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No. 25-10461

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SPIRIT AIRLINES, INC.,

Petitioner,

v.

TRANSPORTATION SECURITY ADMINISTRATION,

Respondent.

Petition for Review from the Transportation Security Administration,
No. B30-19-UF7-UF-27168

BRIEF OF AIRLINES FOR AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Spirit Airlines, Inc. v. Transp. Sec. Admin., No. 25-10461

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 to 26-3, *amicus* certifies that, other than *amicus* and its counsel, it is not aware of any persons or entities that have an interest in the outcome of this litigation and that were not listed in a previously submitted brief. *See* 11th Cir. R. 26.1-2(b).

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/s/ *Nicole A. Saharsky*
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INTEREST OF THE *AMICUS CURIAE*

Founded in 1936, *amicus* Airlines for America (A4A) is the oldest and largest airline trade association in the United States.[1] A4A represents passenger and cargo airlines nationwide, including Alaska Airlines, American Airlines, Atlas Air, Delta Air Lines, FedEx, Hawaiian Airlines, JetBlue Airways, Southwest Airlines, United Airlines, and United Parcel Service. Together, A4A's members and their subsidiaries employ more than 90% of the airline industry's workers. In 2024, A4A's passenger-carrier members and their marketing partners carried more than 90% of U.S. airlines' total passengers, and A4A's all-cargo and passenger members together carried more than 90% of U.S. airlines' total cargo.

As part of its core mission, A4A works to foster a safe, secure, and healthy U.S. air transportation industry – including stable, uniform, and predictable legal rules to govern it. Thus, throughout its seventy-five-plus-year history, A4A (formerly known as the Air Transport Association of America) has been actively involved in the development of the federal law applicable to commercial air transportation.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief.

This case concerns a federal fee imposed on air passengers to cover the cost of providing security services at U.S. airports. The Transportation Security Administration (TSA) takes the view that it is entitled to that fee even when it does not actually provide security services to a passenger. Specifically, TSA's position is that it is entitled to the fee when a customer buys a ticket, cancels the ticket and does not travel, and receives a refund in the form of a credit that then expires. Based on that view, TSA determined that petitioner Spirit Airlines owed it $2.8 million in fees over a two-year period. AR190-91. Spirit seeks review of that determination.

A4A has a significant interest in this issue because it affects many airlines in the industry. That includes many of A4A's passenger-carrier members: All of those members provide credits as refunds in some circumstances, and many do not remit the fee to TSA when the credits expire unused. Indeed, two of A4A's members have filed petitions for review in other courts of appeals to present this same issue. *See Alaska Airlines, Inc. v. Transp. Sec. Admin.*, No. 25-954 (9th Cir. filed Feb. 13, 2025); *Southwest Airlines Co. v. Transp. Sec. Admin.*, No. 25-60052 (5th Cir. filed Jan. 30, 2025).[2] Also, one of A4A's members has filed a suit against Customs and

[2] Two airlines that are not members of A4A, Allegiant Airlines and Frontier Airlines, also have filed petitions that present this issue. *See Allegiant*

Border Patrol (CBP) to challenge the imposition of a similar customs fee in analogous circumstances. *See Southwest Airlines Co. v. United States*, No. 22-141, 2025 WL 841847 (U.S. Ct. Int'l Trade Mar. 18, 2025), *appeal docketed*, No. 25-1787 (Fed. Cir. May 21, 2025).

A4A submits this brief to explain that TSA's position is directly contrary to the governing statute and was adopted without fair notice. If accepted, TSA's position would be very disruptive to the airline industry. This Court should grant the petition and set aside TSA's determination.

INTRODUCTION AND SUMMARY OF ARGUMENT

A federal statute imposes a security service fee on air passengers to cover the costs of providing security screening at airports, air marshals, and other security services. Air carriers collect the fee from their customers and remit it to TSA. TSA argues that it is entitled to this fee even if the customers ultimately do not travel and TSA thus never provides any security services. Specifically, it argues that it is entitled to the fee if a customer cancels the ticket, receives a refund in the form of a credit, and the customer lets the credit expire unused.

