

No. 12-656

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

**BRIEF OF AMICUS CURIAE
NEW ENGLAND LEGAL FOUNDATION
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS CURIAE

New England Legal Foundation (“NELF”) seeks to present its views, and the views of its supporters, on whether certiorari should be granted in this case to decide whether a federal regulation may, consistent with the First Amendment to the United States Constitution, require airlines to obscure “in fine print” their competitive base fares, and the substantial, applicable federal taxes and fees, when advertising the total cost of airfare. This case is of significance to NELF and its constituents because, if certiorari is granted, this Court’s decision will further clarify the First Amendment protections afforded to businesses in the truthful advertising and marketing of their products and services.¹

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in

¹ Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.2(a), NELF states that, on November 29, 2012, counsel for Petitioners filed with this Court a general written consent to the filing of amicus briefs, in support of either or neither party. NELF also states that all parties were provided with at least a ten-day written notice of NELF’s intent to file this brief, which NELF’s counsel emailed to counsel for all parties on December 14, 2012, and in which NELF requested consent from the Solicitor General of the United States. Pursuant to the request from the Solicitor General’s office, NELF also emailed to the Solicitor General, on December 17, 2012, a signed, scanned, formal letter providing notice and requesting consent to the filing of this brief. In his letter of December 19, 2012, a copy of which is filed herewith, the Solicitor General consented to the filing of this brief.

1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

NELF is committed to achieving a reasonable balance between the Government's protection of consumers and the First Amendment's protection of the rights of businesses to convey truthful information about their products and services, along with truthful information about governmental regulation of those products and services. In this connection, NELF filed an amicus brief in *Sorrell v. IMS*, 131 S. Ct. 2653 (2011), arguing in support of First Amendment protection of truthful speech in aid of a business's economic activities. While NELF does not dispute that the Government may regulate business practices to prevent economic harm to consumers, NELF argues that the First Amendment forbids the Government from imposing on truthful and nonmisleading speech any burden that lacks a content-neutral justification or is unrelated to a substantial governmental purpose.

NELF has regularly appeared as amicus curiae in this Court in cases affecting or raising issues of general economic significance to both the New England and the national business communities.² NELF submits its brief in the belief

² See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Hall Street Assocs., L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008);

that it will provide an additional perspective to aid the Court in deciding whether to grant certiorari to resolve the issue presented herein.

SUMMARY OF ARGUMENT

Certiorari should be granted to clarify that a governmental regulation of truthful, nonmisleading speech is subject to heightened scrutiny under the First Amendment. Moreover, such a regulation should fail heightened scrutiny to the extent that it imposes content-based restrictions on truthful, nonmisleading speech without providing a neutral justification.

The disputed “Total Price Rule,” promulgated by the U.S. Department of Transportation (“DOT”), requires the airlines to advertise prominently the total price of airfare. But the rule does not stop there. It also imposes severe restrictions on the manner in which airlines may advertise separately their competitive base fares and the applicable federal taxes and fees that yield the total price. However, DOT’s stated purpose in promulgating the rule was solely to prevent potential consumer confusion with respect to the *total price* of airfare.

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); *S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370 (2006); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Comm’r v. Banks*, 543 U.S. 426 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

DOT has far exceeded its stated purpose by severely restricting the manner in which the airlines may advertise separately their competitive base fares and the applicable federal taxes and fees. These accurate price components, which are protected speech, are not the source of any potential consumer confusion. DOT simply lacks a constitutionally permissible, neutral justification to regulate, let alone regulate so heavily, the advertisement of these price components.

DOT has imposed content-based restrictions on the airlines' speech by singling out and disfavoring the airlines' advertisement of the price components. At the same time, DOT has mandated a far greater prominence for the total price that subsumes and thereby conceals these price components. In so doing, DOT has smothered the airlines' voice both in advertising their competitive base fares and in alerting the public to the Government's sizeable portion of the total price of airfare.

DOT's content-based restrictions on the manner in which the airlines may advertise the price components lack a neutral justification and therefore violate the First Amendment. DOT's claimed neutral justification of preventing consumer confusion applies only to its requirement that airlines display prominently the total price of airfare. DOT has only identified the total price as a potential source of consumer confusion. Even assuming *arguendo* that DOT has sustained its constitutional burden of proof to justify regulating the total price, DOT's neutral justification simply does not apply to the additional and stringent

restrictions that it has placed on the airlines' advertisement of the price components.

