No. 14-1168

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FLYTENOW, INC.,

Petitioner,

v.

Administrator, FEDERAL AVIATION ADMINISTRATION,

Respondent.

PETITIONER'S REPLY BRIEF

On appeal from the final agency Order rendered by the Federal Aviation Administration dated August 14, 2014

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ORAL ARGUMENT REQUESTED BUT NOT YET SCHEDULED

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Flytenow, Inc., Petitioner, herein certifies the following:

A. Parties and Amici. Parties before this Court are Flytenow, Inc. and the Federal Aviation Administration. No intervenors or *amici* are expected to appear before this Court.

B. Rulings Under Review. Petitioner seeks review of a final agency Order issued by the Federal Aviation Administration (i.e., the FAA Chief Counsel Interpretation letter to Gregory S. Winton) dated August 14, 2014.

C. Related Cases. This case has not previously come before this Court or any other court. Counsel is not aware of any other related cases pending before this Court or any other court within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Jonathan Riches
Jonathan Riches
Aditya Dynar
Counsel for Petitioner

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TABLE OF AUTHORITIES

(Authorities on which we chiefly rely are marked with asterisks)

Cases

Statutes

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GLOSSARY

C.A.B.	Civil Aeronautics Board Reports
C.F.R.	Code of Federal Regulation
D.C.	District of Columbia
Expense Sharing Rule	14 C.F.R. §61.113(c)
FAA	Federal Aviation Administration
FAR	Federal Aviation Regulations
FCC	Federal Communications Commission
Haberkorn Interpretation	FAA Legal Interpretation from Rebecca MacPherson, Assistant Chief Counsel for Regulations, to Mark Haberkorn (Oct. 3, 2011)
JA	Joint Appendix
Levy Interpretation	FAA Legal Interpretation from Loretta E. Alkalay, Regional Counsel, to Professor Ron Levy (Oct. 25, 2005)
MacPherson Interpretation	FAA legal Interpretation from Mark Bury, Assistant Chief Counsel for International Law, Legislation, and Regulations, to Rebecca MacPherson (Aug. 13, 2014)
MacPherson-Winton Interpretation	FAA Legal Interpretations from Mark Bury, Assistant Chief Counsel for International Law, Legislation, and Regulations, to Rebecca MacPherson (Aug. 13, 2014) and Gregory Winton (Aug. 14, 2014)
NLRB	National Labor Relations Board
PA	Petitioner's Addendum
RA	Respondent's Addendum
U.S. DHS	United States Department of Homeland Security

Ware Interpretation	FAA Legal Interpretation from Kenneth Geier, Regional Counsel, to Paul Ware (Feb. 13, 1976)
Winton Interpretation	FAA Legal Interpretation from Mark Bury, Assistant Chief Counsel for International Law, Legislation, and Regulations, to Gregory Winton (Aug. 14, 2014)
Winton Request	Request for Interpretation from Gregory Winton to Mark Bury, Assistant Chief Counsel for International Law, Legislation, and Regulations (Feb. 12, 2014)

STATUTES AND REGULATIONS

Pertinent statutes and regulations were reproduced in the Petitioner's Addendum ("PA") and Respondent's Addendum ("RA") filed, respectively, with Petitioner's Opening Brief and Brief for the Respondent.

SUMMARY OF THE ARGUMENT

Throughout its brief, the FAA continues its attempt to hammer a square peg into a round hole, applying an incongruent regulatory framework to the constitutionally protected communicative activities of an innovative startup company and its pilot members. On the one hand, the FAA argues that if two people are "friends or acquaintances," Resp.8, 22, then they may lawfully share flight expenses. But if two people are "strangers," Resp.10, 12, 15, 18, 21, the same expense-sharing flight suddenly becomes a commercial operation, and the pilot is transformed into a common carrier. In other words, according to the FAA, federal aviation regulations say that friends sharing expenses are okay, but people who connect online to share expenses are not. It is a good thing the FAA does not have regulatory authority over dating websites, or two people "going Dutch" on their dinner bill would evidently be "engage[d] in [an] illegal transaction[]" Resp.44.

Indeed, for over 60 years, expense-sharing pilots have communicated their travel plans with potential passengers in order to share flight expenses. Despite the FAA's deconstruction of the common law, this Court's precedent, and the agency's own regulations in this case, the noncommercial communications at issue simply do not transform those same expense-sharing

pilots into common carriers. And the FAA's attempt to burden or eliminate those communications does not survive constitutional scrutiny.

The *MacPherson-Winton* Interpretation must be set aside.

ARGUMENT

I. EXPENSE-SHARING PILOTS ARE NOT "COMMON CARRIERS" UNDER THE COMMON LAW, AS DEFINED BY THIS COURT, OR UNDER THE FAA'S OWN REGULATIONS.

Expense-sharing pilots are private individuals whose personal flight plans are not commercial operations and do not even remotely resemble common carriage as defined by the common law and this Court.

The FAA makes two arguments about why expense-sharing pilots on Flytenow's website must receive a certification reserved for common carrier commercial operations. First, Resp.18-19, by sharing expenses with their passengers, expense-sharing pilots are receiving "compensation" as common carriers. Second, Resp.17-18, by communicating travel plans on Flytenow's subscriber-only website, expense-sharing pilots are indiscriminately "holding out" transportation services.

