, and the overall landscape was imbalanced, skewing heavily toward American and United.

Fast-forward to today: the competitive landscape in the transborder market is strong and fertile for further growth, with a balanced mix of carriers offering a diverse array of business models and service options. There are more than 10 competitors in the market, representing a cross-section of business models ranging from ULCCs to LCCs to point-to-point carriers to full-service network carriers. American, United, and Volaris each hold a seat share of at least 15%—with American at 21%, United at 16%, and Volaris at 16%.[12] Combined, Delta and Aeromexico hold a seat share of 20%.[13] The remaining 27% seat share is fragmented across multiple carriers, including Alaska, Southwest, and Viva Aerobus ("Viva").[14] Moreover, U.S. airlines operated 71% of the flights between the United States and Mexico, 68% of the seats, and 65% of the available seat miles in 2024.[15] It is thus simply untrue, as the Department insinuates, that U.S. passenger carriers have been materially harmed by an anti- or under-competitive environment between the United States and Mexico. The market is functioning in a competitive manner. If the JCA were disapproved, however, both Delta and Aeromexico would be unable to maintain their current competitive position, likely resulting in market consolidation.

Since JCA implementation in 2017, multiple LCCs have expanded their U.S.-Mexico capacity, and they have done so at a brisk pace, significantly outpacing the

[12] OAG Schedules for 2024 via Cirium Diio Mi.

[13] *Id.*

[14] *Id.*

[15] *Id.*

industry recovery and gaining market share. Contrary to the Department's intimations in the Supplemental SCO, transborder LCC capacity growth was not limited to beach markets; it extended to Mexico City as well. In fact, competitors launched new or expanded service on 17 transborder routes to MEX within the first year after the JCA was implemented. Their aggressive growth continued in the following years. In 2021, for example, Volaris grew its U.S.-MEX flights by over 50% and its seats by 47% compared to 2019. Viva, meanwhile, expanded its U.S.-MEX capacity by 285%. These market developments reflect healthy competition in a highly liberalized market—in contrast to the distortive competitive environment described by the Department in the Supplemental SCO.

3. THE DEPARTMENT'S EVALUATION OF THE JOINT VENTURE IS DEFECTIVE AND INCOMPLETE.

The Department appears to have considered none of the benefits discussed above; instead, it seeks to discredit the consumer benefits generated by the JCA by manufacturing a set of statistics that depict JCA capacity growth as "substandard." According to the Department, an analysis of scheduled capacity since the implementation of the JCA shows that Delta and Aeromexico have delivered substandard growth in the U.S.-Mexico market when compared to peers. The Department claims "all other carriers" (i.e., non-JCA carriers) grew 70% in 2024 relative to a 2015 base year, whereas the JCA only grew 18%.

The Department's Capacity Benchmarking Methodology Is Flawed

Benchmarking JCA growth against the growth of all other carriers serving the market is an inapposite comparison that illustrates the flaws in the Department's analysis. Tables 3 and 4, which the Department uses to compare JCA growth with non-JCA growth, lump the full-service network carriers (i.e., American and United) together with the

Mexican and U.S. LCCs. But the JCA Partners cannot be meaningfully compared with the LCCs for this purpose. As the JCA Partners emphasized in their 2022 renewal application and their objections to the 2024 SCO, LCCs have grown at a rapid pace in the transborder market since 2016. For example, the share of transborder seats flown by JetBlue, Frontier, and Spirit doubled from 6% to 12% between 2016 and 2023. And Mexican LCCs increased their seat share over that same period from 15% to 20%. Viva, for example, grew its transborder service between 2015 and 2024 from 1,610 flights per year to 16,282 flights per year—an increase of 911%. Volaris expanded rapidly over that period as well, growing its transborder service from 16,829 flights per year to 38,858 flights per year—an increase of 131%.

The comparatively high growth percentages for LCCs reflected in Tables 3 and 4 are likely a manifestation of the low-base effect—that is, a small absolute change from a low initial amount that translates into a very large percentage increase. The Department's reliance on the low-base effect to buttress its argument that the JCA has delivered substandard growth relative to peers is arbitrary and capricious.

Tables 3 and 4 do provide evidence, however, that undermines the Department's theory that there are anticompetitive factors at play in the U.S.-Mexico and U.S.-MEX markets that unfairly benefit the JCA Partners. Both tables show consistent growth by other carriers, which contradicts the Department's assertion that competitive conditions in the transborder market have been adversely impacted by the GOM's policies at MEX. Generally speaking, entry and expansion by rivals reduces anticompetitive effects. When the pace of growth by LCCs and other rival carriers eclipses that of a larger, more mature competitor, it is indicative of a healthy competitive landscape fertile for growth and new entry. If the market were as anticompetitive and distortive as the Department alleges, the dynamic growth exhibited by non-JCA carriers since 2015 would not have been feasible. The fact that non-JCA growth outpaced JCA growth clearly contradicts the Department's contention that the JCA unfairly entrenches Delta and Aeromexico's market position.

The Department's comparison of JCA capacity growth to "all other carrier" capacity growth is also the wrong measure to evaluate JCA capacity performance. The behavior of other airlines is not the counterfactual against which the JCA should be measured. Instead, the more appropriate counterfactual is: what would have happened to Aeromexico's and Delta's growth in the transborder market in the absence of ATI? The Department should have compared how JCA capacity grew in the year before JCA implementation versus the year afterwards. If growth accelerated, that would indicate the JCA enabled additional growth that would not have been feasible or economical had the JCA Partners continued to operate in the transborder market independently.

That growth acceleration is precisely what transpired. In 2016, the year before JCA implementation, Aeromexico and Delta, combined, grew seats in the U.S.-Mexico market by 2% year-over-year. In 2017, the year of JCA implementation, they grew seats by 5%.

The Department also fails to properly analyze the public benefits flowing from JCA connectivity. The Department claims to have analyzed traffic data on U.S.-MEX routes and found that, between 2016 and 2024, there was a "marked reduction in the amount of connectivity at both the U.S. origin and Mexico City than there was before implementation of the JCA."[16] This conclusion is based on a false premise that reflects the Department's fundamental misunderstanding of the geographic scope of the JCA. The Department's "preliminary quantitative analysis" on connectivity included connections beyond MEX to

[16] Supplemental SCO, at 37.

points that are outside the scope of the JCA—such as Guatemala City (GUA), Lima (LIM), and Madrid (MAD). The JCA's scope is transborder; the only beyond-MEX flights that are within the scope of the JCA are those that serve destinations in Mexico. While it is true that overall connections beyond MEX—irrespective of the JCA's scope—are down, the JCA Partners' own quantitative analysis of actual flown data shows that connections beyond MEX within the scope of the JCA (i.e., beyond MEX but within Mexico) increased by 5% between 2016 and 2024. Moreover, connections beyond MEX to core interior Mexico cities such as Oaxaca, Durango, and Veracruz increased by 32% over that same period. These MEX connectivity results are consistent with expectations, as Delta and Aeromexico are incentivized by the JCA's profit-and-loss sharing settlement structure to prioritize within-scope traffic.

The Department's Capacity Analysis Ignores Multiple Extraordinary Factors That Impacted JCA Capacity

The Department's dissatisfaction with Delta and Aeromexico's JCA-enabled network and capacity enhancements is not only illogical, but also unfair. The Department's JCA capacity analysis discounts context—particularly the multiple overlapping exogenous events that presented extraordinary obstacles for all carriers serving the U.S.-Mexico market, but especially the JCA Partners. The Department failed to analyze the correct question, which is what would have happened to Delta's and Aeromexico's growth in the transborder market in the absence of ATI.

A more contextual comparison of current JCA flying to pre-pandemic flying reveals that the JCA Partners have largely delivered on the transborder capacity expansion vision they presented to the Department in 2015 when they initially applied for ATI, notwithstanding multiple intervening exogenous events, including: the extraordinary air travel demand shock attributable to the COVID-19 pandemic, Aeromexico's Chapter 11 bankruptcy proceedings between 2020 and 2022, the 28-month International Aviation Safety Assessment ("IASA") safety rating downgrade of Mexico from Category 1 to Category 2 between 2021 and 2023 that imposed capacity and codeshare restrictions on Mexican carriers, Boeing certification and delivery challenges, and the 2024 SCO threatening JCA termination. Relative to the pre-pandemic period between October 2018 and September 2019, JCA departures between October 2023 and September 2024—the 12-month period following the Federal Aviation Administration's ("FAA") restoration of Mexico's safety rating—were up 11% in U.S.-Mexico flying, with seats up over 25%.

As soon as Mexico's safety rating was upgraded to Category 1—thus unlocking additional Aeromexico flying to the United States—the JCA Partners launched a robust array of new and enhanced transborder flights. Between October 2023 and June 2025, on the expectation that ATI-level JCA coordination would continue indefinitely, the JCA Partners launched flights in 37 new transborder markets, increased frequencies in four existing markets, and upgauged equipment in 17 markets, as detailed below.

New Markets	New Frequencies	Upgauges
ATLBJX	ATLMTY#2	JFKCUN
ATLCZM	ATLMEX#5	MIAMEX
ATLQRO	ATLCUN#6	ATLSJD
ATLSLP	DTWCUN#2	DENMEX
ATLTQO		AUSMEX
BOSMEX		SEAMEX
CVGCUN		SLCPVR
MIACUN		JFKMEX
RDUCUN		MCOMEX
MSPCZM		ATLPVR
DENGDL		LAXSJD
DENMTY		SEACUN
DTWPVR		SFOMEX
DTWQRO		MSPCUN
DTWSJD		SATMEX
DTWTQO		LASMEX
EWRMEX		DFWMEX
FATGDL		
LAXGDL		
MCOGDL		
MIAGDL		
ORDGDL		
SFOGDL		
SLCGDL		
SMFGDL		
IADMEX		
JFKSJD		
MCOMTY		
PHLMEX		
PHXMEX		
RDUMEX		
TPAMEX		
MFENLU		
MIAMTY		
MSPPVR		
MSPSJD		
MSPTQO		

The JCA's substantial capacity enhancements following the pandemic, Aeromexico's emergence from Chapter 11 bankruptcy protection in March 2022, and the

FAA's restoration of Mexico's Category 1 safety designation in September 2023 belie the Department's characterization in the Supplemental SCO that the JCA has delivered "substandard" capacity growth. That the JCA Partners were able to deliver these capacity enhancements despite multiple exogenous events that either severely impacted demand in the U.S.-Mexico transborder market or hampered the JCA Partners' ability to cooperate as robustly as their JCA contemplates is a testament both to the synergies of the JCA and to the wisdom of the Department in approving the JCA and granting it ATI in 2016.

In addition to summarily discounting the extraordinary demand shock attributable to the COVID-19 pandemic and the Category 2 downgrade—which dramatically altered the transborder travel environment for nearly four of the eight years the JCA has been in existence—the Department neglects to consider two other highly impactful developments, both of which were initiated by the Department itself (during different administrations). In 2016, as a condition of approving and immunizing the JCA, the Department required the JCA Partners to divest 14 slot pairs at MEX—equivalent to nearly double Delta's MEX slot holdings at that time. Right off the bat, the JCA lost 14% in U.S.-MEX capacity. Despite the harsh and ultimately unsuccessful MEX slot remedy, the JCA Partners managed to grow capacity at MEX by 22% relative to the 2016 baseline and overall transborder capacity by 22%.

The Department discounts this achievement and theorizes that the inability of some of the carrier-recipients of the divested MEX slots to sustain transborder service evidences an anticompetitive market. This argument blinks reality. The slot remedy required by the Department was supposed to "facilitate entry to overcome market concerns,"[17] but it proved to be a failed experiment in industrial engineering by the

[17] *Id.* at 32.

Obama/Biden Department. As the Department notes in the Supplemental SCO, 8 of the 14 divested slot pairs were ultimately returned by the carriers who received them as part of the reallocation process. Those carriers' failure to sustain service in the transborder market was not, as the Department concludes, a manifestation of the Department's "entry and market power concerns at MEX" or proof that the divestitures "were not sufficient[]."[18] To the contrary, the return of 8 of the 14 divested MEX slots shows that the Department's slot remedy was a solution in search of a problem; it was a market-based validation that MEX slots are not nearly as coveted as the Department had assumed and the JCA's competitors had alleged. Airlines seldom, if ever, return slots at high-demand slot-controlled airports like London Heathrow ("LHR") or Tokyo Haneda ("HND"), but within just one year of receiving divested MEX slots, several U.S. carriers had already returned them. Had the JCA Partners been permitted to retain those divested slots, they could have made better use of them and been better able to sustain capacity levels in key markets and deliver even greater overall capacity growth in the U.S.-Mexico market than they have done since JCA implementation in 2017.

B. THE DEPARTMENT HAS NOT DEMONSTRATED THAT THE JCA SUBSTANTIALLY REDUCES OR ELIMINATES COMPETITION.

Under 49 U.S.C. § 41309, the Department can only disapprove a previously approved cooperative agreement if the ***agreement*** substantially reduces or eliminates competition.[19] A theoretical, prospective reduction in competition in a particular market resulting from a foreign government's policy decisions does not qualify under the statute

[18] *Id*.

