Before the
DEPARTMENT OF TRANSPORTATION
Office of the Secretary
Washington, D.C. 20590

Defining Unfair or Deceptive Practices	)	Docket No. DOT–OST–2019–0182

COMMENT OF
FEDERAL TRADE COMMISSIONER
ROHIT CHOPRA[*]

I write to outline serious concerns with the Department of Transportation's (DOT) proposal to revamp its enforcement and rulemaking approach by redefining "unfair" practices, and to correct the record regarding the false assertions made by the airline industry. Mirroring the Federal Trade Commission (FTC) Act's definition of "unfair" would undermine passenger protections and make it difficult to hold airlines accountable for widespread harms. Given the significant consolidation in the industry and the lack of choice on most routes, it is unreasonable to expect "market forces" to correct these harms. At a time when airlines are receiving extraordinary bailouts while also unlawfully withholding refunds for struggling Americans, it is especially ill-advised and inappropriate to finalize this rulemaking.[1]

Introduction

At the behest of the airline lobby, which represents Delta Air Lines, United Airlines, American Airlines, and other recipients of taxpayer bailouts, DOT has proposed a rule that adopts the FTC's definition of "unfair," which was developed forty years ago. DOT should reject the airline lobby's demands and withdraw this misguided proposal.

DOT argues that this proposal is simply clarifying the law. In 1980, when the FTC articulated its present unfairness definition in its Policy Statement on Unfairness (Policy Statement),[2] the

[*] This comment represents my own views and does not necessarily reflect those of the Federal Trade Commission or any other Commissioner. Samuel Levine provided invaluable assistance in drafting and preparing this comment.
[1] My colleague, Rebecca Kelly Slaughter, has submitted a comment to this rulemaking evaluating DOT's procedural proposals, and I share her view that imposing new hurdles to commonsense rulemaking will undermine protections for passengers.
[2] Under the Policy Statement on Unfairness, an act or practice is unfair only if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." Congress largely codified the statement in 1994, but notably did not apply it to DOT and other agencies that enforce prohibitions on unfair practices. *See* FTC Act Amendments of 1994, Pub. L. No. 103-312, § 9, 108 Stat. 1691, 1695 (codified at 15 U.S.C. § 45(n)).

Commission argued that it, too, was simply clarifying how it applied the law.[3] But, this Statement was transformational, and it was hardly clarifying. In the years that followed, the number of enforcement actions and rulemakings plummeted, leaving a vacuum that hobbled development of the law. This left the FTC ill-prepared to tackle emerging unfair practices like subprime lending, a catastrophic failure that led Congress to create a new data-driven regulator armed with better defined authority.

States, which generally look to the FTC for guidance in applying their own unfairness prohibitions, did not do so here, with only a small fraction adopting the FTC's definition. This helped states act earlier and more aggressively than their federal counterparts to protect consumers against pervasive unfair practices, including abusive subprime lending and manipulative cigarette advertising. However, if DOT adopts the FTC's unfairness approach, passengers cannot count on state enforcers to fill in enforcement gaps, as the Airline Deregulation Act prevents states from acting on their own to combat airline abuses.[4]

The FTC's approach to unfairness is an especially poor fit for the airline market. In addition to relying on concurrent state enforcement, the FTC's approach is predicated on vigorous competition that allows consumers to avoid harmful practices. But after decades of mergers, that competition does not exist in the market for air travel, where the top four airlines now control two-thirds of the market.[5] When passengers, especially in smaller metropolitan areas and rural areas, have few if any choices in choosing an airline, we cannot count on competition to protect the public.

DOT also operates under a fundamentally different mandate than the FTC. Congress codified the FTC's standard, in part, to deemphasize the importance of broader public policy goals in enforcing the unfairness standard. But DOT operates under explicit mandates to *prioritize* certain public policies, with public safety being the primary goal. DOT's proposal provides no indication of how these mandates would be reflected in an unfairness analysis under the proposed definition.

Adopting the FTC's unfairness definition would not only hobble future enforcement but would also threaten existing protections for passengers. The airline lobby's deregulatory demand leaves little doubt that the industry plans to aggressively challenge procompetitive rules, including rules on fee transparency, tarmac delays, and compensation for overbooking.[6] The FTC's unfairness definition could prove to be the airlines' Trojan Horse. A recent study found that applying the

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[3] In 1980, the FTC asserted its statement would "provide the Committee with a concrete indication of the manner in which the Commission has enforced, and will continue to enforce, its unfairness mandate." *See* FTC POL'Y STATEMENT ON UNFAIRNESS, Letter from Michael Pertschuk, Chairman, Fed. Trade Comm'n to Wendell H. Ford, Chairman, and John C. Danforth, Ranking Minority Member, S. Comm. on Com., Sci., and Transp., Consumer Subcomm. (Dec. 17, 1980), https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness. Similarly, DOT now asserts that this rulemaking "would clarify how the Department interprets the terms "unfair" and "deceptive[.]" Notice of Proposed Rulemaking, Defining Unfair or Deceptive Practices, 85 Fed. Reg. 11,881, 11,888 (Feb. 28, 2020) (to be codified at 16 C.F.R. pt. 399).

