NO. _____

In the
Supreme Court of the United States

SPIRIT AIRLINES, INC.; ALLEGIANT AIR, LLC;
and SOUTHWEST AIRLINES CO.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF
TRANSPORTATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRITE OF CERTIORARI

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QUESTIONS PRESENTED

In 1978, Congress passed a major initiative to deregulate the airline industry and allow the marketplace, not regulators, to determine the fares, routes, and services offered in this critical industry. Until recently, carriers were free to advertise prices in that marketplace in the same manner as virtually every other industry—on a pre-tax basis—as long as additional taxes and fees were clearly disclosed. Petitioners were quite happy not just to disclose, but to emphasize the extent to which government fees and taxes outside their control contributed to the consumer's final cost. They also sought to emphasize that the pre-tax fares within their control were lower than their competitors. Importantly, the total price was always calculated for and clearly displayed to the customer before purchase.

The Department of Transportation ("DOT") nonetheless concluded that truthful speech about pre-tax fares and the extent of the government's tax burden is somehow "unfair" or "deceptive." DOT thus mandated that airline advertisements display the *total* price of the ticket, inclusive of all taxes and fees, and barred airlines from "prominently" identifying government-imposed taxes and fees, dictating that any such disclosures appear in "significantly smaller type." DOT also attempted to re-regulate the extent to which carriers can sell tickets on a non-refundable basis by mandating a 24-hour refund period on most tickets.

The questions presented are:

(1) Whether DOT violated the First Amendment by mandating "total cost" advertising and restricting airlines' truthful speech about the large (and ever-growing) share of each ticket that consists of government taxes and fees.

(2) Whether DOT exceeded its statutory mandate and acted arbitrarily and capriciously by re-regulating—down to the size of typeface and the length of mandatory refunds—an industry that Congress expressly chose to deregulate.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Spirit Airlines, Inc., and Allegiant Air, LLC were Petitioners in the proceedings before the D.C. Circuit. Petitioner Southwest Airlines Co. intervened on behalf of Spirit and Allegiant in the D.C. Circuit.

Respondent U.S. Department of Transportation was the Respondent below. The American Society of Travel Agents, Inc. intervened on behalf of Respondent.

RULE 29.6 STATEMENT

Petitioner Spirit Airlines, Inc. has no parent corporation and no publicly held company has a 10% or greater ownership interest in it.

Petitioner Allegiant Air, LLC is a wholly owned subsidiary of Allegiant Travel Company. As of December 31, 2011, T. Rowe Price Associates, Inc. held beneficial ownership of 10.5% of the stock of Allegiant Travel Company.

Petitioner Southwest Airlines Co. has no parent company and no publicly held company has a 10% or greater ownership interest in it.

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PETITION FOR CERTIORARI

Petitioners Southwest Airlines Co. ("Southwest"), Spirit Airlines, Inc. ("Spirit"), and Allegiant Air, LLC ("Allegiant") respectfully submit this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The D.C. Circuit's opinion is reported at 687 F.3d 403 and reproduced at Pet.App.1-35. The challenged Department of Transportation regulations were issued on April 18th, 2011 in Docket DOT-OST-2010-0140. The final rules are reported at 76 Fed. Reg. 23,110 and reproduced in relevant part at Pet.App.36-83.

JURISDICTION

The D.C. Circuit issued its decision on July 24, 2012. On October 5, 2012, the Chief Justice extended the time for filing this petition to and including November 21, 2012. *See* No. 12A332. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

The Airline Deregulation Act of 1978, as amended, provides in relevant part: "If the Secretary, after notice and an opportunity for hearing, finds that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition, the

Secretary shall order the air carrier, foreign air carrier, or ticket agent to stop the practice or method." 49 U.S.C. § 41712(a).

INTRODUCTION

In 1978, Congress deregulated the airline industry, allowing carriers—rather than federal regulators—to choose their own fares, routes, schedules, and marketing practices. Since then, fares have fallen significantly, passenger miles have more than tripled, and new low-cost carriers have emerged. While the Department of Transportation ("DOT") retains a narrow authority to police deceptive practices and unfair competition, Congress made clear that market forces would replace the role of federal regulators. Nonetheless, DOT has recently promulgated a number of new rules, with more in the offing, that seek to micro-manage the business decisions of this highly competitive industry, including dictating how air carriers advertise their prices and communicate the extent to which government taxes contribute to the final price. Those rules violate the First Amendment and Congress' intent to deregulate the industry.

I. Although firms in nearly every industry in the country advertise and price their products on a pre-tax basis, DOT promulgated a regulation (the "Total Price Rule") that not only forces airlines to advertise fares inclusive of all government-imposed taxes and fees, but also specifically *prohibits* airlines from drawing conspicuous attention to those taxes. The rule mandates that any disclosure of taxes "not be displayed prominently and be presented in significantly smaller type than the listing of the total

price." Pet.App.72. Such a government effort to micro-manage how speakers communicate the burdens of taxation would raise serious First Amendment concerns in any industry, but they are doubly problematic in an industry Congress specifically chose to deregulate.

This regulation is an unconstitutional limitation on speech critical of the government, as it restricts carriers' ability to convey truthful information about the significant tax burden on air travel. Petitioners primarily serve price-conscious travelers, and believe it is important for their customers to know which portion of their fare is within the airline's control and which portion is a product of government fiat. The Total Price Rule hamstrings Petitioners from clearly communicating this information to consumers at the very moment they are most receptive to Petitioners' message—namely, just before that tax burden is imposed upon the consumer. This restriction on speech critical of the government at the precise point at which it would be most effective should be subject to (and would fail) strict scrutiny.

Indeed, as Judge Randolph concluded in his dissent, the Total Price Rule cannot survive even the lower level of First Amendment scrutiny that this Court has applied to "commercial speech." DOT has asserted that the Rule is necessary to prevent "deception" or "confusion." But it strains credulity to suggest that consumers are somehow deceived by advertisements of pre-tax prices, given that this is standard operating procedure in virtually every other U.S. industry. It is true that air travel is subject to many different types of taxes and fees that may be

unfamiliar to consumers, but that only highlights the importance of speech informing customers of the extent to which the final price of an airline ticket reflects the government's cut.

Moreover, the Total Price Rule is far broader than necessary to address the government's purported interest in preventing confusion. A regulation that allows airlines to advertise pre-tax pricing but requires airlines to clearly disclose the additional taxes and fees on each ticket and calculate the all-in price before purchase—which is the precise rule that has governed the industry for the last three decades—is more than sufficient to eliminate any risk of actual deception or confusion.

II. This kind of government micro-management of truthful speech critical of the government would be troubling in any industry. The fact that it occurs in an industry Congress expressly chose to deregulate means that DOT's efforts exceed its statutory authority as well as First Amendment limits. Indeed, the Total Price Rule is just one example of the government's effort to re-regulate the industry through the back door by relying on its narrow consumer protection authority to prohibit deception as justification for broader rules regarding carriers' pricing practices.

Another regulatory overreach is DOT's new "24-Hour Refund Rule," which directly regulates prices by forcing carriers either to hold a reservation at a quoted fare without payment or allow customers to cancel a reservation without penalty, for 24 hours, if the ticket was booked a week or more before departure. While a regulator might favor this rule as

part of a broader regime of price regulation, there was no evidence whatsoever that the rule was needed to prevent "deception" or "unfairness." For the last 30 years, air carriers have been allowed to sell nonrefundable tickets or assess change penalties as long as they clearly disclosed those conditions before the customer purchased a ticket. Indeed, before the adoption of the challenged rules, DOT repeatedly recognized that the availability of a variety of different fare options is *pro-competitive*, as it allows carriers to better manage their seat capacity and promotes the availability of lower fares.

The Total Price Rule and 24-Hour Refund Rule have nothing to do with deceptive or unfair practices, and are little more than an attempt to impose mandatory "best practices" on a highly competitive industry. But a core purpose of the Deregulation Act was to "leave largely to the airlines themselves . . . the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services." *American Airlines v. Wolens*, 513 U.S. 219, 228 (1995). DOT has attempted to reclaim the authority to regulate not only the type of tickets airlines may offer, but how they communicate their prices to customers. Neither the First Amendment nor the Deregulation Act permits this micro-management. This Court should grant review to make clear that truthful speech critical of the government may not be so readily suppressed, and that an industry expressly de-regulated by Congress may not be so readily re-regulated.

STATEMENT OF THE CASE

A. Congress' Deregulation of the Airline Industry

1. The deregulation of the airline industry has been one of the most successful policy initiatives of the last three decades. Until 1978, the Civil Aeronautics Board exercised broad authority over airlines, including the authority to regulate "rates, fares, and charges for air transportation" as well as "all classifications, rules, regulations, practices, and services in connection with such air transportation." Federal Aviation Act of 1958, Pub. L. No. 85-726, §§ 403-04. Under that regime of command-and-control regulation, prices were high, routes and schedules were insensitive to consumer demand, and competition was virtually non-existent.[1]

By the late 1970s, it was apparent this system of pervasive regulation was in desperate need of reform. In 1978, Congress concluded that "maximum reliance on competitive market forces would best further efficiency, innovation, and low prices as well as variety and quality of air transportation services." *Morales v. TWA*, 504 U.S. 374, 378 (1992) (citations omitted). As Senator Edward Kennedy, a cosponsor of the legislation, explained:

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[1] *See generally* Robert Crandall & Jerry Ellig, Economic Deregulation and Customer Choice 34 (1997) (noting that "entry and fare regulations combined to create a government-enforced cartel that kept average fares above competitive levels"), *at* http://mercatus.org/sites/default/files/publication/MC_RSP_RP-Dregulation_970101.pdf.

> [The Deregulation Act] will change the entire face of the domestic aviation regulatory process. We will have the chance to tell the American Public that we believe competition to be better than regulation, [and] that business men and women can make better decisions about the conduct of their businesses than bureaucrats …

124 Cong. Rec. S5860 (Apr. 19, 1978).

Congressional faith in the power of competition has proven well justified. Between 1980 and 2006, passenger miles tripled, median fares fell by approximately 40%, and the average number of competitors on each route increased from 2.2 to 3.5.[2] Petitioners Southwest, Spirit, and Allegiant are innovative, low-cost airlines that have been at the forefront of these pro-consumer developments under deregulation. Petitioners vigorously compete on the basis of price and aim to serve budget-conscious travelers. As a result, Petitioners have opened up many underserved markets to competition, and have made air travel accessible to millions of consumers who otherwise could not afford to fly.

One thing deregulation has not meant, however, is the elimination or reduction of federal taxes and fees on the industry. To the contrary, the federal government has steadily ratcheted up the tax

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[2] *See* GAO, *Reregulating the Airline Industry Would Likely Reverse Consumer Benefits and Not Save Airline Pensions* at 10-11, 18-19, 26-27 (GAO-06-630, June 2006), *at* http://www.gao.gov/new.items/d06630.pdf

burdens on airlines and their passengers. Taxes and fees already comprise approximately 20% of the average plane ticket, *see* Rec.1631 at 47, and the government is seeking to triple the passenger security fee from $2.50 to $7.50 per flight segment, which as a flat fee has a greater relative impact on low fares.[3] The airline industry is vigorously opposing these proposed tax increases.

B. DOT's Longstanding Approach to Regulation of Pricing and Advertising

Following deregulation of the industry, Congress carefully limited DOT's residual authority to impose economic regulation on air carriers. DOT may "investigate and decide whether an air carrier . . . 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," and may order carriers to cease practices that are deemed unfair or deceptive. 49 U.S.C. § 41712(a). Congress further provided that it is "in the public interest" for DOT to "plac[e] maximum reliance on competitive market forces and on actual and potential competition— (A) to provide the needed air transportation system; and (B) to encourage efficient and well-managed air carriers to earn adequate profits and attract capital." 49 U.S.C. § 40101(a)(6).

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[3] The President's Plan for Economic Growth and Deficit Reduction at 22 (Sep. 19, 2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/jointcommitteereport.pdf.

Pursuant to these statutory mandates, DOT has long given carriers significant flexibility in pricing and advertising their services. For example, airlines have adopted a wide array of different policies regarding refundable tickets and reservation cancellation and change fees. Some carriers (such as Southwest) generally do not assess change fees, and advertise this as a competitive advantage; others (such as Spirit and Allegiant) believe that cancellation and change fees are an important tool for managing capacity and keeping base fares to a minimum. For the last 30 years, DOT has allowed each carrier to choose whether to impose such fees, as long as they "[give] consumers specific advance notice of any condition that would restrict refunds or impose any monetary penalties for cancellation."[4]

DOT's longstanding policy also gave airlines discretion whether to advertise their fares on a pre-tax or post-tax basis. In 1985, DOT issued an order providing that airline advertisements may list a $3 government-imposed departure tax separately from the total advertised price. *See* Order 85-12-68 (Dec. 24, 1985). DOT emphasized that separate listing of this tax "ha[d] long been a common practice in the industry," and was not deceptive or misleading as long as the advertisements "clearly state[d] the amount of tax elsewhere in the ad." *Id.* at 6-7.

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[4] *Petition of Joel Kaufman*, Order 2003-3-11, at 2 (DOT Mar. 18, 2003), *at* http://www.airlineinfo.com/Sites/DailyAirline/web-content/ostpdf41/747.pdf ("*Petition of Kaufman*").

A few years later, DOT formally extended that policy to nearly all government-imposed taxes and fees, including "custom fees, immigration fees, security fees, agriculture inspection fees, tourism and fuel surcharges, as well as any other surcharges . . . that may be imposed by . . . Federal, State, or local governments or foreign governments." Order 88-3-25, at 4 (Mar. 10, 1988). And carriers had discretion about *how* to disclose such fees. For example, they could choose to "includ[e] the additional costs in the generally-larger typeface stating the price of the trip," or could "us[e] an asterisk with a notation showing the total cost of the additional charges with the kind of charges itemized." *Id.*[5]

Later in 1988, DOT reaffirmed that "[s]eparate listing of these charges *is not deceptive*, because it informs consumers of the exact amount that will be collected and passed on to the government." Order 88-8-2 (Aug. 2, 1988) (emphasis added). Indeed, DOT found that "passengers benefit from knowing how much they are paying government entities apart from the fares they pay the carriers." *Id.*

In 2005, DOT issued a notice of proposed rulemaking that sought comment on several proposed changes to its pricing and advertising rules. One of the proposed rules would have allowed

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[5] For internet advertisements, taxes and fees could "be disclosed through a prominent link placed adjacent to the stated fare that notes that taxes and fees are extra," where the linked page "prominently and immediately" displays "the nature and amount of taxes and fees." *US Airways*, Order 2011-6-2, 2011 WL 2168867 (June 2, 2011).

airlines to advertise only "the total fare the consumer would pay." 70 Fed. Reg. 73,960, 73, 962 (Dec. 14, 2005). After receiving more than 700 comments, the Department declined to adopt that change, noting that the rule would "create marketing difficulties for sellers without necessarily making prices more transparent to consumers." 71 Fed. Reg. 55,398, 55,402 (Sep. 22, 2006).

Thus, for essentially the entire post-deregulation era, airlines—just like companies in nearly every other industry—were free to advertise fares on a pre-tax basis, as long as they clearly disclosed the existence and amount of any additional taxes or fees. And the total price was always calculated and shown to the customer before purchase. As DOT explained, those disclosure rules were more than sufficient to "protect[] consumers, facilitate[] price comparison, foster[] fare competition, and afford[] sellers an appropriate degree of freedom to innovate." *Id.* at 55,401.[6]

C. DOT's Recent Efforts to Re-Regulate the Airline Industry

On June 8, 2010, DOT published a notice of proposed rulemaking seeking comment on a large number of proposed regulations involving tarmac delays, customer service, overbooking, advertising,

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[6] In the handful of instances in which carriers or ticket agents did not comply with these disclosure rules, DOT quickly issued penalties. *See Orbitz Worldwide*, OST-2011-0003 (Oct. 17, 2011); *Virgin Atlantic Airways*, OST-2011-0003 (Sept. 26, 2011); *Lowestfare.com*, OST-2011-0003 (Sept. 16, 2011).

and ancillary services such as baggage fees. *See* 75 Fed. Reg. 32,318 (June 8, 2010). DOT received more than 2,100 comments, the vast majority of which addressed proposals regarding the accommodation of travelers with peanut allergies. On April 25, 2011, DOT promulgated final rules regarding each of the issues raised in the NPRM, two of which are at issue here.

The Total Price Rule: In a stark departure from longstanding policy, the final rules provide that "advertised fare[s] . . . must include all government-imposed taxes and fees as well as mandatory carrier-imposed charges." Pet.App.70. DOT concluded that "consumers are deceived when presented with fares that do not include numerous required charges," and that "air travelers will be better able to make price comparisons when they can see the entire price of the air transportation." *Id.* That finding of "deception" was based entirely on a handful of consumer complaints and postings on DOT's "Regulation Room" website, in which individuals claimed to "feel[] deceived when they are not quoted the full price to be paid." Pet.App.69.

Even though companies in countless other industries routinely advertise pre-tax prices, DOT found that "[a]irfares are different from products in other industries for a variety of reasons, including the multitude of methods of advertising that sellers of air transportation employ and the various taxes and government fees that apply." Pet.App.70; *see* Pet.App.69 (noting that "some carriers have started to sell tickets through Facebook and some have Twitter feeds dedicated solely to advertising sale

fares"). The substantial amount and variety of taxes and fees on air travel, as well as the lack of consumer familiarity with them, would seem to justify *more* speech directed specifically to those taxes and fees. But DOT reached a very different conclusion. Because "taxes and fees can increase and become a significant portion of the price to be paid by consumers," DOT concluded that "consumers need a full picture of the total price to be paid in order to compare fares and routings." Pet.App.69-70.

DOT did not stop at simply requiring carriers to advertise the total price inclusive of taxes and fees; it also prohibited airlines from drawing conspicuous attention to the magnitude of those government-imposed fees. The rule allows carriers to "advise the public in their fare solicitations about government taxes or fees" only if they are "displayed in a manner that otherwise does not deceive consumers." Pet.App.72. In elaborating on that last requirement concerning how truthful speech about government taxes could be communicated, DOT specified that "any such listing [of taxes and fees] *not be displayed prominently and be presented in significantly smaller type* than the listing of the total price to ensure that consumers are not confused about the total price they must pay." *Id.* (emphasis added).

