

2017

## Sharing the Skies: The Legal State of “Flight-Sharing” After *Flytenow* and Current Regulatory Issues with Lyft: Lifting the Sharing Economy Off the Ground

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### Recommended Citation

Alexander P. Cohen, *Sharing the Skies: The Legal State of “Flight-Sharing” After Flytenow and Current Regulatory Issues with Lyft: Lifting the Sharing Economy Off the Ground*, 82 J. Air L. & Com. 587 (2017)  
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**SHARING THE SKIES: THE LEGAL STATE OF “FLIGHT-  
SHARING” AFTER *FLYTENOW* AND CURRENT  
REGULATORY ISSUES WITH LYFTING THE  
SHARING ECONOMY OFF THE GROUND**

ALEXANDER P. COHEN\*

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“UBER IN THE SKY,” while catchy, does not accurately capture the business models of Flytenow and AirPooler. Instead, pilots would post to an online bulletin board on a semi-private website, members would decide which flight to join based on a common destination, and the pilot and each passenger-member would pay a pro rata share of the expenses. This so-called “flight-sharing” is not a new concept. In fact, the Federal Administrative Agency (FAA) explicitly wrote private pilot flight-sharing exceptions into its rules far before Uber or the Internet were even conceived.<sup>1</sup> It was, and still is, permissible for a private pilot to fly others and charge a pro rata share of expenses under FAA rules.<sup>2</sup> So long as the fees charged merely cover costs, the FAA has historically been permissive.

And Flytenow thought its business model fell squarely within the blessing of this long-standing “expense-sharing exception” for private pilots. However, there has always been a fine line between private flight, which may not be for profit, and commercial flight, which implicates “common carrier” standards in exchange for the ability to make a profit.<sup>3</sup> The common carrier line has been tested before. But recently, it was pushed past its limits when this wave of start-ups moved the legal flight-sharing model online.<sup>4</sup>

Flytenow and AirPooler utilized this relatively low-tech mash-up of Craigslist and private flight until the FAA issued an opinion that shut them down.<sup>5</sup> Subsequently, the D.C. Circuit Court of Appeals determined that the conglomeration of private pilots was acting far outside the permissible scope of the pilots’ non-commercial licenses. When the Supreme Court denied their petition for certiorari, it grounded—once and for all—Flytenow and AirPooler’s flight-sharing operation. While the decision was the correct application of law, the author worries about the larger implications. In this comment, the author offers a more developed analysis of relevant issues discussed in the D.C. Circuit opinion. This comment further opines on relevant adminis-

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<sup>1</sup> Private Pilot Privileges, 15 Fed. Reg. 5226, 5226 (Aug. 12, 1950) (final rules of the Civil Aeronautics Board, pre-FAA, discussing expense-sharing exception to general rule that private pilots cannot accept compensation in exchange for flight).

<sup>2</sup> See 14 C.F.R. § 61.113 (2016).

<sup>3</sup> *Id.*; see generally 14 C.F.R. §§ 91.101–47.

<sup>4</sup> See *Flytenow, Inc. v. FAA*, 808 F.3d 882, 886–88 (D.C. Cir. 2015).

<sup>5</sup> FAA Legal Interpretation Letter from Mark W. Bury, Assistant Chief Counsel for Int’l L., Legis., and Reg., to Rebecca MacPherson (Aug. 13, 2014) [hereinafter *AirPooler Interpretation*].

trative law issues that, while not preserved in the *Flytenow* case, currently carry with them a great deal of controversy.

First, this comment provides background and historical development of the relevant law, focusing specifically on FAA rules, regulations, and interpretation of expense-sharing as well as common carriage.

Second, this comment turns to the background, history, and recent developments in the *Flytenow* case. Namely, this comment argues that the FAA correctly applied this existing law to AirPooler and Flytenow in the respective interpretation letters. The comment then fast-forwards to *Flytenow*, the case. There, the D.C. Circuit justifiably affirmed the agency's interpretation of current statutes and regulations. While the FAA properly interpreted the law, Flytenow failed to properly preserve an argument for appeal and leaned far too heavily on its weaker "as applied" and First Amendment challenges.

Third, this comment analyzes *Flytenow* as if the petitioner would have preserved an *Auer* challenge to the validity of the FAA's interpretation of the word "common carriage." In this alternate universe, the Supreme Court may have granted Flytenow's petition for writ of certiorari. But the hypothetical end result likely would have been the same.

Fourth, this comment discusses current holes in administrative law and its dangerous implications, using *Flytenow* as a test balloon for more issues on the horizon with the recent economic mutation to the so-called "sharing economy." This comment argues the current administrative infrastructure cannot support this shift. And the problem is exacerbated by the lack of clear direction on agency review standards for lower courts. Flytenow and AirPooler were victims to this deadly cocktail, and many more (in the aviation sector and beyond) will similarly crash and burn if these deficiencies are not defused.

Finally, this comment briefly offers recommendations, both for companies entering unchartered skies and for regulators just trying to stay afloat. Current administrative regulations and law resulted from a long, onerous process of regulation-making. The time has come to run this course again.

In sum, administrative law remains highly disjunctive (and perhaps too deferential) under *Auer* and its progeny at a time where a whole new set of regulations will be necessary to come remotely close to keeping up with changes in technology. While a challenge is ripe for Supreme Court review, *Flytenow* was not the proper vehicle. That the D.C. Circuit correctly upheld the

FAA's interpretation in *Flytenow*, however, does not lessen the concern with the holding's implications. By refusing to alter its rules or adapt its interpretations to changing economic circumstances, the FAA diminished commercial certainty for companies like AirPooler and Flytenow. Indeed, *Flytenow* temporarily grounded those trying to share the skies.

## I. LEGAL BACKDROP

In the Federal Aviation Act, Congress granted the FAA authority to “promote safe flight of civil aircraft.”<sup>6</sup> Under that charge, the FAA has the ability and duty to license pilots and attach regulations to those licenses.<sup>7</sup> To discharge its duty, the FAA created multiple sets of complimentary regulations. Two are relevant here: (1) Part 91 and 119 govern minimum flying standards, depending on the nature of the operation as private or commercial;<sup>8</sup> and (2) other regulations, 14 C.F.R. §§ 61.102–17; §§ 61.121–33, establish privileges and set limitations on pilots based upon their “privilege” level.<sup>9</sup>

### A. ALL AIRCRAFT UNDER PART 91 V. ONLY AIR CARRIERS UNDER PART 119

First, Part 91 creates bare minimum standards that apply to “all aircraft operating in the United States,” like seat belts, safe altitudes, and speed.<sup>10</sup> Conversely, Part 119, which is far more stringent,<sup>11</sup> creates an extensive list of minimum standards for those who operate aircraft as “air carrier, commercial operator, or both, in air commerce.”<sup>12</sup> Among the heightened requirements, Part 119 mandates those who fall under one of the statu-

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<sup>6</sup> Federal Aviation Act, 49 U.S.C. § 44701(a) (2012).

<sup>7</sup> *Id.* §§ 44701(b)(1), 44703(a), 44705.

<sup>8</sup> *See* 14 C.F.R. § 119.1 (2016); 14 C.F.R. § 91.1 (2016).

<sup>9</sup> *See* 14 C.F.R. §§ 61.102–17; 61.121–33.

<sup>10</sup> *Flytenow, Inc. v. FAA*, 808 F.3d 882, 886 (D.C. Cir. 2015); *see* 14 C.F.R. §§ 91.101–47.

<sup>11</sup> *Compare* 14 C.F.R. §§ 61.103(g); 61.109(a)–(b); 61.56(a), (c) (outlining less stringent requirements for private pilots operating solely under Part 91), *with* 14 C.F.R. §§ 135.243(a), (b)(1)–(2), (c)(1)–(2); 135.293 (requiring, *inter alia*, additional flight experience, heightened safety requirements, and increased intervals of testing and checks for some Part 119 commercial pilots).

<sup>12</sup> *See* 14 C.F.R. § 119.1 (outlining requirements to obtain a certificate); 121.1–121.1119 (detailing, in precise detail, operational requirements for commercial aircrafts); 135.1–135.621 (detailing, in precise detail, operational requirements for those commercial operations that also qualify as commuter aircrafts); *see also* AirPooler Interpretation, *supra* note 5, at 2.

tory categories obtain a certificate, ensuring compliance and proper registration.<sup>13</sup> Therefore, Part 119 fulfills the FAA's statutory obligation to issue certificates and regulate air carriers at a higher level of scrutiny.<sup>14</sup>

Nevertheless, Congress and the FAA—perhaps intentionally—left gaps in the statutory and regulatory framework.<sup>15</sup> For example, Congress defines the first category of operations that need a Part 119 certificate, “air carrier,” in the Federal Aviation Act. Air carrier means a “[person] undertaking by any means, directly or indirectly, to provide air transportation,”<sup>16</sup> which includes those engaged in “interstate air transportation” and “air commerce.”<sup>17</sup> In the statute, Congress defines “interstate air transportation” as “the transportation of passengers or property by aircraft as a *common carrier for compensation . . .*”<sup>18</sup> And it defines, somewhat circularly, “air commerce” as including “. . . interstate air commerce, . . . the operation of aircraft within the limits of a Federal airway, or the operation of aircraft that di-

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<sup>13</sup> See 14 C.F.R. § 119.1. A Part 119 certificate is also required in other situations that are outside the scope of this article. For example, when an aircraft's seat capacity exceeds 19 passengers or maximum weight-load exceeds 6,000 pounds. *Id.* However, these provisions are outside the scope of this article, as the FAA conceded in its interpretation letter that neither AirPooler nor Flytenow implicated the provisions with the proposed business models. See AirPooler Interpretation, *supra* note 5.

<sup>14</sup> 49 U.S.C. §§ 44705 (2012) (the FAA “shall issue an air carrier operating certificate to a person desiring to operate as an air carrier when the Administrator finds . . . that the person properly and adequately is equipped and able to operate safely . . . . [The] certificate shall – (1) contain terms necessary to ensure safety . . . ; and (2) specify the places to and from which, and the airways of the United States over which, a person may operate as an air carrier”); 44711(a)(4) (“(a) A person may not . . . (4) operate as an air carrier without an air carrier operating certificate or in violation of a term of the certificate”).

<sup>15</sup> See 49 U.S.C. § 40102(a); 14 C.F.R. § 119.1; see also *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (“[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”); *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 79 (1990) (“In casual conversation, perhaps, such absentminded duplication and omission are possible, but Congress is not presumed to draft its laws that way.”); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (establishing that the rule in which courts “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed” is engrained in American statutory interpretation).

<sup>16</sup> 49 U.S.C. § 40102(a)(2) (2012).

<sup>17</sup> *Id.* § 40102(a)(3), (5).

