FIRST AMENDMENT — COMMERCIAL SPEECH — D.C. CIRCUIT HOLDS THAT RULE PROHIBITING AIRLINES FROM DISPLAYING TAXES "PROMINENTLY" DOES NOT VIOLATE THE FIRST AMENDMENT. — *Spirit Airlines, Inc. v. U.S. Department of Transportation*, 687 F.3d 403 (D.C. Cir. 2012).

Government regulation of advertising has recently reemerged as a major constitutional issue. Most prominently, the D.C. Circuit and the Sixth Circuit have disagreed over whether the government can require cigarette manufacturers to display graphic warnings on their packaging.[1] Constitutional questions related to advertising have also appeared in a variety of other contexts.[2] Recently, in *Spirit Airlines, Inc. v. U.S. Department of Transportation*,[3] the D.C. Circuit held that a Department of Transportation (DOT) rule requiring airlines to state the total price of tickets explicitly and prohibiting them from displaying taxes "prominently" in their advertisements did not violate the First Amendment.[4] In upholding the rule under the deferential standard of review from *Zauderer v. Office of Disciplinary Counsel*,[5] the court signaled a willingness to apply *Zauderer* to laws that not only mandate factual disclosures but also restrict the manner of commercial speech by limiting the size and appearance of other claims in an advertisement.

In April 2011, DOT issued a final rule (the "Airfare Advertising Rule") modifying existing regulations of airline advertising.[6] The existing regulations had required airlines to disclose "the entire price to be paid by the customer" in their advertisements,[7] but airlines could satisfy that obligation by listing separately the base fare, taxes, and fees, requiring consumers to add those numbers to determine the total price.[8] The Airfare Advertising Rule made two significant changes to the existing regulations: First, it required airlines to state the total price explicitly[9] (the "total price provision"). Second, it specified that component prices, such as taxes, "may not be displayed prominently

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[1] *Compare* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1222 (D.C. Cir. 2012) (finding rule unconstitutional under First Amendment), *with* Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 551 (6th Cir. 2012) (upholding same rule). *See also* Recent Case, 126 HARV. L. REV. 818 (2013) (discussing *R.J. Reynolds*, 696 F.3d 1205).

[2] *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (video game labeling and age restrictions); Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott, 647 F.3d 202, 211–14 (5th Cir. 2011) (charitable solicitations).

[3] 687 F.3d 403 (D.C. Cir. 2012).

[4] *Id.* at 414–15.

[5] 471 U.S. 626 (1985).

[6] Enhancing Airline Passenger Protections, 76 Fed. Reg. 23,110, 23,166 (Apr. 25, 2011) (to be codified at 14 C.F.R. pt. 399).

[7] 14 C.F.R. § 399.84 (2011).

[8] Enhancing Airline Passenger Protections, 76 Fed. Reg. at 23,142.

[9] *Id.* at 23,166.

[and] may not be presented in the same or larger size as the total price"[10] (the "prominence provision").

In June 2011, Spirit Airlines filed a petition in the D.C. Circuit challenging the Airfare Advertising Rule.[11] Spirit argued the rule was arbitrary and capricious because there was insufficient evidence showing that existing advertising practices caused confusion.[12] Spirit also alleged that the rule was unconstitutional.[13] Maintaining that its advertisements were political speech intended to inform consumers about the government's tax policies,[14] Spirit contended that DOT unconstitutionally restricted that speech "to suppress information that is unfavorable to the government."[15] Alternatively, Spirit claimed the rule violated the First Amendment under commercial speech standards.[16]

A divided panel of the D.C. Circuit denied the petition for review.[17] Writing for the panel, Judge Tatel[18] began by rejecting Spirit's claim that the rule was arbitrary and capricious.[19] He explained that the total price provision retained the key language of existing regulations requiring airlines to disclose the total price of tickets and that DOT had interpreted the regulations to require that airlines state the total price explicitly.[20] Judge Tatel, noting that DOT had relied on numerous comments to support the change, reasoned that Spirit had not shown that DOT acted arbitrarily.[21] Moving on to the prominence provision, Judge Tatel argued that the rule merely required that the total price be the most prominent, which was a reasonable way to "prevent[] airlines from confusing consumers about the total cost."[22]

