No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In deciding what level of deference is due an agency's interpretation when it predominately interprets common law terms, five circuit courts of appeals have held no deference is due such an interpretation. Three others have held such an interpretation is "not entitled to great deference." The D.C. Circuit here afforded deference under *Auer v. Robbins*, 519 U.S. 452 (1997) to the Federal Aviation Administration's ("FAA") legal interpretation predominately interpreting the common law term, "common carriage." What, 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?

2. Did the circuit court err when it held, in contravention of this Court's long-standing definition of "common carrier," that pilots who use the Internet to communicate are "common carriers" when those pilots do not earn a commercial profit or indiscriminately offer to share their travel plans with the general public, thus warranting remand?

3. Pilots have lawfully communicated a particular message—namely, the time and location of travel plans—with prospective passengers since the beginning of general aviation using a variety of different means of communication. Did the circuit court err in holding that the FAA could, consistent with the First Amendment, lawfully discriminate against content-based Internet communications because of the message conveyed and the means chosen by pilots to convey it?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding are all listed on the cover.

Petitioner, Flytenow, Inc., is a Delaware corporation with its principal place of business in Massachusetts. No parent corporation or publicly held corporation owns 10% or more of the stock of Flytenow, Inc.

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OPINIONS BELOW

The U.S. Court of Appeals for the District of Columbia Circuit decision is reported as *Flytenow, Inc. v. Federal Aviation Administration*, 808 F.3d 882 (D.C. Cir. 2015), and is reproduced at App. 1–27. The Federal Aviation Administration's *MacPherson–Winton Interpretation* is unreported. It is reproduced at App. 30–40.

STATEMENT OF JURISDICTION

The court of appeals filed its order denying rehearing *en banc* on February 24, 2016 and it is reproduced at App. 41–42. This Court granted Flytenow's motion to extend time for filing the petition for a writ of certiorari to and including June 24, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 49 U.S.C. § 46110(e).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . " U.S. Const. amend. I

"A private pilot may not pay less than the pro rata share of the operating expenses of a flight with passengers, provided the expenses involve only fuel,

oil, airport expenditures, or rental fees." 14 C.F.R. § 61.113(c) ("Expense Sharing Rule").

STATEMENT OF THE CASE

The court below upheld an action by the FAA that prohibits pilots from doing what they have lawfully done since the beginning of general aviation—sharing expenses with their passengers—because in this instance pilots used the Internet to communicate. In a world where communications are increasingly posted online, rather than on airport bulletin boards, the circuit court's decision is dangerously anachronistic. That decision also conflicts with centuries of common law and this Court's definition of "common carrier." Additionally, it applies the wrong standard of regulatory review to reach a result that the First Amendment directly prohibits: forbidding pilots from engaging in truthful communications about a lawful activity.

Petitioner, Flytenow, Inc., operates a website for the exclusive use of FAA-certified pilots and their passengers which allows them to communicate in order to share the operating expenses of a pre-planned flight. Flytenow does not employ pilots or contract with them to provide flights. Rather, Flytenow acts as a communications facilitator to match pilots with passengers and then allows a pilot to defray operating expenses of the flight with passengers pursuant to the FAA's Expense-Sharing Rule. 14 C.F.R § 61.113(c). App. 35. Like

the ridesharing company, Uber, Flytenow is in the business of communicating—although unlike Uber, the pilots do not, indeed cannot, profit—they only share the *costs* of a flight with passengers.

FAA-licensed pilots subscribe to Flytenow.com and are subject to background checks by Flytenow. D.C. Circuit Case No. 14-1168, Doc. No. 1530251, Petitioner's Addendum (hereafter "PA"), PA.023. The pilots self-designate their FAA certification level and Flytenow requires that they have at a minimum a "private pilot" license to ensure they are proficient in the safety and operations training of Parts 61 and 91 of the FAA's regulations. 14 C.F.R. Pts. 61, 91. Such FAA-licensed pilots may lawfully—and for decades have—posted the time and destination of their pre-planned small-aircraft private flights on airport bulletin boards to facilitate ride-sharing and cost-sharing. Flytenow allows them to do so more conveniently on the Internet. A person who wants to fly to the same destination can request that she be allowed on the planned flight. The pilot retains full control of the flight, including the right to cancel the flight or refuse a particular passenger for any or no reason.

Thus, the Flytenow model is exactly the opposite of a charter operation which is subject to Part 135 of FAA regulations. 14 C.F.R. Pt. 135. In a charter operation, the *passenger* chooses the time and destination, and the charter company promises to provide flight-on-demand operations to passengers. By contrast, pilots who communicate their travel plans via Flytenow.com are in full control of the flight, including destination

and departure times. The passenger, and Flytenow, exercise no such control. Flytenow, unlike a charter company and unlike a commercial operator, owns no inventory.

The Flytenow model also is diametrically different from the commercial airline operations that are subject to Part 119. Part 119 operations are operations where a commercial airline company owns a fleet of commercial airplanes and operates a set schedule between set points of operation. 14 C.F.R. Pt. 119.

Flytenow.com also provides a forum for pilots and enthusiasts to engage in a dialog, thus providing ample opportunities to passengers to learn about the qualifications, licensure, and skill level of pilots before agreeing to share expenses. PA.026. Thus, passengers obtain *more* information about pilot competence and safety than even commercial common carriers like American Airlines disclose on their websites. Flytenow is simply not an airliner. It merely provides a way for pilots and passengers to communicate, and, after the flight has taken place, calculate the pro-rata share and facilitate the online exchange of money. For this, Flytenow charges a small commission, which itself is pro-rated, and which does not go to the pilots.

For over 50 years, the FAA has recognized the right of pilots and passengers to share the operating expenses of flights. *See* 29 Fed. Reg. 4717, 4718 (April 2, 1964); 62 Fed. Reg. 16220, 16263 (April 4, 1997). Pilots have customarily posted their planned flights on local airport bulletin boards, or in other community

spaces, so that a passerby who has an interest in riding along can contact the pilot, ask to join the flight, and share the costs pursuant to the Expense-Sharing Rule.

Today, communication is no longer limited to physical bulletin boards, but rather, has extended to the Internet, and to social media and mobile websites. Flytenow has simply created an online bulletin board to facilitate the sharing of expenses between pilots and passengers travelling to the same destination.

Flytenow launched its Internet-based platform in January 2014. Shortly thereafter, Flytenow learned that the FAA was notifying pilots who communicated their travel plans on Flytenow's website that such communication was unlawful. As one pilot-member noted, FAA enforcement officials "let me know in no uncertain terms that they consider this [the Flytenow website] [to be] holding out for illegal charter. They will be/are going after these operations." PA.007. Responding to these concerns, in February 2014, Flytenow requested a formal Letter of Interpretation from the Office of the Chief Counsel of the FAA regarding Flytenow's communications platform and the Expense-Sharing Rule. D.C. Circuit Case No. 14-1168, Doc. No. 1530250, Joint Appendix (hereafter "JA"), JA.047–50.

On August 14, 2014, the FAA rendered a final agency order to Flytenow, concluding that pilots communicating on the website must obtain a Part 119

commercial license prior to engaging in such communications. Interestingly, the certification the FAA demanded had nothing to do with pilot training or certification. Indeed, one effect of the FAA's order is to *prohibit* even the most highly trained pilots in the world from *ever* sharing expenses. Rather, the FAA's order required that the flight operation obtain commercial certification, which means that flight operators must show that the operation is commercially viable.

However, when pilots share operating expenses under the Expense-Sharing Rule, they are required to pay a pro-rata share of the flight operation. For example, if a pilot shares a flight with one other passenger, the pilot must pay at least one half of the costs of the flight. If a pilot shares a flight with two other passengers, the pilot must pay at least one third of the flight expenses. And so on. As a result, it is literally *impossible* for pilots who operate under the Expense-Sharing Rule to *ever* earn a commercial profit.

Consequently, the FAA's order extinguished entirely the traditional right of a pilot to defray operating expenses under the Expense-Sharing Rule, because the order requires a certification that is factually impossible to obtain for expense-sharing pilots. JA.061–62.

Flytenow timely filed a petition for review in the District of Columbia Circuit challenging the FAA's interpretation.

On December 18, 2015, the circuit court denied the petition. The circuit court also denied a petition for a rehearing *en banc*. This timely petition for certiorari follows.

REASONS FOR GRANTING THE PETITION

Although pilots have been communicating with passengers in order to share flight operating expenses since the beginning of general aviation, and with the express approval of the FAA for over 50 years, the FAA has now deemed such communications unlawful if they are done over the Internet. In doing so, the FAA has issued an interpretation that violates the First Amendment and this Court's precedent. Certiorari should be granted for three reasons.

First, the panel did not resolve the question of what level of deference is due given that the *MacPherson–Winton Interpretation* predominately interpreted common law terms, instead of statutory or regulatory language. This is a question of exceptional importance. Moreover, application of *Auer* deference in this case contravenes this Court's precedent. *See Gonzales v. Oregon*, 546 U.S. 243, 245–46 (2006); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2159 (2012); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015).

Second, the circuit court's decision upholding the FAA's definition of "common carrier" conflicts with this Court's precedent and the common law. Those sources

of law define common carriers as both engaged in a commercial enterprise and willing to accept paying members of the public without refusal. Neither of these criteria exist for Flytenow pilots. By classifying them as common carriers, the decision below has upended that significant legal classification in direct contravention of this Court's precedent and decades of common law.

Third, the circuit court's decision directly contravenes this Court's holding in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), because the FAA's determination burdens speech based on its content and the means of communication. In *Reed*, this Court held that "a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2231. Applying strict scrutiny, the Court struck down a town's sign code that "single[d] out signs bearing a particular message: the time and location of a specific event." *Id.* Here, the FAA has imposed content based speech restrictions on the communications of Flytenow and its member pilots by singling out web postings that bear a particular message; viz., the time and location of a pilot's specific travel plans. At the same time, the FAA has allowed pilots to communicate their travel plans using *some* means of communication, *e.g.*, airport bulletin boards, but not others, viz., the Internet. The court of appeals erred by not applying strict scrutiny to this content based restriction on speech and by discriminating against the means Flytenow pilots chose to communicate their travel plans.

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CIRCUIT SPLIT ON THE QUESTION OF WHAT, IF ANY, DEFERENCE IS OWED AN AGENCY'S INTERPRETATION WHEN IT PREDOMINATELY INTERPRETS TERMS OF COMMON LAW IN WHICH COURTS, NOT ADMINISTRATIVE AGENCIES, HAVE SPECIAL COMPETENCE.