The first argument expressly contradicts this Court's definition of "common carrier" and the second misunderstands the "holding out" requirement of common carriage as well as how Flytenow works. Any form of common carriage requires both a commercial enterprise component and an inability to refuse paying passengers. Neither criterion exists, indeed cannot exist, for Flytenow member pilots engaging in personal travel. Moreover, expense-sharing pilots on Flytenow's website are not receiving "compensation" under the plain language of FAA regulations and are not indiscriminately "holding

out" because they maintain control over their noncommercial, personally-directed flight plans.

A. Expense-sharing pilots are not "common carriers" because there is no commercial enterprise and expense-sharing pilots can refuse passengers for any reason.

Throughout its brief, the FAA seeks to transform private, expense-sharing pilots engaged in personally-directed flights into common carriers. Expense-sharing pilots in no way resemble common carriers as defined in the common law or by this Court.

The FAA concedes, Resp.30, 35, that its own definition of "common carrier" is derived from the common law. Moreover, as the FAA observes, this Court has "already interpreted the term 'common carrier' in the governing FAA statute." Resp.35. "'Common carrier' is a well-known term that comes to us from the common law…. The term refers to a *commercial transportation enterprise* that 'holds itself out to the public' and is willing to take all comers who are willing to pay the fare, '*without refusal*.'" *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 415 (D.C.Cir. 2011) (emphasis added) (internal citations omitted). Black's Law Dictionary echoes this definition, defining a common carrier as a "*commercial enterprise* that holds itself out to the public as offering to transport freight or passengers for a fee." Black's clarifies that "[a] common carrier is generally *required by law* to transport freight or passengers *without refusal* if the approved fare or charge is paid." CARRIER, Black's Law Dictionary (10th ed. 2014) (emphasis added); *see Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S.Ct. 1997, 2002 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning"). Thus, this

Court, consistent with the established and accepted definition of "common carrier" has required two components of "common carriage" that simply are not present when applied to expense-sharing pilots on Flytenow.com: (1) a commercial enterprise, and (2) an inability to refuse paying passengers.

Expense-sharing pilots are not, and by definition cannot, be engaged in a commercial enterprise. It is, of course, axiomatic, that a commercial enterprise is a business pursuit for livelihood or profit. As this Court has observed, "the well settled definition of business" or commercial activity is "that which occupies the time, attention, and labor of men *for the purpose of a livelihood or profit*." *Stone v. D.C.*, 198 F.2d 601, 603 (D.C.Cir. 1952) (emphasis added). Flights operated by expense-sharing pilots are not commercial operations because there is no profit. Rather, expense-sharing pilots receive only a *pro rata* share of operating expenses in direct and express compliance with 14 C.F.R. §61.113(c). Moreover, expense-sharing pilots cannot possibly earn a livelihood by participating on Flytenow's website. An expense-sharing pilot can merely offset costs for preplanned and personally-directed flights.

Expense-sharing pilots do not operate a business. "To bring a person therefore within the description of a common carrier…. he must hold himself out as ready to engage in the transportation of goods for hire *as a business and not as a casual occupation*." CARRIER, Black's Law Dictionary (10th ed. 2014) (emphasis added) (internal citations omitted). Expense-sharing pilots have exactly zero indicia of engaging in a business or commercial activity; indeed, such pursuit would be self-defeating. They are merely taking unprofitable flights they have a clear right under their license to take and that

they otherwise would have taken. *See United States v. Contract Steel Carriers, Inc.*, 350 U.S. 409, 411-12 (1956) ("We hold also that the fact that appellee has actively solicited business within the bounds of his license does not support a finding that it was 'holding itself out to the general public.'") If the FAA's interpretation of expense-sharing pilots as common carriers is correct, then expense-sharing pilots would be the only common carriers in history to not seek commercial profit from their operations. Indeed, the FAA's interpretation is so far afield that, if accepted, it would turn every college student who posts his travel plans on a university bulletin board and offers to share gas money with passengers into a commercial operator and a common carrier. *See Gale v. Independent Taxi Owners Ass'n*, 84 F.2d 249, 252 (D.C.Cir. 1936) (discussing the degree of care required of taxicabs operating as common carriers). That is, of course, absurd. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.") Flytenow-subscribing pilots are not engaged in commercial activity, and, as a result, they are not common carriers of any kind.

This Court also requires that common carriers accept *all* paying passengers "without refusal." *CSI Aviation*, 637 F.3d at 415. Thus, an entity can only be classified as a common carrier if it can only turn away business for certain, specific reasons, not for any or no reason at all. *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C.Cir. 1976). Moreover, common carriers cannot make individualized determinations regarding what passengers or cargo to accept and which to deny. *Id.* ("[A]

carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal."); *see also* 192 A.L.R.Fed. 403 (2004) ("It is generally recognized that an air carrier, within the limits of its accommodations, must not discriminate in providing transportation for those who apply for it; that is, it may not accommodate one and arbitrarily refuse another").

