No. 16-14

In the Supreme Court of the United States

FLYTENOW, INC., PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MARK R. FREEMAN
THOMAS PULHAM
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether federal courts should grant deference to an agency's interpretation of common-law terms contained in the agency's regulations.

2. Whether the Federal Aviation Administration's definition of a "common carrier" is inconsistent with the common-law definition of that term.

3. Whether the Federal Aviation Administration's determination that petitioner's business model involves common carriage violates the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and regulations: Page

In the Supreme Court of the United States

No. 16-14

FLYTENOW, INC., PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 808 F.3d 882.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28-29) was entered on December 18, 2015. A petition for rehearing en banc was denied on February 24, 2016 (Pet. App. 41). On May 12, 2016, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 24, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner operates a commercial website on which a pilot may post information about upcoming flights to attract passengers willing to pay a pro rata share of the pilot's operating expenses. Petitioner requested a

legal interpretation from the Federal Aviation Administration (FAA) regarding the company's business model. The FAA concluded that pilots who solicit passengers using petitioner's website are "common carriers" —*i.e.*, persons who hold themselves out to the public (or a segment of the public) as available to provide transportation for compensation—and therefore must satisfy the more stringent rules applicable to common carriers under FAA regulations. Pet. App. 30-32. The court of appeals affirmed the FAA's determination. *Id.* at 1-27.

1. The FAA is charged by statute with the responsibility to "promote safe flight of civil aircraft in air commerce." 49 U.S.C. 44701(a). To that end, the FAA issues several categories of "airman certificates" authorizing the holder to engage in certain aircraft operations. 49 U.S.C. 44702(a). The eligibility requirements and operating rules associated with each type of certificate are distinct. In general, the rules that apply to private pilots (*e.g.*, individual pilots operating small airplanes for recreation or personal transportation) are less stringent, while significantly more demanding rules apply to pilots who engage in common carriage or fly larger aircraft. No pilot may operate an aircraft in violation of the terms of the pilot's certificate or related regulations. 49 U.S.C. 44711(a)(2)(B), (4), and (5).

FAA regulations ordinarily forbid persons who hold only private pilot certificates to transport passengers or property in exchange for money. See 14 C.F.R. 61.113(a) ("[N]o person who holds a private pilot certificate may act as pilot in command of an aircraft that is carrying passengers or property for compensation or hire; nor may that person, for compensa-

tion or hire, act as pilot in command of an aircraft."). This bar applies "[e]xcept as provided" in seven narrowly circumscribed situations. See *ibid.*; see also 14 C.F.R. 61.113(b)-(h) (allowing, for example, private pilots to provide compensable transportation in connection with charity events, search and location operations, and flights related to airplane sales).

One regulatory exception to the general bar on private pilots providing transportation in exchange for compensation addresses cost-sharing with passengers. Cost-sharing is permitted as long as the pilot does "not pay less than the pro rata share of operating expenses" and "the expenses involve only fuel, oil, airport expenditures, or rental fees." 14 C.F.R. 61.113(c). In prior legal interpretations, the FAA has limited this exception to situations in which the pilot and passengers share a bona fide "common purpose." See, *e.g.*, C.A. App. 28, 36-37, 39, 43. This requirement helps ensure that the "purpose of th[e] flight is not merely to transport [the] passengers" in exchange for compensation. *Id.* at 43.

The Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, also requires the FAA to regulate persons who wish to provide air transportation as a common carrier. Any person "desiring to operate as an air carrier" must obtain an "air carrier operating certificate," which requires demonstration that "the person properly and adequately is equipped and able to operate safely" under relevant statutes, regulations, and standards. 49 U.S.C. 44705; see 49 U.S.C. 44711(a)(4). Through a series of interrelated provisions, the statute defines "air carrier" to include any person who "undertak[es] by any means, directly or indirectly," to provide interstate or foreign "transpor-

tation of passengers or property by aircraft as a common carrier for compensation." 49 U.S.C. 40102(a)(2), (5), (23), and (25). While the statute does not define the term "common carrier," the FAA has relied for the past 30 years on FAA Advisory Circular No. 120-12A (Apr. 24, 1986) (Advisory Circular).[1] The Advisory Circular noted the term's common-law heritage and identified "four elements" of a common carrier: "(1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation." C.A. App. 30.

