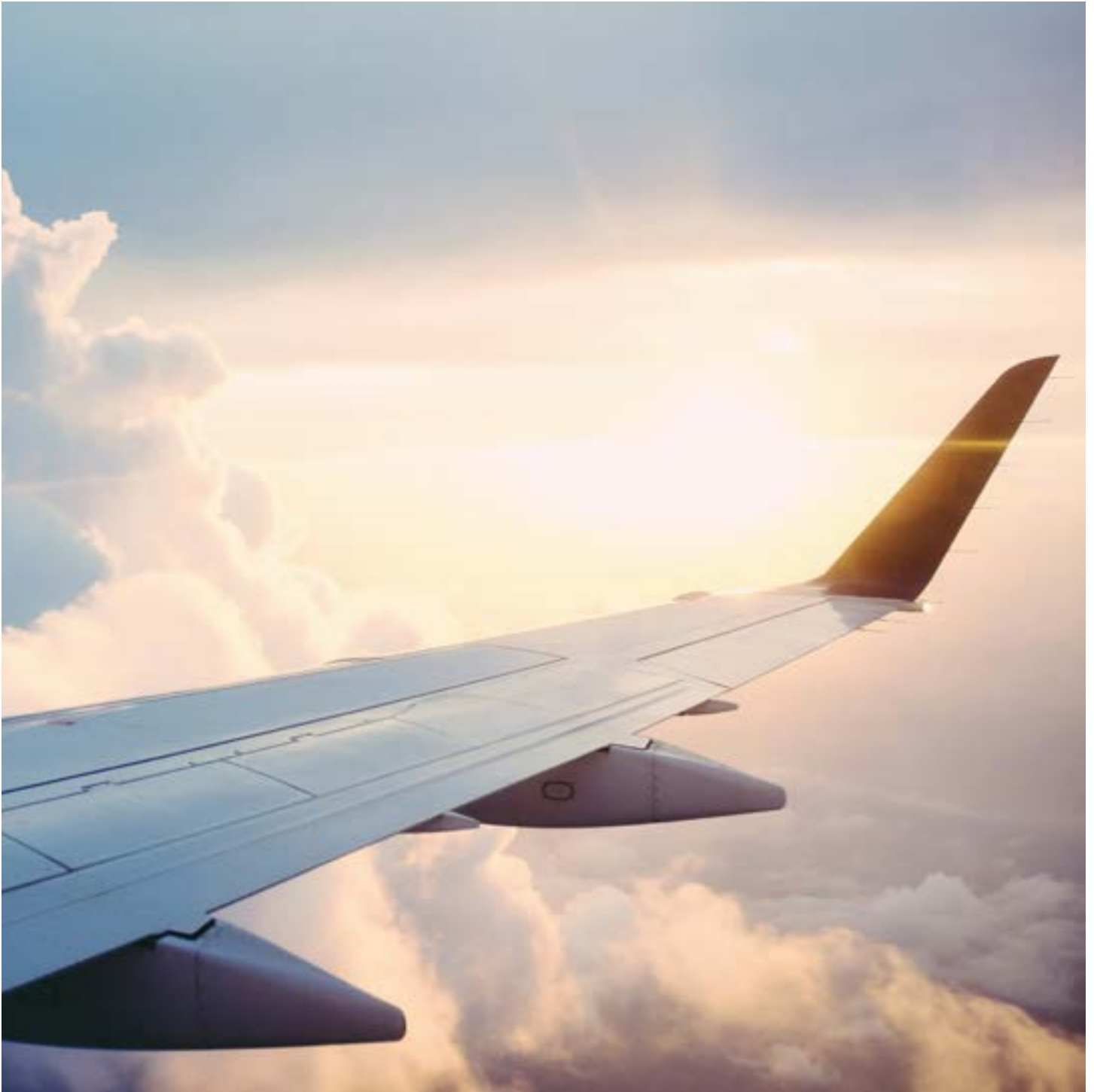

The Sky's the Limit

The Rise of Junk Fees in American Travel

Majority Report | Senator Richard Blumenthal



November 26, 2024 | Permanent Subcommittee on Investigations

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EXECUTIVE SUMMARY

Over the past two decades, U.S. airlines have increasingly charged separately for goods and services that were once included in the price of a ticket. This strategy, known as “unbundling,” has spread to almost every airline in the industry. So-called “ancillary fees” have become a vital revenue stream for the airlines. Unbundling has not lowered the cost of flying for consumers, who now face additional charges to fly with carry-on or checked bags or to sit next to their minor children.¹ Airlines have generated billions of dollars in revenue from ancillary fees while travelers confront more and increasingly complex fees and fewer options for avoiding them, obscuring the total cost of travel and obstructing comparison shopping.

Unpredictable airline fees have made it more difficult for consumers to compare the total cost of air travel across different airlines. Airline websites and mobile applications bury critical information, such as the cost of selecting a particular seat, at later stages of the booking process. At some airlines, proprietary algorithms use consumer data to help set the price of fees so that different people attempting to book the exact same flight at the exact same time may be charged different prices for checking a bag. In this environment, it is not surprising that passenger complaints about U.S. airlines have skyrocketed since 2022.

In response to growing concerns about airline “junk fees,” the Permanent Subcommittee on Investigations (“PSI” or “the Subcommittee”) launched an inquiry in November 2023 to examine the practices surrounding airline ancillary fees. The Subcommittee requested information from three major airlines—American Airlines, Delta Air Lines, and United Airlines—as well as two “ultra-low-cost” (“ULCC”) carriers, Frontier Airlines and Spirit Airlines, both of which helped pioneer many of the fee structures now used throughout the industry.² During the course of its year-long investigation, the Subcommittee reviewed internal airline documents that reveal the airlines’ strategies to grow revenue from ancillary fees, as well as previously undisclosed data, which is published here for the first time. The Subcommittee found:

- ***Frontier and Spirit pay incentives to gate agents for bag policy enforcement.*** Frontier and Spirit paid \$26 million to gate agents and other personnel between 2022 and 2023 to catch passengers allegedly not following airline bag policies, often forcing those passengers to pay a bag fee or miss their flight. Frontier personnel can earn as much as \$10 for each bag a passenger is forced to check at the gate. One Frontier official told the Subcommittee that bag policy enforcement was necessary because the airline does not want customers to be taking more or “stealing” from the airline.

¹ See Jan K. Brueckner, Darin N. Lee, Pierre M. Picard & Ethan Singer, *Product Unbundling in the Travel Industry: The Economics of Airline Bag Fees*, 24(3) J. OF ECON. & MGMT. STRATEGY 457, 481 (2014).

² This report refers to American Airlines as “American,” Delta Air Lines as “Delta,” United Airlines as “United,” Frontier Airlines as “Frontier,” and Spirit Airlines as “Spirit.”

- Internal Frontier records and data shows that incentive payments, including bonuses paid to some managers, were part of the airline’s strategy to boost fee revenue. The same Frontier official told the Subcommittee that some customers “take more services than they have paid for” and that the airline did not want to allow that to happen.
- Both Frontier and Spirit saw increases in ancillary revenue as a result of their bag incentive programs. Frontier projected that the airline would generate more than \$40 million in fees from enforcement in the first year of the program.
- Spirit pays gate agents up to \$5 per bag policy violation and places no limits on the number of commissions gate agents can earn.
- ***Airlines are increasingly using algorithms to set fees and are investing in ways to target pricing based on customer information.*** Airlines leverage advanced technology and specific customer data to set and constantly adjust the prices they charge. This is particularly the case for seat fees, which can vary enormously from flight to flight and customer to customer.
 - Frontier and Spirit use “dynamic” pricing to set their fees for carry-on bags and checked bags, meaning that each customer may pay a different price for their bag.
 - Internal marketing documents from 2022 show that Delta’s digital marketing team “built out propensity modeling to predict a customer’s willingness to buy-up based on their customer profile and unique characteristics.”
- ***The five airlines are making more money from seat fees than ever before.*** Previously undisclosed airline data provided to PSI show that seat fees, which did not exist at most airlines 20 years ago, generated \$12.4 billion in revenue for American, Delta, United, Frontier, and Spirit collectively between 2018 and 2023. These five airlines charge passengers extra for additional legroom, aisle and window seats, or even selecting a seat in advance, compelling parents with minor children to pay to sit together.
 - Seat fees have grown more expensive and farther-reaching. United charged as much as \$319 for an extra legroom seat in 2023. The same year, Spirit charged as much as \$299 per extra legroom seat while American charged up to \$140, Frontier charged up to \$141, and, in 2024, Delta charged up to \$264.99. Spirit charged as much as \$899 for its Big Front Seats in 2023.

- All five airlines saw seat fee revenue increase between 2018 and 2023, but seat fee revenue at Delta and Frontier more than doubled in that period.
- In 2023, for the first time since at least 2018, United collected more revenue from seat fees (\$1.3 billion) than it did from checked bag fees (\$1.2 billion).
- Spirit's Chief Commercial Officer told the Subcommittee that Spirit forces customers to provide personal information on the airline's website before showing the price of selecting seats because this tactic makes customers more likely to complete their purchase.
- ***Ancillary fees are unconnected to the actual cost of providing the services they cover.*** Untethered to any meaningful limitation, airline fees will likely continue to rise. Frontier and Spirit are leveraging dynamic pricing to maximize revenue, and American, Delta, and United increase their fees in lock step.
 - Each of the five airlines told the Subcommittee that they did not regularly track the itemized cost of providing services for which they charge a fee.
 - Despite telling the Subcommittee that it is unable to calculate the cost of checking a bag, American produced an internal document from 2018 estimating that the airline spent \$28 to transport each checked bag that year.
 - United failed to produce an estimate of the cost incurred to transport checked bags, despite its CEO testifying under oath that, "In 2016, at United we spent about \$1.9 billion carrying checked bags." United also claimed that the Government Accountability Office must have misinterpreted United officials who communicated during interviews in 2017 that cost is a major factor in the airline's ancillary fee pricing.
 - Airline competition does not constrain many fees; American, Delta, and United raise their checked bag fees in lock step.
- ***Frontier, Spirit, and United appear to avoid the federally mandated transportation excise tax by labeling portions of their charges as non-taxable fees.*** This creates different tax rates for similar services across airlines. The ambiguity encourages airlines to charge more in non-taxable fees than airfare. Airlines that maximize this strategy gain an advantage attracting price-sensitive customers.
 - Federal law applies a 7.5% tax to passenger air transportation to be remitted by airlines. Some airlines classify certain services as "optional" to avoid the tax on those charges.

- For flights with extra legroom seats, Frontier and Spirit’s use of ancillary fees resulted in an effective tax rate less than half of American and Delta on similar itineraries.

BACKGROUND

I. Airlines increasingly impose fees charged for products and services that were once included in the price of a ticket

Over the past two decades, airlines have introduced and expanded fees for products and services that were previously included in the price of a ticket, such as traveling with a carry-on bag, checking a bag, and selecting a seat.³ The charges that customers face for these services are known as “ancillary fees.”⁴ According to one estimate, about 45% of airline passengers pay more than the base airfare by adding services including carry-on bags, checked bags, advanced seat assignments, priority boarding, and Wi-Fi, among others.⁵ The strategy of “unbundling” ancillary products from the base price of a ticket was once largely limited to low-cost carriers, but airline revenue from ancillary fees has become an important source of revenue for airlines across the industry.⁶ In 2023, the top ten global airlines that charge ancillary fees, including five U.S. airlines—American, Delta, United, Spirit, and Southwest—collected a combined \$54.1 billion in ancillary revenue.⁷

a. Spirit began charging for checked bags, and other airlines quickly followed

In the United States, ultra-low-cost carriers have led the trend of fare unbundling and collect more in ancillary revenue as a percent of total revenue than any other airlines.⁸ In 2006, Spirit adopted a business model in which it lowered ticket prices but charged extra for virtually everything else.⁹ Spirit began charging for checked bags in 2007.¹⁰ In 2008, following the onset of the Great Recession, American, Delta, and

³ See generally Stacey Mumbower, Susan Hotle & Laurie A. Garrow, *Highly debated but still unbundled: The evolution of U.S. airline ancillary products and pricing strategies*, J. OF REVENUE AND PRICING MGMT. (May 18, 2022), <https://doi.org/10.1057/s41272-022-00388-5>.

⁴ See Mark Finlay, *What are Ancillary Fees?*, SIMPLE FLYING (July 25, 2021), <https://simpleflying.com/ancillary-fees/>.

⁵ IdeaWorksCompany Comment on Proposed Rule Enhancing Transparency of Airline Ancillary Services Fees, 2 (Oct. 15, 2022), <https://www.regulations.gov/comment/DOT-OST-2022-0109-0054>.

⁶ See JAY SORENSEN, IDEAWORKSCOMPANY, *THE CARTRAWLER YEARBOOK OF ANCILLARY REVENUE*, 12 (Eric Lucas ed., 2024), <https://ideaworkscompany.com/2024-cartrawler-yearbook-of-ancillary-revenue-report>.

⁷ *Id.* at 8.

⁸ *Id.* at 9.

⁹ David Segal, *Don't Come Crying to This Airline*, N.Y. TIMES (Mar. 28, 2009), <https://www.nytimes.com/2009/03/29/business/29spirit.html>.

¹⁰ Donna Rosato, *Airlines pile on the fees*, CNN MONEY (Apr. 30, 2007), https://money.cnn.com/2007/04/30/pf/airline_fees.money/index.htm.

United all began charging for a passenger’s first checked bag.¹¹ Following the same model as Spirit, Frontier unbundled its offerings beginning in 2014.

Figure 1: Evolution of Ancillary Fees at American, Delta, United, Frontier, and Spirit

2000	United introduces extra legroom “Economy Plus” seating ¹³
2007	Spirit introduces checked bag fees ¹⁴
2008	American, Delta, and United introduce first checked bag fee of \$15 ¹⁵
2010	Spirit introduces carry-on bag fees ¹⁶
2012	American introduces extra legroom “Main Cabin Extra” seating ¹⁷
2012	Delta introduces Basic Economy fares ¹⁸
2013	Frontier introduces carry-on bag fees ¹⁹
2017	American and United introduce Basic Economy fares ²⁰

¹¹ See Micheline Maynard, *Like American, More Airlines Add Fees for Checking Luggage*, N.Y. TIMES (June 13, 2008), <https://www.nytimes.com/2008/06/13/business/13bags.html>; Press Release, Delta Air Lines, Delta Aligns Policies and Fees to Offer Consistency for Customers Traveling on Delta- and Northwest-Operated Flights (Nov. 5, 2008), <https://ir.delta.com/news/news-details/2008/Delta-Aligns-Policies-and-Fees-to-Offer-Consistency-for-Customers-Traveling-on-Delta--and-Northwest-Operated-Flights/default.aspx>; Mumbower, Hotle & Garrow, *supra* note 3 at 256 (positing that 2009 represents “one of the fastest and most-widespread and bumpiest implementations of new ancillary revenue streams in airline history”).

¹² See Press Release, Business Wire, Indigo Partners Completes Acquisition of Frontier Airlines (Dec. 3, 2013), <https://www.businesswire.com/news/home/20131203006643/en/Indigo-Partners-Completes-Acquisition-Frontier-Airlines>; Press Release, Frontier Airlines, Frontier Enhances Services for Customers Using FlyFrontier.com (May 1, 2013), <https://web.archive.org/web/20130505111354/http://news.flyfrontier.com/press-release/general-news/frontier-enhances-services-customers-using-flyfrontiercom>.

¹³ See UAL Corp., Annual Report (Form 10-K) (Mar. 16, 2001), <https://www.sec.gov/Archives/edgar/data/100517/000010051701500026/ualbody.htm>.

¹⁴ See Donna Rosato, *Airlines pile on the fees*, CNN MONEY (Apr. 30, 2007), https://money.cnn.com/2007/04/30/pf/airline_fees.money.com/index.htm.

¹⁵ See U.S. DEP’T OF TRANSP., OFF. OF INSPECTOR GEN., CC-2009-039, A REVIEW OF THE AVIATION INDUSTRY IN 2008 12 (2009), https://www.oig.dot.gov/sites/default/files/Metrics_10_Final_Report_-_508_Compliant.pdf.

¹⁶ See Christopher Elliott, *Spirit Airlines to charge for carry-on bags*, ELLIOTT REP. (Apr. 6, 2010), <https://www.elliott.org/blog/spirit-airlines-to-charge-for-carry-on-bags/>.

¹⁷ See John Ollila, *American Airlines to Launch Main Cabin Extra – Roomier Economy Product*, LOYALTYLOBBY (Mar. 1, 2012), <https://loyaltylobby.com/2012/03/01/american-airlines-to-launch-main-cabin-extra-roomier-economy-product/>.

¹⁸ See Darren Booth, *Delta Introduces “Basic Economy” Airfares*, CNBC (Mar. 27, 2012), <https://www.cnbc.com/2012/03/27/delta-introduces-basic-economy-airfares.html>.

¹⁹ See Press Release, Frontier Airlines, Frontier Enhances Services for Customers Using FlyFrontier.com (May 1, 2013), <https://web.archive.org/web/20130503170619/http://news.flyfrontier.com/press-release/general-news/frontier-enhances-services-customers-using-flyfrontiercom>.

2018	American, Delta, and United raise first checked bag fee to \$30 ²¹
2020	American, Delta, and United eliminate change and cancellation fees, except for Basic Economy ticketholders ²²
2024	Delta raises first checked bag fee to \$35 ²³
2024	American and United raise first checked bag fee to \$40 ²⁴

American, Delta, and United are often called “legacy carriers,” because they are among the airlines that were regulated by the Civil Aeronautics Board prior to the Airline Deregulation Act of 1978.²⁵ Since they began charging for a first checked bag on domestic itineraries, legacy carriers have historically charged the same price as each other, often announcing increases in their first checked bag fees within days or weeks of one another. For example, in September 2018, American, Delta, and United each raised their fee for a first checked bag on domestic itineraries by \$5, from \$25 to \$30.²⁶ More recently, over a period of roughly two weeks in early 2024, American, Delta, and United each raised their fee for a first checked bag from \$30 to \$35 for domestic flights.²⁷

²⁰ See Andrea Sachs, *American and United unveil a new low-fare category. Is it worth the sacrifices?*, WASH. POST (Feb. 28, 2017), https://www.washingtonpost.com/lifestyle/travel/american-and-united-unveil-a-new-low-fare-category-is-it-worth-the-sacrifices/2017/02/28/ddee4f38-f884-11e6-be05-1a3817ac21a5_story.html.

²¹ See David Schaper, *American Airlines Is The Latest To Raise Checked-Baggage Fees*, NPR (Sept. 20, 2018), <https://www.npr.org/2018/09/20/650168363/american-airlines-is-the-latest-to-raise-checked-baggage-fees>.

²² See Leslie Josephs, *United Airlines scraps ticket-change fees for domestic flights in bid to win over customers*, CNBC (Aug. 30, 2020), <https://www.cnbc.com/2020/08/30/united-airlines-scraps-ticket-change-fees-for-domestic-flights.html>.

²³ See Allison Fox, *Delta Just Increased Baggage Fees — What to Know*, TRAVEL + LEISURE (Mar. 6, 2024), <https://www.travelandleisure.com/delta-increases-baggage-fees-for-2024-8605042>.

²⁴ See Michael Bartiromo, *Airlines are raising their checked bag fees: 3 things to know before paying*, THE HILL (Mar. 4, 2024), <https://thehill.com/changing-america/enrichment/arts-culture/4506529-airlines-are-raising-their-checked-bag-fees-3-things-to-know-before-paying/>.

²⁵ See *United States v. JetBlue Airways Corp.*, No. CV 23-10511-WGY, 2024 WL 162876, at *3 (D. Mass. Jan. 16, 2024), appeal dismissed, No. 24-1092, 2024 WL 3491184 (1st Cir. Mar. 5, 2024). The terms “legacy carrier” and “ultra-low-cost carrier” do not appear in statutes or regulations, but are widely used, including by the Department of Transportation. *E.g.*, Press Release, U.S. Department of Transportation Finalizes Procedures to Increase Access at Newark for Lower Cost Carriers (Feb. 25, 2022), <https://www.transportation.gov/briefing-room/us-department-transportation-finalizes-procedures-increase-access-newark-lower-cost> (requesting applications for runway times from “low-cost carriers or ultra-low-cost carriers”).

²⁶ See David Schaper, *American Airlines Is The Latest To Raise Checked-Baggage Fees*, NPR (Sept. 20, 2018), <https://www.npr.org/2018/09/20/650168363/american-airlines-is-the-latest-to-raise-checked-baggage-fees>.

²⁷ American and United charge \$35 for a first checked bag on domestic itineraries only if pre-paid online; otherwise, they charge \$40. See Michael Bartiromo, *Airlines are raising their checked bag fees: 3 things to know before paying*, THE HILL (Mar. 4, 2024), <https://thehill.com/changing-america/enrichment/arts-culture/4506529-airlines-are-raising-their-checked-bag-fees-3-things-to-know-before-paying/>.

Until 2020, American, Delta, and United each charged up to \$200 for changes or cancellations to domestic tickets.²⁸ On August 30, 2020, United eliminated charges for flight changes or cancellations, except for Basic Economy passengers, who may do so for between \$49.50 and \$99.50 per one-way flight.²⁹ American and Delta announced similar policies the following day, and these policies remain in effect.³⁰

b. Legacy carriers introduced Basic Economy to compete with low-cost-carriers

In 2012, Delta began offering “Basic Economy” fares.³¹ Basic Economy fares come with more restrictions, including no advance seat assignment, no changes to the reservation permitted, and other restrictions on upgrades and loyalty program earnings.³² When it debuted, Delta’s Basic Economy fare was offered specifically on routes where Delta competed with Spirit.³³ United and American introduced Basic Economy in 2017.³⁴ Later that year, Delta President Glen Hauenstein announced an expansion of Basic Economy fares while acknowledging that many customers resented the fare’s limitations, saying, “Really the success of that product isn’t how many people buy it, in our mind, but how many people don’t buy it and choose another product.”³⁵

²⁸ See Megan Leonhardt, *Major airlines have canceled change fees—but a few loopholes could still cost you*, CNBC (Sept. 10, 2020), <https://www.cnbc.com/2020/09/10/major-airlines-have-canceled-change-fees-but-there-are-loopholes.html>.