The FAA's regulatory interpretation in this case was not an interpretation of statutory or regulatory language, but of a common law term. Yet, in its decision upholding the FAA's *MacPherson–Winton Interpretation*, the court of appeals determined that in "consider[ing] a challenge to the FAA's interpretation of its own regulations, the familiar *Auer v. Robbins* framework require[d the court] to treat the agency's interpretation as controlling unless" it was "'plainly erroneous or inconsistent with the regulation.'" App. 13 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). This decision significantly expands the doctrine of agency deference. Deference is granted to agencies on the presumption that they have unique expertise in the subject. But common law rules are properly within the *judiciary's* expertise. *See Stern v. Marshall*, 564 U.S. 462, 494 (2011) ("The 'experts' in the federal system at resolving common law counterclaims . . . are the Article III courts, and it is with those courts that her claim must stay.").

The courts of appeals are divided as to what, if any, deference is owed to an executive agency's interpretation of common law. The Third, Fourth, Fifth, Sixth,

and Ninth Circuits have declined to provide such deference. The Second, Eighth, and Tenth Circuits have provided some deference. In the decision below, the D.C. Circuit provided *Auer* deference, also interchangeably called *Seminole Rock* deference, referring to *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). Only resolution by this Court can clarify the extent to which the judiciary must yield to executive agency interpretations of "what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

A. Five courts of appeals have held that no deference is due to an administrative interpretation of predominately common law terms.

The Third, Fourth, Fifth, Sixth, and Ninth Circuits have concluded that no deference is due an agency's interpretation of common law terms. These circuits have reasoned that "there is little reason for the judiciary to defer to an administrative interpretation" where "the issue falls outside the area generally entrusted to the agency" and where the issue "is one in which the courts have a special competence." *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 914–15 (3d Cir. 1981). Issues involving the "common law" or "constitutional law" "are hardly unfamiliar to judges" because "the agency diet is food for the courts on a regular basis." *Id.* at 915. In such situations, "there is little reason for judges to subordinate their own competence to administrative 'expertness.' " *Id.*

In *West Virginia Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239, 245 (4th Cir. 2003), the Fourth Circuit concluded that "when the administrative interpretation is not based on expertise in the particular field . . . but is based on general common law principles," an "exception to *Seminole Rock* deference is invoked to allow *de novo* review of an agency's legal determination" (internal quotations and citation omitted).

White v. INS, 75 F.3d 213, 214–15 (5th Cir. 1996), involved an INS regulation that construed the undefined statutory term "unrelinquished domicile," 8 U.S.C. § 1182(c), to mean only years of "permanent residence," 8 C.F.R. § 212.3(f)(2), instead of taking into account the entirety of the person's "physical presence within the United States." The Fifth Circuit concluded that because domicile "has a well-developed meaning in the common law" and is "a concept widely used in both federal and state courts for jurisdiction and conflict-of-laws purposes," "its meaning is generally uncontroverted." *White*, 75 F.3d at 215. The court declined to defer to the agency's interpretation because it was "contrary to congressional intent, common law principles and common sense." *Id.* at 216.

Like the Third, Fourth, and Fifth Circuits, the Sixth and Ninth Circuits give no deference to an agency's "legal conclusions" that are based on "what is essentially an interpretation of the common law." *NLRB v. Fullerton Transfer & Storage Ltd.*, 910 F.2d 331, 343 (6th Cir. 1990) (Engel, J., concurring). Thus,

an agency's interpretation and application of the "common law" of agency gets no deference. *Id.* at 335 (principal opinion). Also reviewed "under the *de novo* standard" is the "question of whether new standards should be applied retroactively," *Oil, Chemical & Atomic Workers Int'l Union, Local 1–547 v. NLRB*, 842 F.2d 1141, 1144 n.2 (9th Cir. 1988), because retroactive application is not a question "within [the] agency's special competence" and is therefore "not subject to deference." *Id.* (discussing *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141, 148–51 (9th Cir. 1952)).

Deference given to an agency due to its presumed expertise has been too frequently "'allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'" *Hi-Craft*, 660 F.2d at 915 (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965)). This sort of "[b]lind acceptance of agency 'expertise' is not consistent with responsible review." *Id.* The Eighth Circuit, too, has adopted the *Hi-Craft* reasoning and has said that even "if the question involves an interpretation within the specialized knowledge of the agency, a court should not automatically abandon heightened review. Instead, the court should further inquire whether 'the agency diet is food for the courts on a regular basis.'" *Maloley v. R.J. O'Brien & Assocs., Inc.*, 819 F.2d 1435, 1441 (8th Cir. 1987) (citing *Hi-Craft*, 660 F.2d at 915).

Ultimately, the "no deference" circuits hearken back to this Court's decision and reasoning in *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263

(1960). In *Texas Gas*, the Federal Power Commission had asked for highly deferential review of its interpretation of a contract provision based on "specialized knowledge gained from experience in the regulation of the natural gas business." *Id.* at 268. Instead, the record showed that the agency "treated the question as one to be determined simply by the application of ordinary rules of contract construction." *Id.* at 268–69. This Court concluded:

> [S]ince the Commission professed to dispose of the case solely upon its view of the result called for by the application of canons of contract construction employed by the courts, and did not in any wise rely on matters within its special competence, the Court of Appeals was fully justified in making its own independent determination of the correct application of the governing principles.

Id. at 270. Here, the FAA has repeatedly acknowledged that "common carriage is a common law term." JA.042 (citing *Woolsey v. NTSB*, 993 F.2d 516, 523 (5th Cir. 1993)); JA.058; JA.062. In such a situation, it is entirely appropriate to give no deference to the agency's interpretation.

B. Three courts of appeals have held that an agency's interpretation of predominately common law terms is "not entitled to great deference."

The Second, Eighth, and Tenth Circuits have taken a different approach to the question of deference

owed to agency interpretation based predominately on common law terms.

In *Jicarilla Apache Tribe v. Federal Energy Regulatory Comm'n*, the Tenth Circuit held that "in interpreting the word 'purchase,' the FERC relied primarily on property concepts developed and enunciated by the common law." 578 F.2d 289, 293 (10th Cir. 1978). Because "the administrative interpretation . . . [wa]s based on general common law principles," the court held that "great deference [wa]s not required." *Id.* at 292–93. In *Edwards v. Califano*, 619 F.2d 865 (10th Cir. 1980), citing *Jicarilla* and *Texas Gas*, the court concluded that "an agency's interpretation of its own regulation, which is not based on expertise in its particular field but is rather based on general common law principles, is not entitled to great deference." 619 F.2d at 869. *See also Board of Cnty. Comm'rs of Cnty. of Adams v. Isaac*, 18 F.3d 1492, 1497 (10th Cir. 1994) (same); *Mission Grp. of Kansas, Inc. v. Riley*, 146 F.3d 775, 780 n.3 (10th Cir. 1998) (noting the *Jicarilla–Edwards* rule as an "exception[ ] to the rule of *Seminole Rock* deference").

The Eighth Circuit and courts in the Second Circuit, have adopted the *Jicarilla–Edwards* rule. In *Grossman v. Bowen*, 680 F. Supp. 570, 575 (S.D.N.Y. 1988), the court held that "an agency's interpretation is not entitled to great deference" "if it rests upon general common-law principles and not upon expertise within the agency's particular field." *See also Brewster ex rel. Keller v. Sullivan*, 972 F.2d 898, 901 (8th Cir.

1992) ("courts are not obligated to give" "great deference" to an "agency's interpretation . . . which is not based on expertise in its particular field but is rather based on general common law principles" (citation omitted)).

The case below established the D.C. Circuit as the only circuit that has held that agency interpretations of predominately common law terms are entitled to *Auer* deference, which is at odds with previous circuit decisions. Here, the D.C. Circuit held that the FAA's interpretation of the definition of "common carrier" was entitled to *Auer* deference. App. 13. Without explanation as to a heightened level of deference which may have been applied, the court further noted that "[e]ven without such deference, we have no difficulty upholding the FAA's interpretation of its regulations in this case." *Id.* at 13–14. Of course, the FAA was interpreting more than just its own regulations. It was interpreting the common law.[1]

[1] The decision below is also at odds with the D.C. Circuit's reasoning in *Atrium of Princeton, LLC v. NLRB*, 684 F.3d 1310, 1314–15 (D.C. Cir. 2012). In *Atrium*, the court concluded that 29 U.S.C. § 152(13) "incorporates into the NLRA the 'ordinary common law rules of agency' " (citation omitted). Consequently, courts "do not defer to the Board's application of agency principles." *Id.* The statute—49 U.S.C. § 40102(a)—similarly, incorporates into the Federal Aviation Act the "ordinary common law" definition of common carriage. That straightforward reading should have been applied by the court in Flytenow's case.

C. When agencies interpret predominately common law terms, no deference should be provided to those interpretations.

The question of what deference, if any, reviewing courts owe to administrative agencies' interpretation of their own regulations "go[es] to the heart of administrative law." *Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring). In fact, *Auer*'s own author wanted to "restore the balance originally struck by the [Administrative Procedure Act] with respect to an agency's interpretation of its own regulations . . . by abandoning *Auer* and applying the Act as written." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring). Justice Scalia's skepticism is more than warranted because "'decid[ing]' that the text means what the agency says," is tantamount to saying that one litigant is wrong because the adversary says so. *Id.* at 1212. If courts were to "defer to an agency's litigating position," *Brewster*, 972 F.2d at 901, such deference would "raise[] serious constitutional questions." *Perez*, 135 S. Ct. at 1225 (Thomas, J., concurring). It would risk making the executive agency a judge in its own case.

This Court presumes that when Congress uses a term with a "settled meaning" at common law, such meaning is incorporated into the statute as a matter of federal law. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992). For example, in *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1880–81 (2009), this Court assumed that common law tort principles governed the scope of liability for toxic

waste cleanup under the Superfund statute. As noted above, when regulatory regimes incorporate common law concepts, there are more appellate decisions withholding deference than there are opinions deferring to the agency's interpretation.

The "no deference" rule is the better rule for two reasons: meaningful judicial review, and discouraging agencies from creating vague guidance that in turn deters meaningful, responsible innovation in a free market economy.