[19] 49 U.S.C. § 41309(b).

as a sufficient basis for disapproval of an entirely separate, private agreement between airlines.

The competitive benefits of the JCA—which, again, is the relevant focus here—significantly outweigh any theoretical competitive harms. In fact, and despite ample opportunity to do so in the 40-page Supplemental SCO, the Department does not cite any specific consumer harms supposedly emanating from the JCA. The Department does not allege that the JCA has resulted in higher fares. The Department does not allege that the JCA has contracted its network since obtaining ATI. And the Department does not even allege that particular U.S. or Mexican competitors of the JCA have tried but failed to obtain additional slots at MEX to expand service there.

The Department must—but did not—substantiate any decision it makes in this matter with sufficient data and evidence of relevant harms.

1. THE DEPARTMENT HAS NOT DEMONSTRATED THAT THE GOM'S ACTIONS HAVE CAUSED COMPETITIVE HARM OR HAVE OTHERWISE DISADVANTAGED U.S. CARRIERS.

The Department's tentative decision turns on its assessment that the GOM violated the Agreement by reducing capacity at MEX, confiscating slots from U.S. carriers at MEX, and ordering all-cargo carriers to vacate MEX—and that these measures, combined, "are distorting the marketplace" to the advantage of the immunized Delta/Aeromexico JCA.[20] The JCA Partners do not dispute the Department's factual observations regarding the GOM's actions at MEX; however, the GOM's actions and any alleged anticompetitive effects resulting therefrom cannot plausibly be ascribed to the JCA. The Department has not met its burden of demonstrating how the GOM's actions, individually or collectively, cause competitive harm or otherwise disadvantage U.S. carriers. And, more importantly

[20] Supplemental SCO, at 1.

for purposes of the statutorily mandated inquiry—which focuses on the alleged anticompetitive effects of the cooperative agreement—the Department certainly has not met its burden of explaining why terminating the approval and ATI grant for the JCA is warranted under the circumstances.

The Department's Analysis Overlooks Evidence Of Rigorous Competition

While growth opportunities at MEX are currently limited by slot controls and terminal constraints—as is the case at most Level 3-equivalent slot-controlled foreign airports—other key parts of the U.S.-Mexico market have seen tremendous growth. Here, the Department ignores important examples including Cancun, Guadalajara, and Puerto Vallarta. As the Department notes in the Supplemental SCO (albeit in a flawed comparison chart that uses an incorrect 2015 base year), "all other carriers" have grown 70% in the transborder market since 2015. That same group has also grown 13% at MEX specifically since 2015.[21] These figures reflect robust and sustained competition in both the U.S.-Mexico market generally and the U.S.-MEX market specifically, contradicting the Department's theory that the GOM's actions at MEX have materially harmed the non-JCA carriers.

Another flaw with the Department's "competitive issues" analysis is its superficial treatment of, arguably, the most important consideration as to whether a cooperative agreement has lessened competition: the city-pair analysis. The pre-existing networks of Delta and Aeromexico were highly complementary, with limited competitive overlap. There were only two transborder markets where both Delta and Aeromexico provided competitive nonstop service prior to implementing the JCA: Los Angeles-Guadalajara and New York City-Mexico City. The Department analyzed both markets in its 2016

[21] *Id*. at 35, tbls. 3–4.

Show Cause Order, finding that the JCA would not substantially reduce competition on the Los Angeles-Guadalajara route and that the slot remedies it imposed at John F. Kenedy International Airport ("JFK") and MEX were sufficient to address any potential competitive concern on the New York City-Mexico City route. As the Department acknowledges in the Supplemental SCO, the JCA's shares have actually decreased on the JFK-MEX route, which indicates other carriers are entering and maintaining service in this market. Indeed, since the JCA was implemented, both American and Viva have entered and continue to serve the market. Two other carriers—Volaris and JetBlue—entered the market after 2016, though both have since exited. Considering the dynamic entry (and exit) in this market, the JCA's reduced market share, and the 14-plus slot-pair divestitures at MEX and JFK required by the Department as a condition of granting ATI, no competitive harm can be attributed to the fact that the JCA Partners are no longer competing on this pre-JCA nonstop overlap route.

Likewise, the only other nonstop overlap route that existed prior to the JCA—Los Angeles-Guadalajara—raises no credible competition concerns. First, this route involves no slot constraints at either Los Angeles International Airport ("LAX") or Guadalajara International Airport ("GDL"), so there are no material barriers to entry. Second, the JCA Partners' share on this route has decreased significantly since JCA implementation, from 35% in 2016 to 11% in 2024.[22] The Department arbitrarily omits this city-pair market in its Supplemental SCO. In fact, besides JFK-MEX, no other city-pair market was discussed in the Supplemental SCO (much less analyzed for any potential anticompetitive effects). Without this essential analysis, the Department's tentative conclusion of

[22] OAG Schedules accessed via Cirium Diio Mi.

potential competitive harm in the U.S.-Mexico and U.S.-MEX markets is purely speculative and lacks a rational basis.

The Department nevertheless states in conclusory fashion that, "since 2022, Mexico has significantly altered the playing field for airlines in ways that reduce competition and allow predominant competitors to gain an unfair advantage in the U.S.-Mexico market."[23] It further hypothesizes that "anticompetitive measures imposed by the Government of Mexico . . . are distorting the marketplace," without providing specific details or evidentiary substantiation.[24]

In faulting the GOM and, by extension, the JCA, the Department states, abstractly, that it "sees significant economic harm resulting from the actions of Mexico, including with respect to the continuation of the Delta/Aeromexico JV, and this harm is likely to increase over time given the current distortive marketplace."[25] The "significant economic harm" cited by the Department is not specifically linked to the JCA; rather it is pegged to the "actions of Mexico." This is a clear misapplication of the statutory standard, which requires an analysis of benefits and harms *attributable to the JCA specifically*.

In yet another example, the Department claims it is "concerned about potentially severe impacts to consumers, other competing airlines in the market, and the U.S. economy."[26] These are laudable concerns, but the Department does not substantiate them with any actual evidence that the JCA is directly contributing to what the Department characterizes as the "anticompetitive conditions in the U.S.-Mexico market."[27] Abstract,

[23] Supplemental SCO, at 2.

[24] *Id*. at 1.

[25] *Id*. at 2.

[26] *Id*.

[27] *Id.* at 19.

evidence-free descriptions of prospective harm are not sufficient to justify jettisoning an eight-year-old joint venture that has generated massive benefits for the traveling and shipping public.

The GOM's Actions Harm The JCA Partners Too

The Department contends that Delta and Aeromexico are the primary beneficiaries of an allegedly anticompetitive scheme devised by the GOM to build an uneven playing field in Mexico by reducing capacity at MEX, confiscating slots from U.S. carriers, and prohibiting all-cargo operations at MEX. The Department contends that this supposed tilted playing field advantages Mexican carriers at the expense of U.S. carriers. This contention is false.

Delta and Aeromexico are not beneficiaries of the GOM's slot policy at MEX; in fact, they have suffered from that policy to a degree equal to or greater than other carriers serving the transborder market. Mexican airlines funded the vast majority of the slot reductions at MEX implemented since 2022. A comparison of Summer 2025 MEX slot data versus Summer 2022 reveals that the airline industry's total net reduction in slot pairs at MEX—across all carriers serving the airport—was 142. Of that total, Mexican passenger airlines returned 128 slot pairs—90% of the total. Aeromexico was most heavily impacted by the slot returns, as it was forced to return 70 slot pairs. Volaris and Aeromar each returned 21 slot pairs, followed by Viva (13) and Magni (3). U.S. passenger airlines, meanwhile, returned a net total of 6 slot pairs over that comparison period (2 each for American, United, and Delta). Combined, Delta and Aeromexico were forced to return 72 of the 142 surrendered slot pairs—more than 50% of the total slot returns and over three times more than any other carrier serving MEX.

Accordingly, the Department is plainly wrong to insinuate that the JCA Partners are able to exploit an "uneven playing field" in the U.S.-MEX market by adding flights between MEX and U.S. points "[w]hile U.S. carriers continue to be significantly disadvantaged" due to a slot allocation regime at MEX that "continues to favor Aeromexico and Delta."[28] The reality is that the JCA Partners have been severely harmed by the GOM's slot actions at MEX.

This harm to the JCA Partners is exacerbated by the strategic role that MEX plays in their network structure. MEX is the centerpiece of the JCA Partners' joint transborder network, a critical hub for both local and connecting traffic. The MEX slot reductions have impaired the JCA Partners' ability to achieve the hub density at MEX required to maximize the scope and scale of their transborder network for the benefit of consumers.

The Department Fails To Explain How The MEX Cargo Degree Harms Competition

The Department's position on the GOM's cargo decree is similarly flawed. Like the 2024 SCO that preceded it, the Supplemental SCO fails to establish that the GOM's cargo decree has caused material harm to U.S. carriers specifically and U.S. aviation interests more generally. According to the Department, the cargo decree "undermines [the ability of all-cargo carriers] to compete with combination passenger-cargo carriers such as Delta and Aeromexico at the largest Mexican airport."[29] The Department's harm theory is that "forcing all-cargo carriers out of MEX while allowing Delta/Aeromexico and other combination carriers to continue to carry belly-cargo at MEX . . . confers an unfair advantage in the cargo market to the ATI holders."[30] This position is unsupported, as

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[28] *Id*.

[29] *Id*.

[30] *Id*. at 21.

cargo carriers' business models differ from Delta and Aeromexico's belly cargo operations.

Because most cargo is inanimate, all-cargo operations are generally less time-sensitive than passenger operations and less reliant on an airport's location in a particular city or region. So long as a package arrives at its final destination on schedule—often following a multi-modal itinerary involving a combination of ground and air transportation—the package, the shipper, and the recipient are generally indifferent as to whether the package's journey by air to a particular market was non-stop, one-stop, or multi-stop, or whether or not its entry point into the destination market was at the airport most proximate to the central business district of a city.

With these unique attributes of the cargo industry in mind, the Department has failed to substantiate that requiring all-cargo carriers to exit MEX and use alternate airports like nearby Santa Lucia Airport ("NLU") materially harms U.S. aviation interests to the degree that would warrant jettisoning the approval of the JCA. To begin, NLU is proximate to Mexico City. The land area of Mexico City is approximately 571 square miles—larger, for example, than Washington, D.C.'s approximately 61 square miles. Despite the vast geographic footprint of Mexico City, NLU is located approximately 30 miles from the center of Mexico City. By comparison, Washington Dulles ("IAD") is located approximately 25 miles from downtown Washington D.C., in Loudoun County, Virginia. Indeed, multiple U.S. all-cargo carriers have already relocated their operations to NLU, and none has publicly expressed material concerns with this change in Department dockets.

The Department has failed to explain why NLU is not an adequate base for all-cargo carriers serving the Mexico City metropolitan area, or how U.S. aviation interests have been sufficiently harmed by the GOM's decision to warrant such an extreme and unprecedented action against a proconsumer and procompetitive alliance. Nor has the Department established that the alleged anticompetitive effects of the prohibition on all-cargo operations at MEX should be ascribed to the JCA—rather than to the GOM. If the JCA is disapproved, as the Department has proposed, the net effect will be that all-cargo carriers will still be unable to serve MEX. And competition among U.S. belly-cargo carriers at MEX is actually enhanced by the JCA, which strengthened Delta's weak position against the two dominant U.S. carriers at MEX, American and United. The Department's failure to address these facts in the Supplemental SCO renders its tentative findings arbitrary and capricious.

2. THE DEPARTMENT'S ASSESSMENT OF COMPETITIVE CONDITIONS BETWEEN THE U.S. AND MEXICO IS CURSORY AND UNSUPPORTED.

Rather than conduct a comprehensive competitive assessment that analyzes competitive conditions in Mexico and the extent to which the JCA has, supposedly, contributed to a reduction in competition in the transborder market, the Department offers only a cursory review of U.S.-Mexico competition that ignores the fundamental procompetitive premise on which the JCA was based: prior to the JCA, Delta's and Aeromexico's independent route networks were highly complementary—with only two nonstop overlap routes (JFK-MEX and LAX-GDL)—and their combined market shares were lower than each of American's and United's independent networks.

The Department premises its competitive assessment on the claim that "Mexico's actions have adversely affected the market in ways that no longer enable an immunized alliance to operate without substantially reducing competition and consistently with the public interest."[31] But the Department never substantiates this claim.

The Department's next argument is also unavailing. The Department observes that Delta and Aeromexico's combined share of U.S.-MEX traffic increased from 48% in 2016 to 50% in 2025, and that the carriers' combined slot holdings at MEX increased from 50% to 60% over that same period.[32] Although the Department fails to elaborate on why these increases are supposedly indicative of an anticompetitive market, the implication is that an increase in traffic and slot shares at MEX suggests the JCA Partners were exploiting a competitive advantage at MEX to the exclusion of other airlines, particularly new entrants. Offering an example, the Department asserts that "no new carrier has entered the U.S.-MEX market since" 2016.[33] This statement is false. Viva operated zero U.S.-MEX flights in 2015 or 2016. Viva entered the market in 2017 with ambitious growth plans, and, by 2024, Viva operated 8% of U.S.-MEX flights. Combined, the U.S.-MEX capacity of Viva and Volaris has increased 112% relative to the 2017 baseline. If MEX access and entry concerns were as profound as the Department claims, then a new entrant like Viva and a limited incumbent like Volaris would not have been able to rapidly grow capacity at MEX.