Judge Tatel also rejected Spirit's First Amendment arguments.[23] Before discussing the merits of the constitutional claims, he considered which of three possible standards of review should apply.[24] First, the strict scrutiny standard governs laws restricting political speech.[25] Sec-

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[10] *Id.*

[11] Final Joint Brief for Petitioners at 5, *Spirit*, 687 F.3d 403 (Nos. 11-1219, 11-1222). Allegiant Air and Southwest Airlines joined Spirit in challenging the Airfare Advertising Rule. *Spirit*, 687 F.3d at 410. As part of the same case, Spirit and Allegiant also challenged two additional rules as arbitrary and capricious, and the D.C. Circuit rejected both challenges. *Id.* at 416–17.

[12] *See Spirit*, 687 F.3d at 410.

[13] *Id.* at 411.

[14] *Id.*

[15] Final Joint Brief for Petitioners, *supra* note 11, at 38.

[16] *Id.* at 39.

[17] *Spirit*, 687 F.3d at 417.

[18] Judge Tatel was joined by Judge Henderson.

[19] *See Spirit*, 687 F.3d at 410.

[20] *Id.*

[21] *Id.* at 410–11.

[22] *Id.* at 411.

[23] *See id.* at 415.

[24] *Id.* at 411–14.

[25] *Id.* at 411.

ond, the standard articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[26] applies to most laws burdening commercial speech.[27] Under *Central Hudson*, a restriction on commercial speech is permissible if (1) the government's interest is substantial, (2) the restriction directly advances that interest, and (3) the restriction is no more extensive than necessary.[28] Third, the *Zauderer* standard governs laws imposing factual disclosure requirements to prevent deception.[29] A court will uphold these disclosure laws if they are "reasonably related to the State's interest in preventing deception of consumers."[30]

Judge Tatel, noting that the "the advertising of prices . . . is quintessentially commercial," rejected Spirit's claim that its advertising was political speech.[31] He explained that either *Central Hudson* or *Zauderer* can govern a restriction on commercial speech but that the advertisements lacked two features necessary to fall under the *Central Hudson* standard.[32] To begin with, the *Central Hudson* line of cases did not involve laws targeting misleading speech, as does the Airfare Advertising Rule.[33] Moreover, *Central Hudson* and its progeny dealt with affirmative limitations on speech, but "the Airfare Advertising Rule does not prohibit airlines from saying anything."[34] Based on those considerations, Judge Tatel held that *Zauderer* applied.[35] He then determined that the rule was valid, reasoning that DOT issued the rule to prevent confusion and that "it goes without saying that requiring the total price to be the most prominent number is reasonably related to that interest."[36]

To address the dissent's claim that *Central Hudson* governed, Judge Tatel argued that the rule would be valid even under that test.[37] He began by noting that DOT had interpreted the prominence provision to mean only that component prices could not be "in a more prominent place . . . than the total advertised fare."[38] Judge Tatel explained that the court owed "substantial deference" to DOT's interpretation of its own rule, and that its interpretation satisfied the three-

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[26] 447 U.S. 557 (1980).

[27] *Spirit*, 687 F.3d at 411.

[28] *See Central Hudson*, 447 U.S. at 566.

[29] *Spirit*, 687 F.3d at 411.

[30] *Id.* (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)) (internal quotation marks omitted).

[31] *Id.* at 412.

[32] *See id.*

[33] *See id.* at 412–13.

[34] *Id.* at 414.

[35] *Id.*

[36] *Id.* at 415.