First, the common thread in these rejections of deference to common law interpretations is that they concern legal questions over which the judiciary has superior competence. Any quantum of deference given an executive agency's interpretation of common law terms "amounts to a transfer of the judge's exercise of interpretive judgment to the agency." *Perez*, 135 S. Ct. at 1219 (Thomas, J., concurring). Enabling an agency to enact regulations and then to invoke *Auer* deference to "do what it pleases" "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring). As Justice Scalia noted in *Talk America*, when a case involves *statutory* interpretation, the executive agency is interpreting a law written by the legislative branch; thus the lawmaker is distinct from the law-interpreter. But on questions of *regulatory* interpretation, the agency is interpreting a law written by the agency itself, thus making the agency both the lawmaker and

the law-interpreter. 564 U.S. at 68. This "seems contrary to fundamental principles of separation of powers." *Id.* Indeed, when "the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty." MONTESQUIEU, SPIRIT OF THE LAWS, bk. XI, Ch. 6 at 151–52 (O. Piest ed., T. Nugent transl. 1949).

Second, *Auer* deference forecloses the vast majority of challenges to agency regulatory interpretations. A 2008 study by administrative law scholars found that the government wins more than 90 percent of cases that involve *Auer* deference. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1104 (2008). As a result, when a regulatory agency without legislative guidance shuts the door on an innovative company, like Flytenow, it is likely to remain shut, and not subject to meaningful judicial review.

D. The Court should also grant review because the D.C. Circuit's decision conflicts with this Court's decisions in *Christopher*, *Mead*, and *Christensen*.

The D.C. Circuit's decision conflicts with this Court's decisions in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000). This also warrants grant of Certiorari.

Christopher bars courts from affording *Auer* deference in the absence of "fair warning" that the regulated entity could face "massive liability." 132 S. Ct. at 2167. Here, pilots and passengers shared operating expenses as a "traditional right" for over 50 years. JA.061–62; 29 Fed. Reg. 4717, 4718 (April 2, 1964); 62 Fed. Reg. 16220, 16263 (April 4, 1997). The FAA's own prior interpretations had firmly established the right of pilots and passengers to communicate about and share in the operating expenses of a private flight. JA.023; PA.10–11. The *MacPherson–Winton Interpretation* provided no "fair warning" that the FAA was going to upend the decades-old Expense-Sharing Rule. Per *Christopher*, the "measure of deference" is "proportional to" the thoroughness, validity, consistency, and persuasiveness of the agency's interpretation, 132 S. Ct. at 2169—that is, the appropriate level of deference due here is *no deference* because the *MacPherson–Winton Interpretation* fails all four of these factors. In *Christensen*, this Court held that "[i]nterpretations such as those in opinion letters" are not entitled to deference. 529 U.S. at 587. And interpretive rules "as a class" are also denied deference. *Mead*, 533 U.S. at 232. Yet, the D.C. Circuit gave "greater deference" to the agency's purported interpretation of its own regulation—14 C.F.R. § 61.113(c)—than courts give to agency interpretations under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

After this Court's decision in *Perez*, heeding *Mead*, *Christopher*, and *Christensen* has become more imperative. Judicial review must align with the principle,

recognized in *Mead*, 533 U.S. at 232–34, that there should be either more rigorous process on the front end of an agency action (such as notice and comment), or else less deference on the back end. Otherwise, agencies acquire the power to create binding norms without either procedural safeguards (such as notice and comment) or meaningful judicial review. Even before *Perez* was decided, this Court twice rejected *Auer* deference when an agency interpreted its own regulations. In *Gonzales v. Oregon*, 546 U.S. 243 (2006), this Court held that an agency's interpretation of its own regulation is "entitled to respect" only to the extent it has the "power to persuade." *Id.* at 256 (citing *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944)). The other occasion, of course, is *Christopher*, 132 S. Ct. at 2159. But after *Perez*, because notice-and-comment rulemaking is not required, the need for meaningful judicial review of agency action is even greater.

Finally, even assuming *Auer* were applicable, the agency's interpretation was nonetheless "plainly erroneous" and "inconsistent with the regulation" because the two *sine qua non* indicia of common carriage—a commercial enterprise and provision of carriage without refusal—are wholly absent from the Flytenow model. Thus, the decision below drastically altered the legal understanding of common carriage with potentially significant consequences for transportation regulation generally, and airline regulation in particular.

II. IN THE ALTERNATIVE, THE CIRCUIT COURT'S DRASTIC DEPARTURE FROM THE COMMON LAW DEFINITION OF "COMMON CARRIER" WARRANTS REMAND.

The circuit court's opinion transforms pilots of small aircraft who use the Internet to communicate their travel plans, and who are by definition not engaged in a commercial enterprise, into commercial common carriers akin to large airline providers. Yet, expense-sharing pilots in no way resemble common carriers as defined in the common law or by this Court.[2] Such a dramatic change in the law will have significant consequences for this nation's regulation of airline travel. If accepted, it may also significantly impact other forms of transportation in the sharing economy.

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[2] Since the outset of this litigation, Flytenow has contended that the FAA's definition of "common carriage" contravenes both this Court's definition of that term as well as the common law. However, the court below did not consider this crucial argument because it concluded that Flytenow raised the argument for the first time in its reply brief. App. 20–21. Flytenow not only raised the issue of the common law definition of common carriage in its opening brief, but Flytenow also replied to this issue in direct response to arguments made in the FAA's Answering Brief. As a result, the court below should have considered this argument. Because the court below did not, this Court could, in the alternate, grant certiorari, vacate the decision below, and remand with instructions to review *de novo* whether the FAA's definition of "common carriage" violates the common law. *See Dewey v. City of Des Moines*, 173 U.S. 193, 197–98 (1899); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 677–78 (2001).

The circuit court's opinion classifies pilots who share expenses, and who cannot as a factual matter possibly earn a profit, as commercial common carriers. In so doing, the circuit court has turned centuries of case law on its head and directly contravened decisions of this Court. Common carriers, by definition, must be businesses in pursuit of a commercial activity. Flytenow pilots are only individuals sharing expenses; by definition, they are not engaged in commercial activity, and cannot ever earn a profit. If the circuit court is correct, and Flytenow pilots are common carriers, they would be the only common carriers in the history of the United States to ever engage in activity for which it was impossible to earn a commercial profit.

Common carrier status, and all its attendant legal consequences, always has and must contain a commercial element. "The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers." *Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1, 9 (1912). As the circuit court previously observed: "'Common carrier' is a well-known term that comes to us from the common law. . . . The term refers to a *commercial transportation enterprise* that . . . is willing to take all comers who are willing to pay the fare, '*without refusal.*'" *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 415 (D.C. Cir. 2011) (emphasis added) (internal citations omitted). Black's Law Dictionary echoes this definition, defining a common carrier as a "commercial enterprise that

holds itself out to the public as offering to transport freight or passengers for a fee." Carrier, BLACK'S LAW DICTIONARY (10th ed. 2014).

Consistent with the established and accepted definition of "common carrier," this Court has required a commercial enterprise component for all entities classified as common carriers. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 516 (1940) ("The term 'commerce', we said in *Second Employers' Liability Cases* . . . , 'embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.' "); *see also Wisconsin Elec. Power Co. v. United States*, 336 U.S. 176, 182 (1949) (defining as common carriers only commercial enterprises, including "electric and gas companies, waterworks, telegraph, telephone, and radio communication companies, railroads, other similar common carriers").

The requirement that a common carrier must be engaged in a commercial enterprise goes back in the common law tradition as far as passengers and property have been transported. Expense-sharing pilots do not operate a business. As early as 1832, Justice Joseph Story defined common carriage thusly: For common carriage, service must be offered, *on demand*, to the public at large or to a group of people generally, and the carrier "must hold himself out as ready to engage in the transportation of goods for hire, *as a business, not as a casual occupation*." J. Story, Commentaries on the Law of Bailments, § 495 (1832) (emphasis added). Black's Law Dictionary reiterates this definition: "To

bring a person therefore within the description of a common carrier . . . he must hold himself out as ready to engage in the transportation of goods for hire as a business and not as a casual occupation." Carrier, BLACK'S LAW DICTIONARY (10th ed. 2014) (internal citations omitted).[3] Yet, in the opinion below, the circuit court contravened this long-standing precedent and transformed private pilots using the Internet to communicate into common carriers.

If the circuit court's interpretation of expense-sharing pilots as common carriers is correct, then expense-sharing pilots would be the only common carriers in history to not seek commercial profit from their operations. In a world where technology is greatly expanding the possibilities for expense-sharing in transportation, that result could have far reaching consequences. Indeed, if this interpretation were accepted, it would turn every college student who posts his travel plans on a university bulletin board and offers to share gas money with passengers into a commercial operator and a common carrier. *See Gale v. Independent Taxi*

[3] Expense-sharing pilots have exactly zero indicia of engaging in a business or commercial activity; indeed, such pursuit would be self-defeating. They are merely taking unprofitable flights they have a clear right under their license to take and that they otherwise would have taken. *See United States v. Contract Steel Carriers, Inc.*, 350 U.S. 409, 411–12 (1956) ("We hold also that the fact that appellee has actively solicited business within the bounds of his license does not support a finding that it was 'holding itself out to the general public.' ").

Owners Ass'n, 84 F.2d 249, 252 (D.C. Cir. 1936) (discussing the degree of care required of taxicabs operating as common carriers).

This Court also requires that common carriers accept *all* paying passengers of the general public. *See United States v. Contract Steel Carriers*, *Inc*., 350 U.S. 409, 410 n.1 (1956) ("A common carrier is one 'which holds itself out to the general public to engage in the transportation by motor vehicle of passengers or property.' "). Thus, an entity can only be classified as a common carrier if it offers transportation to all paying passengers without refusal. "A common carrier is generally *required by law* to transport freight or passengers *without refusal* if the approved fare or charge is paid." Carrier, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added). Moreover, common carriers cannot make individualized determinations regarding what passengers or cargo to accept and which to deny. *See FCC v. Midwest Video Corp*., 440 U.S. 689, 701 (1979) (A common carrier does not "make individualized decisions, in particular cases, whether and on what terms to deal"); *see also* 192 A.L.R.Fed. 403 § 2[a] (2004) ("It is generally recognized that an air carrier, within the limits of its accommodations, must not discriminate in providing transportation for those who apply for it; that is, it may not accommodate one and arbitrarily refuse another.").

