

ORAL ARGUMENT HAS NOT BEEN SCHEDULED
NO. 11-1219 (CONSOLIDATED WITH NO. 11-1222)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SPIRIT AIRLINES, INC., et al.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondent.

On Petition for Review of Final Rules of the Department of Transportation,
Enhancing Airline Passenger Protections, 76 Fed. Reg. 23, 110 (April 25,
2011)

**BRIEF OF INTERACTIVE TRAVEL SERVICES ASSOCIATION AS
AMICUS CURIAE IN SUPPORT OF RESPONDENT**

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**CERTIFICATES AS TO PARTIES, RULINGS, AND RELATED
CASES**

All parties, intervenors and amici are set forth in the Brief for Petitioners, as is the final rule under review and the fact that is matter has not previously been before this court or any other court.

s/Dale C. Andrews
Dale C. Andrews

January 5, 2012

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1, the Interactive Travel Services Association (“ITSA”) states that ITSA is the trade association for global distribution systems and online travel companies, which maintain sophisticated computerized systems that provide airline fare, inventory and other information for hundreds of airlines to thousands of independent travel companies that book airline services for passengers on domestic and international routes, or which provide such information to consumers directly. ITSA has no parent company, is not publicly traded, and no publicly traded company owns 10 percent or more of ITSA.

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GLOSSARY OF ABBREVIATIONS

DOT or Department – United States Department of Transportation

GDS – Global Distribution Systems

ITSA – Interactive Travel Services Association

OTC – Online Travel Companies

STATUTES AND REGULATIONS

Copies of all pertinent statutes and regulations are set forth in the addendum to the Brief of Petitioners.

**STATEMENT OF AUTHORSHIP
AND FINANCIAL CONTRIBUTIONS**

Pursuant to Rule 29(c)(5), ITSA states that no party's counsel has authored this brief either in whole or in part, and that no party other than ITSA and its membership has contributed any funding for the preparation or submission of this brief.

**STATEMENT OF IDENTITY, INTEREST IN CASE
AND SOURCE OF AUTHORITY TO FILE AS AMICUS CURIAE**

The Interactive Travel Services Association (“ITSA”) is the trade association and public policy voice for the major U.S.-based online travel companies (“OTCs”), and for Global Distribution Systems (“GDSs”). GDSs are the entities that aggregate travel data from travel suppliers such as airlines, which generally participate in each GDS (*e.g.*, flight schedules, fares and availability information), provide search functionality to OTCs and traditional travel agencies and allow bookings by such entities. OTCs and traditional travel agencies are responsible for approximately 60% of the sales of airline tickets.¹ Among other services, these outlets provide an alternative to direct bookings with airlines (such as through airline websites) and an effective vehicle for comparison shopping of airline prices and services by passengers. It is this ability to comparison shop through OTCs and other travel agencies, particularly with respect to the cost of travel, that makes them major players in airline distribution.

¹ See July 2010 Government Accountability Report entitled “Consumers Could Benefit from Better Information About Airline-Imposed Fees and Refund of Government-Imposed Taxes and Fees” at page 15 (“GAO Better Information Report”). That Report was attached as Exhibit A to ITSA’s Comments submitted to DOT in the rulemaking proceeding under review. [JA ___].

ITSA's OTC and GDS members are each "ticket agents" within the definition of 49 U.S.C. 40102(45) and as such are subject to DOT's authority to prohibit deceptive practices under 49 U.S.C. 41712 ("Section 41712") to the same extent that airlines are subject to DOT prohibited practices jurisdiction.² Thus, DOT's Advertising Rule (which requires the display of a total price that includes the applicable fare and all government taxes) at issue in this proceeding applies not only to airlines, but also to the display of airline fares by OTCs and other travel agencies.³

ITSA has a strong interest in this case because it supports regulatory efforts to address deceptive pricing practices and to enhance the ability of airline consumers to engage in meaningful price comparison. The Advertising Rule, together with other rules adopted by DOT in the same

² Ticket agents are defined in the statute as "a person (except an air carrier, a foreign air carrier, or an employee of an air carrier or foreign air carrier) that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation." This court has determined that GDSs are ticket agents for purposes of DOT regulation. *See Sabre, Inc. v. Department of Transportation*, 429 F.3d 1113, 1121-25 (D.C. Cir. 2005).