²⁹ See Nicole Schuman, *United Abolishes Change Fees in Airline PR Grab*, PR NEWSWIRE (Aug. 31, 2020), <https://www.prnewsonline.com/united-no-change-fees-pr/>; Ben Schlappig, *United Airlines Basic Economy: What Are The Restrictions?*, ONE MILE AT A TIME (Feb. 5, 2024), <https://onemileatatime.com/guides/united-airlines-basic-economy/>.

³⁰ See Merrit Kennedy, *United, Delta, American Say They Are Dropping Change Fees For Domestic Flights*, NPR (Aug. 31, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/08/31/907985043/united-airlines-says-it-is-permanently-dropping-change-fees-for-domestic-flights>.

³¹ See Genevieve Shaw Brown, *Delta Airlines New Fare Class: Cheaper, No Seat Assignment*, ABC NEWS (Apr. 3, 2012), <https://abcnews.go.com/blogs/lifestyle/2012/04/delta-airlines-new-fare-class-cheaper-no-seat-assignment>.

³² See *id.*; Darren Booth, *Delta Introduces ‘Basic Economy’ Airfares*, CNBC (Mar. 27, 2012), <https://www.cnbc.com/2012/03/27/delta-introduces-basic-economy-airfares.html>.

³³ See Jack Nicas, *A Stingy Spirit Lifts Airline’s Profit*, WALL ST. J. (May 11, 2012), <https://www.wsj.com/articles/SB10001424052702304749904577384383044911796>.

³⁴ See AMERICAN AIRLINES, INC., Annual Report (Form 10-K) (Feb. 21, 2018), 16 <https://www.sec.gov/Archives/edgar/data/4515/000000620118000009/a10k123117.htm>. UNITED AIRLINES, INC., Annual Report (Form 10-K) (Feb. 22, 2018), 30 <https://ir.united.com/node/6146/html>.

³⁵ Leslie Josephs, *Airlines love this product because many passengers don’t*, CNBC (Oct. 11, 2017), <https://www.cnbc.com/2017/10/11/delta-will-expand-basic-economy-worldwide-next-year.html>; see Remarks of Glen Hauenstein, President, Delta Air Lines, Delta Air Lines Inc To Host Investor Day – Final, FD (FAIR DISCLOSURE) NEWSWIRE (Nov. 20, 2024), <https://plus.lexis.com/api/permalink/52ef8a9a-7eb7-4199-8bb7-3253ae90bcdf?context=1530671&federationidp=Q6FT9956370> (“Well, I mean, generally, I’d say we’re excited when basic economy offerings are shrinking. Because that means that the offerings that are sitting on top of them are greater.”); William J. McGee, *What You Should Know About Basic Economy Airfares*, CONSUMER REPS. (Aug. 9, 2017), <https://www.consumerreports.org/airline-travel/what-you-should-know-about-basic-economy-airfares/> (“the airlines use their basic economy fares to lure travelers to their websites. Then, once they see the restrictions, it’s not that hard to get them to buy a more expensive, standard economy ticket instead”).

As legacy carriers have reclaimed some market share from ULCCs, their strategy has evolved to make Basic Economy more prevalent and more flexible for those willing to pay additional fees.³⁶ For example, until recently, United required Basic Economy ticketholders to check-in exclusively at an airport ticket counter so an agent could confirm the customer was not traveling with more luggage than is permitted by the Basic Economy restrictions.³⁷ American changed its Basic Economy offering to permit one carry-on bag at no additional charge after initially requiring customers to pay to check carry-on bags brought to the boarding gate.³⁸ All three legacy carriers now permit Basic Economy ticket holders to pay a fee to cancel their tickets more than 24 hours after booking, which was previously not allowed.³⁹ At American's 2024 Investor Day Conference, Vasu Raja, then the airline's Chief Commercial Officer, explained that "in a bygone time, we once tried to make it so that customers would never buy [Basic Economy]. But actually, it's now become our entry-level product. . . .[C]ustomers

³⁶ See Mary Schlangenstein, *Legacy Airlines Are Thriving With Ultracheap Fares, Crushing Budget Carriers*, BLOOMBERG (June 7, 2024), <https://www.bloomberg.com/news/articles/2024-06-07/delta-and-united-undercut-budget-airlines-with-cheap-flights> ("Rather than just a defensive move, [Basic Economy fares are] increasingly being used by the largest US carriers to lure price-conscious travelers from the very upstart airlines that pioneered ultralow fares that bought only a seat."). An internal 2018 PowerPoint file provided to the Subcommittee by American notes that the "Primary Goal/Objectives" of Basic Economy are: "Basic Economy [BE] is an unbundled fare product that gives American the ability to compete more effectively with ultra-low-cost carriers. BE is tailored to price-sensitive customers who value price over other aspects of travel. Basic Economy is designed to further unbundle the Coach product to give customers the lowest fare, give more frequent customers an alternative to sell-up to a better product, and drive incremental ancillary revenue." American Airlines Internal PowerPoint, Big Rock Projects, Basic Economy, AAIR-PSI-000608 (on file with the Subcommittee).

³⁷ UNITED AIRLINES, *Basic Economy*, <https://www.united.com/en/us/fly/travel/inflight/basic-economy.html> (last visited Nov. 22, 2024) ("If you're not checking a bag, you need to check in at the airport. We'll confirm your personal item meets size and height requirements at the airport."). Beginning August 6, 2024, United allows Basic Economy passengers to check-in online, but "[t]o prevent basic economy travelers who check in online from sneaking a carry-on bag on board, United will now require them to put a credit card on file and agree to a \$65 charge if they do bring a bag to the gate." Alison Fox, *United Just Made a Big Change to Its Basic Economy Tickets*, TRAVEL + LEISURE (Aug. 2, 2024), <https://www.travelandleisure.com/united-just-made-a-big-change-to-its-basic-economy-tickets-8689605>.

³⁸ American changed its policy in 2018. See Dawn Gilbertson, *American now allows free carry-on bag for 'basic economy' passengers*, USA TODAY (July 26, 2018), <https://www.usatoday.com/story/travel/flights/todayinthesky/2018/07/26/american-airlines-basic-economy-tickets-free-carry-ons/840313002/>.

³⁹ See Brett Snyder, *The One Thing That Really Bothers Me About Basic Economy*, CRANKY FLIER (Feb. 6, 2017), <https://crankyflier.com/2017/02/06/the-one-thing-that-really-bothers-me-about-basic-economy/> (emphasizing the inflexibility of early Basic Economy offerings); DELTA AIR LINES, *Change or Cancel Overview* (last visited Nov. 22, 2024), <https://www.delta.com/us/en/change-cancel/overview> ("Basic Economy tickets cannot be changed in most cases; however, you may be able to cancel (minus a cancellation fee [of up to \$199])"); AMERICAN AIRLINES, *Bag and optional fees* (last visited Nov. 22, 2024), <https://www.aa.com/i18n/customer-service/support/optional-service-fees.jsp> ("Voluntary cancellation of a Basic Economy fare ticket before first flight departs [is] \$99 for AAdvantage members traveling within the 50 U.S. states"). United's website says Basic Economy ticketholders can "cancel your trip after 24 hours [from the time of booking] for a partial travel credit," but it does not clearly disclose the amount of the penalty incurred when cancelling a Basic Economy ticket. See UNITED AIRLINES, *Basic Economy*, <https://www.united.com/en/us/fly/travel/inflight/basic-economy.html> (last visited Nov. 22, 2024).

purchase basic economy, but then they want to be able to do things like choose seats or check bags or earn miles.”⁴⁰

c. Some ancillary fees are not reasonably avoidable

Airlines often claim that ancillary fees are not required, but as more varied and more expensive fees are charged for previously included aspects of travel, some have questioned the value proposition of certain fees and argued that some fees are not reasonably avoidable by customers choosing the lowest fare.⁴¹ For example, traveling with a carry-on bag and obtaining an advanced seat assignment next to a minor child are two once-included options that often cannot be avoided by families traveling together.⁴² Passengers on ULCCs must pay a fee to bring a carry-on bag, and United Basic Economy ticketholders cannot travel with any carry-on bags.⁴³

In 2022, the DOT conducted a review of the family seating policies of the ten largest U.S. carriers and found that “airlines generally promised to make efforts to seat families together, but many required families to pay an additional fee to be assured that a young child traveling in the party would be seated adjacent to an accompanying adult.”⁴⁴

⁴⁰ Remarks of Vasu Raja, Chief Commercial Officer, American Airlines, American Airlines Group Inc Investor Day – Final, FD (FAIR DISCLOSURE) NEWSWIRE (Mar. 4, 2024), <https://plus.lexis.com/api/permalink/a95f2a5d-0e85-4105-85d6-8e75f8df24d5/?context=1530671>.

⁴¹ See Megan Cerullo, *You bought your airline ticket, now pay to pick a seat*, CBS NEWS (Dec. 21, 2018), <https://www.cbsnews.com/news/airline-seat-assignment-fees-new-way-to-boost-airline-profits/>; Scott McCartney, *The Airline Fee to Sit With Your Family*, WALL ST. J. (May 25, 2016), <https://www.wsj.com/articles/the-airline-fee-to-sit-with-your-family-1464198317>; Scott McCartney, *That Airline Seat You Paid for Isn't Yours*, WALL ST. J. (July 26, 2017), <https://www.wsj.com/articles/that-airline-seat-you-paid-for-isnt-yours-1501081568>. Until 2020, the three legacy carriers charged up to \$200 to change or cancel their least-expensive tickets. See e.g., Christopher Elliott, *Can I get a refund on that 'nonrefundable' airline ticket?*, WASH. POST (Aug. 6, 2015), https://www.washingtonpost.com/lifestyle/travel/can-i-get-a-refund-on-that-nonrefundable-airline-ticket/2015/08/06/2ac629b8-2ca1-11e5-a250-42bd812efc09_story.html.

⁴² See e.g., Donna Rosato, *Airlines Fall Short in Fixing Family Seating Problems*, CONSUMER REPS. (Mar. 4, 2020), <https://www.consumerreports.org/air-travel/airline-fixes-to-family-seating-problems-fall-short/> (describing a United customer’s frustration when she and her children were assigned seats in different rows on a flight from San Francisco to Newark in 2019). United has since made changes to its family seating policy, but the airline still does not guarantee adjacent seats for children 13 or under and an accompanying adult at no additional cost for all fare types according to the DOT. See DEP’T OF TRANSP., *Airline Family Seating Dashboard*, <https://www.transportation.gov/airconsumer/airline-family-seating-dashboard> (last visited Nov. 22, 2024). Among the five airlines, the same is true of Delta and Spirit. *Id.*

⁴³ See Alexander Mitchell & Aaron Bailey, *Which Was The First Major Airline To Start Charging For Carry-On Bags?*, SIMPLE FLYING (Aug. 27, 2024), <https://simpleflying.com/first-major-airline-with-carry-on-charges/>; UNITED AIRLINES, *Contract of Carriage Document*, (revised Oct. 24, 2024), <https://www.united.com/en/us/fly/contract-of-carriage.html> (“[United] will not accept any Carry-on Baggage for passengers traveling on a Basic Economy fare and Basic Economy passengers whose baggage is checked at the gate will be charged the applicable checked bag service charge, plus a 25 USD/25 CAD gate handling service charge.”).

⁴⁴ Family Seating in Air Transportation, 89 Fed. Reg. 65272, 65273 (Aug. 9, 2024) (to be codified at 14 C.F.R. pts. 259, 261).

Several airlines have announced changes to their family seating policies.⁴⁵ However, most airlines still do not “guarantee that they would seat a parent and a child together at no extra cost.”⁴⁶ Following a Congressional mandate to implement fee-free family seating, on August 1, 2024, the DOT proposed an amendment to existing regulations that would require airlines to seat children 13 and under next to an accompanying adult at no additional cost.⁴⁷ The DOT said it was concerned that airlines that did not already offer such a guarantee were effectively forcing families to pay additional fees for advance seat assignment.⁴⁸

d. Some loyalty programs and co-branded credit cards exempt members from certain ancillary fees and are increasingly lucrative to airlines

Airline loyalty programs, also known as frequent flyer programs, allow airlines to attract repeat customers by offering rewards and benefits in the form of points or miles accumulated by flying with a specific airline, which can be redeemed for various benefits such as flight rewards, seat upgrades, lounge access, and other benefits.⁴⁹ Since the 1980s, airlines have offered credit cards in partnership with financial institutions (known as “co-branded credit cards”) that help cardholders collect frequent flyer miles or points.⁵⁰ Recently, some of the primary benefits offered by airline co-branded credit cards are services that were once included in the cost of airfare, such as one or more free checked bags and a greater likelihood of finding overhead bin space for carry-on bags.⁵¹ For example, Delta partners with American Express to offer the “Delta SkyMiles Gold American Express Card,” which provides priority boarding and a free first checked bag to its cardholders.⁵² Exempting co-branded credit card holders and certain loyalty

⁴⁵ See Peter Butler, *Most Airlines Still Don't Let Kids Sit With Their Parents for Free*, CNET (Mar. 26, 2024), <https://www.cnet.com/personal-finance/most-airlines-still-dont-let-kids-sit-with-their-parents-for-free/>.

⁴⁶ Family Seating in Air Transportation, 89 Fed. Reg. at 65274.

⁴⁷ See Sec. 516, H.R. 3935 (118th Cong.), FAA Reauthorization Act of 2024, <https://www.congress.gov/bill/118th-congress/house-bill/3935/text>; Family Seating in Air Transportation, 89 Fed. Reg. at 65272.

⁴⁸ See Family Seating in Air Transportation, 89 Fed. Reg. at 65272.

⁴⁹ See *generally*, Hande Sahin, Ali Osman Kusakci, Baboucarr Mbwe, *The effects of frequent flyer programs in the airline industry on customer loyalty*, 3(2) HERITAGE AND SUSTAINABLE DEV. (2021), <https://doi.org/10.37868/hsd.v3i2.69>; Evert R. de Boer, Sveinn Vidar Gudmundsson, *30 years of frequent flyer programs*, 24 J. OF AIR TRANSP. MGMT. 18-24 (2012), <https://doi.org/10.1016/j.jairtraman.2012.05.003>.

⁵⁰ JAY SORENSEN, IDEAWORKSCOMPANY, AIRLINE LOYALTY BECOMES A MULTI-BILLION DOLLAR CLUB 4 (Eric Lucas ed., 2024), <https://ideaworkscompany.com/wp-content/uploads/2024/04/Airline-Loyalty-and-Co-Branding.pdf>.

⁵¹ See Ganesh Sitaraman, *Airlines Are Just Banks Now*, THE ATLANTIC (Sept. 21, 2023), <https://www.theatlantic.com/ideas/archive/2023/09/airlines-banks-mileage-programs/675374/>.

⁵² See AMERICAN EXPRESS, *Delta SkyMiles Gold American Express Card*, <https://www.americanexpress.com/us/credit-cards/card/delta-skymiles-gold-american-express-card/> (last visited Nov. 22, 2024).

program members from some ancillary fees can add value to the airline's frequent flyer program.⁵³

Co-branded credit cards are a major source of revenue to many of the airlines that offer them.⁵⁴ By one estimate, in 2023, U.S. airlines generated approximately \$25 billion in revenue from co-branded credit card programs.⁵⁵ The vast majority came from legacy carrier co-branded credit card agreements.⁵⁶ In 2023, American received \$5.2 billion from its co-branded credit card programs, jumping from \$4.5 billion the year before.⁵⁷ Delta reported \$6.8 billion in co-branded credit card revenue from its partnership with American Express, an amount it expected to grow to \$10 billion over the long term.⁵⁸ United reported that its co-branded credit card agreement with JPMorgan Chase Bank was the main driver behind its "other operating revenue" increasing by \$424 million from 2022 to 2023, an increase of 15.4%.⁵⁹

The growth of airline revenue from co-branded credit cards has prompted legacy carriers to change the terms of loyalty programs so that they are less connected to frequent flying and instead tend to resemble complex financial instruments that reward spending with the airline and using the co-branded credit card.⁶⁰ During a May 2024, joint hearing with the DOT on airline credit card reward programs, Director of the Consumer Financial Protection Bureau Rohit Chopra said that frequent flyer programs have "evolved from a perk for an airline's most loyal customers to a multibillion-dollar currency market where credit card companies and airlines buy, sell, convert, and issue

⁵³ See Mumbower, Hotle & Garrow, *supra* note 3 at 266. When asked in March 2024 how American thinks about raising fares versus raising ancillary fees shortly after American raised its domestic checked bag fee, American's Chief Commercial Officer Vasu Raja responded, "our philosophy is simple, life should be better as an AAdvantage customer. And even in bag fees, though they are higher if you have a credit card, they don't exist." Remarks of Vasu Raja, Chief Commercial Officer, American Airlines, American Airlines Group Inc Investor Day – Final, FD (FAIR DISCLOSURE) WIRE (Mar. 4, 2024), <https://plus.lexis.com/api/document?collection=news&id=urn:contentItem:6BGS-5PT1-F072-X34D-0000-00&context=1530671>.

⁵⁴ See JAY SORENSEN, *supra* note 50 at 4.

⁵⁵ See JAY SORENSEN, *supra* note 50 at 5.

⁵⁶ See JAY SORENSEN, *supra* note 50 at 6-8.

⁵⁷ American Airlines, Inc., Annual Report (Form 10-K) (Feb. 21, 2024), 10, <https://www.sec.gov/Archives/edgar/data/6201/000119312524114062/d636721dars.pdf>.

⁵⁸ See Delta Air Lines, Inc., Annual Report (Form 10-K) (Feb. 12, 2024), 4, <https://www.sec.gov/ix?doc=/Archives/edgar/data/27904/000002790424000003/dal-20231231.htm>; Remarks of Ed Bastian, Chief Executive Officer, Delta Air Lines, Corrected Transcript, Delta Air Lines, Inc. J.P. Morgan Industrials Conference, https://s2.q4cdn.com/181345880/files/doc_events/2024/Mar/12/corrected-transcript_-delta-air-lines-inc-dal-us-j-p-morgan-industrials-conference-12-march-2024-7_45-am-et-vf.pdf ("we're on our way over these next several years to a \$10 billion target that both we and Amex have set for ourselves").

⁵⁹ United Airlines, Inc., Annual Report (Form 10-K) (Feb. 29, 2024), 41, <https://www.sec.gov/ix?doc=/Archives/edgar/data/100517/000010051724000027/ual-20231231.htm>.

⁶⁰ See Ganesh Sitaraman, *supra* note 51; Ari Goldfine, *The Financialization of Frequent Flyer Miles: Calling for Consumer Protection*, 77 VANDERBILT L. REV. 233 (2024), <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=4907&context=vlr>.

miles and points throughout sectors of the economy.”⁶¹ In September 2024, the DOT announced an inquiry into the four largest airline loyalty programs, citing, among other concerns, allegations that airlines had retrospectively devalued points earned by loyalty program members.⁶²

Airline loyalty can have an outsized impact on consumer behavior. Amid consolidation in the airline industry, expansive loyalty programs have made swaths of consumers less likely to comparison shop, with those that have built up large numbers of points feeling “locked in” with a particular airline.⁶³ During a panel examining airline loyalty in May 2024, Spirit’s Chief Commercial Officer said, “What ends up happening is customers sort of get trapped. They’re in cities, they’re dominated by certain airlines, which means you have to fly those airlines in those cities.”⁶⁴

⁶¹ Consumer Financial Protection Bureau, Prepared Remarks of CFPB Director Rohit Chopra at the Joint Hearing on Airline and Credit Card Rewards Programs (May 9, 2024), <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-at-the-joint-hearing-on-airline-and-credit-card-rewards-programs/>.

⁶² See Press Release, U.S. Dep’t of Transp., USDOT Seeks to Protect Consumers’ Airline Rewards in Probe of Four Largest U.S. Airlines’ Rewards Practices (Sept. 5, 2024), <https://www.transportation.gov/briefing-room/usdot-seeks-protect-consumers-airline-rewards-probe-four-largest-us-airlines-rewards>. The inquiry seeks information from rewards programs at American, Delta, United, and Southwest Airlines. *Id.*

⁶³ See Jay L. Zagorsky & H. Sami Karaca, *Airlines are frustrating travelers by changing frequent flyer program rules – here’s why they keep doing it*, CNN (Dec. 14, 2023), <https://www.cnn.com/travel/why-airlines-change-frequent-flyer-rules/index.html>.

⁶⁴ Remarks of Matthew Klein, Chief Commercial Officer, Spirit Airlines, *CFPB and DOT Hold Joint Hearing on Airline and Credit Card Rewards Programs*, 1:18:30 YouTube (May 9, 2024), <https://www.youtube.com/watch?v=cfcOdanISro>.

e. Ancillary fees have grown as airline industry competition has declined

Between 2001 and 2016, the number of major U.S. airlines dropped from 12 to five.⁶⁵ Most of the decline resulted from mergers and acquisitions that took place following the Great Recession, including:

Figure 2: Airline Consolidation 2008-2016

2008	Delta Air Lines merger with Northwest Airlines ⁶⁶
2010	United Airlines merger with Continental Airlines ⁶⁷
2011	Southwest Airlines' acquisition of AirTran Airways ⁶⁸
2013	American Airlines merger with U.S. Airways ⁶⁹
2016	Alaska Airlines' acquisition of Virgin America ⁷⁰

Today, approximately 68% of the U.S. air travel market is controlled by four carriers: American, Delta, United, and Southwest Airlines.⁷¹ In response to the proposed merger between American Airlines and US Airways, the Department of Justice (“DOJ”) noted in 2013 that “industry consolidation has left fewer, more-similar airlines, making it easier for the remaining airlines to raise prices, impose new or higher baggage and other ancillary fees, and reduce capacity and service.”⁷² At least one industry leader has expressed a similar conclusion. At a 2012 industry conference, Scott Kirby—currently

⁶⁵ TRANSP. RSCH. BD., *How Has Air Service Changed Over Time?* <https://crp.trb.org/acrpwebresource12/understanding-air-service-and-regional-economic-activity/how-has-air-service-changed-over-time/> (last visited Nov. 22, 2024). DOT regulations recognize three “air carrier groupings” based on annual operating revenue. See 14 C.F.R. § 04 (2019). Airlines with annual operating revenue in excess of \$1 billion are known as “Carrier Group III,” and are frequently called “major airlines.” *Id.* American, Delta, United, Frontier, and Spirit are considered Group III airlines. *Id.*

⁶⁶ See Press Release, Delta Air Lines, Delta and Northwest Merge, Creating Premier Global Airline (Oct. 29, 2008), <https://ir.delta.com/news/news-details/2008/Delta-and-Northwest-Merge-Creating-Premier-Global-Airline/default.aspx>.