The 24-Hour Refund Rule: DOT also adopted "minimum standards for the customer service plans of both U.S. and foreign carriers." Pet.App.57. One of those new standards requires "carriers to allow reservations to be held at the quoted fare without payment, or cancelled without penalty, for at least twenty-four hours after the reservation is made," if

the ticket was booked one week or more before the scheduled departure. Pet.App.62. DOT concluded that this significant new restriction on carriers' ability to sell nonrefundable tickets "strikes the right balance between a consumer's desire to make travel plans and shop for a fare that meets his or her needs, and the carrier's need for adequate time to sell seats on its flights." Pet.App.63.

D. The D.C. Circuit's Decision

Petitioners sought review of these rules in the D.C. Circuit,[7] arguing that they exceeded DOT's deregulatory mandate and were arbitrary and capricious, and that the Total Price Rule's restrictions on truthful disclosure of government-imposed taxes and fees violated the First Amendment.

By a two-to-one vote, the majority rejected Petitioners' challenge to the Total Price Rule. The court held that DOT reasonably relied on comments showing that customers were "confused" by advertised fares that did not include taxes and fees. Pet.App.8. The court characterized this rule as a "limited imposition" that merely "requires the total,

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[7] DOT's efforts to re-regulate the airline industry were not limited to these two rules. DOT also promulgated a rule that would have forbidden airlines from raising the price of any non-included fees, such as beverage charges, after the purchase of a ticket. Pet.App.81. The only fees exempted were the government's own taxes and fees. *Id.* After Petitioners challenged this rule in the D.C. Circuit, DOT announced that it would initiate a new rulemaking to reconsider its policy, and no direct challenge to that rule is included in this Petition.

final price to be the most prominently listed figure, relying on the reasonable theory that this prevents airlines from confusing consumers about the total cost of their travel." Pet.App.9.

For largely the same reasons, the majority rejected Petitioners' First Amendment challenge. The court held that the Total Price Rule only regulates commercial speech that proposes a transaction for a specific product. Pet.App.11-12. The court then applied the lowest level of scrutiny under the commercial speech doctrine, which is reserved for laws that mandate "clarifying disclosure[s]." Pet.App.13 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651-53 (1985)). According to the majority, the Total Price Rule "does not prohibit airlines from saying anything; it just requires them to disclose the total, final price and to make it the most prominent figure in their advertisements." Pet.App.15. Although this rule "limit[s] the manner in which airlines may advertise information," the court found that "this neither prohibits nor substantially burdens airlines' ability to provide that information." *Id.* In reaching that conclusion, the court relied on a screenshot from Spirit's website that was not in the record, as well as a concession from DOT counsel that this advertisement was "compliant" with the Total Price Rule. Pet.App.16.

The court further held that the 24-Hour Refund Rule "has nothing to do with airfares," and merely "regulates cancellation policies on the basis of a finding that existing practices were deceptive and unfair." Pet.App.19. The court relied primarily on

DOT's "decades worth of recorded experience," and its "systematic effort aimed at preventing unfair and deceptive practices." Pet.App.20. The court deferred to DOT's finding that not allowing refunds within 24 hours of purchase was "unfair" because "consumers were led to expect" that such refunds were generally available. *Id.*

Judge Randolph dissented in part, concluding that the Total Price Rule violates the First Amendment because it "dictates how airlines . . . may convey information criticizing the taxes and fees extracted from their consumers," and "attempt[s] to restrict speech critical of the government." Pet.App.25. While the majority focused on the *extent* of the burden on protected speech, Judge Randolph found this to be a "red herring." Pet.App.26-27. He believed the dispositive facts were that DOT has: (1) "forbidden airlines from displaying taxes and fees 'prominently'"; (2) "made it illegal for airlines to put these government charges in the same or larger typeface than that of the total price"; and (3) "ordered airlines not to place government taxes and fees above the total price and not to show these items in bold or italics or with underlining." Pet.App.27.

Judge Randolph noted that there were good reasons to treat this rule as a restriction on core political speech. Indeed, the landmark case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), involved "an advertisement placed in a newspaper to raise money," yet the Supreme Court found this to be fully protected political speech. Pet.App.28.

Judge Randolph nonetheless found it unnecessary to decide the applicable level of scrutiny because he

concluded that the Total Price Rule could not satisfy even the less-demanding standard applicable to commercial speech. Pet.App.29. He found the government's purported interest in providing "accurate" information to consumers to be unavailing because "there is no evidence – how could there be? – that smaller typeface for taxes and fees . . . . leads to more accurate airline advertising." Pet.App.30. Judge Randolph also found DOT's interest in "preventing confusion" to be insufficient because DOT failed to "explain[] why disclosure of taxes in the same or larger font size as the total price, or at the top of the page rather than at the bottom, or in bold typeface rather than regular typeface, would confuse anyone." Pet.App.31.

In sum, Judge Randolph concluded that "[p]eople get bills all the time that breakout the components of the total amount due," and "one of the abiding principles of the commercial speech cases is that the government may not restrict speech on the basis that someone somewhere may misread a particular advertisement." Pet.App.34.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI TO ADDRESS THE CONSTITUTIONALITY OF THE TOTAL PRICE RULE

A. The Total Price Rule Restricts Airlines' Ability to Engage in Core Political Speech Informing Customers about Tax Burdens

"Criticism of government is at the very center of the constitutionally protected area of free discussion." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). The

ability to criticize "the use of the public's money to take care of the public's business by a paid agent of the public" is "necessarily included in the guarantees of the First Amendment." *Rosenblatt*, 383 U.S. at 94 (Black, J., concurring and dissenting). And courts are rightly skeptical of speech restrictions that benefit the government actors that impose them. *See, e.g., Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., joined by Ginsburg, J., concurring) (noting that "permitting incumbents to insulate themselves from effective electoral challenge" is a "constitutional evil[]" under the First Amendment).

Petitioners are low-cost carriers that vigorously compete on the basis of price and primarily serve price-conscious consumers. Because Petitioners' fares are lower than those of traditional "legacy" airlines, taxes make up a larger percentage of the total amount Petitioners' customers must ultimately pay.[8] As a result, Petitioners' advertisements have prominently identified—and, at times, criticized—the large and ever-growing portion of each fare that is attributable to government-imposed taxes, fees, and airport facility charges. For example, Spirit's advertisements have prominently labeled taxes and fees "the government's cut." And Southwest has engaged in a political and public-relations campaign specifically opposing the high taxes on air travel. *See*

[8] Several of the government fees on air travel are flat amounts. For example, the proposed $7.50 per-segment security fee comprises 7.5% of a $100 ticket, but less than 1% of a $1,000 ticket.

Add. 9 to Southwest Airlines' Opening Br. (D.C. Cir. Feb. 9, 2012).

Petitioners have a powerful interest in engaging in truthful speech to make tax burdens as transparent as possible, to ensure that the government—not Petitioners—are held accountable for these costs. Indeed, when DOT issued the Total Price Rule, the airline industry "was already publicly protesting" the huge tax burden on airlines. Amicus Br. of Air Transport Ass'n ("ATA") (D.C. Cir. Feb. 27, 2012) at 15. The "prominent disclosure and separate listing of federal taxes and fees" was "part and parcel of a campaign . . . to persuade the public of the industry's position." *Id.* at 16. A government rule that seeks to prevent this truthful speech designed to hold the government accountable strikes at the heart of the First Amendment.

The Total Price Rule is just such a rule. Rather than emphasizing the portion of each fare that is actually within their control (and independently drawing attention to the applicable taxes and fees), Petitioners must now give pride of place to a "total price" that obscures the government's cut. Worse yet, Petitioners are forbidden from identifying those taxes and fees "prominently" in their advertisements. Pet.App.72. Any listing of such fees must be "presented in *significantly smaller type* than the listing of the total price." *Id.* (emphasis added). That is, not only must Petitioners present prices in tax-inclusive terms that hide the tax burden, but they

are *prohibited* from drawing prominent attention to the amount of those taxes.[9]

Perhaps not surprisingly, the promulgation of the tax-obscuring Total Price Rule coincided with the Administration's push for new, higher taxes on airline passengers. Taxes and fees already account for approximately 20% of the average plane ticket, yet the Administration has pushed to raise those taxes further.[10] So while taxes become an ever more prominent portion of the total fare, the regulators have attempted to prevent carriers from identifying the tax burden too "prominently" in their advertisements to consumers. The Framers anticipated the government's temptation to suppress truthful speech designed to lay bare tax burdens and other controversial policies, and included the First Amendment to prevent such efforts.

The D.C. Circuit majority disregarded all of these concerns, noting that Petitioners retained "the full panoply of protections" for their "direct comments on public issues." Pet.App.11 (citation omitted). But

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[9] The Total Price Rule is uniquely self-serving for the government because it disguises the separate impact of taxes, while leaving airline-imposed optional charges—such as baggage fees, priority boarding fees, or premium seating fees—outside of the "total price." Indeed, other provisions of DOT's rules require *prominent* disclosures of airline-imposed baggage fees. *See* 49 U.S.C. § 399.85.

[10] *See* The President's Plan for Economic Growth and Deficit Reduction at 22 (Sep. 19, 2011), http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/jointcommitteereport.pdf.

the fact that the Total Price Rule does not bar Petitioners from engaging in *other* forms of political advocacy regarding airline taxes does not immunize the rule from First Amendment scrutiny. This Court has "rejected summarily" the argument that an "inhibition" on the freedom of expression was justifiable because there were "other means available . . . for the dissemination" of the information. *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974); *see Schneider v. New Jersey*, 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").

Indeed, the Total Price Rule is a uniquely onerous speech burden because it restricts airlines from communicating to customers truthful information about tax burdens *at the very moment when it matters most*—namely, when customers are shopping for a ticket and about to feel the impact of those taxes. Attempting to capture the general public's attention about the rising tide of taxes on air travel in the abstract is difficult, if not impossible. Getting a consumer's attention while they are considering alternative travel options and are about to click "pay now" is easy—except for DOT's suppression of truthful speech about the cost of that travel. In this sense, the Total Price Rule is a particularly pernicious speech restriction because it applies *only* when the speech is most likely to be relevant to the recipient. *See*, *e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 895 (2010); *McConnell v. FEC*, 540 U.S. 93, 335 (2003) (Kennedy, J., dissenting) (speech restriction

failed strict scrutiny where it applied only "during the crucial weeks before an election").[11]

* * *

If anything in this case is "unfair" or "deceptive," it is DOT's attempts to prohibit carriers from drawing clear and conspicuous attention to truthful information about the significant tax burden on airline tickets, at a time when the Administration is pushing to raise those taxes even higher. Truthful speech about the burdens of controversial government policies is at the very top of the First Amendment hierarchy, and DOT's attempts to muzzle it must accordingly satisfy strict scrutiny. DOT has never even attempted to defend the Total Price Rule under that exacting standard. This Court should grant review to reaffirm that such speech is fully protected and to condemn the government's effort to suppress speech that would lay bare the increasing tax burden on airlines and passengers.

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[11] The Total Price Rule is not the only provision of DOT's final rules that protects the government's ability to raise taxes. Another new rule barred airlines from increasing the prices of certain services (such as baggage fees) after a ticket had been purchased. Pet.App.81. But the rule expressly exempted any "government-imposed tax or fee." *Id.* Thus, DOT's purported concerns about "unfairness" or "deception" were clearly not strong enough for the government to limit *its own* ability to raise taxes after a ticket had already been purchased.

B. The Total Price Rule Cannot be Upheld Even as a Valid Regulation of Commercial Speech

1. This Court has repeatedly held that truthful, non-deceptive advertising that proposes a business transaction is entitled to substantial First Amendment protection. *See*, *e.g.*, *Sorrell v. IMS Health*, 131 S. Ct. 2653, 2667-68 (2011); *Thompson v. Western States Medical Ctr.*, 535 U.S. 357, 373-74 (2002); *Virginia State Bd. Of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976). Indeed, a number of Justices have expressed a willingness to reconsider the notion that commercial speech should be treated differently from other forms of fully protected speech. *See Western States*, 535 U.S. at 367-68 (collecting cases and noting that at least five Members of the Court have "expressed doubts about the [commercial speech] analysis").

This case demonstrates one of the primary difficulties with the commercial speech doctrine—namely that providing truthful information about controversial government policies ought to receive the highest level of protection whether it appears in a paid commercial advertisement, on the news pages of a for-profit media outlet, or in the midst of proposing a commercial transaction. But it is also clear that, as Judge Randolph emphasized, DOT's suppression of truthful information about government taxes cannot survive the scrutiny this Court applies to commercial speech.

This Court has repeatedly held that it is a "matter of public interest" that consumers' decisions be "intelligent and well informed." *Id.* at 367. Thus, the

government's "paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it." *44 Liquormart v. Rhode Island*, 517 U.S. 484, 497 (1996) (op. of Stevens, J., joined by Kennedy and Ginsburg, J.J.). That is particularly true when the information lays bare the burdens the government itself imposes on consumers.

Under this Court's precedents, "[c]ommercial speech that is not false, deceptive, or misleading can be restricted, but only if the [government] shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Ibanez v. Florida Dep't of Bus. Regulation*, 512 U.S. 136, 142 (1994). The burden is on the government to justify such restrictions, and "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). Even if the Total Price Rule is deemed to regulate mere "commercial" speech, it cannot satisfy the applicable standard for several independent reasons.

First, the speech that the Total Price Rule seeks to restrict is not "misleading" or "deceptive" at all. This Court has refused to simply defer to the government's efforts to label certain truthful speech as "misleading" or "deceptive." To the contrary, it has held that commercial speech is "misleading" only if it is "inherently likely to deceive or where the

record indicates that a particular form or method of advertising has in fact been deceptive." *In re R.M.J.*, 455 U.S. 191, 202-03 (1982). Advertising pre-tax prices, while prominently drawing attention to the amount of any taxes, is not even slightly misleading. Indeed, advertising pre-tax prices is standard operating procedure in U.S. commerce. A clothing store does not "deceive" its customers when it does not include sales tax on the price tag of a pair of pants. Nor does a hotel mislead its customers when advertised room rates do not include taxes, whether general sales taxes or special hospitality taxes.[12]

Second, even accepting the validity of DOT's interest in preventing deception or confusion, the Total Price Rule will not "materially advance" that interest. DOT suggested that a special rule was needed for the airline industry because airlines advertise through a "multitude of methods," including social media sites such as Facebook and Twitter, and the government imposes "various taxes

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[12] DOT's contrary view is apparently not shared by the federal agency expressly tasked with preventing unfair or deceptive trade practices. The Federal Trade Commission ("FTC") has endorsed a flexible approach that allows base prices to be advertised with conspicuous separate disclosures of additional taxes. For example, the FTC has concluded that telecommunications carriers can provide "full and non-misleading information" about government-imposed universal service fees by *either* "listing the universal service or access fees separately" *or* "including them in the advertised price." FTC Comments at 18 & n.32, *Truth-in-Billing and Billing Format*, FCC Dkt. No. 98-170 (Nov. 13, 1998), http://apps.fcc.gov/ecfs/document/view?id=6005543580.

and government fees." Pet.App.70. Neither point assists the government. Nearly all companies now use social media to advertise and promote their products. Macy's can tweet "Dockers pants on sale for $29.99," without deceiving customers by "prominently" featuring the pre-tax price. Customers will be no more deceived by a comparable tweet for a "Baltimore to Houston flight, $99 each way, plus taxes." Indeed, if anything, consumers are less likely to be confused by Petitioners, who have a decided interest in simultaneously highlighting the substantial tax burdens and emphasizing their relatively low pre-tax prices.

What is unique about social media advertisements is not the potential for customer confusion, but the negative impact of DOT's Total Price Rule. As Judge Randolph explained, both Facebook and Twitter allow postings only in one, uniform font size. Pet.App.31-32 n.6. Thus, in order to avoid violating the Total Price Rule and its typeface-regulations, an airline advertising on Facebook or Twitter would have to either omit *all* information about taxes—to avoid giving that information undue "prominence"—or decline to advertise prices altogether.

DOT does no better—indeed, considerably worse—by emphasizing the multitude and variety of "taxes and government fees" imposed on air travel. It may be true that consumers are less familiar with the multitude of taxes and fees imposed on the airline industry than more ubiquitous sales taxes. But that is a reason for *more* speech, not less. Nothing in the long history of the First Amendment

suggests the government ought to have a freer hand when it comes to controversial government policies of which the public is relatively unaware. Thus, DOT's requirement that efforts to bring independent attention to the magnitude of the government's cut be "presented in *significantly smaller type*" runs afoul of the basic First Amendment prescription that "more speech, not less, is the governing rule." *Citizens United*, 130 S. Ct. at 911.

Third, the Total Price Rule is far "more extensive than necessary" to further DOT's confusion-preventing rationale, and there are many "more limited restrictions" that could advance that interest equally well. *Central Hudson Gas v. PSC of New York*, 447 U.S. 557, 569-70 (1980). Most obviously, DOT could have eliminated any risk of confusion by requiring airlines that advertise fares on a pre-tax basis to prominently disclose that the fares do not include taxes and fees.[13] Indeed, that is exactly what DOT has allowed for almost 30 years, *see supra* at 8-11, and is exactly how products are priced in virtually every other U.S. industry.

Moreover, DOT's primary justification for the Total Price Rule was that airlines' increasing use of social media advertising somehow increased the risk of confusion or deception. Even if that were true, it would only justify applying the Total Price Rule to social media advertisements. But the Rule extends

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[13] *See Pearson v. Shalala*, 164 F.3d 650, 658 (D.C. Cir. 1999) (finding "prominent disclaimers" to be a less-restrictive alternative to broader rules regulating health claims).

to *all* advertisements, regardless of medium. DOT has not even attempted to explain why it would be unfair or deceptive for airlines to advertise pre-tax prices through television and print ads, as they have done for decades, or through the Internet. Nor did the D.C. Circuit majority.

2. Relying on the *Zauderer* decision, the panel majority concluded that the Total Price Rule is a mere "disclosure" requirement that is subject to the lowest form of First Amendment scrutiny. Pet.App.13-17. According to the majority, the Total Price Rule "imposes no burden on speech" other than a disclosure requirement. Pet.App.19.

That conclusion reflects a serious misunderstanding of both *Zauderer* and the Total Price Rule. In *Zauderer*, this Court upheld an Ohio law requiring lawyers who worked on contingency to make an additional disclosure if "the client may have to bear certain expenses even if he loses." 471 U.S. at 650. The Court held that a law requiring businesses to include "purely factual and uncontroversial information" in their advertisements "easily passes muster" under the First Amendment. *Id.* at 651-52.

