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 OPENING BRIEF

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

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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/ Gregory S. Winton
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Counsel for Petitioner

RECOMMENDATION ON ORAL ARGUMENT

Because of the novelty and public importance of the issues presented, Petitioner believes the Court may benefit from oral argument.

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GLOSSARY

APA	Administrative Procedure Act
Bobertz Interpretation	FAA Legal Interpretation from Rebecca MacPherson, Assistant Chief Counsel for Regulations, to Don Bobertz (May 18, 2009)
Brown Interpretation	FAA Legal Interpretation from DeWitte Lawson, Jr., Acting Regional Counsel, to David Brown (Apr. 16, 1976)
Bunce Interpretation	FAA Legal Interpretation from Rebecca MacPherson, Assistant Chief Counsel for Regulations, to Peter Bunce (Nov. 19, 2008)
C.A.B.	Civil Aeronautics Board Reports
C.F.R.	Code of Federal Regulation
Chero Interpretation	FAA Legal Interpretation from John Cassady, Assistant Chief Counsel, to Thomas Chero (Dec. 26, 1985)
Dobis Interpretation	FAA Legal Interpretation from Mark Bury, Asst. Chief Counsel for International Law, Legislation and Regulations, to Andy Dobis (May 21, 2014)
FSDO	Flight Standards District Office
FAA	Federal Aviation Administration
FAR	Federal Aviation Regulations
Haberkorn Interpretation	FAA Legal Interpretation from Rebecca MacPherson, Assistant Chief Counsel for Regulations, to Mark Haberkorn (Oct. 3, 2011)
JA	Joint Appendix

Klee Interpretation	FAA Legal Interpretation from John Cassady, Assistant Chief Counsel, to Hal Klee
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 Request	Request for Interpretation from Rebecca MacPherson to Mark Bury, Assistant Chief Counsel for International Law, Legislation, and Regulations (May 19, 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)
Mangiamele Interpretation	FAA Legal Interpretation from Rebecca MacPherson, Assistant Chief Counsel for Regulations, to Guy Mangiamele (Mar. 4, 2009)
NPRM	Notice of Proposed Rulemaking
PA	Petitioner's Addendum
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)

STATEMENT OF JURISDICTION

On August 14, 2014, the FAA rendered its Legal Interpretation to Gregory S. Winton ("*Winton* Interpretation"), Joint Appendix ("JA") JA.061-62, counsel for Flytenow, Inc. ("Flytenow"), which fully incorporates and by reference relies upon and applies to Flytenow the August 13, 2014 Legal Interpretation issued to Rebecca B. MacPherson ("*MacPherson* Interpretation"), JA.057-60. Flytenow challenges, collectively, the *Winton* Interpretation and the *MacPherson* Interpretation ("*MacPherson-Winton* Interpretation"). The *MacPherson-Winton* Interpretation constitutes a final agency action under the Administrative Procedure Act as codified. 5 U.S.C. § 704.

This Court has jurisdiction pursuant to 49 U.S.C. § 46110.

STATEMENT OF ISSUES

1. Whether the FAA's *MacPherson-Winton* Interpretation, concluding that pilots participating on the Flytenow website are engaged in common carriage, is arbitrary, capricious, or otherwise not in accordance with the law.

2. Whether the FAA's *MacPherson-Winton* Interpretation violates Sections 553 and 706 of the Administrative Procedure Act as codified, 5 U.S.C. §§ 553, 706, and/or 14 C.F.R. Part 11, because it constitutes a substantive rule or a change in interpretation to 14 C.F.R. § 61.113(c) or the term "common carriage," which was promulgated without the required notice-and-comment rulemaking process.

3. Whether the FAA lacks regulatory authority to restrict private communications over the Internet.

4. What, if any, deference is owed to the FAA's interpretation and sudden change of position articulated in the *MacPherson-Winton* Interpretation?

5. Whether the *MacPherson-Winton* Interpretation violates the free speech rights of Flytenow and its members in violation of the First Amendment to the U.S. Constitution.

6. Whether the FAA defines "common carriage" so broadly, and singles out Flytenow and its members, but not others similarly situated, for unequal treatment, that it violates the equal protection and due process components of the Fifth Amendment to the U.S. Constitution.

7. Whether the FAA's interpretation of the "holding out" element of common carriage and application of the "holding out" element to private flight operations is unconstitutionally vague.