Nor does the Department consider the fact that the JCA Partners' increase in traffic and slot holdings at MEX stems in large part from the exit of Interjet, which ceased operations in 2020 after facing significant financial difficulties attributable, in part, to the COVID-19 pandemic. At the time, Interjet was Mexico's third-largest airline, behind

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[31] *Id*. at 31.

[32] *Id*. at 32.

[33] *Id*.

Volaris and Aeromexico, with a significant presence at MEX. Viva and Volaris were the primary beneficiaries of Interjet's exit. They moved quickly to fill the void left by Interjet at MEX, expanding their service from MEX—including but not limited to the transborder market—which is indicative of a healthy, functioning marketplace. Aeromexico acquired approximately 50% of Interjet's slots at MEX, while Viva and Volaris took the remaining 50%, contributing to increased competition at MEX and allowing the airlines to quickly adapt to Interjet's exit.

The Department's final argument in the competitive assessment actually undermines its position. The Department notes that the JFK-MEX market—one of the two nonstop overlap routes identified by the Department in 2016 as a source of concern—"remains concerning" due to the JCA Partners' 72% share in this market.[34] The Department acknowledges, however, that their combined share on this route in 2025 is considerably lower than it was in 2016, when they commanded a combined 81% share. As the JCA Partners' concentration on this route has decreased, the Department cannot credibly assert that the JCA has caused a reduction in competition on this important transborder route.

In sum, the Department has failed to substantiate that the JCA has resulted in a substantial reduction in competition. In fact, the JCA has been procompetitive and proconsumer—and thus the Department has no basis to terminate the JCA or withdraw its grant of ATI.

[34] *Id*.

III. UNRAVELING THE JCA WOULD CAUSE SEVERE HARM TO CONSUMERS, COMPETITION, COMMUNITIES, AND THE ECONOMY.

As the JCA Partners detailed in their 2022 ATI Renewal Application, and their objections to the 2024 SCO, the JCA generates substantial public benefits and exemplifies the virtues of deep metal-neutral cooperation enabled by the Department's ATI grants.[35] The JCA has irrefutably fostered significant public benefits over the past eight years in the form of new routes, expanded capacity, enhanced products, and more convenient service offerings between the United States and Mexico.

Dissolution of the JCA would undermine these proconsumer and procompetitive benefits, causing acute harm to passengers, employees, and economic activity. The JCA creates incentives for Delta and Aeromexico to enhance capacity to connect their complementary networks in the United States and Mexico, respectively. Absent the JCA, Delta and Aeromexico would not engage in profit-and-loss sharing on in-scope JCA routes, and without such sharing, their incentives to codeshare or otherwise cooperate in ways that enhance benefits to passengers would be severely curtailed. That arrangement cannot come close to replicating the consumer and competition benefits of the JCA. The Department must take these negative effects of its contemplated course of action into account in its decisionmaking process. *See, e.g.*, *Michigan v. EPA*, 576 U.S. 743, 753 (2015) ("reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions" (emphasis in original)).

The adverse impacts of a dissolved JCA on U.S.-Mexico consumers would be massive. According to Dr. Brian Keating's Economic Assessment, eliminating the JCA

[35] The JCA Partners incorporate by reference the content of their 2022 ATI Renewal Application and supporting materials.

would place at risk 23 nonstop frequencies on 21 U.S.-Mexico routes.[36] These at-risk frequencies account for approximately 1.8 million round-trip transborder seats annually (4% of total transborder seats).[37] The elimination of at-risk nonstop frequencies would also reduce connecting options and, for many communities, would substantially reduce connections between the United States and Mexico. Critically, the at-risk transborder nonstop flights also serve as legs on connecting itineraries that connect smaller communities in the United States and Mexico. In total, 1,062 one-stop itineraries on 831 different routes would be placed at risk. In many cases, these one-stop itineraries represent the only viable means of air travel on the route. For example, 132 transborder routes that currently have at least one one-stop option would have no non-stop or one-stop flight options available in the absence of the JCA.[38]

The Economic Assessment estimates that these and other consequences of eliminating the JCA would harm passengers by more than $800 million per year.[39] Such harm would be manifested through a significant reduction of non-stop and one-stop options available to passengers and a corresponding reduction in the level of cooperation between Delta and Aeromexico. These network cuts would harm consumers by materially reducing the quality of transborder air travel options available to them. These consumer harms would be felt not just on routes between the U.S. and Mexico City, where the Department has expressed the greatest concern, but also on many routes that do not

[36] B. Keating, An Economic Assessment of the Effect of Eliminating the Joint Cooperation Agreement Between Delta Air Lines and AeroMexico at 2–3, DOT-OST-2015-0070 (Feb. 23, 2024) ("Economic Assessment").

[37] *Id*. at 3.

[38] *Id*. at 3–4.

[39] *Id*. at 3.

touch Mexico City, including for example, major business routes that connect U.S. and Mexico automotive hubs.[40]

Dissolution of the JCA would also endanger nearly 4,000 jobs in the United States attributable to the loss of at-risk frequencies that directly and indirectly support thousands of jobs, including pilots, flight attendants, reservations staff, maintenance staff, customer service staff, and management.[41] A loss in frequencies would also adversely affect tourism. Specifically, the loss of nonstop service on select routes will cause nearly 90,000 fewer tourists to visit the United States from Mexico—accounting for over $200 million in annual tourism spending. These estimates are conservative because they do not account for the additional loss of one-stop service, meaning actual reductions in tourism expenditures are likely to be even greater. In total, the elimination of the JCA would reduce the GDP of the United States by over $310 million, attributable to the reduction in economic activity, including loss of jobs and reduction in tourism spending.[42]

As the JCA Partners emphasized in their ATI Renewal Application and their objections to the 2024 SCO, an unwinding of the JCA would also cause the competitive landscape in the transborder market to erode by weakening the only U.S.-Mexico competitor capable of building and maintaining a network and schedule that can compete meaningfully with American and United. The Department does not refute these findings in the Supplemental SCO; in fact, it does not even acknowledge them.

[40] *Id*. at 4–5.

[41] *Id*. at 5.

[42] *Id*.

IV. THE DEPARTMENT'S SUPPLEMENTAL SCO, LIKE ITS PREDECESSOR, IS FATALLY FLAWED UNDER THE ADMINISTRATIVE PROCEDURE ACT.

The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Supplemental SCO, if finalized in its current form, would violate the APA in multiple respects: The Supplemental SCO does not apply the correct statutory standard; it is internally inconsistent and misses important aspects of the relevant problem by focusing solely on MEX, rather than the broader U.S.-Mexico market; it fails to engage with either the JCA Partners' Economic Assessment or their 2022 application to renew their ATI, providing no real reasoning for either omission; and the Department again fails to explain why it cannot proceed with available alternatives for addressing the purported problems at MEX or why it is treating the JCA so differently from multiple other immunized joint ventures with foreign airlines that benefit from slot controls, including at LHR, Lisbon ("LIS"), or HND. Any of these reasons, standing alone, would be a sufficient basis for a court to set aside an order terminating the JCA and its ATI.

A. THE DEPARTMENT STILL FAILS TO APPLY THE RELEVANT STATUTORY STANDARDS.

The Department, like any other federal agency, is required to comply with the statutory provisions that define, channel, and constrain its authority. Here, the Department must carry out its responsibilities under 49 U.S.C. §§ 41308 and 41309, which prescribe the standards under which the Department must consider applications for approval of international alliance agreements and for exemptions from the antitrust laws to the extent necessary to allow air carriers to implement those agreements. While the Department's Supplemental SCO acknowledges the statutory standard (its predecessor had not), the Department continues to ignore the controlling statutory directives. Rather than applying the clear statutory standards laid out in detail in Sections 41308 and 41309, the Supplemental SCO superimposes an extra-textual "necessary" "predicate" of its own creation: the adherence by the GOM to its obligations under the U.S.-Mexico Open Skies Agreement.[43] The Supplemental SCO also conflates the separate statutory standards governing approvals of cooperative agreements, on the one hand, and ATI, on the other hand. Each action is contrary to law and, if not remedied by the Department, would render any final order invalid. *See* 5 U.S.C. § 706.

In reviewing agency actions under the APA, courts must "first . . . decide whether the [agency] acted within the scope of [its] authority." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). "[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted b[e] clearly disclosed and adequately sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("*Chenery I*"); *see also* 49 U.S.C. § 46110(a) (providing for judicial review of ATI orders); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (holding that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority"). Agencies "must follow the procedures 'specifically authorized' by Congress," rather than "their own notions" of how they might prefer to proceed. *Civ. Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 334 (1961). And, in exercising their statutory authority, agencies must ensure fidelity to Congress's directives as written. *See Loper Bright*, 603 U.S. at 413 ("courts need not and under the APA *may not* defer to an agency interpretation of the law simply because a statute is ambiguous" (emphasis added)).

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[43] Supplemental SCO, at 15–18.

Congress has directed the Department to undertake a two-step analysis of joint venture agreements submitted for approval and accompanying requests for ATI. The first step—the analysis of the joint venture agreement—requires the Department to determine whether the agreement is "not adverse to the public interest." 49 U.S.C. § 41309(b). In undertaking that inquiry, it is the Department's policy to consider whether the agreement is necessary "to achieve important public benefits," including "U.S. foreign policy goals," Order 2011-11-16 at 5 (citing prior decisions), and whether the agreement promotes the public-interest considerations set forth in 49 U.S.C. § 40101(a). If an agreement is "not adverse to the public interest," the Department must then determine whether the agreement "substantially reduces or eliminates competition." 49 U.S.C. § 41309(b)(1). If the Department finds that it does, the Department must disapprove the agreement "unless the [Department] finds" both that the agreement "is necessary to meet a serious transportation need or to achieve important public benefits (including international comity and foreign policy considerations)," *id.* § 41309(b)(1)(A), and that "the transportation need cannot be met or those benefits cannot be achieved by reasonably available alternatives that are materially less anticompetitive," *id.* § 41309(b)(1)(B). A party seeking approval of the agreement must establish the "transportation need or public benefi[t]"; a party opposing the agreement has the burden of establishing that the agreement "substantially reduces competition and that less anticompetitive alternatives are available." *Id.* § 41309(c)(2).

The second step of the analysis focuses on the Department's authority to exempt the agreement from U.S. antitrust laws pursuant to 49 U.S.C. § 41308. Assuming the Department has already found that the agreement is not adverse to the public interest under Section 41309 and further determines that it is "required by the public interest," it may exempt the parties to the agreement from the antitrust laws, but only to the extent necessary to allow those parties to proceed with the transaction. 49 U.S.C. § 41308(b). To determine whether an agreement is "required by the public interest," the Department assesses whether the parties to the agreement would not otherwise proceed with the transaction. *See* Order 2010-7-8 at 8. If the Department finds that the agreement substantially reduces competition under Section 41309(b)(1), but that countervailing needs and benefits warrant approval, the statute requires the Department to grant ATI under Section 41308(c) to the extent necessary to allow the parties to proceed with the transaction.

Open Skies Predicate

Distilled to its core, the statutory framework authorizes the Department to approve and grant ATI to an international alliance agreement involving a U.S. and foreign air carrier if: (1) the agreement is not adverse to the public interest and does not substantially reduce or eliminate competition; and (2) a grant of immunity is required for the parties to proceed with the transaction. It does *not*, however, authorize the Department to superimpose additional prerequisites to approval and a grant of ATI on top of those expressly prescribed by Congress.