Travel Co. v. Transp. Sec. Admin., No. 25-960 (9th Cir. filed Feb. 13, 2025); *Frontier Airlines, Inc. v. Dep't of Homeland Sec.*, No. 25-9523 (10th Cir. filed Feb. 12, 2025).

TSA's position is contrary to the governing statute. Under the statute, the fee is due when a "passenger[]" is traveling "in air transportation." 49 U.S.C. § 44940(a)(1). That language makes clear that TSA only can collect the fee when a customer actually travels in air transportation. If a customer does not travel, then TSA is not owed any fee because there was no passenger and no air transportation. That makes sense, because the whole point of the fee is to compensate TSA for actually providing security services. Notably, in an analogous case involving a fee for customs inspections, the Court of International Trade held that CBP cannot impose the customs fee when the customer cancels the ticket and does not travel.

TSA makes a variety of arguments to try to justify its reading of the statute, but none holds up to scrutiny. TSA argues that the statute imposes a fee on airlines that are engaged in providing air transportation, but that argument ignores the statute's focus on the passengers who travel. TSA relies on administrative provisions about the collection and remittance of the fee, but those provisions do not change the substantive scope of the statute. And TSA relies on one of its regulations, but the regulation cannot contradict the statute, and anyway the cited regulation does not speak to the question here.

TSA ultimately lacks the courage of its convictions, because it admits that no fee is owed if the customer cancels the ticket and receives a refund. But then TSA says that refunds in the form of expiring credits do not qualify as refunds if the customer never uses the credit. That is doubly wrong. The statute does not say anything about refunds; it only talks about when the fee is owed, and that is when a "passenger[]" travels "in air transportation." And a credit *is* a refund, even if the customer chooses not to use it. TSA's line drawing between credits that are used versus those that expire unused results in the government being paid when it did not provide any services, which is just the government trying to obtain a windfall.

TSA's position has another, separate problem: TSA did not provide fair notice of its position. For almost two decades, airlines understood that the no fee was due when customers cancelled their tickets and received refunds, regardless of the form of the refunds. TSA was well aware of this practice and made no effort to change it. But then, during the course of fee audits, TSA abruptly took the view that the fee is due when customers cancel tickets and receive refunds in the form of credits that expire. The industry could not reasonably have anticipated that change. TSA cannot impose its new view retroactively – as it seeks to do to Spirit in this case and to other airlines in other cases – because doing so would violate due process.

Adopting TSA's position would be disruptive and unfair to the airline industry. Providing refunds in the form of credits is a common practice across the industry; indeed, each of A4A's passenger-carrier members provides credits that expire in certain situations, in return for lower prices on airfare. For years, many airlines did not remit the security fee to TSA in that situation, and TSA accepted that practice. Now, TSA contends it is entitled to the fee when the credits expire. If that position were accepted, TSA would receive tens of millions of dollars each year for security services that it never provided. Nothing in the statute authorizes that windfall.

This Court should grant the petition and set aside TSA's decision.

STATEMENT OF THE ISSUE

Whether TSA is entitled to the security service fee imposed by 49 U.S.C. § 44940(a)(1) if a customer cancels a ticket and does not travel, receives a refund in the form of a credit, and lets that credit expire unused.

ARGUMENT

TSA's Position Is Contrary To The Governing Statute, Was Imposed Without Fair Notice, And If Accepted Would Be Disruptive And Unfair To The Airline Industry

Congress enacted the Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001), following the September 11, 2001, attacks. The Act created TSA and charged it with providing security services

for civil aviation, including performing security screenings at airports and employing air marshals on flights. *See* 49 U.S.C. § 114. The Act instructed TSA to impose a security service fee – a "uniform fee" on "passengers of air carriers . . . in air transportation . . . originating at airports in the United States" to pay for the "costs of providing civil aviation security services." *Id.* § 44940(a)(1).

The question in this case is whether the fee is due to TSA when the customer does not actually travel and no security services are provided. Spirit's position is straightforward: If the customer does not travel, no fee is due. Pet'rs Br. 19-25.