The Total Price Rule does not compel truthful disclosures; rather, it *restricts* airlines from disclosing truthful information about taxes "prominently." A rule allowing airlines to advertise pre-tax fares if they disclose the nature and amount of applicable taxes and fees would be covered by *Zauderer*. But that describes DOT's traditional rule that has applied for the last three decades, not the Total Price Rule. The distinction is critical. Indeed, *Zauderer* expressly distinguished a disclosure rule

from a law that "attempt[s] to prevent [businesses] from conveying information to the public." 471 U.S. at 650; *see Milavetz, Gallop & Milavetz v. United States*, 130 S.Ct. 1324, 1340-41 (2010) (upholding disclosure requirement that did not prevent the company from "conveying any additional information").

Petitioners do not dispute that DOT can require them to make truthful disclosures to consumers about all taxes and fees applicable to each ticket. Indeed, they welcome the opportunity to do so "prominently" rather than in "significantly smaller type." But that is the precise rule that has been in force for the last three decades—and is a far-less-restrictive alternative to the significant burdens on speech imposed by the Total Price Rule.

C. The D.C. Circuit's Holding Creates a Circuit Split and Implicates Critical Issues About the Government's Ability to Obscure Tax Burdens and Restrict Truthful, Non-Misleading Speech

Even though this case involves a facial challenge to agency regulations—which will rarely give rise to a square circuit split—the Sixth Circuit has reached the opposite conclusion in a very similar case. In *BellSouth Telecomms. v. Farris*, 542 F.3d 499 (6th Cir. 2008), Kentucky imposed a new 1.3% tax on telecommunications carriers and simultaneously barred those carriers from "separately stat[ing] the tax on the bill to the purchaser." *Id.* at 501. The Sixth Circuit would not allow it. In an opinion written by Judge Sutton, the court held that this

restriction on disclosure of accurate information about taxes violated the First Amendment.[14]

The court emphasized that "truthfully telling customers why a company has raised prices simply by listing a new tax on a bill . . . is not the kind of false, inherently misleading speech that the First Amendment does not protect." *Id.* at 506. As the court explained, "[t]he Commonwealth offers no reason why telecommunications customers are any more likely to be confused by tax line items on bills than are consumers of, say, natural gas, and we cannot think of a good reason on our own." *Id.* at 507-08. Finally, the court found that there was not a "reasonable fit" between the Kentucky law and the purported state interests because there were "numerous and obvious less-burdensome alternatives to the restriction on commercial speech." *Id.* at 508-09.

There is no serious question that this case would have been decided differently had it arisen in the Sixth Circuit. Like the Kentucky statute at issue in *BellSouth*, the Total Price Rule restricts the ability of companies in a single industry to provide truthful information about taxes to consumers who are used to dealing with pre-tax prices and information about taxes. The Sixth Circuit recognized that while consumers are not easily deceived by truthful

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[14] The Sixth Circuit did not decide whether the Kentucky law burdened political speech or commercial speech because the court would have found the law unconstitutional under either standard. 542 F.3d at 505.

information about taxes, governments are easily tempted to obscure the fact that they are responsible for a price increase.

And that temptation underscores the importance of the issues here and of this Court's review. In an era of massive government deficits and rising taxes, it is not difficult to imagine similar policies at the federal, state, and local level that are designed to hide the true cost of such taxes. For example, a high-tax jurisdiction could attempt to force retailers to display only the "total" price of their products, inclusive of all sales taxes. Similarly, the federal government could rely on "customer confusion" as the basis for imposing similar pricing policies on regulated firms in the energy and telecommunications industries (*e.g.*, by requiring advertisements of cell-phone or cable plans to be inclusive of taxes and fees). The decision below gives a green light to such policies even though they obscure the reality that much of the consumer's "total price" reflects government exactions, not factors within the private sector's control. Worse still, the decision below authorizes the micro-management of efforts to convey information about taxes by upholding a regulation prohibiting the "prominent" display of such information and dictating the relative type sizes.

The issues here are also important because of the broader efforts of the federal government to regulate truthful, non-misleading speech. While this Court has emphasized that even some non-truthful speech is entitled to significant First Amendment protection, *see United States v. Alvarez*, 132 S. Ct. 2537 (2012),

the federal government continues to regulate and impose massive penalties for truthful, non-misleading speech. To pick only the most prominent, and lucrative, example, the federal government has collected billions of dollars in prosecutions based on off-label promotion of FDA-approved pharmaceuticals and devices.[15] Although those fines also reflected misconduct unrelated to speech, prosecutors routinely point to truthful speech about off-label uses as evidence of impermissible "promotion," even though the FDA permits such off-label uses. *Compare* 42 U.S.C. §§ 1396b(i)(10), 1396r-8(k) (allowing reimbursement for "medically accepted" off-label prescriptions") *with* 21 C.F.R. § 202.1(e)(4)(i)(A) (imposing *per se* ban on "advertisement[s]" for off-label use of prescription drugs).

Thus, this particular challenge is hardly the only context in which the government has attempted to regulate truthful, non-misleading speech about the government's own policies. The need for further clarity about the extent to which the First Amendment permits the government to regulate such speech clearly merits this Court's review.

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[15] *See*, *e.g.*, DOJ, Abbott Labs to Pay $1.5 Billion to Resolve Investigations of Off-label Promotion (May 7, 2012), *at* http://www.justice.gov/opa/pr/2012/May/12-civ-585.html.

II. THE COURT SHOULD GRANT CERTIORARI TO ADDRESS WHETHER DOT MAY, BASED ON ANECDOTAL EVIDENCE, RE-REGULATE AN INDUSTRY THAT CONGRESS HAS EXPRESSLY CHOSEN TO DEREGULATE

The degree to which DOT is seeking to micro-manage truthful, non-misleading speech about government taxes and fees—down to the type-face—would be troubling in any industry. The First Amendment generally prefers to leave such matters to the marketplace of ideas. That it occurs in an industry Congress decided should be guided by market forces underscores that DOT's efforts at re-regulation run afoul of statutory as well as constitutional limits.

The Deregulation Act significantly curbed the government's power to regulate airline rates and other business decisions, mandating that market forces should "decide on the variety and quality of, and determine prices for, air transportation services." 49 U.S.C. § 40101(a)(12)(B). Nonetheless, in its final rules, DOT bootstraps its narrow authority to address "unfair" and "deceptive" practices under 49 U.S.C. § 41712 into a more general authority to re-regulate and homogenize airline prices and marketing practices. The Court should reject that gambit.

DOT itself has long recognized that under the Act it has "extremely limited powers with respect to domestic airfares and related conditions." *Petition of Kaufman* at 2. Because of Congress' deregulatory mandate, DOT must "allow[] the marketplace to govern carrier decisions regarding fares and their

associated conditions" absent "*compelling evidence* of consumer deception or unfair methods of competition." *Id.* (emphasis added).[16]

1. The 24-Hour Refund Rule directly regulates pricing practices. That rule forces carriers either to hold a reservation at a quoted fare without payment or to allow customers to cancel a reservation without penalty, for 24 hours, if the ticket was booked a week or more before departure. Pet.App.62-63.

DOT did not even attempt to argue that a carrier's failure to offer such refunds is "deceptive." For the last 30 years, airlines have been free to sell nonrefundable tickets or impose change penalties, as long as the airline "[gave] consumers specific advance notice of any condition that would restrict refunds or impose any monetary penalties for cancellation." *Petition of Kaufman* at 2.

Nor is the 24-Hour Refund Rule needed to prevent "unfairness." As DOT has explained, "[t]here are usually several fares available on any given flight, and the prices vary depending on the extent of the conditions with which the passenger is willing to comply, including the ability to cancel a ticket and receive a full refund." *Id.* Some customers might choose to pay more for a refundable ticket, while others might opt for a cheaper nonrefundable ticket. The "lower price for nonrefundable tickets is a trade-off for passengers agreeing to a restriction that

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[16] *See also* Order 2012-11-4, at 4 (DOT Nov. 6, 2012) (denying request to regulate change fees), http://www.dot.gov/sites/dot.dev/files/docs/eo_2012-11-4.pdf.

allows a carrier to manage its inventory and cash flow." *Id.* Whether to purchase such a ticket is a fully informed decision that involves no "unfairness" whatsoever.

Indeed, "in a deregulated environment," the availability of a variety of different fare options "provide[s] carriers with flexibility in pricing and inventory control that is generally beneficial to the industry and the public." *Id.* For example, it has been estimated that providing refunds mandated by this rule will cost low-cost carriers, like Petitioners, an average of $30 per transaction, a cost that must be recouped though higher fares for all passengers, whether or not they take advantage of the regulation. Jenkins Decl. Appx. B at 50.

DOT's brief discussion of the 24-Hour Refund Rule simply notes that the new policy "strikes the right balance between a consumer's desire to make travel plans and shop for a fare that meets his or her needs, and the carrier's need for adequate time to sell seats on its flights." Pet.App.63. But DOT does not have a roving mandate to establish "best practices" or to "strike balances" concerning consumer preferences and carrier needs. Congress left it to the market—not the regulators—to strike the right balance. In a competitive industry, the seller of a product has no obligation to facilitate a customer's ability to buy a competitor's product.

In light of DOT's "lack of authority to regulate domestic fares" and related conditions,[17] and the absence of any evidence at all—much less *compelling* evidence—of unfairness or deception, the 24-Hour Refund Rule's effort at re-regulation exceeds DOT's limited statutory authority and must be vacated.

2. As to the Total Price Rule, DOT premised that regulation on nothing more than a handful of comments and anonymous web postings from consumers who claimed to "feel" deceived by advertisements of pre-tax fares. Pet.App.69. Many of those comments consisted of little more than invective and *ad hominem* attacks on the airline industry. *See* Msolo Comment 6/4/2010 ("NO, no wiggle room: all fare prices should be as stated and final! All this [*sic*] caveats are just indended [*sic*] to provide sellers with means to mislead customers into thinking the fare is smaller than it is!"). Indeed, DOT conceded that it had no evidence of *actual* deception resulting from pre-tax pricing. When DOT examined carriers' websites for the accuracy of their disclosures "[a]ll eight carrier websites displayed the additional fees and taxes at the flight booking stage." Final Regulatory Impact Analysis at 54.

A core purpose of the Deregulation Act was to "leave largely to the airlines themselves . . . the selection and design of marketing mechanisms

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[17] Order 2011-10-13, at 4 (DOT Oct. 19, 2011), *at* http://airconsumer.ost.dot.gov/EO/eo_2011-10-13.pdf; *see id.* at 4 n.3 (DOT authority over "fares charged in interstate air transportation" "does not exist").

appropriate to the furnishing of air transportation services." *Wolens*, 513 U.S. at 228. Anecdotal evidence that a handful of consumers "feel" deceived by pre-tax pricing cannot justify DOT's sweeping new regulations of airline marketing practices.

That is doubly true in the context of the Total Price Rule given Congressional intent to deregulate and the serious First Amendment issues addressed above. *See Rubin v. Coors Brewing*, 514 U.S. 476, 490 (1995) (rejecting reliance on "anecdotal evidence and educated guesses" to justify restriction of commercial speech). When regulations raise "grave and doubtful constitutional questions," courts may "assume Congress did not intend to authorize their issuance." *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991). It is simply not plausible that in the Deregulation Act Congress would have delegated to DOT the power to re-regulate airline advertisements and marketing practices—both protected speech and the precise marketplace activity that Congress intended would determine prices—based on nothing more than a limited number of (mostly anonymous) customer complaints.

3. DOT's evasion of Congress' intent to deregulate merits this Court's review. DOT's disregard of statutory limits on its ability to re-regulate an industry Congress has deregulated is arbitrary and capricious, but it is much more than that. The Deregulation Act was a major congressional policy initiative and a watershed event in the history of both the airline industry and regulatory policy. DOT's effort to re-regulate the industry through the Total Price Rule and 24-Hour

Refund Rule is not some administrative law foot fault, but an assault on a major congressional initiative.

Nor are these two rules isolated instances of DOT re-regulation. DOT has made clear that these rules are just the leading edge of its efforts to exert regulatory control over perceived excesses of marketplace competition. But if there is to be a return to the days in which regulation, rather than competition, strikes the balance in the marketplace, that initiative must come from Congress, not agencies proceeding under the Deregulation Act. As in other contexts in which Congress has made major policy determinations, authorizations for agencies to undo Congress' initiatives are not lightly to be presumed to be lurking in the statutory details. *See FDA v. Brown & Williamson*, 529 U.S. 120, 159-160 (2000); *MCI v. AT&T,* 512 U.S. 218, 231 (1994). Congress does not "hide elephants in mouseholes," *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001), and did not authorize DOT to re-regulate the airline industry based on the narrow residual authority maintained by the Deregulation Act.

CONCLUSION

This Court's review is warranted to vindicate both the First Amendment and Congress' manifest intent to deregulate—not re-regulate—the airline industry. The Court should grant the petition.

Respectfully submitted,

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November 21, 2012

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1219

SPIRIT AIRLINES, INC., et al.,

Petitioner,

SOUTHWEST AIRLINES, CO.,

Intervenor

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent,

AMERICAN SOCIETY OF TRAVEL AGENTS, INC.,

Intervenor.

On Petitions for Review of Final Rules
of the U.S. Department of Transportation

Argued May 7, 2012
Decided July 24, 2012

Before: HENDERSON and TATEL, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* TATEL.

Opinion concurring in part and dissenting in part filed by *Senior Circuit Judge* RANDOLPH.

OPINION

TATEL, *Circuit Judge*: Pursuant to its authority to regulate "unfair and deceptive" practices in the airline industry, the Department of Transportation issued a final rule entitled "Enhancing Airline Passenger Protections." 76 Fed. Reg. 23,110 (Apr. 25, 2011). Spirit Airlines and others challenge three of the rule's provisions—the requirement that the most prominent figure displayed on print advertisements and websites be the total price, inclusive of taxes (as arbitrary and capricious and a violation of the First Amendment); the requirement that airlines allow consumers who purchase their tickets more than a week in advance the option of canceling their reservations without penalty for twenty-four hours following purchase (as arbitrary and capricious); and the prohibition against increasing the price of air transportation and baggage fees after consumers purchase their tickets (as procedurally defective and otherwise arbitrary and capricious). For the reasons set forth in this opinion, we deny the petitions for review.

I.

Prior to 1978, the federal government regulated the fares airlines could charge and the routes they could fly, and had authority to take administrative action against certain deceptive trade practices. Federal Aviation Act of 1958, Pub. L. No. 85-726, §§ 403–404, 411, 1002, 72 Stat. 731, 758–60, 769, 788–91. That changed in 1978 when Congress passed

the Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705, which, among other things, eliminated the government's ability to set airfares on the theory that "maximum reliance on competitive market forces would best further efficiency, innovation, and low prices as well as variety and quality of air transportation services," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (alteration, omission, and internal quotation marks omitted). Notwithstanding these changes, the government, through the Department of Transportation (DOT), retained authority to prohibit "unfair or deceptive practice[s] . . . in air transportation or the sale of air transportation." 49 U.S.C. § 41712(a).

Pursuant to that authority, DOT issued a final rule entitled "Enhancing Airline Passenger Protections." *See* 76 Fed. Reg. 23,110. Three of its provisions are at issue in this case.

The first relates to the advertising of airfares. Since 1984, DOT has required that any advertised price for air transportation disclose the "entire price to be paid by the customer to the air carrier." 49 Fed. Reg. 49,440, 49,440 (Dec. 20, 1984) (codified as amended at 14 C.F.R § 399.84(a)). Prior to the rulemaking at issue here, DOT allowed airlines to advertise the pre-tax price of tickets provided that the advertisement clearly disclosed the amount of the tax. *See* 75 Fed. Reg. 32,318, 32,327 (June 8, 2010) (explaining DOT enforcement policy regarding the 1984 rule). For example, airlines could advertise a "$167 base fare + $39 taxes and fees" even though consumers would have to add these two numbers to arrive at the total, final price they would have to

pay—$206. DOT reaffirmed this policy in 2006. *See* 71 Fed. Reg. 55,398, 55,401 (Sept. 22, 2006) (withdrawing Notice of Proposed Rulemaking and retaining status quo). But in the challenged rule, DOT, citing consumer confusion, revised its policy to require airlines to state the total, final price—$206. *See* 76 Fed. Reg. at 23,166 (amending 14 C.F.R § 399.84(a)). Under this so-called "Airfare Advertising Rule," airlines remain free to provide an itemized breakdown (displaying to the customer the amount of the base fare, taxes, and other charges), but they may not display such price components "prominently" or "in the same or larger size as the total price." *Id.* In subsequent guidance, DOT explained that airlines may not list price components "in a more prominent place on a webpage or in a print advertisement than the advertised total fare." Office of Aviation Enforcement & Proceedings, Dep't of Transp., Answers to Frequently Asked Questions 22 (Oct. 19, 2011), *available at* http://airconsumer.ost.dot.gov/rules/EAPP_2_FAQ_10-19-2011.pdf. In other words, to ensure that consumers will clearly understand what final price they will have to pay, the total cost must be the most prominent figure. DOT describes this as a change in "enforcement policy." *See* 75 Fed. Reg. at 32,327 (discussing the proposed change).

DOT issued the second challenged provision, the "Refund Rule," in the context of a broader effort to curb deception and unfairness in the airline industry. Relying on customer feedback and Office of Inspector General reports, 72 Fed. Reg. 65,233, 65,236 (Nov. 20, 2007), DOT found that many airlines failed either to provide consumers with clear customer service

plans or to adhere to whatever plans they did provide. Accordingly, DOT ordered U.S. carriers to adopt customer service plans that address a list of topics, including whether the airline "[a]llow[s] reservations to be held without payment or cancelled without penalty for a defined amount of time." 74 Fed. Reg. 68,983, 69,003 (Dec. 30, 2009) (amending 14 C.F.R. § 259.5(b)(4)). But in a later rulemaking, the one at issue here, DOT found this insufficient and that further steps were necessary to "ensure that . . . plans are specific and enforceable." 75 Fed. Reg. at 32,323. It found that some airlines had adopted "vague[]" policies that made it "difficult for a consumer to know" what exactly to expect. *Id.* For example, Allegiant Air's plan told customers that they could "cancel their reservations up to 24 hours before the scheduled time of departure, but fail[ed] to mention that there are significant fees associated with cancellation." Letter from Susan Kurland, Assistant Sec'y for Aviation & Int'l Affairs, Dep't of Transp., to Joanne W. Young & David M. Kirstein, Counsel for Petitioners 6 (July 20, 2011) (denying stay of the rule and explaining DOT's findings). Responding to such shortcomings, DOT proposed "establishing minimum standards for the plans," which would "result in consumers being better informed and protected," 75 Fed. Reg. at 32,323—the idea being that anything less than the guarantees contained in the rule constitutes an unfair practice or has an unacceptably high risk of deceiving customers. One such requirement, the Refund Rule, directs airlines to allow passengers to cancel reservations without penalty for twenty-four hours "if the reservation is made one week or more prior to a

flight's departure." 76 Fed. Reg. at 23,165 (amending 14 C.F.R. § 259.5(b)(4)).