STATUTES AND REGULATIONS

Pursuant to Circuit Rule 28(a)(5), pertinent statutes and regulations are reproduced in the Petitioner's Addendum to this brief.

STATEMENT OF THE CASE

Petitioner, Flytenow, Inc., operates a website for the exclusive use of Federal Aviation Administration ("FAA") certificated pilots and their passengers to communicate in order to identify a common purpose to share a planned flight. Once a common purpose between the pilot(s) and passenger(s) is

identified for a specific planned flight, the website facilitates a pilot's right to defray operating expenses of the flight with passengers under 14 C.F.R § 61.113(c) ("Expense-Sharing Rule").[1]

In February 2014, Flytenow requested a formal Letter of Interpretation from the Office of the Chief Counsel of the FAA regarding the Expense-Sharing Rule. JA.047-50. On August 14, 2014, the FAA rendered its final agency order to Petitioner in the Letter of Interpretation from Mark W. Bury to Gregory S. Winton, counsel for Flytenow, JA.61-62, which fully incorporates by reference and relies upon the Letter of Interpretation from Mark W. Bury to Rebecca B. MacPherson, dated August 13, 2014, JA.57-60. Flytenow challenges, collectively, the *MacPherson-Winton* Interpretation because it extinguishes the "traditional right"[2] of a pilot to defray operating expenses with passengers.

For decades, the FAA has recognized the rights of pilots and passengers to share the operating expenses of flights. *See* 29 Fed. Reg. 4717, 4718 (April 2, 1964), PA.001-3[3]; 62 Fed. Reg. 16220, 16263 (April 4, 1997), PA.015-18.

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[1] *See* JA.058 ("[A] pilot may accept compensation in the form of a pro rata share of operating expenses for a flight from his or her passengers."

[2] 29 Fed. Reg. 4717, 4718 (April 2, 1964) (articulating the FAA's intent in adopting what is now the Expense-Sharing Rule codified in 14 C.F.R. § 61.113(c), referring to the sharing of operating expenses with a pilot's passengers as a "traditional right.") PA.001-3.

[3] Under Rule 201 of the Federal Rules of Evidence, and Circuit Rules 28(a)(5) and 28(a)(7), Flytenow respectfully requests that this Court notice Petitioner's Addendum.

Pilots and passengers have been able to connect with one another for purposes of identifying a common purpose for flights using a wide variety of platforms.

For example, one such customary practice involves pilots posting their planned flights on local airport bulletin boards, or in other community spaces, so that a passerby who has a common purpose in the destination of the flight can contact the pilot, request to join the flight, and share the costs pursuant to the Expense-Sharing Rule codified at 14 C.F.R. § 61.113(c). *See* JA.023 ("*Ware* Interpretation") ("For instance, if you plan to go to St. Louis for a 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.").

Today, the power of collaborative consumption – systems of organized sharing through digital technologies – continues to transform the way we live and communicate. Communication is no longer limited to physical bulletin boards, as was the case when the *Ware* Interpretation was issued in 1976, but rather, has extended to the Internet, and by virtue, to social media and websites.

Flytenow has effectively created an online bulletin board to facilitate the genuine sharing of expenses between pilots and passengers who have a demonstrated common purpose in a flight. Flytenow launched its Internet-based platform in January 2014. Shortly thereafter, several pilot-members indicated that the FAA insisted participation on Flytenow was illegal. As one pilot-

member noted, "the FSDO[4] has let me know in no uncertain terms that they consider this [the Flytenow website] [to be] holding out for illegal charter. They will be/are going after these operations." PA.007.

Consequently, Flytenow submitted the *Winton* Request to the FAA's Office of Chief Counsel asking whether the Flytenow website, as used by pilots and passengers, ran afoul of Federal Aviation Regulations ("FAR"). JA.047-50. Similarly, the *MacPherson* Request involved a request for a legal interpretation on the same issue.[5] JA.51-56.

A. The *MacPherson-Winton* Interpretation

On August 14, 2014, the FAA issued the *Winton* Interpretation to Flytenow. The *Winton* Interpretation fully incorporates and by reference relies upon and applies to Flytenow the *MacPherson* Interpretation, issued on August 13, 2014. The FAA's position in the *MacPherson-Winton* Interpretation is:

> We concluded that pilots participating in the [Flytenow] website required a [14 C.F.R.] Part 119 certificate because they were engaged in common carriage.