⁶⁷ See United Continental Holdings, Inc., Notice of 2013 Annual Meeting of Stockholders to be Held June 12, 2013 1 (Schedule 14A) (Apr. 26, 2013), <https://www.sec.gov/Archives/edgar/data/100517/000104746913004972/a2214585zdef14a.htm>.

⁶⁸ See SOUTHWEST AIRLINES, *AirTran Acquisition*, <https://www.southwestairlinesinvestorrelations.com/stock-information/airtran-acquisition> (last visited Nov. 22, 2024).

⁶⁹ See Press Release, American Airlines, AMR Corporation And US Airways Group Come Together To Build The New American Airlines (Dec. 9, 2013), <https://news.aa.com/news/news-details/2013/AMR-Corporation-And-US-Airways-Group-Come-Together-To-Build-The-New-American-Airlines/default.aspx>.

⁷⁰ See Press Release, Alaska Airlines, Alaska Air Group closes acquisition of Virgin America, becomes the 5th largest U.S. airline (Dec. 14, 2016), <https://news.alaskaair.com/newsroom/alaska-air-group-closes-acquisition-of-virgin-america-becomes-the-5th-largest-u-s-airline/>.

⁷¹ See BUREAU OF TRANSP. STAT., *Airline Domestic Market Share September 2023 – August 2024*, <https://www.transtats.bts.gov/> (last visited Nov. 22, 2024).

⁷² Amended Complaint at 4, United States v. US Airways Group, Inc., 38 F.Supp.3d 69, No.13-cv-1236 (D.D.C. 2014).

the CEO of United, but then-president of US Airways—stated that consolidation had “allowed the industry to do things like ancillary revenues.”⁷³

Following criticism that the DOJ’s supervision of airline mergers was overly deferential to the wave of consolidation that followed the Great Recession, the DOJ has brought two major antitrust claims against carriers in the past three years.⁷⁴ In 2020, American and JetBlue Airways (“JetBlue”) negotiated the “Northeast Alliance,” an agreement that would allow them to share “slots”—authorizations from the Federal Aviation Administration (“FAA”) to land at or take off from an airport at a particular time—for flights between New York and Boston.⁷⁵ In response to a DOJ lawsuit raising an antitrust challenge, the federal district court in Massachusetts enjoined the alliance in May 2023.⁷⁶ In January 2024, a federal district court in Massachusetts enjoined the proposed merger of Spirit and JetBlue on antitrust grounds.⁷⁷ On October 24, 2024, the DOT and DOJ launched a public inquiry into the state of competition in air travel, seeking information from airlines, industry stakeholders, and the public about “previous airline mergers, exclusionary conduct, airport access, aircraft manufacturing, airline ticket sales, pricing and rewards practices and the experiences of aviation workers.”⁷⁸

Additional consolidation and shifts in business strategy have punctuated the post-pandemic era.⁷⁹ On December 3, 2023, Alaska Airlines announced plans to merge with Hawaiian Airlines.⁸⁰ The post-pandemic recovery of air travel has seen legacy carriers

⁷³ Complaint at 4, *United States v. US Airways Grp., Inc.*, No. 13-cv-1236, 2014 WL 13078262 (D.D.C Apr. 25, 2014), 2013 WL 4055128. See U.S. DEP’T OF TRANSP., OFF. OF THE INSPECTOR GEN., EC2020036, CHANGES IN AIRLINE SERVICE DIFFER SIGNIFICANTLY FOR SMALLER COMMUNITIES, BUT LIMITED DATA ON ANCILLARY FEES HINDERS FURTHER ANALYSIS 37 (2020), https://www.oig.dot.gov/sites/default/files/Airline%20Service%20to%20Small%20Communities%20Final%20Report_0.pdf (“airlines’ offerings and pricing of ancillary services represent an important aspect of competition in the industry”).

⁷⁴ See Justin Elliott, *The American Way*, PROPUBLICA (Oct. 11, 2016), <https://www.propublica.org/article/airline-consolidation-democratic-lobbying-antitrust>; Press Release, Justice Department Sues to Block Unprecedented Domestic Alliance Between American Airlines and JetBlue (Sept. 21, 2021), <https://www.justice.gov/opa/pr/justice-department-sues-block-unprecedented-domestic-alliance-between-american-airlines-and>; Press Release, Justice Department Sues to Block JetBlue’s Proposed Acquisition of Spirit (Mar. 7, 2023), <https://www.justice.gov/opa/pr/justice-department-sues-block-jetblue-s-proposed-acquisition-spirit>.

⁷⁵ See *United States v. Am. Airlines Grp. Inc.*, 675 F. Supp. 3d 65, 78 (D. Mass. 2023).

⁷⁶ See *id.* at 128.

⁷⁷ See *United States v. JetBlue Airways Corp.*, 712 F. Supp. 3d 109, 164 (D. Mass. 2024), appeal dismissed, No. 24-1092, 2024 WL 3491184 (1st Cir. Mar. 5, 2024).

⁷⁸ Press Release, U.S. Dep’t of Justice, Justice Department and Department of Transportation Launch Broad Public Inquiry into the State of Competition in Air Travel (Oct. 24, 2024), <https://www.justice.gov/opa/pr/justice-department-and-department-transportation-launch-broad-public-inquiry-state>.

⁷⁹ See e.g., David Shepardson, *Alaska Airlines, Hawaiian can close merger deal, DOT says*, REUTERS (Sept. 17, 2024), <https://www.reuters.com/business/aerospace-defense/alaska-airlines-hawaiian-can-close-merger-deal-dot-says-2024-09-17/>.

⁸⁰ Press Release, Alaska Airlines, Alaska Airlines and Hawaiian Airlines to Combine, Expanding Benefits and Choice for Travelers Throughout Hawai’i and the West Coast (Dec. 3, 2023), <https://news.alaskaair.com/company/alaska-airlines-and-hawaiian-airlines-to-combine-expanding-benefits-and-choice-for-travelers-throughout-hawaii-and-the-west-coast/>.

reclaim some of the market share they had previously lost to ULCCs as the latter struggle financially.⁸¹ The dominance of legacy carrier operations at certain hubs—so called “fortress hubs”—evidences the diminishing options available to travelers in key cities such as Atlanta, Dallas, and Chicago.⁸² In May 2024, United CEO Scott Kirby compared changes the airline had adopted in response to pressure from low- and ultra-low-cost carriers to repairing a “breach in the moat,” and said that United was now in a position such that “in our hubs, no one can compete with us, we are just winning and we’re going to win in our hub. It is structural, it is permanent, it is irreversible.”⁸³

f. Consolidation has led to a worse passenger experience

In fortress hubs and beyond, airline industry consolidation has left consumers with fewer choices in air travel and led to a worse customer experience.⁸⁴ For example, with one notable exception, it is difficult or impossible to avoid flying an airline in the U.S. that does *not* charge for a first checked bag when purchasing the lowest-available airfare.⁸⁵ And customers purchasing the lowest-available fare on any major U.S. airline will soon be unable to avoid seat assignment fees if they want to select their seat in advance.⁸⁶ As the airline industry has consolidated, the average passenger experience has

⁸¹ See e.g., Ashab Rizvi, *From Leaders to Laggards: What Went Wrong With the Ultra Low-Cost Carriers?*, SKIFT (Aug. 2, 2024), <https://skift.com/2024/08/02/from-leaders-to-laggards-what-went-wrong-with-the-ultra-low-cost-carriers/>; Brett Snyder, *A Closer Look at the Problems that Face Frontier, Other ULCCs*, CRANKY FLIER (Sept. 3, 2024), <https://crankyflier.com/2024/09/03/a-closer-look-at-the-problems-that-face-frontier-other-ulccs/>.

⁸² See James Pearson, *The Battle Of The Big US Hubs: American vs Delta vs United*, SIMPLE FLYING (Aug. 18, 2021), <https://simpleflying.com/the-battle-of-the-big-us-hubs-american-vs-delta-vs-united/>.

⁸³ Remarks of Scott Kirby, Chief Executive Officer, United Airlines, United Airlines Holdings, Inc. (UAL) Bernstein’s 40th Annual Strategic Decisions Conference (Transcript), SEEKING ALPHA – EARNINGS CALL TRANSCRIPTS (May 30, 2024), <https://plus.lexis.com/api/permalink/549d3039-228a-4b28-bbd7-26194f136e7d/>.

⁸⁴ See generally William J. McGee & Ganesh Sitaraman, *How to Fix Flying: A New Approach to Regulating the Airline Industry*, AM. ECON. LIBERTIES PROJECT (Jan. 2024), <https://www.economicliberties.us/wp-content/uploads/2024/01/20240124-AELP-airlines-v5.pdf>; Scott McCartney, *I’ve Tried to Make Travel Better for 20 Years. Mostly It’s Gotten Worse.*, WALL ST. J. (Dec. 15, 2021), <https://www.wsj.com/articles/travel-flights-delays-seats-fees-11639510969>.

⁸⁵ Among the top ten airlines in terms of market share, only Southwest Airlines does not charge for two checked bags, leaving almost three quarters of the U.S. air travel market dominated by nine carriers that all charge bag fees when purchasing the lowest-available fare. See BUREAU OF TRANSP. STAT., *Airline Domestic Market Share September 2023 - August 2024*, <https://www.transtats.bts.gov/> (last visited Nov. 22, 2024). Southwest Airlines has recently faced pressure to consider charging bag fees. See Roger Dooley, *Investor With Near \$2 Billion Stake Puts Southwest Airlines’ Free Checked Bag Policy At Risk*, FORBES (June 10, 2024), <https://www.forbes.com/sites/rogerdooley/2024/06/10/southwest-airlines-free-checked-bag-policy-under-fire-from-investor/>.

⁸⁶ In a move toward unbundling, Southwest Airlines, the only major U.S. airline that does not charge for advanced seat assignments when purchasing the lowest-available fare, recently announced that it would adopt paid assigned seating. See Edward Russell, *Southwest Airlines to launch assigned seating, premium cabin in 2025*, WASH. POST (Sept. 26, 2024), <https://www.washingtonpost.com/travel/2024/09/26/southwest-airlines-free-bags-assigned-seating/>.

worsened in various ways.⁸⁷ Passenger complaints about the air travel experience are varied and numerous, including criticism focused on shrinking average seat sizes, the reduction in average legroom, lost and damaged luggage, unfair and deceptive fees and policies, and unsatisfactory treatment during irregular operations.⁸⁸

The DOT's Office of Aviation Consumer Protection releases monthly reports cataloging flight delays, mishandled baggage, oversales, and consumer complaints.⁸⁹ In recent years, customer complaints about airlines have generally increased. In January 2023, the DOT received 7,754 complaints against U.S. carriers, as compared to 2,602 in January 2022.⁹⁰ This increase was significantly larger than the increase in passenger volume that followed the easing of pandemic travel restrictions.⁹¹ The sum of complaints declined as the 2022-2023 holiday season passed, but remained elevated over previous years, staying above 4,000 complaints per month through May 2023.⁹² In August 2023, the DOT announced that it would delay the release of complaints data "primarily because of the increase in consumer complaints received in this calendar year compared to the prior two years."⁹³ By November 2023, the DOT noted that it "continues to receive a high volume of air travel service complaints against airlines and ticket agents," and that the release of complaint data was delayed "primarily because of the

⁸⁷ See Bina Venkataraman, *Flying is a nightmare. But it could be fixed.*, WASH. POST (Feb. 8, 2024), <https://www.washingtonpost.com/opinions/2024/02/08/airlines-flying-misery-solution/>; Ganesh Sitaraman, *Why Flying Sucks—And What to Do About It*, THE FREE PRESS (Dec. 21, 2023), <https://www.thefp.com/p/why-flying-sucksand-what-to-do-about>.

⁸⁸ See U.S. DEP'T OF TRANSP., *Air Travel Consumer Reps.*, <https://www.transportation.gov/individuals/aviation-consumer-protection/air-travel-consumer-reports> (last visited Nov. 22, 2024); Bina Venkataraman, *Flying is a nightmare. But it could be fixed.*, WASH. POST (Feb. 8, 2024), <https://www.washingtonpost.com/opinions/2024/02/08/airlines-flying-misery-solution/>; Ganesh Sitaraman, *supra* note 87.

⁸⁹ See U.S. DEP'T OF TRANSP., *Air Travel Consumer Rep. Archive*, <https://www.transportation.gov/airconsumer/air-travel-consumer-report-archive> (last visited Nov. 22, 2024).

⁹⁰ U.S. DEP'T OF TRANSP., OFF. OF AVIATION CONSUMER PROT., AIR TRAVEL CONSUMER REP. 44 (Mar. 2023), https://www.transportation.gov/sites/dot.gov/files/2023-09/March%202023%20ATCR_Revised%20092623.pdf. The DOT traditionally releases complaint statistics within two months of receiving complaints, meaning the January 2023 data were part of the DOT's Air Travel Consumer Report issued in March 2023.

⁹¹ For comparison, the DOT received 506 complaints in January 2019. See U.S. DEP'T OF TRANSP., OFF. OF AVIATION CONSUMER PROT., AIR TRAVEL CONSUMER REP. 44 (Mar. 2019), <https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/339546/march-2019-atcr-revised-12-2-2019.pdf>.

⁹² See U.S. DEP'T OF TRANSP., OFF. OF AVIATION CONSUMER PROT., AIR TRAVEL CONSUMER REP. 44 (Apr. 2023), https://www.transportation.gov/sites/dot.gov/files/2023-09/April%202023%20ATCR_Revised%20092623.pdf; U.S. DEP'T OF TRANSP., OFF. OF AVIATION CONSUMER PROT., AIR TRAVEL CONSUMER REP. 52 (May 2023), https://www.transportation.gov/sites/dot.gov/files/2023-11/May%202023%20ATCR_Revised%20110823.pdf; U.S. DEP'T OF TRANSP., OFF. OF AVIATION CONSUMER PROT., AIR TRAVEL CONSUMER REP. 44 (June 2023), https://www.transportation.gov/sites/dot.gov/files/2023-11/June%202023%20ATCR_Revised%20110823.pdf; U.S. DEP'T OF TRANSP., OFF. OF AVIATION CONSUMER PROT., AIR TRAVEL CONSUMER REP. 44 (July 2023), https://www.transportation.gov/sites/dot.gov/files/2023-11/July%202023%20ATCR_Revised%20110823.pdf.

⁹³ U.S. DEP'T OF TRANSP., OFF. OF AVIATION CONSUMER PROT., AIR TRAVEL CONSUMER REP. 54 (Aug. 2023), <https://www.transportation.gov/sites/dot.gov/files/2023-09/August%202023%20ATCR.pdf>.

time needed to review and process these complaints.”⁹⁴ The DOT has not released passenger complaint data since its report for May 2023; it has said it would release updated complaints data in September 2024, but as of November 22, 2024, the data was unavailable.⁹⁵

II. The regulatory landscape of airfare and airline fees

a. Airlines must advertise (and thus compete on) the price of airfare

The DOT regulates many aspects of commercial aviation to ensure the safety, fairness, and reliability of air travel.⁹⁶ In 2011, the DOT adopted the first passenger protection regulation addressing ancillary fees.⁹⁷ Federal regulations require that airlines advertise the entire price of a ticket, including all “mandatory charges” for air transportation.⁹⁸ However, airlines are not required to prominently disclose fees for optional products and services, including checked bags, ticket changes or cancellation fees, and seat selection fees when airfare is first presented to customers.⁹⁹

Airlines primarily compete for customers through the published cost of airfare, not including optional fees.¹⁰⁰ Customers can compare fares and book flights through third-party online travel agents (“OTAs”), but a 2017 Government Accountability Office (“GAO”) analysis concluded that there were deficiencies with the information available about ancillary fees on these platforms.¹⁰¹ In 2023, Airlines for America, an airline industry trade group whose members include American, Delta, United, as well as others, said that the “transparency concerns” identified by the GAO persist for OTAs.¹⁰²

⁹⁴ *Id.*

⁹⁵ See U.S. DEP’T OF TRANSP., OFF. OF AVIATION CONSUMER PROT., AIR TRAVEL CONSUMER REP. 55 (Aug. 2024), <https://www.transportation.gov/sites/dot.gov/files/2024-08/August%202024%20ATCR.pdf>; U.S. DEP’T OF TRANSP., OFF. OF AVIATION CONSUMER PROT., AIR TRAVEL CONSUMER REP. 45 (Sept. 2024), <https://www.transportation.gov/sites/dot.gov/files/2024-09/September%202024%20ATCR.pdf>; U.S. DEP’T OF TRANSP., OFF. OF AVIATION CONSUMER PROT., AIR TRAVEL CONSUMER REP. 45 (Oct. 2024), <https://www.transportation.gov/sites/dot.gov/files/2024-10/October%202024%20ATCR.pdf>.

⁹⁶ See e.g., 49 U.S.C. § 41712(a) (authorizing the DOT to regulate unfair or deceptive practices in the airline industry).

⁹⁷ See Enhancing Airline Passenger Protections, 76 Fed. Reg. 23110, 23110 (Apr. 25, 2011) (to be codified at 14 C.F.R. pts. 244, 250, 253, 259, 399).

⁹⁸ 14 C.F.R. § 399.84(a) (the “full fare rule”).

⁹⁹ The full fare rule “does not require that the full fare quoted include the many kinds of ancillary fees consumers may pay for optional services.” Enhancing Transparency of Airline Ancillary Service Fees, 87 Fed. Reg. 63718, 63719 (Oct. 20, 2022) (to be codified at 14 C.F.R. pt. 399).

¹⁰⁰ See Evan Douglas, *The Pricing and Competitive Strategies of U.S. Airlines*, 5(2) J. OF APPLIED BUS. RSCH. 23 (Oct. 2011), https://www.researchgate.net/publication/27467782_The_Pricing_And_Competitive_Strategies_Of_US_Airlines.

¹⁰¹ See U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-756, INFORMATION ON AIRLINE FEES FOR OPTIONAL SERVICES 31-33 (2017), <https://www.gao.gov/assets/gao-17-756.pdf>.

¹⁰² Airlines for America, Comment on Proposed Rule to Enhance Transparency of Airline Ancillary Service Fees, 24 (Jan. 23, 2023), <https://www.regulations.gov/comment/DOT-OST-2022-0109-0090>.

Along with the expansion of ancillary fees, in recent years new technology has enabled airlines to offer more individualized prices for all aspects of air travel, known as dynamic pricing.¹⁰³ In recent years, airlines have invested in systems that can present fares and ancillary options that distinguish based on attributes specific to a given customer, such as status with an airline's loyalty program.¹⁰⁴ While the technology behind this strategy has primarily been applied to airfares, some airlines, including Frontier and Spirit, apply the same approach to ancillary fees, charging a range of prices for the same ancillary product.¹⁰⁵ In practice, this means that, for example, the only way to know how much Spirit or Frontier will charge to check a bag is to use a price calculator on their respective websites and complete the purchase to lock in the price.¹⁰⁶

Dynamic pricing allows airlines to tailor the price of airfare and fees to specific customers or groups of customers.¹⁰⁷ The Airline Tariff Publishing Company defines dynamic pricing as “the methodology that is used in the airline industry to set the price that most closely matches the marketplace conditions at the time of the product offer.”¹⁰⁸ Related terms indicate that dynamic prices may vary “for certain customers or in certain situations.”¹⁰⁹ Further, there are multiple types of dynamic pricing, including “continuous pricing,” which is “fully dynamic, choosing a price from a predetermined range or linking directly to an airline's revenue management system.”¹¹⁰

Airlines sometimes distinguish between “variable pricing” and “dynamic pricing,” with the former meaning that the price of a product will vary depending on attributes of the product itself, and the latter meaning that the price will vary depending on attributes of

¹⁰³ See generally Press Release, Sabre, What is NDC in Travel? (Jan. 5, 2022), <https://www.sabre.com/insights/new-distribution-capability/>. A “dynamic fee” is a fee generated whenever the Airline “charge[s] different customers different prices for the same set of products, as a function of an observable state of nature. . .” Mumbower, Hotle & Garrow, *supra* note 3.

¹⁰⁴ See e.g., American Airlines, Comment on Proposed Rule to Enhance Transparency of Airline Ancillary Service fees, 22 (Jan. 24, 2023), <https://www.regulations.gov/comment/DOT-OST-2022-0109-0102> (“...American Airlines has been a leader in the promulgation of [New Distribution Capability] technology and that distributors are turning to this new technology...[New Distribution Capability] also enables carriers to provide individually-tailored offers and bundles to consumers based on a traveler's past product purchases, loyalty program status, and flight searches.”).

¹⁰⁵ See Thomas Fiig, Remy Le Guen & Mathilde Gauchet, *Dynamic Pricing of Airline Offers*, 17 J. OF REVENUE AND PRICING MGMT. 381 (2018), <https://www.iata.org/contentassets/0688c780d9ad4a4fad461b479d64e0d/dynamic-pricing--of-airline-offers.pdf>; Alison Sider & Allison Pohle, *The Way Airlines Charge for Bags Is Becoming More Complex and Expensive*, WALL ST. J. (Apr. 22, 2024), <https://www.wsj.com/lifestyle/travel/airline-baggage-fees-climbing-d7c80874>.