Finally, the "Post-Purchase Price Rule" prohibits airlines from "increas[ing] . . . the price of the seat," the "price for the carriage of passenger baggage," or the "applicable fuel surcharge, after the air transportation has been purchased by the consumer, except in the case of an increase in a government-imposed tax or fee." *Id.* at 23,167 (amending 14 C.F.R. § 399.88(a)). DOT has now advised us that "it will undertake another rulemaking process to assess the appropriateness of applying the rule to ancillary charges other than baggage charges that traditionally have been included in the price of air transportation" and that "[u]ntil the conclusion of that rulemaking, the agency will only enforce the rule as applied to charges the consumer has already paid, to any charges for carry-on baggage and first and second checked bags, and to mandatory charges like fuel surcharges." DOT Br. 9.

Spirit Airlines and Allegiant Air (collectively Spirit) claim that all three rules are arbitrary and capricious and that the Airfare Advertising Rule violates the First Amendment rights of airlines to engage in commercial and political speech. Intervening on behalf of petitioners, Southwest Airlines challenges only the Airfare Advertising Rule.

II.

Beginning with their challenge to the Airfare Advertising Rule, the airlines argue that there is nothing inherently deceptive about listing taxes separately and that DOT lacked substantial evidence

for concluding that doing so is deceptive in practice. By the airlines' count, only six commenters suggested that existing airline displays were confusing or misleading, and just two of those pointed to the exclusion of taxes from base fares as the source of their confusion. The airlines also emphasize that in 2010 (the year of the rulemaking), there were only 77 complaints about advertising, as compared, for example, to 3,336 about flight-related problems. Spirit Br. 27 (citing Office of Aviation Enforcement & Proceedings, Dep't of Transp., Air Travel Consumer Report 42 (Feb. 2011)). Thus, they argue, DOT acted arbitrarily and capriciously when it relied on such scant evidence, particularly given (1) the general norm in the U.S. economy of listing prices exclusive of taxes, (2) DOT precedent rejecting consumer comments about feeling deceived as insufficient to demonstrate deception, and (3) the fact that in 2006, DOT reaffirmed its policy of allowing base-fare advertising (i.e., not requiring airlines to integrate taxes into their advertised fare), even though roughly 500 commenters urged it to depart from that policy, *see* 71 Fed. Reg. at 55,399, 55,401.

We are unpersuaded. For one thing, DOT left unaltered the rule's key language (though it did add language allowing airlines to state charges, fees, and taxes separately while prohibiting them from doing so "prominently" or "in the same or larger size as the total price," 14 C.F.R. § 399.84). Since 1984, DOT has required any advertised price for air transportation to state the "entire price to be paid by the customer to the air carrier." 49 Fed. Reg. at 49,440 (codified as amended at 14 C.F.R § 399.84(a)). Because neither Spirit nor Southwest challenges the original rule, the

only question before us is whether DOT acted arbitrarily and capriciously when it decided to enforce that rule by requiring that airlines actually add the taxes to the base fare and disclose the total price. In considering this question, "we give substantial deference to an agency's interpretation of its own regulations, according the agency's interpretation thereof controlling weight unless it be plainly erroneous or inconsistent with the regulation." *St. Luke's Hosp. v. Sebelius*, 611 F.3d 900, 904 (D.C. Cir. 2010) (internal quotation marks omitted). Not only have the airlines offered us no basis for questioning DOT's interpretation of its rule, but they give short shrift to the record as a whole. In addition to the comments mentioned by the airlines, DOT relied on the following evidence: (1) comments from the original 1984 rulemaking, (2) roughly 500 comments from the 2006 hearing explaining how consumers were being confused by advertisements that itemized price components rather than display a single, total price, and (3) feedback from its "Regulation Room," an online forum DOT employs to solicit comments. Spirit contests the relevance of the Regulation Room, claiming that DOT framed the issue to elicit comments helpful to its end. But we need not consider the Regulation Room comments because the other two categories of evidence sufficiently support the intuitive conclusion that customers are likely to be deceived by price quotes significantly lower than the actual cost of travel. *See Kornman v. SEC*, 592 F.3d 173, 184 (D.C. Cir. 2010) ("Substantial evidence . . . means such relevant evidence as a reasonable mind might accept as

adequate to support a conclusion." (internal quotation marks omitted)).

The airlines also challenge DOT's prohibition on disclosing government taxes and fees "prominently," arguing that "DOT provides no explanation [for] why the prominent disclosure of taxes and fees would be confusing to consumers," and that DOT acted arbitrarily and capriciously by "requir[ing] airlines to prominently and conspicuously disclose airline-imposed fees but . . . bury[ing] in fine print the taxes and fees that the government itself imposes on air transportation." Southwest Br. 28–29. DOT responds that it "reasonably declined to allow the airlines to state, with equal prominence, the breakdown of that figure as between base fare, airline-imposed fees, and government taxes and fees." DOT Br. 27. In addition, it clarifies that its prohibition on prominently stating taxes "'means that the break-out of per-person charges cannot be in a more prominent place on a web page or in a print advertisement than the total advertised fare.'" *Id.* at 28 (quoting Office of Aviation Enforcement & Proceedings, Dep't of Transp., Answers to Frequently Asked Questions 22).

DOT has the better argument. Contrary to the airlines' repeated suggestions, nothing in the Airfare Advertising Rule requires airlines to hide the taxes—or, as Spirit's website puts it, the "Government's Cut." It just requires that the total, final price be the most prominently listed figure, relying on the reasonable theory that this prevents airlines from confusing consumers about the total cost of their travel. This limited imposition hardly amounts to an arbitrary exercise of DOT's statutory authority to

prevent "unfair or deceptive practice[s]," 49 U.S.C. § 41712(a). *See Petal Gas Storage, LLC v. FERC*, 496 F.3d 695, 703 (D.C. Cir. 2007) (under the arbitrary and capricious standard of review, an agency "is not required to choose the best solution, only a reasonable one").

Next, the airlines contend that the Airfare Advertising Rule violates the First Amendment. The parties dispute which standard of review governs: strict scrutiny, applied to laws burdening political speech, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007); intermediate scrutiny, as defined in *Central Hudson* and applied to laws regulating commercial speech, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980); or reasonableness review, as defined in *Zauderer* and applied to laws requiring "purely factual" disclosures "reasonably related to the State's interest in preventing deception of consumers," *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

The airlines argue that strict scrutiny applies because they have "a First Amendment right to engage in political speech that informs [their] customer base of the huge tax burden that the federal government imposes on air travel." Southwest Br. 29; *see also* Spirit Br. 36–37. For support, they point to *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530 (1980), where the Supreme Court invalidated a rule prohibiting utilities from including pronuclear energy statements in their invoice envelopes. In doing so, the Court treated the ban as a restriction on political speech,

meaning that it had to be "a precisely drawn means of serving a compelling state interest," *id.* at 540. According to the airlines, because they wish to inform their customers about the large and burdensome taxes imposed on airfare, the Airfare Advertising Rule must also be subject to strict scrutiny. We disagree.

The speech at issue here—the advertising of prices—is quintessentially commercial insofar as it seeks to "do[] no more than propose a commercial transaction," *Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (internal quotation marks omitted). According to the airlines, their speech does more than propose a transaction, as it also makes a political point. *See also* Dissenting Op. at 4 n.2. But where speech "cannot be characterized merely as proposals to engage in commercial transactions," it is nonetheless commercial in certain circumstances, for instance when it is an "advertisement[]," "refer[s] to a specific product," and the speaker "has an economic motivation" for it. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983). "The combination of all these characteristics"—undoubtedly present in this case—suffices to classify the speech as "commercial speech" under *Bolger*. *See id.* at 67 (emphasis omitted). As the Court explained there, "advertising which links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech." *Id.* at 68 (internal quotation marks omitted). "A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such

statements are made in the context of commercial transactions. Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." *Id.* (footnote and citation omitted).

This leaves either the *Central Hudson* or *Zauderer* frameworks, and we think the latter applies. The *Central Hudson* cases have at least two features not fully present here. As the Court recently explained, where, as in this case, laws are "directed at *misleading* commercial speech," and where they "impose a disclosure requirement rather than an affirmative limitation on speech," *Zauderer*, not *Central Hudson*, applies, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339 (2010)—i.e., "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651. In *Central Hudson* itself, an electric utility challenged the constitutionality of a state regulation banning promotional advertising by the utility. 447 U.S. at 558. The Court explained that because "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising, . . . there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it." *Id.* at 563. But "[i]f the communication is neither misleading nor related to unlawful activity"—as was the advertising the state

had banned in that case—the government "must assert a substantial interest to be achieved by restrictions on commercial speech." *Id.* at 564. Likewise, in *In re R.M.J.*, 455 U.S. 191 (1982), the Court applied intermediate scrutiny to ethics rules that "prohibited attorneys from advertising their practice areas in terms other than those prescribed by the State Supreme Court and from announcing the courts in which they were admitted to practice." *Milavetz*, 130 S. Ct. at 1340 (citing *In re R.M.J.*, 455 U.S. at 197–98). As the Court held there, and as it has since explained, there was no reason—in common sense or in experience—to suggest the prohibited "advertisements were themselves likely to mislead consumers." *Id.* (citing *In re R.M.J.*, 455 U.S. at 205). In addition, the rule in *In re R.M.J.* completely *prohibited* a category of speech (advertising practice areas in non-prescribed terms).

By contrast, in *Zauderer* the Court faced a rule that, instead of prohibiting speech, simply required a clarifying disclosure. Specifically, the rule required attorneys advertising contingency-fee services "to disclose in their advertisements that a losing client might still be responsible for certain litigation fees and costs." *Id.* at 1339 (describing *Zauderer*, 471 U.S. 626). The Court concluded that "an attorney's constitutionally protected interest in *not* providing the required factual information is 'minimal.'" *Id.* (quoting *Zauderer*, 471 U.S. at 651). In doing so, the Court demanded no evidence that the advertisements would be misleading because, as it explained, "the *possibility* of deception" in that case was "self-evident." *Zauderer*, 471 U.S. at 652–53 (emphasis added). And in *Milavetz*, the Court applied the

Zauderer standard to uphold a law requiring debt relief agencies to "'clearly and conspicuously disclose in any advertisement of bankruptcy assistance services . . . that the services or benefits are with respect to bankruptcy relief' " and to include the following, "'or a substantially similar statement'": "'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.'" *Milavetz*, 130 S. Ct. at 1330 (quoting 11 U.S.C. § 528(a)(3), (4)). Citing *Zauderer*, the Court explained that the government had no need to produce "evidence that [the] advertisements are misleading" because, based on experience and common sense, the "likelihood of deception" in that case was "hardly a speculative one." *Id.* at 1340 (internal quotation marks omitted).

As in the *Zauderer* cases and unlike in the *Central Hudson* cases, the Airfare Advertising Rule targets misleading speech and does not constitute what the case law defines as an affirmative limitation on speech. To begin with, the government, as in *Milavetz*, had no need to produce additional "evidence that [the] advertisements are misleading" because the "likelihood of deception" here is "hardly . . . speculative," *id.* (internal quotation marks omitted). Based on common sense and over three decades of experience and complaints, DOT concluded that it was deceitful and misleading when the most prominent price listed by an airline is anything other than the total, final price of air travel. Disclosure requirements, moreover, are not the kind of limitations that the Court refers to when invoking the *Central Hudson* standard of review. To be sure, the airlines claim that the rule here imposes an

affirmative limitation on speech because it requires them to post the total, final price in the most prominent manner, thus prohibiting them from posting other numbers as prominently or more prominently than the total, final price. But by mentioning affirmative limitations on speech, the Court was referring to rules that prohibit certain kinds of speech—like the one in *In re R.M.J.*, which flatly "prohibited attorneys from advertising their practice areas in terms other than those prescribed by the State Supreme Court and from announcing the courts in which they were admitted to practice." *Milavetz*, 130 S. Ct. at 1340 (citing *In re R.M.J.*, 455 U.S. at 197–98); *see also Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 360, 368 (2002) (applying intermediate scrutiny to a law prohibiting providers of "compounded drugs" from advertising or promoting particular drugs); *Central Hudson*, 447 U.S. 557 (intermediate scrutiny for a law prohibiting promotional advertising by electric utilities); *Virginia State Bd.*, 425 U.S. at 773 (rejecting state statute that "completely suppress[ed] the dissemination of concededly truthful information about entirely lawful activity"). By contrast, the Airfare Advertising Rule does not prohibit airlines from saying anything; it just requires them to disclose the total, final price and to make it the most prominent figure in their advertisements. Though limiting the manner in which airlines may advertise information, this neither prohibits nor significantly burdens airlines' ability to provide that information.

And indeed they do. For example, Spirit's website prominently displays "Our Price"—broken down into "Base Fare + Fuel"—and then adds, with a

plus sign, "Government's Cut," which is displayed clearly and separately, and then finally provides, in slightly larger font, the "Total Price." *See* Appendix A (a screenshot of a sample flight advertised on Spirit's website). The website also separately states, underlined and in bold, the "government tax rate" for each flight price quote, so that consumers know the tax burden in both absolute and relative terms. Moreover, a bright orange link (in the form of a question mark) appears next to each of those price components—i.e., "Base Fare," "Fuel," and "Government's Cut"—and if one clicks that link, the site provides a further breakdown of what makes up the cost of airfare. For example, the base fare on domestic flights generally includes the cost of "Flight," a "Passenger Usage Fee," and what Spirit labels a fee for the "Unintended Consequences of DOT Regulations." *See generally* Spirit, www.spirit.com (last search conducted on June 6, 2012); *see also* Oral Arg. Rec. 32:37–33:05 (government attorney acknowledging that Spirit's current website is compliant with the new enforcement policy). All of this demonstrates what the rule's text already tells us: the rule is aimed at providing accurate information, not restricting it. Nothing in the rule prohibits the airlines from separately alerting the public to the taxes imposed on air transportation, much as the utility in *Consolidated Edison*, 447 U.S. 530, advised its customers of its support for nuclear energy. The airlines can even call attention to taxes and fees in their advertisements; what they cannot do is call attention to them by making them more prominent than the total, final price the customer must pay.

Having determined that the *Zauderer* standard applies, we have no doubt that DOT's final rule, which requires the total, final price to be the most prominently listed figure, is "'reasonably related to the [government's] interest in preventing deception of consumers.'" *Milavetz*, 130 S. Ct. at 1340 (quoting *Zauderer*, 471 U.S. at 651). The rule aims to prevent consumer confusion about the total price they have to pay, and it goes without saying that requiring the total price to be the most prominent number is reasonably related to that interest.

The dissent disagrees, arguing that the rule fails under the *Central Hudson* test. To reach that conclusion, the dissent says that the rule bans airlines "from displaying taxes and fees prominently." Dissenting Op. at 3 (internal quotation marks omitted). But DOT interprets the rule to mean only that the "'break-out of per-person charges cannot be in a more prominent place on a web page or in a print advertisement than the total advertised fare,'" such as "'at the top of the page, ahead of the total price,'" or with "'special highlighting that sets it apart and makes it more prominent than the total price,'" DOT Br. 28–29 (quoting Office of Aviation Enforcement & Proceedings, Dep't of Transp., Answers to Frequently Asked Questions 22). We owe "substantial deference" to the government's interpretation of its own rule, "according [it] controlling weight unless it be plainly erroneous or inconsistent with the regulation," *see St. Luke's Hosp.*, 611 F.3d at 904 (internal quotation marks omitted). Confirming this interpretation, government counsel stated at oral argument that Spirit's website, which displays taxes and fees vividly, *see* Appendix

A, is fully compliant with the rule. *See* Oral Arg. Rec. 32:37–33:05.

So interpreted, the rule satisfies even the *Central Hudson* test. That test requires that we ask three questions. First, is the asserted government interest substantial? *Central Hudson*, 447 U.S. at 566. This is easy. The Supreme Court has already held that "[f]or purposes of [the *Central Hudson*] test, there is no question that [the government's] interest in ensuring the accuracy of commercial information in the marketplace is substantial," *Edenfield v. Fane*, 507 U.S. 761, 769 (1993). The second and third inquiries are related: "whether the regulation directly advances the governmental interest asserted," *Central Hudson*, 447 U.S. at 566, and "whether the fit between the government's ends and the means chosen to accomplish those ends 'is not necessarily perfect, but reasonable,'" *Pearson v. Shalala*, 164 F.3d 650, 656 (D.C. Cir. 1999) (quoting *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). These too are easy. The government interest—ensuring the accuracy of commercial information in the marketplace—is clearly and directly advanced by a regulation requiring that the total, final price be the most prominent. Moreover, such a regulation appears reasonably tailored to accomplish that end. Unlike in other cases—where the government expressly prohibits certain kinds of speech on the premise that consumers need government to protect them from accurate information, *see Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1977) ("[W]e view as dubious any justification that is based on the benefits of public ignorance."); *cf. 44 Liquormart, Inc. v. Rhode Island*,

517 U.S. 484, 503 (1996) (opinion of Stevens, J.) ("The First Amendment directs us to be especially skeptical of regulations [of truthful, nonmisleading information] that seek to keep people in the dark for what the government perceives to be their own good.")—the rule simply regulates the manner of disclosure. It imposes no burden on speech other than requiring airlines to disclose the total price consumers will have to pay. This the First Amendment plainly permits.

III.

Next, we address Spirit's challenge to the Refund Rule, which allows consumers to cancel reservations without penalty for twenty-four hours provided that they made those reservations more than a week in advance of the flight. Spirit argues that the rule violates the Airline Deregulation Act, which prohibits regulation of fares. It also argues that "DOT did not make a finding or even discuss the possibility that charging a cancellation penalty is deceptive" or unfair. Spirit Br. 49–50. Finally, Spirit points out that cancellation penalties allow airlines to ensure that their planes are full. Without cancellation penalties, consumers could book several seats to cover their contingencies, cancel, and get full refunds, leaving the airlines with insufficient time to rebook.

