No. 12-656

In the Supreme Court of the United States

SPIRIT AIRLINES, INC., ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

STUART F. DELERY
Principal Deputy Assistant Attorney General

MICHAEL S. RAAB
DANIEL TENNY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

ROBERT S. RIVKIN
General Counsel

PAUL M. GEIER
Assistant General Counsel

PETER J. PLOCKI
Deputy Assistant General Counsel for Litigation

TIMOTHY H. GOODMAN
Senior Trial Attorney

SAMUEL PODBERESKY
Assistant General Counsel for Aviation

BLANE WORKIE
Deputy Assistant General Counsel for Aviation Enforcement & Proceedings

Department of Transportation
Washington, D.C. 20590

QUESTIONS PRESENTED

Under his authority to prohibit "unfair or deceptive practice[s] * * * in air transportation or the sale of air transportation," 49 U.S.C. 41712(a), the Secretary of Transportation (Secretary) issued: (1) a rule requiring advertisements for airfares clearly to disclose the total price to be paid by the consumer for air transportation, inclusive of taxes and fees (the Airfare Advertising Rule), and (2) a rule requiring air carriers either to permit cancellation of reservations within 24 hours of being made without penalty or to hold reservations without payment for 24 hours, if the reservation is made at least one week before the scheduled travel (the 24-Hour Rule). The questions presented are:

1. Whether the Airfare Advertising Rule is in excess of the Secretary's statutory authority or violates the First Amendment.

2. Whether the 24-Hour Rule is in excess of the Secretary's statutory authority.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and regulations:

Miscellaneous:

Miscellaneous—Continued: Page

.

In the Supreme Court of the United States

No. 12-656

SPIRIT AIRLINES, INC., ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 687 F.3d 403. The final rules issued by the Department of Transportation (Pet. App. 36-83) are published at 76 Fed. Reg. 23,110.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2012. On October 5, 2012, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 21, 2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A federal agency has long had authority to prohibit any "unfair or deceptive practice * * * in air

transportation or the sale of air transportation." 49 U.S.C. 41712(a). This authority was included in the Civil Aeronautics Act of 1938, and has remained virtually unchanged ever since, despite significant changes in other aspects of federal regulation of air transportation. See Civil Aeronautics Act of 1938, ch. 601, § 411, 52 Stat. 1003 (enacting predecessor to 49 U.S.C. 41712); *Sabre, Inc.* v. *Department of Transp.*, 429 F.3d 1113, 1124 n.3 (D.C. Cir. 2005) (describing provision's history). There are no other significant consumer-protection measures applicable to air travel because state regulation is expressly preempted, see 49 U.S.C. 41713; *Morales* v. *Trans World Airlines*, 504 U.S. 374 (1992), and the Federal Trade Commission's general authority to prevent unfair or deceptive practices does not apply to air carriers, see 15 U.S.C. 45(a)(2).

2. Congress has vested the Secretary of Transportation (Secretary) with broad authority to "take action" he "considers necessary to carry out" his statutory duties, "including [by] conducting investigations, prescribing regulations, standards, and procedures, and issuing orders." 49 U.S.C. 40113(a). This authority is the only means of enforcing the statutory prohibition against unfair or deceptive airline practices because there is no private right of action to enforce it. See *Air Transport Ass'n of Am., Inc.* v. *Cuomo*, 520 F.3d 218, 221 (2d Cir. 2008).

At issue here are two regulations the Secretary promulgated under this authority to regulate unfair and deceptive practices.

a. *Airfare Advertising Rule.* Beginning in 1984, the Civil Aeronautics Board (CAB) considered "any advertising or solicitation" by an air carrier "that

states a price for * * * air transportation * * * to be an unfair or deceptive practice, unless the price stated is the entire price to be paid by the customer to the air carrier * * * for such air transportation." 49 Fed. Reg. 49,440 (Dec. 20, 1984) (14 C.F.R. 399.84). That rule could readily have been interpreted to require carriers to state a total price that included all applicable taxes and fees. See Pet. App. 65.

