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 FOR AIRLINES FOR AMERICA AND AIR LINE PILOTS ASSOCIATION, INT'L AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

BRIEF FOR *AMICI CURIAE* 1

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. THE D.C. CIRCUIT FAILED TO REQUIRE ANY EVIDENCE THAT THE PROMINENCE FORMATTING REQUIREMENT WAS REASONABLY NEEDED TO PREVENT CONSUMER DECEPTION 7

A. The Prominence Formatting Requirement 7

B. The Complete And Undisputed Absence Of Any Evidence Justifying The Prominence Formatting Requirement 9

II. THE D.C. CIRCUIT'S FAILURE TO REQUIRE EVIDENCE JUSTIFYING THE PROMINENCE FORMATTING REQUIREMENT WARRANTS THIS COURT'S REVIEW 11

A. The D.C. Circuit's Decision Directly Conflicts With Decisions Of The Fifth And Sixth Circuits That Have Invalidated Unjustified Prominence Formatting Requirements In Mandatory Commercial Disclosures 11

B. The D.C. Circuit's Decision Is Especially Troubling Given The Adverse Effect On Political Speech Criticizing Excessive Taxation Of The Airline Industry 14

C. The D.C. Circuit's Decision Is Particularly Problematic Given The Adverse Effect On The Deregulation Of The Airline Industry 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Alexander v. Cahill,
598 F.3d 79 (2d Cir. 2010) 19

Edenfield v. Fane,
507 U.S. 761 (1993) 14

Ibanez v. Fla. Dep't of Bus. & Prof'l Reg.,
512 U.S. 136 (1994) 12

In re R.M.J.,
455 U.S. 191 (1982) 19

Int'l Dairy Foods Ass'n v. Boggs,
622 F.3d 628 (6th Cir. 2010) 6, 13, 14

Milavetz, Gallop & Milavetz, P.A. v. United States,
130 S. Ct. 1324 (2010) 12

Pearson v. Shalala,
164 F.3d 650 (D.C. Cir. 1999) 19

Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.,
632 F.3d 212 (5th Cir. 2011) 6, 12, 14, 19

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) 17

Sorrell v. IMS Health Inc.,
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Zauderer v. Office of Disciplinary Counsel,
471 U.S. 626 (1985) ....*passim*

STATUTES

1978 Airline Deregulation Act,
Pub. L. No. 95-504, 92 Stat. 1705 3

49 U.S.C. § 40101(a)..17, 18

49 U.S.C. § 41712(a) 3, 18, 19

RULES AND REGULATORY AUTHORITIES

14 C.F.R. § 399.84(a) 3, 8

76 Fed. Reg. 23,110 (Apr. 25, 2011)............3, 8, 9, 10

Petition of Joel Kaufman,
Order 2003-3-11, (DOT Mar. 18, 2003),
http://www.regulations.gov/#!documentDeta
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aying_Field_June_2012.html.............................. 16

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%20Letter%Urging%20Rejection%20of%20
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http://www.whitehouse.gov/sites/default/file
s/omb/budget/fy2012/assets/jointcommitteer
eport.pdf.. 15

BRIEF FOR *AMICI CURIAE*

Airlines for America ("A4A") and Air Line Pilots Association, Int'l ("ALPA") respectfully submit this brief as *amici curiae* in support of Petitioners.[1]

INTEREST OF *AMICI CURIAE*

A4A, formerly known as Air Transport Association of America ("ATA"), is the principal trade and service organization of the U.S. scheduled-airline industry. Its members carry 86% of U.S. passenger and cargo traffic annually. A4A seeks to foster a business and regulatory environment that ensures safe and secure air transportation while permitting U.S. airlines to flourish, which stimulates economic growth locally, nationally, and internationally. As part of that mission, A4A identifies, highlights, and challenges policies and laws that impose unwise regulatory burdens or impinge on marketplace freedoms, such as excessive taxation. And it therefore advocates for consensus industry positions on important policy and legal issues in administrative and judicial proceedings.