Again, we are unpersuaded. For one thing, the rule has nothing to do with airfares. Instead, it regulates cancellation policies on the basis of a finding that existing practices were deceptive and unfair—a regulation plainly allowed under 49 U.S.C. § 41712 so long as it "was reasonable and . . .

supported by substantial evidence in the record," *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 372 F.3d 454, 461 (D.C. Cir. 2004). It was. DOT's finding of deception and unfairness in the context of an ongoing effort to reduce unfairness in the industry rests on over a decade's worth of recorded experience. DOT found that airlines were routinely misleading consumers with vague customer service policies. One manifestation of that unfairness, DOT found, was that consumers were led to expect, based on widespread advertising and general practices, that they may cancel reservations without penalty for twenty-four hours only to have that expectation thwarted by airlines with vague policies that often departed from this practice. Viewing this as unfair and deceptive, DOT now requires airlines to meet a basic set of customer service guarantees—guarantees that it crafted after canvassing industry norms and gauging consumer expectations. Finally, DOT took account of Spirit's concern about ensuring that its planes are full: it amended the proposed rule to apply only if seats are purchased more than a week in advance, thus allowing airlines at least that much time to rebook.

In sum, Spirit gives us no reason to believe that the Refund Rule—developed as part of a systematic effort aimed at preventing unfair and deceptive practices—is arbitrary or capricious. *See Petal Gas Storage*, 496 F.3d at 703 (agencies "[are] not required to choose the best solution, only a reasonable one").

IV.

This brings us, finally, to the Price Rule, which prohibits airlines from increasing the price of air

transportation after consumers purchase their tickets. Because of some dispute as to whether the rule applies to ancillary charges, such as inflight refreshments, DOT has informed us that it "will undertake a new notice-and-comment procedure before enforcing the post-purchase price increase provision to any ancillary service other than the carriage of carry-on baggage and the first and second checked bag." DOT Br. 51. Taking DOT at its word, we agree that the only issue before us is whether DOT appropriately prohibited airlines from raising the price of airline tickets, carry-on luggage, or the first two checked bags after customers buy their tickets.

According to Spirit, the Price Rule is procedurally unlawful because the final rule was not "a logical outgrowth of its notice" of proposed rulemaking. *See CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) (internal quotation marks omitted). In the Notice of Proposed Rulemaking, DOT explained it was considering prohibiting airlines "from raising the price after the consumer completes the purchase." 75 Fed. Reg. at 32,330. Given this, Spirit tells us that it "reasonably believed the proposal would prohibit the collection of additional amounts for a ticket *after* the passenger purchased a ticket, or for an optional service such as a checked bag or seat selection *after* the passenger paid for the optional service." Spirit Br. 53. Until the final rule was promulgated, it had no idea "that DOT also intended to prohibit price increases for optional services, which a passenger can select *after* he buys a ticket, *before* the passenger purchases them." *Id.* at 53–54. Thus, DOT failed to give adequate "notice of

the scope and general thrust of the proposed rule." *Id.* at 56. (internal quotation marks omitted).

This argument is ridiculous. As the government points out, the proposed rule deemed it an unfair and deceptive practice for a "seller of scheduled air transportation . . . to increase the price of that air transportation to a consumer, *including but not limited to* increase in the price of the seat, *increase in the price for the carriage of passenger baggage*, or increase in an applicable fuel surcharge, *after* the air transportation has been purchased by the consumer." 75 Fed. Reg. at 32,341 (emphasis added). The final rule adopted the same operative language with the following amendments: (1) adding "except in the case of an increase in a government-imposed tax or fee," and (2) specifying that a "purchase is deemed to have occurred when the full amount agreed upon has been paid by the consumer." 76 Fed. Reg. at 23,167 (amending 14 C.F.R. § 399.88(a)).

Spirit next argues that the Refund Rule is arbitrary and capricious. According to Spirit, DOT based the rule on its concern that "some *air tour operators* (who were also subject to the notice requirements) . . . were burying consumer notices about the possibility of price increases in their conditions of carriage." Spirit Br. 57. But, Spirit argues, this has no relationship to raising the price of an *optional* service *before* a consumer purchases it—especially given that "under the status quo, airlines are prohibited from increasing prices without first giving consumers notice prices could go up." *Id.* at 58. In addition, Spirit points out, "a passenger can protect himself against future price increases by

purchasing optional services at the same time as (or as soon as possible after) he purchases his ticket." *Id.* at 59. But DOT saw this as a classic bait and switch. It found that when consumers purchase airline tickets, they assume that the price they pay for extra bags at the airport will be the price advertised when they bought their ticket. Thus, DOT concluded, increasing the price of these very commonly purchased and practically necessary services (like the ability to carry bags onto the flight) amounts to an unfair practice. Under the APA, we ask only whether DOT's conclusion "was reasonable and . . . supported by substantial evidence in the record." *Nat'l Ass'n of State Util. Consumer Advocates*, 372 F.3d at 461. It was.

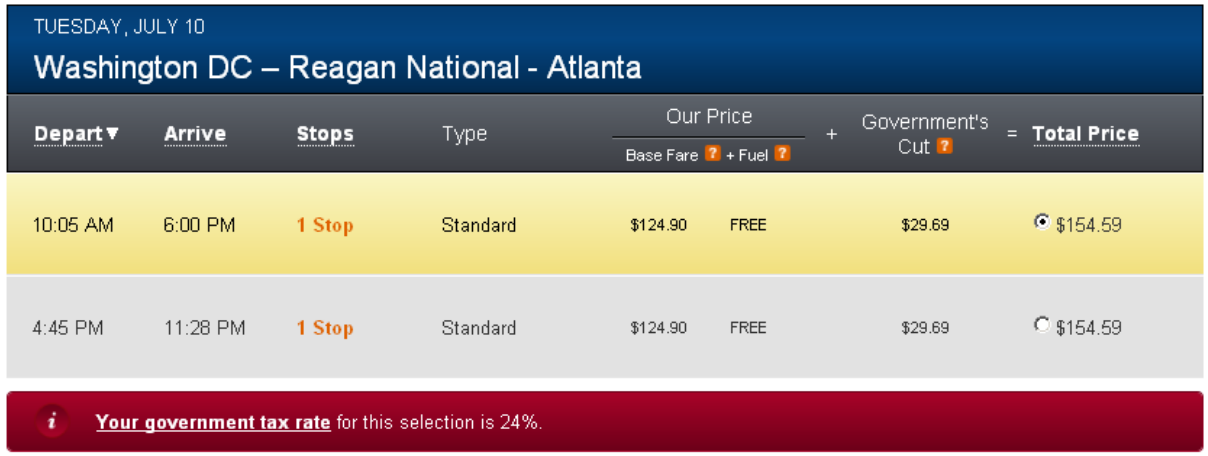
V.

For the foregoing reasons, the petitions for review are denied. *So ordered.*

APPENDIX A

[Fold Out Exhibit, see next 2 pages]

APPENDIX A

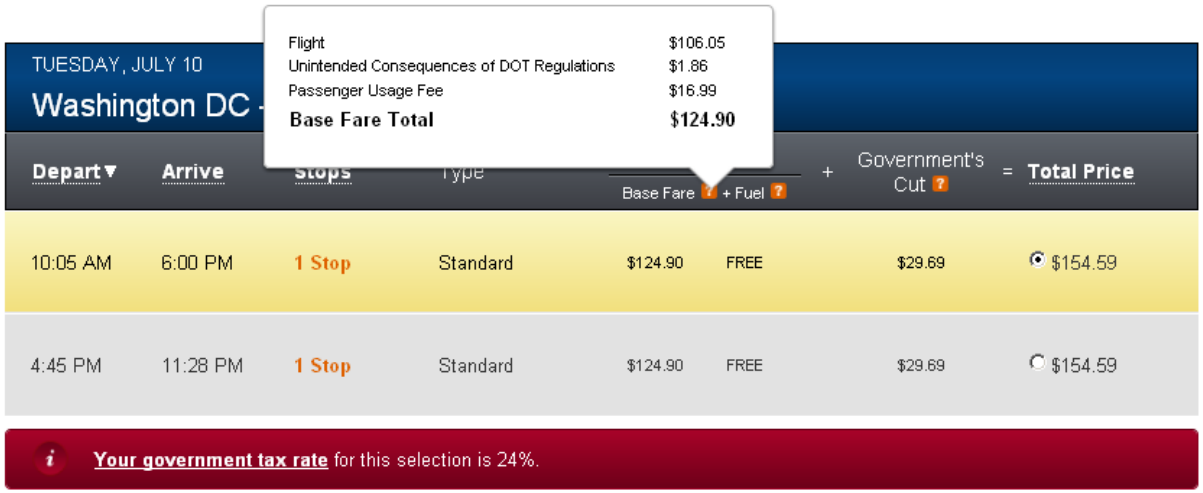


TUESDAY, JULY 10

Washington DC – Reagan National - Atlanta

Depart▼	Arrive	Stops	Type	Our Price (Base Fare + Fuel)		+ Government's Cut	= Total Price
10:05 AM	6:00 PM	1 Stop	Standard	$124.90	FREE	$29.69	$154.59
4:45 PM	11:28 PM	1 Stop	Standard	$124.90	FREE	$29.69	$154.59

Your government tax rate for this selection is 24%.


Flight $106.05
Unintended Consequences of DOT Regulations $1.86
Passenger Usage Fee $16.99
Base Fare Total $124.90
TUESDAY, JULY 10
Washington DC -
Depart▼
Arrive
Stops
Type
Base Fare + Fuel
+
Government's Cut
=
Total Price
10:05 AM 6:00 PM 1 Stop Standard $124.90 FREE $29.69 $154.59
4:45 PM 11:28 PM 1 Stop Standard $124.90 FREE $29.69 $154.59
Your government tax rate for this selection is 24%.

RANDOLPH, *Senior Circuit Judge*, concurring in part and dissenting in part: Speech about government, especially speech critical of government, is at the core of "the freedom of speech." The First Amendment thus protects speech complaining about taxes. One of the Department of Transportation's new rules restricts such speech. The new rule dictates how airlines and others selling air transportation may convey information criticizing the taxes and fees exacted from their customers. The government is thus attempting to restrict speech critical of the government. The majority opinion upholds the rule. I think the rule violates the First Amendment.

The Department's rule regulates airfare advertising. I join the majority in its decision sustaining the rule's requirement that such advertisements must state the total price of airfare. 14 C.F.R. § 399.84(a). My problem is with the following portion of the rule: "Although charges included within the single total price listed (e.g., government taxes) may be stated separately or through links or 'pop ups' on websites that display the total price, such charges may not be false or misleading, may not be displayed prominently, may not be presented in the same or larger size as the total price, and must provide cost information on a per passenger basis that accurately reflects the costs of the item covered by the charge." *Id.*

The rule does not define "not . . . prominently." In the past, the Department used "prominently" to describe text that was "clear" and "large enough to alert a reader to the [subject]." *Trans World Airlines, Inc.*, Dep't of Transp., Order 95-7-46 (July 28, 1995). The preamble to the advertising rule reflects that

definition. It explains that sellers of air transportation may display taxes and government-imposed fees "on the same page" as an advertised fare if the taxes and fees appear "in fine print." The preamble goes on to say that taxes and fees must "be presented in significantly smaller type" than the total price. Enhancing Airline Passenger Protections, 76 Fed. Reg. 23,110, 23,143 (Apr. 25, 2011). A guidance document issued to explain the regulation states: "'Prominent' under this rule means that the break-out of per-person charges cannot be in a more prominent place . . . than the advertised total fare." Office of Aviation Enforcement and Proceedings, Dep't of Transp., Answers to Frequently Asked Questions 22 (Oct. 19, 2011). The document adds that taxes and fees "cannot be at the top of the page, ahead of the total price. The total price should be in larger font. The [taxes] should not have special highlighting that sets [them] apart and makes [them] more prominent than the total price (e.g., bold font, underlined, or italicized)." *Id*.

The majority quibbles about how much smaller the typeface of taxes and fees must be in comparison to the typeface of the total price.[1] This is a classic red

[1] The majority accuses me of not accepting the government's interpretation of its rule because I state that the rule requires taxes and fees to be displayed in "fine print" or a "significantly smaller" font size than the total price. Maj. Op. at 15–16. "Fine print" and "significantly smaller" are not my words. They are the Transportation Department's interpretation of what its rule requires. *See* 76 Fed. Reg. at 23, 143. The guidance document the majority invokes does not suggest otherwise; that document interprets only the word "prominently," retains the requirement

herring, an attempt to divert attention from what is really at stake here. No matter how hard the majority tries, it cannot disguise the fact that the government has forbidden airlines from displaying taxes and fees "prominently"; that it has made it illegal for airlines to put these government charges in the same or larger typeface than that of the total price; that the government has ordered airlines not to place government taxes and fees above the total price and not to show these items in bold or italics or with underlining.

The airlines say they are engaging in political speech rather than commercial speech when they inform customers, and potential customers, of the amount of the total airfare attributable to

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that the total price be listed in "larger font," and says nothing about how much smaller taxes and fees must be in comparison. Office of Aviation Enforcement and Proceedings, Dep't of Transp., Answers to Frequently Asked Questions 22.

The majority strains to support its ruling by reaching outside the record, in violation of the Administrative Procedure Act. *See Camp v. Pitts*, 411 U.S. 138, 142–43 (1973). It examines Spirit's current website and proclaims that although taxes and fees are not displayed in fine print, Spirit is not violating the rule. Maj. Op. at 15–16. And how exactly does the majority know this? Because the Department of Justice attorney supposedly said so during oral argument. But the Justice Department attorney said no such thing. How could he? There is no indication that the attorney had ever seen Spirit's website (it was Judge Tatel who brought it up during Spirit's argument). And at no point did the attorney say anything about *how much smaller* the type size of taxes and fees must be in comparison to the total price, which is the subject the Transportation Department discussed in the passages I quoted.

government taxes and fees. For this reason they believe they are entitled to the full protection of the First Amendment. Their speech about taxes and fees will be in advertisements, and the airlines, of course, have an economic incentive for educating the public about these charges: if discourse regarding these charges results in the government lessening the financial burden it imposes, airfares would become more affordable and people would fly more often. These circumstances—advertising and economic incentive—do not necessarily disqualify the airlines' speech from being treated as political speech. In one of the leading First Amendment cases, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court held that an advertisement placed in a newspaper to raise money was political speech the First Amendment protected. *See also Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530 (1980).

The majority opinion nevertheless holds that anything the airlines say in their advertisements regarding taxes and fees falls within the category of commercial speech, and is therefore subject to less than full constitutional protection. Maj. Op. at 10–11. No Supreme Court decision has ever dealt with the sort of regulation we have here. That is, none of the commercial speech cases—including *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983),[2] on which

[2] *Bolger* defined commercial speech as "speech which does 'no more than propose a commercial transaction.'" 463 U.S. at 66 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). The airlines want to do more than "merely" propose that the customer purchase airfare:

the majority relies—involved the government's attempt to control and to muffle speakers who are critical of the government. As the Sixth Circuit wrote in an analogous situation, a law "looks like a ban on core political speech" if it restricts companies from "announcing who bears political responsibility for a new tax . . . in the forum most likely to capture voters' attention"—here, in an advertisement. *Bellsouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 504–05 (6th Cir. 2008). Because the law in *Bellsouth* was unconstitutional even if it regulated commercial speech, the Sixth Circuit found it unnecessary to decide how the speech in that case should be classified. *Id*. The same is true here, and I am therefore content to assume *arguendo* that we have before us a law restricting commercial speech.

For commercial speech the current test, despite criticism,[3] is still *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980): restrictions on commercial speech are permissible if the government demonstrates (1) that it has a substantial interest in the restriction; (2) the regulation directly advances that interest; and (3) the regulation is not more extensive than necessary. *Id.*

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the airlines want to criticize the government by revealing prominently the full extent of the costs government imposes on their customers' air travel.

[3] *See, e.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 377 (2002) (Thomas, J., concurring); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501–04 (1996) (opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ.); *id.* at 517 (Scalia, J., concurring in part and concurring in judgment).

at 566. False, deceptive, or misleading advertisements can be banned altogether. *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994).

What then are the government's interests here? The government's brief offers two: the "interest in ensuring that consumers are accurately informed of the cost of air travel"; and the interest in preventing consumers from being "confuse[d] . . . as to the actual price" of airfare.

With respect to the first–ensuring accurate information–the Transportation Department in the rulemaking never mentioned this in connection with the taxes and fees restrictions. And for good reason. The accuracy of the amount of fees and taxes listed in an advertisement does not depend on font size, positioning, prominence, or anything else regulated by the advertising rule.[4] And of course there is no evidence–how could there be?–that smaller typeface for taxes and fees, or anything else the rule requires for these charges, leads to more accurate airline advertising.

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[4] The only evidence in the record indicates that consumers "feel" misled when the total price is not disclosed or is hidden in footnotes and hyperlinks. *See* 76 Fed. Reg. at 23, 142–43; Enhancing Airline Passenger Protections, 75 Fed. Reg. 32, 318, 32, 327–28 (proposed June 8, 2010); Price Advertising, 71 Fed. Reg. 55, 398, 55, 401–02 (Sept. 22, 2006). But the part of the rule addressing this topic is not the subject of my dissent.

The second interest—preventing confusion—was the only justification mentioned in the rulemaking.[5] But neither the Department in its rulemaking nor the government in its brief explains why disclosure of taxes in the same or larger font size as the total price, or at the top of a page rather than at the bottom, or in bold typeface rather than regular typeface, would confuse anyone. And neither the Department in its rulemaking nor the government in its brief cites any sort of evidentiary support for such a notion. The majority's opinion cites nothing either. These omissions should have resulted in a holding that this aspect of the advertising rule is unconstitutional.[6]

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[5] The entirety of the Transportation Department's explanation is the following *non sequitur*: Disclosure of taxes and fees "must accurately reflect the actual costs to the carrier of the service or matter covered, be displayed on a per passenger basis, and be displayed in a manner that otherwise does not deceive consumers. Consequently, the rule requires that any such listing not be displayed prominently and be presented in significantly smaller type than the listing of the total price to ensure that consumers are not confused about the total price they must pay." 76 Fed. Reg. at 23,143.

[6] A further consideration is worth mentioning. Airlines, like most businesses, market their products through a variety of mediums. The preamble identifies social networking websites like Facebook and Twitter as popular ways to sell and advertise airfares. 76 Fed. Reg. at 23,143. The Notice of Proposed Rulemaking points to the common practice of marketing via text message. 75 Fed. Reg. at 32,327. In addition to being popular means for advertising, Facebook, Twitter, and text messages have this additional characteristic in common: *only one font size currently is possible*. The user can input text and numbers, but

In commercial speech cases, the government's burden is to demonstrate that its speech restriction "directly" advances the interest it identifies. *Central Hudson*, 447 U.S. at 566. To this end, the Supreme Court has required an evidentiary showing that the regulation advances the government's interest to a material extent. *See, e.g.*, *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999); *44 Liquormart*, 517 U.S. at 505 (plurality); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486–90 (1995); *Ibanez*, 512 U.S. at 142–43; *Edenfield v. Fane*, 507 U.S. 761, 770 (1993); *cf. Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499

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can do nothing more with regard to style or size before his message is distributed.