³ This rule is codified at 49 C.F.R. 399.84 and applies by its terms to airlines and to "tickets agents." The rule has been referred to by other parties and amici in this proceeding as the "Airline Advertising Rule" and the "Full Fare Disclosure Rule."

proceeding (and not under challenge in this court), require fuller disclosure of airline fees for ancillary services such as fees for baggage, priority boarding and upgraded seats. For example, the rule recognizes the significantly increased degree to which airlines are imposing separate fees for certain ancillary or optional services, such as checked baggage, that historically were included in base fares, a practice known as “unbundling.” ~~See~~ DOT’s Proposed Rule, 75 Fed. Reg. 32318, 32327 (2010). DOT’s new rules also require that airlines provide information concerning baggage and other ancillary fees on their websites, and that e-ticket confirmations provide information from which a passenger can discern the fees and allowances for any optional baggage services that they may purchase. These DOT fee disclosure rules -- including the Advertising Rule -- serve the interest of enhancing the ability of ticket agents to display, and passengers to understand and compare, the full price offered by competing airlines.⁴

As DOT noted in its decision here under review, “in recent years, carriers are increasingly unbundling the cost of air travel, which further obscures the total fare to be paid by the consumer.” 76 Fed. Reg. 23143. As

⁴ The ancillary fee disclosure requirements adopted by DOT have been codified at 14 C.F.R. 399.85 and 399.87.

ITSA observed at page 5 of its Comments, DOT's Bureau of Transportation Statistics reported that U.S. airlines alone collected \$7.8 billion in ancillary fees in 2009, and the amount collected continues to increase markedly quarter after quarter.⁵ DOT thus concluded that an important justification for the Advertising Rule is the increased degree of passenger confusion that has resulted from the widespread unbundling of base fares into fees imposed for various ancillary services, as well as from other airline practices, such as offering increasingly complex, multi-stop routings. *Id.* In other words, the Advertising Rule's requirement to quote the base fare, with all government taxes included, eliminates one potential source of pricing confusion and deception in the already increasingly confusing setting faced by unwitting consumers. As DOT stated in its preamble to the Advertising Rule, "[i]n order to understand the true cost of travel, consumers need to be able to see the entire price they need to pay to get to their destination the first time the airfare is presented to them." *Id.*

ITSA thus supported DOT's enhanced disclosure rules, including the Advertising Rule, at the rulemaking stage, stating that such a rule, like the

⁵ See

http://www.bts.gov/press_releases/2010/bts021_10/html/bts021_10.html.

proposals for enhanced fee disclosure, “will eliminate passenger confusion and ensure that passengers understand the total cost of air travel.” ITSA Comments at 42. [JA__]. ITSA offers this brief in support of that Rule and in support of DOT’s statutory right under Section 41712 to regulate deceptive and unfair competitive practices as the Department has done in the rulemaking here at issue, and plans to do in a forthcoming rulemaking designed to build on the enhanced disclosure rules it has already adopted.

ITSA believes that it is critical for this Court to affirm the Department’s oversight authority to address consumer issues of this sort, particularly in view of the decisions of U.S. and foreign air carriers over the past several years to increasingly unbundle the air services that they offer by breaking out numerous ancillary service fees from the base air fare. The complexity of airline pricing is such that that consumers utilizing airline websites or the comparative pricing services offered by ITSA members face an increasingly serious challenge in ascertaining the full cost (fares, taxes and ancillary services fees) offered by individual carriers and in undertaking meaningful comparisons of the full cost of travel on an “apples to apples” basis across airlines. This Court should uphold DOT’s ability to address this problem, as the Department has done in the challenged Advertising Rule, as

well as in the unchallenged fee disclosure rules adopted in the same rulemaking.

ARGUMENT

I. THE DEPARTMENT'S CHALLENGED RULES ARE LAWFUL, SUPPORTED BY THE RECORD, AND REQUIRED AS A RESULT OF THE DECISIONS BY AIRLINES TO UNBUNDLE THEIR AIR SERVICES

DOT has not questioned the decision of air carriers and foreign air carriers to move to a system of pricing that breaks historically unitized fares into separate component parts. But in doing so the effect on the traveling public cannot be ignored. As ITSA and other parties demonstrated in their comments before the agency, the result of the carriers' approach is increased confusion on the part of the flying public concerning the total cost of air transportation between any two points. As ITSA pointed out in its Comments before the agency, this confusion will continue unless and until there is complete transparency concerning the total cost that the traveler can expect to pay. ITSA Comments at 8-28. [JA ____]

As is obvious from the record in this proceeding, transparency in air fares has recently become less and less the norm. The Consumer Travel Alliance and ITSA noted in their comments before the agency that a 2010

Consumer Travel Alliance survey found that approximately two-thirds of air travelers say they have been surprised by hidden fees at the airport. ITSA Comments at 12; Consumer Travel Alliance Comments at 1.⁶ [JA__].