Part 119 of the FAA's regulations govern the qualifications and actions of a person "operating or intending to operate" civil aircraft as a common carrier. 14 C.F.R. 119.1(a).[2] Any person proposing to offer common carriage services by air must obtain an appropriate certificate, unless an exception to the certificate requirement applies. See 14 C.F.R. 119.5(a)-(b) and (g), 119.21, 119.25, 119.33(a)(2) and (b)(2); see also 14 C.F.R. 119.1(e) (listing exceptions). FAA regulations further provide that "[n]o person may advertise or

---

[1] https://www.faa.gov/DocumentLibrary/media/Advisory_Circular/AC%20120-12A.pdf.

[2] By its terms, Part 119 applies to anyone acting as an "air carrier" or a "commercial operator." 14 C.F.R. 119.1(a)(1). The regulatory definition of air carrier includes a person who engages in "interstate, overseas, or foreign air transportation." 14 C.F.R. 1.1 (defining "[a]ir carrier" and "[a]ir transportation"). A commercial operator engages in other forms of "carriage by aircraft," including certain intrastate operations. *Ibid.* (defining "[c]ommercial operator"). Both include "the carriage by aircraft of persons or property as a common carrier for compensation or hire." *Ibid.* (defining "[i]nterstate air transportation," "[f]oreign air transportation," and "[o]verseas air transportation"); accord *ibid.* (defining "[c]ommercial operator").

otherwise offer to perform an operation subject to [Part 119] unless that person is authorized by the [FAA] to conduct that operation." 14. C.F.R. 119.5(k).

Air operations covered by Part 119 are generally subject to more stringent safety regulations than other private-pilot operations. See 14 C.F.R. 119.21-119.25 (citing Pts. 121, 125, and 135). For example, while a private pilot can generally operate a plane with only 40 hours of prior flight experience, see 14 C.F.R. 61.103(g), 61.109(a)-(b), pilots operating under Part 119 must, at a minimum, hold a commercial pilot certificate and have additional flight experience, with the amount depending on the size of the aircraft and the type of operation. See, *e.g.*, 14 C.F.R. 135.243(a), (b)(1)-(2), and (c)(1)-(2) (certain Part 119 pilots must have 500 hours of flight experience and others must have 1200 hours). Similarly, Part 119 pilots in command of an aircraft must pass certain recurrent safety checks and tests, see 14 C.F.R. 135.293, while pilots operating under the FAA's general operating rules in Part 91 are not subject to such a requirement, see 14 C.F.R. 61.56(a) and (c).

2. Petitioner operates a commercial website on which pilots can post information about upcoming flights to attract passengers willing to pay a pro rata portion of the pilots' operating expenses. Any member of the public may use petitioner's service and pay to become a passenger on a posted flight. See Pet. App. 2-3 (explaining that, although individuals must apply for "member[ship]" to the website before accessing the flight-listing service, "anyone may become a member by filling out an online form").

A participating pilot posts on petitioner's website the dates, times, and points of operation of any upcom-

ing flight on qualifying aircraft. Pet. App. 3.[3] Prospective passengers may view all of the posted flights and request to be a passenger on any of them. *Id.* at 2-3. If a pilot accepts such a request, the website "enables the pilot to accept pro rata reimbursement" from the passenger for expenses identified in 14 C.F.R. 61.113(c). C.A. App. 48. Petitioner collects a commission on each such transaction. Pet. 4.

In February 2014, petitioner submitted a letter to the FAA requesting a "legal interpretation" regarding whether its website (or a passenger or pilot using it) would "run afoul" of FAA regulations. C.A. App. 47-50. The company offered its own analysis, suggesting that pilots who use the website share operating expenses in a manner permitted by 14 C.F.R. 61.113(c) and are not common carriers. C.A. App. 47-50.

In response, the FAA issued a legal interpretation concluding that pilots offering flight services through petitioner's website to paying strangers would be engaged in common carriage and therefore would require a Part 119 certificate. Pet. App. 30-32. The FAA noted that it had recently addressed petitioner's questions in a legal interpretation offered to AirPooler, a similar web-based operation. *Id.* at 31; see *id.* at 33-40 (reproducing AirPooler letter). In the AirPooler letter, the FAA explained that it "views expense-sharing as compensation," albeit compensation that

---

[3] Pilots may only list flights involving airplanes with a seat configuration of under 20 passengers and a maximum payload capacity of under 6000 pounds. C.A. App. 49 n.10. These restrictions track FAA regulations, which would require a Part 119 certificate for the operation of aircraft with higher passenger or payload capacities without regard to whether the operator is a common carrier. See 14 C.F.R. 119.1(a)(1)-(2).