<sup>18</sup> *Id.* § 40102(a)(25) (emphasis added).

rectly affects, or may endanger safety in, foreign or interstate air commerce.”<sup>19</sup>

In addition, the FAA regulations define the second category of operations that require a Part 119 certificate (i.e., “commercial operator”).<sup>20</sup> There, commercial operator means 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 . . . .”<sup>21</sup> In sum, under the complex, interwoven statutory and regulatory scheme established by Congress and the FAA, an operation must obtain a Part 119 certificate when it acts as either: (1) a common carrier that accepts compensation for carrying persons or property; or (2) a person who carries persons or property, in air commerce, for compensation or hire.<sup>22</sup>

However, “common carriage” and “compensation” are not defined in § 40102, in the remainder of the Federal Aviation Act, nor anywhere in FAA regulations.<sup>23</sup> Instead, the FAA created a distinction between private carriage and common carriage in a 1986 Advisory Circular.<sup>24</sup> Under the standard outlined in that circular, an operation engages in “common carriage” when it satisfies four elements: “(1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation.”<sup>25</sup> Nevertheless, the FAA left open the meaning of “compensation.”

Certainly, the stringent requirements in Part 119 govern traditional commercial airlines, like Southwest and American Airlines, under either the statutory definition of “air carrier” or the regulatory definition of “commercial operator.”<sup>26</sup> These ventures exist to transport large groups of passengers and property to make a profit.<sup>27</sup> But not all Part 119 classifications are so cut and dried.<sup>28</sup> Rather, much litigation, including *Flytenow*, revolves around who is a common carrier and when an entity acts as a

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<sup>19</sup> *Id.* § 40102(a)(3).

<sup>20</sup> 14 C.F.R. § 1.1 (2016).

<sup>21</sup> *Id.* (emphasis added).

<sup>22</sup> *See id.*; 14 C.F.R. § 119.1; 49 U.S.C. § 40102(a).

<sup>23</sup> *See* 49 U.S.C. § 40102(a).

<sup>24</sup> FAA Advisory Circular 120-12A (Apr. 26, 1986), J.A. 30–32.

<sup>25</sup> *Id.* ¶ 4, J.A. 30.

<sup>26</sup> *See* 14 C.F.R. § 119.1(a); 49 U.S.C. § 40102(a); 14 C.F.R. § 1.1.

<sup>27</sup> *See* 14 C.F.R. § 119.1(a).

<sup>28</sup> *See id.*; *see, e.g., Flytenow, Inc. v. FAA*, 808 F.3d 882, 886 (D.C. Cir. 2015).

common carrier<sup>29</sup> as well as what constitutes compensation.<sup>30</sup> Likewise, much litigation turns on the distinction between classification as private or commercial pilot.<sup>31</sup>

### B. PRIVATE V. COMMERCIAL PILOT

Second, interrelatedly yet separately to the Part 91-Part 119 dichotomy, FAA regulations distinguish between private and commercial pilots.<sup>32</sup> Most importantly, while commercial pilots may carry passengers or property for compensation or profit, it is well-established that private pilots generally may not.<sup>33</sup> Indeed, private pilots (like all pilots) must comply with Part 91 aircraft regulations.<sup>34</sup> But they may not act as “air carriers” without also implicating the Part 119 requirements.<sup>35</sup> In addition, per § 61.113, private pilots may not transport persons or property for compensation or hire.<sup>36</sup>

Doing so could implicate two separate but related violations: (1) if a private pilot acts without a Part 119 certificate and accepts compensation, she violates § 61.113;<sup>37</sup> and (2) if that same pilot acts as a common carrier or implicates the “commercial operator” definition in 14 C.F.R. § 1.1, she violates not only § 61.113 but also Part 91, Part 119, and the Federal Aviation Act.<sup>38</sup> Such a violation could result in serious consequences, in-

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<sup>29</sup> See, e.g., *Woolsey v. Nat'l Transp. Safety Bd.*, 993 F.2d 516, 523–24 (5th Cir. 1993).

<sup>30</sup> See *Flytenow*, 808 F.3d at 885–86.

<sup>31</sup> See *id.* at 886.

<sup>32</sup> Compare 14 C.F.R. §§ 61.102–17 (outlining requirements, rules, privileges, and limitations on private pilots), with §§ 61.121–33 (outlining same for commercial pilots).

<sup>33</sup> Compare 14 C.F.R. § 61.113(a) (“[e]xcept as provided in paragraphs (b) through (h) . . . no 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*”) (emphasis added), with § 61.133(a)(1)(i) (“[p]rivileges— . . . A person who holds a *commercial* pilot certificate may act as pilot in command of an aircraft . . . [c]arrying persons or property *for compensation or hire* . . .”) (emphasis added).

<sup>34</sup> 14 C.F.R. § 91.101.

<sup>35</sup> *Id.* § 119.1; see also 49 U.S.C. § 40102(a); 14 C.F.R. § 1.1.

<sup>36</sup> 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 compensation or hire, act as pilot in command of an aircraft.”).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; 14 C.F.R. § 119.1; 49 U.S.C. § 44711(a)(4).

cluding massive civil penalties<sup>39</sup> and potential criminal action.<sup>40</sup> It helps to conceptualize the former violation as exceeding private privileges (akin to stepping outside of bounds) and the latter as commercially operating without a certificate (akin to an amateur spectator jumping on the field to play professional football).<sup>41</sup>

### C. FILING THE GAPS: COMPENSATION EXCEPTIONS V. EXEMPTIONS

While compensation is not defined in the scheme, the FAA uses the term throughout its regulations. Of note, the FAA adopted several tests that help determine when compensation exists, does not exist, or exists but is excepted.<sup>42</sup> First, the FAA sought to clarify its definition of commercial carrier for purposes of the Part 91-Part 119 dichotomy.<sup>43</sup> “Where 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.”<sup>44</sup>

Second, the FAA crafted a list of “exceptions” (or “exemptions”)<sup>45</sup> to the general limitations on private pilots receiving compensation.<sup>46</sup> Of particular relevance here, under § 61.113(c), a private pilot may accept a “pro rata share of the operating expenses of a flight with passengers, provided the ex-

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<sup>39</sup> 49 U.S.C. § 46301(a) (“(1) A person is liable to the United States Government for a civil penalty of not more than \$25,000 (or \$1,100 if the person is an individual or small business concern) for violating – (A) . . . chapter 447 [certificate procurement requirements] . . . (2) A separate violation occurs . . . for each day the violation . . . continues or, if applicable, for each flight involving the violation”) (emphasis added).

<sup>40</sup> *Id.* § 46317 (“(a) General criminal penalty – An individual shall be fined . . . or imprisoned for not more than 3 years, or both, if that individual . . . (1) knowingly and willfully serves or attempts to serve in any capacity as an airman operating an aircraft in air transportation without an airman’s certificate authorizing the individual to serve in that capacity; or (2) knowingly and willfully employs for service or uses in any capacity as an airman to operate an aircraft in air transportation an individual who does not have an airman’s certificate authorizing the individual to serve in that capacity.”).

<sup>41</sup> See generally AirPooler Interpretation, *supra* note 5, at 1–2.

<sup>42</sup> See, e.g., *id.* at 2 (citing 14 C.F.R. § 1.1).

<sup>43</sup> See 14 C.F.R. § 1.1.

<sup>44</sup> *Id.* (emphasis added).

<sup>45</sup> Rebecca MacPherson, *Can’t Get No Compensation: FAA’s Interpretation of Expense Sharing*, 29 No. 1 AIR & SPACE LAW. 1, 20–21 (2016) (arguing that the expense-sharing rule under § 61.113 was, is, and always has been an exemption rather than an exception).

<sup>46</sup> 14 C.F.R. § 61.113(a).

penses involve only fuel, oil, airport expenditures, or rental fees.”<sup>47</sup> If, however, the pilot accepts any compensation above a pro rata share, she “violate[s] the limits of the expense-sharing exception” and risks crossing the threshold from private to commercial.<sup>48</sup> Further, the pilot can only receive pro rata expenses from a passenger if the two share a “bona fide common purpose.”<sup>49</sup> This requirement ensures that pilots are not using pro rata expense-sharing as a pretext to serve as a glorified taxi cab. By limiting expense-sharing to situations in which the pilot and passenger have a “common purpose,” the FAA protects the underlying rationale of § 61.113 of merely offsetting rather than compensating.<sup>50</sup> But that line is blurry.

Take, for example, a sole pilot who owns and operates a two-seater airplane. He clearly does not operate a large-scale commercial operation. Nor would he appear to be a commercial operator under the traditional understanding of the phrase.<sup>51</sup> However, assume he accepts a “free” night in a hotel in exchange for moving a friend from Point A to Point B, a place where he was already planning to go.<sup>52</sup> The statutory and regula-

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<sup>47</sup> *Id.* § 61.113(c).

<sup>48</sup> See AirPooler Interpretation, *supra* note 5, at 2.

<sup>49</sup> FAA Legal Interpretation Letter from Rebecca B. MacPherson, Assistant Chief Counsel for Reg., to Ronald R. Lamb (Mar. 10, 2010) (“[t]he FAA has consistently interpreted this exception [under § 61.113(c)] to require a pilot to share with his passengers a bona fide common purpose for conducting the flight”) [hereinafter Lamb Interpretation]; FAA Legal Interpretation Memorandum from Rebecca B. MacPherson, Assistant Chief Counsel for Reg., to Don Bobertz (May 18, 2009) (“Absent a bona fide common purpose for their travel, reimbursement for the pro rata share of operating expenses constitutes compensation and the flights would be considered a commercial operation for which a part 119 certificate is required. Whether a bona fide common purpose exists depends upon the facts of the situation at hand.”) (citation omitted) [hereinafter Bobertz Interpretation]; see also FAA Legal Interpretation Letter from Rebecca B. MacPherson, Assistant Chief Counsel for Reg., to Peter Bunce (Nov. 19, 2008) [hereinafter Bunce Interpretation].

<sup>50</sup> “[I]f pilots pay less, they would not just be sharing expenses but would actually be flying for compensation or hire.” 62 Fed. Reg. 16,220, 16,263 (Apr. 4, 1997); see also FAA Legal Interpretation Letter from Rebecca B. MacPherson, Assistant Chief Counsel for Reg., to Guy Mangiamele (Mar. 4, 2009) [hereinafter Mangiamele Interpretation].

<sup>51</sup> *Cf.* Lamb Interpretation, *supra* note 49 (citing 14 C.F.R. § 119.1 and finding that a pilot who flew physicians and accepted full reimbursement in return was a “commercial operation” that required a Part 119 certificate).