Further, ITSA pointed out before the agency the problems that a lack of air fare transparency causes for prospective passengers shopping for the best fare:

In many cases, the airlines don't include the information necessary for transparent shopping on their websites in any fashion, as witnessed by comments from multiple airlines in their filings and as demonstrated by the Consumer Travel Alliance in a YouTube video illustrating the lack of information about fees on airline websites today:

http://www.youtube.com/watch?v=FqDrmXp_US8 The video illustrates that it took a consumer over 20 minutes to conduct one incomplete apples-to-apples comparison of flight and fee offerings on a single city pair search using airline websites.

ITSA Reply Comments at 15. [JA__]. ITSA and others demonstrated in the agency proceeding that members of the general public, industry analysts and members of Congress have all called for DOT to redress this problem.

See, e.g., Comments filed by Senators Menendez, Schumer, Lemieux, Landrieu, Wyden, Begilch and Cardin at 1-2 (urging DOT to require broad disclosure of ancillary fees) [JA__]; ITSA Comments at 13-14 (quoting

⁶ The survey results are available at http://www.businesstravelcoalition.com/cta_survey_results.pdf.

members of Congress who have indicated that DOT should address the issue of air fare transparency) [JA__]; *id.* at Exhibit A (GAO Better Information Report, which concludes that DOT should require greater fee disclosure across all distribution channels) [JA__]; *id.* at 15-16 (quoting newspaper editorials calling for greater fee disclosure) [JA__].

DOT's rule and preamble, set forth in over 50 pages of the Federal Register, summarize fully the record in the agency proceeding and DOT's rationale for promulgating its passenger protection rules, only some of which are challenged by petitioners before this court. 76 Fed. Reg. 23110, *et seq.* DOT's rules are fully warranted, but they also constitute only the beginning of what the agency must ultimately do if it is to ensure complete transparency in airline pricing given the current approach of airlines of unbundling air fares into component fees and then not reflecting the actual amount of such fees in a manner that makes calculation of the total expected price readily ascertainable by the traveling public.

As ITSA has argued, it is critical that consumers have the ability to secure the total cost, and all pricing information, not only from airline websites, but also from any point of sale of air travel. ITSA

Comments at 21-28 [JA__]. To achieve this goal, airlines must be required to share information on their numerous fees for ancillary services with all points of sale by providing that information to the GDSs and OTCs that comprise ITSA's membership. In the proceeding that led to the rules under challenge here, DOT took initial steps towards revising its requirements concerning disclosure of ancillary airline fees. ITSA was an active participant in that proceeding and will continue to advocate before DOT the need for rules that will require broader airline disclosure of all fee information. In fact, DOT has already announced a forthcoming airline consumer protection rulemaking that will build on the disclosure rules it previously adopted, including the Advertising Rule. *See Enhancing Airline Passenger Protections III*, at <http://regs.dot.gov/rulemakings/201112/report.htm#83> (DOT to address whether to require that ancillary fees be displayed through all sales channels).

While Spirit, Allegiant and Southwest argue that DOT lacks authority and a record basis to address these concerns, the petitioners in fact attack only limited portions of the Department's rule.

Specifically, Spirit, Allegiant and Southwest together challenge only one aspect of the rule: the Department's decision that henceforth in addition to the requirement that all ancillary fees must be clearly divulged, governmental fees and taxes must be included in the advertised price of air fares. Spirit and Allegiant (but not Southwest) also challenge two other aspects of the rule: the Department's conclusion that passengers must be allowed in most circumstances to cancel any ticket purchased within the first twenty four hours following purchase, and the Department's decision that ancillary services, principally baggage fees, must be available to passengers at the rate in effect at the time air transportation is purchased.

