

A state law imposes penalties for "any public statement containing false or misleading information about a service or product." An airline falsely claimed in an advertisement that its competitor had an inferior safety record. The claim was based on erroneous information, found on the website of a nonprofit consumer advocacy group, that the airline assumed to be true. The airline was charged under the state law for making a false statement. No federal statute applies.

Which of the following best supports the airline in a defense based on the First Amendment?

- A. Its statement about the safety record was made without malice.
- B. Its statement about the safety record was protected noncommercial speech.
- C. The state law is a prior restraint.
- D. The state law is overbroad.

Explanation:

Constitutional challenges

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| Facial | <ul style="list-style-type: none">• No application of law would be constitutional• Strike down law in its entirety |
| As applied | <ul style="list-style-type: none">• Generally valid law is unconstitutional as to challenger• Overturn application of law against challenger |

The state law cannot be challenged *as applied* to the airline's false advertisement because the First Amendment does not protect commercial speech that is (1) false or misleading or (2) concerns an unlawful activity. But the airline can still use the First Amendment to challenge the law *on its face* based on the **overbreadth doctrine**. Under this doctrine, a law is **unenforceable against anyone**—including those engaged in unprotected speech—if it **restricts a substantial amount** of constitutionally **protected speech**.

Here, the law penalizes "any public statement containing false or misleading information about a service or product." And though this encompasses unprotected commercial speech, it also impacts a substantial amount of protected speech—eg, false or misleading *noncommercial* speech. Therefore, the airline's best defense is that the law is overbroad.

(Choice A) **Defamation** of a public official or figure (eg, the airline's competitor) requires proof that the speaker acted with malice—ie, knowingly or recklessly disregarded the falsity of its published statement. And though the airline's lack of malice may show that its advertisement was not defamatory, the false advertisement is still unprotected speech. Therefore, this evidence would not aid the airline's defense.

(Choice B) The airline's claim about the competitor's safety record was *commercial* speech because it was used in an advertisement—a type of economically-oriented expression. And it was *unprotected* commercial speech because it contained false information.

(Choice C) A prior restraint is a government action (eg, an injunction) that prohibits speech *before* it occurs. But the state law is not a prior restraint since it imposes penalties *after* speech occurs.

Educational objective:

Under the overbreadth doctrine, a law is unenforceable against anyone—including those engaged in unprotected speech—if it restricts a substantial amount of constitutionally protected speech.

References

- Houston v. Hill, 482 U.S. 451, 458–59 (1987) (explaining the overbreadth doctrine).

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