Spirit Airlines v. U.S. Dep't of Transportation

Brief Of Amici Curiae CATO Institute And The National Federation Of Independent Business Small Business Legal Center In Support Of The Petitioners

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It is axiomatic that the freedom of speech is vitally important to our democratic society and that being able to criticize the government is at the core of this freedom. Yet government officials are constantly inventing new ways to limit such criticism, particularly with respect to regulatory and tax burdens. In April 2011, the Department of Transportation imposed several new pricing regulations on the airline industry, most burdensome of which is that airline advertisements must now "prominently" feature the "total price" of the advertised fare, inclusive of all taxes and fees. Any information highlighting the part of the price constituting the government's cut "may not be presented in the same or larger size as the total price." This font regulation (!) means that the tax-and-fees portion often cannot be displayed whatsoever or, at most, is relegated to a small and non-obvious size and placing. Three low-cost carriers — Spirit, Allegiant, and Southwest — have challenged the regulations because they are now largely unable to prominently identify, and thus criticize, the excessive and ever-growing portion of fares attributable to taxes, fees, and airport facility charges. The airlines contend that the regulations violate the First Amendment and also raise broader questions regarding the treatment of commercial speech. Under current jurisprudence, courts afford "commercial" speech far less protection than other kinds — this despite the inherent difficulties in categorizing speech and that most commercial speech is intertwined with other forms of speech (political, artistic, etc.). No reasoning has ever been truly accepted for the distinction in protection. Indeed, truthful commercial speech can be just as important as fully "political" speech in drawing attention to the government's missteps: The DOT regulation at issue in the lawsuit described here restricts speech that is both truthful and critical of the government. And it's no excuse to suggest that airlines can complain elsewhere because making the tax burden obvious to consumers at the exact moment when they care most about the issue — when buying the affected airline tickets — is the most effective speech possible under the circumstances. Nevertheless, a divided U.S. Court of Appeals for the D.C. Circuit ruled against the airlines. Cato has now joined the National Federation of Independent Business in filing an amicus brief urging the Supreme Court to hear this case, which is also important because it involves an executive agency's effort to obscure the true extent of the government's tax burden and to effectively re-regulate an industry that Congress deregulated decades ago. In the 1941 case of Milk Wagon Drivers Union v. Meadowmoor Dairies, the Supreme Court said: "The First Amendment is often inconvenient. But that is beside the point. Inconvenience does not absolve the government of its obligation to tolerate speech." Spirit Airlines v. DOT presents the Court with an opportunity to clarify the law on commercial speech by ending the distinction between commercial and noncommercial speech and granting truthful commercial speech full First Amendment protection.

Please see full brief below for more information.