In its brief, Respondent Department of Transportation has soundly demonstrated the need for the new rule, the rationale for each challenged portion of the rule, and the basis in the record and the law for the agency's decision. The Department's brief correctly describes the agency's broad authority to determine that certain airline practices are deceptive under Section 41712 "on the basis of common sense and experience",⁷ while

⁷ See *United Air Lines v. Civil Aeronautics Board*, 766 F.2d 1107, 1112 (7th Cir. 1985)

putting to rest the altogether false assertion of petitioners that economic deregulation of airline routes and rates in the 1980's somehow reduced DOT's oversight authority to address consumer protection issues. As the Department's brief demonstrates, Petitioners' assertion ignores the fact that when Congress partially deregulated airlines it specifically left intact the consumer protection provisions now codified at Section 41712. DOT Brief at 17-18. Petitioners also overlook the fact that the Department has consistently exercised its consumer protection authority in past decades through rulemakings, guidance documents and enforcement actions such as those discussed further below.

ITSA endorses fully the analysis offered in DOT's brief. Indeed, the positions propounded by petitioners are in many respects illogical on their face. Thus, petitioners Spirit and Allegiant admit that the record before the agency demonstrates that air passengers can be "surprised by the size of the tax burden" that is charged when an air fare is ultimately purchased, and that there is evidence that passengers may mistakenly believe that the amount of such taxes "should be lower," Brief for Spirit and Allegiant at 28.

Nonetheless petitioners contest the Department's conclusion that the actual amount of such taxes should be reflected in the advertised air fare so that the

traveling public will know from the beginning of the process the total price of the air transportation they are purchasing.

Perhaps even more telling is Southwest's assertion, Brief for Southwest at 11, that the Department's rule renders it "impossible to advertise a single accurate price to cover all possible itineraries between the passenger's origin and destination cities." By Southwest's own admission, however, this is only so because there *is* no such "single accurate price." As Southwest points out, *id.* at 10, depending on the chosen routing the total price to be paid by a Southwest passenger in an illustrative trip between El Paso and Las Vegas can vary between \$201.20 and \$211.90. It is hard to fathom Southwest's ultimate conclusion that revealing this actual range of total prices, including governmental taxes, to the consumer will "increase[e] . . . the level of customer confusion." *Id.*

Moreover, in arguing that inclusion of governmental taxes and fees in the advertised fare breaks with the agency's past practice, Petitioners virtually ignore the fact that this break was occasioned by their own decision to embark on a promotional campaign dependent on quoting one fare, but then separately charging for a host of ancillary services. Whatever basis there may have been in the past to except

governmental taxes and fees from the otherwise applicable requirement of 14 C.F.R. 399.84 -- that “any advertising or solicitation . . . that states a price for . . . air transportation” must state “the entire price to be paid by the customer” -- was a basis that existed prior to the decision by airlines to unbundle the services they offer. There is ample authority for DOT to reconsider its prior exception in the light of the plethora of ancillary fees that have now been adopted, and the resulting confusion for passengers attempting to ascertain the precise fees that will be charged in any given circumstance. *See* ITSA Comments at 6 (citing memorandum prepared by the House Committee on Transportation and Infrastructure explaining that there are about 100 different types of fees, the nature and number of which varies from airline to airline) [JA__]; *id.* at 7, 10 (discussing the GAO Better Information Report that identifies a variety of fees and explains that due to these fees and the lack of disclosure, customers and travel agents cannot readily obtain and compare complete trip prices) [JA__]; *id.* at 11-13 (citing various surveys showing that individuals and travel professionals find it difficult to ascertain the true cost of travel and to accurately compare the costs of alternative flights) [JA__].

The arguments offered by Spirit and Allegiant in support of the two aspects of the rule that only they attack are equally wide of the mark. Clearly there is no basis for their argument that the adoption of DOT's 24-hour refund rule – a not at all uncommon consumer protection requirement in the context of other commercial undertakings – “seeks to return the airline industry to the days when most or all airline tickets were fully refundable.” Brief of Spirit and Allegiant at 49. Nor is there any credible basis to attack DOT's decision precluding after-the-fact post purchase adjustments to charges imposed for ancillary services, particularly where, as DOT has now made clear, the rule will only be enforced (pending a further rulemaking) to carry-on and first and second checked baggage fees. DOT Brief at 51-54. What good does it do to make ancillary fees imposed by airlines for carry-on or checked baggage transparent if the carrier then can charge a different, and not previously disclosed, amount when bags are in fact carried on or checked?