By contrast, Flytenow-subscribing pilots are not common carriers because they can refuse passengers for any reason, or no reason at all. Not only does

Flytenow control who does or does not receive membership as a pilot or passenger on the Flytenow website, JA.047, but once a flight enthusiast requests to join a pilot on a preplanned flight, the pilot may "accept or reject an enthusiast's request to partake in the planned Aviation Adventure, for any or no reason." JA.048.

The same arrangement is true with other forms of transportation in the sharing economy. For example, on ride-sharing applications, such as Uber, drivers may accept or reject passengers for any reason. Car-pooling technologies operate the same way. So do boat-sharing applications. The examples go on. Yet, these new transportation services cannot possibly be construed as common carriers. Communications platforms, such as ride-sharing technologies, simply allow casual service providers to connect directly with consumers in a burgeoning but ever increasingly important part of our nation's transportation economy. Such casual service providers can accept or reject passengers for any reason. If all such casual service providers are designated common carriers, with all of that designation's attendant legal consequences, such benevolent societal sharing would cease to exist.

Finally, if the opinion of the court of appeals is allowed to stand, it signals to regulatory agencies that they are free to ignore common law precedent in fashioning their own rules. The common law definition of common carrier, as described above, is plainly at odds with the FAA's definition. *See* D.C. Circuit Case No. 14-1168, Doc. No. 1530249, Petitioner's Opening Brief

(hereafter "POB"), POB.16, POB.29–30, POB.35; D.C. Circuit Case No. 14-1168, Doc. No. 1541908, Respondent's Brief (hereafter "Resp."), Resp. 3–9. Addressing a fundamental and central issue in this case that involves a conflict between this Court's precedent and the FAA's rules, therefore, presents an important federal question necessitating a grant of Certiorari.

III. THE CIRCUIT COURT'S OPINION UPHOLDS A CONTENT-BASED RESTRICTION ON INTERNET COMMUNICATIONS IN VIOLATION OF THE FIRST AMENDMENT.

The circuit court's opinion regarding the First Amendment violations at issue in this case directly conflicts with this Court's opinion in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and results in discrimination against Internet-based communications.

In *Reed*, this Court held that "a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2231. Content-based laws are "presumptively unconstitutional" and must satisfy strict scrutiny. *Id.* at 2226–27. Applying strict scrutiny, the Court invalidated a town sign code that "single[d] out signs bearing a particular message: the time and location of a specific event." *Id.* at 2231.

The FAA's action here is a content-based speech regulation. It applies to speech because of the topic discussed: that is, communication by Flytenow pilots of

their travel plans. The FAA also singled out communications bearing a particular message: the time and location of pilots' travel plans. *Reed* requires that these actions satisfy strict scrutiny. Yet, the circuit court did not apply strict scrutiny. App. 20–21. Instead, it held that "[a]ny incidental burden the FAA's regulations impose on pilots' speech does not violate the First Amendment because the regulations further an important government interest [flight safety] unrelated to the suppression of free expression." App. 25. Not only did the circuit court apply the wrong standard of review, but its justification for why that speech restriction is permissible is simply untrue.

When the FAA issues pilot certificates under 14 C.F.R. Part 61, it gives them permission to carry passengers because the FAA has already determined that the pilot has enough training to do so safely. This includes training on preflight action, use of safety belts and shoulder harnesses, aircraft speed, safe altitudes, altimeter settings, fuel requirements, and weather conditions. In other words, regardless of their certificate level, the FAA has already determined that all Flytenow-subscribing pilots can safely transport passengers and share operating expenses with those passengers.

After *Reed*, "an innocuous justification" such as safety "cannot transform a facially content-based law into one that is content neutral," 135 S. Ct. at 2222, and "at the first step, the government's justification or purpose in enacting the law is irrelevant." *Cahaly v.*

Larosa, 796 F.3d 399, 405 (4th Cir. 2015). *Reed* "effectively abolishes any distinction between content regulation and subject-matter regulation." *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015). Thus, regulations prohibiting activity-related speech are now content-based speech restrictions that are strictly scrutinized. *Id.* at 413 (Manion, J., concurring).

But the FAA argued below, and the circuit court agreed, that pilots can expense-share only if the audience to which the pilot communicates his travel plans is "sufficiently limited." Resp. 30; App. 20. But how does one judge that? And why does the size of the audience matter? No answer is apparent.

In other words, the FAA's action, upheld by the court below, is not only content-based, but it discriminates against the *means* of communication. Remarkably, the FAA's position is that a pilot *may* post flight information and invite passengers to share costs, if he does so on a physical bulletin board, JA.043, but not if he does so on Flytenow.com. But the physical bulletin board is actually a potentially more dangerous scenario, since anyone can walk by it and view the message, while Flytenow controls visitors and members, maintains and makes available pilot training and flight history information, and thus limits who may view the message.[4]

[4] Even if FAA's purported safety justification were factually substantiated, it would not save the regulation here, because the agency is trying to keep willing recipients of truthful information "in the dark for what the government perceives to be their own

The paradox created by the decision below becomes clear if one asks: *What happens if someone takes a picture of the bulletin board and posts it online?* Is the underlying operation automatically illegal at that point? What if someone other than the pilot took the picture and posted it? Again, no answer is apparent from the decision below. What this Court said in the context of political speech, is equally true here:

> While some means of communication may be less effective than others at influencing the public in different contexts, any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, 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 circuit court's opinion thus not only ratifies a content-based speech restriction, it directly discriminates against the means of communication chosen by the speaker.

The circuit court cites *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376,

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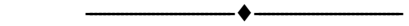
good"—which the First Amendment does not tolerate. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996).

388–89 (1973), to conclude that the advertising of illegal *activity* has never been protected speech. App. 24. But *expense-sharing under 14 C.F.R. § 61.113(c) is not an illegal activity*. It is expressly permissible, and always has been.[5]

The growth of communication-facilitating technologies in recent years, such as Uber, Airbnb, and Flytenow, is breathtaking. On a scale never before seen in history, communications technology is allowing service providers to connect directly with consumers without middlemen, giving rise to an entire economic sector: the sharing economy. From transportation to housing accommodations, to delivery service, to medical care, the sharing economy is permeating nearly every industry in the United States. The legal dividing line between *speech* and *activity*, already a "rough" one in Justice White's day, *Lowe v. SEC*, 472 U.S. 181, 231 (1985) (White, J., concurring), is in sore need of clarification. This case falls squarely on the speech side of that line. Attempts by the government, as here, to restrict Flytenow's provision of a platform for communication—a restriction based on the content and the method of speaking—cannot be tolerated. A grant of certiorari can provide clarity to the extraordinarily important First Amendment questions affecting these new communications platforms.



[5] Thus, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388–89 (1973), on which the court below relied, is inapplicable.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 25, 2015 Decided December 18, 2015

No. 14-1168

FLYTENOW, INC.,
PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION, ADMINISTRATOR,
RESPONDENT

On Petition for Review of an Order
of the Federal Aviation Administration

Jonathan Riches argued the cause for petitioner. With him on the briefs were *Gregory S. Winton, Clint Bolick*, and *Aditya Dynar.*

Sydney A. Foster, Attorney, U.S. Department of Justice, argued the cause for respondent. With her on the brief were *Benjamin C. Mizer*, Acting Assistant Attorney General, *Ronald C. Machen Jr.*, U.S. Attorney at the time the brief was filed, and *Mark R. Freeman*, Attorney.

Before: PILLARD and WILKINS, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge.*

Opinion for the Court filed by *Circuit Judge* PILLARD.

PILLARD, *Circuit Judge*: Flytenow, Inc., developed a web-based service through which private pilots can offer their planned itineraries to passengers willing to share the pilots' expenses. After starting operations in early 2014, Flytenow sought a legal interpretation from the Federal Aviation Administration (FAA) regarding its business plan's compliance with the Federal Aviation Act of 1958 and the FAA's regulations. The FAA responded with a Letter Interpretation, concluding that pilots offering flight-sharing services on Flytenow's website would be operating as "common carriers," which would require them to have commercial pilot licenses. Flytenow's members, licensed only as private pilots, thus would violate FAA regulations if they offered their services via Flytenow.com.

Flytenow asks us to set aside the FAA's Interpretation as arbitrary and capricious and inconsistent with statutory and constitutional law. Because we conclude that the FAA's Interpretation is consistent with the relevant statutory and regulatory provisions and does not violate Flytenow's constitutional rights, we deny Flytenow's petition for review.

I.

Flytenow.com facilitates connections between pilots and "general aviation enthusiasts" who pay a share of the flight's expenses in exchange for passage on a route predetermined by the pilot. Enthusiasts must be members of Flytenow to search for flights, but anyone may become a member by filling out an

online form. Pilots using Flytenow's service "initially and unilaterally dictate the time, date, and points of operation" of their proposed flights. J.A. 48. After a member-enthusiast expresses interest in being a passenger on a particular flight, a pilot may "accept or reject an enthusiast's request . . . for any or no reason." *Id.* If a pilot carries one or more passengers, Flytenow facilitates the sharing of expenses on a pro rata basis between passengers and pilot. *Id.* Around the same time that Flytenow publicly launched its flight-sharing website and requested the FAA's legal opinion, another firm proposing a substantially similar service, AirPooler, Inc., submitted a parallel request for a legal interpretation on the same issue.

The FAA is charged with "promot[ing] safe flight of civil aircraft." 49 U.S.C. § 44701. To that end, the FAA is empowered to regulate nearly every aspect of private and commercial flight, including licensing and regulation of pilots and their operations. *See, e.g.*, *id.* §§ 44701(a), 44703, 44705. At issue here is whether the FAA permissibly concluded that private pilots using Flytenow's service to offer flights to potential passengers hold themselves out as common carriers transporting persons from place to place for compensation in violation of the terms of their noncommercial licensure.

The FAA issues several categories of "airman certificates" licensing qualified pilots to fly in various capacities subject to specified terms. *See id.* §§ 44702, 44703; 14 C.F.R. §§ 61.81-95, 61.102-17, 61.121-33. Relevant to this petition are "commercial pilot"

licenses, *id.* Part 61, subpart F, and "private pilot" licenses, *id.* subpart E. Certified commercial pilots are qualified to transport passengers or property for compensation. *See id.* § 61.133(a)(1). Private pilots, by contrast, are barred from receiving compensation. *See id.* § 61.113(a).