[4] 49 U.S.C. § 41713.

[5] E. Mazareanu, *Domestic market share of leading U.S. airlines from March 2019 to February 2020**, STATISTA (May 18, 2020), https://www.statista.com/statistics/250577/domestic-market-share-of-leading-us-airlines/.

[6] Comments of Airlines for America [("A4A")], Part One: Proposals for Fundamental Reform of DOT Economic and Service Regulation and Enforcement Before the Dep't. Of Trans., Docket No. OT-OST-2017-0069, 13-17 (Dec. 1, 2017) [hereinafter "A4A Comment"].

FTC's unfairness criteria to state unfairness actions would doom more than two-thirds of them,[7] and the industry appears eager to replicate this experiment in the real world with legal challenges to existing protections for passengers. DOT should not open the door to this airline assault.

Before discussing these concerns in greater depth, it is important to correct the record. In their political push for deregulation, the airline lobby misrepresented the laws protecting consumers from unfair and deceptive practices, and then relied on those misrepresentations to impugn DOT's consumer protection efforts. I urge DOT to reject demands for "fundamental reform" that are based on a fundamental misreading of the law.

Airlines Misrepresent the Law to Serve Themselves at the Expense of Passengers

I am deeply troubled that the airlines have put forth a slew of factually inaccurate assertions in their regulatory assault on their own passengers. As acknowledged in DOT's proposal, this rulemaking was initiated at the request of the airline lobby, Airlines for America (A4A). Before delving into the substance of the rulemaking, it is important to emphasize from the outset that the airlines' request appears to be based on mistaken views of the very laws protecting the public from unfair and deceptive practices (UDAP).

First, the airlines repeatedly claim that deception can be challenged only if it can be shown to be intentional.[8] While this argument is frequently raised by fraudsters sued by the FTC, it is false, and courts have been clear that intent to deceive is *not* an element of deception.[9] This makes sense, as enforcers seldom have a window into wrongdoers' subjective intent.

Next, the airlines wrongly claim that deception is actionable only when it "causes or is likely to cause substantial injury to consumers."[10] This, too, is false. In fact, the quoted language is an element of unfairness, not deception. The airlines' citation to the FTC's Policy Statement on Deception is itself deceptive, given the absence of this language in the statement.[11] In reality, the Commission need not prove injury as a standalone element of deception, and instead can presume injury when misrepresentations are material.[12]

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[7] Elise M. Nelson & Joshua D. Wright, *Judicial Cost-Benefit Analysis Meets Economics: Evidence from State Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 997, 1001 (2017). The authors argued that these results underscored problems with state UDAP statutes, or perhaps with state courts. I do not share that assessment, but agree that "cases brought under state UDAPs vary significantly from the enforcement actions brought by the FTC under its unfairness authority." *Id*., 1010.

[8] First, the airlines falsely claim that the FTC's test for deception requires a showing of intent. *See* A4A Comment, *supra* note 6 at 8. They then attack DOT's guidance on airfare transparency, claiming the practices addressed involved "no intent to deceive consumers." *Id*., 20. Later, they attack specific DOT enforcement actions, including an action against Lufthansa, which they claim "involved no evidence of intent to deceive. . . ." *Id*., 33.

[9] *See, e.g., FTC v. Bay Area Business Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005) ("The FTC is not, however, required to prove intent to deceive").

[10] *See* A4A Comment, *supra* note 6 at 8.

[11] *Id*., n.25.

[12] *See* FTC POL'Y STATEMENT ON DECEPTION, Letter from James C. Miller, Chairman, Fed. Trade Comm'n to John D. Dingell, Chairman, House Comm. on Energy and Com., 2 (Oct. 14, 1983) (stating "[a] finding of materiality is also a finding that injury is likely to exist"), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

Those are not the airlines' only misunderstandings. Airlines argue that DOT should challenge deception only in instances of "market failure," quoting the FTC as claiming "market incentives place strong constraints on the likelihood of deception."[13] But the FTC applies this as a presumption, not as an element of proof, and the airlines conveniently omit that this presumption is expressly limited to markets for "inexpensive" and "frequently purchased" products.[14] Of course, for most Americans, airline tickets are neither. The airline lobby also misstates the test for unfairness, omitting that it can cover *likely* injury,[15] which courts have affirmed under challenge.[16] Finally, when it suits their agenda, airlines ignore the FTC's approach altogether – claiming DOT should instead follow the Federal Aviation Administration by avoiding enforcement actions in "all but the most egregious cases."[17] Setting aside the wisdom of following an oversight model that has resulted in tragic failures,[18] this does not reflect the FTC's approach to enforcement.