<sup>52</sup> See FAA Legal Interpretation Letter from Rebecca MacPherson, Assistant Chief Counsel for Reg., to Mike Sommer (Oct. 8, 2010) (determining that provision of a “free dinner” in exchange for flying a passenger constitutes compensation) [hereinafter Sommer Interpretation].

tory scheme itself offers little certainty to that pilot as to (1) whether he has either stepped outside the limitations of his private pilot license, violating section 61 rules; or (2) whether he should have procured a Part 119 certificate under the statutory definition of an air carrier or regulatory definition of a commercial operator.<sup>53</sup> To be sure, under the current interpretation of “compensation,” our hypothetical pilot with the two-seater likely exceeded his license (stepped outside of bounds) and engaged in impermissible commercial operation (jumped onto the field).<sup>54</sup>

Adding to the confusion, there is currently a debate as to whether § 61.113(c) outlines exemptions or exceptions.<sup>55</sup> The distinction has reaching consequences. If the list outlines *exemptions*, then the pro rata payment is not compensation—ever. Not for purposes of Title 14, Part 61, and not for purposes of common carrier analysis.<sup>56</sup> And under this view, the pilot who accepts pro rata payment has not actually accepted compensation.

If it lists *exceptions*, then pro rata payment *is* compensation, but the FAA considers that compensation excluded from private pilot limitations under § 61.113(a). Pro rata payments would still qualify as “compensation” for other purposes, like satisfying a prong of the common carriage standard. Under this interpretation, a pilot could accept pro rata payment as compensation without a Part 119 certificate only if the operation did not involve common carriage.<sup>57</sup> But if this pilot engaged in “common carriage,” the § 61.113(c) compensation exceptions would become moot.<sup>58</sup> Regardless of whether the compensation received was *de minimis* or only a pro rata share of the expenses, this pilot would be considered an “air carrier” under the “exceptions”

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<sup>53</sup> See, e.g., Petitioner’s Opening Brief, at \*21–22, *Flytenow, Inc. v. FAA*, 808 F.3d 882, 886 (D.C. Cir. 2015) No. 14-1168, 2015 WL 66004 (Jan. 5, 2015). *But see* AirPooler Interpretation, *supra* note 5, at 1.

<sup>54</sup> Sommer Interpretation, *supra* note 52 (determining that provision of a “free dinner” in exchange for flying a passenger constitutes compensation).

<sup>55</sup> Compare MacPherson, *supra* note 45, at 20, with FAA Legal Interpretation Letter from Mark W. Bury, Assistant Chief Counsel for Int’l L., Legis., and Reg., to Andy Dobis (May 21, 2014) (“[C]ompensation under the FAA’s view is the receipt of *anything of value*, including the receipt and use of donated funds . . . for piloting services.”) (emphasis added).

<sup>56</sup> MacPherson, *supra* note 45, at 22–23 (advocating for exemptions view despite growing trend in FAA interpretations to the contrary).

<sup>57</sup> See *Flytenow*, 808 F.3d at 886; see also Mangiamiele Interpretation, *supra* note 50.

<sup>58</sup> See AirPooler Interpretation, *supra* note 5, at 2.

view.<sup>59</sup> In that situation, the pilot could still accept pro rata payment as compensation, but only as a common carrier and in compliance with Part 119 and other requirements of commercial operation.<sup>60</sup> Thus, an “exceptions” view casts a wider doctrinal net.

If simply reading about the regulatory schemes seems confusing, imagine how an emerging company felt when trying to operate under them. This is the tapestry with which Flytenow and AirPooler had to work. And one in which they failed to properly navigate. Complicated or not, the FAA acted predictably in *Flytenow* under its statutory and regulatory scheme. It merely extended an existing trend of broadly reading compensation and applied it to a new situation. The D.C. Court of Appeals, thus, correctly upheld the FAA’s interpretation.

## II. FLYTENOW, INC. V. FAA

### A. FACTUAL BACKGROUND

Flytenow attempted to capitalize on the so-called “expense-sharing rule” under § 61.113(c).<sup>61</sup> Under the Flytenow model, private pilots could connect with passengers to fill unused seats in their planes. To do so, pilots signed up at Flytenow.com, thereby agreeing to a background and license check.<sup>62</sup> Then, pilots would post their open seats on, what Flytenow dubbed, an “online bulletin board.”<sup>63</sup> The site required the pilots input date, time, and locations.<sup>64</sup> Most, if not all, of Flytenow pilots had private pilot licenses, and Flytenow itself did not own an inventory of planes.<sup>65</sup> Thus, the company attempted to distinguish its model from commercial charter operations, many of

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<sup>59</sup> See *id.*; see also 49 U.S.C. § 40102(a)(2) (defining “air carrier” as a “[person] undertaking by any means, directly or indirectly, to provide air transportation”); § 40102(a)(25) (defining “interstate air transportation” as “the transportation of passengers or property by aircraft as [a] a common carrier [b] for compensation”) (emphasis added).

<sup>60</sup> Compare 14 C.F.R. § 61.113(a), with 14 C.F.R. § 61.133(a)(1).

<sup>61</sup> *Flytenow, Inc. v. FAA*, 808 F.3d 882, 885–86, 890 (D.C. Cir. 2015).

<sup>62</sup> Petition for a Writ of Certiorari at \*3, *Flytenow, Inc. v. FAA*, 2017 WL 69183 (U.S. Jan. 9, 2017) (No. 16-14), 2016 WL 3564280 (June 24, 2016).

<sup>63</sup> *Id.* at \*3, \*5.

<sup>64</sup> FAA Legal Interpretation Letter from Mark W. Bury, Acting Assistant Chief Counsel for Int’l L., Legis., and Reg. Div., to Gregory S. Winton (Aug. 14, 2014) [hereinafter *Flytenow Interpretation*].

<sup>65</sup> Petition for a Writ of Certiorari at \*3–4, *Flytenow, Inc. v. FAA*, 2017 WL 69183 (U.S. Jan. 9, 2017) (No. 16-14), 2016 WL 3564280 (June 24, 2016).

which are passenger-centric and hold their own plane inventory.<sup>66</sup>

Members, who consisted mainly of flight enthusiasts and other pilots, would also register online and “select an Aviation Adventure for which he or she has a bona fide common purpose’ and request to participate in the planned Aviation Adventure.”<sup>67</sup> Multiple members could join in on the same ride, assuming the pilot had space.<sup>68</sup> Once the pilot accepted the flight with one or multiple members, the member(s) plus the pilot would each pay a pro rata share of the operating expenses.<sup>69</sup> Flytenow also took a prorated commission.<sup>70</sup> In an attempt to comply with the expense-sharing rule in § 61.113, Flytenow forbid pilots from making a profit or even contributing less than their pro rata share.<sup>71</sup>

Like Uber, pilots were in control of accepting or denying rides.<sup>72</sup> Pilots could also cancel at any time for any or no reason.<sup>73</sup> And passengers who were concerned or curious could access a pilot’s background, license information, and other personal details before deciding to fly with that pilot.<sup>74</sup> Unlike Uber, passengers were never in control of the ultimate location of the trip; rather, their interest was either recreational or to travel to the same location as the pilot.<sup>75</sup> Therefore, Flytenow

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<sup>66</sup> See *id.* at \*4. But see generally 14 C.F.R. §§ 135.1–135.621 (describing detailed requirements for service as a commercial charter operation).

<sup>67</sup> Flytenow Interpretation, *supra* note 64, at 1. Flytenow’s companion, AirPooler, described the service 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[.]” AirPooler Interpretation, *supra* note 5, at 1 (alteration in original).

<sup>68</sup> Flytenow, Inc. v. FAA, 808 F.3d 882, 885 (D.C. Cir. 2015).

<sup>69</sup> *Id.*

<sup>70</sup> Petition for a Writ of Certiorari at \*4, Flytenow, Inc. v. FAA, 2017 WL 69183 (U.S. Jan. 9, 2017) (No. 16-14), 2016 WL 3564280 (June 24, 2016).

<sup>71</sup> Marcia Coyle, ‘Uber of the Sky,’ *Challenging the FAA, Gets Business Backing in SCOTUS*, LAW.COM (Aug. 9, 2016), <http://www.law.com/sites/almstaff/2016/08/09/uber-of-the-sky-challenging-the-faa-gets-business-backing-in-scotus/?slreturn=20170108193121>.

<sup>72</sup> Flytenow Interpretation, *supra* note 64, at 1.

<sup>73</sup> Petition for a Writ of Certiorari at \*3, Flytenow, Inc. v. FAA, 2017 WL 69183 (U.S. Jan. 9, 2017) (No. 16-14), 2016 WL 3564280 (June 24, 2016).

<sup>74</sup> *Id.* at \*4. In its petition, Flytenow argued that the service actually offered a *higher* degree of safety than some commercial carriers. When a passenger books a flight through American Airlines, for example, there is no information about the pilot himself. But Flytenow allowed members to browse pilot profiles before agreeing to an arrangement. *Id.*

<sup>75</sup> See *id.* at \*3–4.

asserted, and the FAA did not dispute, passengers and pilots always shared a bona fide common purpose.<sup>76</sup> Further differentiating itself from Uber, Flytenow created a platform that was non-public and only accessible to pilots and members.<sup>77</sup>

### B. THE FAA LEGAL INTERPRETATION

Due to the growing success of the business model, Flytenow and AirPooler asked the FAA for a legal interpretation per judicial review procedure prescribed in the overarching regulatory scheme for administrative law, the Administrative Procedure Act.<sup>78</sup> Relying on its standard for common carriage and its interpretation of administrative rules, the FAA determined Flytenow and its pilots were operating beyond the scope of their private pilot licenses without complying with the additional standards required to run such an operation.<sup>79</sup> Specifically, the FAA outlined and applied the legal background discussed above.<sup>80</sup>

First, the FAA settled the dispute on expense-sharing under § 61.113(c) and determined that pro rata payment constitutes an “exception.”<sup>81</sup> In other words, payment, even if pro rata and solely as a reimbursement of costs, is compensation nonetheless.<sup>82</sup> In so doing, the FAA affirmed what Flytenow and others should have already recognized—that the modern FAA’s view construes compensation broadly.<sup>83</sup> Somewhat ironically, Flytenow grasped at straws to find a definition of “compensation” precisely because the FAA failed to clearly define it previously.<sup>84</sup> The FAA then rejected Flytenow’s proposed “enterprise for

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<sup>76</sup> *Id.* at \*5; Flytenow Interpretation, *supra* note 64, at 1.

<sup>77</sup> See Flytenow Interpretation, *supra* note 64, at 1.

<sup>78</sup> Administrative Procedure Act, 5 U.S.C. § 704 (2012).

<sup>79</sup> AirPooler Interpretation, *supra* note 5, at 4; Flytenow Interpretation, *supra* note 64, at 1.

<sup>80</sup> See AirPooler Interpretation, *supra* note 5, at 1–3.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 3 (determining that, when a pilot accepts pro rata expenses under § 61.113(c), “the issue of compensation is not in doubt”).

<sup>83</sup> See FAA Legal Interpretation Letter from Rebecca MacPherson, Assistant Chief Counsel for Reg., to Mark Haberkorn, at 2, n.1 (Oct. 3, 2011) (“any reimbursement of expenses, including a pro rata share of operating expenses, constitutes compensation”) (emphasis added) [hereinafter Haberkorn Interpretation]; Bobertz Interpretation, *supra* note 49, at 2–3; Mangiamele Interpretation, *supra* note 50, at 1; Bunce Interpretation, *supra* note 49, at 1; Clarification of Private Pilot Privileges, 28 Fed. Reg. 8157 (Aug. 8, 1963) (clarifying that expense sharing is compensation but a recognized exception to general prohibition on private pilots and compensation).