TSA's position is more complicated. TSA starts with the view that any time an airline sells a ticket, the airline has to collect the fee and remit the fee to TSA. AR191. According to TSA, it is entitled to the security service fee "without regard to whether travel occurs." AR196. But then TSA seems to recognize that it would be nonsensical to demand the fee when the customer cancels the ticket and the airline issues a refund. *See* AR191. So TSA says that no fee is due when the customer cancels the ticket and the airline issues a refund – but only for certain types of refunds. *Id.* According to TSA, if the refund is in the form of a credit and the customer uses the credit before it expires, no fee is due, but if the customer lets the credit expire

unused, then the fee is due. *Id.* That gerrymandered position has no basis in the text of the statute.

A. The Security Service Fee Only Is Due When A Passenger Travels In Air Transportation

1. The statute's plain language requires a "passenger" traveling "in air transportation"

Under the governing statute, TSA can only collect the security service fee when the customer travels in air transportation. The statute states that TSA "shall" impose the fee "on passengers of air carriers and foreign air carriers in air transportation . . . originating at airports in the United States." 49 U.S.C. § 44940(a)(1). Thus, only "passengers" who are "in air transportation . . . originating at airports in the United States" are subject to the fee. *Id.*

Only a customer who boards a plane at a U.S. airport is a "passenger[]" in "air transportation . . . originating at [an] airport[] in the United States," and thus only such a passenger is subject to the fee. A customer who buys a ticket but then cancels and does not travel is not "in air transportation"; indeed, the customer never becomes a "passenger[]" at all. *See Webster's New Collegiate Dictionary* 803 (1995) (defining "passenger" as "[a] traveler in a conveyance, as in a train, automobile, or bus, who does not participate in its operation").

That straightforward reading of the statute makes sense in context. The whole point of the statute is to authorize a fee to "pay" for certain enumerated "costs of providing civil aviation security services," including the "salar[ies] . . . of screening personnel," the "costs of . . . acqui[ring] . . . [screening] equipment," and "[t]he costs of the Federal air marshals program." 49 U.S.C. § 44940(a)(1). All of these are costs that TSA incurs only when a passenger travels – *i.e.*, when the person goes through a security screening checkpoint at a U.S. airport to board a plane. A person who does not travel from a domestic airport does not go through TSA security screening, and thus TSA does not incur any costs with respect to that person. So there is no statutory basis for TSA to receive a fee from that person.

Elsewhere in the statute, Congress made clear its view that imposition of the fee depends on the receipt of security services from TSA. The fee applies only to passengers whose flights "originat[e]" at "airports in the United States." 49 U.S.C. § 44940(a)(1). A passenger who arrives to the United States on a flight from a foreign country does not receive security screening services from TSA (the passenger is screened by the foreign country), and so it makes sense that the passenger would not have to pay the fee. Further, Congress provided that TSA "may exempt" from the fee a passenger "emplaning at an airport in the United States that does not receive

screening services," 49 U.S.C. § 44940(h) – such as a passenger traveling on a smaller charter flight who does not pass through security screening, *see* 49 C.F.R. § 1544.101(a)(2). All of this confirms that TSA is owed the fee only when it actually provides security services to a passenger. Because TSA does not provide security services to a person who does not travel, it is not owed a fee in that situation.

TSA's view – that sometimes it is owed the fee when a customer cancels the ticket and does not travel – has no basis in the statute's text. TSA's position does not depend on whether the passenger travels and receives security services, but instead on whether the customer receives a refund and the form of that refund. AR191. But the key statutory text does not mention refunds, let alone condition TSA's entitlement to the fee on a certain form of refund.[3] Instead, the trigger for payment of the fee is a "passenger[]" who travels in "air transportation." 49 U.S.C. § 44940(a)(1). When the passenger does not travel, no fee is owed in the first place.

Spirit's position reads the statute as a whole and makes sense of all of it. TSA's position, in contrast, strays far from the statutory text, imposing

[3] Section 44940 as a whole mentions refunds only once, to state that TSA "may refund any fee paid by mistake or any amount paid in excess of that required." 49 U.S.C. § 44940(g). No party relies on that language here.

limitations that Congress never even mentioned. It should be rejected for that reason.