By contrast, Flytenow-subscribing pilots are not common carriers because they can refuse passengers for any reason, or no reason at all. Not only does Flytenow control who does or does not receive membership as a pilot or flight enthusiast on the Flytenow website, JA.047, but once a flight enthusiast requests to join a pilot on a preplanned flight, the pilot may "accept or reject an enthusiast's request to partake in the planned Aviation Adventure, for any or no reason", JA.048. *See also* JA.048 n.1 ("Once the connection is made between the pilot and enthusiast, the ultimate decision remains exclusively with the pilot-in-command to make a determination that a flight can and will take place in accordance with the FARs.") As described *infra*, Flytenow-subscribing pilots expressly do not hold themselves out as a common carrier taking all paying passengers on the same terms. The exact opposite is true. Flytenow-subscribing pilots may allow flight enthusiasts to join or not join on a pilot-directed flight in the pilot's sole discretion, and passengers may choose to join or not join a flight for any reason. This is unambiguously expressed in Flytenow's Terms of Service, agreed to by both flight enthusiasts and pilots: "It is up to the discretion of a Pilot to decide whether or not to share a flight with an Enthusiast, and it is up to the Enthusiast to decide whether or not to share a

flight with a Pilot." PA.020 (capitalized in original). Thus, a necessary requirement of common carriage to take all passengers without refusal is simply not present in this case. Accordingly, Expense-sharing pilots are plainly not common carriers.

B. Expense-sharing pilots are not "common carriers" because they are not engaged in an enterprise for profit.

The clear language of the governing regulations in this case also demonstrates that expense-sharing pilots are not engaged in commercial operations, and are therefore not common carriers. The FAA correctly observes, Resp.4-5, that Part 119 only applies to a person operating "civil aircraft as a common carrier, whether as an 'air carrier' or as a 'commercial operator.'" 14 C.F.R., §119.1(a)(1). The FAA then concedes that "air carrier" and "commercial operator" are "a closely related category." Resp.5. The FAR specifically defines a commercial operator:

> Commercial operator means a person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property....*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.*

14 C.F.R. §1.1 (emphasis added). Although 14 C.F.R. §61.113(c) plainly excludes expense-sharing from the definition of "compensation," at the very least whether compensation is involved is "doubtful." As a result, the "major enterprise for profit" test of 14 C.F.R. §1.1 must apply. *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1031, n.1-2 (D.C.Cir. 1999) *abrogated by Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199 (2015) (citing the "commercial

operator" requirements under Part 119 and approving of the major enterprise for profit test). Applying that test, expense-sharing pilots cannot possibly be engaged in a "major enterprise for profit" because they are not earning *any* profit under the Expense-Sharing Rule.

The FAA attempts to brush aside the "major enterprise for profit" test as "wholly inapplicable," JA.060; Resp.27, arguing instead that the "test is meant for circumstances in which a flight operator provides transportation for goods or passengers in a manner that is not directly compensated but nonetheless indirectly results in the payment of money." Resp.28. The FAA's contention, however, is a work of pure imagination, unsupported entirely by the plain language of 14 C.F.R. §1.1 and the record. In defining commercial operators 14 C.F.R. §1.1 makes no distinction between whether a pilot receives direct or indirect compensation; it speaks instead to whether that compensation, direct or indirect, provides a major enterprise for profit.

Moreover, the regulatory definition of commercial operator expressly asks whether the flight is "merely incidental to the [pilot's] other business." Because Flytenow-subscribing pilots are posting their *own personally-directed travel plans* on the Flytenow website, that flight operation is by definition "merely incidental to the [pilot's] other business." The FAA's arbitrary "direct/indirect compensation" interpretation of 14 C.F.R. §1.1 might make sense if a pilot receives more than a *pro rata* share of operating expenses through some type of remuneration (e.g., engaging in a flight to take aerial photographs for a separate business), Resp.28. But in a case like this, where there is no question that Flytenow-subscribing pilots pay only and *at a minimum*

a *pro rata* share of operating expenses, the FAA's interpretation is emphatically incorrect.

C. Receipt of a *pro rata* share of operating expenses is not "compensation or hire" under the governing regulations.

The FAA continues the analytical contortion present in the *MacPherson-Winton* Interpretation by arguing, Resp.18-19, that an exception to something is the thing from which it is excepted. The FAA claims, Resp.19, that because the Expense-Sharing Rule is an "exception to the bar on 'compensation or hire,'" expense-sharing by pilots is compensation or hire. It is, of course, a matter of black letter law that a statutory or regulatory exception exempts persons or conduct from the law's operation. *See* EXCEPTION, Black's Law Dictionary (10th ed. 2014). The Expense-Sharing Rule is facially not "compensation or hire" specifically because it is excepted from the prohibition of pilots receiving compensation.

The FAA supports its argument that expense-sharing is compensation or hire by citing "the 1963 Notice of Proposed Rulemaking that preceded the initial codification of the expense-sharing rule" Resp.19, citing PA.004-6. This is an extraordinary and desperate reliance on a *notice* of *proposed* rulemaking, particularly when the preamble to the final, *actually codified* rule resolved the matter expressly: "[O]ne or more passengers contribut[ing] to the actual operating expenses of a flight *is not considered* the carriage of persons *for compensation or hire*." PA.002 (emphasis added).

The FAA's interpretation that an exception to the definition is the same as the definition would undermine the regulatory scheme set out in the Expense-Sharing Rule and any other regulatory scheme to which this logic is applied.