This leaves airlines three options when advertising on many platforms: (1) disclose taxes and violate the regulation; (2) suppress tax information and comply with the rule; or (3) cease marketing on the platform altogether. The government addressed this problem at oral argument by explaining that it was "not aware of the [mediums] where you only have a choice of one font, but if [airlines] have a particular problem with the rule as applied in some situation like that . . . they can make that point with the agency." Oral Arg. Rec. at 33:31–46. If I understand the point, the onus is on the airlines to justify same-size disclosures whenever fine print is not an option, and it is the agency's prerogative to exempt truthful disclosures from the rule's reach. This is completely backwards; supplication and administrative clemency have no place in the First Amendment. "If the First Amendment means anything, it means that regulating speech must be a last- not first- resort." *Thompson*, 535 U.S. at 373.

(1984).[7] Government "speculation" or "conjecture" will not suffice. *Ibanez*, 512 U.S. at 143 (quoting *Edenfield*, 507 U.S. at 770).

Yet the government has presented not a shred of evidence to support its tax and fee rule, and it has offered no reasoning to explain why a significant number of consumers would be confused without the rule. The lack of evidence is particularly telling. It is not because the Transportation Department was without experience with a system in which taxes were stated in large type. For more than a quarter of a century before the current advertising rule, the Department required airlines not to bury the amount of taxes in fine print, but to state the amount of taxes "clearly" and prominently, in a typesize at least as large as "the price of the trip." *Request of the Air Transp. Ass'n of Am. for an Exemption*, Dep't of Transp., Order 85-12-68 (Dec. 24, 1985). Yet there is no history, no example, of anyone reading the airlines' advertisements and coming away with the belief that the taxes and fees amounted to the total price of the airfare. The idea that the new rule is now needed to prevent such confusion is, to put it mildly,

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[7] In *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1340 (2010), a commercial speech case dealing with the constitutionality of a federal statute, the Court accepted as evidence material in the congressional record and stated that it was self-evidence that the advertisements at issue were misleading. *Milavetz* has no bearing on the relevant portion of the tax and fee rule. The opinion dealt with the requirement of disclosure. *Id.* at 1339; Maj. Op. at 12–13. The issue I am addressing deals with suppression of speech.

absolutely absurd. Taxes and fees for air travel are steep, but—the record shows—they still make up only twenty percent of the total cost of a ticket. Given the fact that the total airfare and the total taxes and fees included therein would be labeled as such, only a fool would confuse or misunderstand the two, regardless of how prominently the taxes and fees were displayed in comparison to the total charge. People get bills all the time that breakout the components of the total amount due. (Many list the total amount due at the bottom of the page—not at the top as the Department's rule requires.) Maybe someone somewhere at some time would be confused. But one of the abiding principles of the commercial speech cases is that the government may not restrict speech on the basis that someone somewhere may misread a particular advertisement.[8]

I therefore dissent from the majority opinion to the extent that it upholds the rule prohibiting sellers of air transportation from prominently displaying

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[8] The Supreme Court has rejected the proposition "that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct cut incomplete information." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 374–75 (1977).

Even if commercial speech "may be potentially misleading to some consumers, that potential does not satisfy the [government's] heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the [wider] public." *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 109 (1990).

government taxes and fees. I join the balance of the majority's opinion.

Appendix B

Relevant Excerpts of 76 Fed. Reg. 23,110
Enhancing Airline Passenger Protections

DEPARTMENT OF TRANSPORTATION
Office of the Secretary
14 CFR Parts 244, 250, 253, 259, and 399
[Docket No. DOT–OST–2010–0140]
RIN 2105–AD92
Enhancing Airline Passenger Protections

AGENCY: Office of the Secretary (OST), Department of Transportation (DOT).
ACTION: Final rule.

SUMMARY: The Department of Transportation is issuing a final rule to improve the air travel environment for consumers by: Increasing the number of carriers that are required to adopt tarmac delay contingency plans and the airports at which they must adhere to the plan's terms; increasing the number of carriers that are required to report tarmac delay information to the Department; expanding the group of carriers that are required to adopt, follow, and audit customer service plans and establishing minimum standards for the subjects all carriers must cover in such plans; adding carriers to those required to include their contingency plans and customer service plans on their websites; increasing the number of carriers that must respond to consumer complaints; enhancing protections afforded passengers in oversales situations, including increasing the maximum denied boarding compensation airlines must pay to passengers bumped from flights; strengthening, codifying and

clarifying the Department's enforcement policies concerning air transportation price advertising practices; requiring carriers to notify consumers of optional fees related to air transportation and of increases in baggage fees; prohibiting post-purchase price increases; requiring carriers to provide passengers timely notice of flight status changes such as delays and cancellations; and prohibiting carriers from imposing unfair contract of carriage choice-of forum provisions. The Department is taking this action to strengthen the rights of air travelers in the event of oversales, flight cancellations and delays, ensure that passengers have accurate and adequate information to make informed decisions when selecting flights, prohibit unfair and deceptive practices such as postpurchase price increases and contract of carriage choice-of-forum provisions, and to ensure responsiveness to consumer complaints.

DATES: This rule is effective August 23, 2011 except for the amendments to 14 CFR 399.84 which become effective October 24, 2011.

FOR FURTHER INFORMATION CONTACT: Blane A. Workie, Tim Kelly or Daeleen Chesley, Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, U.S. Department of Transportation, 1200 New Jersey Ave., SE., Washington, DC 20590, 202-366-9342 (phone), 202-366-7152 (fax), *tim.kelly@dot.gov* or *blane.workie@dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

Background

On December 30, 2009, the Department published a final rule in which it required certain U.S. air carriers to adopt contingency plans for lengthy tarmac delays; respond to consumer problems; post flight delay information on their websites; and adopt, follow, and audit customer service plans. The rule also defined chronically delayed flights and deemed them to be an "unfair and deceptive" practice. The majority of the provisions in that rule took effect on April 29, 2010. See 74 FR 68983 (December 30, 2009).

In the preamble to that final rule, the Department noted that it planned to review additional ways to further enhance protections afforded airline passengers and listed a number of subject areas that it was considering addressing in a future rulemaking. On June 8, 2010, the Department published a notice of proposed rulemaking (NPRM), 75 FR 32318, in which it addressed the following areas: (1) Contingency plans for lengthy tarmac delays; (2) reporting of tarmac delay data; (3) customer service plans; (4) contracts of carriage; (5) responding to consumer problems/complaints (6) oversales; (7) full fare advertising; (8) baggage and other ancillary fees; (9) post-purchase price increases; (10) notification to passengers of flight status changes; (11) choice-of-forum provisions; and (12) peanut allergies. In response to the NPRM, the Department received over 2,100 comments, the vast majority of which were related to the proposal to address peanut allergies in air travel.

The Department received comments on the NPRM from the following: U.S. carriers and U.S. carrier associations; foreign air carriers and foreign carrier associations; U.S. and foreign consumer groups; travel agents and members of organizations in the travel industry; airports and various airport-related industry groups; members of Congress; embassies; peanut industry groups and allergy associations; as well as a number of individual consumers. In addition, the Department received a summary of the public discussion on the NPRM proposals that occurred on the Regulation Room Web site, *http://www.regulationroom.org*. The Regulation Room site is a site where members of the public can learn about and discuss proposed federal regulations and provide feedback to agency decision makers. To support this Administration's open government initiative, the Department partnered with Cornell University in this pilot project to discover the best ways to use Web 2.0 and social networking technologies to increase effective public involvement in the rulemaking process. The Department has carefully reviewed and considered the comments received. The commenters' positions that are germane to the specific issues raised in the NPRM and the Department's responses are set forth below, immediately following a summary of regulatory provisions and a summary of the regulatory analysis.

Summary of Regulatory Provisions

Subject	Final Rule
Tarmac Delay Contingency Plans.....	• Requires foreign air carriers operating to or from the U.S. with at least one aircraft with

.	30 or more passenger seats to adopt and adhere to tarmac delay contingency plans. • Requires U.S. and foreign air carriers to not permit an international flight to remain on the tarmac at a U.S. airport for more than four hours without allowing passengers to deplane subject to safety, security and ATC exceptions. • Expands the airports at which airlines must adhere to the contingency plan terms to include small hub and non-hub airports, including diversion airports. • Requires U.S. and foreign carriers to coordinate plans with Customs and Border Protection (CBP) and the Transportation Security Administration (TSA). • Requires notification regarding the status of delays every 30 minutes while aircraft is delayed, including reasons for delay if known. • Requires notification of opportunity to deplane from an aircraft that is at the gate or another disembarkation area with door open if the opportunity to deplane actually exists.

Tarmac Delay Data……	• Requires all carriers that must adopt tarmac delay contingency plans to file data with the Department regarding lengthy tarmac delays.
Customer Service Plans……	• Requires foreign air carriers that operate scheduled passenger service to and from the U.S. with at least one aircraft with 30 or more passenger seats to adopt, follow and audit customer service plans. • Establishes standards for the subjects U.S. and foreign air carriers must cover in customer service plans. Examples include: o delivering baggage on time, including reimbursing passengers for any fee charged to transport a bag if the bag is lost; o where ticket refunds are due, providing prompt refunds including refund of optional fees charged to a passenger for services that the passenger was unable to use due to an oversale situation or flight cancellation; and o allowing reservations to be held at the quoted fare without payment, or cancelled without penalty, for at least

	twenty-four hours after the reservation is made if the reservation is made one week or more prior to a flight's departure date.
Posting of Customer Service Plans and Tarmac Delay Contingency Plans.	• Requires foreign carriers to post their required contingency plans, customer service plans, and contracts of carriage on their websites as is already required of U.S. carriers.
Response to Consumer Problems……..	• Expands the pool of carriers that must respond to consumer problems to include foreign air carriers operating scheduled passenger service to and from the U.S. with at least one aircraft with 30 or more passenger seats (*i.e.*, monitor the effects of irregular flight operations on consumers; inform consumers how to file a complaint with the carrier, and provide substantive responses to consumer complaints within 60 days).

Oversales……..	• Increases the minimum denied boarding compensation limits to $650/$1,300 or 200%/400% of the one-way fare, whichever is smaller. • Implements an automatic inflation adjuster for minimum DBC limits every 2 years. • Clarifies that DBC must be offered to "zero fare ticket" holders (*e.g.*, holders of frequent flyer award tickets) who are involuntarily bumped. • Requires that a carrier verbally offer cash/check DBC if the carrier verbally offers a travel voucher as DBC to passengers who are involuntarily bumped. • Requires that a carrier inform passengers solicited to volunteer for denied boarding about all material restrictions on the use of transportation vouchers offered in lieu of cash. • Requires that a carrier inform passengers solicited to volunteer for denied boarding about all material restrictions on the use of transportation vouchers offered in lieu of cash.
Full Fare Advertising… …	• Enforces the full fare advertising rule as written (*i.e.*, ads which state a price must state the full price to be paid).

	Carriers currently may exclude government taxes/fees imposed on a per-passenger basis. • Clarifies the rule's applicability to ticket agents. • Prohibits carriers and ticket agents from advertising fares that are not the full fare and impose stringent notice requirements in connection with the advertisement of "each-way" fares available for purchase only on a roundtrip basis. • Prohibits opt-out provisions in ads for air transportation.
Baggage and Other Fees and Related Code-Share Issues…….	• Requires U.S. and foreign air carriers to disclose changes in bag fees/allowances on their homepage for three months, to include information regarding the free baggage allowance. • Requires carriers (U.S. and foreign) and ticket agents to include on e-ticket confirmations information about the free baggage allowance and applicable fees for the first and second checked bag and carry-on but allows ticket agents, unlike carriers, to do so through a hyperlink. • Requires carriers (U.S. and foreign) and ticket agents to inform passengers on the first

	screen on which the ticket agent or carrier offers a fare quotation for a specific itinerary selected by a consumer that additional airline fees for baggage may apply and where consumers can go to see these baggage fees. • Requires U.S. and foreign air carriers to disclose all fess for optional services to consumers through a prominent link on their homepage. • Requires that the same baggage allowances and fees apply throughout a passenger's journey. • Requires that the same baggage allowances and fees apply throughout a passenger's journey. • Requires the marketing carrier to disclose on its website any difference between its optional services and fees and those of the carrier operating the flight. Disclosure may be made through a hyperlink to the operating carriers' websites that detail the operating carriers' fees for optional services, or to a page on its website that lists the differences in policies among code-share partners.

Post-Purchase Price Increases……	• Bans the practice of post-purchase price increases in air transportation or air tours unless the increase is due to an increase in government-imposed taxes or fees and only if the passenger was provided full disclosure of the potential for the increase and affirmatively agreed to the potential for such an increase prior to purchase.
Flight Status Changes……..	• Requires U.S. and foreign air carriers operating scheduled passenger service with any aircraft with 30 or more seats to promptly notify consumers through whatever means is available to the carrier for passengers who subscribe to the carrier's flight status notification services, in the boarding gate area, on a carrier's telephone reservation system and on its website of delays of 30 minutes or more, cancellations and diversions within 30 minutes of the carrier becoming aware of a change in the status of a flight.
Choice-of-Forum Provisions……..	• Prohibits U.S. and foreign air carriers from limiting a passenger's forum to pursue litigation to a particular inconvenient venue.

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B. Content of Customer Service Plan

The NPRM: In the NPRM, we noted that under the final rule published on December 30, 2009, U.S. carriers are required to adopt customer service plans for their scheduled flights that address, at a minimum, the following service areas: (1) Offering the lowest fare available; (2) notifying consumers of known delays, cancellations, and diversions; (3) delivering baggage on time; (4) allowing reservations to be held or cancelled without penalty for a defined amount of time; (5) providing prompt ticket refunds; (6) properly accommodating disabled and special-needs passengers, including during tarmac delays; (7) meeting customers' essential needs during lengthy on-board delays; (8) handling "bumped" passengers in the case of oversales with fairness and consistency; (9) disclosing travel itinerary, cancellation policies, frequent flyer rules, and aircraft configuration; (10) ensuring good customer service from code-share partners; (11) ensuring responsiveness to customer complaints; and (12) identifying the services they provide to mitigate passenger inconveniences resulting from flight cancellations and misconnections. We proposed to extend the requirement to address these twelve subjects in the customer service plan to foreign air carriers and requested comment on whether any of these subjects would be inappropriate if applied to a foreign carrier.

The NPRM also proposed to require that U.S. and foreign carriers' customer service plans meet minimum standards to ensure that the plans are

specific and enforceable. The minimum standards that we proposed are as follows: (1) Offering the lowest fare available on the carrier's website, at the ticket counter, or when a customer calls the carrier's reservation center to inquire about a fare or to make a reservation; (2) notifying consumers in the boarding gate area, on board aircraft, and via a carrier's telephone reservation system and its website of known delays, cancellations, and diversions; (3) delivering baggage on time, including making every reasonable effort to return mishandled baggage within twenty-four hours and compensating passengers for reasonable expenses that result due to delay in delivery; (4) allowing reservations to be held at the quoted fare without payment, or cancelled without penalty, for at least twenty-four hours after the reservation is made; (5) where ticket refunds are due, providing prompt refunds for credit card purchases as required by 14 CFR 374.3 and 12 CFR part 226, and for cash and check purchases within 20 days after receiving a complete refund request; (6) properly accommodating passengers with disabilities as required by 14 CFR part 382 and other special-needs passengers as set forth in the carrier's policies and procedures, including during lengthy tarmac delays; (7) meeting customers' essential needs during lengthy tarmac delays as required by 14 CFR 259.4 and as provided for in each covered carrier's contingency plan; (8) handling "bumped" passengers with fairness and consistency in the case of oversales as required by 14 CFR part 250 and as described in each carrier's policies and procedures for determining boarding priority; (9) disclosing cancellation policies, frequent flyer rules, aircraft configuration, and

lavatory availability on the selling carrier's website, and upon request, from the selling carrier's telephone reservations staff; (10) notifying consumers in a timely manner of changes in their travel itineraries; (11) ensuring good customer service from code-share partners operating a flight, including making reasonable efforts to ensure that its code-share partner(s) have comparable customer service plans or provide comparable customer service levels, or have adopted the identified carrier's customer service plan; (12) ensuring responsiveness to customer complaints as required by 14 CFR 259.7; and (13) identifying the services it provides to mitigate passenger inconveniences resulting from flight cancellations and misconnections.

In addition, we invited comment on whether the minimum standards for any of the subjects contained in the customer service plans should be modified or enhanced in some way. With regard to delivering baggage on time, we solicited comment on whether we should also include as standards (1) that carriers reimburse passengers the fee charged to transport a bag if that bag is lost or not timely delivered, as well as (2) the time when a bag should be considered not to have been timely delivered (*e.g.,* delivered on the same or earlier flight than the passenger, delivered within 2 hours of the passenger's arrival). With regard to providing prompt refunds, we sought comment on whether we should also include as a standard that carriers refund ticketed passengers, including those with non-refundable tickets, for flights that are canceled or significantly delayed if the passenger chooses not to travel as a result of the travel disruption. In addition, we requested comment

on whether it is necessary to include as a standard the requirement that when a flight is cancelled carriers must refund not only the ticket price but also any fees for optional services that were charged to a passenger for that flight (*e.g.,* baggage fees, "service charges" for use of frequent flyer miles when the flight is canceled by the carrier). With respect to notifying passengers on board aircraft of delays, we sought comment on how often updates should be provided and whether we should require that passengers be advised when they may deplane from aircraft during lengthy tarmac delays.

Finally, we requested comment as to whether it is workable to set minimum standards for any of the subjects contained in the customer service plans and invited those that oppose the notion of the Department setting minimum standards for customer service plans as unduly burdensome to provide evidence of the costs that they anticipate. We also sought comment on whether the Department should require airlines to address any other subject in their customer service plans. We specifically asked if mandatory disclosure to passengers and other interested parties of past delays or cancellations of particular flights before ticket purchase should be a new subject area covered in customer service plans.

Comments: U.S. carriers and carrier associations are generally opposed to the Department setting minimum standards for the customer service plans, particularly if the Department requires that the plans be incorporated into the carriers' contracts of carriage. ATA notes that, although U.S. carriers are already required under the current regulation to

address each of the proposed customer service plan topics, the current regulation does not mandate minimum requirements and allows carriers to set their own standards for their customer service plans based on their own particular circumstances. ATA asserts that for the Department to set the minimum standards for carriers' plans would face a major change to existing carrier policies in areas where U.S. carriers currently compete and could dampen innovation, harm competition and reduce the flying public's options. Many U.S. carriers concur with ATA.