In contrast to the airlines' comment, DOT's proposal correctly characterizes the legal standard applicable to FTC enforcement and rulemaking. Nevertheless, A4A's repeated false claims about the consumer protection laws, and the airlines' reliance on those false claims to impugn DOT's rulemaking and enforcement, suggest that the "fundamental reforms" airlines seek are grounded in a mistaken view of the laws they are bound to follow.

DOT Should Not Adopt the FTC's Approach to Unfairness

Even if the false claims made by airline lobbyists are ignored, DOT should not adopt the FTC's approach to unfairness. The FTC claimed its 1980 unfairness definition would only clarify its approach to the law, while continuing to protect consumers from harmful practices. But three decades later, after the FTC faced what was arguably the biggest test in its history, it became clear that the agency's approach to unfairness had failed. As the economy imploded in 2008, brought down by subprime lending largely carried out by nonbank lenders under FTC jurisdiction, Congress questioned why the FTC had been so absent, and zeroed in on the agency's failure to challenge unfair lending practices. Congress would go on to strip the FTC of key legal authorities, and arm a new regulator – the Consumer Financial Protection Bureau – with better defined authority to root out harmful practices. As detailed further below, the FTC's model is not one that DOT should emulate.

Before 1980, the Commission applied its unfairness authority according to the so-called "Cigarette Rule," which employed criteria that were acknowledged by the Supreme Court in 1972.[19] Amidst a deregulatory push in the late 1970s and early 1980s, the Commission revised

[13] A4A Comment, *supra* note 6 at 11 n.27.
[14] *See* FTC POL'Y STATEMENT ON DECEPTION, *supra* note 12 at 5.
[15] A4A Comment, *supra* note 6 at 9; *see also* 15 U.S.C. § 45(n).
[16] *See FTC v. Wyndham Worldwide Corp*., 799 F.3d 236, 246 (3d Cir. 2015) (noting that "the FTC Act expressly contemplates the possibility that conduct can be unfair before actual injury occurs").
[17] A4A Comment, *supra* note 6 at 35.
[18] *See generally* Andy Pasztor, *Congressional Report Faults Boeing on MAX Design, FAA for Lax Oversight*, WALL STREET J. (updated Mar. 6, 2020, 6:31 PM), https://www.wsj.com/articles/congressional-report-says-max-crashes-stemmed-from-boeings-design-failures-and-lax-faa-oversight-11583519145. That the airline lobby claims FAA's hands-off approach "has improved safety" should further undermine the credibility of its argument. A4A Comment, *supra* note 6 at 34.
[19] *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972) (describing the unfairness factors as "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been

these criteria, issuing a Policy Statement on Unfairness in 1980, and formally adopting that Policy Statement in the *International Harvester* decision in 1984.[20] Congress codified the current elements of unfairness in 1994 for the FTC, but did not do so for other agencies that enforce a prohibition on unfair practices, such as DOT.[21]

Following the adoption of the Policy Statement, observers quickly questioned whether the revised unfairness criteria actually added any clarity,[22] and scholarship since then has challenged the key economic assumptions animating the standard.[23] But the most striking result of the FTC's post-1980 approach was a dramatic drop in enforcement and rulemaking, and catastrophic inaction in the face of manifestly unfair practices.

After 1980, the number of unfairness enforcement actions plummeted, as the Commission counted on market forces, rather than active enforcement, to protect consumers.[24] According to the FTC's own analysis, between 1980 and 1993, there were only five adjudicated unfairness orders, three federal appellate reviews, and zero reviews by the Supreme Court.[25] Rulemaking also slowed down dramatically, leading one observer to lament that the agency's "reluctance to

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established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)").

[20] *See* FED. TRADE COMM'N, COMMISSION STATEMENT OF POLICY ON THE SCOPE OF THE CONSUMER UNFAIRNESS JURISDICTION, 104 F.T.C. 1070, 1071 (1984) (appended to *In re Int'l Harvester Co*., 104 F.T.C. 949 (1984)).

[21] *See* 15 U.S.C. § 45(n) (an act or practice is unfair only if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition").