¹⁰⁶ See SPIRIT AIRLINES, *Optional Services*, <https://www.spirit.com/optional-services> (last visited Nov. 22, 2024); FRONTIER AIRLINES, *Bag Options*, <https://www.flyfrontier.com/travel/travel-info/bag-options/> (last visited Nov. 22, 2024).

¹⁰⁷ See Christopher Elliot, *Could Dynamic Pricing Be Influencing How Much You Pay for Your Plane Ticket?*, WASH. POST (Aug. 19, 2020), https://www.washingtonpost.com/lifestyle/travel/could-dynamic-pricing-be-influencing-how-much-you-pay-for-your-plane-ticket/2020/08/19/7e77e182-e17d-11ea-8181-606e603bb1c4_story.html.

¹⁰⁸ ATPCO, *Glossary for the Airline Industry*, <https://www.atpco.net/resources/glossary/d?page=1> (last visited Nov. 22, 2024).

¹⁰⁹ *Id.* (explaining “dynamic price adjustment”).

¹¹⁰ *Id.*

the customer purchasing the product.¹¹¹ For example, an airline that charges different prices to select a seat, with the amounts varying based upon criteria preselected by the airline, such as the seat's location within the cabin, would be using variable pricing. An airline that charges different prices to check a bag, with the amounts varying based upon factors such as the zip code associated with the IP address of the person browsing, would be using dynamic pricing.

b. The proliferation of varying and complex fees makes it more difficult to determine the total cost of travel

The proliferation of varying and complex airline fees can make comparison shopping for air travel more difficult and confusing because airline fees obscure the total cost of travel.¹¹² In 2017, a GAO report noted that four consumer groups and three industry groups expressed concern that “as a result of the variety of new optional service fees, bundled products, and fares that airlines now offer, it has become increasingly difficult for consumers to compare airfare ticket prices, fees, and associated rules, and understand what is included in their purchases.”¹¹³ In 2022, the DOT wrote that ancillary fees tend to be disclosed “in complex charts that are confusing to customers and that are not readily available at the moment consumers need the information to comparison shop.”¹¹⁴

On April 30, 2024, the DOT issued a regulation to enhance the transparency of airline ancillary fees.¹¹⁵ The rule seeks to “ensure that customers know upfront the fees carriers charge” for “critical ancillary services,” which it defined as “(1) transporting a first checked bag, a second checked bag, and a carry-on bag; and (2) changing or canceling a reservation.”¹¹⁶ The rule requires airlines to disclose the fee for these critical

¹¹¹ See Elliot, *supra* note 107 (“Airlines have always had variable prices for seats. They range from super-discounted coach-class tickets to sky-high unrestricted first-class fares. But dynamic pricing takes the process a step further. It prices the tickets according to what the airline knows about you, including your ability to pay more — or less — for the ticket.”).

¹¹² See Press Release, National Consumers League, Advocates Call on DOT to Mandate Easier Airfare Cost Comparison (Jan. 25, 2023), <https://nclnet.org/dot-mandate-easier-cost-comparison/>; U.S. Public Interest Research Group, Comment on Proposed Rule to Enhance Transparency of Airline Ancillary Service Fees (Jan 23, 2023), <https://www.regulations.gov/comment/DOT-OST-2022-0109-0383>; AARP, Comment on Proposed Rule to Enhance Transparency of Airline Ancillary Service Fees (Jan. 23, 2023), <https://www.regulations.gov/comment/DOT-OST-2022-0109-0093>; Rick Seaney, *Airline Fees Make Comparison Shopping a Nightmare*, USA TODAY (June 14, 2016), <https://www.usatoday.com/story/travel/columnist/seaney/2016/06/14/airline-fees/85827430/>; GOV'T. ACCOUNTABILITY OFF., GAO-17-756, COMMERCIAL AVIATION: INFORMATION ON AIRLINE FEES FOR OPTIONAL SERVICES 1 (2017), <https://www.gao.gov/assets/gao-17-756.pdf>.

¹¹³ GOV'T. ACCOUNTABILITY OFF., *supra* note 112 at 33.

¹¹⁴ Enhancing Transparency of Airline Ancillary Service Fees, 87 Fed. Reg. 63718, 63722 (Oct. 20, 2022) (to be codified at 14 C.F.R. pt. 399). <https://www.govinfo.gov/content/pkg/FR-2022-10-20/pdf/2022-22214.pdf>

¹¹⁵ Enhancing Transparency of Airline Ancillary Service Fees, 89 Fed. Reg. 34620, 34621 (Apr. 30, 2024) (to be codified at 14 C.F.R. pts. 259, 399).

¹¹⁶ Enhancing Transparency of Airline Ancillary Service Fees, 89 Fed. Reg. at 34621. The rule noted “Any other service may also be determined, after notice and opportunity to comment, to be critical” by the DOT Secretary. *Id.* at 34639.

ancillaries on their websites earlier in the booking process and with greater visibility than is currently the case.¹¹⁷ Most airlines objected to the new requirements.¹¹⁸ In 2024, Airlines for America filed a lawsuit arguing, among other things, that the regulation exceeds the DOT's legal authority.¹¹⁹ On July 29, 2024, the Fifth Circuit Court of Appeals stayed implementation of the regulation.¹²⁰

c. A federal excise tax applies to airfare, but not ancillary fees

The Internal Revenue Code imposes a tax on airline fares equal to 7.5% of “the amount paid for taxable transportation” (“the transportation tax”).¹²¹ When a single payment covers “charges for nontransportation services as well as for transportation of a person,” the “nontransportation” charges may be excluded from the transportation tax, provided the charges are “separable” and shown to the customer during the payment process.¹²² If a fee is “required to be paid as a condition to receiving air transportation” then it is part of the “amount paid for transportation” and is subject to the transportation tax.¹²³ Services that are “not reasonably necessary to the air transportation itself” are not subject to the tax so long as the services are “optional” and the amount charged “bears a reasonable relation to the cost of providing the service.”¹²⁴

Regulations provide some specific examples of charges that are and are not subject to the tax. Changes in the “class of accommodations” are considered payment for transportation and are subject to the transportation tax.¹²⁵ However, fees for “the transportation of baggage” are not subject to the tax.¹²⁶

¹¹⁷ Enhancing Transparency of Airline Ancillary Service Fees, 89 Fed. Reg. at 34621. The rule required disclosure “during the itinerary search process at the first point where a fare and schedule is provided in connection with a specific flight itinerary.” *Id.*

¹¹⁸ The five airlines submitted comments to the DOT opposing the rule’s implementation. See Airlines for America, Comments on Proposed Rule to Enhance Transparency of Airline Ancillary Service Fees (Jan. 23, 2023), <https://www.regulations.gov/comment/DOT-OST-2022-0109-0090>; Frontier Airlines, Comments on Proposed Rule to Enhance Transparency of Airline Ancillary Service Fees (Jan 23, 2023), <https://www.regulations.gov/comment/DOT-OST-2022-0109-0084>; Spirit Airlines, Comments on Proposed Rule to Enhance Transparency of Airline Ancillary Service Fees (Jan. 23,2023), <https://www.regulations.gov/comment/DOT-OST-2022-0109-0092>. *But see* Southwest Airlines, Comments on Proposed Rule to Enhance Transparency of Airlines Ancillary Service Fees, at 2 (Jan. 23, 2023) (commenting that the rule generally “meets the expectations of American consumers, who benefit from knowing, and being able to compare, the total price of their travel options upfront. . .”), <https://www.regulations.gov/comment/DOT-OST-2022-0109-0101>. American, Delta, and United are members of Airlines for America. See AIRLINES FOR AMERICA, *Who Are We*, <https://www.airlines.org/who-we-are/> (last visited Nov. 22, 2024).

¹¹⁹ See *Airlines for Am. v. Dep’t of Transp.*, 110 F.4th 672 (5th Cir. 2024).

¹²⁰ *Id.* at 677.

¹²¹ 26 U.S.C. § 4261(a).

¹²² 26 C.F.R. § 49.4261-2(c).

¹²³ Rev. Rul. 73-508, 1973-2 C.B. 366 (1973).

¹²⁴ Rev. Rul. 80-31, 1980-1 C.B. 251 (1980).

¹²⁵ 26 C.F.R. § 49.4261-7(c). Other airline regulations specify that “Class of service means seating in the same cabin class such as First, Business, or Economy class, or in the same seating zone if the carrier has more than one seating product in the same cabin such as Economy and Premium Economy class.” 14 C.F.R. § 250.1 (pertaining to ticket “oversales”).

¹²⁶ 26 C.F.R. § 49.4261-8(f)(1).

The revenue generated by the transportation tax replenishes the Airport and Airway Trust Fund (“Trust Fund”), which is the primary source of funding for the FAA.¹²⁷ There are several excise taxes that serve as revenue streams for the Trust Fund, but the transportation tax is the most significant.¹²⁸ In a January 2020, analysis of revenue sources supporting government agencies, the GAO noted that “the increasing airline practice of unbundling fees from ticket prices by charging for things like baggage and seat assignments separately could negatively affect trust fund income.”¹²⁹ According to a RAND Corporation study of airport infrastructure financing commissioned by the FAA, in 2018, the exemption of baggage fees from the transportation tax deprived the Trust Fund of \$367 million.¹³⁰

d. Revenue from seat selection fees is not itemized when disclosed to the Department of Transportation

Airlines are not required to provide data breaking down revenue from seats or most other ancillary fees.¹³¹ In 2008, as ancillary fees became more common, the DOT began requiring airlines to report itemized revenue from checked bag fees and from change or cancellation fees, but classified all “charges for seating” to be “part of the ticket price” and instructed airlines to report them under the same “account.”¹³²

In 2011, the DOT announced that it would begin collecting more detailed ancillary revenue data, specifying 19 separate categories of “optional charges” for which it would begin collecting data, including seat fees.¹³³ One of the primary benefits of having this data, the DOT concluded, would be to provide “information to assess the potential

¹²⁷ See FED. AVIATION ADMIN., *Airport & Airway Trust Fund*, (Feb. 21, 2023), <https://www.faa.gov/about/budget/aatf>.

¹²⁸ See *id.*

¹²⁹ GOV'T ACCOUNTABILITY OFF., GAO-20-156, FEDERAL TRUST FUNDS AND OTHER DEDICATED FUNDS: FISCAL SUSTAINABILITY IS A GROWING CONCERN FOR SOME KEY FUNDS 39 (2020) <https://www.gao.gov/assets/gao-20-156.pdf>.

¹³⁰ See BENJAMIN MILLER ET AL., RAND CORP., U.S. AIRPORT INFRASTRUCTURE AND FINANCING: ISSUES AND POLICY OPTIONS PURSUANT TO SECTION 122 OF THE 2018 FEDERAL AVIATION ADMINISTRATION REAUTHORIZATION ACT 65 (2020), https://www.rand.org/content/dam/rand/pubs/research_reports/RR3100/RR3175/RAND_RR3175.pdf.

¹³¹ The DOT requires airlines to submit Air Carrier Financial Reports, known as Form 41. BUREAU OF TRANSP. STAT., *Transtats Data Library: Aviation*, https://www.transtats.bts.gov/databases.asp?Z1qr_VQ=E&Z1qr_Qr5p=N8vn6v10&f7owrp6_VQF=D (last visited Nov. 22, 2024). For major carriers, Schedule P-1.2 of Form 41 is a quarterly filing with more detailed categories of operating revenues that include “Passenger Baggage Fees” and “Reservation Cancellation Fees.” BUREAU OF TRANSP. STAT., TRANSTATS, https://www.transtats.bts.gov/Fields.asp?gnoyr_VQ=FMI (last visited Nov. 22, 2024).

¹³² BUREAU OF TRANSP. STAT., ACCOUNTING AND REPORTING DIRECTIVE, NO. 289, REPORTING ANCILLARY REVENUES ON FORM 41 1 (2009), https://www.bts.gov/sites/bts.dot.gov/files/2024-08/number_289.pdf.

¹³³ Reporting Ancillary Airline Passenger Revenues, 76 Fed. Reg. 41589, 41726-30 (July 15, 2011) (to be codified at 14 C.F.R. pts. 234, 241), <https://www.govinfo.gov/content/pkg/FR-2011-07-15/pdf/FR-2011-07-15.pdf> The DOT proposed that airlines would report this information on a new form to be known as Form 41, Schedule P-9.1, Statement of Ancillary Revenues. *Id.*

impact of [ancillary] fees on the Airport and Airway Trust Fund.”¹³⁴ In 2017, the DOT withdrew the proposed rule prior to implementation, stating that, although there would be “benefits of collecting and publishing the proposed aviation data, the Department takes seriously industry concerns about the potential burden of this rule.”¹³⁵

III. The Subcommittee’s Inquiry

On November 19, 2023, the Subcommittee requested information and documents related to ancillary fees from five major U.S. airlines—American Airlines, Delta Air Lines, United Airlines, Frontier Airlines, and Spirit Airlines.¹³⁶ Along with the amounts the airlines charged for twelve different ancillary fees and how they changed between 2018 and the present, the Subcommittee sought to learn how much each airline earned from these fees, what percentage of the airline’s total revenue these fees generated, and what each airline spent to provide each of the services for which it charges a fee. The information provided to the Subcommittee by each of the five airlines enabled the Subcommittee to learn how ancillary fees and revenue changed over time and to compare the performance of the different airlines.

The Subcommittee also sought internal documents from the airlines in order to understand the decisions they made associated with ancillary fees. This included airlines’ internal measurements of their revenue from ancillary fees, planning documents reflecting airlines’ strategy for ancillary revenue, and minutes or agendas from meetings of committees where ancillary fees were discussed. The Subcommittee also sought to understand how ancillary fees were presented and explained to potential customers, and obtained records related to how these fees are displayed on the airlines’ websites and mobile applications. The Subcommittee reviewed thousands of pages of airline records, interviewed officials with responsibility for ancillary fees at each of the five airlines, and spoke with consumer interest groups, the GAO, and the DOT. As is explained in further detail below, the Subcommittee also reviewed the booking path of each airline’s website, creating sample bookings in order to understand how each airline’s ancillary fee policies translate into options for consumers.

¹³⁴ Reporting Ancillary Airline Passenger Revenues, 76 Fed. Reg. at 41728.

¹³⁵ Ancillary Airline Passenger Revenues, 82 Fed. Reg. 58777, 58778 (Dec. 14, 2017) (to be codified at 14 C.F.R. pt. 241).

¹³⁶ Letter from the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations to American Airlines (Nov. 19, 2023), <https://www.hsgac.senate.gov/wp-content/uploads/2023-11-19-Blumenthal-Request-to-American-Airlines.pdf>; Letter from the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations to Delta Air Lines (Nov. 19, 2023), <https://www.hsgac.senate.gov/wp-content/uploads/2023-11-19-Blumenthal-Request-to-Delta-Air-Lines.pdf>; Letter from the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations to United Airlines (Nov. 19, 2024), <https://www.hsgac.senate.gov/wp-content/uploads/2023-11-19-Blumenthal-Request-to-United-Airlines.pdf>; Letter from the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations to Frontier Airlines (Nov. 19, 2023), <https://www.hsgac.senate.gov/wp-content/uploads/2023-11-19-Blumenthal-Request-to-Frontier-Airlines.pdf>; Letter from the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations to Spirit Airlines (Nov. 19, 2023), <https://www.hsgac.senate.gov/wp-content/uploads/2023-11-19-Blumenthal-Request-to-Spirit-Airlines.pdf>.

FINDINGS

I. The five airlines are making more money from seat fees than ever before: American, Delta, United, Frontier, and Spirit generated \$12.4 billion in seat fee revenue between 2018 and 2023

Fees charged by airlines for selecting a seat are an increasingly important source of airline revenue.¹³⁷ Fees for seats with extra legroom were first introduced by Northwest Airlines in 2006.¹³⁸ Since then, every major U.S. airline has begun charging for seat selection in some form.¹³⁹ The trend of charging for seat assignments has become increasingly common in recent years as legacy carriers have introduced Basic Economy fares, which do not include an advanced seat assignment.¹⁴⁰

American, Delta, United, Frontier, and Spirit each charge for selecting any seat in advance of a flight if a customer purchases the cheapest-available economy fare and does not hold status within the airline's loyalty program.¹⁴¹ The five airlines also offer paid "preferred seats" (seats with desirable locations in the cabin) and extra legroom seats (including exit row and bulkhead seats).¹⁴² Combined, American, Delta, United, Frontier, and Spirit collected \$12.4 billion in seat fee revenue between 2018 and

¹³⁷ See generally JAY SORENSEN, IDEAWORKSCOMPANY, AIRLINES ASSIGN BIG REVENUE PRIORITY TO SEAT SELECTION 5 (Eric Lucas, ed., 2023), <https://ideaworkscompany.com/wp-content/uploads/2023/05/Airlines-Assign-Big-Revenue-Priority-to-Seat-Selection.pdf>; Dawn Gilbertson, *Want to Know Where You're Sitting on Your Next Flight? It'll Cost You*, WALL ST. J. (Apr. 16, 2024), <https://www.wsj.com/lifestyle/travel/airline-seat-fees-flights-europe-d10e3f3e>.

¹³⁸ Susan Carey, *Northwest to Charge Extra for Aisle Seats*, WALL ST. J. (Mar. 14, 2006), <https://www.wsj.com/articles/SB114230172303097322>.

¹³⁹ See *id.*; Gilbertson, *supra* note 137.

¹⁴⁰ See Aaron Hurd, *Before You Book A Basic Economy Airfare, Read This*, FORBES ADVISOR (Oct. 14, 2024), <https://www.forbes.com/advisor/credit-cards/travel-rewards/before-you-book-a-basic-economy-airfare-read-this/>; Gilbertson, *supra* note 137.

¹⁴¹ AMERICAN AIRLINES, *Basic Economy*, <https://www.aa.com/i18n/travel-info/experience/seats/basic-economy.jsp> (last visited Nov. 22, 2024); DELTA AIR LINES, *Basic Economy: Low Fare with Restrictions*, <https://www.delta.com/us/en/onboard/onboard-experience/basic-economy> (last visited Nov. 22, 2024); UNITED AIRLINES, *Basic Economy*, <https://www.united.com/en/us/fly/travel/inflight/basic-economy.html#your-seats> (last visited Nov. 22, 2024); FRONTIER AIRLINES, *Do I have to Purchase a Seat Assignment?*, <https://faq.flyfrontier.com/help/do-i-have-to-purchase-a-seat-assignment> (last visited Nov. 22, 2024); SPIRIT AIRLINES, *Do I Have to Purchase a Seat Assignment?*, <https://customersupport.spirit.com/en-US/category/article/KA-01247> (last visited Nov. 22, 2024).

¹⁴² AMERICAN AIRLINES, *Main Cabin Extra*, <https://www.aa.com/i18n/travel-info/experience/seats/main-cabin-extra.jsp> (last visited Nov. 22, 2024); DELTA AIR LINES, *Delta Comfort Plus: It's More than Just a Flight*, <https://www.delta.com/us/en/onboard/onboard-experience/delta-comfort-plus> (last visited Nov. 22, 2024); UNITED AIRLINES, *Economy Plus*, <https://www.united.com/en/us/fly/travel/inflight/economy-plus.html> (last visited Nov. 22, 2024); FRONTIER AIRLINES, *Seating Options*, <https://www.flyfrontier.com/travel/travel-info/seating-options/> (last visited Nov. 22, 2024); SPIRIT AIRLINES, *Customize Your Comfort*, <https://www.spirit.com/s/onboardexperience> (last visited Nov. 22, 2024).

2023.¹⁴³ Compared to other categories of ancillary fee revenue, seat fee revenue is second only to bag fee revenue, which, according to the DOT, totaled \$25.3 billion across the five airlines in the same time period.¹⁴⁴ In 2023, for the first time since at least 2018, United collected more revenue from seat fees (\$1.3 billion) than it did from checked bag fees (\$1.2 billion).¹⁴⁵

The seat fee revenue information provided to the Subcommittee offers the first public disclosure of this information since airlines began collecting seat fees almost 20 years ago.¹⁴⁶ Seat fee revenue information obtained by the Subcommittee includes revenue from fees for advanced seat selection, preferred seats, and extra legroom seats.¹⁴⁷

¹⁴³ The Subcommittee added the total seat fee revenue provided by each of the five airlines. See Letter from Couns. for American Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations, Exhibits 1-2 (May 13, 2024) (on file with the Subcommittee); Letter from Couns. for Delta Air Lines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (May 15, 2024) (on file with the Subcommittee); Letter from Couns. for United Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Mar. 8, 2024), UA-PSI-00000911 (on file with the Subcommittee); Letter from Couns. for Frontier Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Apr. 2, 2024) (on file with the Subcommittee); Letter from Couns. for Spirit Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (June 21, 2024) (on file with the Subcommittee). Delta's revenue data does not include revenue generated from the sale of Comfort Plus, which includes the majority of the airline's extra leg room seats (excluding higher cabins of service), because Delta considers Comfort Plus to be a separate cabin. See Letter from Couns. for Delta Air Lines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Feb. 20, 2024) (on file with the Subcommittee). Because Delta sells Comfort Plus as a separate cabin of service, Delta's fee revenue information was limited to that generated by seat fees in the main cabin, including exit row seats and certain aisle and window seats. See *id.* The difference between the average Delta economy class fare (including Basic Economy) and Delta Comfort Plus fare was \$53 in 2018 and \$62 in 2023. See Email from Couns. for Delta Air Lines to PSI Staff (May 15, 2024) (on file with the Subcommittee). Delta Comfort Plus seats are similar to seating offered by United's Economy Plus seating and American's Main Cabin Extra seating. See Erik Van Dootingh, *Comparing Premium Economy Products on the Domestic Legacy Carriers*, REWARDEXPERT (Jan. 31, 2022), <https://www.rewardexpert.com/blog/comparing-domestic-premium-economy/>.

¹⁴⁴ See BUREAU OF TRANSP. STAT., *Baggage Fees by Airline 2023*, <https://www.bts.gov/topics/airlines-and-airports/baggage-fees-airline-2023> (last visited Nov. 22, 2024).