ALPA is the largest airline pilot union in the world. It represents nearly 51,000 pilots at 35 U.S. and Canadian airlines. In addition to negotiating contracts on behalf of pilots, ALPA advocates pilots'

[1] Counsel of record for all parties received notice at least 10 days prior to this brief's due date of *amici*'s intention to file. The parties' letters of consent to the filing of this brief are on file with the Clerk. No counsel for a party authored this brief in whole or in part. No person other than *amici*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no party or party's counsel made such a contribution (though Petitioner Southwest Airlines Co. is a member of A4A and so indirectly contributed).

views to all airline industry decision-makers, including federal agencies and courts. Like A4A, ALPA believes that high taxes and the regulations addressed here are harmful to airline employees, airlines themselves, and the traveling public.

As Petitioners have explained, the Department of Transportation ("DOT") has promulgated a regulation (the "Total Price Rule" or "Rule") that radically transforms airline price advertising. *See* Pet. 8-13. In the airline industry, as in myriad other industries, the longstanding advertising practice has been generally to state the individual components of a ticket's total price separately. Advertisements initially break out (1) the base price chosen by airlines, from (2) the taxes and fees imposed by the Government, leaving the total price to be implicitly calculated by the consumer. Of course, before the final purchasing decision is made, airlines explicitly present the consumer with the total purchase price. This is how products and services are priced and sold in virtually every other industry—from groceries and cars to telephone charges and internet bills.

The Total Price Rule requires the airline industry to abandon this standard practice, in two distinct ways. *First,* it compels airlines to expressly state the total price of a ticket *inclusive* of taxes and fees at all times when price is advertised. *Second*, it also prohibits airlines from separately stating any individual price components *more prominently* than the total price. In other words, airlines are prohibited from using location, size, or other formatting techniques to separately emphasize the base price, taxes and fees, or other price components, *even if* the mandated total-price statement

nevertheless remains clear and conspicuous at all times. *See* 76 Fed. Reg. 23,110, 23,166 (Apr. 25, 2011) (amending 14 C.F.R. § 399.84(a)).

A4A and ALPA support Petitioners' challenge to the Total Price Rule for several related reasons. *First*, the Rule micro-manages the content and format of airline advertising with no real evidence that these specific regulations are needed to prevent consumers from being deceived. This is precisely the type of onerous and unwarranted regulation of the airline industry that *amici* oppose. *Second*, the Rule hinders the ability of airlines to inform consumers about the oppressive and ever-increasing tax burdens that the Government specially imposes on the airline industry. The effective dissemination of this political message is vital to the industry. *Finally*, the Rule is part of a larger effort by DOT, notwithstanding the 1978 Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705, to broadly re-regulate airline industry pricing and services under the guise of its narrow residual authority to prevent deceptive or unfair practices, 49 U.S.C. § 41712(a). This threatens to destroy the significant benefits for the industry and its consumers that three decades of deregulation have created.

SUMMARY OF ARGUMENT

As Petitioners have explained, the D.C. Circuit held that the Total Price Rule is authorized by the Airline Deregulation Act and permitted by the First Amendment under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). In short, the panel majority reasoned that the Rule is simply a commercial disclosure requirement that is reasonably related to preventing consumers from

being deceived about the full cost of airline tickets. *See* Pet.App. 6-19. Although *Amici* entirely agree with Petitioners' powerful arguments why the D.C. Circuit's erroneous decision warrants this Court's review, they respectfully submit this brief in order to emphasize an important additional argument in support of granting the petition and reversing.

To briefly recapitulate, Petitioners have already identified two fatal defects in the D.C. Circuit's decision that render it worthy of certiorari. *First*, as a threshold matter, compelling airlines to expressly calculate and state a ticket's total price *inclusive* of taxes and fees in all price advertisements is an entirely unnecessary and onerous disclosure requirement. It thus fails any level of First Amendment scrutiny and also exceeds DOT's statutory authority under the Airline Deregulation Act. Forcing airlines to state the total price at all times and in all forms of media, particularly social media, creates serious difficulties. Yet consumers cannot possibly be deceived about the ticket's full cost in the absence of this novel total-price mandate: not only are consumers easily able to add the figures together during the initial stages of the purchasing process, but, in addition, they are always presented with the final, total purchase price before deciding to make the purchase. *See* Pet. 10-11, 24-26, 36-37.

