No. 16-14

In The
Supreme Court of the United States

FLYTENOW, INC.,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION, Administrator,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This case is an appropriate vehicle to resolve the questions presented, all of which have been properly preserved and presented to this Court.

I. The Question of What Deference Is Owed An Agency's Interpretation of Common Law Terms Is Outcome-determinative.

The Federal Aviation Administration ("FAA") mischaracterizes the question presented. *See* Br. for the Respondent in Opposition ("Resp.") at 13–23. The question presented is *not* whether "an agency's interpretation of a *regulation*" is entitled to deference, *id*. at 14 (emphasis added). The question is "[w]hat, if any, deference is due an agency's interpretation when it predominately interprets *terms of common law* in which courts, not administrative agencies, have special competence." Pet. at i (emphasis added).

The question Flytenow presents does not turn on whether the agency interprets its regulation, or a statute, or a federal contract, or merely applies a common law term to a set of facts. Instead, Flytenow contends that as long as an agency interprets *a term of common law* that interpretation deserves no deference whatsoever—because courts, not administrative agencies, are entrusted with the constitutional duty to interpret—and have unique competence in interpreting—terms of common law.

That question is properly preserved and presented to this Court. The court of appeals concluded that "the familiar *Auer v. Robbins* framework *requires us* to treat the agency's interpretation as controlling unless 'plainly erroneous or inconsistent with the regulation.'" App. at 13 (emphasis added) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). It gave *Auer* deference to the *MacPherson–Winton Interpretation*, and thereby widened the existing circuit split. *See* Pet. at 9–20.

Should this Court decide that no deference is due an agency's interpretation of terms of common law, it would require the court of appeals to independently determine whether Flytenow-subscribing pilots are common carriers under the common law definition. The deference question is outcome-determinative; the circuit-split on the question weighs in favor of granting certiorari.

II. This Case Is An Ideal Vehicle to Decide Whether Government Discrimination Against Modern Communications Platforms Should be Subject to First Amendment Strict Scrutiny.

The FAA argues that it can prohibit a particular means of communication depending on the "size of the intended audience." Resp. at 25. Specifically, the FAA contended below, and the court of appeals agreed, that if pilots communicate to "defined and limited groups" (as, for instance, on Facebook.com) they can continue to share expenses, as they have since the beginning of

general aviation, *id.* at 25, but that they cannot do so if they communicate on Flytenow.com. But this Court has concluded that "any effort . . . to decide which means of communications are to be preferred for the particular type of message and speaker would raise . . . [s]ubstantial questions" under the First Amendment, particularly given the fact that "those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 326 (2010).

The speech prohibition or regulation contained in 14 C.F.R. §§ 61.113 and 119.5(k) is triggered by the identity of the speaker (a person holding an FAA pilot license), and the means of communication utilized by the speaker (Flytenow.com, as opposed to Facebook.com, a private email to a group of acquaintances, or a physical bulletin board). And it is triggered by the fact that the speech at issue conveys a message with a particular content (the travel plans of a private pilot seeking to share expenses). Thus, the regulation is a content- and identity-based speech restriction, and subject to strict scrutiny under *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011).

This case is an ideal vehicle to decide whether government discrimination against modern communications platforms should be subject to strict scrutiny. Here, the FAA applied regulations written in the days of push-pin bulletin boards to cutting-edge Internet communications, and did so in a manner that censors

a particular type of speech about a particular subject matter if conveyed in a particular medium.

The court below erred in sustaining that regulation. And individuals, businesses, and lower courts throughout the country would be well served if this Court clarified that strict scrutiny applies to discrimination against communications over the Internet, just as it does to discrimination against older forms of communications technologies.

III. Arguments Regarding the Common Law Definition of Common Carriage Have Been Properly Preserved and Presented to This Court.

The FAA contends that this Court should not grant review to consider whether it departed from the "common law definition of 'common carrier'" because the argument has been forfeited. Resp. at 18. To the contrary, that argument is properly preserved and presented to this Court.

Flytenow expressly asserted below that the FAA's definition of common carrier "radically departed" from common law precedent. *See* D.C. Circuit Case No. 14-1168, Doc. No. 1530249, Petitioner's Opening Brief ("POB"), at 16. As a result, the argument was simply not forfeited. It was "fairly presented" to the Court of Appeals, and is now presented to this Court. *Smith v. Goguen*, 415 U.S. 566, 577 (1974).

An entire section of Flytenow's opening brief in the court of appeals discussed how the FAA's interpretation of common carriage was owed no deference because common carriage is defined in the common law, and the FAA's interpretation departs from that definition. *See* POB at 16 ("Since the FAA has interpreted *only common law terms* here, and because the FAA has *radically departed* from previous interpretations *and precedent*, the *MacPherson–Winton Interpretation* is entitled to no deference by this Court." (emphasis added)); *id.* at 30 ("Here, the key terms that the FAA had to interpret and apply to Flytenow's facts [including 'common carriage'] are, by the FAA's own admission, all *common law terms*." (emphasis added)); *id.* at 35 ("'[C]ommon carriage' as opposed to private carriage . . . [is a] purely *common law term*[]." (emphasis added)).[1]

Flytenow also directly replied to arguments regarding the common law definition of common carriage that the FAA made in its answering brief below. *See* D.C. Circuit Case No. 14-1168, Doc. No. 1541908, Respondent's Brief at 35 ("the term 'common carrier' . . .