[22] *See, e.g*., Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225, 248-250 (1981) (questioning the predictability of the balancing test, among other criticisms); Ernest Gellhorn, *Trading Stamps, S & H, and the FTC's Unfairness Doctrine*, 1983 DUKE L.J. 903, 943 (1983) (arguing that the post-1980 definition leaves a "gap in the underlying theoretical justification"). *See also* Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1958-1960 (2000) (criticizing "the dearth of binding precedent" since 1980). Notwithstanding these concerns, experience since 1980 has shown – and courts have affirmed – that when the FTC does bring unfairness actions, market participants have had ample notice that their practices were unlawful, and ample opportunities to challenge the FTC's application of the three-part test. *FTC v. Wyndham Worldwide Corp. et al.*, 10 F. Supp. 3d. 602 (D.N.J. 2014).

[23] Recent scholarship challenges many of the assumptions behind neoclassical economics, especially with respect to consumer behavior. *See, e.g*., Luke Herrine, *Unfair Acts and Practices: An Essay in Reconstruction* (Yale Univ. L. Sch., Working Draft, 2020); Oren Bar-Gill, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS (Oxford University Press, 1st ed. 2012); Eyal Zamir & Doron Teichman, THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW (Oxford University Press, 1st ed. 2014); Daniel Kahneman, THINKING FAST AND SLOW (Farrar, Straus, and Giroux 1st ed. 1994); George A. Aklerof & Robert J. Shiller, PHISHING FOR PHOOLS (Princeton University Press, 1st ed. 2016).

[24] As described in the Policy Statement on Unfairness:

> Normally we expect the marketplace to be self-correcting, and we rely on consumer choice-the ability of individual consumers to make their own private purchasing decisions without regulatory intervention--to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory. *See* FTC POL'Y STATEMENT ON UNFAIRNESS, *supra* note 3.

[25] Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1958-1960 (2000). *See also* J. HOWARD BEALES III, DIR., BUREAU OF CONSUMER PROTECTION, FED. TRADE COMM'N, THE FTC'S USE OF UNFAIRNESS AUTHORITY: ITS RISE, FALL, AND RESURRECTION § II (May 30, 2003) (noting that "[s]ubsequent to the codification of the unfairness test, however, the Commission showed extreme reluctance to assert its unfairness authority"), https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection.

aggressively or creatively use its unfairness rulemaking authority, and to proceed through threatened litigation and consent decrees, has led to a remarkable dearth of unfairness case law at the appellate level during the past two decades."[26]

The FTC's early failure to develop its unfairness authority left it unprepared to tackle emerging harmful practices, forcing other enforcers to step into the void. In the early 1990s, amidst growing concern that tobacco companies were targeting children with their advertising, the FTC considered bringing an enforcement action charging these practices as unfair. But after Commissioners questioned whether cigarette advertising met the agency's rigid unfairness standard, the agency dropped its investigation,[27] reportedly leading to congressional criticism that Commissioners had "made themselves irrelevant."[28] When the FTC later tried to revive its unfairness claim, its efforts were mooted by state attorneys general, who deployed their own unfairness authority to halt the unfair practices.[29]

In the 2000s, the Commission began resurrecting unfairness to target unlawful practices such as unauthorized billing and lax data security. However, the Commission failed to address the most pervasive unfair practice of the era: nonbank subprime mortgage lending.[30] During that period, the Commission focused its efforts on small-time scams rather than unfair lending products,[31] leaving the agency blindsided when these products triggered an economic collapse.

This enforcement record was not lost on Congress, which blasted the FTC for its failure to use its unfairness authority,[32] and questioned the wisdom of the unfairness definition itself.[33] In the