Contrary to the decision of the lower court in this case, the First Amendment does not draw a distinction between a rule that burdens protected speech and a rule that bans it outright. As this case illustrates, there is frequently no practical difference between an outright ban and onerous restrictions on protected speech. The First Amendment does not countenance any unjustified infringement of protected speech along this regulatory continuum. It is also of no consequence that DOT may not have actually intended either to stifle speech critical of Government or impair an industry's ability to advertise its product effectively. A regulation fails First Amendment scrutiny where, as here, it has either the purpose or effect of suppressing protected speech without an adequate justification.

Certiorari should also be granted to clarify that, to the extent the Total Price Rule restricts the airlines' manner of displaying the price components, the rule cannot even survive intermediate scrutiny under the Court's "commercial speech" test. This portion of the Total Price Rule restricts, if not virtually suppresses, speech that is entirely unrelated to the Government's stated goal of preventing consumer confusion over the total price. DOT has not identified any such potential consumer confusion arising from the airlines' advertisement of their base fares or applicable Government charges. DOT's aggressive regulation of the airlines' ability to advertise separately these price components is simply unrelated to its goal of preventing consumer confusion over the total price.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO CLARIFY THAT A CONTENT-BASED REGULATION OF PROTECTED SPEECH CONCERNING ECONOMIC ACTIVITY SHOULD BE SUBJECT TO HEIGHTENED SCRUTINY UNDER THE FIRST AMENDMENT, AND CANNOT SURVIVE SUCH SCRUTINY WHEN IT LACKS A NEUTRAL JUSTIFICATION.

The Court should grant certiorari in this case to reaffirm the principle that the First Amendment to the United States Constitution, U.S. Const. amend. I, requires heightened scrutiny of a content-based regulation of protected speech concerning economic activity. *See Sorrell v. IMS*, 131 S. Ct. 2653, 2664 (2011) (state law singling out and burdening truthful, nonmisleading speech of pharmaceutical marketers imposed content-based restriction warranting heightened judicial scrutiny). Certiorari is further warranted to clarify that such a regulation must fail heightened scrutiny where, as here, it targets and disfavors truthful, nonmisleading speech but lacks a neutral justification. *See Sorrell*, 131 S. Ct. at 2672 (content-based law violated First Amendment because it lacked neutral justification, such as protecting consumers from false or misleading speech, or protecting privacy interests).

The disputed regulation in this case is the final rule promulgated by Respondent U.S. Department of Transportation (“DOT”) on April 25, 2011, pursuant to its statutory authority, under 49 U.S.C. § 41712(a), to bar “unfair and deceptive”

practices in the airline industry. *See* Enhancing Airline Passenger Protections, 76 Fed. Reg. 23,110, 23,166 (Apr. 25, 2011) (to be codified at 14 C.F.R. § 399.84) (“Total Price Rule”). That rule requires the airlines to advertise prominently the total price of airfare. *See id.* But the rule does not stop there. It also imposes severe restrictions on the manner in which airlines may advertise separately their competitive base fares and the applicable federal taxes and fees that yield the total price. *Id.*

DOT’s stated purpose in promulgating the rule was to prevent the airlines from misleading consumers about the *total price* of airfare in the print and electronic media. “Our objective is to ensure that consumers are not [to] be deceived or confused about the *total fare* they must pay, which we believe can best be ensured by requiring that consumers be able to see clearly the entire price of the air transportation being advertised whenever a price is displayed” Notice of Proposed Rulemaking, 75 Fed. Reg. 32,318, 32,328 (June 8, 2010) (emphasis added). According to DOT, certain airlines were causing potential consumer confusion by obscuring the Government charges applicable to the advertised base fare, such as through links and pop-ups on the internet. *See* 76 Fed. Reg. at 23,143.