Seven narrow, enumerated exceptions to the compensation bar permit private pilots to receive compensation in specified circumstances. *Id.* § 61.113(b)-(h). Those exceptions authorize, for example, private pilots to accept compensation for certain charity events, *id.* § 61.113(d), search-and-location operations, *id.* § 61.113(e), or airplane-sale-related flights, *id.* § 61.113(f). One of the seven exceptions to the compensation bar provides that a private pilot may share expenses with passengers, provided that the pilot does "not pay less than the pro rata share of the operating expenses" and that the expenses "involve only fuel, oil, airport expenditures, or rental fees." *Id.* § 61.113(c). The pro rata sharing of expenses is further limited by the FAA's "common-purpose test," which requires private pilots and their expense-sharing passengers to share a "bona fide common purpose" for their travel. *See* FAA Legal Interpretation Letter from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations, to Mark Haberkorn (Oct. 3, 2011) (Haberkorn Interpretation), J.A. 41-44. Private pilots' receipt of compensation outside of the seven exceptions is a violation of section 61.113 subject to civil penalties under 49 U.S.C. § 46301.

In addition to pilot licensing, the FAA regulates the conduct of aircraft and pilots in flight. The regulations make an important distinction between private carriage and common carriage, with the latter subject to more stringent operating requirements.

Part 91 of the FAA's regulations establishes baselines that apply to all aircraft operating in the United States. *See* 14 C.F.R. § 91.101; *see generally id.* §§ 91.101-47. Part 91 governs, for example, the use of seat belts, *id.* § 91.107, minimum safe altitudes, *id.* § 91.119, aircraft speed, *id.* § 91.117, and rights of way among aircraft, *id.* § 91.113.

Part 119 of the FAA's regulations subjects flights operating as air carriers to safety requirements beyond what Part 91 requires of all flights. *See* 14 C.F.R. § 119.1. An "air carrier" under the Federal Aviation Act is a person undertaking to provide "air transportation," 49 U.S.C. § 40102(a)(2), defined to include "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft," *id.* § 40102(a)(5). Interstate air transportation, the category relevant to this case, "means the transportation of passengers or property by aircraft as a common carrier for compensation. . . ." *Id.* § 40102(a)(25). Anyone piloting as an air carrier must have "an air carrier operating certificate" and operate only in compliance with its terms. 49 U.S.C. § 44711(a)(4). The term "[a]ir carrier" for purposes of Part 119 of the regulations tracks the statutory definition. *See* 14 C.F.R. § 1.1. Thus, as relevant here, under the statutory and regulatory definitions, an "air carrier" is a person

engaged in transportation of passengers as a "common carrier."

The statute does not define "common carrier" or "compensation." *See* 49 U.S.C. § 40102(a). Instead, the FAA has relied for nearly thirty years on a definition of common carriage it announced in an advisory circular. FAA Advisory Circular 120-12A (April 26, 1986) (FAA Advisory Circular), J.A. 30-32. That circular noted the common-law heritage of "common carriage" and "private carriage" and determined that, because the Act left those terms undefined, FAA "guidelines giving general explanations" of the terms "would be helpful." *Id.* ¶ 3, J.A. 30.

The FAA Advisory Circular distinguished "private carriage" from "common carriage." It explained that "[p]rivate carriage for hire is carriage for one or several selected customers, generally on a long-term basis." *Id.* ¶ 4.d., J.A. 31. As long as she does not hold herself out to the public generally, and any compensation she receives does not exceed the passenger's pro rata share of expenses, a private pilot may offer private carriage consistently with the regulations. *See generally* FAA Advisory Circular, J.A. 30-31. In contrast to private carriage, the FAA's Advisory Circular defined "common carriage" as service meeting four elements: "(1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation." *Id.* ¶ 4, J.A. 30. The two "common carriage" definitional factors at issue here are the first and fourth – holding oneself out as willing to

transport passengers, and doing or offering to do so for compensation.

As noted above, a pilot with a commercial license is qualified to offer carriage for compensation; a private pilot may only receive compensation pursuant to one of the seven exceptions in section 61.113. 14 C.F.R. § 61.113. Under the FAA Advisory Circular, a pilot's receipt of compensation may be evidence that a pilot's operations are "air transportation," meaning common carriage, requiring a higher level of pilot qualification. FAA Advisory Circular, J.A. 31. For example, notwithstanding the regulatory permission for private pilots to carry selected customers and share flight costs with them pursuant to the express exception set forth in section 61.113(c), even carriers flying members of only "one organization may be . . . common carrier[s] if membership in the organization and participation in the flights are, in effect, open to a significant segment of the public." *Id.* ¶ 4.f., J.A. 31. The FAA also noted that a private pilot's provision of "free transportation" for a hotel or casino that requested "nominal charges" for "gifts and gratuities" has been held to be "common carriage based on the fact that the passengers [we]re drawn from the general public and the nominal charge constituted compensation." *Id.* ¶ 4.g., J.A. 31.

The FAA Advisory Circular defined "holding out" as making representations "to the public, or to a segment of the public" that a carrier is "willing to furnish transportation within the limits of its facilities to any person who wants it." *Id.* The FAA warned that a

private pilot may intend to offer only private carriage, but the pilot's flights could come to be treated as common carriage: "The number of contracts must not be too great, otherwise it implies a willingness to make a contract with anybody." *Id.* ¶ 4.d., J.A. 31. The FAA emphasized that its definition of "holding out" as a factor in the definition of common carriage is broad and flexible: "'holding out' which makes a person a common carrier can be done in many ways and it does not matter how it is done." *Id.* ¶ 4, J.A. 30. If a carrier were to show that it did not have rate schedules, that it offered services only pursuant to separately negotiated contracts, or that the carrier occasionally refused service to would-be customers, such facts would not necessarily be "conclusive proof" that a carrier is a private – as opposed to common – carrier. *Id.* ¶ 4, J.A. 30. A carrier cannot avoid a "holding out" determination and its regulatory implications simply by avoiding advertising on its own behalf; "'holding out' may be accomplished through the actions of agents, agencies, or salesmen who may, themselves, procure passenger traffic from the general public. . . ." *Id.* ¶ 4.b., J.A. 31.

The FAA responded to Air Pooler's [sic] and Flytenow's requests for legal interpretations in separate letters on August 13 and August 14, respectively. The letter to Flytenow incorporated by reference the letter to AirPooler. The letters concluded that pilots offering services on Flytenow.com or AirPooler.com would be engaged in common carriage as the FAA defines it, which would subject them to Part 119, the

more stringent regulations governing pilots in air commerce.

First, in its letter to AirPooler, the FAA explained the general rule that a private pilot may not act as pilot-in-command of an aircraft carrying passengers or property for compensation or hire. That general rule admits of a narrow exception for private pilots' "accept[ance] [of] compensation in the form of a pro rata share of operating expenses" from their passengers. J.A. 58. That expense-sharing provision is cast as "an exception to the compensation or hire prohibition," that is, it specifies a circumstance in which compensation is permitted. *Id.*

Second, the FAA explained that it treats flight-sharing services as "common carriage." Under the FAA's definition of "common carriage," flight-sharing services meet the compensation element of the common-carriage definition because expense sharing *is* compensation. J.A. 59. The "holding out" element is met by pilots' use of the online service to "post[] specific flights" to the website. J.A. 60. In its letter to Flytenow, the FAA explained that "[h]olding out can be accomplished by any 'means which communicates to the public that a transportation service is indiscriminately available' to the members of that segment of the public it is designed to attract." J.A. 62 (quoting *Transocean Airlines*, 11 C.A.B. 350 (1950) (enforcement proceeding)). The FAA concluded that, "[b]ased on [Flytenow's] description, the website is designed to attract a broad segment of the public interested in transportation by air." J.A. 62. The FAA thus

concluded that a pilot holding out his services and receiving expense-sharing compensation is engaged in "common carriage" and requires a Part 119 certificate.

Flytenow timely filed this petition for review challenging the FAA's Interpretation.

II.

We have jurisdiction to review Flytenow's petition under section 46110 of the Federal Aviation Act, whether or not the FAA's interpretation is a final order. Even where no party contests jurisdiction, "it is well established that a court of appeals must first satisfy itself of its own jurisdiction, *sua sponte* if necessary, before proceeding to the merits." *Blackman v. District of Columbia*, 456 F.3d 167, 174 (D.C. Cir. 2006) (quoting *Citizens for Abatement of Aircraft Noise, Inc. v. Metro. Wash. Airports Auth.*, 917 F.2d 48, 53 (D.C. Cir. 1990), *aff'd*, 501 U.S. 252 (1991)). Neither party has identified any jurisdictional defect in this appeal, and we perceive none.

The Federal Aviation Act authorizes review in this court by any "person disclosing a substantial interest in an order issued by" the FAA Administrator. 49 U.S.C. § 46110(a). There would perhaps be an obstacle to our review of the FAA's Interpretation if the Administration's letter were not final action, but the FAA has not objected to our reviewing the letter as an "order" under section 46110(a) or otherwise contended that the Interpretation is unreviewable as non-final.

See Br. of Respondent 1. At oral argument, the FAA disclaimed any non-finality bar to our review. We need not address finality *sua sponte* because finality is not jurisdictional under either the Administrative Procedure Act or the Federal Aviation Act.

The APA authorizes judicial review of "final agency action for which there is no other adequate remedy in a court," as well as [a]gency action made reviewable by statute." 5 U.S.C. § 704. After a period of uncertainty in our circuit, it is "now firmly established" that finality under the APA is non-jurisdictional. *Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 661 (D.C. Cir. 2010).

Like the APA's section 704, section 46110 of the Federal Aviation Act, on which Flytenow relies, authorizes judicial review of an "order." Unlike the APA, however, section 46110 does not impose any explicit finality requirement.

Rather, we have incorporated generally applicable finality principles into the analysis of what counts as an "order" under section 46110. *See, e.g.*, *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 411 (D.C. Cir. 2011) (citing *Bennett v. Spear*, 520 U.S. 154, 178 (1997)); *Vill. of Bensenville v. Fed. Aviation Admin.*, 457 F.3d 52, 68 (D.C. Cir. 2006) (same); *Puget Sound Traffic Ass'n v. Civil Aeronautics Bd.*, 536 F.2d 437, 438-39 (D.C. Cir. 1976) (noting that the Federal Aviation Act's review provision, "which gives this court power to review Board orders, has been judicially restricted to review of final agency orders").

Because the finality requirement under section 46110(a) is judicially imported from the APA, it is no more jurisdictional than the APA's own finality requirement. Our precedent confirms that finality under the Federal Aviation Act is a matter of judicial creation, allowing us to "avoid premature intervention in the administrative process." *CSI*, 637 F.3d at 411 (citing *Puget Sound*, 536 F.2d at 438-39).