2. The only court to address an analogous issue has rejected the government's argument

As noted, this issue, and a closely related issue, have been raised in other courts. To date, only one court has weighed in: The Court of International Trade addressed whether CBP is owed an analogous fee for customs inspections when the passenger does not actually travel, and that court decisively rejected the government's position. *See Southwest Airlines*, 2025 WL 841847, at *5.

The customs fee at issue in the Court of International Trade is similar to the fee here. The statute authorizes CBP to "charge and collect . . . fees . . . for the provision of customs services in connection with . . . the arrival of each passenger aboard a . . . commercial aircraft from a place outside the United States." 19 U.S.C. § 58c(a). That statute's key language is similar to the key language here: Both statutes allow the fee to be imposed when a "passenger" travels by air ("aboard a . . . commercial aircraft" or "in air transportation"), and both statutes explain that the fee pays for particular services ("customs services" or "security services"). *Compare id.* (customs fee), *with* 49 U.S.C. § 44940(a)(1) (security screening fee).

Like TSA here, CBP argued that it was entitled to the customs fee when a customer cancels a ticket and does not travel. *Southwest Airlines*, 2025 WL 841847, at *4. The Court of International Trade rejected that argument, holding that the statute "empowers CBP to collect fees" only "in connection with the arrival of a passenger." *Id.* at *6. The court explained that, reading the statute "as a whole," "CBP is entitled to the fee based on the provision of customs services in connection with the arrival of a passenger"; indeed, "[t]he statute introduces the fee as 'for the provision of customs services in connection with . . . the arrival of each passenger.'" *Id.* (quoting 19 U.S.C. § 58c(a)(5)(A)). "Where a customer cancels their ticket, there is no arriving passenger, CBP provides no customs services, and thus CBP is not entitled to a fee." *Id.*

The same analysis applies here. The statute here permits TSA to collect the security service fee only on a "passenger[]" who travels "in air transportation" from a domestic airport, to pay for the costs of providing security services for that passenger. 49 U.S.C. § 44940(a)(1). Accordingly, TSA is entitled to the fee only when it provides "services in connection with the [travel] of a passenger," and "not upon the carrier's collection of the funds." *Southwest Airlines*, 2025 WL 841847, at *6.

B. TSA's Arguments Lack Merit

TSA has advanced essentially three arguments in response. Each lacks merit.

1. The statute is about passengers traveling, not airlines offering air travel

TSA first argues that the statutory phrase "in air transportation" "describes the types of air carrier operations that are covered, rather than the passengers themselves." AR195-96. TSA takes the view that it is due the security service fee whenever an air carrier sells a ticket because the air carrier is engaged "in air transportation . . . originating at airports in the United States." 49 U.S.C. § 44940(a)(1). According to TSA, that fee is due "without regard to whether" the customer actually travels in air transportation. AR196.

That reading of the statute ignores the statutory requirements of a "passenger[]" traveling "in air transportation." 49 U.S.C. § 44940(a)(1). Under the statute, the fee is triggered by a flight – a "passenger[]" traveling "in air transportation." The fee is not triggered by the mere fact that airlines *offer* air transportation services.

TSA reads the key language – that the fee applies to "passengers of air carriers . . . in air transportation," 49 U.S.C. § 44940(a)(1) – as being about the carriers, not about the passengers. Specifically, TSA contends

that "air transportation" modifies "air carriers," rather than "passengers." AR195-96. So according to TSA, if the air carriers are engaged in air transportation by selling tickets, the fee is due. That does not make sense. The phrase "in air transportation" clearly modifies "passengers," not "air carriers," because the statute is all about the passengers traveling and receiving security services – not about the sale of airline tickets.

TSA asks this Court to reimagine the statute as if it does not say "passengers" at all, and instead to focus entirely on the air carriers. But that would require the Court to ignore a key word in the statute ("passengers"), rewrite the rest of the statute (to say "air carrier engaged in air transportation"), and ignore the statute's stated reason for the fee (to pay for the "costs of providing civil aviation security services"). 49 U.S.C. § 44940(a)(1). The Court should reject TSA's attempt to rewrite the statute. *See Fernandez v. Seaboard Marine Ltd.*, 135 F.4th 939, 949 (11th Cir. 2025) ("in construing a statute," this Court seeks to "give meaning to all the words in the statute" (internal quotation marks omitted)); *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1224 (11th Cir. 2009) (courts do not add words to statutes).