RAA is opposed not only to the establishment of minimum standards but also to any continued requirement for its members to adopt customer service plans. RAA explains that most regional carriers do not offer fares, take reservations, ticket passengers, receive payment from passengers, provide refunds to passengers, or have their own frequent flyer rules or cancellation policies. RAA maintains that the subjects to be addressed in the customer service plan would be inappropriate if applied to an airline that does not hold out, market, sell tickets for its operations and asks that the customer service requirements apply only to carriers that hold out, market, sell and ticket air transportation.

Most foreign carriers and carrier associations expressed strong opposition both to the requirement to have a customer service plan and for that plan to meet minimum standards set by the Department. A number of foreign carriers such as Air Berlin and associations such as IATA and IACA raised the issue

of extraterritoriality and argued that the Department was overreaching as the customer service requirements could be interpreted in such a way as to cover sales generated outside the U.S. and to cover the conduct of foreign carriers on foreign soil or in foreign airspace. There were also assertions that the Department's regulatory proposals ignore the fact that airlines have designed their customer service initiatives in a way to attract customers and the fact that carrier customer service plan provisions are a way for carriers to differentiate their services. South African Airways contends that prescriptive regulations should not take the place of competitive forces, especially when there is no evidence of market failure. Virgin Atlantic, while agreeing that defining a baseline standard is acceptable, states that forcing all carriers to be the same denies them the right to compete commercially and does not allow carriers to innovate.

Others raised the existence of customer service requirements imposed by other entities as a reason for the Department not to issue a rule in this area. For instance, Air France and KLM state that the customer service proposals should not be finalized as to EU carriers where they are inconsistent with or more stringent than EU regulations. Still other foreign carriers raised concerns that some of the minimum service levels are impracticable for a carrier to meet (for example, if a carrier sells a number of tickets via a travel agent and the passenger contact information is not passed on then the carrier may not have that passenger's contact information in order to advise them of a change in itinerary). Some carriers also expressed concerns

that certain provisions may be outside of a carrier's control (*e.g.,* "good customer service" from a code-share partner).

Travel agent organizations such as ASTA and consumer groups such as AAPR, Flyersrights.org, NBTA, and CTA all support requiring carriers to adopt customer service plans and for those plans to meet the minimum standards as proposed in the NPRM. Most individual commenters also support these DOT proposals, but a few oppose the regulation as burdensome and fear the costs will be passed on to consumers. Many "Regulation Room" commenters want the Department to go further in setting minimum standards and prohibiting certain practices.

The Department received a number of comments on some of the minimum standards proposed to be included in the customer service plans as well as some of the questions we posed on modifying or enhancing these standards and we address those issues more fully below.

* * *

2. Allowing Reservations To Be Held at the Quoted Fare

A number of foreign carriers and carrier industry groups also expressed serious concerns with the proposal to allow reservations to be held at the quoted fare without payment, or cancelled without penalty, for at least twenty-four hours after the reservation is made and thought this provision may lead to inconsistent sales policies. For example, Air New Zealand strongly opposes this provision because

it takes inventory off the market for the duration of the refund period, blocking it from sale to other customers and risking that the seat may not be sold again. The carrier points out that passengers have the option to buy refundable fares, and choosing whether to allow a passenger to hold a reservation without payment is a commercial decision. Air France and KLM oppose this proposal primarily for the reasons stated above, as does Qatar Airways. Alitalia opposes this proposal and thinks the airline should be the party that establishes commercial terms and conditions with its customers. Singapore Airlines states that it is not set up to permit reservation holds and reprogramming the system to do so is costly. It also notes that this proposal interferes with the free market and deprives other passengers of the lowest fare, as well as compromises an airline's ability to adjust to overnight currency fluctuations. British Airways notes that its current selling systems do not allow for reservations to be held without penalty, but passengers that book via call centers have a "24 hour cooling off" period. It also states that consumers that visit BA.com have several opportunities to review exactly what they are booking and to confirm knowledge of details prior to booking.

ATA strongly objects to a CSP proposal that would require a carrier to hold a reservation "at the quoted fare" for 24 hours for the following reasons: it eliminates the carrier's ability to sell these seats to another willing buyer; the DOT has not demonstrated a market failure that merits this action; a consumer could hold a reservation during the last 24 hours and then cancel, resulting in a seat

that will never be sold; and this requirement would effectively prevent re-pricing, which ordinarily happens multiple times a day.

Of the U.S. carriers that commented, US Airways does not support adoption of a 24-hour standard as a rigid rule. The carrier suggests that DOT allow airlines flexibility to restrict refunds in certain situations in order to assure that the largest number of potential passengers have access to seats. Spirit states this proposal is an effort to impose on all airlines a practice that was common prior to deregulation. As a low cost carrier, it states that almost all low-fare carriers require payments at time of booking to guarantee the fare and that making tickets non-refundable is a practice that is critical to its ability to keep fares low. Should a consumer choose to, he or she can buy refundable tickets at a higher price. The carrier states that travel agents that book via global distribution systems (GDS) can hold a reservation (space only) for 24 hours without penalty and Spirit offers a 24 hour courtesy refund for bookings made via GDS, but no other procedure for refunds via travel agents can be accomplished due to limited GDS functions. In order to comply with this provision, Spirit states that it would have to substantially change its business model and incur large IT cost.

Hawaiian Airlines (Hawaiian) notes that it has "on-demand" or "walk-up" flights that run on a high frequency basis. As proposed, this provision would put the carrier in the position of turning inventory over to passengers who will make several reservations for a flight (within a 24 hour time

period) but will pay for only one of the reservations, even though Hawaiian must retain a seat for them on each flight. It notes the rule could result in forcing Hawaiian to oversell flights to protect against the loss of seats and revenue. The carrier suggests the proposal be modified to allow customers to hold seats for 24 hours up until 72 hours before the departure of the flight. Similar to Hawaiian, JetBlue suggest that the proposal be modified and that the "24 hour rule" apply not later than 120 hours prior to departure for carriers that have a no oversales policy. JetBlue explains that it does not oversell seats on its flights and it is the company's policy not to issue refunds to passengers that cancel their reservations (in return for a guaranteed seat on the flight). It notes that the proposal would allow customers to hold a reservation without making a financial commitment and could cause lower load factors, which would threaten JetBlue's business model. ASTA supports the 24 hour "reservation hold" rule applying to travel agent bookings.

* * *

DOT Response: Having fully considered the comments, the Department has decided to adopt a final rule largely along the lines set forth in the NPRM, with some clarifications to address comments received about extraterritorial application of U.S. law and the appropriateness of individual customer service commitments. In adopting this approach, we believe that our action strikes a proper balance between ensuring that the traveling public is provided an adequate level of service and is not subjected to unfair or deceptive practices, while

ensuring the marketplace governs to the extent possible. We also view our approach as striking the proper balance between protecting consumers on nearly all flights to and from the United States by requiring not just U.S. carriers but also foreign carriers to adopt and adhere to customer service plans, while ensuring that these requirements do not involve an extraterritorial application of U.S. law by limiting their application to foreign carriers to flights to and from the U.S., sales made within the U.S., and to the conduct of foreign carriers on U.S. soil.

Under the final rule, foreign carriers are required to address the same subjects in their customer service plan as U.S. carriers. The final rule also establishes minimum standards for the customer service plans of both U.S. and foreign carriers. In making this decision, we note that carriers are already required to address a number of the subjects and comply with the minimum standards imposed for these subjects through existing requirements [*e.g.,* 14 CFR part 250, Part 254 (for U.S. carriers), and Part 382] or requirements imposed by other sections of this rule (*e.g.,* 14 CFR 259.4, 259.7, and 259.8). Additionally, based on the comments received, many carriers already address many of the requirements in the customer service plans and, in some cases, their customer service commitment is more stringent than those we are adopting. Consequently, we are not persuaded that it would be unduly burdensome for carriers to adopt and adhere to these standards.

Commenters have convinced us that it is not appropriate to require U.S. or foreign air carriers to include in their customer service plans a commitment

to ensure good customer service from their code-share partners by making certain that code-share partners have comparable customer service plans or provide comparable customer service levels. We agree with commenters that the requirement for code-share partners to have comparable service may unnecessarily restrict the marketplace and may unduly discourage code-sharing arrangements. We have also decided against requiring covered carriers to include in their customer service plans an assurance that they will notify consumers of past delays and cancellations. We are persuaded that the current availability of data about past delays and cancellations provided by the largest U.S. carriers on their websites as a result of action of our recent consumer rulemaking is sufficient and additional requirements in this area would not materially benefit consumers.

While, as noted above, the Department has decided to establish minimum standards for the customer service plans of both U.S. and foreign carriers, we are modifying or clarifying a few of these standards based on comments received. For example, we are clarifying, as requested by U.S. and foreign carriers and associations, that the requirement to compensate passengers for reasonable expenses that result due to delay in baggage delivery comports with 14 CFR part 254 for domestic transportation and applicable international agreements for international transportation. We are also adding as a standard that carriers must reimburse passengers for any fee charged to transport a bag if the bag is lost. We have decided against requiring carriers to reimburse passengers for any fee charged to transport a bag

that is not timely delivered. Arguably, as is the case with transporting passengers themselves, while delay in receiving baggage may be inconvenient, once the carrier delivers a bag the service has been performed. Consumers may, of course, seek reimbursement for damages caused by delay in the delivery of their baggage by filing a claim with the airline or, if dissatisfied with the airline's resolution of the matter, with an appropriate civil court.

With regard to carriers' obligation to notify passengers of known delays, cancellations and diversions, we specify that the minimum standard required to comply with this obligation is met through compliance with a requirement imposed elsewhere in this final rule, *i.e.,* 14 CFR 259.8. Under section 259.8, we explain that the obligation to notify passengers of delays applies only to delays of 30 minutes or more and that the carrier has the obligation to inform passengers of such delays, cancellations and diversions within 30 minutes of the carrier becoming aware of a change in the status of a flight. We also explain that carriers must inform consumers of cancellations and delays of 30 minutes or more and diversions in the boarding gate area at U.S. airports, on board aircraft, via a carrier's telephone reservation system and on its website, and through whatever means made available by the carrier for passengers who subscribe to the carrier's flight status notification services.

With respect to providing prompt refunds, we conclude that the obligation to provide such refunds applies not only to refunding the basic price of a ticket but also to refunding optional fees charged to a

passenger for services that the passenger is unable to use due to an oversale situation or a flight cancellation. For example, if a passenger pays for premium economy seating, but his flight is canceled or oversold and that seating is not available on the flight that he/she has agreed to be re-rerouted on, then the carrier must promptly refund the passenger the fee paid for the premium seating. In adopting this requirement, the Department believes it is unfair for a carrier to refuse to provide a refund to a passenger of fees paid for services not provided through no fault of the passenger.

We continue to believe that there are circumstances in which passengers would be due a refund, including a refund of non-refundable tickets and optional fees associated with those tickets due to a significant flight delay. However, we have been persuaded by industry commenters that the Department should not adopt a strict standard of what constitutes a significant delay as such a delay is difficult to define. We agree with the contention of carriers and carrier associations that the definition of a significant delay depends on a wide variety of factors such as the length of the delay, length of the flight and the passenger's circumstances. The Department's Aviation Enforcement Office will continue to monitor how carriers apply their non-refundability provision in the event of a significant change in scheduled departure or arrival time, and will determine on a case by case basis based on the facts and circumstances of the delay whether a failure to provide a refund in response to such a delay is an unfair and deceptive practice.

We reject some carriers' and carrier associations' assertions that carriers are not required to refund a passenger's fare when a flight is cancelled if the carrier can accommodate the passenger with other transportation options after the cancellation. We find it to be manifestly unfair for a carrier to fail to provide the transportation contracted for and then to refuse to provide a refund if the passenger finds the offered rerouting unacceptable (*e.g.,* greatly delayed or otherwise inconvenient) and he or she no longer wishes to travel. Since at least the time of an Industry Letter of July 15, 1996 (see *http://airconsumer.dot.gov/rules/guidance*) the Department's Aviation Enforcement Office has advised carriers that refusing to refund a non-refundable fare when a flight is canceled and the passenger wishes to cancel is a violation of 49 U.S.C. 41712 (unfair or deceptive practices) and would subject a carrier to enforcement action.

We also have determined to modify the standard regarding the availability of the lowest fare from what was proposed in the NPRM. In the NPRM, we proposed that a carrier offer the lowest fare available on the carrier's website, at the ticket counter, or when a customer calls the carrier's reservation center to inquire about a fare or to make a reservation. Having taken into consideration the comments received about how this requirement could unduly interfere with airline business models by requiring airlines offer to a consumer shopping via one point-of-sale the lowest fare available via any channel, we are modifying this provision to require carriers to disclose to consumers who contact the carrier through any of these mediums that a lower fare may

be offered by the carrier through another channel (for example, the carrier must reveal via its telephone reservation service that a lower fare may be available on the carrier's website if that is the case). Of course, wherever the carrier offers its lowest fare, the carrier should not state that the lowest fare may be available elsewhere as such a statement would likely confuse consumers and could result in increased search time by consumers for a nonexistent lower fare. In sum, we are not requiring carrier personnel to offer the lowest fare available via whatever sales channel a consumer chooses to use, but to inform all of its customers and prospective customers that a lower fare may be available elsewhere in the carrier's systems in order to give the consumer the opportunity to locate a lower fare offered by that carrier.

We have also decided to modify the customer service proposal which would require carriers to allow reservations to be held at the quoted fare without payment, or cancelled without penalty, for at least twenty-four hours after the reservation is made. We agree with commenters who expressed concerns that allowing consumers to hold a seat without payment for twenty-four hours could result in loss of sales and revenue by carriers and prevent other passengers from purchasing the seat if the seat is not released in a timely manner prior to the flight. We find persuasive the comments submitted by JetBlue and Hawaiian Airlines suggesting that a set point in time should exist after which carriers would no longer be required to hold a passenger's reservation in order to give the carrier a more realistic opportunity to sell that seat in the final days before

the flight departs. Accordingly, we are modifying this provision to require carriers to hold the reservation for twenty-four hours only if a consumer makes the reservation one week (168 hours) or more prior to a flight's scheduled departure. After that time, a carrier is no longer required to hold a reservation without payment for any period of time. The Department believes that this modification strikes the right balance between a consumer's desire to make travel plans and shop for a fare that meets his or her needs, and the carrier's need for adequate time to sell seats on its flights.

As for the remaining seven customer service requirements, we received very few comments on them and we are adopting them as proposed in the NPRM. These seven customer service requirements pertain to accommodating passengers with disabilities, meeting customers' essential needs during lengthy tarmac delays, handling "bumped" passengers with fairness and consistency, disclosing cancellation policies, frequent flyer rules, aircraft configuration, and lavatory availability, notifying consumers of changes in their travel itineraries, ensuring responsiveness to customer complaints, and identifying the services the carrier provides to mitigate passenger inconveniences resulting from flight cancellations and misconnections. In adopting these customer service commitments as proposed, we note our disagreement with comments stating that the requirement for carriers to notify consumers of itinerary changes should be limited to passengers who book their tickets directly with the carrier and not apply to passengers who book their tickets through a travel agent. A passenger has a right to

know and benefit from knowing about changes in his/her itinerary whether that person purchased the ticket directly from a carrier or from a travel agent. We also disagree with comments that the disclosure of aircraft configuration be limited to the selling carrier's website. While most consumers will have access to the Internet and be able to obtain this information from carriers' websites, we also see benefit in requiring that aircraft configuration information be made available upon request from the selling carrier's telephone reservations staff, particularly for those passengers who do not have access to the Internet or are not familiar with how to use it. With regard to the concern expressed by a carrier that it may be required to respond to complaints from non-passengers, we want to point out that "complaint" is defined in section 259.7 as a specific written expression of dissatisfaction concerning a difficulty or problem which a person experienced when using or attempting to use an airline's services.

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7. Full Fare Advertising

A. Change in Enforcement Policy

The NPRM: The Department's price advertising rule (14 CFR 399.84) states that any advertised price for air transportation, an air tour or an air tour component must be the entire price to be paid by the customer for that transportation, tour or tour component. However, the Department's enforcement policy with regard to this rule has permitted sellers of air transportation to state separately from the

advertised price government-imposed taxes and fees, provided that they are not ad valorem in nature, are collected by the seller on a per-passenger basis, and their existence and amount are clearly indicated in the advertisement so that the consumer can determine the full price to be paid. The Department has prohibited sellers of air transportation from breaking out any other seller imposed fees, including fuel surcharges and service fees, and taxes imposed on an ad valorem basis.

In the NPRM, the Department proposed enforcing the price adverting rule as it is written. This proposal would change the existing enforcement policy by ending the practice of permitting sellers to exclude government taxes and fees from the advertised price, and would instead require that the price advertised include all mandatory fees. The Department invited comments on how sellers of air transportation foresee this change in enforcement policy affecting the methods they use to advertise fares and how consumers view the change. The Department also requested comment on the potential cost of changing the current advertising structures that carriers and ticket agents have in place in order to adhere to the proposed policy shift.

Comments: Individuals and consumer organizations such as Flyersrights.org, in addition to individuals who participated on Regulation Room, support the proposal that advertisements for air transportation state the total price to be paid by the consumer. Some commenters participating in discussions through Regulation Room reported that there were occasions when they thought they were

going to pay one price for air transportation, but the final price was much higher due to additional taxes and fees. Regulation Room commenters also stated that the current advertising method borders on bait-and-switch tactics. Some individual commenters expressed similar sentiments, noting how they have been surprised by the total amount to be paid at the end of a purchase online and their preference to know the total amount to be paid earlier. Some consumers and consumer groups go further by suggesting that the Department should require that the true cost of travel, including ancillary fees, be disclosed earlier in the booking process. For example, CTA states that even if the price advertising rule requires the disclosure of all mandatory fees, consumers may still have trouble finding out the true cost of travel due to the proliferation of many kinds of ancillary fees for optional services.