Yet the Department has done just that by creating an extra-statutory "step zero" in its analysis: to secure approval of a joint venture agreement and a grant of ATI, parties must demonstrate that Open Skies exist in the relevant markets. This is impermissible under the clear text of the statute. *See Barnhart v. Walton*, 535 U.S. 212, 217 (2002) (courts "must give effect to the unambiguously expressed intent of Congress"). And, even to the extent that the Supplemental SCO's adoption of its Open Skies predicate may be read as an attempt to fill in the interstices of the statutory commands (which it cannot), the

Department must bring a critical eye to its prior interpretations of this statutory framework in light of recent precedent enhancing courts' role in scrutinizing agency interpretations. *See Loper Bright*, 603 U.S. at 412–13. But the Department fails to revisit its prior interpretations in light of *Loper Bright* and is unable to reconcile its Open Skies predicate with a statutory scheme unambiguously imposing a two-step—not a three-step—review process.[44]

The Department's proffered justifications for adopting an Open Skies predicate are uniformly unpersuasive. *First*, the Department argues that this Open Skies predicate has long been a feature of its ATI analysis.[45] But neither the practice's longevity nor its utility is relevant here. "[T]he fact that [an agency's] practice is longstanding cannot render it lawful." *Envtl. Def. Fund v. EPA*, 124 F.4th 1, 18 (D.C. Cir. 2024). The Department cannot override the analysis required by Congress by inventing, and then continuing to apply, its own extra-statutory "Step Zero" for ATI analysis. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if," among other things, "the agency has relied on factors which Congress has not intended it to consider"). Moreover, an Open Skies predicate is particularly

[44] The Department of Justice ("DOJ") attempts to avoid this problem by re-writing the Supplemental SCO, saying that the Department's Open Skies predicate is really just *part* of an overall competition analysis. Comments of the Department of Justice at 12–13, DOT-OST-2015-0070 (Aug. 8, 2025); *but see* Supplemental SCO at 15 (the Department will "not *consider* requests for ATI in a market" without an Open Skies agreement (emphasis added)). It is unclear what DOJ means by this. If DOJ means that all the elements of an Open Skies agreement are necessary for the Department to find robust competition, then DOJ creates the same extra-statutory condition as the Department. And if DOJ means that the elements of an Open Skies agreement are merely a *factor* in an overall competition analysis, then DOJ agrees with the JCA Partners that the Department must perform a competition analysis for the entire U.S.-Mexico market, without treating Open Skies as a predicate or otherwise giving undue weight to the Open Skies elements. As noted both above and below, such a full-blown analysis demonstrates that the U.S.-Mexico market remains highly competitive; neither the Department nor DOJ has said anything that shows otherwise.

[45] *Id*. at 15–16 (stating that Open Skies is the "starting point" for reviewing joint ventures).

inappropriate in the setting of the U.S.-Mexico market because—regardless of whether the GOM is in technical compliance with the Agreement—U.S. carriers already have substantial access to the market. As discussed above, U.S. airlines operated 71% of the flights between the United States and Mexico, 68% of the seats, and 65% of the available seat miles in 2024. Thus, even if an Open Skies predicate were appropriate in markets where U.S. carriers' access is substantially foreclosed, it has no place in the U.S.-Mexico market, which U.S. airlines robustly serve.

Second, the Department attempts to side-step the JCA Partners' objection, arguing that its Open Skies predicate is consistent with the competition and public-interest inquiries called for under the statute.[46] But agencies are not permitted to substitute their own preferred procedures for those Congress has prescribed—even when they believe that either procedural approach would lead to similar substantive results. *See, e.g.*, *Delta Air Lines, Inc.*, 367 U.S. at 334 (agencies "must follow the procedures 'specifically authorized' by Congress and cannot rely on their own notions of implied powers"); *United States v. Seatrain Lines*, 329 U.S. 424, 432–33 (1947) (agencies may act only via those procedures "specifically authorized by Congress"). Here, the statutorily prescribed procedures call for an examination of all pertinent aspects of competition and the "public interest," and the Department cannot pretermit that holistic analysis with the binary question whether Open Skies exist in a given country.

Third, the Department points to Delta's prior statements acknowledging the Department's consideration of Open Skies in evaluating international alliance

[46] *See, e.g.*, *id.* at 16 ("Delta and Aeromexico argue that the Department's reliance on the 'Open Skies predicate' to dismiss the application is 'extra-statutory.' *Regardless of the label*, the Department's approach is firmly grounded in statute and U.S. competition law.") (emphasis added).

agreements, accusing Delta of "chang[ing] [its] position."[47] But Delta's *acknowledgment* of the Department's prior practice is hardly an *endorsement* of the Department's decision to diverge from the statutorily mandated analysis and, in any event, could not prevail over Congress's clear statutory commands.

For all of these reasons, the Department lacks the authority to condition either the continuation of the JCA Partners' joint venture agreement or the grant of ATI on Mexico's compliance with its Open Skies obligations. But, as explained below, even if Open Skies were relevant here, it would be relevant only to *the grant of ATI*, not to the distinct and antecedent question whether the joint venture agreement should be approved.

Sequential Statutory Steps

Congress required the Department, when considering international alliance agreements, to separately and sequentially address the two distinct aspects of parties' applications: in Step 1, the Department must determine whether to approve a joint venture agreement, 49 U.S.C. § 41309(b)(1), and then, in Step 2, the Department must consider whether to grant ATI for that agreement, *id.* § 41308. The Department may not ignore Step 1. *See id.* § 41309(c)(3) (the Department must "include the findings required [in Step 1] in an order of the [Department] approving or disapproving an agreement"). Nor may the Department reorder the steps on its own initiative. *See Delta Air Lines, Inc.*, 367 U.S. at 334.

The Department's practice of considering Open Skies when assessing international alliances—which, to be clear, the JCA Partners believe contravenes the statutory framework, *see supra*, at 32–38—reflects this distinction and makes clear that, at most, compliance with an Open Skies agreement is relevant to the second step of

[47] *Id*. at 15 & nn.62–63.

whether to grant ATI, not the first step of whether to approve a joint venture agreement. As the Department explains, "it is the longstanding policy of the Department not to consider requests for *ATI* in a market until all elements of an Open Skies agreement are available to carriers."[48] That "longstanding policy" is pegged to *ATI* for a cooperative agreement between airlines (Step 2 of the statutory analysis), not to mere *approval* of such an agreement (Step 1 of the statutory analysis). To the JCA Partners' knowledge, the Department has never announced a policy whereby it will not consider *approval* of a cooperative agreement absent an Open Skies environment.

Here, the Department takes the position that the GOM is not observing all essential elements of the U.S.-Mexico Agreement and, consequently, that Open Skies no longer exists in Mexico. Applying its policy that Open Skies is a predicate to entertaining and maintaining *ATI*, the Department might decide that it is left with no choice but to withdraw the ATI grant for the JCA (although, for the many reasons addressed elsewhere in this submission, the JCA Partners submit that such a decision would impair the public interest and be arbitrary and capricious). But the Department has not proposed to do that here. Rather it has proposed to *disapprove the JCA* on the basis of its Open Skies concerns—and then *withdraw the ATI* grant as a necessary consequence of the disapproval.[49] The Department's distortion of its own Open Skies policy here thus represents an unacknowledged and unreasoned departure from the Department's previous interpretations of the statutes governing its review of joint ventures and requests for ATI. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (When an agency

[48] *Id*. at 15 (citing Order to Show Cause, Nov. 4, 2016; Order 2016-11-2, DOT-OST-2015-0070-0074, at 7) (emphasis added).

[49] *See, e.g.*, *id*. at 3.

chooses to depart from its prior policy, it "must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'") (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox I*")).

Accordingly, even accepting the Department's own Open Skies policy, the Department has it backward. Under that policy, disapproval of a cooperative agreement is not an appropriate consequence of an Open Skies breach; the only permissible consequence under that policy is the loss of ATI. The JCA Partners emphasize that this is a distinction *with* a difference, as the statutory standards for disapproval of a cooperative agreement are distinct from the statutory standards for termination of an ATI grant. Like courts, the Department must seek to "effectuate the will of Congress" and engage in reasoned decision-making within statutory boundaries. *Loper Bright*, 603 U.S. at 395. Because the Department did not correctly apply Step 1 of the statutory analysis to the JCA—even accepting the validity of the Department's Open Skies policy—the Department must re-do that analysis before it can be in a position to conclude that the JCA no longer meets the ATI test in Step 2 of the statutory analysis.[50]

[50] The Department diverges from its own policies in other respects as well. The Department acknowledges that it must conduct a competitive effects analysis of the JCA under the Clayton Act test as part of Step 1 of the statutory analysis. *See* Supplemental SCO at 17 ("Under section 41309, the Secretary shall disapprove a joint venture agreement that 'substantially reduces or eliminates competition,' which is the same standard applied in the Clayton Act when examining the impact of a transaction (such as a merger) on relevant markets."). But the Department failed to conduct that analysis here, asserting that, before it can be in position to apply the Clayton Act test to the JCA, "Mexico [must first] establish a track record of providing certainty that the rights of new entry, competitive pricing, and a fair and equal opportunity to compete will be respected. Only under such circumstances can the Department have confidence that its competition analysis, conducted under Clayton Act standards, is able to fully assess the competitive implications of a grant of ATI." *Id.* at 2. The Department thus admits it did not—because, according to the Department, it could not—apply the Clayton Act test required by the statute and Department precedent in evaluating the competitive effects of the JCA. The Department does not meaningfully explain, however, why such an analysis would be impossible at this time in the supposed absence of "a track record of certainty" established by the GOM; after all, many aspects of competition analysis are inherently counterfactual and predictive. Accordingly, the Department

Finally, as the JCA Partners noted in their prior submission,[51] even if the Open Skies predicate were appropriate at Step 2 of the statutory analysis, the Department could apply it here only by addressing each of the 11 Open Skies factors and determining which the GOM has allegedly violated. The Department contends that the GOM's actions are inconsistent with provisions of the U.S.-Mexico Agreement,[52] but it still does not explain how GOM's actions affect the Open Skies factors. The Department cannot rely upon an Open Skies policy and precedent assertedly developed under that policy and then fail to apply the policy to the facts before it.[53]

B. THE SUPPLEMENTAL SCO IS INTERNALLY INCONSISTENT.

The Supplemental SCO is also flawed due to the Department's internally inconsistent reasoning. Because the APA requires agencies to provide a reasoned explanation for their decisions, any explanation that "contradicts itself" or is otherwise "internally inconsistent" is arbitrary and capricious. *Interstate Nat. Gas Ass'n of Am. v. Pipeline & Hazardous Materials Safety Admin.*, 114 F.4th 744, 755 (D.C. Cir. 2024); *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1028 (D.C. Cir. 2018). Here, the Department's order includes three notable inconsistencies: (1) The Department argues that the JCA threatens competition, while faulting the JCA Partners for underperforming compared to their competitors; (2) the Department asserts that it will assess the supposed anticompetitive barriers facing the JCA Partners' competitors against a hypothetical world without those alleged barriers, while refusing to evaluate the JCA's benefits against a

has engaged in an unexplained and unreasoned departure from prior precedent, and any final order that followed suit would be unlawful. *See* Part IV.D, *infra*.

[51] 2024 SCO Objections, at 14–15.

[52] Supplemental SCO, at 18–19.

[53] *Id*. at 15.

hypothetical world where the JCA does not exist; and (3) the Department says that it has formulated its approach to the JCA to incentivize the GOM to comply with its Open Skies Agreement, while simultaneously denying that the Department is trying to bring the GOM into compliance with the Agreement.

First, the Department contradicts itself when discussing the competitive benefits and purported competitive harms of the JCA. As detailed above, the Department repeatedly says that maintaining the JCA's ATI would afford Aeromexico and Delta an unfair competitive advantage by entrenching their position in the supposedly anticompetitive MEX market.[54] According to the Department, the GOM's actions at MEX have created an "uneven playing field" that the JCA Partners "are able to exploit . . . by adding additional flights between MEX and U.S. points" while other U.S. carriers are "significantly disadvantaged in their ability to plan, maintain and/or add services at MEX."[55] But, at the same time, the Department faults the JCA Partners for "deliver[ing] substandard growth rates" compared to their peers and failing to grow their capacity as much as competitors "in the overall U.S.-Mexico market."[56]

The Department cannot have it both ways. If the JCA Partners are being significantly outperformed by their competitors, it cannot also be the case that the JCA Partners are exploiting some anticompetitive advantage to freeze their competitors out of the market. The Department does not explain how the JCA Partners are, on the one hand, supposedly benefitting from an advantage attributable to the GOM's allegedly anticompetitive policies at MEX, while, on the other, are growing capacity at rates far

[54] *Id*. at 2, 19, 26.

[55] *Id.* at 19.

[56] *Id.* at 34–36.

slower than their competitors. *See Chenery I*, 318 U.S. at 94 (agency decisions must be reasoned). The only reasonable conclusion is that, in reality, the JCA Partners are *not* benefitting from any unfair, anticompetitive advantage and that competition in the U.S.-Mexico market remains free and fierce.

The Department's inconsistent reasoning highlights another problem with the Department's analysis. As detailed throughout this submission, the Department's discussion of the JCA's supposedly anticompetitive effects almost exclusively focuses on the U.S.-MEX market. The Department repeatedly asserts that the JCA Partners are purportedly benefiting from nontransparent slot allocations *at MEX*, cargo restrictions *at MEX*, and other problems *at MEX*. But the relevant market here is the broader U.S.-Mexico market, which includes routes between dozens of airports in the United States and Mexico. Indeed, the Department acknowledges this. When critiquing the JCA Partners' capacity growth, for example, the Department admits that the JCA Partners recorded "growth in the U.S.-MEX market"—but dismisses that growth because the JCA Partners' competitors "still grew more . . . in the *overall* U.S.-Mexico Market."[57] That is another unreasoned inconsistency: If the relevant market is the overall U.S.-Mexico market (which it is), then the Department must consistently apply that market throughout its analysis, including when assessing the supposedly anticompetitive effects of the JCA.