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[26] Matthew A. Edwards, *The FTC and New Paternalism*, 60 ADMIN. L. REV. 323, 350–51 (2008).
[27] Dara J. Diomande, *The Re-Emergence of the Unfairness Doctrine in Federal Trade Commission and State Consumer Protection Cases*, 18 ANTITRUST 53, 55 (2004). *See also* John Harrington, *Up in Smoke: The FTC's Refusal to Apply the "Unfairness Doctrine" to Camel Cigarette Advertising,* 47 FED. COMM. L.J. 593, 595 (1995).
[28] *FTC closing its Camel cigarettes investigation without action*, FTC WATCH (June 6, 1994, 2:49 PM), https://www.mlexwatch.com/articles/11/ftc-watch-no-414.
[29] Press Release, Fed. Trade Comm'n, Federal Trade Commission Dismisses Joe Camel Complaint (Jan. 27, 1999), https://www.ftc.gov/news-events/press-releases/1999/01/federal-trade-commission-dismisses-joe-camel-complaint.
[30] *See* REENGINEERING NONBANK SUPERVISION, CHAPTER TREE: OVERVIEW OF NONBANK MORTGAGE, CONF. OF STATE BANK SUPERVISORS, 23 (Sept. 2019) (noting that before the financial crisis, "nonbank mortgage lenders dominated the market sector of "non-traditional" (or "non-conforming") mortgage products"), https://www.csbs.org/sites/default/files/chapter_three_-_overview_of_nonbank_mortgage_1.pdf.
[31] Lydia B. Parnes, Dir. Bureau of Consumer Protection, Prepared Statement of the Fed. Trade Comm'n on Consumer Protection in Fin. Servs.: Subprime Lending and Other Financial Activities Before the H. Comm. on Appropriations Subcomm. on Fin. Servs. and General Gov., 5 n.11 (Feb. 28, 2008) (listing enforcement actions related to mortgage lending), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-consumer-protection-financial-services-subprime-lending/p064814subprime.pdf.
[32] As the mortgage crisis worsened during this era, the FTC's failure to tackle unfair lending practices was criticized with growing intensity. In 2008, Senator Byron Dorgan accused the FTC of being "absent" on subprime lending, while Senator Bill Nelson, as well as a witness, zeroed in on the agency's failure to challenge unfair lending products. *See* Improving Consumer Protections in Subprime Lending Before the Subcomm. on Interstate Com., Trade, and Tourism, of the S. Comm. on Com., Sci., and Trans.,110th Cong., 9 (2008), https://www.govinfo.gov/content/pkg/CHRG-110shrg75345/pdf/CHRG-110shrg75345.pdf. One year later, at another hearing where the FTC's enforcement track record was challenged, another witness described the agency as being "completely passive" in using its unfairness authority. *See* Consumer Credit and Debt: The Role of the Fed. Trade Comm'n in Protecting the Public: Hearing Before the Subcomm. on Com. Trade, and Tourism, of the H. Comm. on Energy and Com., 111th Cong., 69 (2009) (testimony of Ira Rheingold, Executive Dir., Nat'l Assoc. of

landmark 2010 financial reform law, Congress stripped the FTC of key responsibilities and transferred them to a new, independent, data-driven agency, the Consumer Financial Protection Bureau. Importantly, it armed the Bureau with a new tool – a prohibition on "abusive" practices – to fill in the gaps where unfairness had failed.[34]

To be clear, problems in the FTC's approach to unfairness are not limited to the term's definition. Even weak standards can be enforced effectively, and even strong ones can fail if they go unenforced. But there is no question that the FTC's Policy Statement heralded a fundamental shift in the FTC's approach to unfairness, as theories about self-correcting markets supplanted formal adjudication and rulemaking. This reliance on market forces alone to protect consumers proved disastrous, and it is fortunate that the overwhelming majority of state enforcers did not follow the FTC down this path.

States Have Rightly Rejected the FTC's Approach to Unfairness

Given the FTC's track record, it should not be surprising that only a small fraction of states have followed the FTC's lead in redefining unfairness. Unlike DOT, the FTC shares its consumer protection responsibility with the states, and almost every state has enacted statutes to protect consumers and honest businesses, with 28 adopting "Mini FTC Acts" containing parallel prohibitions on unfair or deceptive acts or practices.

Deploying these authorities, states have led the way in protecting their citizens from marketplace abuses. For example, unlike the FTC, states acted aggressively in the years before the financial crisis to combat unfair mortgage lending, bringing a multistate action against the nation's largest subprime lender as early as 2006.[35] After the financial crisis, states challenged predatory practices by for-profit colleges, bringing dozens of actions to halt unfair and deceptive conduct

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Consumer Advocates), https://www.govinfo.gov/content/pkg/CHRG-111hhrg67816/html/CHRG-111hhrg67816.htm.

[33] In 2007, the Chairman of the House Financial Services Committee, Representative Barney Frank, argued there was "broad consensus" that the agency's standard was too rigid to tackle emerging unfair lending abuses. *See* Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Fin. Servs., 110th Cong., 40 (2007), https://www.gpo.gov/fdsys/pkg/CHRG-110hhrg37556/html/CHRG-110hhrg37556.htm. At the same hearing, then-Federal Deposit Insurance Corporation Chair Sheila Bair called unfairness a "restrictive legal standard," and argued that Congress should consider enacting a more flexible standard to tackle some of the most problematic practices of the era. *Id.* Two years later, the incoming Chairman of the FTC, challenged on why the FTC had brought so few unfairness actions, acknowledged that the agency's post-1980 definition had left it less prepared to bring cases. *See* Consumer Credit and Debt Hearing, *supra* note 32 (testimony of Jon Leibowitz, Chairman, Fed. Trade Comm'n).