In any event, TSA does not even fully believe its argument. If it actually thought that it is entitled to the security service fee "without regard to

whether travel occurs," AR196, then it would insist on receiving the fee even if the passenger cancels the ticket and receives a refund. But TSA recognizes that result would be absurd, so it takes the view that if the passenger cancels the ticket and receives "a full refund of the fee," then no fee is due. AR194 (internal quotation marks omitted).

TSA then goes on to say that only some refunds qualify as a "refund." AR198-99. In particular, it distinguishes between a credit that the customer uses to purchase a new ticket, and a credit that customer lets expire unused. It accepts that the customer has received a "refund" in the first situation but says that the customer did not receive a sufficient refund in the second situation. *See id.* That distinction appears nowhere in the statute.

Further, that distinction is wrong. The ordinary meaning of "refund" encompasses a credit. *See Caver v. Central Ala. Elec. Coop.*, 845 F.3d 1135, 1147 (11th Cir. 2017) (recognizing that "a refund" need not "be in a cash payment as opposed to a . . . credit"). If the customer lets that credit expire unused, that is due to the customer's independent choice; it does not change the nature of the credit at the time the airline issued it. Thus, even if TSA's entitlement to the fee depended on whether the customer received a refund, TSA would not be entitled to the fee here. *See* Petr's Br. 34-39.

2. The statute's administrative provisions do not help TSA

TSA also relies on how the fee is administered as support for its position. Specifically, TSA argues that because the carrier collects the fee when it sells the ticket, the fee is due without regard to whether the customer actually travels. *See* AR195-96.

TSA relies on the statute's collection provisions, which provide that "[a] fee imposed under subsection (a)(1) shall be collected by the air carrier . . . that sells a ticket for transportation described in subsection (a)(1)," 49 U.S.C. § 44940(e)(2), and "[a] fee collected under this section shall be remitted on the last day of each calendar month by the carrier collecting the fee," *id.* § 44940(e)(3). In TSA's view, these provisions mean that the air carrier must collect the fee at the time it sells the ticket, and once the fee is collected, it must be remitted to TSA even if the passenger does not travel. AR196.

TSA's reading of these provisions is mistaken. The provisions specify only *who* must collect the fee ("the air carrier . . . that sells a ticket"), not *when* the fee must be collected. 49 U.S.C. § 44940(e)(2). To be sure, air carriers generally collect the fee at the time they sell tickets, but that is for the convenience of their customers, not because the statute requires it. It would be equally consistent with the statute for the air carrier to collect the

fee at check in for a flight. Notably, TSA's regulations do not require air carriers to collect the fee when they sell tickets; they, like the statute, are silent on when air carriers must collect the fee. *See* 49 C.F.R. § 1510.9(b).

Even if the statute specified that the air carrier must collect the fee at the time of ticketing, that would not address whether the fee is owed in the first place. The first collection provision simply instructs the air carrier to collect the "fee imposed by subsection (a)(1)," 49 U.S.C. § 44940(e)(2); it does not add to, clarify, or modify any requirement for imposition of the fee in 49 U.S.C. § 44940(a)(1). As explained, the fee only is imposed on "passengers" in "air transportation . . . originating at airports in the United States," to pay for the "costs of providing civil aviation security services." *Id.* § 44940(a)(1). Nothing in the collection provision expands that scope.

The other collection provision, which states that fees "shall be remitted" at the end of each month, 49 U.S.C. § 44940(e)(3), likewise does not change the requirements for imposition of the fee. Instead, it simply makes clear that air carriers do not have to pay each fee to TSA individually, but instead can pay all fees at month end.

Here again, TSA lacks the courage of its convictions. It admits that it should not receive the fee if the customer cancels the ticket and receives a refund. AR195. If TSA really thought that it was entitled to the fee anytime

an airline collects the fee under 49 U.S.C. § 44940(e)(2), then it would insist on receiving the fee even when the customer cancels the ticket and the airline refunds the fee. TSA pointedly has not advocated that absurd position.