Because finality is non-jurisdictional, we accept the FAA's decision not to pursue any such defense it might have had. This case presents no exceptional circumstances warranting our consideration of the potential finality bar despite its forfeiture. *See District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1084-85 (D.C. Cir. 1984). Government litigants may sometimes "want to waive or forfeit certain non-jurisdictional, non-merits threshold defenses so as to permit or obtain a ruling on the merits." *Grocery Mfrs. Ass'n v. Envtl. Prot. Agency*, 693 F.3d 169, 185-86 n.5 (D.C. Cir. 2012) (Kavanaugh, J., dissenting). We do not second-guess the FAA's decision here.

III.

Flytenow characterizes the FAA's Interpretation as a significant deviation from the Administration's prior interpretation of its own regulations and asserts that such a shift requires notice and comment rulemaking under the Administrative Procedure Act. That argument is foreclosed by *Perez v. Mortgage Bankers Ass'n*, in which the Supreme Court expressly

abrogated the doctrine of our circuit upon which Flytenow relies. 135 S. Ct. 1199, 1207 (2015) (abrogating *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997)). As the Supreme Court in *Perez* explained, the APA's "notice-and-comment requirement 'does not apply . . . to interpretative rules.'" *Id.* at 1206 (quoting 5 U.S.C. § 553(b)(A)) (omission in original). *Perez* tells us that its "exemption of interpretive rules from the notice-and-comment process is categorical. . . ." *Id.* The Interpretation at issue here is a quintessential interpretative rule, as it was "issued by an agency to advise the public of the agency's construction of the statutes and rules it administers." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979)). We thus reject Flytenow's contention that the Interpretation is invalid for want of notice and comment rulemaking.

A.

On the merits, Flytenow objects that its pilots do not engage in "common carriage" and so cannot be required to comply with Part 119's common-carrier licensure requirements. Flytenow argues that the FAA has misconstrued the definition of common carriage. When we consider a challenge to the FAA's interpretation of its own regulations, the familiar *Auer v. Robbins* framework requires us to treat the agency's interpretation as controlling unless "plainly erroneous or inconsistent with the regulation." 519 U.S. 452, 461 (1997). Even without such deference, we

have no difficulty upholding the FAA's interpretation of its regulations in this case.

The FAA concluded that pilots offering their services on Flytenow.com would be common carriers. That conclusion rests on the FAA's interpretations of "compensation" and "holding out" as the FAA uses those two terms in its regulations. Flytenow objects that: (1) the FAA misinterpreted its regulations in finding that expense sharing under Flytenow's service would be "compensation" to participating pilots; and (2) the FAA erroneously concluded that pilots' participation on Flytenow.com would amount to "holding out" an offer of transportation to the public. Both of Flytenow's objections are unpersuasive.

1. Compensation. The FAA correctly interpreted its regulation prohibiting private pilots from receiving compensation. The FAA concluded that the exception from the general ban on receipt of compensation – allowing private pilots to engage in expense sharing in certain circumstances – did not redefine expense sharing as something other than compensation. That exception instead narrowly authorized some expense sharing notwithstanding the otherwise-applicable general ban on private pilots' receipt of compensation. Flytenow argues that the FAA's reading impermissibly treats the "exception to the definition [as] the same as the definition" – i.e., that it "contort[s]" the exception by treating what Flytenow says the regulation identifies as "not compensation" as if it were still compensation. Reply Br. 9. Flytenow misapprehends the FAA's analysis. The expense-sharing

rule, by excepting certain expense sharing from the ban on private pilots' receipt of compensation, creates a category of compensated flight that is permitted.

The text and structure of the regulation make clear that allowable expense sharing is still compensation, albeit an authorized subcategory. Under the heading "Private pilot privileges and limitations: Pilot in command," the rule explains that, "except as provided in paragraphs (b) through (h) of this section, no person who holds a private pilot certificate may act as pilot in command of an aircraft that is carrying passengers . . . for compensation or hire." 14 C.F.R. § 61.113(a). In other words, section 61.113 defines the only circumstances in which private pilots may receive compensation. Those are set forth in seven categories of compensation, including expense sharing, that are exempted from the general bar. *Id.* § 61.113(b)-(h). The most natural reading of that rule's language and structure – and the reading the FAA adopted – is that the exempted expense sharing is "compensation," but is nevertheless permitted in the identified contexts. The exceptions in paragraphs (b) through (h) – including the limited expense-sharing exception – set out acceptable forms of compensation; they do not change the underlying definition of compensation.

The FAA's position that expense sharing can be permitted compensation is consistent and well established. Since at least the 1980s, the FAA has explained that "any payment for a flight, even a partial payment, means that the flight is for compensation or

hire." FAA Legal Interpretation Letter from John H. Cassady, Assistant Chief Counsel, Regulations & Enforcement Div., to Hal Klee, Executive Director, Pilots & Passengers (undated, identified by FAA as 1985), J.A. 26-27. "This is true even if the payment is made under the 'expense sharing' provisions. . . ." *Id.*; *see also* FAA Legal Interpretation from John H. Cassady, Assistant Chief Counsel, Regulations & Enforcement Div., to Thomas Chero, Vice President – Legal, AVEMCO Ins. Co. (Dec. 26, 1985) (Chero Interpretation), J.A. 28. And as recently as 2011, the FAA explained that it "construes the term compensation very broadly; any reimbursement of expenses, including a pro rata share of operating expenses, constitutes compensation." Haberkorn Interpretation, J.A. 42 n.1. The FAA correctly concluded here, in keeping with its prior interpretation, that expense sharing is always compensation.

Flytenow argues that, where a pilot and her passengers share a common purpose, as Flytenow's service contemplates, expense sharing cannot be compensation within the meaning of the "common carrier" definition. Br. of Petitioner 19-21. But that analysis confounds two issues. The FAA applies the "common-purpose" test to identify the narrow circumstances in which admittedly private pilots may share expenses under section 61.113. *See* FAA Legal Interpretation Letter from Kenneth E. Geier, Regional Counsel, to Paul D. Ware (Feb. 13, 1976) (Ware Interpretation), J.A. 23; Chero Interpretation; FAA Legal Interpretation from Rebecca MacPherson, Assistant

Chief Counsel for Regulations, to Guy Mangiamele (Mar. 4, 2009), J.A. 35-36; Haberkorn Interpretation. Here, however, the question is whether Flytenow pilots would be acting as private pilots, or instead as common carriers without adequate licensure. The common-purpose test has no bearing on whether compensation in the form of passengers' expense sharing, together with holding out to the general public, tends to show that a private pilot is operating as a common carrier.

Flytenow invokes an interpretation from a local field office that, it claims, read the regulations differently from all of the interpretations issued by the FAA's Office of the Chief Counsel. *See* Br. of Petitioner 20 (citing Legal Interpretation Letter from Loretta E. Alkalay, Regional Counsel, to Ron Levy (Oct. 25, 2005)). To the extent that the Levy Interpretation concluded that, so long as the passenger and pilot share a common purpose, a private pilot may generally hold herself out as providing flights on an expense-sharing basis and remain in compliance with Part 119, it was erroneous. An anomalous local field office interpretation cannot control. *Cf. Paralyzed Veterans of Am.*, 117 F.3d at 587 ("A speech of a mid-level official of an agency, however, is not the sort of 'fair and considered judgment' that can be thought of as an authoritative departmental position."), *abrogated on other grounds by Perez*, 135 S. Ct. 1199. In sum, we reject Flytenow's effort to recast the common-purpose limitation as part of the definition of compensation

rather than as part of an exception under which the FAA permits private pilots to receive compensation.

2. Holding Out. Flytenow's argument regarding the "holding out" element of common carriage is question-begging and incorrect. Flytenow contends that the limitation against pilots "holding out" is "codified in" section 119.5(k), which bars advertising or offering unauthorized service. Br. of Petitioner 24; 14 C.F.R. § 119.5(k). Section 119.5(k) states: "No person may advertise or otherwise offer to perform an operation subject to this part [governing air carriers] unless that person is authorized by the [FAA] to conduct that operation." Flytenow reads that restriction to mean that any pilot *not* subject to Part 119's stringent rules for air carriers *may* "advertise or otherwise offer" herself or himself as willing to provide expense-sharing services, without that conduct establishing the "holding out" element of the "common carrier" definition. *See* Brief of Petitioner 2425.

As the FAA rightly notes, section 119.5(k) is not the codification of the "holding out" requirement. Rather, section 119.5(k) is a prohibition on advertisement of unauthorized services. The statute and regulations do not define "holding out"; the FAA instead uses "holding out" as that concept is defined through the common law, *see CSI Aviation*, 637 F.3d at 415; FAA Advisory Circular, J.A. 30, and applies it in a functionalist, pragmatic manner, *see* FAA Advisory Circular, J.A. 30; Haberkorn Interpretation, J.A. 42-43.

Flytenow's reliance on section 119.5(k) has the reasoning backwards. The central question in this case is whether Flytenow's pilots are "subject to this part" – i.e. Part 119 on commercial operation – and the answer depends on whether the pilots are acting as "air carriers," *see* 14 C.F.R. § 119.1(a)(1) ("This part applies to each person operating or intending to operate civil aircraft . . . [a]s an air carrier. . . ."). As noted above, an "air carrier" is a "common carrier." *See* 14 C.F.R. § 1.1 (defining "air carrier"). Section 119.5(k) does not define, but depends on, whether a pilot is operating as a common carrier, which turns in part on whether the pilot is "holding out."

Under the definition of "holding out" the FAA articulated in the 1986 circular, J.A. 30, we have no trouble finding that Flytenow's pilots would be doing so. Flytenow.com is a flight-sharing website putatively limited to members, but membership requires nothing more than signing up. Any prospective passenger searching for flights on the Internet could readily arrange for travel via Flytenow.com. Flytenow's statement to its members that its pilots may on a case-by-case basis decide not to accept particular passengers is not to the contrary. As the FAA noted in its circular, no "conclusive proof" that a pilot is not a common carrier can be gleaned from the absence of rate schedules, or pilots occasionally refusing service or offering it only pursuant to separately negotiated contracts. FAA Advisory Circular, J.A. 30.