According to DOT, then, consumers were potentially being misled about the total price of airfare. The First Amendment places the burden of proof on DOT “to justify its content-based law” *Sorrell*, 131 S. Ct. at 2667. Even assuming *arguendo* that DOT has sustained its constitutional burden of proof here, such a determination would only justify requiring disclosure of the total price. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of*

Ohio State, 471 U.S. 626, 651 (1985) (no First Amendment violation where state required attorney, in advertising contingent-fee representation, to disclose that unsuccessful client may be liable for costs).

But the Total Price Rule far overreaches DOT's narrow goal of dispelling any potential consumer confusion about the total price, and *Zauderer* is therefore inapposite, notwithstanding the lower court's reliance upon it in this case. See *Spirit Airlines v. U.S. Dep't of Transp.*, 687 F.3d 403, 411-13 (D.C. Cir. 2012). Instead of regulating only the airlines' advertisement of the total price, DOT has also severely restricted the manner in which the airlines may advertise separately their competitive base fares and the applicable federal taxes and fees that yield the total price. However, DOT did not find that the airlines' advertisement of these price components caused any consumer confusion. See 75 Fed. Reg. at 32,327-28. DOT only identified the *total price* as the source of potential consumer confusion. *Id.* And these price components, which are undisputedly accurate, are clearly speech protected by the First Amendment. "[T]he creation and dissemination of information are speech within the meaning of the First Amendment. . . . Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Sorrell*, 131 S. Ct. at 2667. DOT simply lacks a constitutionally permissible, neutral justification to regulate, let alone regulate so heavily, the advertisement of these price components.

And DOT has indeed restricted, if not virtually silenced, the airlines' ability to display

these price components. DOT has literally reduced them to “fine print” and to “significantly smaller type” than the total price, and has relegated them to less prominent placement in the advertisement. 76 Fed. Reg. at 23,143. *See also* 76 Fed. Reg. at 23,166 (requiring smaller typeface and less prominent display of component charges). DOT has even specified that “[t]he break-out of charges should not have special highlighting that sets it apart and makes it more prominent than the total price (e.g., bold font, underlined, or italicized).” Office of Aviation Enforcement and Proceedings, DOT, Answers to Frequently Asked Questions, at 22 (Oct. 19, 2011), *available at* http://airconsumer.dot.gov/rules/EAPP_2_FAQ_81911.pdf (as visited December 20, 2012).

These burdensome restrictions are content-based because they deliberately target and disfavor the airlines’ display of their base fares and the applicable Government charges. At the same time, DOT has privileged, and mandated far greater prominence for, the total price that subsumes and thereby conceals the price components. *See Sorrell*, 131 S. Ct. at 2663, 2667 (state law imposed content-based restriction on marketing speech by barring access to prescriber-identifiable information, while allowing access to same information for other kinds of speech).

In so regulating the airlines’ speech, DOT has smothered the airlines’ voice in advertising their competitive base fares to consumers. The airlines are restricted to conveying this useful information in a hushed, ineffectual whisper, in unadorned “fine print.” The First Amendment bristles at such flagrant and unjustified governmental interference

with a business's ability to promote its products effectively. "[T]hose whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups" *Sorrell*, 131 S. Ct. at 2665 (quoting *United States v. United Foods, Inc.*, 533 U.S. 405, 410–411 (2001)).

The Total Price Rule also severely limits the airlines' ability to display the Federal Government's portion of the total price. *See* 76 Fed. Reg. at 23,143, 23,166. These are federally imposed taxes and fees over which businesses have no control, other than through the political process. In that light, the Total Price Rule stifles the airlines' voice in alerting the public to the Government's sizeable allotment of the total price of airfare. And it goes without saying that "[c]riticism of Government is at the very center of the constitutionally protected area of free discussion." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

These content-based restrictions on the manner in which the airlines may advertise the price components are impermissible under the First Amendment because they lack a neutral justification. *See Sorrell*, 131 S. Ct. at 2672. To be sure, DOT's stated goal of protecting consumers from potentially misleading speech is, in the abstract, a neutral justification for a content-based regulation. *See id.* But even assuming *arguendo* that DOT did substantiate this neutral justification here, it would not apply to DOT's regulation of the price components. The only potentially misleading speech that DOT has identified, and hence the only possible source of commercial harm here, is the

advertisement of the total price. *See* 75 Fed. Reg. at 32,327-28. Therefore, DOT's aggressive regulation of the price components lacks a content-neutral justification and is an impermissible content-based regulation of protected speech. *See Sorrell*, 131 S. Ct. at 2672.