may be permissible under the "exception to the general prohibition against private pilots acting as pilot in command for compensation or hire" set forth in Section 61.113(c). *Id.* at 38-39. Thus, the FAA determined in the AirPooler letter that pilots who accept compensation in the form of shared expenses from passengers solicited through the AirPooler website satisfy "all four elements of common carriage": they are "holding out to transport persons or property from place to place for compensation or hire." *Id.* at 39. The FAA noted that "[t]his position [was] fully consistent with prior legal interpretations related to other nationwide initiatives involving expense-sharing flights." *Ibid.*

The FAA also rejected petitioner's assertion that its pilots were not "holding out" an offer of transportation to the general public because "transportation is only available to an enthusiast who has demonstrated a common interest" in the particular "[a]viation [a]dventure" the pilot was offering. Pet. App. 32. 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." *Ibid.* (quoting *Transocean Air Lines, Inc., Enforcement Proceeding*, 11 C.A.B. 350, 353 (1950)). The FAA found that, based on petitioner's description, "the website is designed to attract a broad segment of the public interested in transportation by air." *Ibid.* Because pilots using petitioner's website, like pilots using AirPooler, are engaged in common carriage, the FAA concluded that they require Part 119 certificates. *Ibid.*

3. Petitioner filed a petition for review of the FAA's decision, which the court of appeals denied. Pet. App. 1-27.

a. Petitioner's principal argument in the court of appeals was that the FAA misapplied its definition of common carriage because, in petitioner's view, pilots using petitioner's website share a "common purpose" with their passengers as required by Section 61.113(c); they do not receive compensation within the meaning of the FAA's regulations and the Advisory Circular; and they are not subject to 14 C.F.R. 119.5(k), which petitioner contended was the only restriction on holding out offers of transportation to the public. Pet. C.A. Br. 19-25. The court noted that, under this Court's decision in *Auer* v. *Robbins*, 519 U.S. 452 (1997), a court ordinarily must accept an agency's interpretation of its own regulations as controlling unless that interpretation is plainly erroneous or inconsistent with the regulation. Pet. App. 13. But the court of appeals found it unnecessary to rely on *Auer* deference because, "[e]ven without such deference, we have no difficulty upholding the FAA's interpretation of its regulations in this case." *Id.* at 13-14.

The court of appeals rejected petitioner's argument that expense sharing under Section 61.113(c) is not "compensation" for purposes of the regulatory definition of common carriage. The court concluded that "[t]he most natural reading of [Section 61.113's] language and structure—and the reading that the FAA adopted—is that the exempted expense sharing is 'compensation,' but is nevertheless permitted in the identified contexts." Pet. App. 15; see *id.* at 15-16 (noting that this interpretation was reflected in "consistent" FAA legal interpretations over the past 30 years). The

court explained that, while the common-purpose test identifies the narrow circumstances in which private pilots may legally share expenses, it "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." *Id.* at 17.[4]

The court of appeals also rejected petitioner's contention that its pilots were not violating regulatory restrictions on "holding out." The court noted that the "holding out" requirement arises from the Advisory Circular, not 14 C.F.R. 119.5(k), and that the term is "defined through the common law" and is applied in a "functionalist, pragmatic manner." Pet. App. 18. The court had "no trouble finding that [petitioner's] pilots" were "holding out" transportation services. *Id.* at 19. Membership in petitioner's website "requires nothing more than signing up," the court explained, and "[a]ny prospective passenger searching for flights on the Internet could readily arrange for travel via Flytenow.com." *Ibid.* Although petitioner's terms of service permit pilots to "decide not to accept particular passengers" "on a case-by-case basis," the court determined that such discretion was not "'conclusive'" of whether the pilots were engaged in common carriage. *Ibid.* (quoting Advisory Circular).

b. In its reply brief before the court of appeals, petitioner further argued that the definition of common

---

[4] The court of appeals noted that, although a local FAA field office had once suggested that the common-purpose test was part of the definition of compensation for common-carriage analysis, that interpretation was "erroneous" and did not displace "all of the interpretations issued by the FAA's Office of the Chief Counsel" consistently stating otherwise. Pet. App. 17.