Second, and perhaps more importantly, banning airlines from additionally stating the ticket's base price or taxes and fees *more prominently* than the ticket's total price is not an affirmative disclosure requirement at all. Rather, that ban is a negative restriction on an airline's ability to emphasize its own speech. It thus is subject to far more stringent

First Amendment scrutiny than *Zauderer*'s reasonableness standard. Specifically, it should be reviewed, and invalidated, under at least intermediate scrutiny as a restriction on commercial speech promoting an airline's low base fares, if not strict scrutiny as a restriction on political speech criticizing federal tax policy. *See id.* 17-24, 26-29. *Amici* agree with these arguments by Petitioners and will not repeat them in this brief.

Instead, *amici* wish to emphasize an *additional* reason why this case is worthy of certiorari, even assuming *arguendo* that: (1) the Rule's mandated total-price statement is a valid commercial disclosure requirement under *Zauderer* and the Airline Deregulation Act; and (2) the Rule's ban on stating individual price components more prominently than the required total-price statement is also subject to no greater First Amendment scrutiny than *Zauderer*. Namely, even accepting these two (erroneous) assumptions, the D.C. Circuit still failed to require DOT to adduce any evidence that the prominence formatting requirement is reasonably required to prevent consumer deception, instead deeming that point self-evident. Such a conclusory application of *Zauderer* to commercial disclosure formatting requirements squarely conflicts with decisions of two other circuit courts and raises important questions of federal law in the context of the airline industry.

In particular, the D.C. Circuit majority held that "it goes without saying that requiring the total price to be the most prominent number is reasonably related to th[e] interest" in "prevent[ing] consumer confusion about the total price they have to pay." Pet.App. 17. But, as Judge Randolph's dissent

cogently observed, that simply is not true. Neither the evidentiary record below nor even common-sense suggests that any real-world consumer would be confused if the mandated total-price statement were displayed *conspicuously, yet less prominently* than the base fare or taxes and fees that airlines wish to emphasize. *See id.* 30-34. In short, the majority's decision upholding the Rule's prominence formatting requirement rests on nothing more than *ipse dixit*.

That crucial aspect of the decision below warrants this Court's review for three reasons:

First, the D.C. Circuit's decision directly conflicts with decisions of the Fifth and Sixth Circuits. Those courts, applying *Zauderer*, have invalidated formatting rules requiring that mandatory commercial disclosures have similar prominence as the regulated entity's speech, on the ground that there was no evidence that similarly prominent formatting was reasonably required for the disclosures to prevent consumer deception. *See Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 228-29 (5th Cir. 2011); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 642-43 (6th Cir. 2010).

Second, the complete failure of DOT to justify the need for the prominence formatting requirement is particularly pernicious because the requirement has the effect, and perhaps even the purpose, of hindering airlines' opposition to the Government's tax policy. The prominence requirement forces airlines to de-emphasize not just commercial speech about their own base fares, but also core political speech criticizing excessive federal taxation of the industry, which was a hotly debated issue when the Rule was enacted (and remains so today).

Third, the D.C. Circuit's lax inquiry into the real-world risk of consumer deception more generally threatens to subvert the Airline Deregulation Act. It opens the door for DOT to try to broadly re-regulate the industry through pretextual findings of deception whenever airlines adopt normal business practices that the agency disfavors on other policy grounds. Indeed, this dynamic is vividly illustrated by the D.C. Circuit's separate holding rubber-stamping the DOT's "24-Hour Refund Rule," which Petitioners also correctly challenge. *See* Pet. 13-14, 33-38.

For these reasons, explained further below, the petition for a writ of certiorari should be granted.

ARGUMENT

I. THE D.C. CIRCUIT FAILED TO REQUIRE ANY EVIDENCE THAT THE PROMINENCE FORMATTING REQUIREMENT WAS REASONABLY NEEDED TO PREVENT CONSUMER DECEPTION

The Total Price Rule specifically requires that the mandated total-price statement must be more prominent than any statement of the ticket's individual price components. But the D.C. Circuit did not require DOT to adduce any evidence that this prominence formatting requirement was specifically needed to prevent consumer deception.

A. The Prominence Formatting Requirement

In relevant part, the Total Price Rule provides as follows:

> The [DOT] considers any advertising or solicitation … for passenger air transportation … that states a price … to be an unfair and deceptive practice in violation

> of 49 U.S.C. § 41712, *unless the price stated is the entire price to be paid by the customer*.... Although charges included within the single total price listed (e.g., government taxes) may be stated separately ..., such charges may not be ... *displayed prominently[] ... [or] in the same or larger size as the total price* ....