<sup>84</sup> *But see* AirPooler Interpretation, *supra* note 5, at 3.

profit” test, shooting down Flytenow’s attempt to bootstrap the language from 14 C.F.R. § 1.1 into a test for compensation. Accordingly, the FAA correctly stuck to its modern definition, that compensation under the FAA’s view is “the receipt of anything of value.”<sup>85</sup>

Nevertheless, it should be noted that simply flying an aircraft with a private license while accepting pro rata expenses still does not (without more) go outside the limitations on private pilots.<sup>86</sup> Pro rata payment only constitutes compensation, which a private pilot can accept under the § 61.113 exception if her operation does not run afoul of other regulations. In other words, there must be something more than pro rata excepted compensation for a violation.

Second, the FAA found that something more in Flytenow’s operation as a common carrier.<sup>87</sup> Of the four elements of common carriage, Flytenow only disputed two: compensation and holding out.<sup>88</sup> Because the FAA determined expense-sharing under § 61.113(c) is *compensation*, regardless of its excepted quality, the FAA easily disposed of that line of argument in its interpretation.<sup>89</sup> In fact, the FAA cited to a notice of proposed rulemaking from 1967 to support the contention that this view is, has, and will continue to be the view of the FAA regarding the exemption versus exception debate.<sup>90</sup>

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<sup>85</sup> FAA Legal Interpretation Letter from Mark W. Bury, Assistant Chief for Int’l L., Leg., and Reg., to Jeffery J. Reich, at 2 (Dec. 13, 2013) (“Regarding the definition of compensation, the FAA has continually maintained a long[-]standing policy that defines compensation in *very broad terms*. It does not require profit, a profit motive, or the actual payment of funds.”) (emphasis added) (citations omitted) [hereinafter Reich Interpretation]; *see also* FAA Legal Interpretation Letter from Mark W. Bury, Acting Assistant Chief Counsel for Int’l L., Legis. and Reg., to Robert P. Silverberg, at 2 (July 2, 2013) (citing FAA Legal Interpretation Letter from Rebecca B. Macpherson, Assistant Chief Counsel for Regulations, to Alan M. Dias (Dec. 19, 2011); FAA Legal Interpretation Letter from Rebecca B. MacPherson, Assistant Chief Counsel for Reg., to Joseph A. Kirwan, at 2 (May 27, 2005) (defining expense sharing for charitable medical flights as “compensation,” and considering the operation a “commercial operation” that required a Part 119 certificate).

<sup>86</sup> *Cf.* MacPherson, *supra* note 45, at 20–22 (expressing concern that the *Flytenow* holding could lead to such a result).

<sup>87</sup> AirPooler Interpretation, *supra* note 5, at 2–4; *Flytenow, Inc. v. FAA*, 808 F.3d 882, 887 (D.C. Cir. 2015).

<sup>88</sup> AirPooler Interpretation, *supra* note 5, at 3–4; FAA Advisory Circular 120-12A (Apr. 26, 1986), ¶ 3–4, J.A. 30.

<sup>89</sup> AirPooler Interpretation, *supra* note 5, at 3.

<sup>90</sup> *Id.* (quoting Clarification of Private Pilot Privilege, 28 Fed. Reg. 8157 (Aug. 8, 1963)) (opining that “[t]he ordinary meaning of ‘compensation’ includes the

Next, the FAA applied a literal standard to determine that Flytenow was “holding out.”<sup>91</sup> Because Flytenow pilots posted on a common website, the FAA determined that they held themselves out to the public as available to transport from Point A to Point B.<sup>92</sup> Flytenow and Airpooler argued that the pilot and passenger shared a common destination and purpose, so their pilots did not hold themselves out. Regardless, the FAA took issue with how Flytenow pilots obtained passengers as opposed to why they did.<sup>93</sup>

Thus, the FAA seemed primarily worried about the operation’s manner rather than its asserted motivation. Perhaps most indicative, the FAA cited to previous attempts at similar operations to the Flytenow model.<sup>94</sup> While the internet developed rather recently, the desire to offset expenses (and to take advantage of the exception) has been around since the development of the expense-sharing rule.<sup>95</sup> Indeed, at least one similar operation from the 1970s also took the form of a “membership club.”<sup>96</sup> There, the requested legal interpretation letter opined on the legality of a club-styled venture named “Share-A-Flite.” The club sent copy of the membership card, welcome letter, and membership agreement to the FAA, which ultimately determined that the rudimentary flight-sharing program stretched the expense-sharing exception past its intended application.<sup>97</sup> Despite the obvious difference between an enterprise from the 1970s and a modern Internet enterprise, the similarities between the “Share-A-Flite” scheme and Flytenow are striking. Both attempted to capitalize on the expense-sharing rule with a

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act of making up for whatever has been suffered or lost through another, and the act of remuneration”). According to this proposed rule, despite the propriety of expense-sharing as a “traditional right,” the act of receiving pro rata reimbursement still falls squarely within that definition of “compensation.” 28 Fed. Reg. 8157.

<sup>91</sup> AirPooler Interpretation, *supra* note 5, at 4; FAA Advisory Circular 120-12A (Apr. 26, 1986), ¶¶ 4a–e, J.A. 30–31.

<sup>92</sup> AirPooler Interpretation, *supra* note 5, at 4; *see* FAA Advisory Circular 120-12A (Apr. 26, 1986), ¶¶ 4a–e, J.A. 30–31.

<sup>93</sup> *See* AirPooler Interpretation, *supra* note 5, at 4.

<sup>94</sup> *Id.* (citing, *inter alia*, FAA Legal Interpretation Letter from DeWitte Lawson, Regional Counsel, to D. David Brown (Apr. 16, 1976) [hereinafter Brown Interpretation]).

<sup>95</sup> *See* Brown Interpretation, *supra* note 94; FAA Legal Interpretation Letter from John H. Cassidy, Assistant Chief Counsel, Regulations and Enforcement Division, to Thomas Chero (Dec. 26, 1985).

<sup>96</sup> Brown Interpretation, *supra* note 94.

<sup>97</sup> *Id.*

semi-public offering of transportation services by private pilots not licensed to offer them. There, as it did in *Flytenow*, the FAA expressed concern with the attendant legal implications of allowing private pilots to hold themselves out in such a manner. Further, both interpretations memorialize the FAA's extreme reluctance to interpret expense-sharing as anything more than a narrow exception.<sup>98</sup>

### C. WHY THE D.C. CIRCUIT COURT GOT IT RIGHT

Flytenow and AirPooler challenged the FAA interpretation in the D.C. Circuit, which consolidated the judicial review proceedings, and ultimately upheld the FAA's letter as a final order.<sup>99</sup> On appeal, Flytenow's argument was two-fold. However, neither argument carries much water. First, Flytenow asserted that the FAA "misinterpreted" its own standard for compensation, focusing largely on the exemption-versus-exception dichotomy.<sup>100</sup> Further, Flytenow argued that compensation cannot exist when the pilot and passenger share a common purpose.<sup>101</sup> Second, Flytenow argued that, even if it did meet compensation, it could not be common carrier.<sup>102</sup> According to Flytenow's requested definition, holding out must involve some form of active marketing. And here, Flytenow argued that if *anything* is passive marketing, posting on a site and walking away certainly is.<sup>103</sup>

In a reply brief, Flytenow also criticized the FAA's use of an antiquated definition that, despite thirty years of ability to do so, the FAA never codified in its rules.<sup>104</sup> As a conglomerate of private pilots governed by Part 91, Flytenow argued that its pilots should have been able to operate under the expense-sharing exception.<sup>105</sup> In sum, because Flytenow pilots only accepted pro rata reimbursement and merely posted flights on an online bulletin board, Flytenow maintained that a Part 119 certificate was not required.<sup>106</sup> The D.C. Circuit vehemently disagreed and

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<sup>98</sup> See *id.*; *Flytenow, Inc. v. FAA*, 808 F.3d 882, 885 (D.C. Cir. 2015).

<sup>99</sup> *Flytenow*, 808 F.3d at 885.

<sup>100</sup> Petitioner's Opening Brief at \*19, *Flytenow, Inc. v. FAA*, 808 F.3d 882, 886 (D.C. Cir. 2015) No. 14-1168, 2015 WL 66004 (Jan. 5, 2015).

<sup>101</sup> *Id.* at \*19-20.

<sup>102</sup> *Id.* at \*21-26.

<sup>103</sup> See *id.* at \*24-25.

<sup>104</sup> Petitioner's Reply Brief at \*9, *Flytenow, Inc. v. FAA*, 808 F.3d 882, 886 (D.C. Cir. 2015) No. 14-1168, 2015 WL 1569752 (Apr. 8, 2015).

<sup>105</sup> Petitioner's Opening Brief at \*19, *Flytenow, Inc. v. FAA*, 808 F.3d 882, 886 (D.C. Cir. 2015) No. 14-1168, 2015 WL 66004 (Jan. 5, 2015).

<sup>106</sup> *Id.*

sided with the FAA without even resorting to a controversial agency deference analysis.<sup>107</sup>

### 1. *Compensation*

The court properly started with the plain meaning and natural reading of the statutory and regulatory scheme.<sup>108</sup> To be sure, the text of the rule itself uses “exception” language.<sup>109</sup> If the FAA had intended for expense-sharing to be excluded from the definition of compensation, it could have just as easily done so.<sup>110</sup> In fact, its predecessor, the Civil Aeronautics Board (CAB) did just that: “that one or more passengers contribute to the actual operating expenses of a flight *is not considered the carriage of persons for compensation or hire.*”<sup>111</sup> But the FAA chose not to carry similar language into its current regulations.

Moreover, the court noted the FAA’s trend toward a broader definition of “compensation.”<sup>112</sup> While this conclusion could have drawn *Auer* critics to assault the court’s deference to the FAA’s interpretation of its own rule, the court correctly embraced this broader view of “compensation” and disposed of the *Auer* question on procedural grounds.<sup>113</sup> Because *Flytenow* did not reach the *Auer* issue, critics instead aim their criticism toward the FAA’s arguably broad interpretation of compensation itself, rather than the court’s deference thereto.<sup>114</sup>

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<sup>107</sup> *Flytenow, Inc. v. FAA*, 808 F.3d 882, 889–90 (D.C. Cir. 2015) (“Even without [*Auer*] deference, we have no difficulty upholding the FAA’s interpretation of its regulations in this case.”) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)) (*Auer* held that an agency’s interpretation of a term used in its rule controls unless such interpretation is “plainly erroneous or inconsistent with the regulation.”) (*see infra* notes 179–87 for further discussion of *Auer*).

<sup>108</sup> *See, e.g., King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (explaining that statutory, and thus regulatory, interpretation starts with the plain and natural reading when viewed in context and in light of the larger scheme).