Second, the Department's treatment of the JCA's supposed competitive harms and benefits is inconsistent on yet another key benchmark: whether the harms and benefits should be assessed against real-world outcomes or hypothetical outcomes and risks. When assessing the JCA's supposed competitive harms, the Department says that it cannot look only to the real-world number of new services launched at MEX, but must

[57] *Id.* at 36.

"take into account the counterfactual" of what airlines would do absent the GOM's alleged Open Skies violations "and the overall impact on the market given the limitations placed on" the JCA Partners' competitors.[58] Similarly, the Department raises concerns about potential risks that the GOM might extend similar slot practices to other airports, such as Cancun, Guadalajara, or Puerto Vallarta.[59] Each of these concerns is hypothetical and removed from the actual facts on the ground.[60]

Yet when assessing the benefits of the JCA, the Department does not engage in a similar hypothetical or counterfactual analysis. For example, the Department refuses to evaluate the counterfactual of how Delta and Aeromexico would have competed against their numerous competitors without the JCA and ATI. Instead, the Department focuses on how the JCA Partners have *actually* performed since 2015, without asking whether the JCA Partners' performance would have been materially worse without the 2016 grant of ATI. That omission is particularly glaring given the competitive disadvantages that Delta and Aeromexico faced before their collaboration, the headwinds they faced during the subsequent COVID-19 pandemic, and the stiff competition they have continued to face from American and United. And when confronted with Dr. Keating's Economic Assessment of the risk that cancelling the JCA Partners' ATI will lead to "cancellation or reduced service," the Department dismissed the analysis as "not determinative" in part because those risks may not materialize.[61] *See supra*, at 6–11, 29–32 (analyzing the Department's discussion of the JCA's actual performance and Dr. Keating's analysis).

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[58] *Id.* at 20.

[59] *Id.* at 19.

[60] *See* DOJ Comment at 12 (noting this "counterfactual competitive evaluation").

[61] Supplemental SCO, at 30–31.

The Department provides no explanation for its divergent approaches to evaluating the JCA's supposedly competitive harms (where evaluating hypothetical risks and counterfactuals is deemed appropriate) and purported lack of benefits (where hypothetical risks and counterfactuals are not considered). If the Department wishes to evaluate only the real-world facts, it must do so when assessing competitive harms as well—and it must grapple with the facts showing that American and United continue to lead the U.S.-Mexico market among U.S. carriers and that there is robust competition in that market among both U.S. and Mexican carriers. Conversely, if the Department wants to engage in a counterfactual analysis and consider hypothetical risks, it must do so when assessing the JCA's benefits as well—including acknowledging the facts that the JCA Partners' growth has been enabled by their joint venture and ATI, and that terminating the JCA and ATI risks eliminating multiple routes and shifting even greater market share to American and United. Either way, the Department's internally inconsistent approaches are arbitrary and capricious.

Third, the Department contradicts itself regarding whether it views the JCA Partners' ATI as a tool to bring the GOM into compliance with the Open Skies Agreement. On the one hand, the Department says that, in 2016, it limited "the original grant of ATI to five years" in order to "provide an incentive for Mexico" to implement promised reforms.[62] In keeping with the spirit of that decision, the Department also now suspends Delta and Aeromexico's 2022 *de novo* application pending, in part, "Mexico's full compliance with the [Open Skies] Agreement."[63] But on the other hand, the Department refuses to credit other tools that could bring the GOM into compliance with the Agreement because the

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[62] *Id.* at 20.

[63] *Id.* at 38–39.

Department asserts that it is not "taking this action to assert leverage to bring Mexico into compliance with the Agreement."[64] *See infra*, at 63–72 (discussing alternatives).

Once again, the Department cannot have it both ways. If the Department is *not* evaluating the JCA Partners' joint venture and ATI with the goal of bringing the GOM into compliance with Open Skies, then a major premise of the original five-year time limit and suspension of the 2022 application would fall away. But if the Department *is* evaluating the JCA Partners' joint venture and ATI with that goal in mind, then its reasons for rejecting other tools for facilitating the GOM's compliance with Open Skies are flawed. This contradiction is likewise arbitrary and capricious.

C. THE DEPARTMENT DISREGARDED MULTIPLE KEY ASPECTS OF THE PROBLEM AND OTHERWISE FAILED TO PROVIDE REASONING FOR ITS TENTATIVE DECISION.

The Department's analysis of the JCA and its ATI misses key issues, and therefore any final order adopting the Supplemental SCO's incomplete analysis would be arbitrary and capricious. Because agency actions must be reasoned and reasonable, agency orders are "arbitrary and capricious if the agency . . . failed to consider an important aspect of the problem." *Bidi Vapor LLC v. U.S. Food & Drug Admin.*, 47 F.4th 1191, 1202 (11th Cir. 2022) (internal quotation marks omitted). Here, the JCA and its ATI are part of a transnational system of air travel, spanning dozens of airports across the United States and Mexico, which means that the Department must undertake a comprehensive analysis of public benefits and competition that accounts for the full U.S.-Mexico market for air

[64] *Id.* at 29.

services.[65] The Department recognizes as much, stating that its analysis considers "the state of competition in the U.S.-Mexico air services market."[66]

But the Department does not actually evaluate the JCA and its ATI in the context of the full U.S.-Mexico market. Rather, the Department's Supplemental SCO focuses nearly exclusively on a single airport within that market: MEX, excluding other relevant markets such as Cancun, Guadalajara, and Puerto Vallarta. The Department proposes to unwind the JCA, which covers dozens of airports, based on its assertion that the supposedly nontransparent MEX slot regime and ban on all-cargo flights at MEX impair competition. But the Department does not identify anticompetitive prices, decreasing capacity, or other traditional consumer harms at MEX that would typically manifest from anticompetitive conditions at that airport. Nor does the Department purport to identify any such consumer harms *in the broader U.S.-Mexico market*.

This myopic focus on MEX is unwarranted. Indeed, MEX does not even have outsize importance for the U.S.-Mexico market. Unlike, say, LHR or LIS—which account for a majority of the traffic between the United States and the United Kingdom and Portugal, respectively—MEX represents a mere 22% of the flights that travel between 206 airport pairs in the United States and Mexico. Airports at Cancun, Guadalajara, and Puerto Vallarta together comprise a far larger share of the U.S.-Mexico market, with 26 other airports also providing service to the United States.[67] The Department's analysis does not account for this reality, instead treating competitive conditions at MEX as

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[65] *See id*. at 5 (Delta and Aeromexico's JCA and ATI application concerned "the U.S.-Mexico market").

[66] *Id.* at 1; *see also id.* at 2.

[67] OAG Schedules for 2024 via Cirium Diio Mi.

somehow dispositive of overall conditions in the much larger market of which MEX is only a part.

Evaluating the broader U.S.-Mexico market confirms that competition remains robust and open. As the Department recognizes, while the JCA Partners' market share has grown as a result of their immunized collaboration, they continue to trail other carriers; American and United together, for example, still control approximately 37% of the U.S.-Mexico market, with Volaris, Southwest, Alaska, and Viva together accounting for another 43%. The JCA Partners, meanwhile, account for roughly 20% of the market.[68] That relatively modest share of an unconcentrated market belies the Department's contention that the JCA Partners have been unfairly entrenched by the GOM's allegedly anticompetitive conduct. Moreover, the U.S.-Mexico market remains in flux, with new routes increasing or decreasing in market share; Denver-Cancun, for example, saw an astonishing 157.9% growth between 2019 and 2023, yet the JCA Partners have no flights on that route.[69]

The Department does not account for any of this. It instead focuses solely on MEX, failing to address the U.S.-Mexico market as a whole and thus missing key parts of the supposed problem it is trying to assess: whether the JCA and its ATI afford Delta and Aeromexico an unfair advantage on the routes they serve between the United States and Mexico.[70]

The Department also misses key parts of the supposed problem at MEX itself. The Department never considers whether the GOM's slot or cargo policies at MEX actually

[68] *Id.*

[69] *Id.*

[70] DOJ's Comment adopts the Department's single-minded focus on MEX without additional analysis and thus suffers from all the same problems. DOJ Comment at 11–12.

cause anticompetitive effects or harms to the public interest. *See supra*, at 24–26. The Department does not argue, for example, that prices have increased on any U.S.-MEX route, that the price of transporting cargo to Mexico City has increased, or that the JCA Partners have restricted capacity to or from MEX. Even as to cargo transported to MEX—the one aspect of the U.S.-Mexico market where the Department provides detailed figures—the Department can show only that the JCA Partners have captured a larger share because they transport *belly cargo* to MEX. But the overall market for cargo to Mexico City includes cargo-only flights to NLU, *see supra*, at 26, and the Department never alleges that the JCA Partners have a substantial share of that overall cargo market.

As for slots at MEX, the Department claims that other carriers have been forced to cut capacity between the United States and MEX while the JCA Partners have announced new routes. But this fails to acknowledge the fact that the GOM's slot policies at MEX might have harmed Aeromexico to a greater extent than any other airline. *See supra*, at 23–24. And it similarly ignores that the JCA Partners' competitors had voluntarily divested multiple slots at MEX prior to 2019—well before the allegedly nontransparent slot policies were imposed at MEX by the GOM in 2022. That timing raises the question whether the GOM's slot policies at MEX are actually depriving the JCA Partners' competitors of slots that they would otherwise still use and whether the GOM's policies are actually causing those competitors any other harms. The Department should answer those questions before proceeding to any final decision.

Beyond the Department's misguided focus on MEX, the Department also misses other key parts of the problem. As detailed above, the Department ignores extensive evidence that the JCA Partners have submitted regarding the JCA's benefits to the public, including evidence submitted in the JCA Partners' 2022 Application and the Economic

Assessment of Brian Keating.[71] *See supra*, at 5–10, 29–32. Moreover, when comparing the JCA Partners to their competitors, the Department omits key facts regarding the headwinds the JCA Partners have faced, including the fact that, unlike the U.S. Government, the GOM did not offer financial assistance to airlines during the COVID-19 pandemic, leading to Aeromexico's declaring bankruptcy in 2020. As mentioned above, the Department never assesses how the JCA Partners would have performed without their joint venture or ATI—a critical question given the Department's statutory obligation to determine whether the immunized JCA benefits the public and competition. Finally, the Department fails to acknowledge the perverse consequence of its proposed actions: disapproving the JCA and revoking ATI for Delta and Aeromexico would harm a U.S. company, as well as a company in which it holds a substantial equity stake, and redound to the benefit of the GOM's state-owned airline, Mexicana. In short, the Department would be *rewarding* the GOM for the very course of conduct the Department decries.

At bottom, the Department's view of this complex and extensive market puts far too much weight on a single airport, while missing key aspects of the broader market that underscore the JCA's benefits. Before making any decision to revoke the JCA and its ATI, the Department must engage with all aspects of the problem, including the public benefits and competitive effects of the JCA in the U.S.-Mexico market as a whole, not simply as to MEX. And even as to MEX, the Department must analyze the relevant pricing and capacity data, rather than simply focusing on slot allocations and all-cargo operations. If the Department were to engage fully with these issues, it would discover that the JCA

[71] Joint Application of Delta and Aeromexico for Renewed Approval of and Grant of Antitrust Immunity for Alliance Agreements, DOT-OST-2015-0070, at 16-17 (Mar. 29, 2022); Economic Assessment.

Partners are delivering significant public benefits and that their ATI is causing no competitive harms to the U.S.-Mexico market.

D. THE DEPARTMENT HAS NOT ADEQUATELY EXPLAINED ITS DEPARTURE FROM ITS PRECEDENTS IN APPLYING A DIFFERENT AND MORE STRINGENT STANDARD TO THE DELTA-AEROMEXICO JCA THAN OTHER IMMUNIZED INTERNATIONAL ALLIANCES.

The Department's tentative decision to depart from its own precedents and take retaliatory action against the JCA Partners based on the purportedly anticompetitive actions of the GOM, while other international alliances continue to enjoy ATI in similar circumstances, has resulted in a discriminatory double standard the Department has repeatedly failed to—and cannot—justify. Although the Supplemental SCO focuses on allegedly anticompetitive access restrictions imposed at MEX by the GOM,[72] the Supplemental SCO ignores similar, and in some cases more significant, access restrictions at other airports where Delta's competitors have been granted and continue to operate with ATI, including HND, LHR, and LIS.

Historically, the Department has afforded significant deference to foreign governments and slot coordinators in managing congestion at constrained airports under their jurisdiction. Consistent with this approach, the Department generally does not interfere with or substitute its judgment for a foreign government's policy decisions on slot controls and airport congestion. So long as the foreign government and slot coordinator generally abide by the IATA Worldwide Airport Slot Guidelines ("WASG") or similar rules for slot-controlled airports in their jurisdiction, the Department has traditionally allowed U.S. carriers and their foreign partners to attain and maintain grants of ATI for their international alliance agreements. Until the 2024 SCO, the Department had never taken

[72] Supplemental SCO, at 1–2.

the position that a highly congested, slot-controlled airport with limited opportunities for new entry and growth serves as the basis to terminate a proconsumer, procompetitive metal-neutral joint venture and its grant of ATI.