Nonetheless, the Department of Transportation (the Department)—which assumed CAB's consumer-protection responsibilities, see *Musson Theatrical, Inc.* v. *Federal Express Corp.*, 89 F.3d 1244, 1250 (6th Cir. 1996)—declined to enforce the rule against airlines whose advertisements quoted prices exclusive of taxes and fees (except for the component of the federal excise tax that is required by statute to be included in the quoted fare, see 26 U.S.C. 7275), so long as the type and amount of those taxes and fees were described somewhere in the advertisement. Pet. App. 3; see *id.* at 3-4 (explaining that, under the 1984 rule as interpreted by the Department, "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").

In a 2010 notice of proposed rulemaking, the Department proposed to begin "enforcing the price advertising rule as it is written" by "ending the practice of permitting sellers to exclude government taxes and fees from the advertised price." Pet. App. 65; see *id.* at 38. While airlines generally opposed the proposal, see *id.* at 66-67, air travelers supported it, reporting 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." *Id.* at 65-66; see *id.* at 66 (complaint that "the current advertising method borders on bait-and-switch tactics"). Air travelers also expressed "their preference to know the total amount to be paid earlier" in the purchase process, "noting how they have been surprised by the total amount to be paid at the end of a purchase online." *Id.* at 66. The American Society of Travel Agents and the Interactive Travel Services Association also supported the change on the ground that "full fare disclosure is the best way to eliminate passenger confusion and ensure that passengers understand the total cost of their air travel." *Id.* at 68.

After considering the comments, the Department decided to adopt the proposed change. Pet. App. 69. It rejected the contention that the record did not demonstrate "harm to consumers," noting that comments "show[ed] consumers feel deceived when the total price, including taxes and fees, is not quoted to them after an initial fare inquiry." *Ibid.* The Department also explained that it had "received complaints regarding fare advertising, some of which specifically mention [consumers] feeling deceived when they are not quoted the full price to be paid after an initial inquiry." *Ibid.* Moreover, the Department observed that carriers had recently "started to offer more complicated routings with multiple connections in order to provide the 'lowest' airfare to consumers." *Ibid.* Such bookings can result in higher fees, making them "a significant portion of the price to be paid by consumers." *Id.* at 69-70. In those instances, "consumers need a full picture of the total price to be paid in order to compare fares and routings." *Id.* at 70.

The Department also rejected air carriers' proffered analogy to "other industries" that "advertise without including government-imposed taxes and fees." Pet. App. 70. The Department explained 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." *Ibid.* In that context, "consumers are deceived when presented with fares that do not include numerous required charges and * * * air travelers will be better able to make price comparisons when they can see the entire price of the air transportation." *Ibid.*

In response to concerns expressed by carriers that passengers would not know what proportion of the total price they paid was comprised of taxes, the Department "assure[d] [them] that nothing in this rule prohibits them from making this information available to consumers." Pet. App. 72. Carriers could still fully disclose taxes and fees, as long as they did not do so "prominently" when compared to the total price and so long as that information was not "presented in the same or larger size as the total price." *Id.* at 79. Subsequent guidance has explained that a carrier may not list price components "in a more prominent place on a web page or in a print advertisement than the advertised total 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." Office of Aviation Enforcement and Proceedings, Department of Transportation, Answers to

Frequently Asked Questions 22 (Aug. 19, 2011; revised Sept. 6, 2011, and Oct. 19, 2011).[1]

b. *24-Hour Rule*. The new regulations also require certain changes to airline customer-service plans. In December 2009, the Department had issued a final rule requiring each U.S. carrier to adopt a customer-service plan that addresses certain topics, to "audit its own adherence to its plan annually," and to make the audit results available to the Department for review upon request. *Enhancing Airline Passenger Protections*, 74 Fed. Reg. 69,003 (Dec. 30, 2009) (adding 14 C.F.R. 259.5(c)). Of particular relevance here, an airline's customer-service plan was required to address the airline's policy regarding "[a]llowing reservations to be held without payment or cancelled without penalty for a defined amount of time." *Ibid.* (adding 14 C.F.R. 259.5(b)(4)); see Pet. App. 47.

In the rulemaking at issue here, the Department considered further steps to "ensure that [airline customer-service] plans are specific and enforceable." Pet. App. 47-48. The agency proposed "establishing minimum standards for the plans," which would "result in consumers being better informed or protected." *Id.* at 5 (citation omitted). The minimum standards were based on a review of existing customer-service plans and a selection of "services already provided by some carriers that appear to be 'best practices.'" 75 Fed. Reg. 32,323 (June 8, 2010). The only portion of the minimum standards challenged here requires airlines to hold reservations or allow cancellation without penalty for 24 hours "if the reservation is made one week or more prior to a flight's departure." Pet. App.