<sup>109</sup> 14 C.F.R. § 61.113(a) (2016) (“[e]xcept as provided in paragraphs (b) through (h) . . . no 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*”) (emphasis added).

<sup>110</sup> *Cf. MacPherson, supra* note 45, at 20.

<sup>111</sup> Private Pilot Privileges, 15 Fed. Reg. 5226, 5226 (Aug. 12, 1950) (emphasis added).

<sup>112</sup> *Flytenow, Inc. v. FAA*, 808 F.3d 882, 891 (citing *Haberkorn Interpretation, supra* note 83).

<sup>113</sup> *Cf. MacPherson, supra* note 45, at 20–22; *see infra* text accompanying notes 179–87 for a full discussion on *Auer*.

<sup>114</sup> *See MacPherson, supra* note 45, at 18–22.

Rebecca MacPherson, who previously served as Assistant Chief Counsel to the FAA, has been among the most vocal opponents of *Flytenow*. She published a detailed critique of the FAA's interpretation, the court's holding, and the worrisome implications to the aviation law world.<sup>115</sup> Specifically, MacPherson argues that the FAA's reading of § 61.113 as an exception over an exemption contravenes previous interpretations of the expense-sharing provision.<sup>116</sup> At the very least, she argues, the FAA has been silent on the matter.<sup>117</sup>

Conspicuously missing from her argument is any mention of several FAA Interpretations on that same topic, namely the Lamb, Bunce, Bobertz, or Reich Interpretations.<sup>118</sup> Each of these Interpretations states in no uncertain terms that pro rata expense-sharing *is* compensation.<sup>119</sup> And each Interpretation bolsters the FAA's contention in *Flytenow* that § 61.113 is to be read narrowly.

Admittedly, the factual circumstances of each of these previous Interpretations differ somewhat from *Flytenow*'s circumstances.<sup>120</sup> And most of these Interpretations focus on common purpose as opposed to the exemption-exception dichotomy. However, that does not discount their discussion of the term "compensation." On the contrary, they demonstrate that the FAA has consistently signaled to private pilots that the compen-

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<sup>115</sup> See *id.* at 17–18, 19–20.

<sup>116</sup> Reich Interpretation, *supra* note 85, at 2 ("Regarding the definition of compensation, the FAA has continually maintained a long[-]standing policy that defines compensation in *very broad terms*. It does not require profit, a profit motive, or the actual payment of funds.") (emphasis added) (citations omitted).

<sup>117</sup> MacPherson, *supra* note 45, at 20 n.26.

<sup>118</sup> See *id.* at 18–22.

<sup>119</sup> See Lamb Interpretation, *supra* note 49, at 2 (stating "the FAA broadly defines compensation, which includes reimbursement of operating expenses"); Bunce Interpretation, *supra* note 49, at 1 ("Reimbursement for the pro rata share of operating expenses constitutes compensation and would be considered a commercial operation for which a part 119 certificate is required."); Bobertz Interpretation, *supra* note 49, at 2 ("pro rata share of operating expenses constitutes compensation"); Reich Interpretation, *supra* note 85, at 2 ("compensation under the FAA's view is the receipt of anything of value"). Ironically, MacPherson authored or at least signed several of those legal interpretations during her time at the FAA.

<sup>120</sup> The Lamb and Bunce Interpretations answer similar expense-sharing questions in a medical transportation setting. The Bobertz Interpretation arises out of recreational plane-sharing to canoe sites, and the Reich Interpretation analyzed a model akin to *Flytenow*'s model but in the not-for-profit situation. See Lamb Interpretation, *supra* note 49, at 1; Bunce Interpretation, *supra* note 49, at 1; Reich Interpretation, *supra* note 85, at 1.

sation restrictions set forth in § 61.113(a) are stronger than ever.<sup>121</sup> More importantly, the Interpretations demonstrate the FAA's signaling that how it interprets "compensation" does not change from one set of factual circumstances to another. In fact, it appears that the FAA does not plan to back down from such restrictions, even in the modern technology-dependent era.<sup>122</sup>

## 2. *Common Carriage*

Flytenow focused most of its argument to the D.C. Circuit on the issue of holding out.<sup>123</sup> Albeit, the propriety of focusing on application of the common carrier definition was questionable.<sup>124</sup> But Flytenow did correctly recognize several inconsistencies in the FAA's past interpretations of the term.<sup>125</sup> While Flytenow did not dispute that its operation undoubtedly met elements (2) and (3) of the common carrier standard (i.e., transportation of persons or property from place to place, respectively), Flytenow reiterated its dispute with (4) compensation and hotly disputed the FAA's application of (1) "holding out."<sup>126</sup> In the past, the FAA has defined the standard for holding out as "communicat[ing] to the public, or a segment to the public, that transportation services are indiscriminately available to any person with whom contact is made."<sup>127</sup> Direct advertising and large scale signs (e.g., billboards) certainly satisfy that definition.<sup>128</sup> However, the FAA stopped short of defining the exact contours of the test.

Not surprisingly, the FAA has struggled with applying its twentieth century standard to modern, twenty-first century factual circumstances.<sup>129</sup> For example, the FAA previously determined that posting flights on community college bulletin boards did not qualify as "holding out."<sup>130</sup> The FAA reasoned that the post-

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<sup>121</sup> See, e.g., *supra* note 119 and accompanying text.

<sup>122</sup> See *supra* notes 118–20 and accompanying text.

<sup>123</sup> *Flytenow, Inc. v. FAA*, 808 F.3d 882, 891–93 (D.C. Cir. 2015).

<sup>124</sup> See *infra* notes 138–44 and accompanying text.

<sup>125</sup> See Petitioner's Opening Brief at \*15, *Flytenow, Inc. v. FAA*, 808 F.3d 882, 886 (D.C. Cir. 2015) No. 14-1168, 2015 WL 66004 (Jan. 5, 2015).

<sup>126</sup> *Id.* at \*22–23.

<sup>127</sup> *Haberkorn Interpretation*, *supra* note 83, at 2 (citing *Transocean Airlines, Enforcement Proceeding*, 11 C.A.B. 350, 350 (1950)).

<sup>128</sup> *Id.*

<sup>129</sup> See, e.g., *MacPherson*, *supra* note 45, at 20 n.26.

<sup>130</sup> See Brief for the Respondent at \*21 n.11, 30, *Flytenow, Inc. v. FAA*, 808 F.3d 882, 886 (D.C. Cir. 2015) No. 14-1168, 2015 WL 1064063 (Mar. 11, 2015); Petitioner's Reply Brief at \*13, *Flytenow, Inc. v. FAA*, 808 F.3d 882, 886 (D.C. Cir.

ing would be restrained in scope by virtue of its static location. Potential passengers would come from a rather limited, identifiable class of viewers.<sup>131</sup> In 2011, a request for legal interpretation asked the FAA to extend that bulletin board rationale to the world's modern bulletin board: Facebook.<sup>132</sup> The FAA responded with a somewhat cryptic interpretation.<sup>133</sup> Instead of giving an answer, the FAA wrote that it did not have enough information about the specific operation to make a determination. It did note, however, that "advancing technology allows one to quickly reach a large audience through the electronic communications and internet posts."<sup>134</sup> And the FAA stuck to the definition on which it has relied for decades.<sup>135</sup>

While Flytenow attempted to capitalize on this ambiguity in its appeal to the D.C. Circuit, the FAA and D.C. Circuit correctly shut down that line of reasoning.<sup>136</sup> Noting several important considerations, the D.C. Court determined that a semi-public website (e.g., Facebook or the Flytenow website) was distinguishable from the bulletin board scenario. First, the FAA and court explained that something is not excluded from "holding out" simply because it does not reach the entire general public.<sup>137</sup> As the Haberkorn Interpretation explains, "[posting on Facebook] may still be considered holding out if it expresses a willingness to provide transportation for *all within this class or segment to the extent of its capacity*."<sup>138</sup> Second, the court further explained that the manner of communication was not the determinative issue;

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2015) No. 14-1168, 2015 WL 1569752 (Apr. 8, 2015) (both discussing FAA Legal Interpretation Letter from Kenneth Geier, Regional Counsel, to Paul Ware (Feb. 13, 1976) ("if you plan to go to St. Louis for the weekend, there would be nothing wrong with your advertising on the school bulletin board for other students to accompany you in order to defray your costs"))).

<sup>131</sup> Brief for the Respondent at \*21 n.11, *Flytenow, Inc. v. FAA*, 808 F.3d 882, 886 (D.C. Cir. 2015) No. 14-1168, 2015 WL 1064063 (Mar. 11, 2015).

<sup>132</sup> Haberkorn Interpretation, *supra* note 83, at 1.

<sup>133</sup> *See id.* at 2.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *See* Petitioner's Opening Brief at \*9, *Flytenow, Inc. v. FAA*, 808 F.3d 882, 886 (D.C. Cir. 2015) No. 14-1168, 2015 WL 66004 (Jan. 5, 2015).

<sup>137</sup> *Flytenow, Inc. v. FAA*, 808 F.3d 882, 892-93 (D.C. Cir. 2015).

<sup>138</sup> Haberkorn Interpretation, *supra* note 83, at 2 (quoting FAA Legal interpretation Letter from Donald P. Byrne, Acting Assistant Chief Counsel for Regulations and Enforcement, to William A. Dempsay (June 5, 1990)) (emphasis in original).

rather, the FAA focuses on size of the potential viewer class.<sup>139</sup> Third, while Flytenow argued that the website had a limited viewing audience because the portal was “semi-private” and only open to members, the court did not bite.<sup>140</sup> In reality, membership required “nothing more than signing up.”<sup>141</sup> Therefore, even if the FAA left some ambiguity after its *Haberkorn* Interpretation, the “online bulletin board” in this case reached much farther than a bulletin board or an individual’s Facebook account ever could.<sup>142</sup> Fourth, Flytenow’s briefing conveniently left out the whole definition of “common carrier” from the FAA Circular.<sup>143</sup> The standard explicitly states that “. . . *occasional refusals* to transport, are not conclusive proof that the carrier is not a common carrier.”<sup>144</sup> While Flytenow argued that pilots could choose to accept or reject a flight for any reason or no reason at all, that did not exclude the operation from the contours of the FAA standard.<sup>145</sup> Without a challenge to the FAA’s definition of the term itself, the D.C. Court properly upheld the only reasonable application of the “common carrier” standard—Flytenow was a common carrier.

#### D. FLYTENOW’S FATAL FLAWS

While the FAA properly interpreted and applied the germane regulations to the Flytenow business plan, Flytenow made several litigation errors that prevented the chance of a more successful appeal.<sup>146</sup> First, Flytenow did not challenge FAA’s definition of “common carriage” until its reply brief on ap-

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<sup>139</sup> *Flytenow*, 808 F.3d at 892; Brief for the Respondent in Opposition to the Petition for Certiorari at \*21–22, *Flytenow, Inc. v. FAA*, 2017 WL 69183 (U.S. Jan. 9, 2017) (No. 16-14), 2016 WL 6777193 (Nov. 14, 2016).