[34] Congress defined an abusive act or practice as one that "(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of—(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer." 12 U.S.C. § 5531(d). This authority was defined to fill in the gaps left by Congress' definition of unfairness. *See* Restoring American Financial Stability Act of 2010, S. Rep. No. 111-176, 172 ("Current law prohibits unfair or deceptive acts or practices. The addition of 'abusive' will ensure that the [CFPB] is empowered to cover practices where providers unreasonably take advantage of consumers").

[35] *See* Office of Ill. Att'y Gen., Press Release, Madigan, Martinez: Ameriquest to Pay $325 Million and Reform Lending Practices to Resolve States' Investigation (Jan. 26, 2006), https://illinoisattorneygeneral.gov/pressroom/2006_01/20060123b.html.

and return money to defrauded students.[36] The FTC stood on the sidelines during the worst years of for-profit college predation, waiting until 2016 to bring its first significant enforcement action.[37]

Importantly, states have achieved these successes while departing from the FTC's approach to unfairness.[38] Although most state laws prohibiting unfair or deceptive practices include harmonization provisions directing courts to accord weight to the FTC's interpretations, only five states have adopted the unfairness criteria that DOT now proposes to adopt.[39] Tellingly, state attorneys general on the front lines of protecting consumers have resisted efforts to copy the FTC's criteria, with one calling them "repugnant" to state enforcement efforts.[40]

Those states that did not adopt the FTC's criteria have relied instead on their traditional approaches to unfairness, which are guided by precedent, experience, and fact-intensive analysis. For example, Massachusetts – which does not define unfairness in its consumer protection statute – successfully took Fremont Investment & Loan to court to challenge subprime loans shown to trap borrowers in default, preventing thousands of illegal foreclosures in the Commonwealth.[41] Similarly, Illinois, which likewise charted its own course, relied on expert analysis and decades of precedent to challenge a student loan product that resulted in default for the vast majority of borrowers.[42] There are many more examples where the FTC lagged state efforts to combat systemic abuses.[43] These efforts not only halted harmful practices but also advanced the

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[36] *See* David Halperin, *Law Enforcement Investigations and Actions Regarding For-Profit Colleges*, REPUBLIC REPORT (updated Apr. 28, 2020) (listing actions), https://www.republicreport.org/2014/law-enforcement-for-profit-colleges/.

[37] *See* Statement of Commissioner Rohit Chopra In the Matter of University of Phoenix, Comm'n File No. 1523231 (Dec. 10, 2019) (describing the FTC's enforcement against for-profit college abuses, which declined precipitously after 1980), https://www.ftc.gov/public-statements/2019/12/statement-commissioner-rohit-chopra-matter-university-phoenix-inc.

[38] Scholars have posited many reasons for states' apparent reluctance to adopt the FTC's unfairness criteria, including their reliance on previous decisions, the difficulty for factfinders of interpreting the FTC's criteria, and uncertainty in applying the balancing test, which uncertainty is likely exacerbated by the lack of adjudicated decisions. *See* David L. Belt, *Should the FTC's Current Criteria for Determining "Unfair Acts or Practices" Be Applied to State 'Little FTC Acts'?* 9 ANTITRUST SOURCE 1, 7-11 (2010). Perhaps the simplest explanation, however, is that states saw firsthand the weaknesses in the FTC's approach.

[39] Belt, *supra* note 38 at 6.

[40] *See, e.g., Legg v. Castruccio*, 100 Md. App. 748, 764, 642 A.2d 906, 914 (1994) (quoting amicus brief by the Maryland Attorney General calling the FTC's standard "repugnant" to state enforcement); *Camacho v. Auto. Club of S. California*, 142 Cal. App. 4th 1394, 1403 (2006) (noting that the California Attorney General urged the court to apply the *Sperry* test). In addition, the Senate Report accompanying the legislation codifying the FTC's unfairness definition noted that state attorneys generals "have expressed a concern that the limitation on unfairness in this section may be construed to affect provisions in State statutes or State case law." S. Rep. No. 130, 103d Cong., 2d Sess. 13 (1994). The Report assured states that they could continue to chart their own course. *Id*. *See also* Belt, *supra* note 38 at 7-8 (surveying state laws and interpretations).

[41] Although unfairness is not defined in Massachusetts, the concept is guided by decades of precedent and public policy considerations, affording Fremont ample grounds to challenge the Commonwealth's allegations. *See Com. v. Fremont Inv. & Loan*, 452 Mass. 733, 735 (2008) (addressing Fremont's defenses and affirming that its lending was unfair under Massachusetts law). Indeed, the Supreme Judicial Court's opinion in this matter is notable for its depth and rigor, as contrasted with the settlements typically reached by the FTC, which contain no findings or analysis.