76 Fed. Reg. at 23,166 (amending 14 C.F.R. § 399.84(a)) (emphases added).

Accordingly, the Rule goes well beyond even the unnecessary mandate that airline advertising must always contain a total-price disclosure, and even that the total-price disclosure must be displayed "prominently." It additionally imposes a formatting requirement concerning the *relative* prominence of the mandatory total-price disclosure and the airline's own speech about the individual price components.

As upheld by the D.C. Circuit based on DOT's litigation position, this prominence formatting requirement means that the "break-out of per-person charges cannot be in a *more prominent* place ... than the total advertised 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." *See* Pet.App. 17 (emphasis added and internal quotation marks omitted). In fact, DOT's contemporaneous comments accompanying the Rule seemed to construe the formatting requirement even more stringently, as Judge Randolph's dissent correctly observed. *See id.* 25-27 & n.1 (identifying administrative comments that taxes and fees must be stated in "significantly smaller type"). But the panel majority emphasized

repeatedly that it was deferring to DOT's subsequent interpretation that the formatting requirement "mean[s] only" that the mandated total-price statement must be "more prominent" than any voluntary statement of the individual price components. *See id.* 4, 9, 16-18. In all events, regardless of exactly how much more prominent the total-price disclosure must be, the Rule requires that the airline's own speech about the individual price components must be *less* prominent, thus inhibiting the airlines' ability to emphasize the size of the Government's cut.

B. The Complete And Undisputed Absence Of Any Evidence Justifying The Prominence Formatting Requirement

As noted, the D.C. Circuit majority held that the prominence formatting requirement satisfied the First Amendment and the Airline Deregulation Act because "it *goes without saying* that requiring the total price to be the most prominent number is reasonably related to [DOT's] interest" in "prevent[ing] consumer confusion about the total price they have to pay." *Id.* 17 (emphasis added); *accord id.* 9 (deeming this to be a "reasonable theory"). In other words, as Judge Randolph's dissent emphasized (without contradiction or dispute), the majority's holding on this critical issue was *ipse dixit*:

> [N]either the [DOT] in its rulemaking nor the government in its brief explains why disclosure of taxes in the same or larger font size as the total price, or at the top of a page rather than at the bottom, or in bold typeface rather than regular typeface, would confuse

> anyone. And neither the [DOT] in its rulemaking nor the government in its brief cites any sort of evidentiary support for such a notion. The majority's opinion cites nothing either.

Id. 31.

Judge Randolph explained that, instead, "[t]he only evidence in the record indicates that consumers 'feel' misled when the total price is not disclosed or is hidden in footnotes and hyperlinks." *Id.* 30 n.4. Even apart from the significant flaws with that purported evidence, *see* Pet. 24-26, 36-37, it *at most* supports mandating that the total price be displayed *conspicuously*. It thus was a "*non sequitur*" for DOT to invoke that evidence to justify further mandating that the total price be displayed *most prominently* (and thereby subordinating the airlines' own speech to a *less* prominent position). Pet.App. 31 n.5.

In fact, as Judge Randolph further explained, it defies common-sense to suggest that consumers may be deceived unless the total price is displayed *most* prominently. "People get bills all the time that breakout the components of the total amount due," and "[m]any list the total amount due at the bottom of the page—not at the top as the [DOT]'s rule requires." *Id.* 34. But "only a fool would confuse or misunderstand" the amount of the "total charge" so long as it was conspicuously displayed, "regardless of how prominently the taxes and fees [or base price] were displayed in comparison." *See id.*

Indeed, the irrationality of the formatting requirement is vividly illustrated by the website price displays of Petitioner Spirit Airlines, which the majority separately (and erroneously) invoked when

concluding that the burden imposed by the formatting requirement is minimal. *See id.* 15-18, 24. In particular, while the Rule requires that the "Total Price" be stated slightly larger than "[Spirit]'s Price" and the "Government's Cut," it is crystal clear that no reasonable consumer could possibly be confused if the relative sizes were flipped.