---

[1] http://www.dot.gov/sites/dot.dev/files/docs/EAPP_2_FAQ.pdf.

78-79 (amending 14 C.F.R. 259.5(b)(4)); see *id.* at 62-63.

3. The court of appeals rejected petitioners' challenge to the new regulations. See Pet. App. 1-35.

a. The court observed that since 1984 the applicable rule had "required any advertised price for air transportation to state the 'entire price to be paid by the customer to the air carrier.'" Pet. App. 7 (quoting 49 Fed. Reg. at 49,440). Petitioners did not challenge that rule, so "the only question before [the court] [was] whether [the Department] 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." *Id.* at 7-8.

The court of appeals concluded that the agency's conclusion was supported by substantial evidence, including "(1) comments from the original 1984 rulemaking," and "(2) roughly 500 comments from [a] 2006 hearing explaining how consumers were being confused by advertisements that itemized price components rather than display a single, total price." Pet. App. 8. The court explained that these "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." *Ibid.*

The court of appeals also rejected petitioners' challenge to the prohibition on setting out the components of the total fare so that they appear with greater or equal prominence than the total price. Pet. App. 9-10. The court explained that, "[c]ontrary to the airlines' repeated suggestions, nothing in the Airfare Advertising Rule requires airlines to hide the taxes." *Id.* at 9. Instead, the rule "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." *Ibid.*; see *id.* at 9-10 ("This limited imposition hardly amounts to an arbitrary exercise of [the Department's] statutory authority to prevent 'unfair or deceptive practice[s].'") (quoting 49 U.S.C. 41712(a)) (alteration in original).

The court of appeals also rejected petitioners' First Amendment challenge to the Airfare Advertising Rule. See Pet. App. 10-19. As an initial matter, the court disagreed with petitioners that the rule should be subject to strict scrutiny as a regulation of political speech. See *id.* at 10-11. "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.'" *Id.* at 11 (quoting *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (alteration in original; internal quotation marks omitted in original)). Accordingly, the court analyzed the case under the standard applicable to regulations that are "directed at *misleading* commercial speech" and that "impose a disclosure requirement rather than an affirmative limitation on speech." *Id.* at 12 (quoting *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 130 S. Ct. 1324, 1339 (2010)). Under that standard, the court explained, "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." *Ibid.* (quoting *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).

The court of appeals noted that "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." Pet. App. 15. To illustrate its point, the court observed that, after the new regulation took effect, the website of petitioner Spirit Airlines "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 a slightly larger font, the 'Total Price.'" *Id.* at 15–16; see *id.* at 24 (fold-out reproduction of screen shot); see also *id.* at 16 (noting that counsel for the government stated at oral argument that Spirit's website "is compliant with the new enforcement policy"). 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." *Ibid.* In addition, "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." *Ibid.*

The court of appeals explained that "[a]ll of this demonstrates what the rule's text already tells us: the rule is aimed at providing accurate information, not restricting it." Pet. App. 16. Moreover, "[n]othing in the rule prohibits the airlines from separately alerting the public to the taxes imposed on air transportation," and "[t]he airlines can even call attention to taxes and fees in their advertisements." *Ibid.*

Even if the rule were not properly analyzed as a disclosure requirement, the court concluded in the alternative that the rule would satisfy the standard applicable to restrictions on commercial speech. Pet. App. 18. First, the court explained, the government has a substantial interest in "ensuring the accuracy of commercial information in the marketplace." *Ibid.* (quoting *Edenfield* v. *Fane*, 507 U.S. 761, 769 (1993)). Second, that interest "is clearly and directly advanced by a regulation requiring that the total, final price be the most prominent." *Ibid.* Third, the regulation is "reasonably tailored" because it "simply regulates the manner of disclosure" and "imposes no burden on speech other than requiring airlines to disclose the total price consumers will have to pay." *Id.* at 18-19.