carriage set forth in the Advisory Circular was inconsistent with the common-law definition of that term. Pet. C.A. Reply Br. 2-7. The court of appeals concluded that petitioner "did not contest the FAA's definition of common carriage" in its opening brief, and thus held that petitioner had forfeited the argument. Pet. App. 21. Indeed, the court noted that petitioner's opening brief had expressly "invoked the FAA Advisory Circular's articulation" of common carriage as the standard the FAA was required to apply. *Ibid.*

c. The court of appeals also rejected "several other statutory and constitutional claims" petitioners had advanced. Pet. App. 21; see *id.* at 21-27. As relevant here, the court rejected petitioner's argument that the FAA's legal interpretation imposes an unconstitutional prior restraint on speech or amounts to impermissible content-based regulation of speech. *Id.* at 24-26; see Pet. C.A. Br. 36-46. The court explained that the FAA's letter did not impose a prior restraint, but rather "set[] forth the FAA's view that pilots advertising their services on [petitioner's website] risk liability if they are not licensed for the offered services." Pet. App. 24. The court held that the FAA's consideration of pilots' speech to determine whether they were engaged in the practice of "holding out" was "fully compatible with the First Amendment." *Ibid.* The advertisement of illegal activity (including flight services without a proper certificate) has never been protected speech, the court explained, and the FAA had merely used speech on petitioner's website "as evidence that its pilots are offering service that exceeds the limits of their certifications." *Id.* at 25. Any incidental burden on speech caused by pilots' inability to advertise services they were not certified to offer,

the court found, was justified by the government's important interest in promoting safe flight. *Ibid.*

ARGUMENT

Petitioner contends that this Court should grant review to decide three questions related to the FAA's determination that pilots using petitioner's website qualify as common carriers. First, petitioner argues (Pet. 9-21) that, under the principles of *Auer* v. *Robbins*, 519 U.S. 452 (1997), a court of appeals may not defer to an agency's interpretation of a common-law term contained in the agency's regulations. As petitioner acknowledges (Pet. 7), however, the court of appeals "did not resolve" that issue; indeed, it expressly upheld the FAA's interpretation of its regulations "*without* such deference." Pet. App. 13 (emphasis added). Second, petitioner asserts (Pet. 21-27) that review is warranted to determine whether the FAA's definition of common carriage conflicts with the common-law understanding of that term. The court did not address that issue because it concluded that petitioner had forfeited the claim, and the argument is meritless in any event. Third, petitioner argues (Pet. 27-31) that the FAA violated the First Amendment by advising petitioner that pilots using its website to offer air transportation to the public in exchange for compensation must obtain the same certificate under FAA regulations as anyone else offering a similar service. The court correctly rejected that claim, and its decision does not conflict with any decision of this Court or of any other court of appeals. The petition for a writ of certiorari should be denied.

1. a. In general, an agency's interpretation of its own regulation is controlling unless the interpretation is "plainly erroneous or inconsistent with the regula-

tion." *Auer*, 519 U.S. at 461 (quoting *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)) (citation omitted); see, *e.g.*, *Decker* v. *Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013); *Talk Am., Inc.* v. *Michigan Bell Tel. Co.*, 564 U.S. 50, 59 (2011); *Chase Bank USA, N.A.* v. *McCoy*, 562 U.S. 195, 208 (2011); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945). Such deference is not, however, "an inexorable command in all cases." *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1208 n.4 (2015); see, *e.g.*, *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (holding that agency "interpretation of ambiguous regulations to impose potentially massive liability * * * for conduct that occurred well before that interpretation was announced" would not be entitled to deference).[5]

Although the court of appeals noted these principles, see Pet. App. 13, it did not have cause to apply them because, "[e]ven without such deference," the court "ha[d] no difficulty upholding the FAA's interpretation of its regulations in this case" under the plain language of those regulations. *Id.* at 13-14. Thus, as petitioner acknowledges (Pet. 7), "the panel did not resolve the question of what level of deference is due" to an agency's interpretation of regulations that incorporate common-law terms.

---

[5] This Court has granted review in *Gloucester County School Board* v. *G.G.*, cert. granted, No. 16-273 (Oct. 28, 2016), which raises the question whether *Auer* deference should be afforded to an agency letter interpreting a regulation issued under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* That case does not involve an agency's interpretation of terms derived from the common law.

That alone is a sufficient reason to deny review. This Court does not "sit [to] decide abstract questions of law * * * which, if decided either way, affect no right" of the parties. *Supervisors* v. *Stanley*, 105 U.S. 305, 311 (1882). The Court has also repeatedly emphasized that it is a court "of final review, 'not of first view,'" *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (*Fox Television*) (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)), and that, "as a general rule, '[it] do[es] not decide in the first instance issues not decided below,'" *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1338 (2015) (quoting *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012)). The court of appeals did not decide the question on which petitioner seeks review, nor would the answer to that question affect the court of appeals' judgment. Review is not warranted in these circumstances.