II. THE D.C. CIRCUIT'S FAILURE TO REQUIRE EVIDENCE JUSTIFYING THE PROMINENCE FORMATTING REQUIREMENT WARRANTS THIS COURT'S REVIEW

There are three related reasons why this Court should review the D.C. Circuit's failure to require DOT to adduce any evidence justifying the Total Price Rule's prominence formatting requirement. *First*, that failure squarely conflicts with decisions of the Fifth and Sixth Circuits. *Second*, that failure underscores the impropriety of the burden imposed on airlines' political speech concerning federal taxation. *Third*, that failure facilitates DOT's improper efforts to re-regulate the airline industry.

A. The D.C. Circuit's Decision Directly Conflicts With Decisions Of The Fifth And Sixth Circuits That Have Invalidated Unjustified Prominence Formatting Requirements In Mandatory Commercial Disclosures

In *Zauderer*, this Court established the standard of review under the First Amendment for speech regulations that just require factual commercial *disclosures* rather than impose commercial speech *restrictions*. It held that the mandatory disclosure: (1) must be "reasonably related to the [Government]'s interest in preventing deception of consumers"; *and* (2) cannot be "*unjustified or unduly*

burdensome." *Zauderer*, 471 U.S. at 651 (emphasis added); *accord Ibanez v. Fla. Dep't of Bus. & Prof'l Reg.*, 512 U.S. 136, 146-47 (1994); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339-40 (2010). For precisely that reason, the Fifth and Sixth Circuits have applied *Zauderer* to invalidate formatting rules requiring that mandatory commercial disclosures must have similar prominence as the regulated entity's speech, where, as here, the Government failed to introduce any evidence that the prominence formatting requirement was reasonably justified to facilitate the disclosure's prevention of consumer deception.

In *Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board*, the Fifth Circuit upheld a mandatory disclaimer for attorney advertisements that used actors posing as clients, but it struck down the disclaimer's prominence formatting requirement. 632 F.3d at 228-29. In particular, the court invalidated the requirement that the disclaimer in written advertisements use a font size "as large as the largest print size used," and that the disclaimer in televised advertisement be "spoken at the same or lower rate of speed as the other spoken content." *Id.* at 228. The court reasoned that, while there was evidence that "previous disclaimer requirements were ineffective" because they were written "too small" or spoken "too quickly," that alone was "*not evidence*" that the "*specific requirements*" adopted were reasonably justified to prevent consumer deception. *Id.* at 229 (emphases added). In other words, there was evidence, at most, of the need for a prominent disclaimer—but *not* a disclaimer *equally prominent*, let alone *more prominent*, than the advertiser's own commercial speech.

Likewise, in *International Dairy Foods Association v. Boggs*, the Sixth Circuit upheld a mandatory disclaimer for the label of certain milk products, but it struck down the disclaimer's prominence formatting requirement. 622 F.3d at 642-43. In particular, the court invalidated the requirement that the disclaimer must be placed "contiguous[ly]" to the manufacturer's label speech that it concerned, rather than placed elsewhere on the label and "link[ed] … through the use of an asterisk." *Id.* at 643. The court reasoned that, while the state agency "asserted, *without any supporting evidence*," that non-contiguous disclaimers might be overlooked, the contiguity requirement "ha[d] *no demonstrable connection* to ensuring that consumers are not misled." *Id.* (emphases added). Again, therefore, it was insufficient for the Government simply to show that a *prominent* disclaimer was needed—it needed to introduce evidence justifying the disclaimer's *relative* prominence as compared to the commercial speech that it was burdening.[2]

The D.C. Circuit's decision is irreconcilable with these cases. At a general level, the D.C. Circuit did not require DOT to justify the "most prominent" formatting requirement with any actual evidence. Instead, it conclusorily asserted that it "goes without saying" that this requirement is reasonably related

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[2] To be sure, the Sixth Circuit did uphold as "self-evident" other formatting requirements that "prevent[ed] label designers from hiding the disclosure by manipulating the text." *Int'l Dairy Foods Ass'n*, 622 F.3d at 643. But, in stark contrast to the Total Price Rule, those obviously reasonable requirements merely ensured the disclaimer was *conspicuous*, not the *most prominent*—*e.g.*, the disclaimer only needed to be "half the size" of the manufacturer's speech, not the same size or larger. *Id.*

to preventing consumer deception. *Supra* at 9-10. More specifically, the D.C. Circuit allowed DOT to make the unsubstantiated leap from the alleged need for a *conspicuous* total-price disclosure to the stricter requirement of the *most prominent* one. *Supra* at 10-11. Not only did the court's decision thus conflict with the decision of two other circuit courts, but it is fundamentally incompatible with the First Amendment, which imposes upon the Government the "burden of justifying" that "the harms it recites are real" and therefore requires evidence rather than "mere speculation or conjecture." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

In sum, even accepting the D.C. Circuit's (flawed) characterization of the prominence formatting requirement, *but see supra* at 4-5, the court's decision upholding it under *Zauderer* conflicts with the decisions of the Fifth and Sixth Circuits.