¹⁴⁵ The Subcommittee combined 2023 revenue information provided by United for preferred seats, seats with extra leg room, and advanced seat selection and compared it with 2023 bag fee revenue United reported to the DOT. Compare Letter from Couns. for United Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Mar. 8, 2024) (on file with the Subcommittee), UA-PSI-00000911 with BUREAU OF TRANSP. STAT., *Baggage Fees by Airline 2023*, <https://www.bts.gov/topics/airlines-and-airports/baggage-fees-airline-2023> (last visited Nov. 22, 2024).

¹⁴⁶ There have been estimates of airline seat fee revenue based on publicly available information. See JAY SORENSEN, *supra* note 137 at 5 (“\$4.2 billion is my estimate of the assigned seat fee revenue generated by eight key US airlines (Alaska, Allegiant, American, Delta, Frontier, JetBlue, Spirit, and United) for their US domestic networks in 2022.”).

¹⁴⁷ Although the details of each offering varies by airline, advanced seat selection fees are typically paid by customers purchasing the cheapest-available fare that does not include a seat assignment, including Basic Economy on American, Delta, and United. See Zach Wichter, *Your airfare includes a seat, but the airline wants you to pay more*, USA TODAY (Feb. 14, 2024), <https://www.usatoday.com/story/travel/columnist/2024/02/14/airplane-seat-selection-fees-cruising-altitude/72322308007/>. Preferred seats are typically ordinary economy class seats that are located in a desirable location, typically toward the front of the cabin, and can include middle seats. See *id.* Extra

Airlines are not required to report granular seat fee revenue to the DOT, which collects and publishes checked baggage and change/cancellation fee revenue each quarter.¹⁴⁸

a. For American, Delta, United, Frontier, and Spirit, seat fees made up a higher share of total revenue in 2023 than in 2018

Despite sharply decreased air travel during the COVID-19 pandemic, American, Delta, United, Frontier, and Spirit each grew their seat fee revenue both in dollar amount generated and as a percentage of total annual revenue between 2018 and 2023.¹⁴⁹ In 2018, the five airlines collected a combined \$2 billion in seat fee revenue, which increased by 50% to \$3 billion in 2023.¹⁵⁰ At Delta and Frontier, seat fee revenue more than doubled between 2018 and 2023.¹⁵¹ The share of total revenue collected from seat fees increased at each airline between 2018 and 2023:¹⁵²

Figure 3: Portion of Total Revenue from Seat Fees¹⁵²

Airline	2018 percent of revenue from seat fees	2023 percent of revenue from seat fees
American	1.7%	1.8%
Delta	0.2%	0.3%
United	2.0%	2.6%
Frontier	5.0%	6.1%
Spirit	5.0%	6.6%

legroom seats are economy class seats that offer more legroom than the typical economy class seat. This category includes the following branded seating: American Main Cabin Extra, United Economy Plus, Spirit Big Front Seats, and Frontier Premium and UpFront Plus seats. Revenue from the sale of Delta Comfort Plus seats is not included in the Subcommittee’s fee revenue data. See note 143, *supra*.

¹⁴⁸ See Background II(d), *supra*.

¹⁴⁹ The Subcommittee combined the percentage of annual revenue for all seat revenue categories provided by each of the five airlines. See Letter from Couns. for American Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations, Exhibits 1-2 (May 13, 2024) (on file with the Subcommittee); Letter from Couns. for Delta Air Lines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (May 15, 2024) (on file with the Subcommittee); Letter from Couns. for United Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Mar. 8, 2024) (on file with the Subcommittee), UA-PSI-00000911; Letter from Couns. for Frontier Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Apr. 2, 2024) (on file with the Subcommittee); Letter from Couns. for Spirit Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (June 21, 2024) (on file with the Subcommittee).

¹⁵⁰ See note 149, *supra*.

¹⁵¹ See Letter from Couns. for Delta Air Lines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (May 15, 2024) (on file with the Subcommittee); Letter from Couns. for Frontier Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Apr. 2, 2024) (on file with the Subcommittee).

¹⁵² See note 149, *supra*.

Data obtained by the Subcommittee shows that Frontier and Spirit have significantly increased the maximum price of their extra legroom seats since 2018.¹⁵³ In 2018, Spirit charged a maximum of \$71 for an exit row seat with extra legroom, which rose to \$299 in 2023.¹⁵⁴ The maximum fee for Spirit’s Big Front Seats, the airline’s most premium offering, increased more than six-fold, rising from \$140 in 2018 to \$899 in 2023.¹⁵⁵ Frontier’s most expensive extra legroom seat in 2018 cost \$50, which nearly tripled to \$141 in 2023.¹⁵⁶ United’s maximum extra legroom fee increased by \$63 between 2018 and 2023, going from \$256 in 2018 to \$319 in 2023, while American’s top extra legroom fee dropped by \$20 between 2018 and 2023, going from \$160 in 2018 to \$140 in 2023.¹⁵⁷

Figure 4: Price of the most expensive extra legroom seat 2019-2024¹⁵⁸

	2018	2019	2020	2021	2022	2023-2024
American	\$160	\$126	\$121	\$120	\$137	\$140
Delta ¹⁵⁹	“Unavailable” according to Delta	“Unavailable” according to Delta	“Unavailable” according to Delta	“Unavailable” according to Delta	“Unavailable” according to Delta	\$264.99

¹⁵³ See Letter from Couns. for Frontier Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Apr. 2, 2024) (on file with the Subcommittee); Spirit Airlines Fee Ranges 2023-12-11, NK-PSI-000001 (on file with the Subcommittee) [hereinafter Spirit Fee Ranges, NK-PSI-000001].

¹⁵⁴ See Spirit Fee Ranges, NK-PSI-000001, *supra* note 153.

¹⁵⁵ See *id.*

¹⁵⁶ See Letter from Couns. for Frontier Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Apr. 2, 2024) (on file with the Subcommittee).

¹⁵⁷ Letter from Couns. for United Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Mar. 8, 2024), UA-PSI-00000910 (on file with the Subcommittee); Letter from Couns. for United Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Oct. 28, 2024) (on file with the Subcommittee); Letter from Couns. for American Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (May 2, 2024) (on file with the Subcommittee).

¹⁵⁸ Letter from Couns. for American Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (May 2, 2024) (on file with the Subcommittee); Letter from Couns. for United Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Mar. 8, 2024), UA-PSI-00000910 (on file with the Subcommittee); Letter from Couns. for United Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Oct. 28, 2024) (on file with the Subcommittee); Letter from Couns. for Frontier Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Apr. 2, 2024) (on file with the Subcommittee); Spirit Fee Ranges, NK-PSI-000001, *supra* note 153.

¹⁵⁹ Delta did not provide the Subcommittee with fee information for any year except 2024. Delta told the Subcommittee that seat fee data for years going back to 2018, including for 2023, the year in which PSI first requested this information, was “unavailable” or “not readily available.” Letter from Couns. for Delta Air Lines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (May 15, 2024) (on file with the Subcommittee). In response to the Subcommittee’s follow-up questions about the unavailability of this information, Delta replied that “Delta has provided the Subcommittee with the data it has available. As a general matter, Delta does not maintain historical fee information in the normal course of its business, as ancillary fees are not a primary focus of Delta’s business model.” Email from Couns. for Delta Air Lines PSI Staff (Sept. 6, 2024) (on file with the Subcommittee).

United	\$256	\$309	\$240	\$242	\$301	\$319
Frontier	\$50	\$99	\$96	\$101	\$132	\$141
Spirit ¹⁶⁰	\$71	\$99	\$126	\$150	\$99	\$299

The increased prevalence and complexity of seat selection fees follows the post-pandemic trend of increased demand for premium travel products.¹⁶¹ But the rise of paid extra-legroom seating has generally accompanied airlines configuring aircraft with more seats that are closer together.¹⁶² This limits seating options for families traveling with children, who may be pressured to pay for premium seats in order to sit next to their kids.¹⁶³

b. American, United, Frontier, and Spirit do not show customers the cost of seat selection fees until they provide personal information

The proliferation of ancillary fees has made airline booking paths more complex and resulted in carriers requiring different amounts of information before providing customers with the price of certain ancillary fees.¹⁶⁴ For example, after a prospective customer has selected specific flights, many airlines require the customer to provide personal information before displaying an airplane seat map where customers can see the price of fees for specific seats.¹⁶⁵

¹⁶⁰ Spirit is unique among the five airlines to offer an economy class seating option (Big Front Seats) that is comparable to legacy carrier business class seats when considering the seat width and legroom exclusively. See SPIRIT AIRLINES, *What is a Big Front Seat?*, <https://customersupport.spirit.com/en-us/category/article/KA-01250> (last visited Nov. 22, 2024). For this reason, the data presented here reflects the price of Spirit’s exit row seats, the only other extra leg room seating option available on Spirit when the information was provided to the Subcommittee. See Kyle Potter, *Is the Spirit Big Front Seat Worth it? We Put it to the Test*, THRIFTY TRAVELER (Mar. 11, 2022), <https://thriftytraveler.com/reviews/flights/spirit-big-front-seat/>.

¹⁶¹ See Matt Villano, *Airline Seat Selection Fees: It’s Pay to Play*, CNN (Jan. 5, 2019), <https://www.cnn.com/travel/article/airline-seat-selection-fees/index.html>; Rajesh Kumar Singh, *US Airlines Jump on the Premium Seat Bandwagon*, REUTERS (Aug. 1, 2024), <https://www.reuters.com/business/aerospace-defense/us-airlines-jump-premium-seat-bandwagon-2024-07-31/>.

¹⁶² Scott McCartney, *Skinnier Seats on More Crowded Planes*, WALL ST. J. (Oct. 29, 2014), https://www.wsj.com/articles/skinnier-seats-on-more-crowded-planes-1414602406?mod=article_inline.

¹⁶³ William J. McGee, *Airlines tell Parents to Pay up or Risk Sitting Rows Away from Their Kids. That’s Wrong.*, USA TODAY (Nov. 20, 2019), <https://www.usatoday.com/story/opinion/voices/2019/11/20/airlines-seat-reservations-families-children-separate-column/4196405002/>. Of the five airlines, only American and Frontier guarantee adjacent seats for families with minor children according to the DOT. See U.S. DEPT. OF TRANSP., *Airline Family Seating Dashboard*, <https://www.transportation.gov/airconsumer/airline-family-seating-dashboard> (last visited Nov. 22).

¹⁶⁴ See JAY SORENSEN, *supra* note 137 at 7.

¹⁶⁵ In sample bookings, for the three legacy carriers, staff selected an Economy ticket for a round-trip flight from Orlando International Airport (MCO) to Chicago O’Hare International Airport (ORD), departing November 22 and returning November 30, and navigated to the seat map provided on each

Figure 5: Customer information required by each airline website in order to view seat fee prices

Airline	Customer Information
American	Name, gender, date of birth, state and country of residence, email address, and phone number
Delta	None
United	Name, gender, date of birth
Frontier	Name, gender, date of birth, email address, mobile phone number, country of residence, zip code
Spirit	Name, gender, date of birth, street address, state and country of residence, zip code, email address, and phone number

American and United charge fixed prices for specific seats.¹⁶⁶ As a result, the customer information they require, as indicated in the chart above, is likely unnecessary in order for each airline to determine the prices they charge for specific seats.¹⁶⁷ Frontier and Spirit similarly withhold specific seat fee prices, but they use dynamic pricing for seat fees, which can rely on customer-specific information when setting prices.¹⁶⁸ Spirit told the Subcommittee that it does not use “customer-specific information” for dynamic pricing of seat fees.¹⁶⁹ It is not clear whether Frontier and Spirit require customers to provide personal details before displaying the cost of seats because the airlines’ price-setting technology requires it, or for other reasons.

Spirit’s Chief Commercial Officer told the Subcommittee that it currently places seat selection after the collection of personal information because the company’s own evaluation showed that this booking path generated the most “conversions” and the least “abandonment.”¹⁷⁰ In other words, Spirit determined that customers are more likely to complete a purchase after they have spent the time necessary to input their personal information, and the airline has structured their online booking path accordingly. Spirit

airline’s desktop website. For the two ULCCs, staff selected the cheapest fare for the same city pair and dates. Frontier and Spirit offered the ability, before inputting personal information, to select a bundled fare that included selection of certain seats as well as other products or services. Although the total price of the bundle was available before inputting personal information, navigating to the seat map itself still required inputting personal information first. United also offered bundles that included seat selection, but these were offered only after inputting personal information.

¹⁶⁶ PSI Interview with Scott Chandler, Senior Vice President – Revenue Management and Loyalty, and Kim Cisek, Vice President of Customer Experience, American Airlines (July 17, 2024) [hereinafter PSI Interview with American Airlines]; PSI Interview with Amy Costigan, Director of Digital Marketing, Content, and Personalization, United Airlines (July 9, 2024) [hereinafter PSI Interview with United Airlines].

¹⁶⁷ See Elliot, *supra* note 107.

¹⁶⁸ PSI Interview with James Fenner, Vice President of Pricing and Revenue Management, Frontier Airlines (Aug. 1, 2024) [hereinafter PSI Interview with Frontier Airlines]; PSI Interview with Matthew Klein, Executive Vice President and Chief Commercial Officer, Spirit Airlines (July 24, 2024) [hereinafter PSI Interview with Spirit Airlines]. For a definition of dynamic pricing, see Background II(a).

¹⁶⁹ Email from Couns. for Spirit Airlines to PSI Staff (Nov. 20, 2024), (on file with the Subcommittee).

¹⁷⁰ PSI Interview with Spirit Airlines, *supra* note 168.

said that its booking path was “constantly” under review, and that, at the time the interview took place, it was considering changing the current order.¹⁷¹ Frontier’s Vice President of Pricing and Revenue Management confirmed that, once a customer has selected their flights on the airline’s website, Frontier’s algorithms have enough information to determine the price of a checked bag and assigned seats.¹⁷² Asked why the airline nonetheless required customers enter personal information before providing the prices of individual ancillary fees, the Vice President stated that Frontier’s website had been structured that way since 2014, that the airline was incapable of testing different booking paths, and that it had not considered changing the booking path because it would be too costly.¹⁷³

II. The price of ancillary fees at American, Delta, United, Frontier, and Spirit is not tied to each airline’s cost of providing a service

Providing air transportation incurs a variety of costs that airlines work to minimize when possible.¹⁷⁴ Generally, fuel, human resources, and aircraft are among airlines’ most significant expenses.¹⁷⁵ Airlines closely track their operating costs.¹⁷⁶ In the 1980s, American determined that removing a single olive from its first class salads would save the airline \$40,000 per year.¹⁷⁷ More recently, when asked in June 2024, how much it costs to provide passengers with sanitizing wipes upon boarding, United CEO Scott Kirby responded that eliminating the pandemic-era practice would save United about \$5

¹⁷¹ PSI Interview with Spirit Airlines, *supra* note 168. Since the Subcommittee’s interview, Spirit has introduced three bundled fare options that, if selected, allow prospective customers to know the total cost of their trip that includes an assigned seat. See Press Release, Spirit Airlines, Go Big or Go Comfy: Spirit Airlines to Offer Unmatched Value with New Travel Options and Transformed Guest Experience (July 30, 2024), <https://ir.spirit.com/news-releases/news-details/2024/Go-Big-or-Go-Comfy-Spirit-Airlines-to-Offer-Unmatched-Value-with-New-Travel-Options-and-Transformed-Guest-Experience/default.aspx>. For prospective customers that choose Spirit’s lowest-available fare, the requirement to provide the customer information listed above before learning the price of assigned seating options remains. See SPIRIT AIRLINES, <https://www.spirit.com/> (last visited Nov. 23, 2024).

¹⁷² PSI Interview with Frontier Airlines, *supra* note 168.

¹⁷³ PSI Interview with Frontier Airlines, *supra* note 168. On May 17, 2024, Frontier introduced bundled fare options and corresponding changes to its booking path; however, prospective Frontier customers that choose the airline’s cheapest fare must still provide the personal information listed above to learn the price of seat selection fees. See Press Release, Frontier Airlines, Announcing ‘The New Frontier’: Transparent Pricing, No Change Fees, and Enhanced Customer Experience (May 17, 2024), <https://news.flyfrontier.com/announcing-the-new-frontier-transparent-pricing-no-change-fees-and-enhanced-customer-experience/>; FRONTIER AIRLINES, <https://www.flyfrontier.com> (last visited Nov. 23, 2024).

¹⁷⁴ See Justin Hayward, Linnea Ahlgren & Alexander Mitchell, *The Cost Of Flying: What Airlines Have To Pay To Get You In The Air*, SIMPLE FLYING (Nov. 22, 2023), <https://simpleflying.com/the-cost-of-flying/>.

¹⁷⁵ See *id.*

¹⁷⁶ See e.g., AIRLINES FOR AMERICA, *Data and Statistics: A4A Passenger Cost Index* (Oct. 31, 2024), <https://www.airlines.org/dataset/a4a-quarterly-passenger-airline-cost-index-u-s-passenger-airlines/>.

¹⁷⁷ See Gary Leff, *A Lesson About Cost Controls That Airline Executives Need To Learn From Bob Crandall*, VIEW FROM THE WING (Mar. 24, 2021), <https://viewfromthewing.com/a-lesson-about-cost-controls-that-airline-executives-need-to-learn-from-bob-crandall/>.

million.¹⁷⁸ Although airlines regularly cite increasing costs as justification for raising the price of fees,¹⁷⁹ each of the five airlines told the Subcommittee that the price of a given fee is not directly tied to the airline's cost of providing the underlying service, such as transporting checked baggage and assigning seats in advance of a flight.¹⁸⁰

When asked to provide the total cost or average cost per passenger incurred by the airline for providing several fee-based services,¹⁸¹ each of the five airlines told the Subcommittee that, in the regular course of their business, they do not track or maintain cost information with sufficient granularity to know how much it costs to provide each underlying service.¹⁸² American told the Subcommittee that "American Airlines does not track this information in the regular course of our business."¹⁸³ Delta said it "does not maintain the information necessary to respond to this request in a readily accessible format."¹⁸⁴ United responded that, "In the ordinary course of business for the period subject to the [Subcommittee's] Letter, United has not tracked or evaluated costs associated with individual optional services—including those for which it charged an ancillary fee."¹⁸⁵ For each fee for which the Subcommittee asked about costs, Frontier

¹⁷⁸ See The Air Show, *The Scott Kirby Interview* (June 3, 2024), <https://podcasts.apple.com/us/podcast/the-scott-kirby-interview/id1735858856?i=1000657735794>.

¹⁷⁹ See e.g., ASSOCIATED PRESS, *Delta Air Lines is Hiking Checked-Baggage Fees 17% Following Similar Moves by United and American* (Mar. 5, 2024), <https://apnews.com/article/delta-checked-baggage-bags-fee-increase-bc426d2d8eac8bda1150f09c5cf005bc> ("[Delta] said the increase will help it keep up with unspecified rising industry costs."); Michael Bartiromo, *Airlines are Raising Their Checked Bag Fees: 3 Things to Know Before Paying*, THE HILL (Mar. 4, 2024), <https://thehill.com/changing-america/enrichment/arts-culture/4506529-airlines-are-raising-their-checked-bag-fees-3-things-to-know-before-paying/> ("In statements provided to Nexstar, three of the four airlines that raised bag fees in 2024 (Alaska, American and JetBlue) blamed current operating costs for the increased fees.").

¹⁸⁰ PSI Interview with American Airlines, *supra* note 166; PSI Interview with Michael Hecht, Managing Director Global Product Development, Delta Air Lines (Aug. 2, 2024) [hereinafter PSI Interview with Delta Air Lines]; PSI Interview with Frontier Airlines, *supra* note 168; PSI Interview with Spirit Airlines, *supra* note 168; PSI Interview with United Airlines, *supra* note 166.

¹⁸¹ Carry-on personal item, carry-on bag, first checked bag, second checked bag, preferred seat, seat with extra legroom, advanced seat selection, flight change or cancellation, confirmed same-day flight change, standby same-day flight change, redeeming frequent flyer miles, and redepositing frequent flyer miles. See e.g., Letter from the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations to American Airlines (Nov. 19, 2024), <https://www.hsgac.senate.gov/wp-content/uploads/2023-11-19-Blumenthal-Request-to-American-Airlines.pdf>.

¹⁸² See Letter from Couns. for American Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations 8 (Jan. 5, 2024) (on file with the Subcommittee); Letter from Couns. for Delta Air Lines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Apr. 2, 2024) (on file with the Subcommittee); Letter from Couns. for United Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations 3 (Feb. 9, 2024) (on file with the Subcommittee); Letter from Couns. for Frontier Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations 3-6 (Jan. 5, 2024) (on file with the Subcommittee); Letter from Couns. for Spirit Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations 5 (Jan. 23, 2024) (on file with the Subcommittee).

¹⁸³ Letter from Couns. for American Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations 8 (Jan. 5, 2024) (on file with the Subcommittee).

¹⁸⁴ Letter from Couns. for Delta Air Lines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Apr. 2, 2024) (on file with the Subcommittee).

¹⁸⁵ Letter from Couns. for United Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations 3 (Feb. 9, 2024) (on file with the Subcommittee).

responded that “Frontier does not calculate the total cost or average cost per passenger incurred for providing the product or service for which a fee is charged.”¹⁸⁶ And Spirit responded that “there is no workable formula for calculating the total or average cost for each specific ancillary service.”¹⁸⁷ Although each of the five airlines provided some information about the categories of each airline’s expenses, statements made by representatives of American and United suggest that those airlines are capable of analyzing their costs in additional detail.