Because expense-sharing is expressly excepted from the prohibition on "compensation or hire" expense-sharing is not "compensation or hire."

The FAA also contends, Resp.22, that the "common purpose" test is merely "gloss" on the Expense-Sharing Rule, but it is obviously a more significant safeguard than that, particularly in this case. The common purpose doctrine ensures that the exception does not swallow the rule and expense-sharing arrangements do not result in compensation *in any form*. If the pilot and passenger each have an independent or common purpose in making the trip there is no way any compensatory motive can be ascribed to either party. In fact, the FAA appears to agree with this contention in the *MacPherson* Interpretation. *See* JA.059 ("For this reason, the FAA has required a private pilot to have a common purpose with his or her passengers and must have his or her own reason for travelling to the destination"). Put simply, if there is a common purpose, there is legitimate expense-sharing, and there is no "compensation or hire." Moreover, because there is no compensation present in this case, there is no common carriage, and the Court need go no further.

D. Flytenow members are not "holding out" to the public because a transportation service is not "indiscriminately available."

The FAA next contends, however, that by posting their personal travel plans on an exclusive website, Flytenow-subscribing pilots are "holding out" transportation services that are "indiscriminately available" to the public. Resp.17 (quoting *In re Transocean Air Lines, Inc.*, 11 C.A.B. 350, 353; JA.004). To support this argument, the FAA claims that "there is no indication that Flytenow ever denies membership to a prospective passenger." Resp.18. As a factual matter, this is simply incorrect. *See* PA.021 ("Either You or We

may terminate Your participation in the Flytenow Platform by removing Your Information at any time, for any reason or no reason, without explanation....”). Flytenow controls who does or does not become a member, and the communications posted on Flytenow are not available to the general public, but only to users on an exclusive website. As a result, the Flytenow website is certainly less “public” than a college bulletin board, which the FAA has previously determined is an appropriate forum for the *exact same communications*. JA.023 (“*Ware* Interpretation”)

Even if Flytenow’s forum was entirely public, which it is not, the FAA’s argument still fails because a pilot’s communication of his personal travel plans is not a transportation service that is *indiscriminately* available. The pilot controls the flight and directs when and where he is travelling as well as *who* is travelling with him at any time. As described *supra*, the ability to refuse passengers is a significant factor that distinguishes non-common carriers from common carriers, and makes the latter’s services indiscriminate and the former’s discriminate. This is also fully consistent with the common purpose rule – a flight is by definition only *discriminately* available if pilots and passengers have a common purpose, and a pilot has “his or her own reason for travelling to the destination.” JA.059. A pilot simply cannot indiscriminately hold out to the public by communicating personal travel plans that the pilot alone controls and can change at any time on an exclusive website.

The FAA makes its most astonishing argument asserting that only “friends or acquaintances”, Resp.8, 22, may share expenses under the Expense-Sharing Rule, while “strangers”, Resp.21, may not. This claim is utterly and

completely arbitrary and unsupported by the language of 14 C.F.R. §61.113(c), decades of precedent, and the record in this case.

First, nothing in either the language of §61.113(c) or the regulatory history of that provision even remotely suggests that individuals must have a preexisting friendship or relationship in order to share flight expenses. Rather, §61.113(c) simply permits *any* private pilot to pay a *pro rata* share of operating expenses with his or her passengers.

Second, the FAA's affinity distinction makes no sense in the context of how Flytenow actually works. JA.047-48. Flytenow is a communications platform. It allows a pilot to post travel plans that other users may review and request to join.[1] It is merely a means for two people to communicate. Flytenow members may very well have preexisting relationships with one another, or they may not. Based on the FAA's affinity interpretation, is it true then that two Flytenow members could use Flytenow's communications platform to share expenses if they had a preexisting relationship, while members who had no such relationship would be prohibited from doing so? That is obviously ridiculous, and as described *infra*, demonstrates a clear abridgement of the free speech and association rights of Flytenow and its members.

Finally, the FAA itself has historically rejected an affinity requirement in order for two individuals to communicate to share expenses. In the *Ware* interpretation, the FAA specifically found that a private pilot may post his or her travel plans on a college bulletin board in order to defray costs with any passerby who may be interested in joining on the flight. JA.023 ("For instance,

[1] The pilot may then either accept or deny the request, proceed with the flight, or cancel it for any reason.

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.") In its brief, the FAA expressly reaffirmed the *Ware* interpretation. Resp.21 n.11, 24 n.15, 30. Which begs the question: If the FAA now mandates friendship in order for two people to share expenses, why did the FAA embrace the *Ware* interpretation? The answer, of course, is that the FAA's new affinity requirement is arbitrary, capricious, and plainly not in accordance with the governing regulations or decades of the FAA's own legal interpretations.

II. FLYTENOW'S CONSTITUTIONAL CLAIMS ARE PROPERLY BEFORE THIS COURT.

Not only does 49 U.S.C. §46110 plainly permit Flytenow to bring constitutional claims before this Court, but those claims were previously raised with the FAA, and in any event, are reasonably raised here given the scope of the FAA's sweeping *MacPherson-Winton* Interpretation.