According to the lower court in this case, the Total Price Rule is constitutional because the First Amendment draws a distinction between a rule that merely burdens protected speech and a rule that bans it outright. *See Spirit Airlines*, 687 F.3d at 414 (“[T]he 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.”).

The lower court has erred. To the contrary, as this case illustrates, there is frequently no practical difference between an outright ban and onerous restrictions on protected speech. The First Amendment does not countenance any unjustified infringement of protected speech along this regulatory continuum. As this Court explained in *Sorrell*,

[T]he distinction between laws burdening and laws banning speech is but a matter of degree[,] and . . . the Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans. Lawmakers may no more silence unwanted speech

by burdening its utterance than by censoring its content.

Sorrell, 131 S. Ct. at 2664 (citations and internal quotation marks omitted).

It is also of no consequence here that DOT may not have actually intended either to stifle speech critical of Government or impair an industry's ability to market its products effectively. This Court has expressly rejected a mens rea requirement under the First Amendment. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). A regulation fails First Amendment scrutiny where, as here, it has either the purpose or effect of suppressing protected speech without an adequate justification. "Just as the 'inevitable effect of a statute on its face may render it unconstitutional,' a statute's stated purposes may also be considered." *Sorrell*, 131 S. Ct. at 2663 (quoting *United States v. O'Brien*, 391 U.S. 367, 384 (1968)).

In sum, certiorari should be granted to clarify that, consistent with this Court's decision in *Sorrell*, the Total Price Rule should be invalidated under the First Amendment to the extent that it imposes a content-based restriction on protected speech and lacks a neutral justification.

II. CERTIORARI SHOULD ALSO BE GRANTED TO CLARIFY THAT THE SAME REGULATION CANNOT SURVIVE INTERMEDIATE SCRUTINY BECAUSE IT BURDENS SPEECH THAT IS UNRELATED TO THE GOVERNMENT'S PURPOSE OF PREVENTING COMMERCIAL HARM.

As amicus has argued above, the Total Price Rule should not survive heightened scrutiny under the First Amendment, at least to the extent that the rule severely restricts the airlines' ability to advertise separately their base fares and the applicable federal charges. Alternatively, certiorari should also be granted to clarify that the same portion of the rule cannot even survive intermediate scrutiny under the Court's "commercial speech" test.

Under that inquiry, "[t]here must be a fit between the [Government's] ends and the means chosen to accomplish those ends." *Sorrell v. IMS*, 131 S. Ct. at 2668 (citation and internal quotation marks omitted). DOT must show, among other things, that "the restriction directly and materially advances a substantial [governmental] 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) (emphasis added). Even commercial speech requires "a means *narrowly tailored* to achieve the desired objective" *City of Cincinnati*, 507 U.S. at 416 (citation and internal quotation marks omitted) (emphasis added).

DOT cannot meet its burden here. The rule is far "more extensive than necessary," is not "narrowly

tailored,” and is simply lacking in a means-end fit because it regulates, and virtually suppresses, speech that is entirely unrelated to the Government’s goal of preventing the airlines from misleading consumers about the total price.

As amicus has argued above, DOT has identified potential consumer confusion solely with respect to the total price of airfare. Even assuming *arguendo* that DOT has sustained its constitutional burden of proof on that issue, DOT has not identified any potential commercial harm arising from the airlines’ advertisement of their base fares or applicable Government charges. DOT’s aggressive regulation of the advertisement of these price components is simply unrelated to its goal of preventing consumer confusion over the total price (and even undermines that goal by restricting airlines’ ability to communicate clearly to consumers the public and private charges that compose the total price). Therefore, DOT has employed impermissibly overbroad and scattershot means to serve its narrow legitimate purpose.

In sum, certiorari should be granted to clarify that the Total Price Rule is fatally overbroad under any applicable standard of First Amendment review. The rule encumbers speech that is entirely unrelated to the Federal Government’s purpose of preventing consumer confusion over the total price of airfare.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court grant Petitioners' petition for a writ of certiorari.

Respectfully submitted,

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