[37] *Id.*

[38] *Id.* (quoting Brief for Respondent at 28, *Spirit*, 687 F.3d 403 (Nos. 11-1219, 11-1222)) (internal quotation marks omitted).

pronged *Central Hudson* test.[39] First, the government's interest in "ensuring the accuracy of commercial information" was substantial.[40] Second, the rule directly advanced that interest because requiring airlines to display most prominently the total price ensures accuracy.[41] Third, the means were reasonable because "the rule simply regulates the manner of disclosure" and does not prohibit speech.[42]

Senior Judge Randolph concurred in part and dissented in part.[43] He joined the portion of the majority's opinion upholding the total price provision but believed the prominence provision was unconstitutional.[44] Assuming arguendo that airline advertising was commercial speech, Judge Randolph asserted that *Central Hudson* governed and that the rule failed under that test.[45] He argued that the prominence provision did not satisfy *Central Hudson*'s second requirement, declaring that "the government has presented not a shred of evidence to support its tax and fee rule, and it has offered no reasoning to explain why a significant number of consumers would be confused without the rule."[46] Judge Randolph concluded that the court should have found the prominence provision unconstitutional because the government had failed to meet its burden.[47]

In upholding the Airfare Advertising Rule under *Zauderer*, the court signaled a subtle but important shift in the application of the *Zauderer* standard. *Zauderer* and most cases interpreting it involved laws mandating factual disclosures to prevent the deception of consumers. But those laws imposed no limitations on speech.[48] However, courts more recently have applied *Zauderer* to laws that both mandate

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[39] *Id.* (quoting St. Luke's Hosp. v. Sebelius, 611 F.3d 900, 904 (D.C. Cir. 2010)) (internal quotation marks omitted).

[40] *Id.* (quoting Edenfield v. Fane, 507 U.S. 761, 769 (1993)).

[41] *Id.*

[42] *Id.*

[43] *Id.* at 419 (Randolph, J., concurring in part and dissenting in part).

[44] *See id.* at 419–20.

[45] *See id.* at 421–22. Judge Randolph did not explain in detail why *Central Hudson* governed. *See id.* at 421–24. He merely asserted that *Central Hudson* is "the current test" for commercial speech "despite criticism." *Id.* at 421.

[46] *Id.* at 423.

[47] *See id.* at 422–24.

[48] *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 650 (1985); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 113 (2d Cir. 2001); Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 69–70, 74 (2d Cir. 1996); *see also* Dayna B. Royal, *The Skinny on the Federal Menu-Labeling Law & Why It Should Survive a First Amendment Challenge*, 10 FIRST AMEND. L. REV. 140, 160 (2011); Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847, 918 (2011) ("[I]n the case of commercial disclosure requirements, the Court has suggested that its tolerance for compelled information will end where a significant restraint on advertisers' speech begins.").

factual disclosures and restrict the manner of commercial speech.[49] In *Spirit*, the D.C. Circuit took this approach a step further, suggesting an even greater willingness to apply *Zauderer* to laws regulating the manner of commercial speech by limiting the size and appearance of other claims in an advertisement.

The Supreme Court's early doctrine — beginning with *Zauderer* itself — applied a deferential standard only to laws mandating a factual disclosure, not to those laws that also imposed limitations on speech. In the relevant portion of *Zauderer*, the Ohio Supreme Court sought to discipline a lawyer for failing to include in his advertisements a required disclosure that clients could be responsible for some of the costs of litigation.[50] In rejecting the lawyer's argument that *Central Hudson* governed, the U.S. Supreme Court began by noting that the state had "only required [lawyers] to provide somewhat more information than they might otherwise be inclined to present."[51] The Court explained that the First Amendment protects commercial speech primarily because such speech provides valuable information to consumers, so advertisers have little constitutional interest in not providing additional information.[52] It then held "that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[53]

The Supreme Court maintained this narrow scope for *Zauderer* review in subsequent cases. In *Milavetz, Gallop & Milavetz, P.A. v. United States*,[54] for example, the statute at issue required debt relief agencies to disclose that they assisted clients in filing for bankruptcy.[55] The Court found that *Zauderer*, not *Central Hudson*, governed because the law targeted misleading commercial speech and "the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech."[56] As in *Zauderer*, there was no suggestion that the provisions imposed any limitations on debt relief agencies' ability to convey a particular message.