The FAA contends, Resp.31-32, that this Court is "barred" from considering Flytenow's "unexhausted constitutional claims" under 49 U.S.C. §46110, which allows the Court to consider an objection to a final order of the FAA Administrator "if the objection was made in the proceeding conducted by the ... Administrator or if there was a reasonable ground for not making the objection in the proceeding." The plain language of §46110, the history of this case, and the broad scope of the legal interpretation at issue forecloses the FAA's contention.

A. The requirement of "prior objection" and the doctrine of administrative exhaustion is inapposite where there was no "proceeding."

The jurisdiction conferred on this Court by §46110 is permissive rather than restrictive. That statute permits direct review by this Court of a final order promulgated by the FAA Administrator. 49 U.S.C. §46110. Section 46110 does not prevent judicial review only after a specific administrative scheme has been exhausted, and such a requirement should not be read into that statute. In some cases, administrative orders will become final and reviewable under 49 U.S.C. §46110 after an extensive administrative process. *See, e.g.*, 49 U.S.C. §44709 (authorizing judicial review in this Court after appeal to the National Transportation Safety Board from adverse orders of the FAA Administrator). In other cases, as here, final agency actions will be in the form of a letter of interpretation, where there was no due process "proceeding" prior to this Court reviewing all relevant and cognizable claims. *See Electronic Privacy Info. Ctr. v. U.S. DHS*, 653 F.3d 1, 8 (D.C.Cir. 2011) ("§46110(d) presupposes there was an agency 'proceeding' where the party could advance its argument in the first instance….").

In this case, there was no "proceeding," and certainly no adversarial hearing, in which exhausting all claims would be a possibility, and for which application of the exhaustion doctrine would be appropriate. *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) ("We have previously recognized that the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue.") Indeed, as described *infra*, the constitutional violations brought before this Court did not occur until *after* the FAA issued its *MacPherson-Winton* interpretation. Thus, by utilizing the direct

review procedures of 49 U.S.C. §46110, Flytenow "has availed itself of the only remaining path to judicial consideration of the substantive validity" of its constitutional claims; claims that existed only after the FAA issued its final agency action in the *MacPherson-Winton* interpretation. *NLRB Union v. Federal Labor Relations Auth.*, 834 F.2d 191, 197 (D.C.Cir. 1987). Thus, because there was no "proceeding" in which Flytenow's constitutional objections could be raised, §46110 does not bar this Court from considering Flytenow's meritorious constitutional objections to the FAA's order in this case.

B. In any event, Flytenow raised constitutional concerns in its *Winton* Request.

To the extent its request for a legal interpretation was a "proceeding" within the meaning of 49 U.S.C. §46110, Flytenow identified free speech and vagueness concerns, placing the FAA on notice of those potential issues and making it reasonable for this Court to address the constitutional violations in the *MacPherson-Winton* Interpretation here. As the Supreme Court has observed, for First Amendment purposes, speech is "[a]n intent to convey a particularized message." *Spence v. State of Wash.*, 418 U.S. 405, 410-11 (1974). There are no precise "outer limits of activity that furthers the exercise of free speech rights. It seems to suffice, however, that the ... activity is communicative." *Hilton v. Hallmark Cards*, 599 F.3d 894, 903-04 (9th Cir. 2009).

In this case, Flytenow-subscribing pilots obviously intend "to convey a particularized message" on Flytenow's exclusive website; viz., their personal travel plans. That activity is clearly communicative for First Amendment purposes. In the *Winton* Request, Flytenow made the communicative nature of their activities, and thus the First Amendment implications, clear. *See, e.g.,*

JA.047 ("allows a pilot to *post* an Aviation Adventure;" "allows enthusiasts to *view* an Aviation Adventure); JA.048 ("enthusiasts subsequently *express* shared interest"); JA.049 ("*communicates* to the public;" "such a *communication*"). The FAA, therefore, was on reasonable notice that Flytenow and its members were engaging in communicative activity protected by the First Amendment. As a result, although a specific First Amendment "objection" to a yet-to-exist order was not lodged in Flytenow's *Winton* Request, it is reasonable for the Court to consider those claims now because the FAA was on fair notice of the free speech implications based on Flytenow's request when it issued its unconstitutional interpretation.

The same is true of the vagueness claim. The entire reason for requesting a legal interpretation was because of the vague standards surrounding "common carriage" and "holding out" in FAA regulations and interpretations. Unfortunately, rather than clarifying this area, the *MacPherson-Winton* Interpretation compounded the ambiguity such that expense-sharing pilots now have no way to discern which of their communications are lawful and which are not.

C. Flytenow's constitutional claims are reasonably raised here given the breadth of the FAA's interpretation.

Even if the Court finds that Flytenow's request for a legal interpretation was a "proceeding" and its constitutional claims were not raised, those claims are reasonably raised here given the breadth of the FAA's order. It was not until the FAA issued its sweeping ruling prohibiting expense-sharing pilots from using the Internet to communicate their travel plans, JA.057-62, that those pilots' First Amendment rights were implicated. That prohibition occurred in a

final agency action by the FAA, properly subject to review by this Court. As a result, it is reasonable to raise constitutional claims here because this is the first (and last) opportunity Flytenow has to obtain judicial review of a violation of its constitutionally protected speech rights.