[42] *See Illinois v. Alta Colleges, Inc*., No. 14-C-3786, 2014 WL 4377579, *1 (N.D. Ill. Sept. 4, 2014) (finding, *inter alia,* that Illinois stated a claim for unfairness).

[43] *See* Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L. J. 911, 924 (2017) (describing examples where "federal consumer protection actions lagged behind enforcement actions by the states").

development of each state's unfairness doctrine, benefiting both consumers and law-abiding businesses through rigorous application of the law.

This natural experiment in consumer protection enforcement involved many variables, and reasonable minds can differ as to why states have consistently outperformed the FTC. But there is compelling evidence that actions like these would have been far more difficult had states adopted the FTC's unfairness definition. In a recent study co-authored by Joshua Wright, a former FTC commissioner, a "Shadow Commission" was selected to review a sampling of unfairness actions brought under state law to determine whether such actions would have been viable under the FTC's unfairness criteria. They found that applying the FTC's economic theories would knock out 69 percent of state lawsuits, even while in the real world, courts found unfairness in the vast majority (64 percent) of these cases.[44] These striking results mirrored those of an earlier study, which found that applying the FTC's policy statements on unfairness and deception would sink an astonishing 78 percent of actions challenging unfair and deceptive practices under state law.[45]

These studies offer further evidence that states were right to chart their own course on unfairness, relying on precedent and rigorous analysis to enforce their laws, rather than assuming that markets are self-correcting. This helped states protect their citizens even as the FTC stood on the sidelines. If DOT is looking to revise its approach to unfairness, it should look to the states as a model, not to the FTC.

The FTC's Unfairness Approach is an Especially Poor Fit for Airline Accountability

As detailed above, the FTC's approach to unfairness has major flaws, especially when contrasted with how states have deployed their unfairness authority. If DOT adopts the FTC's model, these flaws are likely to be only exacerbated, as the key planks undergirding the FTC's unfairness definition – competitive markets, consumer choice, and a de-emphasis on public policy – are poorly suited to airline regulation. Worse still, airline passengers will not benefit from state enforcers who can fill in enforcement gaps.

First, the FTC's unfairness definition requires that harm to consumers be weighed against "countervailing benefits" to consumers or competition,[46] and the Commission generally presumes that markets are competitive.[47] But the market for air travel is highly concentrated,[48]

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[44] *See* Nelson & Wright, *supra* note 7 at 1001 (finding that according to "shadow" economists, only 31 percent of unfairness actions under state law would survive under the FTC's unfairness definition). The authors argued that these results underscored problems with state UDAP statutes, or perhaps with state courts. I do not share that assessment, but agree with them that "cases brought under state UDAPs vary significantly from the enforcement actions brought by the FTC under its unfairness authority." *Id.,* 1010.

[45] Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-Ftc Acts?* 63 FLA. L. REV. 163, 187 (2011) (finding that according to a "shadow" Commission, "78% of a sample of [UDAP] claims would not constitute legally unfair or deceptive conduct under FTC policy statements").

[46] 15 U.S.C. § 45(n).

[47] As described in the Policy Statement on Unfairness:

> Normally we expect the marketplace to be self-correcting, and we rely on consumer choice-the ability of individual consumers to make their own private purchasing decisions without regulatory intervention--to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory. *See* FTC POL'Y STATEMENT ON UNFAIRNESS, *supra* note 3.

leaving most Americans with few flight options.[49] Rather than copying and pasting the FTC's unfairness definition, DOT should approach unfairness according to the realities of the airline market, where competition cannot be counted on to protect passengers.

Relatedly, since most Americans have few choices in air travel, it is unclear how DOT would apply the FTC's reasonable avoidability test. As noted, the FTC presumes that consumers can avoid one firm's harmful practices by switching to a competitor.[50] But dominant airlines often act simultaneously to raise fees,[51] reduce service,[52] and find slick ways to profit off of passengers.[53] How will DOT apply the avoidability test under these circumstances? Will DOT assume that passengers can "avoid" the conduct by traveling by bus instead? Air travel is an essential service for many American families and businesses, and DOT cannot presume – as does the FTC – that harmful practices can be avoided through consumer choice.

