

Brief of the Week: A call to elevate the status of commercial speech

By: Jamie Schuman - March 13, 2013

Spirit Airlines boasts about its cheap flights and discounted tickets. But the carrier is concerned that government taxation is making that promise hard to live up to.

Spirit and two other low-cost airlines are petitioning the Supreme Court to strike down a U.S. Department of Transportation regulation that requires carriers to prominently display the total price of flights—including taxes—on their websites. Previously, airlines could highlight the base fare, so long as they disclosed the taxes at some point too.

In *Spirit v. Department of Transportation*, Spirit, Southwest and Allegiant airlines argue that the so-called "Total Price Rule" violates the First Amendment by restricting carriers' ability to spotlight and criticize government fees. An amicus brief by the National Federation of Independent Business Small Business Legal Center and the Cato Institute takes this argument one step further: It sees the airlines' fight as the ideal vehicle for the court to find that commercial speech deserves the same level of protection as other types of speech.

The amici are urging the court to overturn *Central Hudson Gas and Electric Corporation v. Public Service Commission*, a 1980 case that introduced an intermediate-scrutiny analysis for commercial speech cases. Other types of speech typically receive strict scrutiny, which is more deferential to First Amendment rights.

"Fundamentally, we've always been concerned about the fact that, for lack of a better analogy, commercial speech is just like the red-headed stepchild of the First Amendment," said Karen Harned, executive director of the NFIB Legal Center. "There's really no rational reason for that if you look at the text and the history of the First Amendment."

The NFIB, in Washington, represents 350,000 small businesses, which can get "very passionate" about how commercial speech restrictions and hidden government fees affect their work, Harned explained. Cato, a policy group that promotes limited government, also signed the brief.

Steven Engel, a partner at Dechert and a former clerk to Justice Anthony Kennedy, is counsel of record. He previously filed a brief in support of the NFIB's challenge to the Affordable Care Act.

"When we did our first call on how we were going to argue it, it was clear that we were all on the same page," Harned said of her collaborators on Spirit.

The amici want their idea to take flight because they see the line between commercial and political speech as hazy. They also argue that the court has not given a clear rationale for why commercial speech gets less protection than other types of speech.

"[T]here is no theoretical or practical reason to think that American citizens are less able to ascertain the truth among variegated and discordant messages in the commercial marketplace than in the political marketplace," Engel wrote in the brief.

In *Spirit*, the U.S. Court of Appeals for the D.C. Circuit decided last July that the airlines were engaging in commercial—and not political—speech when they highlighted the cost of government taxes on their websites. That court applied an even less demanding test than *Central Hudson* requires, and upheld the Department of Transportation policy.

Still, the D.C. Circuit stressed that airlines could list the cost of taxes and other price components, so long as they did not display them "prominently" or "in the same or larger size as the total price."

And *Spirit*, for one, certainly highlights those taxes. Though the company lists the total price of flights in a slightly larger type size on its website, it also details what it calls the "Government's Cut" and has click-through buttons where people can learn more about the fees.

To the amici, the *Spirit* site shows how the company straddles commercial and political speech—and how the *Central Hudson* standard is unworkable. Under that test, courts first determine if speech is commercial. They then consider such factors as whether the speech is misleading, and whether there is a reasonable fit between the regulation and a substantial government interest.

But, as Engel wrote, many justices have criticized the test and lower courts have had difficulty applying it uniformly. The doctrine has become more muddled in recent years because tools like Facebook and Twitter make it easier for companies to engage in both commercial and political speech, the brief states.

"[W]hether the speech at issue here is labeled as commercial speech or not, any rule restricting speech that is truthful but critical of the government and its taxation burdens is noxious to the First Amendment," Engel wrote.