[1] The court below cited POB at 6 n.6, 11, 25, to conclude that Flytenow forfeited this argument, *see* App. 21, but those portions of Flytenow's opening brief were *describing the FAA's position*. *See* POB at 6 n.6 (stating how the FAA defines common carriage); *id*. at 11 (same; explaining the existing legal framework for sharing of expenses); *id*. at 25 (same). Even if the court of appeals thought Flytenow "invoked," App. at 21, the FAA's articulation of common carriage to argue that the FAA erred in applying that definition to Flytenow, that comes nowhere close to forfeiting Flytenow's common carrier argument.

is a 'well-known term that comes to us from the *common law*' " (citation omitted)); *id*. at 30 ("The 'holding out' element of common carriage . . . has been consistently articulated . . . *by this Court* in applying the 'common carrier' concept." (citation omitted; emphasis added)).

Thus, Flytenow not only *did* raise the issue presented here—the FAA's unilateral redefinition of common carriage—in its opening brief, but the FAA also made arguments regarding this issue in their answering brief. An argument is not "forfeited," Resp. at 18, if "an appellant . . . respond[s] to a contention made by the appellee" in the "reply brief." *United States v. Van Smith*, 530 F.3d 967, 973 (D.C. Cir. 2008).

In addition, the court of appeals discussed at length how the FAA "applie[d]" terms "defined through the common law . . . in a functionalist, pragmatic manner." App. at 18; *see also id*. at 14–20 (discussing "compensation" and "holding out"). Thus, there is no question that this issue—the meaning and application of the common law definition of common carrier—was raised by all parties and was considered by the court below.[2] Flytenow's argument regarding the common law definition of common carriage was "pressed" and "passed upon below." *United States v. Williams*, 504

[2] This is particularly noteworthy because this action was brought in the first instance in the court of appeals, without proceedings in the district court, pursuant to 49 U.S.C. § 46110.

U.S. 36, 41 (1992), and is therefore properly presented to this Court.[3]

IV. The FAA's Position That Common Law Decisions Defining Common Carriage Are Less Than Harmonious Weighs in Favor of, Not Against, Granting This Petition.

This case is an appropriate vehicle to resolve the misapplication of the common law definition of common carriage by regulatory agencies.

Flytenow's business model—acting as a facilitator of communications between pilots and passengers—mirrors the business models of other "sharing economy" technologies in areas of road transportation (Uber), housing accommodations (Homeaway), delivery services (Postmates) and medical care (Stat), among others. And the regulatory burdens imposed by the FAA and similar agencies present a significant threat to their business model. This case is ideal for helping to resolve that concern.

Specifically, defining expense-sharing pilots as "common carriers" significantly impacts modern day transportation regulation. Being classified as a "common carrier" makes a company subject to enormous legal liabilities and implications that simply do not

[3] In the alternative, this Court always has the option of granting certiorari, vacating the decision below, and remanding the case to resolve an outcome-determinative question—an option that is appropriate for all three questions presented in this case. *See Lawrence* ex rel. *Lawrence v. Chater*, 516 U.S. 163, 166 (1996).

make sense given that *Flytenow is only a communications platform, not an airline*.[4] A grant of certiorari will provide clarity on the extraordinarily important matter of when a transportation provider using a platform like this is or is not a common carrier. *See* Br. *Amicus Curiae* Cato Institute *et al.* at 3–10; Br. *Amicus Curiae* Southeastern Legal Foundation *et al.* at 23–36.[5]

The FAA claims that "numerous decisions defining the term [common carriage] are somewhat less than harmonious." Resp. at 22. But that argument weighs in favor of, not against, granting this petition. This Court should harmonize the common law definition of common carriage, particularly in the context of new communications technologies.

[4] The FAA argues that because Flytenow presented "no evidence that participating pilots in fact refuse to transport passengers who are willing to pay," this Court should not review such a "factbound and case-specific argument." Resp. at 22–23. That insinuates that there is a need for fact-finding in this case. Not so. The FAA did "not identif[y] any factual disputes relevant to Flytenow's statutory or constitutional objections, nor d[id] it hint that it missed any opportunity to apply its expertise or revise its rule to avoid Flytenow's objections." App. at 21. Additional fact-finding in this case is neither necessary nor appropriate. The fact that the right to refuse is central to Flytenow's business model has been firmly established. App. 8 (discussing right to refuse).

[5] The FAA's argument that not-for-profit "enterprises are subject to regulation under the Commerce Clause" is simply beside the point. Resp. at 20. The questions are whether the FAA's interpretation is a radical departure from federal common law, an area in which only federal courts are competent, not federal administrative agencies, and whether such departure violates the First Amendment.

CONCLUSION

Flytenow's petition for a writ of certiorari should be granted.

Respectfully submitted,

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