Despite stating that American “does not track” the total cost or average cost per passenger for transporting checked bags in the regular course of its business, the airline simultaneously explained that “[t]he main reason we charge for bags is to offset some of the cost of transporting those bags, and it is important to note that the fees only partially cover that cost.”¹⁸⁸ In response to the Subcommittee’s follow-up questions, American provided an approximation of the costs associated with carrying checked bags prepared in 2018.¹⁸⁹ The approximation shows that, in 2018, American spent \$2.5 billion to transport 89.2 million checked bags, or about \$28 per checked bag.¹⁹⁰ American assessed the checked-bag-related costs from employee and contract labor, airport rent, fuel, capital and support equipment, and information technology.¹⁹¹ Likely because of certain exemptions from bag fees—including for loyalty program status members, co-branded credit card holders, and active duty military passengers—only about 45% of the airline’s checked bags in 2018 incurred a customer fee, which American estimates brought in \$1.2 billion in bag fee revenue, or about \$13.57 per checked bag.¹⁹² Combined with “credit card revenue” of \$83 million, the only other revenue stream attributed to checked bags, bag fees, and credit card revenue amounted to a total of \$1.29 billion, or \$14.50 per bag.¹⁹³ In September 2018, American raised its fee for a domestic first checked bag from \$25 to \$30 and now charges as much as \$40.¹⁹⁴

¹⁸⁶ Letter from Couns. for Frontier Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations 3-6 (Jan. 5, 2024) (on file with the Subcommittee).

¹⁸⁷ Letter from Couns. for Spirit Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations 5 (Jan. 23, 2024) (on file with the Subcommittee).

¹⁸⁸ Letter from Couns. for American Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Jan. 5, 2024) (on file with the Subcommittee); see Letter from Couns. for American Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Sept. 16, 2024) (on file with the Subcommittee) (“American does not monitor or track [the costs associated with carrying checked bags] in the regular course of its business”).

¹⁸⁹ See Letter from Couns. for American Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations 6 (Sept. 16, 2024) (on file with the Subcommittee).

¹⁹⁰ See American estimate of cost to carry checked bags in 2018, AAIR-PSI-000754, attached as Exhibit 1.

¹⁹¹ See *id.*, Ex. 1.

¹⁹² See *id.*, Ex. 1.

¹⁹³ See *id.*, Ex. 1.

¹⁹⁴ See Waverly Colville, *American Airlines Raises Baggage Fees by \$5*, CNBC (Sept. 20, 2018), <https://www.cnbc.com/2018/09/20/american-airlines-raises-baggage-fees-by-5.html>; AMERICAN AIRLINES, *Checked Bag Policy*, <https://www.aa.com/i18n/travel-info/baggage/checked-baggage-policy.jsp> (“1st checked bag fee is \$40 (\$35 if you pay online)”) (last visited Nov. 22, 2024).

On May 2, 2017, United CEO Scott Kirby stated in testimony to the House of Representatives Committee on Transportation and Infrastructure that, “In 2016, at United, we spent about \$1.9 billion carrying checked bags.”¹⁹⁵ The Subcommittee asked United to provide an estimate of how much United spent to carry checked bags between 2018 and 2023, similar to the sum provided by Mr. Kirby in sworn testimony, as well as the number of checked bags United transported in each of those years.¹⁹⁶ United responded that Mr. Kirby’s statement “was a rough estimate that was generated by [United] in connection with that specific hearing” and that because United “has been unable to locate documentation reflecting that calculation or the methodology used to create it. . . . United is not able to generate cost estimates using the same methodology for other years.”¹⁹⁷ United further declined the Subcommittee’s request for a briefing from United personnel to help the Subcommittee better understand United’s finance and cost-tracking practices and capabilities and has not provided the Subcommittee with information about the number of bags the airline transported between 2018 and 2023.¹⁹⁸

The Subcommittee asked United for additional details about the GAO’s 2017 determination that United’s “cost to deliver a service is a major factor in how they charge for that service.”¹⁹⁹ In response, United told the Subcommittee that “the GAO may have incorrectly inferred that United considers ‘cost to deliver a service’ as a ‘major factor’ in its pricing based solely on general statements that United monitors the market and considers its overall costs for items like labor and fuel when setting prices. If so, United disagrees with that inference.”²⁰⁰ The GAO interviewed officials at ten major U.S. airlines and concluded from its interviews that three of those airlines, including United, considered cost as a major factor in how they charge for an ancillary service.²⁰¹ According to the GAO’s report, the GAO conducted its inquiry into ancillary fees “in accordance with generally accepted government auditing standards” that “require that [GAO] plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for [GAO’s] findings and conclusions based on [GAO’s] audit objectives.”²⁰² The GAO “believe[s] that the evidence obtained provides a reasonable basis for [its] findings and conclusions based on [GAO’s] audit objectives.”²⁰³

¹⁹⁵ *Oversight of U.S. Airline Customer Service: Hearing Before the H. Comm. on Transportation and Infrastructure*, 115th Cong. 32 (2017), <https://www.govinfo.gov/content/pkg/CHRG-115hhrg25311/pdf/CHRG-115hhrg25311.pdf>.

¹⁹⁶ See Email from PSI Staff to Couns. for United Airlines (Sept. 10, 2024) (on file with the Subcommittee).

¹⁹⁷ Email from Couns. for United Airlines to PSI Staff (Sept. 24, 2024) (on file with the Subcommittee).

¹⁹⁸ Email from Couns. for United Airlines to PSI Staff (Oct. 7, 2024) (on file with the Subcommittee).

¹⁹⁹ The GAO told the Subcommittee that United was among three airlines whose representatives conveyed in interviews that the United’s “cost to deliver a service is a major factor in how they charge for that service.” U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-756, COMMERCIAL AVIATION: INFORMATION ON AIRLINE FEES FOR OPTIONAL SERVICES 23 (2017), <https://www.gao.gov/assets/gao-17-756.pdf>.

²⁰⁰ Email from Couns. for United Airlines to PSI Staff (Apr. 30, 2024) (on file with the Subcommittee).

²⁰¹ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 199 at 23.

²⁰² *Id.* at 4.

²⁰³ *Id.*

a. American, Delta, Frontier, and Spirit said they have not considered varying the price of existing fees based on the airfare paid or the cost of providing a service

Each of the five airlines' explanations of why and how they charge ancillary fees helps illuminate why certain categories of fees have increased significantly since their introduction and why the traveling public finds some fees to be surprisingly high. Officials at American, Delta, Frontier, and Spirit each told the Subcommittee that they were not aware of their airline ever having considered pricing existing ancillary fees in proportion to the price of the airfare paid or the airline's cost to provide the underlying service.²⁰⁴ As discussed above, and as illustrated below, when seeking to avoid or pay lower ancillary fees by flying a competing airline, often there is no meaningful consumer choice.

Changes made to ancillary fees at the American, Delta, and United illustrate the limited choices available to customers weighing their travel options. Generally, since American introduced the first legacy carrier checked bag fee in 2008, each time American, Delta, or United increases its first checked bag fee for domestic flights, the other two follow suit by adopting the same or a similar change shortly after.²⁰⁵ American, Delta, and United similarly took steps to eliminate some change and cancellation fees during the COVID-19 pandemic within weeks of each other's announcements.²⁰⁶ In interviews with the Subcommittee, officials at American and Delta denied that their airline automatically raises the price of a domestic first checked bag when either of their two closest competitors raises its first checked bag fee.²⁰⁷ But when asked to provide an example of when each airline declined to raise this type of price after either of their two closest competitors had done so, neither could cite such an example.²⁰⁸

²⁰⁴ PSI Interview with American Airlines, *supra* note 166; PSI Interview with Delta Air Lines, *supra* note 180; PSI Interview with United Airlines, *supra* note 166; PSI Interview with Frontier Airlines, *supra* note 168; PSI Interview with Spirit Airlines, *supra* note 168.

²⁰⁵ See, e.g., ASSOCIATED PRESS, *Delta Air Lines is Hiking Checked-Baggage Fees 17% Following Similar Moves by United and American*, (Mar. 5, 2024), <https://apnews.com/article/delta-checked-baggage-bags-fee-increase-bc426d2d8eac8bda1150f09c5cf005bc>; David Schaper, *American Airlines is the Latest to Raise Checked-Baggage Fees*, NPR (Sept. 20, 2018), <https://www.npr.org/2018/09/20/650168363/american-airlines-is-the-latest-to-raise-checked-baggage-fees>.

²⁰⁶ Megan Leonhardt, *Major Airlines have Cancelled Change Fees – but a Few Loopholes Could Still Cost You*, CNBC (Sept. 10, 2020), <https://www.cnbc.com/2020/09/10/major-airlines-have-canceled-change-fees-but-there-are-loopholes.html>.

²⁰⁷ PSI Interview with American Airlines, *supra* note 166; PSI Interview with Delta Air Lines, *supra* note 180. American provided three examples of when it did not raise the price of some second through fifth checked bag fees in specific foreign markets following a corresponding increase by Delta or United, but American did not provide examples of when it did not follow a domestic first checked bag fee increase by Delta or United. See Letter from Couns. for American Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Sept. 17, 2024) (on file with the Subcommittee); Email from Couns. for American Airlines to PSI Staff (Nov. 20, 2024) (on file with the Subcommittee).

²⁰⁸ PSI Interview with American Airlines, *supra* note 166; PSI Interview with Delta Air Lines, *supra* note 180. The Delta official cited an example involving a low-cost carrier fee increase, but Delta did not

b. Ancillary fees sometimes add up to more than the price of the fare itself

The Subcommittee's review of fee prices at each of the five airlines suggests that the price of ancillary fees is limited only by market forces, leading to increasingly high fees, primarily for carry-on bags, checked bags, and seat assignments. Last year, Frontier and Spirit charged as much as \$99 to transport a carry-on bag.²⁰⁹ On American and United, the price for a first checked bag on domestic itineraries reached an all-time high of \$40 in 2024, with a \$5 discount when paying in advance.²¹⁰ As discussed above, seat selection fees have also increased.²¹¹ In 2023, United charged as much as \$319 for a seat with extra legroom.²¹² Delta currently charges as much as \$264.99 for an exit row seat with extra legroom in the main cabin, which does not include more expensive Comfort Plus seating.²¹³ Spirit charges as much as \$900 for a wider, extra legroom seat at the front of the cabin.²¹⁴ In fact, Spirit told the Subcommittee that, in 2023 and 2024, approximately 35% of its customers paid more in ancillary fees than they did for their airfare, up from 26% in 2018.²¹⁵

III. The five airlines increasingly rely on algorithms to set the price of ancillary fees and are investing in pricing strategies based on customer data

The price of ancillary fees at both Spirit and Frontier are currently determined with the assistance of algorithms and can vary from trip to trip.²¹⁶ In 2023, Spirit charged carry-on bag fees that ranged between \$15 and \$99, and fees for a first checked bag that

respond to the Subcommittee's follow-up request for an example involving an increase implemented by American or United. See Email from PSI Staff to Couns. for Delta Air Lines (Aug. 23, 2024) (on file with the Subcommittee).

²⁰⁹ See Spirit Fee Ranges, NK-PSI-000001, *supra* note 153; Letter from Couns. for Frontier Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Apr. 2, 2024) (on file with the Subcommittee).

²¹⁰ Michael Bartiromo, *Airlines are Raising Their Checked Bag Fees: 3 Things to Know Before Paying*, THE HILL (Mar. 4, 2024) <https://thehill.com/changing-america/enrichment/arts-culture/4506529-airlines-are-raising-their-checked-bag-fees-3-things-to-know-before-paying/>.

²¹¹ See Findings I, *supra*.

²¹² See Letter from Couns. for United Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Mar. 8, 2024) (on file with the Subcommittee), UA-PSI-00000910 (on file with the Subcommittee).

²¹³ See Letter from Couns. for Delta Air Lines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (May 15, 2024) (on file with the Subcommittee).

²¹⁴ SPIRIT AIRLINES, *Optional Services*, <https://www.spirit.com/optional-services> (last visited Nov. 22, 2024) ("Big Front Seats (at airport) \$12 to \$900").

²¹⁵ Email from Couns. for Spirit Airlines to PSI Staff (Sept. 14, 2024) (on file with the Subcommittee).

²¹⁶ Letter from Couns. for Spirit Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Jan. 23, 2024) (on file with the Subcommittee); Letter from Couns. for Frontier Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Feb. 9, 2024) (on file with the Subcommittee).

varied between \$10 and \$89.²¹⁷ That year, Frontier charged between \$0 and \$99 for a carry-on bag, and between \$0 and \$138 for a first checked bag.²¹⁸ Data provided to the Subcommittee shows the average Spirit or Frontier passenger paid much more for a bag than passengers of legacy carriers.²¹⁹ The average price of a first checked bag was \$71.80 with Spirit, and \$59 with Frontier.²²⁰

To set bag and seat fees, Frontier relies on Navitaire Dynamic Pricing, a third-party service that “incorporates machine learning models into pricing algorithms designed to optimize revenue results.”²²¹ In an interview with the Subcommittee, Frontier’s Vice President of Pricing and Revenue Management explained that factors including the departure and destination locations, the time of the flight, and market characteristics are used to determine bag and seat fees.²²² Frontier’s Vice President also stated that the algorithm engages in price experimentation, meaning that it periodically sets prices at different levels in order to determine the optimal fee that customers are willing to pay.²²³

²¹⁷ Spirit Fee Ranges, NK-PSI-000001, *supra* note 153. According to Spirit, a \$99 carry-on fee is “only charged for passengers that pay at [the] gate,” rather than ahead of time. *Id.*

²¹⁸ Letter from Couns. for Frontier Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Apr. 2, 2024) (on file with the Subcommittee).

²¹⁹ Letter from Couns. for Spirit Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Apr. 6, 2024) (on file with the Subcommittee); Letter from Couns. for Frontier Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Apr. 2, 2024) (on file with the Subcommittee). In 2023, American and Delta charged \$30 for a first checked bag on domestic flights while United charged \$35 but offered a \$5 discount when customers prepaid online before their flight. See Natasha Etzel, *Checking a Bag? Here’s How Much You’ll Pay When Taking a Domestic Flight With These 5 Airlines*, THE MOTLEY FOOL (June 3, 2023), <https://www.fool.com/money/credit-cards/articles/checking-a-bag-heres-how-much-youll-pay-when-taking-a-domestic-flight-with-these-5-airlines/>; Letter from Couns. for American Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Jan. 5, 2024) (on file with the Subcommittee); Letter from Couns. for Delta Air Lines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Jan. 5, 2024) (on file with the Subcommittee); Letter from Couns. for United Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (June 4, 2024), UA-PSI-00001467 (on file with the Subcommittee).

²²⁰ See Email from Couns. for Spirit Airlines to PSI Staff, Supplemental Question 1 Response (Apr. 6, 2024) (on file with the Subcommittee); Frontier Airlines Response Tables for R1 (Apr. 2, 2024) (on file with the Subcommittee). Each of the three legacy carriers include a carry-on bag for a main cabin ticket, and American and Delta also includes one for Basic Economy passengers. See AMERICAN AIRLINES, *Basic Economy*, <https://www.aa.com/i18n/travel-info/experience/seats/basic-economy.jsp> (last visited Nov. 22, 2024); DELTA AIR LINES, *Carry-On Baggage*, <https://www.delta.com/us/en/baggage/carry-on-baggage> (last visited Nov. 22, 2024); UNITED AIRLINES, *Basic Economy*, <https://www.united.com/en/us/fly/travel/inflight/basic-economy.html>, (last visited Nov. 22, 2024). United does not include a carry-on bag with a Basic Economy ticket for domestic flights. United Basic Economy passengers that bring baggage larger than a personal item to the boarding gate must check their bag for a fee and additional penalty. See UNITED AIRLINES, *Contract of Carriage Document*, (revised Oct. 24, 2024), <https://www.united.com/en/us/fly/contract-of-carriage.html> (“[United] will not accept any Carry-on Baggage for passengers traveling on a Basic Economy fare and Basic Economy passengers whose baggage is checked at the gate will be charged the applicable checked bag service charge, plus a 25 USD/25 CAD gate handling service charge.”).

²²¹ Letter from Couns. for Frontier Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Feb. 9, 2024) (on file with the Subcommittee).

²²² PSI Interview with Frontier Airlines, *supra* note 168.

²²³ PSI Interview with Frontier Airlines, *supra* note 168.

Two different people selecting the exact same Frontier flight and purchasing their tickets at the same time could be charged different prices for the same ancillary product.²²⁴

Spirit also contracts with Navitaire, which it describes as “supporting Spirit’s website.”²²⁵ In an interview with the Subcommittee, Spirit’s Chief Commercial Officer initially said that the airline employed dynamic pricing for ancillary fees, then said he would describe the airline’s pricing as variable.²²⁶ The Chief Commercial Officer said that while Spirit does employ algorithms to set the price of airfare, he was unsure whether the same technology was used to set the price of ancillary fees.²²⁷ In separate communications with the Subcommittee, Spirit stated that Spirit employees use “in-house algorithms and market trend analysis” as tools to set the price of ancillary fees and that staff review the outputs of these tools on a weekly basis before updating the fees “as needed in response to commercial trends.”²²⁸

American, Delta, and United say they do not use dynamic pricing to set the price of ancillary fees.²²⁹ But both American and Delta do use algorithms or formulas to operate the complex pricing schemes used for paid seats.²³⁰ Delta’s fees for preferred and extra legroom seats in part rely on a “simple algorithm” that does not involve machine learning or artificial intelligence.²³¹ In an interview with the Subcommittee, Delta’s Managing Director of Global Product Development said that, although Delta does not use algorithms to set the price of ancillary fees, Delta does use simple algorithms to calculate the cost of an upgrade to a different cabin and that the price of each seat itself is set by a human.²³² American’s Senior Vice President of Revenue Management and Loyalty told the Subcommittee that the airline’s “formula” could, for example, recommend what the difference in price should be between an aisle seat and a window seat for a given flight.²³³ United stated that it does not rely on algorithms to determine

²²⁴ PSI Interview with Frontier Airlines, *supra* note 168.

²²⁵ Comment from Spirit Airlines, Inc. (Supplemental) on Proposed Rule to Enhance Transparency of Airline Ancillary Service, 9-10 (Apr. 6, 2023), <https://www.regulations.gov/comment/DOT-OST-2022-0109-0738>.

²²⁶ PSI Interview with Spirit Airlines, *supra* note 168. For the difference between dynamic and variable pricing, see Background II(a), *supra*.

²²⁷ PSI Interview with Spirit Airlines.

²²⁸ Email from Couns. for Spirit Airlines to PSI Staff (Feb. 21, 2024) (on file with the Subcommittee).

²²⁹ PSI Interview with American Airlines, *supra* note 166; PSI Interview with Delta Air Lines, *supra* note 180; PSI Interview with United Airlines, *supra* note 166.

²³⁰ PSI Interview with American Airlines; PSI Interview with Delta Air Lines. American stated that it uses “a formula with inputs or dimensions” to help determine seat fee pricing; it is not clear how such a formula meaningfully differs from an algorithm. See Email from Couns. for American Airlines to PSI Staff (Nov. 20, 2024), (on file with the Subcommittee).

²³¹ Letter from Couns. for Delta Air Lines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Jan. 5, 2024) (on file with the Subcommittee).

²³² PSI Interview with Delta Air Lines, *supra* note 180. Delta stated that it does not consider seat upsells to be ancillary, on the basis that Delta considers certain seats with extra legroom to be one of among several attributes of a distinct fare product. Email from Couns. for Delta Air Lines to PSI Staff (Nov. 20, 2024), (on file with the Subcommittee).

²³³ PSI Interview with American Airlines, *supra* note 166.

“fees charged to individual consumers.”²³⁴ However, United’s Managing Director of Digital Marketing, Content, and Personalization told the Subcommittee that the prices shown in the airline’s “seat map” depend in part on assessment of the speed at which seat inventory is being purchased.²³⁵ In 2023, United had the largest possible potential variation in prices for extra legroom seats of the three legacy carriers, with possible prices for an extra legroom seat ranging from \$19 to \$319.²³⁶

As airline ancillary fee strategies continue to evolve, airlines will likely expand their use of new technology to further customize fee prices and offerings to specific customers.²³⁷ Like other businesses, airlines are increasingly adopting new uses of algorithms and artificial intelligence to improve their operations and increase revenue.²³⁸ These technologies, which enable strategies like dynamic pricing, increasingly empower airlines to target specific prices and offers to specific customers, or segments of customers, that the airline’s data analysis suggests a customer will be more likely to purchase.²³⁹

According to a 2022 internal marketing document provided by Delta, the airline’s digital team has “built out propensity modeling to predict a customer’s willingness to buy-up based on their customer profile and unique characteristics.”²⁴⁰ One 2018 internal document from American notes that “Offer management / customized packaging” represents the future of the airline’s bag fees, in 2019 and beyond.²⁴¹ And a contract between Frontier and one of its revenue management software providers produced to the Subcommittee states that the licensed software that “allow[s] [Frontier] to advance its goals of data-driven, customer-centric, customized offers” relies in part on data from “post-flight surveys,” “On-board purchase data,” “Segmentation data (e.g. Mosaic or US

²³⁴ Letter from Couns. for United Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Jan. 5, 2024) (on file with the Subcommittee).

²³⁵ PSI Interview with United Airlines, *supra* note 166. Other considerations that are taken into account in United’s seat fee pricing include the route, aircraft type, legroom, and load factor. See Letter from Couns. for United Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Nov. 20, 2024), (on file with the Subcommittee).

²³⁶ Letter from Couns. for United Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Mar. 8, 2024) (on file with the Subcommittee), UA-PSI-00000910 (on file with the Subcommittee).

²³⁷ PROS & SKIFT, *Changing the Game: Inside the New Strategy Redefining Airline Pricing* (Oct. 4, 2024), <https://skift.com/2024/10/04/changing-the-game-inside-the-new-strategy-redefining-airline-pricing/>; Sam Kemmis, *Dynamic Pricing is Coming for Everything in Travel*, NERDWALLET (Apr. 3, 2024), <https://www.nerdwallet.com/article/travel/dynamic-pricing-is-coming-for-everything-in-travel>.

²³⁸ See Julie Weed, *Did You Make Your Connecting Flight? You May Have A.I. to Thank*, N. Y. TIMES (May 12, 2024), <https://www.nytimes.com/2024/05/10/travel/airlines-artificial-intelligence.html>; Chen Chuanren, *AI Will be an Important Tool for Airlines if They Avoid the Risks*, AVIATION WEEK (Oct. 8, 2024), <https://aviationweek.com/air-transport/airlines-lessors/ai-will-be-important-tool-airlines-if-they-avoid-risks>.