b. The court of appeals also sustained the 24-Hour Rule. See Pet. App. 19-20. The court rejected petitioners' contention "that the rule violates the Airline Deregulation Act, which prohibits regulation of fares," pointing out that "the rule has nothing to do with airfares," but merely "regulates cancellation policies." *Id.* at 19. The court explained that the Department, based on "over a decade's worth of recorded experience," "found that airlines were routinely misleading consumers with vague customer service policies," and that "[o]ne manifestation of that unfairness * * * 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." *Id.* at 20. The court said that petitioners had failed to provide any basis for concluding that the Department's effort to ameliorate

that problem, "as part of a systematic effort aimed at preventing unfair and deceptive practices," was arbitrary and capricious. *Ibid.*

c. Judge Randolph concurred in part and dissented in part. See Pet. App. 25-35. He agreed with the majority's rejection of the challenge to the 24-Hour Rule. See *id.* at 34-35. He also "join[ed] the majority in its decision sustaining the [Airfare Advertising Rule's] requirement that such advertisements must state the total price of airfare." *Id.* at 25. His dissent focused only on the aspect of the rule that prohibited advertisements from stating, with equal prominence, the components of the total price. In particular, applying the standard of review for restrictions on commercial speech, Judge Randolph concluded that the Department's rulemaking record did not contain sufficient evidence concerning the substantiality of the government's interest or the degree to which the regulation would directly advance any such interest. *Id.* at 30-34.

ARGUMENT

The decision of the court below is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The Airfare Advertising Rule constitutes a reasonable exercise of the Department's longstanding authority to prevent consumer confusion in airfare advertising, and it is fully consistent with the First Amendment. The Department has authority to prohibit "unfair or deceptive practice[s] * * * in air transportation or the sale of air transportation," 49 U.S.C. 41712(a), and to set standards and promulgate regulations to implement that statutory mandate, 49 U.S.C. 40113(a). The Department has long exercised that authority to prohibit price advertisements that do

not display the full cost to the consumer of air transportation. See 14 C.F.R. 399.84 (2011) (prior version of rule, which dates back to 1984). The Department's authority to adopt that basic prohibition, and its reasonableness and constitutionality, are not in dispute. See Pet. 29 ("Petitioners do not dispute that [the Department] can require them to make truthful disclosures to consumers about all taxes and fees applicable to each ticket."); accord Pet. App. 25 (Randolph, J.).

The potential for customer confusion is particularly great in the airline industry, where taxes and fees can both constitute a significant portion of the total price and can vary considerably even for a given trip. For example, some taxes and fees vary based on which airports travelers pass through, making it difficult to compare fares with multiple connections but the same starting and ending points. See Pet. App. 69-70. Petitioners' attempt to analogize this context to the sale of pants and to general sales taxes, see Pet. 25, ignores these unique features of air travel.

a. As relevant here, the rulemaking made only one change to the longstanding and unchallenged regulatory regime. It addressed advertisements that make it difficult for consumers to identify the total price that will be charged for air travel. Petitioner Spirit Airlines, for example, had a web site with a calendar that advertised the "base fare" for each date in a month, exclusive of taxes and carrier fees, in bold print. When the customer selected a date, the web site indicated, in unbolded font at the bottom, the price inclusive of taxes and fees. The purpose and effect of the web site's format was to draw the customer's attention to the base fare rather than the actual cost of travel, which is what consumers want to know.

In an example the government provided to the court of appeals, the customer's attention would be drawn to the $14 base fare, and not to the total cost of travel, which was $41.69. See Gov't C.A. Br. Addendum.

In the rulemaking at issue here, the Department concluded that such advertisements caused consumer confusion by making it difficult to discern the total price of air transportation. The new rule requires advertisers to display the total amount the consumer must pay, including all applicable taxes and fees. 14 C.F.R. 399.84(a). It also prohibits advertisers from confusing consumers by displaying, with equal or greater prominence, a lower amount that is merely a component of the total amount the consumer would owe if he or she ultimately purchased a ticket. Importantly, however, the rule explicitly authorizes components of the total price, such as the "base fare" charged by the carrier, to be disclosed, so long as they are less prominent than the total fare. *Ibid.* This regulation was a reasonable exercise of the agency's authority and imposes little or no burden on airlines' ability to communicate truthful information.

Petitioners incorrectly contend that the regulation forces them to "hide the tax burden." Pet. 19. As the court of appeals recognized, however, the rule provides ample opportunity for the airlines to provide information to customers about taxes. The court illustrated the point by reference to petitioner Spirit Airlines' current web site, which certainly does not hide consumers' tax burden, yet is fully compliant with the Airfare Advertising Rule. That website clearly displays the base fare and the total taxes and fees, which Spirit refers to as the "Government's Cut." Pet. App. 24; see also *id.* at 15–16 (discussing web site). The

web site also includes, in a slightly larger font, the total price. *Id.* at 24. "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." *Id.* at 16.