Recent circuit cases have interpreted *Zauderer* more broadly to cover laws that impose not only a disclosure requirement but also limitations on the manner of commercial speech. For example, in *Discount Tobacco City & Lottery, Inc. v. United States*,[57] the Sixth Circuit

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[49] For the purposes of this comment, restrictions on the manner of commercial speech refer to limiting the size, positioning, or typeface of an advertiser's message.

[50] *Zauderer*, 471 U.S. at 650.

[51] *Id.*

[52] *Id.* at 651.

[53] *Id.*

[54] 130 S. Ct. 1324 (2010).

[55] *Id.* at 1330.

[56] *Id.* at 1339.

[57] 674 F.3d 509 (6th Cir. 2012).

applied *Zauderer* to a law requiring tobacco companies to display graphic warning labels on a specified percentage of their packaging.[58] The court reasoned that *Zauderer* applied to the warning label requirement, including the size requirement, because the law required a factual disclosure to prevent confusion and did "not impose any restriction on [the companies'] dissemination of speech."[59] However, at least implicitly, the law did limit the manner of speech. Because the law required the warning labels to be a certain size, it necessarily limited the size of other content on the packaging.

The Sixth Circuit again used the same approach in *International Dairy Foods Ass'n v. Boggs*.[60] In that case, the court applied *Zauderer* to a rule requiring milk companies that advertised their milk as produced without a genetically engineered hormone to disclose that the Food and Drug Administration had found no risks associated with the hormone.[61] The rule required that the disclosure be "'in exactly the same font, style, case, and color and at least half the size (but no smaller than seven point font)' as the production claim."[62] The court explained that *Zauderer* applied since the disclosure requirement targeted potentially misleading commercial speech and did not prohibit producers from making any claims.[63] However, as in *Discount Tobacco*, the rule implicitly imposed some restrictions on the manner of speech. Viewed another way, the rule required that the production claim be no more than twice the size of the disclosure.

Like the laws in *Discount Tobacco* and *International Dairy*, the Airfare Advertising Rule imposed several restrictions on the manner of speech. Most significantly, it prohibited airlines from displaying taxes "prominently."[64] According to DOT, that language meant that airlines could not display taxes more prominently than the total price; at the top of an advertisement; or in highlighting, bold, italics, or underlining, if that typeface made the taxes more prominent than the total

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[58] *Id.* at 527.

[59] *Id.*; *see also id.* at 530 (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)) ("With regard to the increased size and placement requirement of the textual warnings on tobacco packaging, the government has demonstrated that the Act's requirements are reasonably tailored to overcoming the informational deficit regarding tobacco harms.").

[60] 622 F.3d 628 (6th Cir. 2010).

[61] *Id.* at 640–42.

[62] *Id.* at 640 (quoting OHIO ADMIN. CODE 901:11-8-01(B)(2) (2010)).

[63] *Id.* at 642–43.

[64] Enhancing Airline Passenger Protections, 76 Fed. Reg. 23,110, 23,166 (Apr. 25, 2011) (to be codified at 14 C.F.R. pt. 399.84).

price.[65] The rule also prohibited airlines from displaying taxes "in the same or larger size as the total price."[66]

By upholding the Airfare Advertising Rule under *Zauderer*, the D.C. Circuit joined the recent trend toward applying *Zauderer* to laws that both mandate a factual disclosure and restrict the manner of commercial speech. The *Spirit* court acknowledged its more expansive application of *Zauderer*, reasoning that the Supreme Court had intended the "affirmative limitation on speech" language in *Zauderer* to apply only to laws that flatly prohibit certain kinds of speech.[67] The court thus concluded that *Zauderer* governed laws limiting the manner of speech, including the Airfare Advertising Rule.[68]