In its comments in the agency proceeding, ITSA supported all of DOT's efforts to “arm passengers with more and better information so that those passengers can make better informed decisions in their air

travel choices and plans.” ITSA Comments at 2. [JA__]. ITSA’s main concern throughout this proceeding has been to ensure that airlines disclose transactable fee information to consumers through any means of distribution used by the airlines, including through the important sales channel provided by ITSA’s membership. ITSA believes that the record thoroughly supports the Department’s decisions in these areas, and that this is clearly and forcefully demonstrated in the Department’s brief.

II. THE DEPARTMENT HAS WIDE STATUTORY AUTHORITY UNDER SECTION 41712 TO ADDRESS UNFAIR OR DECEPTIVE AIRLINE PRACTICES

Of at least equal importance to ITSA, however, are the arguments offered by Petitioners in support of their flawed conclusion that promulgation of the Department’s Advertising Rule is somehow beyond the Department’s statutory authority. Before the agency and before this court Petitioners have argued that except in extreme circumstances the Department lacks any authority to address the matters here at issue. In support of this argument, petitioners proffer that the Department’s authority under 49 U.S.C. 41712 to take action required to remedy any “unfair or deceptive practice or an unfair

method of competition in air transportation or the sale of air transportation” is an extremely limited power that is inapplicable to address issues, such as these, relating to airline pricing decisions.

Spirit and Allegiant argue that following enactment of the Sunset Act in 1984, Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98–443, 98 Stat. 1704, the Department’s authority to “otherwise interfere directly with airline pricing and service decisions” was “eliminated.” Brief of Spirit and Allegiant at 7. And, citing no judicial precedent and only one (inapposite) agency decision, all three Petitioners argue that whatever power the Department *does* have to redress unfair or deceptive practices under section 41712 is so “extremely limited” that it is unavailable to address the practices here at issue. *Id.*, Brief of Southwest at 16-17, each relying on *Petition for Rulemaking of Joel Kaufman*, Docket OST 2003-14334, Order 2003-3-11 (Mar. 18, 2003).

It is not surprising that Petitioners do not cite any judicial precedent in support of their cabined reading of the purportedly limited scope of the Department’s authority under section 41712. In fact, no court has ever embraced petitioners’ view of that statute or any predecessor statute.

Clearly, the better guidance as to the breadth of the Department's section 41712 powers to redress matters relating to consumer practices of airlines regarding prices, routes and services is that offered by the Supreme Court: "DOT retains the power to prohibit advertisements which, in its opinion, do not further competitive pricing." *American Airlines v. Wolens*, 513 U.S. 219, 224 (1995) (quoting *Morales v. Trans World Airlines*, 504 U.S. 374, 390-91 (1992)). As ITSA argued in the agency proceeding, the Department's broad statutory authority under 49 U.S.C. 41712 empowers the Department to take the necessary steps to remedy unfair and deceptive practices resulting from the airlines' decisions to not fully and transparently disclose the prices of ancillary fees and charges that a passenger can expect to pay as part of the total price for air services. That authority has been specifically delegated to the agency by Congress, has been utilized repeatedly by the agency to address potentially unfair or deceptive practices, has been upheld by this and other courts under similar challenges, and clearly should be upheld here as well. *See, e.g. United Air Lines, Inc. v. Civil Aeronautics Bd.*, 766 F.2d 1107 (7th Cir. 1985) (upholding regulations regarding

computer reservation systems against a challenge by the airline industry); *Computer Reservations System Regulations*, 69 Fed. Reg. 976, 995-98 (January 7, 2004) (issuing regulations pursuant to section 41712 prohibiting certain practices by GDSs); *Sabre, Inc. v. Department of Transportation*, 429 F.3d 1113 (D.C. Cir. 2005) (holding that DOT has the power under 49 U.S.C. § 41712 to regulate the practices of independent GDSs); *Spirit Airlines, Inc. Violations of 49 U.S.C. § 41712 and 14 C.F.R. 399.84*, DOT Order 2011-11-23, 2011 DOT Av. LEXIS 502 (Nov. 21, 2011) (issuing a cease and desist order and imposing fines pursuant to section 41712 for failure by Spirit to disclose certain taxes and fees).⁸

Preserving the Congressionally intended remedial scope of the agency's authority is important not only to the issues raised in this challenge, but to the Department's ability in future proceedings to address transparency concerns relating to the airlines' decisions to quote fares that do not fully and completely disclose all fees that may

⁸ As discussed further below, the language empowering DOT to address consumer protection is necessarily broad because Congress explicitly foreclosed other possible methods of consumer redress.

be imposed. Such authority is critically important in the Department's already-announced proceeding addressing the need to establish rules for the full disclosure of all fee information through all sales channels.