Petitioners make no attempt to explain why Spirit's web site presents an inadequate avenue to "communicat[e] to customers truthful information about tax burdens," Pet. 21. And petitioners make no attempt to explain how the new rule in any way inhibits Southwest's "political and public-relations campaign specifically opposing the high taxes on air travel." Pet. 18–19. It does not.[2]

b. The Airfare Advertising Rule is a quintessential consumer-protection regulation—governing "quintessentially commercial" speech, *i.e.*, the "advertising of prices" (Pet. App. 11)—and is fully consistent with the First Amendment. As the court of appeals explained, that is true whether the rule is examined as a disclosure requirement or as a regulation of commercial speech. See *id.* at 10-19. The government's substantial interest in ensuring that consumers receive accurate information about air fares "is clearly and directly advanced by a regulation requiring that the total, final price be the most prominent." *Id.* at 18. And as discussed above, the regulation is "reasonably tai-

---

[2] Petitioners failed to contend during the rulemaking proceeding that application of the Airfare Advertising Rule to certain social media sites would cause special problems for the industry. Cf. Pet. 26-27. Had they done so, the Department could have addressed the matter. Having failed to assert that fact-intensive claim before the agency, petitioners are in no position to challenge the rule on that basis in this Court.

lored," as it expressly authorizes petitioners to present any additional information they deem relevant. *Id.* at 18–19.

Judge Randolph disagreed with the majority on the constitutionality of the rule, but he did so largely on case-specific evidentiary grounds. See Pet. App. 31 (contending there was lack of "evidentiary support" in the rulemaking record on whether practices prohibited by rule "confuse[d]" consumers); see also *id.* at 33 (citing "lack of evidence"). The adequacy of factual support in the rulemaking record here is not a suitable question for this Court's review.

c. Petitioners' attempted analogy between the Airfare Advertising Rule and the statute at issue in *BellSouth Telecommunications* v. *Farris*, 542 F.3d 499 (6th Cir. 2008) (*BellSouth*), fails. In *BellSouth*, the Sixth Circuit considered a provision that "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.'" Pet. 29 (quoting *BellSouth*, 542 F.3d at 501) (alteration in original; emphasis added). Carriers challenged the prohibition on First Amendment grounds because "they want[ed] to identify the new tax as a line item on all customer invoices to explain why they ha[d] raised prices." *BellSouth*, 542 F.3d at 500.

The regulation at issue in this case is fundamentally different. Far from barring advertisers from separately stating taxes, the regulation at issue here expressly authorizes them to do so. See 14 C.F.R. 399.84(a) ("[C]harges 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."). There is thus no con-

flict between the decision below and *BellSouth*, and petitioners fail to cite any other court of appeals decision endorsing the kind of font-size-based First Amendment claim they advance here.[3]

d. Petitioners incorrectly contend (Pet. 36-37) that the agency somehow contravened the Airline Deregulation Act by deciding to enforce its longstanding full-fare advertising rule as written. While the Deregulation Act eliminated the agency's authority to set prices, Congress did not repeal or weaken 49 U.S.C. 41712, the provision authorizing the agency to prohibit

---

[3] Petitioner's amici, Airlines for America and Airline Pilots Association, International, erroneously contend (Br. 11-14) that the court of appeals' decision conflicts with decisions of the Fifth and Sixth Circuits. In *Public Citizen, Inc.* v. *Louisiana Attorney Disciplinary Board*, 632 F.3d 212 (2011), the Fifth Circuit invalidated a rule that required all attorney advertisements to include in large font: "(1) the lawyer's name and office location; (2) a client's responsibility for costs; (3) all jurisdictions in which the lawyer is licensed; (4) the use of simulated scenes or pictures or actors portraying clients; and (5) the use of a spokesperson, whether the spokesperson is a lawyer, and whether the spokesperson is paid." *Id.* at 229 (internal citations omitted). Those disclosure requirements were found to be so burdensome that they "effectively rule[d] out the ability of Louisiana lawyers to employ short advertisements of any kind." *Ibid.* By contrast, the regulations at issue here have no such effect, as demonstrated by petitioner Spirit's fully compliant website, see Pet. App. 15-16, 24. In *International Dairy Foods Ass'n* v. *Boggs*, 622 F.3d 628 (2010), the Sixth Circuit *rejected* a First Amendment challenge to the part of a disclosure requirement that specified a minimum font size, explaining that it had the "self-evident rational basis" of "prevent[ing] marketers" from effectively "hiding the disclosure by manipulating the text." *Id.* at 643. The court invalidated only a separate requirement that the required disclosure appear in a certain "label panel" on the case-specific ground that the government offered no evidence in support of it. *Ibid.*; cf. Pet. App. 8 (discussing record evidence upon which Department relied here).