Significantly, the restrictions in the Airfare Advertising Rule went beyond the provisions upheld in previous cases in form and substance. As to form, DOT framed the rule as a restriction on the manner of commercial speech, not the manner of providing the required disclosure. The rule stated that "charges included within the single total price listed (e.g., government taxes) . . . may not be displayed prominently [and] may not be presented in the same or larger size as the total price."[69] The only required disclosure in the rule was the total price, but DOT did not directly mandate the size of this disclosure.[70] Instead, it limited the size of a different portion of the advertisement — the taxes.[71] By contrast, the laws at issue in *Discount Tobacco* and *International Dairy* specified the size of the required disclosure and limited the size of the rest of the advertising by implication.[72]

As to substance, the Airfare Advertising Rule went further than the laws at issue in *Discount Tobacco* and *International Dairy* in restricting the manner of other commercial speech. The Airfare Advertising Rule required that airlines display the total price in larger font than the taxes,[73] and it prohibited using "special highlighting that sets [the taxes] apart and makes [them] more prominent than the total price (e.g., bold font, underlined, or italicized)."[74] Even the most restrictive provision of the law at issue in *Discount Tobacco* required that the

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[65] OFFICE OF AVIATION ENFORCEMENT & PROCEEDINGS, U.S. DEP'T OF TRANSP., ANSWERS TO FREQUENTLY ASKED QUESTIONS 23 (June 15, 2012) [hereinafter DOT GUIDANCE DOCUMENT].

[66] Enhancing Airline Passenger Protections, 76 Fed. Reg. at 23,166.

[67] *Spirit*, 687 F.3d at 414.

[68] *Id.*

[69] Enhancing Airline Passenger Protections, 76 Fed. Reg. at 23,166.

[70] *See id.*

[71] *Id.*

[72] *See* Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 524 (6th Cir. 2012); Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 640 (6th Cir. 2010).

[73] Enhancing Airline Passenger Protections, 76 Fed. Reg. at 23,166.

[74] DOT GUIDANCE DOCUMENT, *supra* note 65, at 23.

warning label cover half of the packaging, still allowing a tobacco company to display its own message in the same size as the required disclosure.[75] Similarly, the rule in *International Dairy* allowed producers to display their production claim in a size twice as large as that of the disclosure.[76]

Spirit thus portends an even greater role for *Zauderer* review in future cases. Courts following the D.C. Circuit's approach could apply the lenient *Zauderer* standard to laws that purport to restrict the manner of commercial speech, not just the manner of providing a required disclosure. However, this approach has the potential to create confusion about the boundaries between *Zauderer* and *Central Hudson*, which governs most laws burdening commercial speech.[77] Under the narrower conception of *Zauderer*, a court would need to evaluate merely whether a law did more than impose a disclosure requirement to prevent confusion. If so, *Central Hudson* would apply. Under the D.C. Circuit's more expansive view, the court would need to determine not only whether the law imposed limitations on speech but also whether those limitations were restrictions on the manner of speech or "affirmative limitations" that prohibited particular content. While that line is clear regarding the size and typeface restrictions at issue in *Spirit*, it may not be in other situations. Indeed, even size restrictions might qualify as affirmative limitations on speech if they effectively prevent the speaker from conveying information.

Central Hudson and *Zauderer* provide the framework for commercial speech questions, which makes having clear and definitive dividing lines between them all the more important. With its *Spirit* decision, the D.C. Circuit joined a growing trend toward applying *Zauderer* to laws that both mandate a clarifying disclosure and limit the manner of speech. Although this approach has been straightforward in the limited contexts in which it had been applied, it has the potential to blur the lines between *Central Hudson* and *Zauderer* in more ambiguous cases.

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[75] *See Discount Tobacco*, 674 F.3d at 524.

[76] *See Int'l Dairy*, 622 F.3d at 640.

[77] *See, e.g.*, Leslie Gielow Jacobs, *What the Abortion Disclosure Cases Say About the Constitutionality of Persuasive Government Speech on Product Labels*, 87 DENV. U. L. REV. 855, 861 (2010) (explaining that *Central Hudson* governs most laws burdening commercial speech); Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. HEALTH CARE L. & POL'Y 159, 174 (2009) (same).