Finding that Flytenow's pilots are "holding out" does not lead to the absurd consequences of which

Flytenow warns. *See* Br. of Petitioner 25. It is simply not accurate, as Flytenow fears, that "any pilot communicating an expense-sharing flight, for the sole purpose of identifying a common purpose, will now be considered holding out to provide common carriage." *Id.* Pilots communicating to defined and limited groups remain free to invite passengers for common-purpose expense-sharing flights. *See* Br. of Respondent 30. As the FAA notes, *id.*, nothing in the challenged Interpretation calls into question the FAA's reasoning or conclusions in its 1976 Ware Interpretation, in which the FAA opined that posting on a bulletin board is permitted in certain circumstances. J.A. 23. Nor does the Interpretation call into question the continuing vitality of the expense-sharing rule. *See* Br. of Petitioner 33. Private pilots continue to enjoy the right to share expenses with their passengers, so long as they share a common purpose and do not hold themselves out as offering services to the public.

B.

In its reply brief, Flytenow raises a new line of attack against the Interpretation, contending that it must be set aside because the FAA's definition of common carriage contravenes the common-law definition. "Ordinarily, we will not entertain arguments or claims raised for the first time in a reply brief" *Forman v. Korean Air Lines Co.*, 84 F.3d 446, 448 (D.C. Cir. 1996). As we have explained, considering such arguments "is not only unfair to an appellee, but also entails the risk of an improvident or ill-advised

opinion on the legal issues tendered." *McBride v. Merrell Dow & Pharm., Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986) (internal citations omitted).

In its opening brief to this court, Flytenow did not contest the FAA's definition of common carriage. To the contrary, it invoked the FAA Advisory Circular's articulation of the FAA's understanding of common carriage. *See* Br. of Petitioner 6 n.6, 11, 25. Thus, in its response, the FAA did not defend its Interpretation on the ground that its definition of common carriage is in keeping with the common law, aside from making passing reference to a decision in this court that noted the common-law pedigree of "common carriage." *See* Br. of Respondent 30 (citing *CSI*, 637 F.3d at 415). We therefore do not consider Flytenow's argument that the FAA's decision contravenes the common law. That argument is forfeited.

IV.

Flytenow raises several other statutory and constitutional claims. The government argues that these claims are barred by the Federal Aviation Act's exhaustion requirement, 49 U.S.C. §46110(d), because Flytenow did not raise them before the agency. The exhaustion requirement does not apply here, however, because there was a "reasonable ground" for Flytenow's failure to raise its arguments before the agency. *Id.* The Interpretation did not result from the type of administrative "proceeding" in which Flytenow was notified of an agency proposal and had a chance

to raise statutory or constitutional objections. *See Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 8 (D.C. Cir. 2011); *cf. Cont'l Air Lines v. Dep't of Trans.*, 843 F.2d 1444, 1455-56 (D.C. Cir. 1988). Remand to the FAA in this case would not serve the policies that exhaustion is meant to protect. The agency has not identified any factual disputes relevant to Flytenow's statutory or constitutional objections, nor does it hint that it missed any opportunity to apply its expertise or revise its rule to avoid Flytenow's objections. *See generally McKart v. United States*, 395 U.S. 185, 194 (1969). Flytenow was not required to have raised these challenges before the FAA.

A.

Flytenow argues that the FAA has exceeded its jurisdiction under the Federal Aviation Act by regulating private communications on a website. That argument misreads the statute and misapprehends the role of the FAA. The Federal Aviation Act directs the FAA to regulate common carriers. 49 U.S.C. § 44705. As noted above, the "*sine qua non*" of a common carrier is "some type of holding out to the public." *CSI*, 637 F.3d at 415.

The FAA must consider whether air carriers hold themselves out to the public to determine which FAA rules apply. In considering what information pilots communicate via Flytenow.com, and to whom, the FAA relies on the communications as evidence of

"holding out," thereby reaching conduct the Act indisputably authorizes it to regulate. Flytenow's complaint that the FAA treats "all Internet-based communications by a pilot, concerning a proposed expense-sharing flight" as "necessarily 'holding out' is inaccurate. Br. of Petitioner 27. The FAA opined only on the type of flight-sharing program described in Flytenow's and AirPooler's requests for legal interpretation. *See* J.A. 60, 61-62. Other kinds of internet-based communications, such as e-mail among friends, for example, seem unlikely to be deemed "holding out" under the FAA's Interpretation.

If accepted, Flytenow's argument that the FAA lacks statutory authority to consider the evidentiary value of Flytenow's speech would frustrate the FAA's enforcement of the Federal Aviation Act. The Act calls on the FAA to regulate certain aspects of the commercial speech of pilots and airlines. For example, the FAA regulates in detail airline computerized reservation systems, requiring that they display particular information, including schedules and fares, in particular ways. 14 C.F.R. §§ 255.1-.8. The FAA requires that airline websites disclose on-time performance data for any domestic flight for which the sites provide schedule information. *Id.* § 234.11(b). The FAA also requires disclosure of code-sharing arrangements among airlines, and bans airlines from holding out code-sharing flights for sale without such disclosure. *Id.* §§ 257.4-.5. In each such case, the FAA's speech-related requirement is consistent with its statutory mandate.

B.

Flytenow's three constitutional arguments are unavailing.

1. First Amendment. Flytenow challenges the Interpretation as a First Amendment violation on the grounds that: (1) the Interpretation imposes an unconstitutional prior restraint on Flytenow's commercial speech; and (2) the Interpretation is an impermissible content-based regulation.

Flytenow misdescribes the Interpretation as a prior restraint. *See generally Alexander v. United States*, 509 U.S. 544, 549-54 (1993). The Interpretation does not bar any speech in advance, but sets forth the FAA's view that pilots advertising their services on Flytenow.com risk liability if they are not licensed for the offered services. Thus, the Interpretation explains the possible consequences of speech, but does not enjoin it. In any event, the advertising of illegal activity has never been protected speech. *See, e.g.*, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388-89 (1973).

The FAA's reliance on Flytenow's speech as evidence of "holding out" is fully compatible with the First Amendment. It is well settled that "the First Amendment allows 'the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.'" *Whitaker v. Thompson*, 353 F.3d 947, 953 (D.C. Cir. 2004) (quoting *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993)). In *Whitaker*, the court upheld the FDA's reliance on a drug company's speech (via its

drug labeling) to infer that company's intent to sell a drug for purposes for which it was not authorized. *Id.* In this case, the FAA is doing much the same thing: it is using speech (postings on Flytenow.com) as evidence that pilots are offering service that exceeds the limits of their certifications.

Any incidental burden the FAA's regulations impose on pilots' speech does not violate the First Amendment because the regulations further an important government interest unrelated to the suppression of free expression. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Barring pilots from holding themselves out to the public to provide services for which they are not licensed directly advances the government's interest in "promot[ing] safe flight of civil aircraft in air commerce." 49 U.S.C. § 44701(a). Seeking to prevent advertising of services by or on behalf of pilots not licensed to offer them is a constitutionally permissible way to advance the policy that "the general public has a right to expect that airlines which solicit their business operate under the most searching tests of safety." *Woolsey v. Nat'l Transp. Safety Bd.*, 993 F.2d 516, 522 (5th Cir. 1993).

2. Equal Protection. Flytenow's Equal Protection challenge also fails. Flytenow makes no claim that the FAA's classification implicates any fundamental right or categorizes on any inherently suspect basis, but contends that the FAA's regulations cannot be sustained under rational basis review. *See, e.g.*, *Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-15 (1993). To succeed, Flytenow would

have to negate "every conceivable basis which might support" the challenged classification. *Id.* at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 40 U.S. 356, 364 (1973)) (internal quotation marks omitted).

The FAA's distinction between pilots offering expense-sharing services on line to a wide audience and those offering expense-sharing services to a limited group is justified: holding out to the public creates the risk that unsuspecting passengers, under the impression that the service and its pilots lawfully offer common carriage, will contract with pilots who in fact lack the experience and credentials of commercial pilots. Regulators have good reasons to distinguish between pilots who are licensed to offer services to the public and those who are not, as other courts have recognized. *See Woolsey*, 993 F.2d at 522.

3. Vagueness. Finally, there is no credible claim that the Interpretation is unconstitutionally vague. The FAA announced that pilots offering expense-sharing flights on Flytenow.com are holding themselves out to provide common carriage and are therefore subject to Part 119. The Agency was clear in its application of its regulation to Flytenow: "You suggest there is no holding out. . . . We disagree. . . . [Flytenow.com] is designed to attract a broad segment of the public interested in transportation by air." J.A. 62. Flytenow is in no position to assert a facial vagueness challenge. "[A] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19

(2010) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)).

* * *

For the foregoing reasons, Flytenow's petition for review is denied.

So ordered.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1168 **September Term, 2015**
FILED ON: DECEMBER 18, 2015

FLYTENOW, INC.,
PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION, ADMINISTRATOR,
RESPONDENT

On Petition for Review of an Order of the
Federal Aviation Administration

Before: PILLARD and WILKINS, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge Judgment*

JUDGMENT

This cause came on to be heard on the petition for review of an order of the Federal Aviation Administration and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the petition for review is denied, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: December 18, 2015

Opinion for the court filed by Circuit Judge Pillard.

[LOGO]

U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel
800 Independence Ave., S.W.
Washington, D.C. 20591

AUG 14 2014

Gregory S. Winton
The Aviation Law Firm
One Research Court, Suite 450
Rockville, MD 20850

Dear Mr. Winton:

This letter responds to your request for legal interpretation sent to my office on February 12, 2014. You have asked several questions regarding expense-sharing flights that involve exclusive use of a website "by both pilots and aviation enthusiasts, comprising a specific and discreet group of individuals who have demonstrated a common interest and common purpose to share an aviation adventure[.]"

As described in your letter, pilots and aviation enthusiasts apply for membership to the website which is "only available to pilots who ensure they intend to conduct private operations." Upon enrollment, members have access to an isolated, non-public network. The network allows pilots to post an Aviation Adventure with a specific date and time and the points of operation. According to your letter, a member may "select an Aviation Adventure for which he or she has

a bona fide common purpose" and request to participate in the planned Aviation Adventure. The pilot may accept or reject the request. If accepted, the pilot may accept a pro rata reimbursement from his or her passengers under 14 C.F.R. § 61.113(c).