²³⁹ See PROS & SKIFT, *supra* note 237.

²⁴⁰ Delta Air Lines Internal Marketing Document, High-Yield Toolkit, DELTA-PSI-00000100 (on file with the Subcommittee).

²⁴¹ American Airlines Internal Document, The Baggage Evolution – past, present, and future, AAIR-PSI-000684 (on file with the Subcommittee).

Census), “External purchase data,” “Website data,” and “Engagement data,” among others.²⁴²

IV. In 2022 and 2023, Spirit and Frontier paid more than \$26 million to incentivize gate agents and others to collect bag and other fees

In 2022, Spirit and Frontier both launched incentive programs that offered payments to employees and third-party contractors for selling ancillary products, including carry-on bags and seat upgrades.²⁴³ This report offers the first public review of the structure and extent of these incentive payments.

Spirit launched its airport incentives program in November 2022 and paid out \$780,944 under the program that year.²⁴⁴ The program was active for all of 2023, and in that year Spirit paid \$6,955,634.²⁴⁵ Between July 2022 and December 2023, Spirit also paid \$109,450 in incentives to its contact center personnel.²⁴⁶ These two programs provide incentives to employees who collect fees for the following products: carry-on bag fees for passengers who bring a personal item larger than the size permitted by Spirit’s baggage policies; checked bags that exceed the weight limit set by Spirit’s policies; exit row seats; and most recently, selling a Big Front Seat to a customer.²⁴⁷ Sales of exit row seats result in a \$2 commission, and collecting a fee for an overweight bag earns a \$4 commission; Big Front Seat and carry-on bag fees both produce a \$5 commission.²⁴⁸ Spirit personnel are eligible to receive these incentives on a monthly basis; there is no limit to the amount gate agents can collect in a given month, but agents are not eligible if “Guest experience ratings” decline.²⁴⁹ Spirit also has an “Airport Leadership Incentive” that rewards managerial personnel if a particular airport exceeded a “revenue per guest metric” in a given month.²⁵⁰

Frontier’s incentive program, which launched in March 2022, provides incentive payments for similar fees, but was deployed at a larger scale: In 2022, Frontier paid out

²⁴² Contract between Frontier Airlines and Revenue Management Software Provider, First Schedule, (May 2019), FA_00010066-FA_00010067 (on file with the Subcommittee).

²⁴³ Letter from Couns. for Frontier Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Jan. 5, 2024) (on file with the Subcommittee). Spirit stated that incentives were first made available beginning in April 2023. Email from Couns. for Spirit Airlines to PSI Staff (Feb. 21, 2024) (on file with the Subcommittee). However, Spirit provided data to the Subcommittee that identifies “Incentive Commission Expenses” beginning in November 2022 and for every month of 2023. See Spirit Airlines Incentive Commission Expenses, (Feb. 21, 2024), NK-PSI-000058-NK-PSI-000059 (on file with the Subcommittee).

²⁴⁴ See Spirit Airlines Incentive Commission Expenses, (Feb. 21, 2024), NK-PSI-000058-NK-PSI-000059 (on file with the Subcommittee).

²⁴⁵ See *id.*

²⁴⁶ See Spirit Airlines Contact Center Incentives, NK-PSI-000087 (on file with the Subcommittee).

²⁴⁷ PSI Interview with Spirit Airlines.

²⁴⁸ Email from Couns. for Spirit Airlines to PSI Staff (Feb. 21, 2024) (on file with the Subcommittee).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

\$6,310,585 to customer service agents and other workers collecting ancillary fees.²⁵¹ In 2023, this number grew to \$12,512,526.²⁵² Frontier provided incentive payments to seven different types of workers: customer service agents, contracted managers, and contracted supervisors, all of whom were employed by third parties; and regional supervisors, regional managers, general managers, and customer service managers, all of whom were employed by Frontier.²⁵³ Frontier managers and supervisors were also eligible for bonuses that were paid as a percentage of their salary if, in a given month, an “airport or region under their charge” accumulated a particular level of carry-on bag fee sales at the gate.²⁵⁴ The vast majority of incentive payments went to customer service agents, including \$11,412,374 in 2023.²⁵⁵

Frontier customer service agents received commissions when customers purchased carry-on bags at airport ticket counters and at departure gates.²⁵⁶ For domestic flights, customer service agents received \$10 for the purchase of each carry-on bag at the departure gate, \$10 for carry-on bags purchased digitally within 60 minutes of the actual departure time of a passenger’s flight, and \$3 for those purchased at the airport ticket counter.²⁵⁷ Sales of domestic Frontier seats with extra legroom resulted in a \$3 commission for customer service agents.²⁵⁸

a. Frontier paid carry-on bag commissions for 18 months before changing the “goal of the program” to include limiting passenger complaints

Both Spirit and Frontier allow passengers to bring a “personal item” on board for free, but charge passengers a carry-on bag fee if the personal item is deemed to exceed the permitted size for personal items, a process that occurs after the passenger has arrived at the airport.²⁵⁹ News reports documenting consumer frustration with Frontier’s

²⁵¹ Letter from Couns. for Frontier Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations 5-7 (Feb. 9, 2024) (on file with the Subcommittee). This included \$5,991,999 to customer service agents, \$91,696 to third-party contracted managers, \$91,001 to third-party contracted supervisors, \$0 to regional supervisors, \$35,604 to regional managers, \$31,135 to general managers, and \$69,150 to customer service managers. *Id.*

²⁵² *Id.* This included \$11,412,374 to customer service agents, \$228,530 to third-party contracted managers, \$547,574 to third-party contracted supervisors, \$1,340 to regional supervisors, \$47,788 to regional managers, \$103,397 to general managers, and \$171,523 to customer service managers. *Id.*

²⁵³ *Id.* at 5-6.

²⁵⁴ *Id.* at 13.

²⁵⁵ *Id.* at 6.

²⁵⁶ Letter from Couns. for Frontier Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations 12 (Jan. 5, 2024) (on file with the Subcommittee).

²⁵⁷ Letter from Couns. for Frontier Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations 12 (Jan. 5, 2024) (on file with the Subcommittee). Frontier paid smaller incentives for fees collected from passengers on international flights: \$0.50 for carry-on bag purchased at the ticket counter, and \$1 for a carry-on bag purchased on a digital channel within 60 minutes of the actual departure time of a passenger’s flight, and \$1 for a carry-on bag purchased at the gate. *Id.*

²⁵⁸ *Id.*

²⁵⁹ See FRONTIER AIRLINES, *Buy Bags Now & Save Later*, <https://www.flyfrontier.com/travel/travel-info/bag-options/> (last visited Nov. 22, 2024); SPIRIT AIRLINES, *Bag Info*,

incentive policies have included instances of customers claiming that gate agents concluded that personal items did not fit within containers meant to measure the size of a personal item allowed by Frontier’s policy, even though the items visibly did fit.²⁶⁰

Frontier had several eligibility criteria for each of the seven types of contractors or employees who could earn commission payments, all of whom became ineligible for payments if they received a certain elevated level of complaints.²⁶¹ However, while six of the seven types of workers became ineligible if they, or the airport or region they managed, exceeded “system average ratio” for complaints in a given month, customer service agents did not become ineligible until they exceeded twice the system average ratio for complaints.²⁶²

Frontier appears to have adopted the policies about complaint limitations in an internal document that stated the “goal of the program has changed to increase the airport collection of gate bags. . . while controlling the number of associated bag complaints received.”²⁶³ This policy amendment did not take effect until October 2023, more than 18 months after the incentive payment program began.²⁶⁴ The Subcommittee’s analysis of the DOT’s passenger complaint data following Frontier’s introduction of incentive payments for collection of ancillary fees reveal a significant increase in the number of passenger complaints filed with the DOT against Frontier related to baggage. Between March 2021 and February 2022, the year before the policy was updated, the median number of monthly baggage complaints against Frontier was 13.5; between March 2022, and February 2023, it was 51.5.²⁶⁵ Although total passenger volume increased

<https://customersupport.spirit.com/en-us/category/article/KA-01535> (last visited Nov. 22, 2024). Frontier’s website includes a disclaimer noting “The size of your personal item will be checked during boarding. Items larger than the allowed dimensions are subject to an additional charge.” FRONTIER AIRLINES, *Bag Options*, <https://www.flyfrontier.com/travel/travel-info/bag-options/> (last visited Nov. 22, 2024). Spirit’s website notes that a personal item larger than the permitted size “will be considered a carry-on.” SPIRIT AIRLINES, *What does a personal item consist of?*, <https://customersupport.spirit.com/en-us/category/article/KA-01149> (last visited Nov. 22, 2024).

²⁶⁰ See, e.g., Soo Kim, *Frontier Airlines Responds to Viral Video Claiming They ‘Gaslight’ Flyers*, NEWSWEEK (May 30, 2023), <https://www.newsweek.com/frontier-airlines-bag-fees-passenger-complaint-viral-tiktok-1803279>; Amber Raiken, *Woman Claims Frontier Airlines ‘gaslit’ Passengers into Paying for Bags*, THE INDEPENDENT (May 26, 2023), <https://www.independent.co.uk/travel/news-and-advice/frontier-airlines-bag-fee-tiktok-b2346216.html>; Chad Pradelli & Cheryl Mettendorf, *Lawsuit Accuses Frontier Airlines of Bogus Baggage Fees*, WPVI-TV (Nov. 21, 2023), <https://6abc.com/frontier-airlines-bag-policy-class-action-lawsuit-flight-fees/14085587/>; Olivia Harden, *‘Ridiculous’: Frontier Admits to Controversial Carry-On Bag Policy*, SFGATE (May 22, 2023), <https://www.sfgate.com/travel/article/frontier-airlines-bag-policy-controversy-18113158.php>.

²⁶¹ Letter from Couns. for Frontier Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations 7-8 (Feb. 9, 2024) (on file with the Subcommittee).

²⁶² *Id.* The ratio compared gate bag complaints to gate bags collected.

²⁶³ Frontier Amended Airport-Collected Ancillary Revenue Bonus Program, FA_00009738 (on file with the Subcommittee).

²⁶⁴ See *id.*

²⁶⁵ The DOT’s monthly Air Travel Consumer Reports break down complaints received about airlines into 12 different categories, including “Baggage.” The DOT defines the baggage complaint category as including “Claims for lost, damaged or delayed baggage, charges for excess baggage, carry-on problems, and difficulties with airline claims procedures.” This analysis is based on a comparison of

during this time as the coronavirus pandemic receded, baggage complaints increased much faster: Frontier carried about 18.3% more passengers between March 2022 and February 2023 than it did between March 2021 and February 2023, but experienced an increase in median monthly baggage complaints of nearly 300%.²⁶⁶

Because Spirit began implementing its incentive program later than Frontier, and because of the DOT's pause in collecting complaint data, it is not possible to analyze a year's worth of baggage complaints against Spirit following their adoption of incentive payments. Comparing individual months in 2023 to the same month in 2022, to account for seasonal variation, reveals that Spirit also experienced an increase in DOT baggage complaints greater than its increase in passenger volume. Between April 2022 and April 2023, for example, bag complaints about Spirit increased by 120%, but its passenger volume increased by 23.3%.²⁶⁷ Between May 2022, and May 2023, baggage complaints about Spirit grew by 79.3%, while passenger volume increased by 13%.²⁶⁸

b. Incentive payments were part of Frontier's strategy for constant growth of ancillary revenue

Internally, Frontier referred to its incentive program as "airport bag/seat compliance."²⁶⁹ In an interview with the Subcommittee, Frontier's Vice President of Pricing and Revenue Management said that "compliance" in this context meant consistent and equitable application of the airline's baggage policies, and ensuring that agents were not improperly waiving fees.²⁷⁰ When asked if Frontier's commissions were structured so that both the airline and its agents earned more revenue if they determined that a bag was not in compliance with the airline's policies, the vice president said that the airline

the DOT's monthly Air Travel Consumer Reports for March 2021 to February 2022, and March 2022 to February 2023. BUREAU OF TRANSP. STAT., *Air Travel Consumer Report Archive*, <https://www.transportation.gov/airconsumer/air-travel-consumer-report-archive> (last visited Nov. 22, 2024). Because the complaints are tallied on a two-month delay, the March-through-February numbers in each year are compiled using the DOT's May-through-April reports.

²⁶⁶ The analysis of Frontier passenger volume comes from the DOT's figures for passenger enplanements between March 2021 and February 2022, and between March 2022 and February 2023. See BUREAU OF TRANSP. STAT., *Passengers*, https://www.transtats.bts.gov/Data_Elements.aspx (last visited Nov. 22, 2024) (search "Frontier Airlines"). The 300% figure reflects the difference between the complaint figures for those periods: 13.5 and 51.5, respectively. See *supra* note 265.

²⁶⁷ This analysis is based on baggage complaints against Spirit in Air Travel Consumer Reports from April 2022 and April 2023 and DOT data on Spirit's passenger volume for those months. See BUREAU OF TRANSP. STAT., *Air Travel Consumer Report Archive*, <https://www.transportation.gov/airconsumer/air-travel-consumer-report-archive> (last visited Nov. 22, 2024); BUREAU OF TRANSP. STAT., *Passengers*, https://www.transtats.bts.gov/Data_Elements.aspx (search "Spirit Air Lines").

²⁶⁸ This analysis is based on baggage complaints against Spirit in Air Travel Consumer Reports from May 2022 and May 2023 and Bureau of Transportation Statistics data on Spirit's passenger volume for those months. See BUREAU OF TRANSP. STAT., *Air Travel Consumer Report Archive*, <https://www.transportation.gov/airconsumer/air-travel-consumer-report-archive> (last visited Nov. 22, 2024); BUREAU OF TRANSP. STAT., *Passengers*, https://www.transtats.bts.gov/Data_Elements.aspx (search "Spirit Air Lines").

²⁶⁹ Frontier Airlines Joint Board of Directors Meeting July 27, 2022 Commercial Update, FA_00000316 at FA_00000319 (on file with the Subcommittee).

²⁷⁰ PSI Interview with Frontier Airlines, *supra* note 168.

does not want customers to be taking more or “stealing” from the airline.²⁷¹ When asked about a scenario similar to the allegations made in public reports—specifically, whether it was appropriate to charge a customer for a carry-on bag whose personal item visibly fits inside the sizing container that Frontier’s agents use to assess compliance—Frontier’s Vice President raised the possibility of the item containing a lithium battery, then declined to provide a clear answer.²⁷²

Frontier began using the term “compliance” regarding ancillary products in internal documents as early as May 2019, when an update prepared for a joint board of directors meeting stated that Frontier was implementing “enhancements to product, pricing, compliance and technology in efforts to return Frontier to peer-leading ancillary revenue per passenger.”²⁷³ In an interview with the Subcommittee, Frontier’s Vice President of Pricing and Revenue Management acknowledged that, at least at the time the document was created, it was Frontier’s goal to earn more in ancillary revenue per passenger than any of its competitors.²⁷⁴

Internal documents suggest that ancillary fee incentives to its personnel were part of Frontier’s strategy to reach ancillary fee revenue goals. According to commercial updates provided to Frontier’s Board of Directors, after it launched the incentives program in March 2022, the program increased ancillary revenue, and Frontier continued to develop the program throughout the year.²⁷⁵ A commercial update for a meeting of Frontier’s Board of Directors in April 2022 addressing the previous business quarter presented \$75 in ancillary revenue per passenger as the airline’s goal.²⁷⁶ The airline referred to this as the “Drive to \$75.”²⁷⁷ A similar presentation prepared for a meeting in July 2022 stated that Frontier had earned \$74.96 per passenger in “non-fare revenue” in the previous quarter, in which Frontier had “expanded airport agent incentives for ancillary product sales at the ticket counter and gate.”²⁷⁸ The July meeting, covering the first full quarter following adoption of the incentive program, introduced a goal of growing that figure by \$10 per passenger by the end of the year—what it labeled as “Drive to \$85.”²⁷⁹ Frontier’s goal was eventually to reach \$100 in ancillary revenue per passenger.²⁸⁰ Forecasts detailing components of Frontier’s

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ Frontier Airlines Joint Board of Directors Meeting May 7, 2019 Commercial Update, FA_00000179 at FA_00000181 (on file with the Subcommittee).

²⁷⁴ PSI Interview with Frontier Airlines, *supra* note 168.

²⁷⁵ See Ancillary Commission Program Review, FA_00009722-FA_00009727 (noting that, by August of 2022, the program would be implemented at 33 airports and was projected to increase collection of ancillary revenue by as much as \$40 million that year).

²⁷⁶ See Frontier Airlines Joint Board of Directors Meeting April 27, 2022 Commercial Update, FA_00000302 at FA_00000305 (on file with the Subcommittee).

²⁷⁷ *Id.*

²⁷⁸ Frontier Airlines Joint Board of Directors Meeting July 27, 2022 Commercial Update, FA_00000316 at FA_00000318 (on file with the Subcommittee).

²⁷⁹ *Id.* at FA_00000319.

²⁸⁰ *Id.*

strategy to reach these goals included “Airport bag/seat compliance” for 2022 and “Airport bag compliance” for 2023.²⁸¹

A document prepared for the next Board of Directors meeting, in October 2022, stated that quarterly ancillary revenue per passenger had increased still further, which it credited to, among other initiatives, having “built significant momentum in airport ancillary sales through airport agent incentives, messaging strategy, and policy/procedure.”²⁸² Frontier’s public, annual report for 2023 notes that the airline generated \$76.51 in ancillary revenue per passenger that year.²⁸³

c. Frontier and Spirit deny their incentive policies are being abused

Asked about news reports of passengers complaining about wrongful application of Frontier’s policies, the airline’s Vice President of Pricing and Revenue Management said that passenger complaints were not under his supervision.²⁸⁴ Asked whether a significant increase in passenger complaints related to particular ancillary products would influence Frontier’s ancillary revenue strategy, which is under his control, the vice president stated that he was unable to speak to levels of complaints, and directed the conversation toward his perception of the systemic importance of ULCCs in the market for air travel.²⁸⁵ The vice president said that some customers “take more services than they have paid for” and that the airline did not want to allow that to happen.²⁸⁶

In an interview with PSI staff, Spirit’s Chief Commercial Officer said that the incentive policy was implemented to ensure passengers were “treated fairly and equally.”²⁸⁷ According to the Chief Commercial Officer, the goal of the program was “efficiency,” and while the airline’s tracking and analysis of the incentive program showed that the incentive programs did increase the amount of ancillary revenue the airline collected, the airline’s intent was to be fair to customers who had paid for a carry-on bag or other ancillary product.²⁸⁸

V. The share of customer payments airlines subject to taxation varies enormously

A review of sample bookings of similar flights on each of the websites of the five airlines revealed that each airline exposes vastly different shares of the revenue they collect

²⁸¹ *Id.*

²⁸² Frontier Airlines Joint Board of Directors Meeting October 26, 2022 Commercial Update, FA_00000335 (on file with the Subcommittee).

²⁸³ Frontier Group Holdings, Inc., Annual Report (Form 10-K) (Feb. 20, 2024), 6 <https://ir.flyfrontier.com/node/9431/html>.

²⁸⁴ PSI Interview with Frontier Airlines, *supra* note 168.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ PSI Interview with Spirit Airlines, *supra* note 168.

²⁸⁸ *Id.*

from flying passengers to the 7.5% on tax on air transportation.²⁸⁹ Analysis performed by the GAO and others has long raised concerns about the impact of the growth of ancillary fees on the flow of revenue to the Airport and Airway Trust Fund (“the Trust Fund”).²⁹⁰ Instability in the Trust Fund makes maintenance and upgrades to critical infrastructure, including air-traffic control systems, harder to plan for and carry out.²⁹¹

²⁸⁹ During the last week of September 2024, PSI staff navigated to the desktop websites of each of the five airlines that are the subject of this report, submitted sample booking information for a single adult passenger seeking a round-trip ticket between Orlando, Florida (MCO) and Chicago, Illinois (ORD), departing on Friday Nov. 22, 2024, and returning Saturday Nov. 30, 2024. For the three legacy carriers, staff selected similar upgrade options that were short of first class, but which allowed for the selection of a seat with extra legroom. For American, staff selected “Main Plus,” one of the airline’s “bundles” that, along with including one checked bag and other features, allows customers to select an extra legroom seat, and provides priority boarding. For Delta, staff selected Comfort Plus, a fare product that includes “extra legroom, earlier boarding and deplaning,” and other features. Letter from Couns. for Delta Air Lines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Feb. 20, 2024) (on file with the Subcommittee). For United, the Subcommittee selected Economy Plus, which includes an extra legroom seat that in most cases is near the front of the cabin, but which does not include a free checked bag. See Letter from Couns. for United Airlines to the Hon. Richard Blumenthal, Chairman, Permanent Subcomm. on Investigations (Jan. 5, 2024), (on file with the Subcommittee). For the two ULCCs, Subcommittee staff selected a “bundle option” that similarly allowed for the selection of a larger or roomier seat. For Frontier, staff selected the “Business Bundle,” which includes, along with a free checked bag, an “UpFront Plus” seat, an aisle or window seat near the front of the plane with the middle seat left empty. See FRONTIER AIRLINES, *Bundle and Save*, <https://www.flyfrontier.com/travel/travel-info/bundle-save/> (last visited Nov. 22, 2024); Press Release, Frontier Airlines, Frontier Airlines Introduces New UpFront Plus Seating with a Guaranteed Empty Middle Seat for Added Personal Space and Comfort (Mar. 12, 2024), <https://news.flyfrontier.com/frontier-airlines-introduces-new-upfront-plus-seating-with-a-guaranteed-empty-middle-seat-for-added-personal-space-and-comfort/>. For Spirit, Subcommittee staff selected the “Go Big” bundle, which includes a free checked bag, priority boarding, and a “Big Front Seat.” See Press Release, Spirit Airlines, Go Big or Go Comfy: Spirit Airlines to Offer Unmatched Value with New Travel Options and Transformed Guest Experience (July 30, 2024), <https://ir.spirit.com/news-releases/news-details/2024/Go-Big-or-Go-Comfy-Spirit-Airlines-to-Offer-Unmatched-Value-with-New-Travel-Options-and-Transformed-Guest-Experience/default.aspx>. In each instance the least-expensive non-stop flight was selected, except for Delta, which does not offer non-stop service between MCO and ORD. For Delta, the least-expensive one-stop flight was selected. Screenshots of each of the selections, with tax and fee information, are on file with the Subcommittee. Other analyses have arrived at similar results. See Airlines Confidential (Aug. 28, 2024), <https://airlinesconfidential.com/8-28-24/>; Ben Schlappig, *Federal Excise Tax on Airfare: Time for Changes*, ONE MILE AT A TIME (Aug. 28, 2024), <https://onemileatatime.com/insights/federal-excise-tax-airfare/>.