Indeed, it would be unreasonable to require Flytenow to go back to the FAA every time a final agency action raised a new constitutional violation, potentially forfeiting Flytenow's right to judicial review while awaiting a new administrative interpretation. In this case, it took six months for the FAA to respond to Flytenow's *Winton* Request. JA.047, 061. If a similar timeframe were applied to a new interpretation, Flytenow would be foreclosed from judicial review of the first interpretation. *See* 49 U.S.C. §46110(a) (requiring a petition for review "be filed not later than 60 days after the order is issued").[2]

Additionally, the constitutional rights at issue in this case are properly resolved by this Court, not the FAA. As the Supreme Court has explained, "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." *Califano v. Sanders*, 430 U.S. 99, 109 (1977). While the FAA may have administrative expertise with federal aviation matters, Flytenow's constitutional claims are properly considered by this Court, not an administrative agency unequipped, indeed unable, to resolve constitutional concerns. As a result, the doctrine of administrative exhaustion simply does not apply in this case. Indeed, none of the primary purposes that support

[2] Likewise, Flytenow notes that remand to the FAA on the constitutional issues in this case would be futile, as the FAA has already examined and rejected Flytenow's constitutional arguments. Resp.38-47.

administrative exhaustion are applicable here. *See Andrade v. Lauer*, 729 F.2d 1475, 1484 (1984). This Court should, therefore, adhere to "the well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed." *Califano*, 430 U.S. 99 at 109.

III. THE FAA OVERSTEPPED THE BOUNDS OF ITS DELEGATED AUTHORITY.

In its Response, the FAA reads into 14 C.F.R. §61.113(c) a requirement that only friends can share expenses, strangers cannot. Resp.18, 21, 22, 26, 30-31, 39, 42. The FAA has not, indeed, cannot, support this reading based on controlling statutes and its own regulations. More importantly, the FAA has not, and cannot, provide a sufficient justification for the constitutional infirmities that flow from this reading.

The FAA contends that the "friends ok, strangers not ok" innovation to the Expense-Sharing Rule is justified as an "air safety" regulation stemming from authority Congress delegated the FAA under 49 U.S.C. §§44702(a) and 44705. Resp.34-35 n.18. Yet in order to exercise this purported statutory authority under §44705, FAA admits, as it must, that persons must first be "engaged in … common carriage." Resp.35. As explained above, Flytenow-subscribing pilots do not engage in common carriage.

It is not constitutionally permissible for the FAA to have an inquisitorial squad inquiring into all manner of private communications, Resp.36, when those communications do not pertain to air safety. As a result, FAA lacks statutory authority to bootstrap itself into the role of a communications regulator.

The thrust of the *Winton* Request, JA.047-50, was to demonstrate why Flytenow-subscribing pilots are not common carriers and why FAA cannot require them to obtain Part 119 certificates solely because of their Internet-based communications. FAA attempts to downplay this crucial point, Resp.41, and in the process, reveals its disregard for the bounds of its delegated authority. *Cf. Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C.Cir. 2010) (FCC lacks authority to regulate Internet service provider's network management practices).

IV. NO DEFERENCE, OR AT MOST *SKIDMORE* DEFERENCE, IS WARRANTED FOR THE FAA'S *MACPHERSON-WINTON* INTERPRETATION.

The FAA freely admits that the definition of "common carrier" comes from common law. Resp.30, 35. The FAA has "no special administrative expertise that a court does not possess" when it comes to interpreting and applying common law terms. *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 260 (1968). Consequently, no deference is owed to FAA's interpretation and application of common law terms to Flytenow and its members. *International Longshoremen's Ass'n v. NLRB*, 56 F.3d 205, 212 (D.C.Cir. 1995). For the same reason, *Auer* deference is inapposite. The "measure of deference" is "proportional to" the thoroughness, validity, consistency, and persuasiveness of the agency's interpretation. *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2169 (2012). If the agency's interpretation does not meet the four *Skidmore* factors, then the appropriate level of deference due is *no deference*. *Id.* (declining to give *Auer* deference).

Although the FAA insists that *Auer* deference applies, Resp.37, this case does not present an *Auer* deference scenario. *Auer v. Robbins* did not involve

an agency's interpretation of common law terms. 519 U.S. 452, 454-456 (1997). Nor did it involve a scenario where the agency's interpretation of its regulations was constitutionally deficient. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243 (2006) (concluding: no *Auer* deference to an interpretation of regulations promulgated under the Controlled Substances Act; no *Chevron* deference; interpretation unpersuasive under *Skidmore*; interpretation not upheld merely because the administration asserted an ancillary safety concern; interpretation constitutionally deficient); *SmithKline*, 132 S.Ct. at 2159 (*Auer* deference is inappropriate if interpretation is plainly erroneous); *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1208 n.4, 1210, 1212, 1214 (2015) (a unanimous Supreme Court seriously doubting the continued validity of *Auer*).

Moreover, *Auer* deference "is warranted only when the language of the regulation *is ambiguous*." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (emphasis added). Nothing in 14 C.F.R. §61.113(c) is ambiguous. It plainly codifies what the FAA admits was recognized as a "traditional right" before 1950 and since PA.002, that pilots can share with passengers pro-rated operating expenses of a flight.