We recently answered questions regarding a similar web-based expense-sharing scheme in a legal interpretation to Rebecca MacPherson. *See* Legal Interpretation to Rebecca B. MacPherson (Aug. 13, 2014). We believe that legal interpretation answers the questions presented in your request for legal interpretation. The MacPherson Interpretation involved AirPooler, a peer-to-peer general aviation flight sharing company that developed an internet-based discovery platform that allows private pilots to offer available space on flights they are intending to take. We concluded that pilots participating in the AirPooler website required a part 119 certificate because they were engaged in common carriage. Although common carriage is not defined by regulation, Advisory Circular No. 120-12A (Private Carriage Versus Common Carriage of Persons or Property) describes common carriage as "(1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation or hire."[1]

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[1] In *Woolsey v. National Transportation Safety Board*, 993 F.2d 516 (5th Cir. 1993), the Fifth Circuit noted that the Advisory Circular's guidelines are not only consistent with the common law definition, but entirely appropriate within the aviation context.

You suggest there is no holding out under the program described above because the website indicates that transportation is only available to an enthusiast who has demonstrated a common interest in the specific time, date, points of operation, and the particular Aviation Adventure. We disagree. Holding out can be accomplished by any "means which communicates to the public that a transportation service is indiscriminately available" to the members of that segment of the public it is designed to attract. See Transocean Airlines, Enforcement Proceeding, 11 C.A.B. at 350 (1950). Based on your description, the website is designed to attract a broad segment of the public interested in transportation by air.

This response was prepared by Anne Moore, an attorney in the International Law, Legislation, and Regulations Division of the Office of the Chief Counsel. If you have any additional questions regarding this matter, please contact us at your convenience at (202) 267-3073.

Sincerely,

/s/ Mark W. Bury

Mark W. Bury
Acting Assistant Chief Counsel for
International Law, Legislation, and
Regulations Division, AGC-200

[LOGO]

U.S. Department
of Transportation
Federal Aviation
Administration

Office of the Chief Counsel
800 Independence Ave., S.W.
Washington, D.C. 20591

AUG 13 2014

Rebecca B. MacPherson
Jones Day
51 Louisiana Avenue, NW
Washington, DC 20001-2113

Dear Ms. MacPherson:

This letter responds to your request for legal interpretation sent to my office on May 19, 2014, on behalf of your client, AirPooler, Inc. As set forth in the request for legal interpretation, you have described AirPooler as "a peer-to-peer general aviation flight sharing company that has developed an internet-based discovery platform that allows private pilots to offer available space on flights that they are intending to take[.]"

You have asked for (1) confirmation that a pilot participating in the AirPooler service is not receiving compensation in violation of 14 C.F.R. § 61.113; and (2) a legal analysis of whether pilots participating in the AirPooler website are commercial operators who would be required to hold a certificate under 14 C.F.R. part 119.

Your request involves two separate but related issues. First, there is the issue of privileges and limitations related to acting as pilot in command of an aircraft for compensation or hire based on the level of certificate a pilot holds. The second issue relates to whether an operation constitutes a commercial operation requiring a person to obtain a part 119 air carrier or operating certificate before the operation may be conducted. The FAA has consistently noted that the privileges and limitations conferred upon pilots are a separate and distinct issue from whether a particular flight would be considered a commercial operation for which a part 119 air carrier or commercial operator certificate is required. Sep Legal Interpretation to Andy Dobis (May 21, 2014).

Pilot Privileges

A person who holds an airline transport pilot certificate or a commercial pilot certificate may act as pilot in command of an aircraft for compensation or hire and may carry persons or property for compensation or hire provided the pilot is qualified in accordance with part 61 and with the applicable parts of the 14 C.F.R. that apply to the operation 14 C.F.R. §§ 61.133(a); 61.167(a).

Conversely, private pilots as a general rule may not act as pilot in command of an aircraft that is carrying passengers or property for compensation or hire nor, for compensation or hire, may they act as pilot in command of an aircraft. 14 C.F.R. § 61.113(a).

Section 61.113 contains exceptions to this general prohibition. Among the listed exceptions, § 61.113(c) states that "[a] pilot may not pay less than the pro rata share of the operating expenses of a flight with passengers, provided the expenses involve only fuel, oil, airport expenditures, or rental fees." Based on this provision, a pilot may accept compensation in the form of a pro rata share of operating expenses for a flight from his or her passengers as an exception to the compensation or hire prohibition. If a private pilot accepts more than a pro rata share, that pilot has violated the limits of the expense-sharing exception.

Commercial Operations

A part 119 certificate is required for each person operating or intending to operate civil aircraft as an air carrier, commercial operator, or both, in air commerce;[1] or, when common carriage is not involved, in operations of U.S.-registered aircraft with a seat configuration of 20 passengers or more or a maximum payload Capacity of 6,000 pounds or more.[2] 14 C.F.R.

[1] "Air commerce" is defined as "interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, on which may endanger safety in, interstate, overseas, or foreign air commerce."

[2] In the request for legal interpretation, AirPooler has indicated that it would not permit aircraft meeting the seating

(Continued on following page)

§ 119.1(a). Depending on the operation, the holder of a part 119 certificate must comply with more stringent operating rules than those in part 91, for example, the requirements in parts 121, 125, or 135.[3]

Both the regulatory definition of a commercial operator and the common law definition of common carriage include a compensation element. The regulations define a commercial operator as a "person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property, other than as an air carrier or foreign air carrier or under the authority of Part 375" of Title 14, Code of Federal Regulations. 14 C.F.R. § 1.1. The definition further states that "[w]here it is doubtful that an operation is 'for compensation or hire,' the test applied is whether the carriage by air is merely incidental to the person's other business or is, in itself, a major enterprise for profit." Although common carriage is not defined by regulation, Advisory Circular No. 120-12A (Private

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capacity and payload capacity in § 119.1 to be used by pilots participating in the AirPooler website.

[3] Certain commercial operations, such as aerial work operations, crop dusting, banner towing, and ferry or training flights, are excluded from the certification requirements of part 119. *See* § 119.1(c)(4)(iii). These operations are permitted within the United States under the less stringent operating rules of part 91. Although a private pilot would not be permitted under § 61.113 to engage in these activities for compensation, a commercial pilot or airline transport pilot would have no such limitation provided the pilot is qualified in accordance with part 61 and with the applicable requirements That apply to the specific operation.

Carriage Versus Common Carriage of Persons or Property) describes common, carriage as "(1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation or hire."[4]

Compensation

In your request for legal interpretation, you maintain that the AirPooler service is not a commercial operation and does not involve common carriage because there is no compensation of the pilots. We disagree. In 1963, the FAA issued a notice of proposed rulemaking (NPRM) entitled "Clarification of Private Pilot Privileges." 28 FR 8157 (Aug. 8, 1963). In the preamble to that NPRM, the FAA stated:

> The ordinary meaning of "compensation" includes the act of making up for whatever has been suffered or lost through another, and the act of remuneration. Sharing expenses would appear to be prohibited when "for hire or compensation" is prohibited, so that an exception to the rule is necessary to preserve the traditional right to share expenses, and which right has not been found objectionable.

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[4] In *Woolsey v. National Transportation Safety Board*, 993 F.2d 516 (5th Cir. 1993), the Fifth Circuit noted that the Advisory Circular's guidelines are not only consistent with the common law definition, but entirely appropriate within the aviation context.

This view was set forth in the language of the final rule which established a general prohibition against compensation and hire and listed five exceptions to that general prohibition, which included expense-sharing with passengers. The plain language of current § 61.113(a) continues to reflect that share-the-expense flights are compensation for which there is an exception to the general prohibition against private pilots acting as pilot in command for compensation or hire.

As such, although § 61.113(c) contains an expense-sharing exception to the general prohibition against private pilots acting as pilot in command for compensation or hire, a private pilot may not rely on that narrow exception to avoid the compensation component of common carriage. For this reason, the FAA has required a private pilot to have a common purpose with his or her passengers and must have his or her own reason for travelling to the destination.[5]

Likewise, although airline transport pilots and commercial pilots may act as pilot in command on an

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[5] The FAA has consistently stated that "the only allowable share-the-costs operations are those which are bona fide, i.e., joint ventures for a common purpose with expenses being defrayed by all passengers and the pilot." See Legal Interpretation from Kenneth Geier (Regional Counsel) to Paul Ware (Feb, 13, 1976); Legal Interpretation to Thomas Chero, (Dec. 26, 1985); Legal Interpretation to Peter Bunce. (Nov. 19, 2008); Legal Interpretation to Guy Mangiamele (March 1, 2009); Legal Interpretation to Don Bobertz (May 18, 2009); Legal Interpretation to Mark Haberkorn (Oct 3, 2011).

aircraft carrying passengers for compensation or hire, they may not conduct a commercial operation involving common carriage without obtaining a part 119 certificate. You have urged that the test for compensation in commercial operations is "the major enterprise for profit" test set forth in the definition of commercial operator. Specifically, you state that a pilot would not be engaged in a major enterprise for profit "if accepting only the cost reimbursements allowed under § 61.113."

Based on the fact that the FAA views expense-sharing as compensation for which an exception is necessary for private pilots, the issue of compensation is not in doubt.

Therefore, the "major enterprise for profit" test in § 1.1 is wholly inapplicable. Accordingly, we conclude that with regard to pilots using the AirPooler website, all four elements of common carriage are present. By posting specific flights to the AirPooler website, a pilot participating in the AirPooler service would be holding out to transport persons or property from place to place for compensation or hire. Although the pilots participating in the AirPooler website have chosen the destination, they are holding out to the public to transport passengers for compensation in the form of a reduction of the operating expenses they would have paid for the flight. This position is fully consistent with prior legal interpretations related to other nationwide initiatives involving expense-sharing flights. See Legal Interpretation from DeWitte Lawson (acting Regional Counsel) to D. David Brown

(Apr. 16, 1976); Legal Interpretation to Hal Klee (Dec. 12, 1985); Legal Interpretation to Thomas Chero, (Dec. 26, 1985).

This response was prepared by Anne Moore, an attorney in the International Law, Legislation, and Regulations Division of the Office of the Chief Counsel, and has been coordinated with the Airman Certification and Training Branch of Flight Standards Service. If you have any additional questions regarding this matter, please contact us at your convenience at (202) 267-3073.

Sincerely,

/s/ Mark W. Bury
Mark W. Bury
Assistant Chief Counsel for
International Law,
Legislation, and Regulations

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1168 **September Term, 2015**

FAA-08/14/14 Letter

Filed On: February 24, 2016

Flytenow, Inc.,

Petitioner

v.

Federal Aviation Administration, Administrator,

Respondent

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges; Ginsburg, Senior Circuit Judge

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk