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Supreme Court won't hear Spirit Airlines' appeal of ad price policy

By: [Michael Doyle](#) – April 1, 2013

Feisty ad tactics from Florida-based Spirit Airlines won't become a First Amendment test for the Supreme Court, after all.

In a case closely watched by the airline industry and free-speech advocates alike, the court declined Monday to hear Spirit's challenge to federal mandates on how prices are advertised. The court's decision effectively upholds Department of Transportation rules opposed by several airlines and civil libertarians who are concerned about government controls over commercial speech.

"We are disappointed and disagree with the decision," Misty Pinson, Spirit's director of corporate communications, said in an email Monday. "American consumers are going to pay more for air travel, and have less choice, as the government continues to pile costly new rules onto an already over-regulated and overtaxed industry."

At the same time, Pinson said the company "will continue to be in compliance with the rules."

Allegiant Air spokeswoman Jessica Wheeler added that "we're certainly disappointed by the court's decision."

Southwest Airlines spokesman Chris Mainz likewise added that the company is "disappointed in the court's decision" but will "remain in full compliance."

Spirit, joined by Allegiant and Southwest, opposed the federal rule that spells out how ticket prices are listed in ads. Among other things, the rule essentially prohibits airlines from overemphasizing the role that taxes play in a ticket's total cost. The airlines argued that the rule violates free-speech rights.

"Such a government effort to micromanage 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," Spirit's attorneys wrote in a legal brief.

Underscoring the high stakes, the attorney who represented Spirit in its thwarted Supreme Court challenge was former Bush administration Solicitor General Paul Clement, who argued before the Supreme Court last week on the Defense of Marriage Act case.

The International Air Transport Association likewise had urged the court to review the rules that it said extended “down to the size of typeface.” Libertarian-minded lawyers with the Cato Institute and other free-market groups said the Spirit Airlines case offered the court a chance to clarify broader questions about controls on commercial speech .

Obama administration officials argued, with apparent success, that the court should leave the airline advertising rules alone.

“The regulation was a reasonable exercise of the agency’s authority and imposes little or no burden on airlines’ ability to communicate truthful information,” Justice Department attorneys wrote, adding that airlines can still “provide information to customers about taxes.”

Spirit Airlines’ website, for instance, is still able to characterize taxes as the “government’s cut,” in type slightly smaller than the total ticket price.

Four of the court’s nine justices must agree for a case to be heard. The Supreme Court hears only about 75 cases annually, out of about 8,000 petitions received.

With headquarters in Miramar, Fla., about 20 miles north of Miami, Spirit has long burnished its reputation as a low-cost carrier with provocative, and at times controversial, advertising. Past ads, for instance, have played off salacious scandals involving golfer Tiger Woods and President Barack Obama’s Secret Service detail.

Advertising ticket prices poses a different kind of controversy.

Since 1984, the Department of Transportation has required that advertised airline ticket prices disclose the “entire price,” including taxes. Airlines formerly could list the ticket prices and taxes separately, leaving it up to the consumer to add up the total.

In 2010, the department elaborated that while the airlines could list taxes separately, they couldn’t list the tax component “prominently” or “in the same or larger size as the total price.” Officials said they feared that airlines would manipulate ads so the taxes overshadowed the total cost. Airlines countered that they wanted to draw attention to rising taxes and fees, which now account for about 20 percent of a typical ticket’s total cost.

In its decision Monday, issued without explanation, the Supreme Court effectively upheld a lower court’s decision that sided with the Department of Transportation.

“This prevents airlines from confusing consumers about the total cost of their travel,” the U.S. Court of Appeals for the District of Columbia Circuit said last year, in a 2-1 decision, adding that “the rule is aimed at providing accurate information, not restricting it.”