<sup>140</sup> *Flytenow*, 808 F.3d at 892.

<sup>141</sup> *Id.*

<sup>142</sup> *See id.*

<sup>143</sup> *See* Petitioner’s Opening Brief at \*11, *Flytenow, Inc. v. FAA*, 808 F.3d 882, 886 (D.C. Cir. 2015) No. 14-1168, 2015 WL 66004 (Jan. 5, 2015).

<sup>144</sup> FAA Advisory Circular 120-12A (Apr. 26, 1986), ¶ 4, J.A. 30 (emphasis added).

<sup>145</sup> *See id.*

<sup>146</sup> *See* *Flytenow, Inc. v. FAA*, 808 F.3d 882, 892–93 (D.C. Cir. 2015). While only the failure to preserve a deference challenge is discussed in detail, the other flaws should be noted. Flytenow wasted too much litigation capital by (1) attempting to create a circuit split where none existed by toying with potential misrepresentations of the law; (2) not arguing the matter as one of first impression or other pure law arguments; and (3) leaning too heavily on a flawed First Amendment argument. *See id.*

peal.<sup>147</sup> Those watching the case anticipated that the case could provide a vehicle to challenge *Auer*. So much so that the CATO Institute, TechFreedom, the Southeastern Legal Foundation, National Federation of Independent Business Small Business Legal Center, the Buckeye Institute, and the Beacon Center of Tennessee all filed amicus briefs in support of the petition for writ of certiorari alone.<sup>148</sup> However, any hope for a challenge was not properly preserved.<sup>149</sup> Generally, courts “will not entertain arguments or claims raised for the first time in a reply brief,” as doing so would not only be unfair to the appellee but also risky for the court in issuing a less-than-fully-informed opinion.<sup>150</sup> Thus, Flytenow’s procedural mistake prevented what had the potential to be an all-out administrative law battle.<sup>151</sup>

In its briefing in support of its petition for certiorari, Flytenow asserted that it did not forfeit an “as written” challenge below for two reasons. One, Flytenow denied that it failed to raise the issue in its initial briefing to the court of appeals.<sup>152</sup> Flytenow quoted statements from its first brief to that court as support.<sup>153</sup> However, the quotes were over-parsed and taken out of context.

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<sup>147</sup> See Petitioner’s Reply Brief at \*2, *Flytenow, Inc. v. FAA*, 808 F.3d 882, 886 (D.C. Cir. 2015) No. 14-1168, 2015 WL 1569752 (Apr. 8, 2015).

<sup>148</sup> See Brief for The CATO Institute & TechFreedom as Amici Curiae in Support of Petitioner, *Flytenow, Inc. v. FAA*, 2017 WL 69183 (U.S. Jan. 9, 2017) (No. 16-14) 2016 WL 4268635 (2016); Brief of Amici Curiae Southeastern Legal Foundation, National Federation of Independent Business Small Business Legal Center, The Buckeye Institute, The Beacon Center of Tennessee, and Thomas P. Gross in Support of Petitioner, *Flytenow, Inc. v. FAA*, 2017 WL 69183 (U.S. Jan. 9, 2017) (No. 16-14), 2016 WL 4120701, at \*1 (2016).

<sup>149</sup> *Flytenow, Inc. v. FAA*, 808 F.3d 882, 892–93 (D.C. Cir. 2015).

<sup>150</sup> *Id.* (quoting *Forman v. Korean Air Lines Co.*, 84 F.3d 446, 448 (D.C. Cir. 1996)); see also *McBride v. Merrell Dow & Pharm., Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986).

<sup>151</sup> See Brief for The CATO Institute & TechFreedom as Amici Curiae in Support of Petitioner, *Flytenow, Inc. v. FAA*, 2017 WL 69183 (U.S. Jan. 9, 2017) (No. 16-14) 2016 WL 4268635, at \*3 (2016).

<sup>152</sup> Petitioner’s Reply Brief in Support of Petition for a Writ of Certiorari at \*5, *Flytenow, Inc. v. FAA*, 2017 WL 69183 (U.S. Jan. 9, 2017) (No. 16-14), 2016 WL 6994879 (Nov. 23, 2016).

<sup>153</sup> *Id.* Flytenow, in its reply brief in support of the petition for certiorari at Supreme Court level, quoted its original brief to the D.C. Circuit: “Since the FAA has interpreted only *common law terms* here, and because the FAA has *radically departed* from previous interpretations *and precedent*, the *MacPherson-Winton Interpretation* is entitled to no deference by this Court.”; “Here, the key terms that the FAA had to interpret and apply to Flytenow’s facts [including ‘common carriage’] are, by the FAA’s own admission, all *common law terms*.”; “[C]ommon carriage’ as opposed to private carriage . . . [is a] purely *common law term*[.]” *Id.* (citations omitted) (emphasis and alterations in original).

Two, Flytenow asserted that it should have been obvious that it was attempting to challenge the FAA's common carriage standard. In reality, Flytenow and its initial brief only challenged the interpretation of the standard (i.e., the AirPooler and Flytenow Interpretations)<sup>154</sup> rather than the standard itself.<sup>155</sup> Although Flytenow explicitly argued that the court of appeals should give less deference to the AirPooler and Flytenow Interpretations, its opening brief to that court said nothing about deference that should be afforded to the standards for "compensation" or "common carriage" used therein.<sup>156</sup> Thus, the D.C. Circuit correctly determined that a challenge to the interpretation of those terms was forfeited. Rather, the court properly limited its review to application of "compensation" and "common carriage" in the AirPooler and Flytenow Interpretations.

For common carriage, the D.C. Circuit merely had to examine the FAA's application of the four prongs of the common carriage test. Flytenow's model quite clearly satisfied two of the four elements of the standard outlined in the Circular. Compensation and holding out were the only elements that even appeared questionable. And both were previously answered.<sup>157</sup>

Had Flytenow raised the issue in a timely manner, the D.C. Circuit would have been forced to opine on the applicability of *Auer* and determine the degree of deference an agency is given when interpreting a largely common law term (i.e., common carriage).<sup>158</sup> Instead, the opinion only briefly mentioned deference, discussing two points: (1) "[e]ven without such deference, we have no difficulty upholding the FAA's interpretation of its regulations in this case"<sup>159</sup>; and (2) it would "not consider Flytenow's argument that the FAA's decision contravenes the common law. That argument is forfeited."<sup>160</sup>

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<sup>154</sup> Flytenow refers to the two interpretations collectively in its brief to the D.C. Circuit as the "*Macpherson-Winton* Interpretation." Petitioner's Opening Brief at \*1, *Flytenow, Inc. v. FAA*, 808 F.3d 882, 886 (D.C. Cir. 2015) No. 14-1168, 2015 WL 66004 (Jan. 5, 2015).

<sup>155</sup> *Id.* at \*16.

<sup>156</sup> *See id.*

<sup>157</sup> *Flytenow, Inc. v. FAA*, 808 F.3d 882, 890–92 (D.C. Cir. 2015).

<sup>158</sup> Albeit, the analysis *infra* suggests that the outcome would have been no different regardless of which level of agency deference applied.

<sup>159</sup> *Flytenow*, 808 F.3d at 890.

<sup>160</sup> *Id.* at 893.

### III. FLYTENOW AND ADMINISTRATIVE DEFERENCE

Even if the D.C. Court would have reached a deference question, the decision likely would not have changed regardless of what deference standard applied.<sup>161</sup> The Supreme Court has consistently recognized that different situations require differing degrees of deference.<sup>162</sup> In the late twentieth century, the Supreme Court decided a number of landmark decisions that caused great controversy regarding the amount of deference toward agencies.<sup>163</sup> And, while the Court has since tried to clarify the scope and extent of each doctrine,<sup>164</sup> observers still worry that the Court has created great uncertainty<sup>165</sup> and greatly enhanced agency power.<sup>166</sup> Many worry—perhaps justifiably—that the varying degrees of deference have effectively given administrative agencies the ability to act beyond their authority as executors and into the realms of legislators and arbitrators.<sup>167</sup>

#### A. FLYTENOW AND CHEVRON

The most well-established of the doctrines is *Chevron* deference.<sup>168</sup> Under *Chevron*, when Congress has “explicitly left a gap for an agency to fill,” Congress is presumed to have delegated

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<sup>161</sup> *But see* Petition for a Writ of Certiorari at \*18–19, *Flytenow, Inc. v. FAA*, 2017 WL 69183 (U.S. Jan. 9, 2017) (No. 16-14), 2016 WL 3564280 (June 24, 2016) (advocating for lesser deference under cases discussed *infra* note 189).

<sup>162</sup> *United States v. Mead Corp.*, 533 U.S. 218, 220 (2001) (recognizing “various justifications for deference depending on statutory circumstances and agency action”) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) for the quoted proposition).

<sup>163</sup> *See, e.g.*, *Auer v. Robbins*, 519 U.S. 452 (1997); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (both discussing the degree of deference afforded to agency interpretation; both resulting in much controversy, especially recently under the Bush and Obama Administrations).

<sup>164</sup> *Mead Corp.*, 533 U.S. at 226–27 (attempting to define the contours of *Chevron*).

<sup>165</sup> *See, e.g.*, Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1444 (2005) (arguing *Mead* not only failed but also made matters worse).

<sup>166</sup> *See* Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 188 (1992) (discussing tension and confusion among agencies and courts based on changing role of each actor in recent administrative law developments).

<sup>167</sup> *See, e.g., id.*; Charles A. Breer & Scot W. Anderson, Regulation Without Rulemaking: The Force and Authority of Informal Agency Action, Proceedings of 47th Annual Rocky Mountain Mineral Law Institute (2001) (discussing rise of the informal rulemaking phenomenon among agencies and its apparent conflict with the Administrative Procedure Act).

<sup>168</sup> *Mead*, 533 U.S. at 227 (discussing *Chevron*, 467 U.S. at 843–44).

the authority to fill that gap to that agency.<sup>169</sup> Furthermore, the resulting regulation is “binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.”<sup>170</sup> When a reviewing court examines an agency’s interpretation of a statute, the *Chevron* two-step test applies.<sup>171</sup> Under that framework, courts ask “[1] whether the statute is ambiguous and, if so, [2] whether the agency’s interpretation is reasonable.”<sup>172</sup> The *Chevron* two-step “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”<sup>173</sup> Here, Congress left the FAA a gap to fill in § 40102(a)(25) of the Federal Aviation Act by purposefully leaving the phrase “common carrier” undefined.<sup>174</sup> Indeed, for decades, the FAA has relied on the same definition with no dissent from Congress.<sup>175</sup> Certainly the FAA, charged with “promot[ing] safe flight of civil aircraft,”<sup>176</sup> is best suited to define “common carrier” in the context of its own regulations.<sup>177</sup> Thus, a true *Chevron* issue was not presented here. The FAA spotted a gap in the Federal Aviation Act and determined that “guidelines giving general explanation” of common carrier “would be helpful.”<sup>178</sup> Since *Chevron*, however, the Court’s deference jurisprudence has spiraled into a set of complex and inter-related doctrines.