Petitioner contends (Pet. 7) that review should nonetheless be granted because the "application of *Auer* deference" in cases involving common-law terms presents "a question of exceptional importance." Even if that were true, it would not be a reason to abandon normal practice. See *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (per curiam) ("[T]he importance of an issue should not distort the principles that control the exercise of our jurisdiction."). Petitioner identifies no reason why this Court should grant review to consider a question that was not addressed in, or even relevant to, the decision below.

b. Petitioner contends (Pet. 9) that the courts of appeals "are divided as to what, if any, deference is owed to an executive agency's interpretation of com-

mon law," and that this Court's review is necessary to resolve that conflict. According to petitioner, five circuits (the Third, Fourth, Fifth, Sixth, and Ninth) hold "that no deference is due to an administrative interpretation of predominately common law terms" (Pet. 10); three circuits (the Second, Eighth, and Tenth) hold that such interpretations are "not entitled to great deference," but leave open the possibility of lesser deference, Pet. 14 (citation omitted); and the court of appeals in this case applied a "heightened level of deference" under *Auer* (Pet. 15).

Petitioner's description of the alleged circuit conflict is incorrect. Of the five courts that petitioner contends apply no deference, only the Fourth Circuit has addressed the question of deference to an agency's interpretation of a regulation involving common-law principles. See *West Va. Highlands Conservancy, Inc.* v. *Norton*, 343 F.3d 239, 245 (2003) (*West Va. Highlands*). And that court agreed with the Eighth and Tenth Circuits that, "when [an] administrative interpretation is not based on expertise in the particular field . . . but is based on general common law principles, *great deference* is not required." *Ibid.* (emphasis added; citation and brackets omitted) (quoting, *inter alia*, *Jicarilla Apache Tribe* v. *FERC*, 578 F.2d 289, 292-293 (10th Cir. 1978)); see *Brewster ex rel. Keller* v. *Sullivan*, 972 F.2d 898, 901 (8th Cir. 1992); *Edwards* v. *Califano*, 619 F.2d 865, 869 (10th Cir. 1980).[6] Although the Fourth Circuit noted that this rule would "*allow* de novo review of an agency's legal

[6] Petitioner contends (Pet. 14) that the Second Circuit also follows the rule of the Eighth and Tenth Circuits, but the only decision it cites is that of a single district court. See *Grossman* v. *Bowen*, 680 F. Supp. 570, 575 (S.D.N.Y. 1988).

determination," *West Va. Highlands*, 343 F.3d at 245 (emphasis added), it did not foreclose the possibility of deference in appropriate cases.

The other cases petitioner cites for the proposition that agencies' interpretations of common-law terms in regulations are entitled to no deference are inapposite. In *NLRB* v. *Fullerton Transfer & Storage Ltd.*, 910 F.2d 331 (1990), the Sixth Circuit addressed the NLRB's application of federal common-law principles regarding corporate alter egos, but it did not discuss the question of deference (although a concurring judge did). See *id.* at 336-337; *id.* at 343 (Engel, J., concurring). In *Oil, Chemical & Atomic Workers Int'l Union, Local 1-547* v. *NLRB*, 842 F.2d 1141 (1988), the Ninth Circuit reviewed *de novo* whether a new adjudicatory standard should be applied retroactively without addressing the level of deference due to an agency's interpretation of common-law terms in its regulations. *Id.* at 1144 & n.2. And the Third and Fifth Circuit decisions petitioner cites addressed the level of deference due to agency interpretations of statutes rather than common-law terms in regulations. See *White* v. *INS*, 75 F.3d 213, 215 (5th Cir. 1996) ("[T]he precise issue is whether the INS's interpretation of [Section] 212(c) [of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*] passes muster."); *Hi-Craft Clothing Co.* v. *NLRB*, 660 F.2d 910, 912 (3d Cir. 1981) (discussing "the deference a reviewing court should accord to an agency's statutory interpretation").[7]

---

[7] The Third Circuit's view in *Hi-Craft Clothing* that "more intense scrutiny * * * is appropriate when the agency interprets its own authority," 660 F.2d at 916, was rejected by this Court in *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868-1869 (2013).