B. The D.C. Circuit's Decision Is Especially Troubling Given The Adverse Effect On Political Speech Criticizing Excessive Taxation Of The Airline Industry

As *Public Citizen* and *International Dairy Foods Association* make clear, federal courts will invalidate unjustified formatting requirements in mandatory commercial disclosures even when the speech burdened by the requirement is purely commercial. DOT's Total Price Rule is thus especially troubling, because the speech it burdens is not "just" commercial speech, but in fact is often political in nature. Specifically, airlines must needlessly make less prominent than the total-price disclosure their own speech explaining that the reason the total price is so high is the Government's excessive taxation.

The airline industry faces an extraordinarily heavy federal tax burden. As A4A explained in its comment letter during the administrative rulemaking, federal taxes and fees can increase the cost of a fare by *more than 20%*, which is greater than the taxation of products such as alcohol, tobacco, and firearms. *See* CADC J.A. 449-51. Notably, moreover, shortly after DOT promulgated the Rule, the President further proposed sharp increases to certain airline taxes.[3]

Accordingly, while the Rule was being considered, enacted, and challenged, A4A was engaged in a vigorous effort on behalf of its members to lobby the public and lawmakers about the adverse effect of excessive federal taxation on the industry, its customers, and its other stakeholders. For example, A4A wrote op-eds in influential newspapers,[4] and it wrote letters to key members of Congress.[5] A4A has continued to disseminate this political message as a central component of its campaign for a National Airline Policy, including through a citizen petition supporting reduced taxes,[6]

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[3] *See* The President's Plan for Economic Growth and Deficit Reduction, 22 (Sept. 19, 2011), http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/jointcommitteereport.pdf.

[4] *See, e.g.*, Nicholas E. Calio, Opinion, *The Air Travel 'Sin' Tax*, Wall St. J., May 26, 2011, at A15.

[5] Letter from Nicholas E. Calio, President and CEO of ATA, to Hon. Joseph I. Lieberman and Hon. Susan M. Collins, Chairman and Ranking Member, Committee on Homeland Security and Governmental Affairs (Nov. 2, 2011), http://www.airlines.org/Pages/ATA%20Letter%20Urging%20Rejection%20of%20Increase%20in%20Passenger%20Security%20Tax.aspx.

[6] *See* http://nationalairlinepolicy.com/default.aspx.

and large wall-wrap advertisements at Reagan National Airport.[7] ALPA likewise has strongly and consistently advocated for tax reform that would make the airline industry more competitive.[8]

But one of the most effective ways to convey this political message, as this Court generally has recognized and as Petitioners specifically explain, is by speaking to consumers at the moment when they are purchasing tickets and feeling the sticker shock. *See* Pet. 21-22. That is precisely why Petitioners' advertisements often seek to emphasize and criticize the significant share of the total price that is attributable to federal taxation. *See id.* 18-19.

Yet the Total Price Rule prevents airlines from conveying that political message more prominently than the mandated total-price disclosure, even though there is no evidence whatsoever that this prominence requirement is actually needed so long as the disclosure remains conspicuous. At best, therefore, the disclosure's formatting requirement gratuitously interferes with the political speech of airlines. At worst, though, cognizant of airlines' criticism of federal tax policy, the Rule *intentionally* "burdens th[at] speech … in order to tilt [the] public debate in a preferred direction," *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671 (2011), which is an

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[7] *See* https://media.gractions.com/CB4D4909D6E81FE5A54094 62AE352639DFE6FB51/851ac8f3-72d4-4c3b-9d30-d4544135a4c 0.pdf.