## B. INTRODUCTION TO *AUER*

Of these cases, *Auer v. Robbins* is by far the most controversial.<sup>179</sup> Before determining if *Flytenow* would have qualified for

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<sup>169</sup> *Id.* (quoting *Chevron*, 467 U.S. at 843–44).

<sup>170</sup> *Id.* (citing *Chevron*, 467 U.S. at 844).

<sup>171</sup> *Chevron*, 467 U.S. at 843–44.

<sup>172</sup> *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015) (citing *Chevron*, 467 U.S. at 842–43).

<sup>173</sup> *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

<sup>174</sup> Federal Aviation Act, 49 U.S.C. § 40102(a)(25) (2012) (“the transportation of passengers or property by aircraft as a *common carrier* for compensation . . .”) (emphasis added).

<sup>175</sup> See FAA Advisory Circular 120-12A (Apr. 26, 1986), J.A. 30–32.

<sup>176</sup> 49 U.S.C. § 44701 (2012).

<sup>177</sup> See *id.* § 40102(a)(25).

<sup>178</sup> *Flytenow, Inc. v. FAA*, 808 F.3d 882, 886 (D.C. Cir. 2015) (quoting FAA Advisory Circular 120-12A (Apr. 26, 1986), ¶ 3, J.A. 30).

<sup>179</sup> See *Auer v. Robbins*, 519 U.S. 452 (1997); see also *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (citing concerns with *Auer* deference); John F. Manning, *Constitutional Structure and Judicial Deference to Agency In-*

*Auer* deference, introductions are in order. Under *Auer*, a court generally must accept an agency's interpretation of its own regulations as controlling unless that interpretation is plainly erroneous or inconsistent with the regulation.<sup>180</sup> Critics argue the Court went too far with this standard, and the cases that followed have yielded much concern and criticism. Even the late Justice Scalia expressed skepticism with *Auer* in *Talk America, Inc. v. Michigan Bell Telephone Co.*<sup>181</sup> Specifically, Justice Scalia warned of the implications of the line of deferential cases, taking particular concern with the "validity" of *Auer*.<sup>182</sup> He wrote that "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases."<sup>183</sup>

Justice Scalia and others who criticize *Auer* are, at least empirically, somewhat justified in their concern.<sup>184</sup> A recent study examined judicial review of administrative decisions and found that when *Auer* deference (also known as *Seminole Rock* deference) was applied, courts upheld agency action 90.9% of the time.<sup>185</sup> On the other hand, perhaps some of that concern is merely hype, as courts only apply such strong deference in 7.1% of eligible cases.<sup>186</sup> But perhaps those concerns are exacerbated by the lack of uncertainty in when a case will get a certain level of deference.<sup>187</sup> To be sure, under *Auer* and progeny, "the Supreme Court's deference doctrine is complicated as a matter of theory and chaotic as a matter of practice. . . . In short, the Supreme Court's deference jurisprudence is a mess."<sup>188</sup>

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*terpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617 (1996) (laying out the constitutional concerns with increased deference to agency actions).

<sup>180</sup> *Auer*, 519 U.S. at 461.

<sup>181</sup> *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68–69 (2011) (Scalia, J., concurring).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 69 (emphasis added).

<sup>184</sup> See 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, 1098–1104 (2008).

<sup>185</sup> *Id.* at 1103–05.

<sup>186</sup> See *id.* at 1103–04 (calling judicial application of *Auer-Seminole Rock* deference "episodically invoked" and "sporadic").

<sup>187</sup> *Id.* at 1156–57.

<sup>188</sup> *Id.*

C. PREDICTION IF *FLYTENOW* HAD PRESERVED THE DEFERENCE QUESTION

In its reply brief to the D.C. Circuit and its certiorari petition to the Supreme Court, Flytenow argued that if the courts engaged in a deference analysis and gave any deference to the FAA, *Auer* deference would have been the improper standard.<sup>189</sup> Instead, Flytenow cited the Court's administrative deference decisions in *Christopher*, *Mead*, and *Christensen* for what it believed were the "proper" standards in a deference analysis.<sup>190</sup> Specifically, Flytenow argued that each of these standards alone or taken together stand for the proposition that the Supreme Court has recently expressed a preference to limit agency deference. Thus, under Flytenow's line of reasoning, the D.C. Circuit's decision flies in the face of this deference-limiting trend.<sup>191</sup> However, none of those cited decisions would have applied or changed the result of *Flytenow* even if either the D.C. Circuit or Supreme Court would have engaged in a deference analysis of the FAA's interpretation.

First, *Christopher* was an extreme case (likely fact-limited) in which the Court refused to give high agency deference when the potential result was retrospective crushing liability based on conduct that occurred well before the Department of Labor issued an adverse interpretation.<sup>192</sup> *Flytenow* is clearly distinguishable, as the FAA's interpretative letter did not impose *any* retrospective liability on Flytenow, much less crushing liability. In fact, the FAA merely told Flytenow that its current operation violated regulations, with no attendant liability or retroactive effects. Therefore, the Court likely would not have applied far less deferential and far more stringent *Christopher* standard.<sup>193</sup>

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<sup>189</sup> See, e.g., Petition for a Writ of Certiorari at \*10, \*15–16, \*18–19, *Flytenow, Inc. v. FAA*, 2017 WL 69183 (U.S. Jan. 9, 2017) (No. 16-14), 2016 WL 3564280 (June 24, 2016).

<sup>190</sup> *Id.* at \*18–19; *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (discussing the "strong reasons" based on the facts of that case for not applying *Auer* deference); *United States v. Mead Corp.*, 533 U.S. 218, 232–34 (2001) (stating that interpretative rules get lower deference); *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters . . . do not warrant *Chevron*-style deference.").

<sup>191</sup> Petition for a Writ of Certiorari at \*18–19, *Flytenow, Inc. v. FAA*, 2017 WL 69183 (U.S. Jan. 9, 2017) (No. 16-14), 2016 WL 3564280 (June 24, 2016).

<sup>192</sup> *Christopher*, 132 S. Ct. at 2168–69 (refusing to opine on "the general merits of *Auer* deference").

<sup>193</sup> See *AirPooler Interpretation*, *supra* note 5, at 4.

Second, *Mead* and *Christensen* deal with an agency stepping outside congressionally delegated authority.<sup>194</sup> For example, *Mead*, dealt with the authority of the United States Customs Service to issue an interpretation with legally binding force.<sup>195</sup> Thus, even if *Mead* did apply, Flytenow would still have lost the battle. And the sole proposition that Flytenow cherry-picked from *Mead* misstates the relevant holding.<sup>196</sup> The interpretative letters that Flytenow referenced in its *Mead* summary were characterizations of cargo that were never intended to have legal effect under Customs' grant of statutory authority.<sup>197</sup> By contrast, there was no question here that the FAA was acting within its statutory grant.<sup>198</sup> Further, if either court did utilize the *Mead* deference, it would defer to the FAA's interpretation proportionally, based on "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."<sup>199</sup> Here, the FAA acted in conformity with past signaling that (1) it considered § 61.113 expense-sharing an exception, not an exemption; and (2) that it would continue to construe holding out broadly, even in the technology era.<sup>200</sup> Thus, under the *Mead* standard, the FAA's interpretation also passes muster.

Finally, the Court, if it granted the petition to review the deference question, would have had no trouble affirming without

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<sup>194</sup> *Christensen*, 529 U.S. at 586–88; *Mead*, 533 U.S. at 231.

<sup>195</sup> *Mead*, 533 U.S. at 231 (stating "[t]he authorization for classification rulings, and Customs's practice in making them, present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here.>").

<sup>196</sup> *Id.* at 226–27 (holding "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority").

<sup>197</sup> *See id.*

<sup>198</sup> *See* Federal Aviation Act, 49 U.S.C. §§ 44701, 44703, 44705 (2012); *see also* Petition for a Writ of Certiorari at \*19, *Flytenow, Inc. v. FAA*, 2017 WL 69183 (U.S. Jan. 9, 2017) (No. 16-14), 2016 WL 3564280 (June 24, 2016) (arguing that the FAA applied the wrong definition of a common-law term, not that the FAA acted outside its statutory grant).

<sup>199</sup> *Mead*, 533 U.S. at 228 (quoting *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944)).

<sup>200</sup> *See supra* notes 118–22; 134–45 and accompanying text.

*Auer*.<sup>201</sup> The common carrier definition in the Advisory Circular noted the common-law heritage of the term<sup>202</sup> and attempted to conform its standard thereto. And the FAA successfully did so. “Holding out,” the essential prong on which the FAA and D.C. Circuit rested their decisions, is axiomatically part of the “common carrier” definition.<sup>203</sup> In fact, *Black’s Law Dictionary* defines “carrier” as a “commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee.”<sup>204</sup>

Certainly, common carriage has a “broad range of possibly applicable definitions”<sup>205</sup> and perhaps the Court could have found that the FAA’s definition did not deserve the same degree of deference as a narrower common law definition. When courts examine an agency’s interpretation of its own regulations, they generally apply either heightened *Auer* deference or lesser *Skidmore* deference.<sup>206</sup> Here, a court applying *Auer* could easily find that the common carrier standard applied by the FAA is not “plainly erroneous,” as the FAA would argue that it was merely interpreting an ambiguous term within its own regulations.<sup>207</sup>

However, even under the lesser *Skidmore* deference, the FAA’s standard would rule the day. Under *Skidmore*, the FAA’s interpretation would only be given deference if the regulation in question were ambiguous.<sup>208</sup> When *Skidmore* deference applies to an agency’s interpretation of its own regulation, such an interpretation is “entitled to respect,” the weight of which depends on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it *power to persuade*, if lacking power to control.”<sup>209</sup> Here, assuming (*arguendo*) that “common carrier” in the FAA’s regulations is ambiguous,

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<sup>201</sup> See Brief for the Respondent in Opposition at \*13, *Flytenow, Inc. v. FAA*, 2017 WL 69183 (U.S. Jan. 9, 2017) (No. 16-14), 2016 WL 3564280 (Nov. 14, 2016).

<sup>202</sup> See FAA Advisory Circular 120-12A (Apr. 26, 1986), J.A. 30–32.

<sup>203</sup> *CSI Aviation Servs., Inc. v. U.S. Dep’t of Transp.*, 637 F.3d 408, 415 (D.C. Cir. 2011) (“whatever the particular test, some type of *holding out to the public* is the *sine qua non* of the act of ‘provid[ing]’ ‘transportation of passengers or property by aircraft as a common carrier’”) (emphasis added).

<sup>204</sup> Carrier, BLACK’S LAW DICTIONARY (10th ed. 2014) (emphasis added).

<sup>205</sup> *Voyager 1000 v. Civil Aeronautics Bd.*, 489 F.2d 792, 798 (7th Cir. 1973) (for the quote, not the proposition).