Even if there were a conflict among the circuits concerning the propriety of deference when regulations include common-law terms, however, this case would not be an appropriate vehicle to resolve it. As explained, the court of appeals did not defer to the FAA in this case because, "[e]ven without such deference," it had "no difficulty upholding the FAA's interpretation of its regulations." Pet. App. 13-14. The result in this case would therefore have been the same regardless of the appropriate level of deference. Contrary to petitioner's contention (Pet. 15), the court did not "establish[] the D.C. Circuit as the only circuit that has held that agency interpretations of predominantly common law terms are entitled to * * * a heightened level of deference" under *Auer*.

c. Nor is there a conflict between the decision below and this Court's precedent. Petitioner invokes (Pet. 19) this Court's decision in *Christopher* to argue that *Auer* deference is inappropriate when an agency applies a new "interpretation of ambiguous regulations to impose potentially massive liability * * * for conduct that occurred well before that interpretation was announced." *Christopher*, 132 S. Ct. at 2167. But nothing of the sort happened here. As the court below recognized, the FAA's interpretation of its compensation regulation has been "consistent and well established * * * [s]ince at least the 1980s." Pet. App. 15. And its definitions of "common carriage" and "holding out," both drawn from the common law, were articulated in the Advisory Circular in 1986. Moreover, the FAA did not "impose potentially massive liability" on petitioner. Rather, it responded to petitioner's request for a legal interpretation by informing petitioner that pilots who use petitioner's website to solicit

passengers would need an appropriate certificate in order to offer their services to the public.

More fundamentally, there can be no conflict between the decision below and this Court's decision in *Christopher* because the court of appeals gave no deference to the FAA. The same holds true for *United States* v. *Mead Corp.*, 533 US. 218 (2001), and *Christensen* v. *Harris County*, 529 U.S. 576 (2000), both of which are distinguishable for the additional reason that they concerned deference to agencies' statutory interpretations under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *Mead Corp.*, 533 U.S. at 231-234; *Christensen*, 529 U.S. at 586-588. Furthermore, none of those decisions suggests that deference, whether under *Auer* or *Chevron*, would necessarily be unavailable simply because the relevant text being interpreted uses terms derived from the common law. This Court has, for example, concluded that deference can be appropriate when agencies interpret common-law terms used in statutes, even when agency interpretations deviate from the common law. See *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 92-94 (1995).[8] But it is unnecessary to consider whether deference might have been appropriate here, because as the court below recognized, none was necessary to uphold the FAA's determination.

---

[8] Petitioner invokes (Pet. 12-13) this Court's decision in *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263 (1960), to support its argument that courts should not defer to agency interpretations of common-law terms. That decision concerned an agency's interpretation of terms in a contract between private parties, not terms contained in the agency's own regulations. *Id.* at 268-270.

2. Petitioner contends (Pet. 21) that this Court should grant review to determine whether the FAA "drastic[ally] depart[ed] from the common law definition of 'common carrier.'" Specifically, petitioner argues (Pet. 22, 25-26) that pilots using its website cannot be considered common carriers because they "are not engaged in commercial activity, and cannot ever earn a profit," and because the flights are not available to the public indiscriminately. This argument does not warrant further review.

a. As an initial matter, petitioner's argument that the FAA deviated from the common law in defining "common carrier" was not properly presented to, nor decided by, the court below. Indeed, the court of appeals expressly found the argument to have been forfeited. Pet. App. 21. That is sufficient reason to deny review. As noted above, this Court is a court "of final review, 'not of first view,'" *Fox Television*, 556 U.S. at 529 (citation omitted), whose "traditional rule * * * precludes a grant of certiorari" on a question that "was not pressed or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). See *Zivotofsky*, 132 S. Ct. at 1430, 1432 (declining to review claim "without the benefit of thorough lower court opinions to guide our analysis of the merits"); *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001).

Petitioner presents no reason to deviate from that practice here. To the contrary, adherence to the Court's traditional rule is especially appropriate for two reasons. First, petitioner did not simply fail to raise this argument in its opening brief before the court of appeals; rather, petitioner affirmatively embraced the FAA's definition of "common carrier" as

the basis for its argument—both before the court and before the agency. See Pet. C.A. Br. 11 & n.14, 25; C.A. App. 49. Having argued to the court and the FAA that the agency's definition of "common carrier" controlled the analysis (and that pilots using petitioner's website were not "common carriers" under that definition), petitioner should not now be able to "claim[] that the course followed was reversible error." *Freytag* v. *Commissioner*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring in part and concurring in the judgment); cf. *Johnson* v. *United States*, 318 U.S. 189, 201 (1943) (noting that a defendant may not "elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him").