[8] *See* ALPA, *Leveling the Playing Field for U.S. Airlines and Their Employees* (June 2012), http://www.alpa.org/ publications/ALPA_White_Paper_Leveling_The_Playing_Field_ June_2012/ALPA_White_Paper_Leveling_the_Playing_Field_Ju ne_2012.html.

improper effort "to license one side of [the] debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992). Either way, these political-speech implications of the Rule's unjustified prominence formatting requirement underscore the need for this Court's review.

C. The D.C. Circuit's Decision Is Particularly Problematic Given The Adverse Effect On The Deregulation Of The Airline Industry

Although the First Amendment concerns warrant certiorari standing alone, the D.C. Circuit's lax inquiry into the real-world risk of consumer deception more broadly threatens to undermine the Airline Deregulation Act. Specifically, absent a meaningful judicial inquiry into whether a regulated practice is actually deceptive, DOT can continue its efforts to effectively re-regulate the industry by simply characterizing as deceptive many ordinary business practices that it disfavors on other policy grounds.

Congress' decision in 1978 to deregulate the airline industry has proven to be a monumental success for consumers, providing them with significant benefits. As Petitioners have explained, for example, "[b]etween 1980 and 2006, passenger miles tripled and median fares fell by approximately 40%." Pet. 7.

One of the cornerstones of this reform is Congress' instruction that DOT should "plac[e] maximum reliance on competitive market forces" in order "to provide the needed air transportation system." 49 U.S.C. § 40101(a)(6). DOT thus should "rely[] on actual and potential competition" in order

"to provide efficiency, innovation, and low prices" as well as "to decide on the variety and quality of ... air transportation services." *Id.* § 40101(a)(12).

To be sure, DOT retains the limited authority to prevent "unfair or deceptive practice[s] or … method[s] of competition." *Id.* § 41712(a). But, given Congress' deregulatory command, DOT itself previously acknowledged that it must "allow[] the marketplace to govern carrier decisions regarding fares and their associated conditions" absent "*compelling evidence* of consumer deception or unfair methods of competition." *Petition of Joel Kaufman*, Order 2003-3-11, at 2 (DOT Mar. 18, 2003) (emphasis added), http://www.regulations.gov/#!documentDetail;D=DOT-OST-2003-14334-0002.

Accordingly, allowing DOT to regulate the airline practices here based on *unsubstantiated assertions* of consumer deception would seriously undermine the Airline Deregulation Act. Courts must rigorously police the distinction between impermissible deceptive practices and permissible free-market choices, because otherwise DOT will be able to broadly impose its preferred best practices under the pretext of redressing supposed confusion.

Although this problem is presented by the Total Price Rule for the reasons discussed above, it is raised even more starkly by the 24-Hour Refund Rule that the D.C. Circuit likewise rubber-stamped. As Petitioners have explained, there is no credible argument that consumers will be *deceived* by an airline's ordinary business decision not to permit the free cancellation of a reservation within 24 hours of purchase. *See* Pet. 34-35. Although the D.C. Circuit accepted DOT's assertion that consumers had been

"led to expect" that such cancellations were available under "vague customer service policies," Pet.App. 19-20; *see also id.* 4-6, the obvious remedy for any such confusion is to mandate a *clear and unambiguous policy disclaimer*, rather than forcing airlines to provide the service against their will.

Indeed, in the First Amendment context, this Court, the D.C. Circuit, and two other circuit courts all have held that disclaimers are the *presumptive remedy* for consumer confusion absent compelling evidence that they somehow would be inadequate. *See In re R.M.J.*, 455 U.S. 191, 203 (1982); *Pearson v. Shalala*, 164 F.3d 650, 657-59 (D.C. Cir. 1999); *Alexander v. Cahill*, 598 F.3d 79, 95-96 (2d Cir. 2010); *Public Citizen*, 632 F.3d at 224. The D.C. Circuit's abandonment below of this bedrock principle opens the door for DOT to mandate any practice it claims that consumers have come to expect, no matter how clearly airlines disabuse consumers of that expectation. This cannot possibly be a permissible interpretation of DOT's residual authority to prohibit "unfair or deceptive practice[s]." 49 U.S.C. § 41712(a).

In sum, the D.C. Circuit's refusal to require DOT to adduce actual evidence of real-world consumer deception does not just threaten the First Amendment, but the fundamental Congressional policy to deregulate the airline industry.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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