<sup>206</sup> See, e.g., *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000).

<sup>207</sup> See *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

<sup>208</sup> *Christensen*, 529 U.S. at 588.

<sup>209</sup> *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944) (emphasis added); *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006).

the FAA's interpretation comports not only with its own historical practice but also with modern common law practice.<sup>210</sup> Indeed, the FAA's interpretation here is "based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case."<sup>211</sup> Accordingly, like it or not, the FAA's interpretation quite clearly did not "amount[ ] to a transfer of the judge's exercise of interpretive judgment to the agency" and would have held up under even the lower deferential standards.<sup>212</sup>

Therefore, regardless of the deference that could have applied, the outcome in *Flytenow* would have likely been the same. However, because *Flytenow* merely attempted a challenge of the FAA's applications of "common carrier" to its set of facts, neither the D.C. Circuit nor the Supreme Court had occasion to fully flesh out an administrative deference analysis.

#### IV. FLYTENOW IMPLICATIONS: REGULATION IN THE SHARING ECONOMY

*Flytenow*, while correctly decided under current law, demonstrates a larger problem with regulations and with persons and agencies charged to regulate: an inability to adapt to a changing economy that has harmed both private industry and consumers.<sup>213</sup> The world economy continues to shift more and more toward the "sharing economy."<sup>214</sup> Since the early twenty-first century, legal and economic commentators have struggled with how to tackle the unique problems posed by regulating shareable goods and services.<sup>215</sup>

Much debate has centered on the best way to regulate the sharing economy to encourage innovation and ingenuity with-

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<sup>210</sup> See, e.g., *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 415 (D.C. Cir. 2011).

<sup>211</sup> *Skidmore*, 323 U.S. at 139.

<sup>212</sup> *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1219 (2015) (Thomas, J., concurring).

<sup>213</sup> See *Flytenow, Inc. v. FAA*, 808 F.3d 882, 885–93 (D.C. Cir. 2015).

<sup>214</sup> *The Rise of the Sharing Economy*, *ECONOMIST* (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy> (discussing the role of the recession in the emergence of the sharing economy).

<sup>215</sup> See, e.g., Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 *YALE L.J.* 273 (2004) (providing an early commentary in 2004 on the emergence of social and economic issues unique to the "shareable good").

out sacrificing safety and consumer protection.<sup>216</sup> On one side of the debate, some legal commentators advocate for a hands-off approach.<sup>217</sup> They generally maintain that low involvement and minimal agency oversight promotes market self-correction, thus self-regulation.<sup>218</sup> On the other side, legal commentators argue that regulation is not, of itself, stifling. Rather, regulators must adapt to and ultimately embrace this new economic model.<sup>219</sup> Indeed, commentators on this side of the divide advocate for a complete overhaul of existing statutory and regulatory framework.<sup>220</sup>

Ironically, those consumers who the FAA and other agencies try to protect with current regulations are the very people being harmed by them.<sup>221</sup> While start-up companies have enjoyed this wave of sharing, consumers have largely benefitted as well.<sup>222</sup> Those observers who see the economic and legal benefits of wait-and-see regulation, such as Christopher Koopman, argue that the shift to a sharing economy has: increased overall value, allowed new entrants to take advantage of “dead capital” such as empty space in cars (or planes), mitigated traditional consumer problems of information asymmetry and transaction costs between producers and end consumers, and fostered boundless innovation with hyper-specialization.<sup>223</sup> And many of these effects shine directly on consumers, in contrast to traditional slow-mov-

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<sup>216</sup> See Christopher Koopman et al., *The Sharing Economy and Consumer Protection Regulation the Case for Policy Change*, 8 J. BUS. ENTREPRENEURSHIP & L. 529, 530 (2015).

<sup>217</sup> Alamea Deedee Bitran, *The Uber Innovations That Lyfted Our Standards Out of Thin Air(bnb), Because Now, “There’s an App for That”*, 8 ELON L. REV. 503, 504–08 (2016) (discussing the rapid rise and tense protest of the sharing economy; advocating for hands-off self-regulation).

<sup>218</sup> See, e.g., Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 116, 116–17 (2015) (arguing self-regulation and market correction over formal rules).

<sup>219</sup> See, e.g., Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413, 475 (2015) (advocating “limited, but specific, regulation of the sharing economy,” focusing on the need for regulation in the areas of “compulsory contracts between parties, compensation, minimum skill requirements, and rules on liability”).

<sup>220</sup> Andrea Bolton, *Regulating Ride-Share Apps: A Study on Tailored Reregulation Regarding Transportation Network Companies, Benefitting Both Consumers and Drivers*, 46 CUMB. L. REV. 137, 138 (2016) (arguing for legislative action to handle problems posed by sharing the economy).

<sup>221</sup> Koopman et al., *supra* note 215, at 532–38.

<sup>222</sup> *Id.* at 531–32.

<sup>223</sup> *Id.*

ing supply and demand models that take time before benefitting consumers, if at all.

If done hastily and sloppily, or slowly and aloofly, regulation in the sharing economy could have crippling effects like higher entry barriers and liability risks.<sup>224</sup> Over-regulation in the burgeoning field has also produced an interesting counterproductive effect of uniformity among companies.<sup>225</sup> Because these start-ups thrive on innovation and pushing traditional boundaries, the negative effects of uniformity, like higher prices, less competition, and stifled innovation, affect sharing economy companies within this new sector at a visceral level.<sup>226</sup> While the virtues of regulation are up for debate, and indeed often are debated, there is much less debate on the pressing inability for the current regulatory framework to keep up with the changing economy.<sup>227</sup> And, as Koopman argues, this dissonance is trickling down to consumers in an alarming way.<sup>228</sup>

For air technology companies, these forewarned effects have become obvious and immediate.<sup>229</sup> Flight-sharing companies cannot operate under the Flytenow business model, unless (1) the FAA changes its interpretation of an operative term (like “common carrier”); (2) the FAA changes its rules through Administrative Procedure Act notice and comment procedures; or (3) the companies change course midflight and require pilots to obtain the additional commercial certification.<sup>230</sup> Seemingly the FAA left open the possibility that companies like Flytenow could cure the “holding out” defect by limiting membership to an even narrower class of identifiable persons.<sup>231</sup> This is the very ambiguous and hasty regulation that Koopman cautions may ultimately lead to negative consumer outcomes.<sup>232</sup>

Adding more regulatory confusion to the mix, *Flytenow* creates “the bulletin board paradox.” *Flytenow* did not prohibit private pilots and non-commercial operations from posting upcoming flights on a bulletin board at local airport or public place. Pilots

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<sup>224</sup> *Id.* at 537.

<sup>225</sup> *Id.* at 537–39.

<sup>226</sup> *See id.*

<sup>227</sup> *See id.* at 532.

<sup>228</sup> *See id.*

<sup>229</sup> *See, e.g.,* Coyle, *supra* note 71.

<sup>230</sup> *See, e.g.,* MacPherson, *supra* note 45, at 20–21 (discussing possible implications stemming from *Flytenow*, focusing specifically on the effect to aviation start-ups).

<sup>231</sup> *See* AirPooler Interpretation, *supra* note 5, at 4.

<sup>232</sup> *See* Koopman et al., *supra* note 215, at 532–39, 544–45.

who wish to solicit a limited and identifiable class of passengers to travel along with them and offset costs apparently retain the ability to do so, even under *Flytenow*. So long as the passengers share a “common purpose” with the pilot (and that purpose is not just to transport the passenger to the destination) then the pilot would still be under his or her private license. If, however, someone took a picture of that bulletin board and posted it on Facebook, it could become holding out. Thus, exposure based on number of “friends” has now become the test for holding out. While this result is a logical extension of the FAA’s prior interpretations to new circumstances,<sup>233</sup> the bulletin board paradox demonstrates the logical holes in the FAA’s reasoning. *Flytenow* begs the question as to how can the FAA continue to rely on such antiquated notions of communication and aviation in this world of technology and sharing.

## V. CONCLUSION

Although the D.C. Circuit made the right call in *Flytenow*, the result is a mismatch of regulations that have no place governing modern circumstances. Even if the D.C. Circuit would have reached the deference issue, under thirty years of Supreme Court precedent, the crazy house of administrative law mirrors remains highly disjunctive and perhaps too deferential under *Auer*. Only Congress or the agencies themselves can cure the problem. At a time where a whole new set of regulations will be necessary to come remotely close to keeping up with changes in technology and economy, the judiciary has effectively tied its own hands. The implications for aviation start-ups are obvious. The concerns of other start-ups are looming.

Most alarming and far-reaching, however, *Flytenow* signals an inability of regulators to keep up with rapid innovation. For example, Uber has recently become the subject of similar legal debate regarding its status as a potential common carrier.<sup>234</sup>

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<sup>233</sup> See, e.g., Haberkorn Interpretation, *supra* note 83, at 2.

<sup>234</sup> See, e.g., Kevin Werbach, *Is Uber a Common Carrier?*, 12 I/S: J.L. & POL’Y FOR INFO. SOC’Y 135 (2015) (discussing the nuances of common carrier status as they relate to Uber and sharing economy); Riebana Sachs, *The Common Carrier Barrier: An Analysis of Standard of Care Requirements, Insurance Policies, and Liability Regulations for Ride-Sharing Companies*, 65 DEPAUL L. REV. 873 (2016) (discussing legal implications if ride-sharing acts were held to common carrier duties of care and advocating against that possibility); Talia G. Loucks, *Travelers Beware: Tort Liability in the Sharing Economy*, 10 WASH. J.L. TECH. & ARTS 329 (2015) (discussing problems with the sharing economy under current common-law duties and resulting liability).

Though mostly theoretical before, heightened liability could become a reality for ride-sharing companies under the *Flytenow* decision.<sup>235</sup> Uber should especially take note, as it has announced plans to enter the aviation and private aircraft space, recently completing a deal with AirBus to carry out the design and implementation.<sup>236</sup> It may be years before this plan takes off. Nonetheless, *Flytenow* should alert observers that the FAA (1) is still relying on thirty-year-old definitions in their foundational standards; and (2) may not be ready or willing to regulate such a drastic shift in consumer air travel. Time will tell. But for now, “sharing the skies” floats as a pipe dream of decades past.

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<sup>235</sup> See *Flytenow, Inc. v. FAA*, 808 F.3d 882 (D.C. Cir. 2015).

<sup>236</sup> *Fast-Forwarding to a Future of On-Demand Urban Air Transportation*, UBER ELEVATE (Oct. 27, 2016), <https://www.uber.com/elevate.pdf> [<https://perma.cc/3NWY-2W8V>]; Rebecca Blumenstein & Natalia Drozdiak, *Airbus to Join Forces With Uber for On-Demand Helicopter Service, CEO Says*, WALL ST. J. (Jan. 18, 2016), <https://www.wsj.com/articles/airbus-to-join-forces-with-uber-for-on-demand-helicopter-service-ceo-says-1453048668>.