FAA's contradictory attempts at explaining what the Expense-Sharing Rule means, Resp.16-31, only illustrates the lack of persuasiveness under *Skidmore* of the FAA's interpretive position. Specifically, in its Response, FAA attempts to explain away the *Levy* Interpretation as an errant letter issued by a rogue FAA regional counsel. Resp.24-25.[3]

[3] FAA's reliance, Resp.24-25, on *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C.Cir. 1999) actually helps Flytenow's position. *Id*. at 1035-36 (an uncoordinated regional counsel interpretation was an authoritative FAA interpretation). *See United States v. Mead Corp.*, 533 U.S. 218, 235 (2001)

Tellingly, in belatedly attempting to distance itself from the *Levy* Interpretation, the FAA asserts that pilots are allowed to share expenses but cannot communicate to do so "whether in person, on the Internet, or anywhere else," Resp.36. In the *Ware* Interpretation (1976) JA.023, the FAA held communicating *with strangers* on bulletin boards was permissible. In the *Levy* Interpretation (2005) PA.10-11, the FAA held there was "nothing in the *sharetheride* program itself that indicates the unlawful offer of air transportation." In the *MacPherson-Winton* Interpretation, FAA held that pilots needed to obtain a Part 119 certificate to conduct personally-directed expense-sharing flights under the Expense-Sharing Rule. JA.057-62. In its brief, FAA asserts that *any* communication, to friends or strangers—*in person, on the Internet, or anywhere else*—is an "offer[] to engage in illegal transactions." Resp.14. If any deference at all is given to this haphazard and incongruous interpretation, it is at best *Skidmore* deference. *See Mead*, 533 U.S. 218.

V. THE *MACPHERSON-WINTON* INTERPRETATION UNCONSTITUTIONALLY BANS OR BURDENS SPEECH.

The FAA contends that the pilot communications at issue in this case are not protected by the First Amendment because "offers to engage in illegal transactions" are "'categorically excluded from First Amendment protection,'" Resp.44, comparing expense-sharing pilots' speech on Flytenow's website with offers to provide child pornography, Resp.45 (citing *United States v. Williams*,

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(Customs classification rulings, whether issued by uncoordinated regional offices or by Customs Headquarters, receive only as much "respect" under *Skidmore* as is "proportional to" their "power to persuade.").

553 U.S. 285 (2008)), and material support to terrorist organizations, Resp.41 (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010)).

But the FAA also insists, Resp.21, 30 (citing *Ware* Interpretation (1976), JA.023, Resp.7, 21-22, 42 (citing *Haberkorn* Interpretation (2011), JA.041-44, that personally-directed expense-sharing flights under the Expense-Sharing Rule are perfectly legal, as they have been for decades. Thus, everyone agrees that the underlying Part 91 flight operation is legal. As a result, the FAA's assertion, Resp.44-45, that an expense-sharing pilot communicating his travel plans is an "offer[] to engage in illegal transactions" is meritless, indeed, nonsensical, because the FAA itself agrees the underlying operation is not illegal.

Moreover, if the identity of the speaker and the content of the pilots' speech—information about a personally-directed expense-sharing flight—gives FAA authority to ban or burden the speech, or impose a prior restraint upon it, then FAA must assert a "compelling Government interest" that is "narrowly tailored" to the restriction on speech, *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000), and must "carr[y] a heavy burden of showing justification for the imposition of such a restraint." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). Unlike the unlicensed business at issue in *Liberty Coins, LLC v. Goodman*, 748 F.3d 682 (6th Cir. 2014) that the FAA discusses at length, Resp.45, private pilots *are licensed by the FAA*, 14 C.F.R. §§61.102-61.117, and are tested extensively on their aeronautical knowledge, 14 C.F.R. §61.105, flight proficiency, 14 C.F.R. §61.107, and aeronautical experience, 14 C.F.R. §61.109, before receiving a private pilot license. Once private pilots

receive their license, the Expense-Sharing Rule permits them to conduct personally-directed expense-sharing flights. These requirements obviate the FAA's asserted interest in air safety. Even if the pilots' speech on Flytenow's website were commercial speech, which it is not,[4] FAA's "safety" concern, Resp.39, is an attempt to keep willing strangers (but not friends) "in the dark for what the government perceives to be their own good." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996). Consequently, the FAA's burden on Flytenow's speech meets neither the strict scrutiny nor the *Central Hudson* test.

FAA tries to rescue the application of 14 C.F.R. §119.5(k) to Flytenow-subscribing pilots by claiming that this section conditions a person's communication on the FAA's determination that the person can safely conduct an aircraft operation. Resp.47. But only *FAA-licensed* pilots can post on Flytenow's website. Issuance of a pilot license is FAA's determination that the person can safely conduct an aircraft operation.

FAA also asserts that the *MacPherson-Winton* Interpretation places only an incidental burden on speech. Resp.44. But, as this Court recently discussed in *Edwards v. D.C.*, "the challenged regulations [must be] narrowly tailored to further a substantial government interest," 755 F.3d 996, 1002 (D.C.Cir. 2014),

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[4] Whereas "commercial speech" is speech that does no more than "simply propose a commercial transaction," *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 760 (1976), to which the *Central Hudson* test applies, speech that "does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services [is not treated as] a variety of purely commercial speech," *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980), and such speech does "not … retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Riley v. National Fed'n of the Blind of N.C.*, 487 U.S. 781, 796 (1988).

and "the challenged regulations [must] *directly advance* its asserted interests." *Id.* at 1003 (emphasis added). The government's burden "is not satisfied by mere speculation or conjecture." *Id.* Rather, the FAA in "seeking to sustain a restriction on … speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* (citing *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)). FAA's content- and speaker-based ban fails to meet that test. *See Edwards*, 755 F.3d at 1003 (11 interests the government claimed were insufficient to meet the test); *id.* at 1007; *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653 (2011).