In addition to overseeing a market that does not match the FTC's theoretical model, DOT operates under a fundamentally different congressional mandate. When Congress codified the FTC's unfairness definition, it mandated that public policy cannot serve as a primary basis for enforcement or rulemaking.[54] DOT is under a very different mandate, with Congress *requiring* the agency to prioritize certain public policies.[55] These policies include making safety the "highest priority in air commerce", preventing "unreasonable discrimination," being "responsive to the needs of the public," and ensuring access to "those in small communities and rural and remote areas[.]"[56]

Critically, DOT's proposal does not indicate how these congressional mandates would or could be incorporated into any unfairness analysis. For example, when the FTC was evaluating whether cigarette advertising targeting children was unfair, it would have weighed the harms caused by the advertising, such as to public safety, against any theoretical benefits. But Congress directs DOT to make safety its "highest priority," calling into question how its value, relative to other inputs, would be quantified in an unfairness analysis. Given the unique mandate under

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[48] Mazareanu, *supra* note 5.
[49] Statement of Gerald L. Dillingham, Dir., Physical Infrastructure, Regarding Status of Air Serv. To Small Communities and the Fed. Programs Involved (GAO-14-454T) Before the Subcomm. on Aviation, H. Comm. on Trans. And Infrastructure, 113th Cong., 1 (2014) (noting that "[m]any small communities have struggled with limited air service since Congress deregulated commercial air service in 1978"), https://www.gao.gov/assets/670/662831.pdf. *See also Airlines Are Trying to Cut Service to Small Airports During Coronavirus*, CONDÉ NAST TRAVELER (Apr. 23, 2020), https://www.cntraveler.com/story/airlines-are-trying-to-cut-service-to-small-airports-during-coronavirus.
[50] *See* FTC POL'Y STATEMENT ON UNFAIRNESS, *supra* note 3.
[51] Dawn Gilbertson, *No surprise: American Airlines raises bag fees to $30, matching Delta and United*, USA TODAY (Sept. 20, 2018), https://www.usatoday.com/story/travel/flights/todayinthesky/2018/09/20/american-increases-bag-fees-matching-united-delta-jetblue/1189021002/.
[52] CONDÉ NAST TRAVELER, *supra* note 49.
[53] *See, e.g.*, William J. McGee, *Airlines tell parents to pay up or risk sitting rows away from their kids. That's wrong.*, USA TODAY: VOICES (Nov. 20, 2019), https://www.usatoday.com/story/opinion/voices/2019/11/20/airlines-seat-reservations-families-children-separate-column/4196405002/.
[54] *See* 15 U.S.C. § 45(n) ("In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination").
[55] *See* 49 U.S.C. § 40101.
[56] *Id.* § 40101(a)(1), (4), (7), (16).

which DOT operates, adopting the FTC's unfairness definition is likely to add confusion rather than clarity to the law.[57]

Finally, American consumers have benefited from having state enforcers who often lead the way in combatting unfair practices, but because of blanket preemption, airlines passengers do not enjoy this additional layer of protection. Adopting the FTC's standard will make this enforcement gap even more problematic. As noted earlier, according to a third-party analysis, applying the FTC's unfairness standard to state enforcement actions would doom the vast majority of them. The airlines' rulemaking campaign leaves little doubt that this is exactly what the industry hopes to do if the FTC's standard is adopted, bringing collateral challenges to existing rulemakings and working assiduously to block new protections. If they succeed, state enforcers will be powerless to fill in the gaps, and passengers will pay the price.

Conclusion

Misrepresenting the law, the airlines lob charges that DOT is being too aggressive in its efforts to protect the flying public from harmful and illegal practices. But the need for effective passenger protection is greater than ever. Even amidst a pandemic, airlines continue to nickel-and-dime their passengers and ignore their legal obligations. Airlines should be following the law, rather than trying to rewrite it in their own self-interest.

This is no time to dial back passenger protections, but that is exactly what DOT's proposal is likely to do. Far from simply clarifying the law, copying and pasting the FTC's approach will hobble enforcement, increase legal uncertainty, and threaten existing consumer protections. I urge DOT to withdraw this proposal.

[57] It should also be noted that a hands-off approach to protecting public safety has already proven disastrous for airline passengers. The Federal Aviation Administration's outsourced oversight compliance philosophy is under intense scrutiny, given the lives lost due to the Boeing 737 Max. *See, e.g.,* Michael Laris et al., *FAA's lax oversight played part in Boeing 737 Max crashes, but agency is pushing to become more industry-friendly*, THE WASHINGTON POST (Oct. 28, 2019), https://www.washingtonpost.com/local/trafficandcommuting/faas-lax-oversight-played-part-in-boeing-737-max-crashes-but-agency-is-pushing-to-become-more-industry-friendly/2019/10/27/bc0bf184-f4e1-11e9-ad8b-85e2aa00b5ce_story.html.