U.S. carriers and carrier associations generally oppose the Department changing its enforcement policy to enforce the full price advertising rule as written. ATA states that its members support fare transparency, but notes that the Department declined to revise its full-fare rule four years ago and contends that the airfare advertising landscape has not changed since that time in a manner that would justify a change in 25 years of enforcement policy. ATA notes that several other industries advertise without including government-imposed taxes and fees, and states that the air transportation industry should not be treated differently. It asserts that this policy shift would suppress valuable information to consumers about how much of their total price consists of government-imposed taxes and fees. In

addition, ATA argues that this policy shift would negatively impact competition because government-imposed taxes and fees vary from airport to airport and routing to routing. ATA contends that this means that an airline that has a competitive fare, but also has a routing that subjects the fare to higher taxes and fees, will be disadvantaged if it is required to include those taxes and fees in the advertised price. It remarks that this could negatively impact service to smaller communities. ATA also raised concerns about the cost implications of the proposal, because the proposal would require airlines to perform additional route pricing analysis, programming changes, website changes, and auditing and testing of changes. Many U.S. carriers raise similar points.

The views of foreign carriers and associations varied, with many opposing the proposed mandate that the advertised fare be the full fare to be paid by the customer but some supporting it. IATA believes that there is no evidence of widespread advertising deception to justify a change in the Department's enforcement policy. Additionally IATA notes that the complexity of non-airline charges makes listing a full fare with "all mandatory fees" difficult, and would only confuse air travel consumers because this complexity prevents a true fare comparison as the actual fare is obscured by the additional government-imposed taxes and fees. IATA also notes that passengers are made fully aware of the purchase price before purchase. Most foreign airlines support IATA's comments. Some foreign carriers, such as Singapore Airlines, Qatar Airways, and Jetstar Airways, support the proposed mandate that

advertisements state the total price to be paid by the consumer. Many of these airlines state that they already advertise the total price to be paid by consumers due to regulations of other governments. Some foreign carriers expressed concerns about the applicability of this rule to advertisements on websites that are not domiciled in the United States or directed to United States customers.

Among other industry interests that commented, ASTA and ITSA support this policy shift and note that full fare disclosure is the best way to eliminate passenger confusion and ensure that passengers understand the total cost of their air travel. ASTA asserts that the full fare displayed in advertisements should include all mandatory fees, regardless of their source. The United States Tour Operators Association (USTOA) disagrees and states that the proposed change will place costly burdens on travel agents while doing very little to ease customer confusion in airline pricing. USTOA contends, as does ATA and many U.S. airlines, that ending the practice of permitting sellers to exclude government taxes and fees from the advertised price is not justified because the airfare advertising landscape has not changed since the Department last declined to revise the full-fare advertising rule. USTOA states that tour operators would be especially negatively affected by this shift in policy because government-imposed fees vary widely depending on where the consumers choose to start their trip, and therefore a tour operator would not be able to advertise a tour effectively since the purchaser usually has the option of a number of gateways.

DOT Response: The Department has decided to adopt the proposed policy change in relation to the full-fare advertising rule. We disagree with comments that the Department has not shown true harm to consumers in not having the full price quoted to them up front. On the contrary, comments from individual commenters and persons participating in Regulation Room show consumers feel deceived when the total price, including taxes and fees, is not quoted to them after an initial fare inquiry. Many consumers feel that advertising fares that exclude mandatory charges is a "bait and switch" tactic by travel sellers. The Department has also received complaints regarding fare advertising, some of which specifically mention feeling deceived when they are not quoted the full price to be paid after an initial inquiry.

Also, contrary to the assertions of some commenters, the Department has seen changes in the advertising methods used by sellers of air transportation since the Department declined to revise its full-fare rule in 2006. Sellers are now marketing air transportation through a variety of methods that they were not using then. For example, some carriers have started to sell tickets through Facebook and some have Twitter feeds dedicated solely to advertising sale fares. Additionally, in recent years, carriers are increasingly unbundling the cost of air travel, which further obscures the total fare to be paid by the consumer. Carriers and online travel agencies have also started to offer more complicated routings with multiple connections in order to provide the "lowest" airfare to consumers. However, with these changes in routings, taxes and

fees can increase and become a significant portion of the price to be paid by consumers. In those cases, consumers need a full picture of the total price to be paid in order to compare fares and routings. In order to understand the true cost of travel, consumers need to be able to see the entire price they need to pay to get to their destination the first time the airfare is presented to them.

We also are not persuaded by argument that the Department should not require that the advertised price for air transportation, a tour or tour component be the total price to be paid by the customer for that transportation, tour or tour component because other industries advertise without including government-imposed taxes and fees. Airfares are different from products in other industries for a variety of reasons, including the multitude of methods of advertising that sellers of air transportation employ and the various taxes and government fees that apply. We believe that consumers are deceived when presented with fares that do not include numerous required charges and, in our view, air travelers will be better able to make price comparisons when they can see the entire price of the air transportation, tour or tour component being advertised. The advertised fare under this policy shift must include all government-imposed taxes and fees as well as mandatory carrier-imposed charges, including booking fees if the only way the consumer can obtain the air transportation is by paying the booking fee. While a carrier or ticket agent generally is not required to include a booking fee in its advertised fare if there are other means for the passenger to obtain the air transportation (*e.g.,* a booking fee only applies for tickets that are

purchased over the telephone), where airfares are advertised via an Internet site that permits consumers to purchase fares, the fares advertised on the site must include all charges required to make the purchase on the site. For example, it would be unfair and deceptive to hold out on such an Internet site a fare that can be purchased only at airport ticket counters but that excludes a convenience fee that is applied to Internet sales.

In regard to the costs related to this change, online travel agencies that will face many of the same marketing and programming challenges as carriers do, if not more, feel that the operational costs of adhering to the rule will be overly burdensome. Sellers of air transportation are constantly updating their fare matrices and the methods by which they display fares. In addition, we believe many carriers may already have programs in place to accommodate this policy shift, as some foreign governmental entities such as Australia and the European Union already require the total price to be shown to consumers. We note also that the requirement for advertisements to state the total price is limited to advertisements published in the United States, including via the Internet if accessible in the U.S. Further, recognizing the amount of print advertising slated for use by tour operators that would need to be pulled thereby increasing costs of print advertising revision, we have decided that the new full fare adverting requirements will not take effect until 180 days after the publication of this final rule in the Federal Register. This should reduce the costs related to this requirement.

Some airlines were concerned that passengers would not know how much of their total price consists of government imposed taxes and fees. We want to assure these carriers that nothing in this rule prohibits them from making this information available to consumers. This final rule allows carriers to advise the public in their fare solicitations about government taxes and fees, or other mandatory carrier or ticket agent imposed charges applicable to their airfares. Sellers of air transportation may have pop-ups or links adjacent to an advertised price to take the consumer to a listing of such charges, or they may display these charges on the same page in fine print if they prefer. Such charges must accurately reflect the actual costs to the carrier of the service or matter covered, be displayed on a per passenger basis, and be displayed in a manner that otherwise does not deceive consumers. Consequently, the rule requires that any such listing not be displayed prominently and be presented in significantly smaller type than the listing of the total price to ensure that consumers are not confused about the total price they must pay. Also, we are prohibiting the presentation of any "total" fares in advertising that exclude taxes, fees or other charges since the major impact of such presentations is to confuse and deceive consumers.

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9. Post-Purchase Price Increase

The NPRM: The Department proposed to revise its current regulation in 14 CFR 253.7 which allows post purchase price increases as long as the consumer receives direct notice on or with the ticket

of any contract of carriage term that allows a carrier to increase the price after purchase. Under the proposed rule, the Department would prohibit all post-purchase price increases by carriers, tour operators, or other sellers of air transportation, tours or tour components. The seller would be prohibited from increasing the price after the consumer completes the purchase. The Department asked for comment on the proposal to ban post-purchase price increases as well as two alternatives. The first proposed alternative would allow post-purchase price increases, as long as the seller of air transportation conspicuously disclosed to the consumer the potential for such an increase and the maximum amount of such increase before the consumer purchased the air transportation, and the consumer affirmatively agreed to such an increase prior to the completion of the purchase. The second alternative would allow post-purchase price increases (with disclosure) that the consumer agrees to in advance of purchasing the ticket, but would prohibit such an increase within thirty or sixty days of the first flight in the purchased itinerary.

Comments: Individual travelers and consumer organizations representing travelers support the proposal to ban post-purchase price increases in air transportation or tours by carriers and ticket agents. Most consumer commenters state that an outright ban on post-purchase price increases is fair. One commenter asserts that the practice of increasing the price after purchase is egregious, especially in the case of tour operators that raise prices due to fuel surcharges. Another commenter asks for clarification on what an increase in the price of the ticket means,

because the commenter is concerned about change fees being applied to an already purchased ticket. Most commenters participating in Regulation Room favor an outright ban, rejecting the alternatives that allow for conspicuous disclosure of a potential price increase. A small number felt that the proposed alternative of requiring conspicuous notice of a potential maximum amount of an increase would adequately protect consumers.

We also received comments from carriers and carrier organizations regarding this proposal. ATA and its members support the primary proposal to ban post-purchase price increases outright, and do not feel that any alternative is necessary. ATA states that this is consistent with industry practice. IATA and many foreign carriers are not opposed to this proposal, but they do request that an exception be made for post-purchase imposition of government-imposed taxes and fees. AEA, ALTA, and AACO all support a limited exception to a complete ban in the case of an increase in government-imposed taxes and fees. IACA states that an outright ban on post-purchase increases is not consistent with the European Union regulations which allow post-purchase price increases in limited circumstances and with certain disclosures. IACA seems to support one of the alternatives which would allow some increase in the purchase price after purchase is completed.

Air France, KLM and Qantas generally support the proposal with the exception of government-imposed taxes and fees. Additionally Air France, KLM and Qantas ask for clarification on when a

"purchase" is complete. Both airlines suggest that a booking that is being "held" by the airline but has not been purchased should not be a completed purchase for purposes of this rule. Air New Zealand further comments that change fees should be allowed because those apply when a consumer is purchasing a new ticket and not traveling on the same ticket.

USTOA is against the proposal for an outright ban without some contingency built into the rule regarding tax increases and partial customer payments. USTOA views a purchase as being complete if the consumer has paid in full. USTOA also states that an exception to a ban on post-purchase increases should be made for increases in government taxes and fees, provided that the consumer is made aware of such a potential increase. USTOA points out that the tour operators have no control over the increase of the price of scheduled air transportation. USTOA supports the alternatives, but believes that sellers should not be required to state the maximum amount of a price increase because the tour operator will not know the maximum amount.

ASTA contends that in order to protect all sellers, a post-purchase price increase should only be applied on ticketed reservations, contracted group travel arrangements, and business to business transactions between tour operators and airlines. ASTA states that a travel agent does not impose the additional increases in price; rather, the government or carriers impose taxes, fees and fuel surcharges. ASTA prefers the first alternative which allows a post-purchase price increase with specific notice of

the increase and a maximum amount of such increase identified to the consumer. ASTA suggests modifying the first alternative so that the sellers of air transportation also identify when they have imposed such post-purchase price increases in the past.

DOT Response: After fully considering the comments received, the Department has decided to adopt the rule as proposed, but allow for an exception related to an increase in government-imposed taxes and fees. Although taxes and fees are not retroactively applied in the United States, the Department is aware that government-imposed taxes and fees levied by entities outside of the United States might be applied retroactively to a completed ticket purchase. As these fees and taxes are outside of the control of the seller of air transportation, the Department agrees with ASTA and foreign carriers that sellers should be protected from having to absorb the costs imposed by retroactive application of government taxes and fees. This exception to a total ban on post-purchase price increases is limited to government-imposed taxes and fees imposed on a per-passenger basis. It does not include increases in fuel surcharges or other carrier or ticket agent imposed charges. The Department recognizes that changes may be necessary in the way a tour operator prices or advertises packages to comply with the prohibition on post-purchase prices increases with an exception only for government-imposed taxes and fees imposed on a per-passenger basis.

The final rule also requires sellers of air transportation to disclose the potential for a post-

purchase price increase related to an increase in a government-imposed tax or fee in a clear and conspicuous manner to the consumer. The consumer must affirmatively agree to the potential for such an increase prior to the purchase, for example by checking a box on the final page prior to purchase. After purchase, the seller of air transportation can only impose an increase due to government-imposed taxes or fees if such an increase applies to that particular consumer (*e.g.,* the increase cannot be collected from consumers to whom a general increase did not apply because they had purchased and fully paid for their ticket months earlier, and/ or because an increase has been announced but is not yet in effect). For purposes of this section, a purchase is not deemed to have occurred until the full amount agreed upon has been paid by the consumer. Therefore, in the context of a tour that contains an air component, a purchase is complete when the consumer tenders the entire amount paid for the tour to the tour operator. The Department finds it to be unfair for consumers to bear the brunt of any increase in price after they have paid the full amount agreed upon for air transportation or a tour.

To further protect consumers, the final rule requires sellers of air transportation, tours or tour components to notify a consumer of the potential for a price increase that could take place prior to the time that the full amount agreed upon has been paid by the consumer, including but not limited to an increase in the price of the seat, an increase in the price for the carriage of passenger baggage, an increase in an applicable fuel surcharge, or an increase in a government-imposed tax or fee. These

entities must provide the consumer an opportunity to decline the purchase without penalty or affirmatively agree to the potential for such an increase prior to making any payment for the scheduled air transportation, or tour or tour component that includes scheduled air transportation. The Department believes that such a disclosure will provide consumers with important information to help them determine whether they want to purchase the air transportation or tour and if so, the appropriate time to make payment.

With regard to the comments relating to change fees, the Department agrees with commenters that change fees do not constitute an increase in the price of an already-purchased ticket, as technically the consumer is purchasing a new ticket for new travel. However, the Department considers it to be an unfair and deceptive practice within the meaning of 49 U.S.C. 41712 for a seller of air transportation to impose any fee on a consumer to change a travel itinerary unless this possibility was disclosed to the consumer prior to purchase. Additionally, to address the comments about the applicability of this section to tickets marketed and sold in Europe, the final rule specifies that with respect to ticket agents and foreign air carriers, these requirements only apply to advertising or selling in the United States of air transportation or tours.

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§ 259.5 Customer Service Plan.

(a) *Adoption of Plan.* Each covered carrier shall adopt a Customer Service Plan applicable to its

scheduled flights and shall adhere to the plan's terms.

(b) *Contents of Plan.* Each Customer Service Plan shall address the following subjects and comply with the minimum standards set forth: * * *

(4) Allowing reservations to be held at the quoted fare without payment, or cancelled without penalty, for at least twenty-four hours after the reservation is made if the reservation is made one week or more prior to a flight's departure;

* * *

§ 399.84 Price advertising and opt-out provisions.

(a) The Department considers any advertising or solicitation by a direct air carrier, indirect air carrier, an agent of either, or a ticket agent, for passenger air transportation, a tour (i.e., a combination of air transportation and ground or cruise accommodations) or tour component (e.g., a hotel stay) that must be purchased with air transportation that states a price for such air transportation, tour, or tour component to be an unfair and deceptive practice in violation of 49 U.S.C. 41712, unless the price stated is the entire price to be paid by the customer to the carrier, or agent, for such air transportation, tour, or tour component. Although charges included within the single total price listed (e.g., government taxes) may be stated separately or through links or ''pop ups'' on websites that display the total price, such charges may not be false or misleading, may not be displayed prominently, may not be presented in the same or larger size as the total price, and must provide cost

information on a per passenger basis that accurately reflects the cost of the item covered by the charge.

(b) The Department considers any advertising by the entities listed in paragraph (a) of this section of an each-way airfare that is available only when purchased for round-trip travel to be an unfair and deceptive practice in violation of 49 U.S.C. 41712, unless such airfare is advertised as "each way" and in such a manner so that the disclosure of the round-trip purchase requirement is clearly and conspicuously noted in the advertisement and is stated prominently and proximately to the each-way fare amount. The Department considers it to be an unfair and deceptive practice to advertise each-way fares contingent on a round-trip purchase requirement as "one-way" fares, even if accompanied by prominent and proximate disclosure of the round trip purchase requirement.

(c) When offering a ticket for purchase by a consumer, for passenger air transportation or for a tour (i.e., a combination of air transportation and ground or cruise accommodations) or tour component (e.g., a hotel stay) that must be purchased with air transportation, a direct air carrier, indirect air carrier, an agent of either, or a ticket agent, may not offer additional optional services in connection with air transportation, a tour, or tour component whereby the optional service is automatically added to the consumer's purchase if the consumer takes no other action, i.e., if the consumer does not opt out. The consumer must affirmatively "opt in" (i.e., agree) to such a service and the fee for it before that fee is added to the total price for the air transportation-

related purchase. The Department considers the use of "opt-out" provisions to be an unfair and deceptive practice in violation of 49 U.S.C. 41712.

* * *

§ 399.88 Prohibition on post-purchase price increase.

(a) It is an unfair and deceptive practice within the meaning of 49 U.S.C. 41712 for any seller of scheduled air transportation within, to or from the United States, or of a tour (i.e., a combination of air transportation and ground or cruise accommodations), or tour component (e.g., a hotel stay) that includes scheduled air transportation within, to or from the United States, to increase the price of that air transportation, tour or tour component to a consumer, including but not limited to an increase in the price of the seat, an increase in the price for the carriage of passenger baggage, or an increase in an applicable fuel surcharge, after the air transportation has been purchased by the consumer, except in the case of an increase in a government-imposed tax or fee. A purchase is deemed to have occurred when the full amount agreed upon has been paid by the consumer.

(b) A seller of scheduled air transportation within, to or from the United States or a tour (i.e., a combination of air transportation and ground or cruise accommodations), or tour component (e.g., a hotel stay) that includes scheduled air transportation within, to or from the United States, must notify a consumer of the potential for a post-purchase price increase due to an increase in a government-imposed

tax or fee and must obtain the consumer's written consent to the potential for such an increase prior to purchase of the scheduled air transportation, tour or tour component that includes scheduled air transportation. Imposition of any such increase without providing the consumer the appropriate notice and without obtaining his or her written consent of the potential increase constitutes an unfair and deceptive practice within the meaning of 49 U.S.C. 41712.

§ 399.89 Disclosure of potential for price increase before payment.

Any seller of scheduled air transportation within, to or from the United States, or of a tour (i.e., a combination of air transportation and ground or cruise accommodations), or tour component (e.g., a hotel stay) that includes scheduled air transportation within, to or from the United States, must notify a consumer of the potential for a price increase that could take place prior to the time that the full amount agreed upon has been paid by the consumer, including but not limited to an increase in the price of the seat, an increase in the price for the carriage of passenger baggage, an increase in an applicable fuel surcharge, or an increase in a government-imposed tax or fee and must obtain the consumer's written consent to the potential for such an increase prior to accepting any payment for the scheduled air transportation, or tour or tour component that includes scheduled air transportation. Imposition of any such increase without providing the consumer the appropriate notice and obtaining his or her written consent to the potential increase constitutes

an unfair and deceptive practice within the meaning of 49 U.S.C. 41712.