Slot controls are ubiquitous in the international commercial air transportation system; they have existed for decades at hundreds of airports worldwide. According to IATA, there are 70 slot-controlled airports in Asia, 114 in Europe, 20 in the Middle East and Africa, and 13 in the Americas. In fact, most major commercial airports worldwide are slot-controlled.[73] Many of these slot-controlled airports offer limited—and, in some cases, zero—opportunities for new entry and growth. But slot constraints and access concerns, alone, have never precluded the Department from approving proconsumer and procompetitive metal-neutral joint ventures or granting them ATI, nor have they ever—until now—spurred the Department to terminate an existing joint venture or ATI grant. The Department has entertained and maintained ATI for decades notwithstanding slot-access challenges at key hub airports worldwide because it duly recognizes that, on balance, the proconsumer and procompetitive benefits of immunized metal-neutral joint venture cooperation are substantial—and they outweigh harms, if any, resulting from slot-access challenges at highly congested airports.

Here, the Department has taken a different course. The Department's tentative conclusion that the JCA no longer satisfies the public-interest test is animated by its determination that MEX is a distinct market that is effectively closed for new entry with the majority of flights operated by a single competitor. In the Department's own words, "Permitting ATI in a market that the GoM has closed effectively and substantially to new

[73] *See* IATA, Coordinated Airports, available at https://www.iata.org/en/programs/ops-infra/slots/coordinated-airports/.

entrants would mean that the Department has given a license for legalized collusion among partners that control almost 60 percent of operations at the fourth-largest gateway to and from the United States."

Yet applying this principle to other slot-controlled airports reveals the aberrational nature of the Department's tentative conclusions regarding MEX. As described in more detail below, HND and LHR are two of the most important airports in the world, and LIS is one of the busiest airports in Europe. Like MEX, all three airports are slot-controlled with limited—and, in the case of HND, zero—opportunities for new entry and growth, yet the Department has not threatened to rescind ATI to the alliances with leading positions at those three highly restricted airports.

That double-standard violates the APA. When an agency chooses to depart from its prior policy, it "must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars*, 579 U.S. at 221 (quoting *Fox I*, 556 U.S. at 515); *see also McHenry v. Bond*, 668 F.2d 1185, 1190 (11th Cir. 1982) ("An agency must either conform to its prior norms and decisions or explain the reason for its departure from such precedent.") (internal quotation marks omitted). Its explanation for the change in policy "must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars*, 579 U.S. at 221–22 (quoting *Fox I*, 556 U.S. at 515). "It would be arbitrary or capricious to ignore such matters." *Fox I*, 556 U.S. at 515; *see Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020) (quoting *Fox I*, 556 U.S. at 515). Here, the Department fails to acknowledge its departure from its prior decisions approving joint ventures and granting ATI to airlines operating in similar slot-constrained jurisdictions or to provide an adequate explanation for its change in position.

Moreover, the Department's unacknowledged departure from its approach to other immunized alliances and joint ventures has resulted in the disparate treatment of the JCA Partners. "A fundamental norm of administrative procedure requires an agency to treat like cases alike." *Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007). Indeed, a federal agency "can be said to be at its most arbitrary" when it "treat[s] similar situations dissimilarly." *Steger v. Def. Investigative Serv. Dep't of Def.*, 717 F.2d 1402, 1406 (D.C. Cir. 1983); *see also Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 833 F.3d 1274, 1289 (11th Cir. 2016) (applying this doctrine). Accordingly, "[a]n agency must provide an adequate explanation to justify treating similarly situated parties differently. Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld." *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 776–77 (D.C. Cir. 2005) (internal citations omitted); *see also Orangeburg v. FERC*, 862 F.3d 1071, 1087 (D.C. Cir. 2017) (finding that the Federal Energy Regulatory Commission acted arbitrarily and capriciously in issuing an order that treated two classes of energy customers differently, where the agency justified the disparate treatment with a claim that its order "speaks for itself"). The Supplemental SCO—like the 2024 SCO—fails to provide a sufficient rationale for its disparate treatment of the JCA Partners, and any final order adopting its reasoning would be arbitrary and capricious.

All of these concerns were presented to the Department in Delta's Objections to the 2024 SCO, yet the Department offers only a dismissive one-paragraph response.[74] According to the Department, alliances in the U.S.-Japan and U.S.-Europe markets are

[74] Supplemental SCO, at 28.

factually distinguishable because those markets "have transparent slot allocation mechanisms that largely conform to international standards," and the Department has resolved any issues with those slot mechanisms through "regulatory tools or negotiated outcomes."[75] Yet the Department fails to explain why it cannot deploy similar tools or negotiations to address its concerns about MEX (as the JCA Partners have suggested) or why the situation at MEX is not also "largely" consistent with the undefined "international standards" it cites.

The Department further asserts that addressing these "ATI matters" requires a "case-by-case" analysis of facts and circumstances.[76] So, for the avoidance of doubt, the JCA Partners analyze the facts particular to the U.S.-Japan and U.S.-Europe markets as relevant here.

Tokyo Haneda

In 2010, the United States and Japan entered a bilateral air services agreement liberalizing air travel between the two nations ("U.S.-Japan Agreement").[77] The U.S. Government referred to the agreement then—and now—as an Open Skies agreement, insofar as it removed U.S.-Japan frequency limitations and generally expanded air traffic rights between the two countries. But the agreement did not include all the hallmarks of a fully liberalized air transport agreement to which the Supplemental SCO now refers.[78] The skies over HND—one of the world's most important airports serving one of the world's largest cities—remained tightly closed. HND was explicitly carved out of the U.S.-Japan

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[75] *Id.*

[76] *Id.*

[77] Air Transport Agreement, Memorandum of Understanding, U.S.-Japan, Oct. 24, 2010.

[78] *See* Order 92-8-13.

Agreement and U.S. carriers were restricted to four daily slot pairs.[79] Although a few additional HND slots were subsequently unlocked and made available by the Japanese government for use by U.S. carriers following intergovernmental negotiations, HND was then and remains now a closed airport.

Nonetheless, applying its extra-statutory policy of treating Open Skies as a predicate for ATI, the Department granted ATI to the United/ANA and American/JAL metal-neutral joint ventures, fortifying their structural advantages at Tokyo's close-in airport on the basis of the U.S.-Japan Agreement, choosing to overlook HND's severe restrictions.[80] To the JCA Partners' knowledge, the Department has never proposed a mechanism to improve HND access, addressed whether the Government of Japan is in violation of the U.S.-Japan Agreement, or discussed whether the Open Skies predicate can fairly be said to justify continued United/ANA and American/JAL immunity. Yet that is precisely the analysis the Department now seeks to apply to the JCA Partners.

Not only is the HND slot regime plainly inconsistent with a fully liberalized air transport agreement, it is also more restrictive than the GOM's alleged restrictions with respect to MEX. HND is an anomalous airport to which access is restricted by the express terms of a bilateral air transport agreement despite the nominal Open Skies environment between the United States and Japan. HND is also the only airport in an Open Skies country over which the Department fully controls U.S. carrier access (on the rare occasions when the Japanese government makes additional slots available). U.S.

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[79] *See* Air Transport Agreement, Memorandum of Understanding, U.S.-Japan, Annex § 3, Dec. 14, 2009 (limiting U.S. airlines' slots and specifying, among other things, that they shall not be used for all-cargo service).

[80] *See, e.g.*, Order 2010-11-10, at 1 (granting ATI for an alliance including Japanese airlines predicated on the existence of the "U.S.-Japan Open Skies aviation agreement" without discussing restrictions at HND).

carriers have only one way to acquire slots to operate at HND: a competitive route case administered by the Department. In this respect, HND is the antithesis of Open Skies. By contrast, MEX is not carved out in the U.S.-Mexico Agreement for special treatment, and no Department-administered proceeding is required for U.S. carriers to expand service to MEX when slots become available at that airport.

Nowhere in the Supplemental SCO does the Department attempt to reconcile its permissive ATI policy with respect to the operations of American/JAL and United/ANA at HND with the Department's restrictive ATI policy with respect to the JCA Partners' operations at MEX. Even assuming for the sake of argument that the GOM's recent actions at MEX violate the Agreement or are otherwise inconsistent with an Open Skies regime, the Department could not rationally—or lawfully—justify terminating the JCA and revoking the JCA Partners' ATI due to concerns regarding MEX while leaving in place the United/ANA and American/JAL joint ventures and their ATI at HND.

The Department's discriminatory treatment of MEX relative to HND is even more arbitrary when considering the strategic significance of HND in accessing Japan generally and Tokyo specifically. Approximately 55% of the traffic and 52% of the flights between the United States and Japan operate to and from HND.[81] By comparison only 21% of the traffic and flights between the United States and Mexico operate to and from MEX.[82] On balance, meaningful competitive access to HND is far more critical for U.S. air carriers and to the U.S.-Japan competitive landscape than access to MEX is for the U.S.-Mexico market given the strong and persistent U.S.-Mexico passenger demand for a diverse array of Mexico destinations other than Mexico City (many of which the JCA Partners robustly

[81] Source: DDS. Time Period: Feb. 1, 2023-Jan. 30, 2024.

[82] *Id*.

serve). Yet the Department continues to allow United/ANA and American/JAL to enjoy ATI at HND while it proposes to terminate its approval of the JCA and the ATI grant. If finalized, this would be discriminatory, arbitrary and capricious, and an abuse of discretion.

London Heathrow

Like HND, LHR is one of the most important airports in the world, serving one of the largest markets. Due to longstanding runway capacity limitations at LHR, however, slots at the airport are extremely scarce, effectively restricting new entry and expansion of existing service. Despite the ongoing highly restrictive operating environment at LHR—an airport the Department has consistently characterized as a separate relevant market for time-sensitive travelers[83]—in 2007 the Department entered into a multilateral agreement with the member states of the European Union (of which the United Kingdom was then a member) that the Department deemed to include all 11 essential elements of an Open Skies agreement consistent with Order 92-8-13. American and British Airways operate a metal-neutral transatlantic Joint Business Agreement ("JBA"), with LHR as the centerpiece of their cooperation. And, in 2010, the Department granted ATI to the American/British Airways JBA, citing the Department's policy that Open Skies is a predicate for a grant of ATI and finding that Open Skies existed in the United Kingdom. Order 2010-7-8 at 10, 19.

The Department took this action despite severe operating constraints at LHR. Slots have long been far more difficult to acquire at LHR than at MEX, and they continue to be nearly impossible for U.S. carriers to acquire. However, the American/British Airways JBA

[83] *See* Order 2010-2-8, at 20.

continues to operate at LHR with a commanding share of slots, sanctioned by the Department's continuing ATI grant.

As with HND, the Department's favorable disposition toward LHR relative to MEX is irrational and discriminatory, especially when considering the strategic importance of LHR in accessing the United Kingdom generally and London specifically. Over 85% of the traffic and flights between the United States and the United Kingdom operate to and from LHR.[84] By comparison, as noted above, only 21% of the traffic and flights between the United States and Mexico operate to and from MEX. As these numbers demonstrate, meaningful competitive access to LHR is far more critical for U.S. air carriers and to the U.S.-U.K. competitive landscape than access to MEX. Yet the Department continues to allow the American/British Airways JBA to enjoy ATI at LHR while it proposes to terminate the JCA and its ATI grant. There is no conceivable lawful justification for such disparate treatment.

Lisbon

For several years, Delta has tried in earnest to secure additional slots at LIS to support new, procompetitive transatlantic service to Portugal's capital and largest city. These efforts have proven futile. Delta has been advised multiple times in no uncertain terms by the LIS slot authority that slots at LIS are not available and will not be available for the foreseeable future. Delta understands at least three other U.S. carriers recently requested slots at LIS to launch new or expanded service at the airport and all requests were denied.

The flag carrier of Portugal, TAP, controls nearly 50% of the slots at LIS. TAP is a party to an immunized alliance in the transatlantic market involving United, Lufthansa, Air

[84] Source: DDS. Time Period: Feb. 1, 2023-Jan. 30, 2024.

Canada, The Austrian Group, Brussels Airlines, LOT, SAS, Swiss, TAP, and their majority-owned affiliates. *See* Order 2009-7-10. Many of these LIS slots are used to fund transatlantic flights operated by United and TAP pursuant to the immunized Star transatlantic alliance. But despite the facts that LIS is (1) closed indefinitely to new entry or expansion of service by Delta and other carriers, and (2) nearly 50% of the operations at LIS are controlled by carriers that are parties to alliance agreements immunized by the Department, the Department has not taken action against United and its immunized alliance partners. The Department's apparent disinterest in remediating access concerns with respect to LIS—an airport that has been determined by local authorities to be at maximum capacity and currently affords no opportunities to U.S. carriers for new entry or growth—while proposing adverse action against the Delta-Aeromexico JCA for perceived access concerns at MEX is another example of the Department's unjustified disparate and discriminatory treatment of the JCA Partners.