²⁹⁰ See, e.g. GOV’T ACCOUNTABILITY OFF., GAO-10-785, COMMERCIAL AVIATION: CONSUMERS COULD BENEFIT FROM BETTER INFORMATION ABOUT AIRLINE-IMPOSED FEES AND REFUNDABILITY OF GOVERNMENT-IMPOSED TAXES AND FEES (2010), <https://www.gao.gov/assets/gao-10-785.pdf>; Mumbower, Hotle & Garrow, *supra* note 3 at 265; MILLER ET AL., *supra* note 130 at 65.

²⁹¹ See National Airspace Safety Review Team, *Discussions and Recommendations to Address Risk in the National Airspace System* (2023) at 36, https://faa.gov/NAS_safety_review_team_report.pdf; GOV’T ACCOUNTABILITY OFF., GAO-17-131, AIR TRAFFIC CONTROL: EXPERTS’ AND STAKEHOLDERS’ VIEWS ON KEY ISSUES TO CONSIDER IN A POTENTIAL RESTRUCTURING (2016), <https://www.gao.gov/assets/gao-17-131.pdf>.

Figure 6: Effective tax rate for a seat with extra legroom on a round-trip from Orlando to Chicago between November 22-30 on the five airlines²⁹²

Airline	Amount Due Less Tax	Airfare Tax Paid	Effective Rate
American	\$571.87	\$42.89	7.5%
Delta	\$620.23	\$46.52	7.5%
United	\$581.80	\$27.96	4.8%
Frontier	\$543.76	\$16.73	3.1%
Spirit	\$864.96	\$21.82	2.5%

Spirit, Frontier, and United appear to have lowered the effective tax rate on their base fares in part by classifying seat fees as ancillary add-ons rather than part of the ticket itself.²⁹³ (Passengers who choose a flight because the less-taxed advertised fare is lower than a comparable alternative may ultimately end up spending as much or more money as they would have on a fully taxed fare after the cost of ancillary fees is

²⁹² Along with the 7.5% tax on fares, domestic flights are also subject to three flat fees: a \$5.60 security fee, commonly known as the Sept. 11 fee, a \$5 per-segment fee, and a passenger facility charge that varies depending on the airports through which the passenger is travelling but may be up to \$4.50. See Airlines for America, *U.S. Government Imposed Taxes on Air Transportation*, <https://www.airlines.org/dataset/government-imposed-taxes-on-air-transportation/> (last visited Nov. 20, 2024). The “Amount Due Less tax” in the chart is the total due less those figures. Spirit and Frontier also impose additional “non-refundable” carrier fees that they include in their listing of taxes and fees, but which PSI did not subtract. For Spirit, this is the “Passenger Usage Charge” of \$22.99 each way. This fee is mentioned in a Spirit news release from 2014, but the Subcommittee was unable to find an explanation for the fee on Spirit’s website. See Press Release, Spirit Airlines, Spirit Celebrates the 99.99 Percent (Apr. 17, 2014), <https://ir.spirit.com/news-releases/news-details/2014/Spirit-Airlines-Celebrates-the-9999-Percent/default.aspx>. According to several travel websites, it is a fee imposed for booking online and over the phone. See, e.g., Kyle Potter, *The Sneaky Way to Save \$40 on Spirit, Sun Country & Others*, THRIFTY TRAVELER (June 10, 2024), <https://thriftytraveler.com/guides/airlines/how-to-save-budget-airlines-online-booking-fees/>. Frontier applied a “Carrier Interface Charge,” which Frontier’s website states is the fee “assessed on tickets purchased through the website.” FRONTIER AIRLINES, *Optional Services*, <https://www.flyfrontier.com/optional-services> (last visited Nov. 22, 2024).

²⁹³ Each of the Five Airlines’ booking paths provide a breakdown of taxes and fees that a customer may choose to review before providing payment. In that breakdown, American lists a “Transportation Tax (United States)” while Delta lists a “US Transportation Tax”; each of these represented the full 7.5% transportation tax. United identifies a “Fare” with “Taxes and Fees” directly below it, including the “U.S. Transportation Tax”; the upcharges for the seats are listed separately, under “United Travel Options,” and do not include taxes. Frontier lists a “U.S. transportation tax” under “Taxes and Carrier Imposed Fees,” while the bundles are listed in a separate section, titled “BUNDLE IT,” that includes a description of the seats and other amenities but shows no taxation. Spirit lists the price of the “FLIGHT” with “TAXES AND CARRIER CHARGES” directly beneath it, including the “Federal Excise Tax”; a description of the seat and other amenities offered in the bundle is listed in a separate section, titled “GO BIG” that does not note any taxes. Screenshots of these displays are on file with the Subcommittee.

factored in.²⁹⁴) While relevant regulations specify that “charges for transportation of baggage” are an example of “payments not subject” to the transportation tax, seat fees are not mentioned.²⁹⁵ When the Subcommittee looked for a first or business class ticket from United on the same flight, the airline assessed the fare at the tax rate of 7.5%.²⁹⁶ Similar variations in applying the transportation tax exist for other booking paths, including for customers choosing the least expensive fare on one of the legacy carriers and then later in the booking process selecting a seat in a desirable location, such as an aisle seat or a seat closer to the front of the plane.²⁹⁷

It is unclear how the airlines reconcile their professed lack of information about the costs incurred in providing ancillary services with the requirement under federal tax law that a service may be considered “optional,” and thus not subject to the transportation tax, only if the fee charged “bears a reasonable relation to the cost of providing the service.”²⁹⁸ As noted previously, all five of the airlines told the Subcommittee they do not track the granular costs of providing services for which they charge fees, and some stated that such costs are difficult if not impossible to determine.²⁹⁹ Representatives for each of the airlines similarly cited a lack of cost information to explain their inability to address the profitability of seat fees.³⁰⁰

Since 2012, federal regulations have required airlines to “add the taxes to the base fare and disclose the total price” in displaying and advertising fares.³⁰¹ Because airlines are required to advertise “the entire price” of airfare, but face no similar requirement for ancillary fees, they are incentivized to attribute portions of the price a customer pays to

²⁹⁴ See, e.g., MILLER ET AL., *supra* note 130 at 107 (noting that “separating out ancillary fees does not necessarily imply a change in total ticket price”); JAN K. BRUECKNER ET AL., *PRODUCT UNBUNDLING IN THE TRAVEL INDUSTRY: THE ECONOMICS OF AIRLINE BAG FEES 2* (2014), https://sites.socsci.uci.edu/~jkbrueck/course%20readings/bag_fee.pdf (noting that airlines’ average fares fall when they began collecting checked baggage fees, but by less than the amount of the fee).

²⁹⁵ 26 C.F.R. § 49.4261-8(f).

²⁹⁶ A screenshot of this booking path is on file with the Subcommittee.

²⁹⁷ With American, Subcommittee staff selected a Basic Economy ticket for the MCO-ORD flight, then, when shown the seat map, selected seats labeled “Main Cabin Extra” for the outbound and return flights. These fees were broken out separately but were taxed at the 7.5% rate. United also allows Basic Economy passengers to select what it describes as “Preferred” seats for each leg for a fee. These fees are not taxed.

Delta does not allow passengers who purchase Basic Economy tickets to select their seats. However, for flights where Basic Economy tickets have sold out and Main is the cheapest Delta option, passengers may select “Preferred” seat for each leg within the main cabin for a fee, which is not taxed. Screenshots of these booking paths are on file with the Subcommittee.

²⁹⁸ Rev. Rul. 80-31, 1980-1 C.B. 251 (1980).

²⁹⁹ PSI Interview with American Airlines, *supra* note 166; PSI Interview with Delta Air Lines, *supra* note 180; PSI Interview with Frontier Air Lines, *supra* note 168; PSI Interview with Spirit Airlines, *supra* note 168; PSI Interview with United Airlines, *supra* note 166.

³⁰⁰ PSI Interview with American Airlines, *supra* note 166; PSI Interview with Delta Air Lines, *supra* note 180; PSI Interview with Frontier Air Lines, *supra* note 168; PSI Interview with Spirit Airlines, *supra* note 168; PSI Interview with United Airlines, *supra* note 166.

³⁰¹ *Spirit Airlines, Inc. v. U.S. Dep’t of Transp.*, 687 F.3d 403, 410 (D.C. Cir. 2012). Spirit sued DOT in an unsuccessful attempt to stop this rule from going into effect.

“optional” fees rather than part of the airfare itself.³⁰² In the sample flights shown above, the price of the United flight is about 6.2% lower than the price of the Delta flight before taxes; after the transportation tax is included, the United flight is about 8.5% cheaper.³⁰³

Small differences in displayed prices can help airlines win a greater share of potential passengers, because most passengers are highly sensitive to the base price of airfare.³⁰⁴ However, while passengers are very sensitive to advertised fares, they are less sensitive to the price of ancillary fees, the cost of which may be harder to compare across airlines, particularly for customers using third-party OTAs.³⁰⁵ In 2023, the former CEO of Spirit noted that the more airlines shift the cost of travel to ancillary fees while lowering base fares, the better they will be at competing for customers who are “attracted by the low entry price” but “end up buying something else, like a checked bag.”³⁰⁶

The growth of “bundle” options at both legacy carriers and ULCCs means that airlines may be increasingly benefitting from strategies that package many of the same services that were once included in the price of a ticket and yet deeming them “optional.” For example, a United internal analysis revealed the company saw significant growth in “Seat revenue per [Basic Economy] passenger” after the “launch of bundles and [Economy Plus] at check-in Summer 2020.”³⁰⁷ This year, Frontier and Spirit both launched policies that “bundle” multiple ancillary products into one item, changes to their a la carte approach that the airlines described, respectively, as “sweeping” and a “significant transformation.”³⁰⁸

³⁰² See MILLER ET AL., *supra* note 130 at xxi (“This policy favors airlines that separate ancillary fees from their base ticket price over those that do not. . . . the Domestic Passenger Ticket Tax should not incentivize one business model over another by taxing ancillary services differently than bundled ticket prices.”).

³⁰³ This calculation reflects only the price before taxes and after the inclusion of the transportation tax. As addressed above, there are other required taxes, which are fixed rather than rate-based, that go into the final price. See note 292, *supra*.

³⁰⁴ Ben Baldanza, *Why Airlines Like Extra Fees So Much*, FORBES (Mar. 11, 2023), <https://www.forbes.com/sites/benbaldanza/2023/03/11/why-airlines-like-extra-fees-so-much/>; Susan Carey, *Airports Want to Raise Ticket Fees. Airlines Say No. Fight Ensues*, WALL ST. J. (Dec. 8, 2017), <https://www.wsj.com/articles/airports-want-to-raise-ticket-fees-airlines-say-no-fight-ensues-1512729000>. In 2017, Delta estimated that for every \$1 increase in the passenger facilities charge, one of the fixed-amount taxes included in airfare, passenger demand declines by more than 1%. See *id.*; Sebastien Bradley & Naomi E. Feldman, *Hidden Baggage: Behavioral Changes in Airline Ticket Tax Disclosure*, 12 AM. ECON. J.: ECON. POL’Y 58, 60 (2020), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/pol.20190200> (noting that airlines responded to the 2012 requirement to include taxes in displayed prices by “insulat[ing] inattentive consumers from *perceived* fare increases” by shifting costs away from base fares) (*italics in original*).

³⁰⁵ See MILLER ET AL., *supra* note 130 at 107; Background II(a), *supra*.

³⁰⁶ Ben Baldanza, *Why Airlines Like Extra Fees So Much*, FORBES (Mar. 11, 2023), <https://www.forbes.com/sites/benbaldanza/2023/03/11/why-airlines-like-extra-fees-so-much/>.

³⁰⁷ Internal United Airlines Email, March Ancillary Revenue Report (Apr. 9, 2021), UA-PSI-00001315 (on file with the Subcommittee).

³⁰⁸ Press Release, Frontier Airlines, Announcing ‘The New Frontier’: Transparent Pricing, No Change Fees, and Enhanced Customer Experience (May 17, 2024),

CONCLUSION

The growth of airline ancillary fees has made booking a flight a more complicated experience, and for those seeking the least expensive fare, it has made flying itself less bearable. Ultra-low-cost carriers may offer cheaper fares, but they subject their customers to procedures like the sizing of personal items before boarding, where both the airline and its personnel make more money when a backpack or purse is deemed too big. Although the three legacy carriers have eased some Basic Economy restrictions, they have also increasingly leveraged the restrictive nature of these tickets to increase ancillary revenue. Seat assignments, ticket flexibility, and, in the case of United, any bag larger than a personal item, all bear an additional cost for Basic Economy passengers.

This comes as legacy carriers emphasize their focus on “premium” products, and the revenues from their credit card loyalty programs often eclipse that of flying itself. Loyalty programs enable some passengers to avoid paying certain ancillary fees, but nonetheless drive multiple sources of revenue for legacy carriers.³⁰⁹ Delta’s Managing Director of Global Product Development told the Subcommittee that, if given the opportunity to choose between a customer paying a bag fee and signing up for a co-branded credit card with the company, he would prefer the customer signed up for the card.³¹⁰ The result is that the markers of “class” that airlines once adopted have gone far beyond first, business, and coach, and there is no indication that airlines have any plans to stop.³¹¹

RECOMMENDATIONS

I. Congress should require airlines to provide more granular fee data to the DOT and strengthen fee disclosure requirements

The disclosure of ancillary fee revenue must evolve to meet the increasing growth and variety of ancillary fee revenue, including seat fee revenue. A 2020 report issued by the DOT Inspector General found that “the Department of Transportation (DOT) does not collect adequate data on ancillary fees, which reduces its ability to fully assess

<https://news.flyfrontier.com/announcing-the-new-frontier-transparent-pricing-no-change-fees-and-enhanced-customer-experience>;

Press Release, Spirit Airlines, Go Big or Go Comfy: Spirit Airlines to Offer Unmatched Value with New Travel Options and Transformed Guest Experience (July 30, 2024), <https://ir.spirit.com/news-releases/news-details/2024/Go-Big-or-Go-Comfy-Spirit-Airlines-to-Offer-Unmatched-Value-with-New-Travel-Options-and-Transformed-Guest-Experience/default.aspx>.

³⁰⁹ See Background I(d), *supra*.

³¹⁰ PSI Interview with Delta Air Lines, *supra* note 180.

³¹¹ Delta recently indicated that it is considering “unbundling” business class. See Gary Leff, *Delta Air Lines Confirms Plan To “Unbundle” Business Class: Pay For Only What You Need*, VIEW FROM THE WING (July 12, 2024), <https://viewfromthewing.com/delta-air-lines-confirms-plan-to-unbundle-business-class-pay-for-only-what-you-need/>; Gunnar Olson, *Delta to Test New Main Cabin & Comfort Plus Fares in 2025*, THRIFTY TRAVELER (Nov. 20, 2024), <https://thriftytraveler.com/news/airlines/delta-new-fares/> (“Delta said segmentation was coming for all cabins of service.”).

competition in the industry.”³¹² The Subcommittee’s findings show that airlines are increasingly reliant on seat fee revenue, sometimes to the same extent or more than bag fee revenue, traditionally the highest earning category of ancillary fee revenue. Given the significant rise of seat fee revenue and the need for additional transparency into airline seat selection fees, Congress should require the DOT to collect and publish seat fee revenue in the same way it collects granular bag fee revenue. The DOT is uniquely situated to collect and publish seat fee revenue and doing so would provide those who study the aviation industry, the public, and Congress with additional transparency into the evolution of this growing category of airline ancillary revenue. Moreover, should airline ancillary revenue significantly shift to other categories of fees, Congress should similarly require additional transparency into those categories of fees.

Congress should also enact stronger customer-facing disclosure requirements for ancillary fees. The complex variety of fees and different disclosure practices across airlines often obscure the total cost of travel, making it difficult for consumers to comparison shop. For example, the Subcommittee’s investigation revealed that at least one airline deliberately hides seat fees from customers until they enter their personal information because that strategy increases the likelihood that a customer will make a purchase. Customers should be able to quickly and easily access the total cost of travel to compare airline offerings. The DOT’s regulation on enhancing the transparency of airline ancillary fees may further that goal, but the regulation’s implementation has been put on hold potentially indefinitely as a result of a legal challenge to the DOT’s statutory authority. Congress should legislate similar fee disclosure requirements and ensure DOT has the authority to implement them.

II. The Department of Transportation should investigate potential abuses in the use of incentive-based collection of ancillary fees, prohibit unfair and deceptive practices, and assess civil penalties if appropriate

The Subcommittee’s findings suggest that incentive payments paid by Frontier and Spirit to gate agents and other frontline personnel to enforce the airlines’ bag policies may inappropriately encourage abuse of discretion when it comes to deciding whether a passenger’s personal item meets the requirements of each airline’s policy. Specifically, as customer reports suggest, gate agents who stand to supplement their income by as much as \$10 per bag violation identified may inappropriately allege violations of the airline’s bag policy in order to gain personal benefit.³¹³ Moreover, airline passengers forced either to pay an inappropriate bag fee or be denied boarding face an unjust

³¹² See U.S. DEP’T OF TRANSP., OFF. OF THE INSPECTOR GEN., EC2020036, CHANGES IN AIRLINE SERVICE DIFFER SIGNIFICANTLY FOR SMALLER COMMUNITIES, BUT LIMITED DATA ON ANCILLARY FEES HINDERS FURTHER ANALYSIS (2020), https://www.oig.dot.gov/sites/default/files/Airline%20Service%20to%20Small%20Communities%20Final%20Report_0.pdf.

³¹³ See e.g., Tori Gaines, *Frontier Airlines Confirms Gate Agent ‘Incentive’ after Viral TikToks*, THE HILL (May 25, 2023), <https://thehill.com/homenews/4019832-frontier-airlines-confirms-gate-agent-incentive-for-baggage-fees-after-viral-tiktoks/>.

choice. The DOT is empowered to prohibit and assess civil penalties against airlines found to be engaging in unfair and deceptive practices.³¹⁴ The DOT should investigate Frontier and Spirit's implementation of policies, practices, and training surrounding the payment of incentives to gate agents and others charged with applying discretion in the application of bag policies. If the DOT determines that either Frontier or Spirit have engaged in unfair or deceptive practices in their implementation of ancillary incentive payments, if appropriate, it should assess civil penalties and prohibit the practice in question.

III. The Department of the Treasury should examine whether current airline ancillary fee practices comply with rules about applying the transportation tax

The significant variation in approaches airlines take in subjecting customer purchases to the transportation tax suggests that, at minimum, there is confusion or uncertainty within the industry about the rules regarding the tax's application. Airlines pursue different approaches to the taxation of similar products, such as a seat with extra legroom or the ability to select an aisle seat. These disparities are likely to become even more pronounced as seat fees continue to grow as a source of ancillary revenue.

Rather than creating new regulations, the Department of the Treasury should ensure that those already in place are properly understood and enforced. For example, the growth of bundles, which increasingly resemble the standard tickets of the era before ancillary fees, appears to have decreased the share of customer payments that some airlines subject to the transportation tax while also making it harder to determine whether a fee is "required to be paid as a condition to receiving air transportation."³¹⁵ The Department of the Treasury should also ensure that ancillary fees are, as required, reasonably related to the costs of providing the services.³¹⁶

The disparate application of the transportation tax creates uncertainty and instability for the Airport and Airway Trust Fund, making needed improvements to critical infrastructure, like the modernization of air traffic control, harder to project and execute. As ancillary fees proliferate and grow more complex, the Department of the Treasury should ensure uniformity across airlines' application of the transportation tax.

³¹⁴ See 49 U.S.C. § 41712(a) ("the Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation."); 49 U.S.C. § 46301 (establishing civil penalties).








³¹⁵ Rev. Rul. 73-508, 1973-2 C.B. 366 (1973).

³¹⁶ Rev. Rul. 80-31, 1980-1 C.B. 251 (1980).

Exhibit 1

Cost to carry checked bags has increased 16% since 2016

- In light of recent industry increases to checked-bag fees, Congress has inquired on the approximate cost to carry one bag
- While the government claims no appreciable increase to marginal cost of processing a checked-bag, FA estimates a 16% increase vs 2016 in the cost per bag

YE August 2018	Per Bag (\$)	Total \$M	Notes
<i>Revenue</i>			
 Bag Fees	13.57	1,210	89.2M checked bags carried and 45% paid
 Credit Card Revenue	0.93	83	3% of total credit card mkt rev allocated to bags
Total Revenue	14.50	1,293	
<i>Expense</i>			
 Employee/Contract Service	18.44	1,644	Includes fringe benefits
 Airport Rent	5.37	479	Airport space attributable to checked bags
 Fuel ¹	1.47	131	Fuel burn to carry checked bags
 Capital	0.48	42	Run rate based on historical 7 years data
 Support Equipment Mtx	0.46	41	28% of GSE is related to baggage
IT, MBR, and Other	1.83	163	Other includes TSA fees, workers comp, & bag tags
Total Expense	28.05	2,501	

¹ Based on LTM July 2018 fuel burn calculated using Ops Engineering polynomial function based on flight time, bag weight, and aircraft type for each flight; historical average fuel price was \$2.00 per gallon

Financial Analysis