Second, there is no disagreement among the courts of appeals regarding the appropriateness of the FAA's definition. Indeed, the only court of appeals to have addressed the question has concluded that "the definition of common carrier provided [in the Advisory Circular] is in relevant respect the same as that found at common law." *Woolsey* v. *National Transp. Safety Bd.*, 993 F.2d 516, 523 (5th Cir. 1993), cert. denied, 511 U.S. 1081 (1994). Especially in these circumstances, the Court should follow its customary practice and refuse to consider petitioner's argument in the first instance.

b. In any event, petitioner's argument lacks merit. In the Advisory Circular, the FAA defined common carriage to involve "(1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation." C.A. App. 30. In articulating this definition, the FAA expressly acknowl-

edged that "common carriage" is a "common law term[]," *ibid.*, and it did not exercise its interpretive authority to define that term in a way that deviated from the common law. Cf. *Town & Country Elec.*, 516 U.S. at 92-94. As the Fifth Circuit held, this definition "is in relevant respect the same as that found at common law." *Woolsey*, 993 F.2d at 523; see *Washington ex rel. Stimson Lumber Co.* v. *Kuykendall*, 275 U.S. 207, 211 (1927) (explaining that "one who undertakes for hire to transport from place to place the property of others who may choose to employ him is a common carrier").

Petitioner argues that the FAA's definition is deficient in two respects. First, petitioner contends (Pet. 22-23) that "this Court has required a commercial enterprise component for all entities classified as common carriers" and that its pilots are not engaged in commercial activity because they "cannot ever earn a profit." But the opinions petitioner cites simply observe that common carriers are engaged in commerce, see *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 516 (1940) (Hughes, C.J., dissenting), or concern a particular regulation defining energy sold for "commercial consumption," *Wisconsin Elec. Power Co.* v. *United States*, 336 U.S. 176, 182 (1949). They do not purport to engage in any analysis of the definition of common carriage.

Petitioner's suggestion that a pilot offering transportation services to the public cannot be regarded as engaging in commercial activity unless he stands to profit is inconsistent with this Court's repeated holdings that non-profit enterprises are subject to regulation under the Commerce Clause, see, *e.g.*, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520

U.S. 564, 584 (1997) ("We see no reason why the non-profit character of an enterprise should exclude it from the coverage of either the affirmative or the negative aspect of the Commerce Clause."); *Associated Press* v. *NLRB*, 301 U.S. 103, 128-129 (1937) (holding that "[t]he Associated Press is engaged in interstate commerce" even though it "does not operate for profit"), and with case law addressing common carriage in the air transportation market, see *Woolsey*, 993 F.2d at 523 ("The test is an objective one, relying upon what the carrier actually does rather than upon the label which the carrier attaches to its activity or the purpose which motivates it.") (citation and internal quotation marks omitted); *Las Vegas Hacienda, Inc.* v. *Civil Aeronautics Bd.*, 298 F.2d 430, 435 (9th Cir.) (finding common carriage where company "was not interested in profiting and did not profit directly from the transportation"), cert. denied, 369 U.S. 885 (1962). Nor can petitioner's argument that its pilots do not engage in commercial activity be squared with petitioner's admission (Pet. 26) that they offer, for compensation, one of a number of "transportation services" that constitute an "increasingly important part of our nation's transportation economy."

Second, petitioner argues (Pet. 25-26) that pilots soliciting passengers through its website are not common carriers because petitioner "control[s] who does or does not receive membership * * * on the Flytenow website" and pilots "can refuse passengers for any reason, or no reason at all." As the court of appeals noted, these facts do not preclude a finding that petitioner and its pilots satisfy the "holding out" element of common carriage. Petitioner's website may be limited to members, but "membership re-

quires nothing more than signing up." Pet. App. 19. Similarly, petitioner points to no evidence that participating pilots in fact refuse to transport passengers who are willing to pay, and in any event, a pilot's ability to "occasionally refus[e] service or [to] offer[] it only pursuant to separately negotiated contracts" is not "'conclusive proof' that [the] pilot is not a common carrier." *Ibid.* (quoting Advisory Circular, C.A. App. 30); see *Woolsey*, 993 F.2d at 524 ("Although Woolsey claims that PTI was 'discriminating' about whom it would serve, there is no evidence that PTI ever turned away any member of the music industry who was able to pay PTI's fees."). As the FAA explained, "[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." Pet. App. 32 (quoting *Transocean Air Lines, Inc., Enforcement Proceeding*, 11 C.A.B. 350, 353 (1950)). And petitioner's own description of its website establishes that it is "designed to attract a broad segment of the public interested in transportation by air." *Ibid.*

The general concept of common carriage "has been applied in many legal and factual contexts," and thus it is "not surprising that the numerous decisions defining the term are somewhat less than harmonious." *Las Vegas Hacienda*, 298 F.2d at 433; see *Voyager 1000* v. *Civil Aeronautics Bd.*, 489 F.2d 792, 798 (7th Cir. 1973) (noting the "broad range of possibly applicable definitions" of common carriage), cert. denied, 416 U.S. 982 (1974). But "whatever the particular test, some type of holding out to the public is the *sine qua non* of the act of providing transportation of passengers or property by aircraft as a common carrier."