Notably, the Court of International Trade considered and rejected a similar argument in the customs-fee case. The statute there states that a carrier should collect the customs fee "at the time the . . . ticket is issued" 19 U.S.C. § 58c(d)(1), and that the carrier then "shall remit those fees" to CBP within "31 days after the close of the calendar quarter in which the fees are collected," *id.* § 58c(d)(3). Based on those provisions, CBP argued that a carrier must remit the customs fee regardless of whether the passenger ultimately travels. *Southwest Airlines*, 2025 WL 841847, at *6. The Court of International Trade disagreed, explaining that the cited provisions do not change the substantive requirements for imposition of the fee, which make clear that the fee is due only when a passenger actually enters the United States. *Id.*

The same reasoning applies here. The security-fee statute, like the customs-fee statute, includes provisions about how to administer the fee and when to remit the fee to the government. But the administrative provisions do not change the government's entitlement to the fee under either statute. That entitlement depends on the substantive provisions, which make clear

that the fee is due only when passengers actually travel and receive government services.

3. TSA's regulations do not support its argument

TSA relies on its regulations. AR196-97. But TSA's regulations cannot contradict the plain terms of the statute. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 413 (2024). Here, the statute unambiguously provides that only "passengers" "in air transportation" are required to pay the fee, *see* 49 U.S.C. § 44940(a)(1), so TSA cannot by regulation require payment of the fee when customers cancel their tickets and ultimately do not travel, *see Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1084-85 (11th Cir. 2013) (agency's regulation cannot exceed the scope of its statutory authority).

Anyway, the regulations support Spirit's position, not TSA's. The regulations mirror the statutory language, making clear that the fee is imposed only on passengers who travel. *Compare, e.g.*, 49 C.F.R. § 1510.1 ("This part prescribes a uniform fee to be paid by passengers of direct air carriers . . . in air transportation . . . originating at airports in the United States"), *with, e.g.*, 49 U.S.C. § 44940(a)(1) (TSA shall impose "a uniform fee[] on passengers of air carriers . . . in air transportation . . . originating at airports in the

United States"). No regulation states that TSA is entitled to a fee even when the customer ultimately does not travel.

TSA relies on 49 C.F.R. § 1510.9(b). AR196-97. That regulation states that the fee should initially be charged "based on the air travel itinerary at the time the air transportation is sold," but subsequent "changes by the passenger to the itinerary" can result in "additional collection or refund of the security service fee." 49 C.F.R. § 1510.9(b). According to TSA, the regulation shows that the fee is based on the customer's ticketed itinerary, rather than the customer's actual travel. AR197. But the regulation actually supports Spirit's view. It makes clear that what matters is the itinerary that the customer actually flies, because it recognizes that if the customer ultimately "changes" the itinerary and does not fly, then no fee is due to TSA. 49 C.F.R. § 1510.9(b). Thus, the regulation ultimately supports the view that the fee is based on the customer's actual travel.

In sum, TSA's position is contrary to the plain meaning of 49 U.S.C. § 44940. The Court should vacate TSA's decision on that ground alone.

C. TSA Did Not Provide Fair Notice Of Its Position

TSA's collection of the fee from Spirit in this case is invalid for another, independent reason: TSA did not provide fair notice of its position. Indeed, for many years, TSA acquiesced in many carriers' practice of not

paying the fee when customers cancelled their tickets and received refunds in the form of credits that the customers then let expire.

An agency's enforcement action violates due process if the agency does not give "fair notice" of it is interpretation of a statute, "even if that interpretation is reasonable." *SEC v. Almagarby*, 92 F.4th 1306, 1319 (11th Cir. 2024) (internal quotation marks omitted); *see* U.S. Const. amend. V. For a regulated entity to have fair notice of an agency's view, the agency must have "give[n] the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). For example, in *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), the Supreme Court invalidated an FCC action that sought to enforce the agency's view that "fleeting expletives" violated a statutory prohibition against broadcasting obscene language, because the broadcasters did not have fair notice of that view at the time of the broadcasts at issue. *Id.* at 253-58.