The Department has long relied on section 41712 in support of its requirement that advertisements of airfares reflect the total price to be charged to the consumer, including surcharges, service fees and most taxes. See 14 C.F.R. 399.84; *Condor Flugdienst GmbH, Violations of 49 USC 41712 and 14 C.F.R. Part 399*, Order 2009-4-1, 2009 WL 7809768 (Apr. 1, 2009) (airline fined for failing to disclose fuel surcharges and service fees in advertisements). Section 41712 and predecessor authority has allowed the Department to promulgate consumer protection rules in a host of air fare related settings. See, e.g., 14 C.F.R. Part 250 (regulating practices with respect to overselling and imposing denied boarding compensation requirements); *Carrier-Owned Computer Reservations Systems*, 49 Fed. Reg. 32,540 (Aug. 15, 1984) (issuing regulations prohibiting certain practices with respect to computer reservation systems); *United Air Lines, Inc. v. Civil Aeronautics Bd.*, 766 F.2d 1107 (7th Cir. 1985) (upholding regulations regarding computer reservation systems against

a challenge by the airline industry); *Sabre, Inc. v. Department of Transportation*, 429 F.3d 1113 (D.C. Cir. 2005) (holding that DOT has the power under 49 U.S.C. § 41712 to regulate the practices of independent GDSs). Indeed, those un-challenged aspects of the present rule relating to tarmac delays were promulgated in light of the Second Circuit's holding that consumer redress in this area could only be accomplished at a Federal level and not by State or local governments. *See Air Transp Ass'n of America v. Cuomo*, 520 F.3d 218 (2d Cir. 2008).

Section 41712-based full fare disclosure policy, which DOT strengthened in promulgating the rule challenged here, has already been applied by the Department to require that significant air fare conditions must be disclosed to passengers, including optional fees for checked baggage. Specifically, in its May 13, 2008 *Guidance on Disclosure of Policies and Charges Associated with Checked Baggage*, the Department stated as follows:

The Department's long-standing policy has been to require carriers to clearly disclose significant conditions applicable to air fares. Failure to disclose such conditions has been considered an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712 and where warranted the Aviation

Enforcement Office has taken enforcement action against carriers who engage in such practices. The Aviation Enforcement Office considers such significant conditions to include limiting passengers to fewer than two free checked bags of the size and weight that have generally been free on the carrier in the past and to assessing passengers a charge in addition to the air fare for such checked baggage. Therefore, it is important that carriers provide prominent and timely notice of these baggage policies and such charges.⁹

Other examples of the Department's exercise of its section 41712 authority abound. As discussed in ITSA's Comments at 31-32 [JA__], Section 257.5(a) of the DOT rules, 14 C.F.R. 257.5(a), in reliance on section 41712, requires that information on code-share flights be disclosed by airlines to the traveling public and to GDSs. Similarly, Section 258.5(a) of the DOT rules, 14 C.F.R. 258.5(a), likewise relying on Section 41712, requires that airlines disclose change of gauge information to passengers and to GDSs. These consumer protection disclosure rules were adopted by the Department in 1999 in response to the failure of airlines to consistently disclose to passengers that advertised flights might be operated by another carrier, or might involve a change from one size aircraft to another at some

⁹ See <http://www.dot.gov/affairs/aviation080516/baggagefeenotice.htm>

point in the journey. *See Disclosure of Code-Sharing Arrangements and Long Term Wet Leases*, 64 Fed. Reg. 12838 (March 15, 1999); *Disclosure of Change-of-Gauge Services*, 64 Fed. Reg. 12854 (March 15, 1999). DOT also recently issued guidance interpreting a recent amendment to section 41712 that added a new provision regarding code-share disclosures. *Guidance on Disclosure of Code-Share Service under Recent Amendments to 49 U.S.C. § 41712*, 76 Fed. Reg. 2744 (Jan. 14, 2011).¹⁰ This guidance makes clear that DOT will pursue enforcement action where code-share disclosure on websites is limited to rollover or hyperlinked displays.