CSI Aviation Servs., Inc. v. *United States Dep't of Transp.*, 637 F.3d 408, 415 (D.C. Cir. 2001) (citation, internal quotation marks, and brackets omitted). The definition applied by the FAA to petitioner's website required such a "holding out." See Pet. App. 32 (citing Advisory Circular and *Transocean Air Lines*, 11 C.A.B. at 350).

At base, petitioner's argument is that the FAA and the court of appeals erroneously applied a long-established and legally appropriate definition of "common carrier" to its particular business model. That factbound and case-specific argument does not warrant this Court's review.

3. Petitioner argues (Pet. 27) that the FAA's legal interpretation is "a content-based restriction on internet communications" subject to strict scrutiny under the First Amendment. See *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (applying strict scrutiny to invalidate local ordinance that "impose[d] content-based restrictions on speech"). Petitioner does not, however, identify any conflict among the courts of appeals on this issue. That alone is a reason to deny review.

Regardless, the court of appeals correctly rejected petitioner's contention. Pet. App. 24-25. The First Amendment does not prohibit the FAA from requiring that persons who offer flight services to the general public, whether on the Internet or otherwise, must satisfy more stringent certification and safety standards than persons who are engaged in purely private operations. As the court of appeals explained, see *id.* at 25, the fact that the FAA may consider pilots' advertisements or other relevant speech as evidence that they are "holding out" flight services to the public for

compensation, and therefore are common carriers, does not violate the First Amendment.[9] The First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993); see *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.") (citation omitted).

Contrary to petitioner's suggestion, the FAA's legal determination in this case does not "prohibit[] activity-related speech." Pet. 29. Rather, the letter "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." Pet. App. 24. The "liability" at issue is liability for unauthorized flight operations. The regulations that require Part 119 certification "on [their] face deal[] with conduct having no connection with speech." *United States* v. *O'Brien*, 391 U.S. 367, 375 (1968); see, *e.g.*, 14 C.F.R. 119.5(g) ("No person may operate as a direct air carrier or as a commercial operator without, or in violation of, an appropriate certificate and appropriate operations specifications.").[10] Any incidental burden on speech

---

[9] In fact, holding out may be established by any means, including where a person's *conduct* demonstrates a willingness to serve the public. See *Transocean Air Lines*, 11 C.A.B. at 353 (holding out may be established by a "course of conduct").

[10] Another provision of Part 119, which the FAA did not threaten to enforce and which petitioner does not discuss, forbids a person to "advertise or otherwise offer to perform an operation subject to

created by the FAA's certification requirements, moreover, is justified by the government's important interest in "promot[ing] safe flight of civil aircraft in air commerce." 49 U.S.C. 44701(a); see *O'Brien*, 391 U.S. at 377. Imposing more stringent certification requirements on pilots who hold out offers of transportation to the general public in exchange for compensation directly advances the FAA's 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*, 993 F.2d at 522.

Petitioner fares no better with its assertion (Pet. 29) that the FAA has discriminated against means of communication. The FAA's conclusion with respect to petitioner's website "is fully consistent with prior legal interpretations related to other nationwide initiatives involving expense-sharing flights." Pet. App. 39-40 (citing examples). As the court of appeals explained, it is not the means of communication that matters, but the size of the intended audience. "Pilots communicating to defined and limited groups remain free to invite passengers for common-purpose expense-sharing flights" without becoming subject to the rules applicable to common carriers, whether those communications are accomplished through physical means (such as postings on bulletin boards) or electronic ones. *Id.* at 20; see, *e.g.*, C.A. App. 42 (FAA legal

---

this part unless that person is authorized by the [FAA] to conduct that operation." 14 C.F.R. 119.5(k). Although that provision does concern speech on its face, the speech it prohibits—offers to engage in illegal transactions—is "categorically excluded from First Amendment protection." *United States* v. *Williams*, 553 U.S. 285, 297 (2008) (citing *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973)).

interpretation noting that whether use of social media to solicit expense-sharing passengers constitutes "holding out" depends upon "the nature of the post [and] how large [the] * * * audience is."). A pilot who makes a general offer of transportation in exchange for compensation on a publicly available website, accessible by anyone in the world willing to sign up, may properly be subjected to more stringent requirements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MARK R. FREEMAN
THOMAS PULHAM
Attorneys

NOVEMBER 2016