VI. FAA'S *MACPHERSON-WINTON* INTERPRETATION LACKS A RATIONAL RELATIONSHIP TO AN INDEPENDENT AND LEGITIMATE END.

The *MacPherson-Winton* Interpretation is unrelated to FAA's safety concern. Consequently, it flunks the rational relationship test. Part 91 operations by private pilots with passengers on board are allowed and encouraged by the FAA. *See* 14 C.F.R. §61.113(b), (d)-(e) (carrying passengers in connection with any business or employment; carrying passengers for charitable purposes; carrying passengers for search and rescue operations). To satisfy the equal protection clause, the classification must bear a "rational *relationship* to an independent and legitimate legislative end." *Romer v. Evans*, 517 U.S. 620, 633 (1996) (emphasis added). It does not suffice that the end have a rational *basis*; the end needs to have a rational *relationship* with the means. *See Merrifield v. Lockyer*, 547 F.3d 978, 985 (9th Cir. 2008); *Brandon v. D.C. Bd. of Parole*, 734 F.2d 56, 60 (D.C.Cir. 1984). The FAA does not explain why it treats an expense-sharing pilot communicating and flying with

friends differently than an expense-sharing pilot communicating and flying with strangers, Resp.39. *See also Edwards*, 755 F.3d at 1007. The FAA has not shown a rational relationship between its safety concern on the one hand and its ban or burden on Internet-based communications of expense-sharing pilots on the other.

In asserting that FAA can treat expense-sharing pilots and large commercial airlines like Delta the same because "Flytenow pilots and other common carriers share the relevant trait of holding themselves out to the public," Resp.41, the FAA ignores all the other traits that expense-sharing pilots and common carriers *do not share*. See Part I, *supra*. By FAA's logic, elephants, snakes and ropes should be treated the same because elephants have rope-like tails and snakes have rope-like bodies. This logic fails even under the rational relationship test.

VII. THE *MACPHERSON-WINTON* INTERPRETATION IS UNCONSTITUTIONALLY VAGUE.

The *MacPherson-Winton* Interpretation is unconstitutionally vague because expense-sharing pilots cannot ascertain which of their communications are lawful, and which communications would result in an "illegal transaction[]", Resp.14, 44, 47. The FAA contends that its interpretation is not unconstitutionally vague because "the 'holding out' inquiry is not remotely uncertain with respect to Flytenow's pilots", Resp.41, and "concerns about vagueness are lessened where, as here, a regulated party has 'the ability to clarify the meaning of the regulation by its own inquiry, or by resort to the administrative process.'" Resp.42 (citing *Aeronautical Repair Station Ass'n v. FAA*, 494 F.3d 161, 173-74 (D.C.Cir. 2007).

The FAA misses the mark on both counts. First, Flytenow is asserting its vagueness challenge on behalf of itself and its expense-sharing pilot members. *See Cronin v. FAA*, 73 F.3d 1126, 1130 (D.C.Cir. 1996) (finding a member of regulated class and labor organization have representational standing of all members who fall within the regulated class). As a result of the *MacPherson-Winton* Interpretation, Flytenow members are put in the unworkable position of being permitted to share expenses but being unable to communicate their travel plans in order to do so. In other words, members do not know what communications are and are not permitted. The FAA seems to concede this point, Resp.42, by relying on the *Haberkorn* Interpretation, which found that "posting flights on an airport bulletin board or Facebook '*may* be construed as holding out' depending on the relevant circumstances" (emphasis added). To say that communications may or may not be construed as holding out is to say nothing at all – in fact, that is a quintessentially vague rule. The *MacPherson-Winton* Interpretation, therefore, plainly does not provide fair warning of prohibited conduct. *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926).

To save the *MacPherson-Winton* interpretation from its vagueness abyss, the FAA falls back, Resp.42, on the ability of Expense-sharing pilots to seek a legal interpretation regarding the propriety of their conduct. This is patently unreasonable. To have to rely on an administrative process every time a pilot wants to communicate is arbitrary, irrational, and a classic prior restraint. *See Bryant v. Gates*, 532 F.3d 888, 893 (D.C.Cir. 2008) (finding elevated vagueness concerns for requirements that chill speech). Shifting the burden to pilots to seek permission before communicating does not save the FAA's

unconstitutionally vague interpretation and implicates significant First Amendment rights.

CONCLUSION

For the foregoing reasons, Flytenow asks that this Court set aside the *MacPherson-Winton* Interpretation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THE ATTACHED FILING, WAS ELECTRONICALLY FILED AND SERVED BY ECF AND SENT BY U.S. MAIL upon the persons identified in the below Services List on April 8, 2015.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. Civ. App. P. 32(a)(7)(C), the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). This brief contains 6989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman font.

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