As with HND and LHR, the Department's favorable disposition toward LIS relative to MEX is irrational, which becomes abundantly clear when the strategic significance of LIS to accessing Portugal is considered. Approximately 85% of the traffic and 74% of the flights between the United States and Portugal operate to and from LIS, which, as discussed above, are far higher than the United States-Mexico percentages for MEX.[85] As with HND and LHR, meaningful competitive access to LIS is far more critical for U.S. air carriers, U.S.-Portugal air travelers, and the U.S.-Portugal competitive landscape than access to MEX. Yet the Department continues to allow United and TAP to enjoy ATI at LIS while proposing to terminate the JCA and its ATI grant. If finalized, this would be discriminatory, arbitrary and capricious, and an abuse of discretion.

[85] Source: DDS. Time Period: Feb. 1, 2023-Jan. 30, 2024.

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The Department has accordingly failed to adequately explain why it seeks to apply a different and more stringent standard to Delta and Aeromexico at MEX than it has applied—and continues to apply—to other immunized alliances with highly congested slot-controlled airports at the centers of their networks. Delta and Aeromexico are entitled to consistent and fair treatment by the Department, and the Supplemental SCO is a stark departure from that bedrock principle.

Delta and Aeromexico's reliance interests—like those of their competitors in other alliances—amplify the unfairness and unlawfulness of the Department's change in position. *See Fox I*, 556 U.S. at 515. The Department has maintained approval of the JCA and extended ATI to the JCA Partners for over eight years, inducing the JCA Partners to make substantial investments and to engage in extensive business integration. The Department should acknowledge the JCA Partners' substantial reliance interests and adhere to its prior policy of maintaining approval of joint ventures and existing grants of ATI despite the existence of slot controls at highly congested airports and the possibility that incremental slots may not be immediately available for new entry or growth. Yet the Department failed to address these reliance interests in its Supplemental SCO.

If the Department chooses to diverge from its prior policy and unveil a new standard by which an immunized alliance or joint venture no longer meets the statutory public-interest test when incremental slots are not readily available at an airport in a foreign country in which one of the immunized air carriers is based, then it must acknowledge that change in position and adequately explain the rationale for its new policy. Further, and critically, it must apply any new standard fairly and consistently in a nondiscriminatory fashion. The Department's proposed disparate and discriminatory treatment of the Delta-

Aeromexico JCA relative to other international alliances is "not only arbitrary and capricious, but fundamentally unfair." *Kirk v. Comm'r of Soc. Sec. Admin.*, 987 F.3d 314, 321 (4th Cir. 2021).

E. THE DEPARTMENT HAS FAILED TO CONSIDER SEVERAL AVAILABLE ALTERNATIVE PROCEDURES.

As discussed throughout this submission, the Department's tentative decision to terminate the JCA and its ATI grant is legally and factually unjustified, misdirected, and ineffectual as a matter of aviation policy. These flaws are underscored by the fact that the Department failed to consider several sensible, proven alternatives to disapproving the JCA and ending the ATI grant. Those alternatives, which the JCA Partners raised in their Objections to the 2024 SCO, would allow the Department to directly pursue its policy goals without causing collateral damage to U.S. interests.

Under the APA, agencies act in an arbitrary and capricious manner when they fail to consider reasonably available alternatives. *See State Farm*, 463 U.S. at 50–51. "[A]rtificial narrowing of options is antithetical to reasoned decisionmaking and cannot be upheld." *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 817 (D.C. Cir. 1983) (internal citation omitted). Agencies need not "include every alternative device and thought conceivable in the mind of man regardless of how uncommon or unknown that alternative may have been.'" *State Farm*, 463 U.S. at 51 (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 551 (1978)) (cleaned up). But they must consider prominent alternatives to their actions, especially when those alternatives have been presented for their consideration by interested parties. *See Int'l Ladies' Garment Workers' Union*, 722 F.2d at 817.

The Department has several direct mechanisms by which it may seek to hold the GOM to the bargain the Department believes the Agreement reflects. For example, Part

213—which the Department is presently invoking against Mexican carriers in an ongoing process that should be permitted to run its course—authorizes the Department to require foreign carriers to seek advance approval of their U.S. schedules if the Department has legitimate concerns about a foreign government's actions against U.S. carriers. Additionally, the Department enjoys broad authority under IATFCPA to redress unfair, arbitrary threats to U.S. carrier access to foreign markets. Alternatively, the Department could seek to avail itself of the dispute resolution procedures set out in the Agreement. And finally, even if the Department were to proceed with some action against the JCA Partners rather than the GOM, it could easily carve out U.S.-MEX cargo operations from the JCA's ATI, thereby remedying the only alleged competitive concerns associated with the GOM's prohibition on all-cargo flights to MEX. Failure to meaningfully address these alternatives would render any final order terminating the JCA and its ATI grant arbitrary and capricious.

An Alternative Exists Under Part 213

Delta commends the Department for exercising authority under its regulations (14 C.F.R. Part 213) to impose countermeasures on the GOM and its air carriers, having determined such measures are warranted and in the public interest. These measures will provide the Department with an opportunity to more accurately direct and finely calibrate its actions to address its concerns about the GOM's actions than would the proposed termination of the JCA and its grant of ATI. Accordingly, the Department should not move forward with terminating the JCA or its ATI until the Part 213 process has run its course.

14 C.F.R. Part 213 provides the default terms, conditions, and limitations on Section 41302 permits to foreign air carriers. *See* 14 C.F.R. § 213.1. A foreign carrier may generally "determine the schedules (including type of equipment used) pursuant to

which it engages in transportation between points in the United States and points outside thereof." *Id.* § 213.3(a). But the Department "may at any time" require a foreign carrier "to file with the Department traffic data disclosing the nature and extent of such carrier's engagement in transportation between points in the United States and points outside thereof." *Id*. § 213.2. The Department may require such a filing on its own initiative "[i]f it finds that the public interest so requires" in the case of a carrier from a country without an Open Skies agreement. *Id.* § 213.3(b). In the case of carriers from countries with Open Skies agreements, the Department must additionally find that "the government or aeronautical authorities of the government of the holder, over the objections of the U.S. Government, have," among other things, "[t]aken action which impairs, limits, terminates, or denies operating rights." *Id.* § 213.3(c). The Department has imposed Part 213 schedule filing requirements in numerous cases where, as here, a foreign government is alleged to have impaired the operating rights of U.S. carriers. *See*, *e.g.*, Order 2023-11-6 (carriers of the Netherlands); Order 2021-5-10 (Aerolineas Argentina).

As noted above, the Department, concurrently with the Supplemental SCO, has exercised its authority to "impos[e] Phase 1 schedule filing requirements under 14 CFR Part 213 of the Department's regulations to cover all of the scheduled services operated by [specified] foreign air carriers of Mexico to or from the United States."[86] The Department should now see the Part 213 process through to completion before considering a final action disapproving the JCA or ending the ATI grant.

The Department fails to explain in its Supplemental SCO why the Part 213 procedures the Department is currently pursuing offer an insufficient alternative to the actions laid out in the Supplemental SCO. As discussed above, the Department activated

[86] Order 2025-7-11, at 2.

Part 213 countermeasures alongside proposing adverse action against the JCA—a countermeasure against the GOM in its own right—as opposed to taking a sequential approach that allows time for Part 213 to have the intended effect on the GOM's behavior. The Part 213 countermeasures may convince the GOM to change the conduct of concern to the Department without unnecessarily and unfairly punishing Delta and Aeromexico. Accordingly, the Department must thoroughly consider whether the Part 213 measures it has imposed will be sufficient to address the concerns the Department identifies, which can only be done by deferring its proposed action against the JCA until the countermeasures' effects have become clear. At this stage, with the Part 213 measures in their infancy, the Department's suggestion that they are inadequate alternatives to terminating the JCA and withdrawing ATI rests on speculation. *See Del. Dep't of Nat. Res. & Env't. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015) ("To be regarded as rational, an agency must also consider significant alternatives to the course it ultimately chooses. We will reverse when agency action is based on speculation, or when the agency did not engage the arguments raised before it." (internal quotation marks and citations omitted)).

An Alternative Exists Under IATFCPA

The Department also may take action in response to "unreasonable discrimination" by a foreign government or foreign airlines against a U.S. airline pursuant to IATFCPA. 49 U.S.C. § 41310. The IATFCPA process is a sound, time-tested tool to encourage foreign governments to reconsider allegedly problematic policies and actions, offering a vehicle for the U.S. Government to detail what it believes to be discriminatory and unjust conduct of the foreign government and, if necessary, impose retaliatory remedies.

Under IATFCPA, the Department may take actions it "considers are in the public interest to eliminate an activity" of a foreign government, a foreign entity, or a foreign air carrier when the Department, either on its own initiative or in response to a complaint, finds that the activity either "is an unjustifiable or unreasonable discriminatory, predatory, or anticompetitive practice against an air carrier" or "imposes an unjustifiable or unreasonable restriction on access of an air carrier to a foreign market." 49 U.S.C. § 41310(c). The Department's implementing regulations likewise reflect IATFCPA's broad sweep, noting that IATFCPA is intended to "protect[]" "U.S. flag air carriers operating in foreign air transportation" from "all forms of discrimination or unfair competitive practices." 49 C.F.R. § 91.1.

The Department's description of the GOM's actions suggests the Department believes they qualify as "unjustified" and "unreasonable" under IATFCPA.[87] And the IATFCPA process, which directly targets foreign governments and carriers, would be a substantially better fit for the concerns addressed in the Supplemental SCO, which inappropriately proposes taking adverse action against Delta and Aeromexico based solely on the GOM's supposed transgressions. Yet the Department has not begun IATFCPA proceedings regarding the GOM's conduct.[88] It must do so, or meaningfully explain why it has not done so, before taking any action to terminate the JCA or its ATI grant.

An Alternative Exists Under The Agreement

The Supplemental SCO asserts that the GOM has "fail[ed] to honor its obligations under the [U.S.-Mexico Aviation Agreement]."[89] The Agreement itself foresaw the possibility of disagreements regarding the parties' adherence to its terms, and it provides

[87] *See* Supplemental SCO, at 18–28.

[88] *Id*. at 29.

[89] *Id*. at 3.

specific mechanisms for dispute resolution. Article 13 provides that "[e]ither party may, at any time, request consultations relating to this Agreement" and provides a timetable for such discussions.[90] Should consultations fail to resolve the dispute, Article 15 establishes further procedures for adjudication by arbitration. It states that "[a]ny dispute arising under this Agreement . . . that is not resolved within 30 days of the date established for consultations . . . may be referred, by agreement of the Parties, for decision to some person or body." *Id*. art. 15. And, in the event of disagreement, "either Party may give written notice to the other Party through diplomatic channels that it is requesting that the dispute be submitted to arbitration." *Id.* Following such a request, the receiving party "shall" engage in arbitration under the procedures prescribed in Article 15. *Id.*

While the 2024 SCO and Supplemental SCO both allude to the potential for diplomatic engagement, they do not state or even suggest that the U.S. Government has initiated Article 13 consultation procedures.[91] The language of those orders leaves no question that the United States and the GOM are currently involved in a dispute; the pivotal question, therefore, is how best to settle it. The JCA Partners do not know whether the Department tried, but failed, to secure the GOM's agreement to arbitration, and the Supplemental SCO does not clarify the point. But, regardless of any such failed attempts, the U.S. Government has the clear right under the Agreement to request consultation and arbitration, and if it does, the GOM is obligated to participate. The Department must meaningfully consider this alternative as well before finalizing any decision to terminate the JCA and its ATI grant.

[90] Agreement, art. 13.

[91] Supplemental SCO, at 29; 2024 SCO, at 4.

An Alternative Exists To Carve Out U.S.-MEX Cargo Operations

Even if the Department were to forgo all these other alternatives and take action against the JCA Partners, rather than the GOM, it could easily carve out the only area where the Department alleged the JCA Partners have derived any specific benefits from the GOM's policies: cargo operations at MEX. As the JCA Partners explained above, the Department fails to substantiate any actual competitive benefits that the JCA Partners derive from the GOM's all-cargo ban at MEX, much less that the GOM's policy is causing any competitive harm. *See supra*, at 24–26. Nevertheless, if the Department concludes that the GOM's all-cargo ban is unfairly advantaging the JCA Partners, it can easily carve out cargo operations at MEX from the JCA's ATI.

The Department has established carve-outs when granting other airlines ATI. For example, the Department carved out New York-Toronto routes when granting ATI to American and Canadian International; it similarly carved out Chicago-Zurich and Chicago-Brussels routes from an ATI grant to American, Swissair, and Sabena.[92] For Delta as well, the Department previously carved out several U.S.-European routes from an ATI grant to Delta, Austrian, Sabena, and Swissair.[93] There is no reason the Department could not establish a similar carve-out for the JCA's ATI here. It could readily declare that the JCA Partners' ATI extends to the U.S.-Mexico market—thereby preserving all the consumer and competitive benefits described above—except for cargo operations at MEX—thereby avoiding the supposed market distortions regarding cargo transported to Mexico City. If replicated in a final order, the Department's failure to meaningfully consider that potential alternative, which the Department tentatively rejected based solely on its

[92] Order 96-7-21; Order 2000-5-13.

[93] Order 96-6-33.

misplaced concerns about illusory competitive harm in the passenger market at MEX,[94] would be arbitrary and capricious.