That fair notice similarly was missing here. TSA issued initial guidance in 2002, which said that no fee is due if a refund is provided for unused travel. But that guidance never stated that some forms of credits were not considered "refunds" for purposes of the fee. Then, for nearly two decades, TSA did not try to collect the fee when airlines refunded customers by

issuing credits that ultimately went unused. It was not until the audit in this and other cases that TSA indicated that credits that expire unused do not count as refunds. Because carriers could not have reasonably known of that view before then, TSA cannot impose that view retroactively, as it seeks to do in this case.

In particular, TSA has taken several different positions on this issue since Congress enacted 49 U.S.C. § 44940 in 2001. First, in 2002, A4A sent a letter to TSA "requesting guidance on the refundability" of the security service fee "to ticket purchasers who do not travel on their scheduled flights." AR3. In response, TSA issued an informal guidance letter, stating that air carriers should refund the fee when customers do not travel. Specifically, TSA stated that when "a ticket purchaser does not use a ticket" and the "ticket then expires or loses its value," the airline should refund the security fee to the purchaser. *Id.* Notably, this guidance letter did not say that credits only count as refunds in some circumstances.

Then, for nearly two decades, TSA did not require payment of the fees when airlines issued refunds, including as credits. TSA regularly audited airlines' fee remittances, *see* 49 C.F.R. § 1510.19, and yet TSA did not claim an entitlement to the security service fee when airlines provided refunds in the form of credits and the credits expired. Thus, TSA acquiesced in those

airlines' practice, effectively indicating that those credits qualified as refunds.

In 2020, TSA abruptly changed its position, issuing guidance that stated that a credit *never* qualifies as a refund. *See* AR5. Despite describing its guidance merely as a "clarification," TSA expressed a brand-new view: "[P]roviding credit towards future services, with or without an expiration, does not constitute a refund." *Id.* Carriers had no reasonable opportunity to learn of this view before TSA issued this guidance; TSA had never previously hinted that a credit would not qualify as a refund.

Then, in the decision under review and in other similar audit decisions, TSA took an even different view. It backed off the view that a credit never qualifies as a refund, and instead argued that TSA is entitled to the fee when an airline issues a credit and the customer lets the credit expire unused. *See* AR198-99.

Even if TSA's view in the 2020 guidance letter or its present view were reasonable interpretations of the statute, TSA could not impose either view retroactively, as it seeks to do here. This petition involves TSA's audit of the fees that Spirit remitted to TSA between December 2016 and December 2018, AR190 – over one year before TSA issued its 2020 guidance and before it stated its present position in the audit. At the time Spirit remitted the

fees, Spirit could not reasonably have known that TSA believed that it owed fees when it issued credits that later expired. On the contrary, for nearly two decades, TSA stood by while airlines did not remit the fee when customers cancelled tickets, received credits as refunds, and the credits expired. In light of TSA's "abrupt" regulatory change, *Fox Television Stations*, 567 U.S. at 254, TSA cannot collect the fee for periods before it expressed its new view.

D. If Accepted, TSA's Novel Position Would Be Disruptive And Unfair To The Airline Industry

TSA's new position would be very disruptive to the industry, because all major U.S. airlines provide customers with a refund in the form of a credit in some circumstances. *See* Stacey Leasca, *How to Use Airline Flight Credits*, Travel + Leisure (Apr. 2, 2025), https://bit.ly/4kSEEkN. TSA's position also is unfair: It distinguishes between credits that customers use to purchase new tickets, and credits that customers let expire unused. That line has no basis in the statute, and adopting it would serve only to provide an unearned windfall to TSA.

Each of A4A's passenger-carrier members provides customers with a credit that can expire in some cases. In particular, members provide refunds in the form credits when customers cancel so-called "non-refundable"

tickets. Despite the name, members do provide refunds in those situations, just on more restrictive terms than "refundable" tickets:

- *Alaska Airlines*: Alaska provides customers with credit certificates when they cancel "non-refundable" tickets. The certificates are valid for 12 months from the date of original ticket (and for a minimum of 30 days from the date of the cancellation).[4]
- *American Airlines*: American provides customers with trip credits for cancelled "non-refundable" tickets. Trip credits are valid for either 12 months (for members of American's frequent-flyer program) or 6 months (for other customers).[5]
- *Delta Air Lines*: Delta provides customers with eCredits when they cancel "non-refundable" tickets. eCredits are valid for one year from the original ticket date.[6]
- *Hawaiian Airlines*: Hawaiian provides customers with travel vouchers when they cancel "non-refundable" tickets. Travel vouchers are valid for one year from the date they are issued.[7]
- *JetBlue Airways*: JetBlue provides customers with travel bank credits when they cancel "non-refundable" tickets. Travel bank credits are valid for 12 months from the original ticketing date.[8]
- *Southwest Airlines*: Southwest provides customers with flight credits when they cancel "non-refundable" tickets. Flight credits

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[4] *What Are Credit Certificates*?, Alaska Airlines, http://bit.ly/4kznFU6 (accessed July 11, 2025).

[5] *Travel Credit*, American Airlines, https://bit.ly/4lpbkmT (accessed July 11, 2025).

[6] *Certificates, eCredits, & Gift Cards*, Delta Air Lines, https://bit.ly/3IpoDVR (accessed July 11, 2025).

[7] *Travel Vouchers FAQs*, Hawaiian Airlines, https://bit.ly/3IEpn9u (accessed July 11, 2025).

[8] *Refunds*, JetBlue Airways, https://bit.ly/3IqHK1z (accessed July 11, 2025).

expire either six months (for basic fares) or twelve months (for all other fares) from the date of the original booking.[9]

- *United Airlines*: United provides customers with future flight credits when they cancel "non-refundable" tickets. Future flight credits expire one year from the date they were issued.[10]

These policies are clearly stated and fair. "Non-refundable" tickets generally are less expensive than "refundable" tickets; airlines provide that cost savings in return for less customer flexibility in changing or cancelling the tickets. *See* Ella Dunham, *Refundable vs. Non-Refundable Airline Tickets*, Executive Flyers (Aug. 31, 2023), https://bit.ly/4eRyZK0. TSA's position effectively overrides the bargain that the airline and the customer have struck and micromanages how the airline issues refunds. Worse yet, TSA attempts to do so not by issuing a regulation that would provide clear notice, but by imposing an atextual reading of the security service fee statute during fee audits.

Airlines, including *amici*'s members, have tried to faithfully follow the statute's text. Many airlines had a practice of not remitting the security service fee when the passenger does not travel, and of refunding that fee either as a credit or to the original form of payment. For many years, TSA

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[9] *I Want to Learn About Flight Credits and How They Work*, Southwest Airlines, https://bit.ly/4lpTro5 (accessed July 11, 2025).

[10] *United Travel Credits*, United Airlines, https://bit.ly/4lsuQyX (accessed July 11, 2025).

acquiesced in that practice. Now, TSA has abruptly adopted a new view without providing notice to the industry, under which TSA demands the fee even when the customer never travels and TSA never provides any security services.

The result would be a large and unjustified windfall to TSA. In this case, which involves just two years of fees for Spirit Airlines, TSA claims that Spirit owes it $2.8 million in additional fees. AR190. In Southwest's case, involving just over four years of fees, TSA claims it is owed $48.0 million. *See* Record Excerpts at AR1181, AR1292, *Southwest Airlines v. Transp. Sec. Admin.*, No. 25-60052 (5th Cir. June 16, 2025), ECF No. 27. So across the entire industry, TSA stands to gain tens of millions of dollars of fees each year, both for years past and for years to come, for security services that TSA did not actually provide to any traveler.

That outcome would be clearly contrary to Congress's intent. Congress made clear that TSA is entitled to the fee only when a passenger boards a plane from a domestic airport and TSA provides security services to that passenger. Nothing in the statute suggests that Congress intended for TSA to collect the fee when the person does not actually travel and TSA does not provide security services.

CONCLUSION

The Court should grant the petition and set aside TSA's decision.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,278 words, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface and style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: July 17, 2025 /s/ *Nicole A. Saharsky*

CERTIFICATE OF SERVICE

I certify that on July 17, 2025, I filed the foregoing via the CM/ECF system and the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

Dated: July 17, 2025 /s/ *Nicole A. Saharsky*