Now that unbundled airline fees have become commonplace (just as code-sharing grew as a phenomenon in the late 1990s), a similar pro-consumer response was warranted by the Department under its section 41712 authority. Information reflecting the total amount passengers will be charged for travel services is surely no less important than code-share or

¹⁰ Section 41712 was amended by the Airline Safety and Federal Aviation Administration Extension Act of 2010, Pub. L. No. 111-216, Title II, § 210, 124 Stat. 2362. The added provision requires that carriers and ticket agents disclose in any oral, written or electronic communication to the public, prior to the purchase of a ticket, the name of the carrier providing the service for each segment of a passenger's itinerary and that on websites, disclosures be made "on the first display of the Web site following a search of a requested itinerary in a format that is easily visible to a viewer."

change of gauge information; regulation of each is agency oversight authorized by section 41712.

The court should also be mindful that in the absence of DOT authority to propose rules such as those challenged by petitioners, and to then commence enforcement actions if those rules are violated, airline passengers would be left without any effective legal protection for any airline fare decisions that constitute unfair and deceptive practices prohibited by Section 41712. As the Department observed in its NPRM, “[a]ir transportation is unlike any other industry in that the Department has the sole authority to regulate airlines’ fare advertisements by prohibiting practices that are unfair or deceptive.” 75 Fed. Reg. at 32338.

Likewise, as ITSA observed in its Comments at 32-34 [JA__], the Department has sole regulatory authority over the disclosure and display of airline fees. This is so because of the express statutory preemption of the application of state law to matters involving an airline’s “price, route or service” found in the in the Airline Deregulation Act and codified at 49 U.S.C. 41713(b)(1).¹¹ As a result of this broad preemption, passengers who

¹¹ Section 41713(b)(1) provides as follows:

might otherwise complain to state consumer protection agencies, or bring a deceptive practices action under state law against an airline for failure to disclose fees, have no such remedies available. *See Morales v. Trans World Airlines*, 504 U.S. 374, 383-84 (1992) (preempting state fare advertising guidelines on grounds that state law actions having any connection or reference to airline prices are preempted by Section 41713(b)(1)).

Federal preemption over prices, routes and services not only precludes state enforcement of consumer protection statutes, it also precludes private actions based on State law, thereby placing airline passengers in a uniquely disadvantageous posture relative to consumers of other travel and non-travel services (and correspondingly increasing the importance of DOT vigilance against potentially deceptive practices in the area of airline prices, routes and services). Nor do passengers have a private right of action under Section 41712; they must rely on DOT to act under that consumer protection statute. *See, e.g., Statland v. American Airlines, Inc.*, 998 F.2d 539 (7th Cir. 1993) (dismissing a passenger's state law claims on preemption grounds and

Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

holding that the passenger cannot pursue a private right of action under Section 41712).

Not only are state law and private actions inapplicable to protect airline passengers from inadequately disclosed airline prices, the protection that might otherwise be offered by Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, is also unavailable. While Section 5 of the FTC Act prohibits unfair and deceptive practices in most consumer business areas in terms similar to section 41712, Section 5 specifically exempts airline practices from its coverage. See 15 U.S.C. 45(a)(2). Thus FTC consumer protection remedies that otherwise would be available in other travel and non-travel sectors therefore are expressly inapplicable to the issues addressed in DOT's challenged rule.

Petitioners' arguments that DOT's 41712 authority is so "extremely limited" as to be inapplicable here, and that airlines therefore remain totally free to initiate whatever fare advertising practices they desire must be read against this background: if they are correct, Petitioners will have escaped the only consumer protection oversight imposed on their industry.

Petitioners may, understandably, wish for such an outcome. But clearly the

cabined reading of DOT's statutory authority that they offer up in their briefs cannot be correct.

CONCLUSION

For all of the foregoing reasons, the court should deny the petitions for review.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)**

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule 32. This brief contains 4,786 words.

s/Dale C. Andrews
Dale C. Andrews

CERTIFICATE OF SERVICE

I certify that on January 5, 2012, I filed the foregoing brief using the court's CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished under the Appellate CM/ECF system

s/Dale C. Andrews
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