* * *

All these tools—independently and in combination with one another—were at the Department's disposal and within its rights under federal law, regulations, and the Agreement to assist it in resolving its dispute with the GOM. Despite the JCA Partners' prior submission highlighting these alternative options, the Department still fails to provide a reasoned explanation for why these alternative procedures—including the Part 213 proceedings the Department initiated on the same day it issued the Supplemental SCO—would not achieve the Department's goals.

The Department argues that the JCA Partners proceed "on an incorrect premise that the Department is taking this action to assert leverage to bring Mexico into compliance with the Agreement."[95] As discussed above, that is inconsistent with the Department's acknowledgment that it limited its original grant of ATI to five years to "provide an incentive for Mexico" to implement reforms.[96] From the outset, the Department's consideration of the JCA has been inextricably intertwined with the GOM's allegedly anticompetitive actions, and it would be arbitrary and capricious for the Department to conclude otherwise now as a basis for rejecting readily available regulatory alternatives. *See supra*, at 46. And regardless, these alternatives are still superior ways to address the supposedly anticompetitive issues that the Department identifies.

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[94] Supplemental SCO, at 29.

[95] *Id.*

[96] *Id.* at 20.

The Department also maintains that it "will continue to press for solutions with the GOM that allow U.S. carriers to exercise fully the rights available to them under the Agreement," while insisting that actions in this regard "do[] not necessarily lead to the continuation of grants of ATI in the U.S.-Mexico market."[97] Because "[t]he competitive issues . . . are entrenched," the Department claims it should be able to terminate the JCA and revoke ATI now.[98] And it asserts that the alternatives the JCA Partners identify "are separate from the ATI proceeding and are not properly viewed as alternatives."[99]

But each of the alternatives that the JCA Partners have identified—procedures under Part 213, IATFCPA, and the Agreement—are means of addressing the supposedly "entrenched" "competitive issues" that the Supplemental SCO seeks to change. To be sure, an agency may pursue multiple paths toward resolving the same concern. The agency is still required, however, to explain why alternatives to a proposed course of action are not superior or adequate. And alternatives must be identified based on "the purpose and need of the proposed agency action." *Cf. Citizens Action Coalition of Ind., Inc. v. FERC*, 125 F.4th 229, 237 (D.C. Cir. 2025) (considering a similar requirement under the National Environmental Policy Act). Here, the Department has acknowledged that it views ATI as means of incentivizing open competition in the U.S.-Mexico market. Because the alternatives identified above each address that purpose, the Department must give them meaningful consideration alongside its proposed action and explain why they are inadequate. Jumping directly to terminating the JCA and its ATI grant without utilizing one of the alternatives the JCA Partners identify or explaining why they are

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[97] *Id.* at 29.

[98] *Id.*

[99] *Id.*

inadequate would be ineffectual, disproportionately and needlessly harmful to the JCA Partners, discriminatory, and arbitrary and capricious.

F. THE DEPARTMENT FAILED TO ENGAGE WITH EXPERT ANALYSIS PROVIDED BY THE JCA PARTNERS IN RESPONSE TO THE 2024 SCO.

In addition to failing to consider multiple aspects of the problem and readily available alternatives, the Department also fails to engage with Dr. Keating's Economic Assessment of terminating the JCA. The Assessment—which the JCA Partners appended to their response to the 2024 SCO—contains detailed economic forecasts regarding the effects of terminating the JCA. For example, the Assessment estimates that eliminating the JCA would harm passengers in the amount of more than $800 million per year, place at risk 23 nonstop frequencies on 21 U.S.-Mexico routes, and threaten tens of thousands of jobs.[100] Yet the Department barely mentions the Assessment, not once addressing its conclusions or explaining why the Assessment is incorrect.

Instead, the Department gives the Assessment the back of the hand, declaring that "[m]uch of [the] economic assessment is outside the scope of this Order, which reviews the regulatory framework of the U.S.-Mexico market," and dismissing the harms identified in the Assessment as insufficiently definitive.[101] But the Economic Assessment is squarely within the scope of the issues here because it addresses the public benefits of the JCA and the potential harms to the public from unwinding it, which are precisely the issues that the Department is required by law to assess when deciding whether to terminate the JCA and ATI. 49 U.S.C. §§ 41308, 41309. According to the Department, its "focus must remain on broader public interest concerns,"[102] but the Assessment

[100] Economic Assessment at 2– 4.

[101] Supplemental SCO, at 30–31.

[102] *Id.* at 31.

provides exactly that broader assessment as well, by explaining that terminating the JCA will lead to decreased Gross Domestic Product, lost tourism spending, and job losses for everyone from pilots to customer service staff.[103] And the Department's criticism of the risk assessment as insufficiently certain ignores that predictions about future events can never be definitive as well as the comprehensive explanations that Mr. Keating provides to substantiate his predictions. *See Jones v. Otis Elevator Co.*, 861 F.2d 655, 662–63 (11th Cir. 1988) (expert testimony is admissible even if it does not provide "absolute certainty" so long as it contains a "logical basis").

The Department's dismissive treatment of the Economic Assessment fails to adequately engage with this expert submission, thus once again failing to "consider evidence bearing on the issue before it." *Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010). That failure, if adopted in any final order, would result in "arbitrary agency action" that violates the APA. *Id.*

G. THE DEPARTMENT FAILED TO ENGAGE WITH THE JCA PARTNERS' 2022 ATI RENEWAL APPLICATION.

Finally, the Department also failed to engage with the JCA Partners' 2022 renewal application.[104] As the Department is aware, the JCA Partners submitted that application in accordance with the Department's own orders; the application sought renewed approval of and a grant of ATI for the JCA Partners' alliance agreements, including the JCA that serves as the core of their strategic U.S.-Mexico transborder partnership.[105] The submission included a 62-page narrative, accompanied by a supporting economic

[103] Economic Assessment at 3–5.

[104] *See* Joint Application of Delta and Aeromexico for Renewed Approval of and Grant of Antitrust Immunity for Alliance Agreements, DOT-OST-2015-0070 (Mar. 29, 2022).

[105] DOT Order 2020-12-18 (Dec. 17, 2020).

analysis by Compass Lexecon, and a voluminous document production to help the Department evaluate the application against the applicable statutory standards. These materials were the product of extensive research, analysis, and diligence by the parties, and they were prepared over a lengthy period at significant expense. Despite the JCA Partners' previously calling attention to this submission,[106] it remains unclear whether the Department has even reviewed it.

It is a "straightforward proposition[] of administrative law" that "an agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of" the APA. *Butte Cty.*, 613 F.3d at 194; *see also Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1325 (Fed. Cir. 2017) (similar). To fulfill its duty, an agency "must take account of all the evidence of record, including that which detracts from the conclusion the agency ultimately reaches." *Aqua Prods., Inc.*, 872 F.3d at 1325; *see generally Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.").

The Supplemental SCO gives no indication that the Department met its obligation to review and consider the extensive evidence submitted by the JCA Partners in support of their renewal application—a failing that, if replicated in a final order, would be arbitrary and capricious. The Department completely ignores the 2022 application's assessment of the JCA and its consumer benefits, as well as the application's competitive effects analysis and voluminous set of supporting documents. *Cf.* 14 C.F.R. § 303.31 (describing the required contents of Section 41309 applications). Instead, the Department focuses its analysis almost exclusively on materials of its own choosing, including often-outdated materials from the 2015 application and show-cause proceedings. And the Department

[106] 2024 SCO Objections, at 12–13.

never explains why it is implicitly rejecting the arguments and evidence that the JCA Partners submitted in their 2022 application. The Department thus unfairly ties the JCA Partners' hands in these proceedings; it ignores their most up-to-date submission and considers exclusively their earlier, less developed data.

That omission is particularly glaring because the 2022 application was filed in the same docket in which the Department filed its 2024 SCO and 2025 Supplemental SCO. It is thus part of the record, as the JCA Partners previously noted.[107] Yet the Department cannot pick and choose which parts of the evidence and record it will consider. Like every other agency, it must "take account of *all* the evidence of record." *Aqua Prods., Inc.*, 872 F.3d at 1325 (emphasis added). Here, that includes the 2022 application. The Department's unreasoned failure to address the materials contained therein is arbitrary and capricious.

V. THE DEPARTMENT'S SUSPENSION OF THE JCA PARTNERS' 2022 ATI RENEWAL APPLICATION IS CONTRARY TO LAW AND ARBITRARY AND CAPRICIOUS.

The Department also decides to "suspend" the JCA Partners' 2022 application for ATI.[108] That decision is both contrary to law and arbitrary and capricious. The relevant statutes and the Department's own procedures require a "yes or no" decision on the application; the law does not provide for suspending ATI applications.

The Department identifies no legal basis for leaving the 2022 Application in a "suspended state."[109] Rather, the statutory text requires the Department to make a determination of the public interest and then render a decision on the application for ATI.

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[107] *Id.*

[108] Supplemental SCO, at 38–39.

[109] *Id.*

Section 41308 is crystal clear: the Department "may exempt" parties from the antitrust laws if it decides doing so "is required by the public interest"; alternatively, if the Department allows for a cooperative agreement under Section 41309(b)(1), it "shall exempt" parties "to the extent necessary to allow the [parties] to proceed with the transaction." 49 U.S.C. § 41308(b)–(c). That mandatory statutory text leaves no room for suspending applications or withholding a determination and decision. The Department is acting contrary to law by continuing to "suspend" the JCA Partners' 2022 application. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004) (agency actions are "unlawfully withheld" when the agency is "compelled by law to act"); *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (unreasonable delay in taking required action is unlawful).

The Department's own procedural regulations track that statutory requirement. The Department's regulations provide that it "*shall decide*, on the basis of the record and in accordance with [its] procedures . . . , whether to *grant or deny*, in whole or in part, the application." 14 C.F.R. § 303.46 (emphases added). That text likewise requires the Department to adjudicate applications pending before it—via a binary decision to grant or deny the application—and leaves no room for suspending an application. The regulations permit no deviation from making that decision. The text provides that the Department "*shall*" decide whether to grant or deny the application, imposing a mandatory duty. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 172 (2016). And it is a bedrock principle of administrative law that agencies must follow their own regulatory procedures. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265–66 (1954); *see also generally Service v. Dulles*, 354 U.S. 363, 382–83 (1957). Here, that means deciding whether to grant or deny the JCA Partners' application.

The Department's decision to suspend the JCA Partners' application is also at odds with the Department's prior announcement about the procedures it would apply to the application. On April 11, 2022, the Department issued a notice acknowledging receipt of the JCA Partners' ATI Renewal Application, granting access to confidential documents, and suspending the procedural schedule "until we have determined that the record in this case is substantially complete."[110] The Department further noted it "will announce a procedural schedule, including an opportunity for public comment." *Id.*; *see* 14 C.F.R. § 303.42(a) ("Unless a different comment period is specified by notice or order, or in a notice of filing published in the Federal Register, any person may file comments, responses to the application, and/or a request for a hearing, within 21 days of the filing of an application."). But the Department never took any of those prescribed actions—it did not declare the record substantially complete, announce a procedural schedule, or provide an opportunity for the public to comment on the application. The JCA Partners identified all of these problems in their 2024 Objections, but the Department fails to address any of them in declaring that it is "suspending" the Application. The Department's deviation from its previously announced procedures for addressing the application is further evidence that "suspending" an ATI application is procedurally improper.

Additionally, the Department's decision to suspend the 2022 application is arbitrary and capricious because the Department fails to engage with the voluminous materials and arguments submitted along with that application. As noted above, agency actions are arbitrary and capricious if the agency "failed to consider an important aspect of the problem," *Bidi Vapor LLC*, 47 F.4th at 1202, or "all the evidence of record," *Aqua Prods., Inc.*, 872 F.3d at 1325. Yet when deciding to suspend the JCA Partners' 2022 application,

[110] *See* DOT Notice in this docket, issued April 11, 2022.

the Department does not indicate it even reviewed the materials contained therein. Nor does the Department explain why it does not agree with the JCA Partners' arguments and evidence or why they are insufficient to grant ATI. Those failures render the Department's decision arbitrary and capricious.

VI. CONCLUSION

For the foregoing reasons, the JCA Partners urge the Department to withdraw the Supplemental SCO. It is a fatally flawed, discriminatory, and arbitrary and capricious tentative decision that lacks evidentiary support and is contrary to law, and that would violate the Administrative Procedure Act if finalized as proposed.[111]

Respectfully submitted,

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Director – Regulatory Affairs

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[111] Given the practical challenges of winding down the JCA—which has been in place for eight years—and in light of the progress the U.S. Government has been making in its recent trade negotiations with the GOM, the JCA Partners request that, at a minimum, the Department extend the proposed termination date of the approval of and ATI grant for the JCA from October 25, 2025, until March 28, 2026, which is the end of the 2025 IATA Northern Winter Season. This additional time would allow the trade negotiations to potentially resolve the Open Skies issues and/or facilitate a more orderly transition for the JCA Partners.

CERTIFICATE OF SERVICE

A copy of the foregoing document has been served this 11th day of August 2025 upon the following persons via email:

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