unfair or deceptive practices. See *United Air Lines, Inc.* v. *Civil Aeronautics Bd.*, 766 F.2d 1107, 1112 (7th Cir. 1985) ("Congress * * * was very concerned to preserve (in the Department of Transportation) authority to enforce [49 U.S.C. 41712].").

Under that authority, the agency can prohibit a practice "merely on the [agency's] conclusion, after an investigation determined to be in the public interest, that a carrier is engaged in an 'unfair or deceptive practice.' No findings that the practice was intentionally deceptive or fraudulent or that it in fact has caused injury to an individual are necessary." *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 302 (1976) (citing *American Airlines, Inc.* v. *North Am. Airlines, Inc.*, 351 U.S. 79, 86 (1956)). The agency reasonably exercised that authority in this rulemaking.

Tellingly, petitioners cite no provision of the Airline Deregulation Act that purportedly barred the agency from adopting the Airfare Advertising Rule, and there is none. Moreover, given petitioners' concession that the Department's longstanding requirement that airlines' advertisements include the full price of their airfares is statutorily authorized, see Pet. 29, their contention that the modest modification of that rule at issue here constitutes wholesale "re-regulat[ion]" of the airline industry (Pet. 33 (capitalization altered)) is empty hyperbole.

As part of their statutory challenge to the rule, petitioners also mistakenly characterize the evidentiary basis for the advertising rule as "handful of comments and anonymous web postings." Pet. 36. As the court of appeals explained, the record was far more robust than that, including hundreds of comments from concerned consumers over the years. See Pet. App. 8. In

any event, a fact-bound administrative-law dispute about the nature of the record supporting the Department's exercise of its statutory authority in this case would not warrant this Court's review.

2. Petitioners' challenge to the 24-Hour Rule likewise does not merit review. Petitioners make no attempt to address the court of appeals' observation that the Department "found that airlines were routinely misleading consumers with vague customer service policies," or that consumers' reasonable expectations were "thwarted by airlines with vague policies." Pet. App. 20. Nor do they cite any provision of the Airline Deregulation Act that would bar the agency from exercising its longstanding authority to bar deceptive and unfair practices by adopting this rule. Indeed, 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." *Id.* at 19.

Contrary to petitioners' implication (Pet. 34), the rule does not prohibit nonrefundable tickets. Instead, it merely requires airlines to hold reservations without payment, or allow cancellation without penalty, for 24 hours. And that requirement applies only "if the reservation is made one week or more prior to a flight's departure." 14 C.F.R. 259.5(b). As the agency explained, even before this rule, petitioner Spirit Airlines itself already allowed travel agents to reserve seats (though not fares) for 24 hours, and would provide a "courtesy refund" within 24 hours of purchase in certain circumstances. Pet. App. 55.

At bottom, petitioners' contention is that the 24-Hour Rule should be vacated because the Department lacked sufficient evidence to support its adoption. See

Pet. 36. That record-intensive claim lacks merit, see Pet. App. 20 (discussing "over a decade's worth of recorded experience" underlying rule), and, in any event, does not merit this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT S. RIVKIN
General Counsel
PAUL M. GEIER
Assistant General Counsel
PETER J. PLOCKI
Deputy Assistant General Counsel for Litigation
TIMOTHY H. GOODMAN
Senior Trial Attorney
SAMUEL PODBERESKY
Assistant General Counsel for Aviation
BLANE WORKIE
Deputy Assistant General Counsel for Aviation Enforcement & Proceedings
Department of Transportation

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Principal Deputy Assistant Attorney General
MICHAEL S. RAAB
DANIEL TENNY
Attorneys

FEBRUARY 2013