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[4] The Flight Standards District Office (FSDO) is a regional office of the FAA. It is tasked with enforcement of Airmen & Aircraft Regulations of Title 14 of the Code of Federal Regulations. *See generally* FAA Order 8900.1, *available at* http://fsims.faa.gov/picresults.aspx?mode=EBookContents&restricttocategory=all~menu (last visited Dec. 26, 2014).

[5] According to the *MacPherson* Request, "After hearing about the [website], inspectors within the FAA immediately took steps to intimidate pilots who were listing flights on the [website], claiming that headquarters was insisting that the mere posting of a potential flight was illegal. This has led to considerable consternation in the general aviation community." JA.055-56.

JA.061.[6]

> [W]e conclude that, with regard to pilots using the [Flytenow] website, all four elements of common carriage are present. By posting specific flights to the [Flytenow] website, a pilot participating in the [Flytenow] service would be holding out to transport persons or property from place to place for compensation or hire.

JA.060.

In other words, the *MacPherson-Winton* Interpretation (1) declares that *all* pilot participation on Flytenow constitutes a commercial flight operation requiring an air carrier or commercial operating certificate under 14 C.F.R. Part 119, (2) extinguishes the "traditional right" of a pilot to share the operating expenses with his or her passengers under the Expense-Sharing Rule,[7] and (3) creates a new substantive rule, by interpretation or otherwise, without the notice-and-comment rulemaking process required by the Administrative Procedure Act ("APA").

All that has changed between activities that the FAA has historically considered a "traditional right," existed for decades - even before the Expense-Sharing Rule was codified, 29 Fed. Reg. 4717, 4718 (1964), PA.001-3, and activity (i.e., participation on the Flytenow website), which the FAA now prohibits, is the means of communication between pilots and passengers. Specifically, the FAA has now ruled that pilot participation on an *Internet-*

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[6] The FAA defines Common Carriage as: "(1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation." *See* Advisory Circular 120-12A, JA.030-32.

[7] *See* 29 Fed. Reg. 4717, 4718 (April 2, 1964), PA.001-3.

based communication platform to share expenses with passengers amounts to an unlawful commercial flight operation. JA.057 ("Internet-based discovery platform"); JA.061 ("web-based expense-sharing scheme").

To appreciate the comprehensive impact of the *MacPherson-Winton* Interpretation, it is necessary to provide an overview of pilot certification and flight operating rules.

B. Pilot Certification and Flight Operating Rules

Part 61 of 14 C.F.R. sets forth five pilot certifications issued by the FAA, of which, only three permit a pilot to carry two or more passengers:[8] the private pilot certificate, commercial pilot certificate, and the airline transport pilot certificate. When the FAA issues a private, commercial, or airline transport pilot certificate, it gives the pilot permission to carry passengers, as pilot in command of an aircraft, with the assumption that the pilot has completed enough training to do so safely.

The general rule for private pilots, 14 C.F.R. § 61.113(a), provides, "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; nor may that person, for compensation or hire, act as pilot in command of an aircraft." Subsections (b) through (h) of § 61.113 also contain specific instances

[8] *See* 14 C.F.R. §§ 61.89 (Subpart C) – Student Pilots, 61.101 (Subpart D) – Recreational Pilots, 61.113 (Subpart E) – Private Pilots, 61.133 (Subpart F) – Commercial Pilots, and 61.167 (Subpart G) – Airline Transport Pilots.

where the general rule stated in § 61.113(a) does not apply.

Among the listed exceptions, the Expense-Sharing Rule, states, "[a] private pilot may not pay less than the pro rata share of the operating expenses of a flight with passengers, provided the expenses involve only fuel, oil, airport expenditures, or rental fees." 14 C.F.R. § 61.113(c). "Based on this provision, a pilot may accept compensation in the form of a pro rata share of operating expenses for a flight from his or her passengers." JA.058.

In addition to the privileges and limitations set forth in 14 C.F.R. Part 61, the Federal Aviation Regulations (hereinafter "FAR") also provides for two overall types of flight operating rules: (1) General Operating and Flight Rules under 14 C.F.R. Part 91 and (2) Commercial Operating Rules under 14 C.F.R. Part 119 and Parts 121, 125, or 135.[9] For the latter, a Part 119 air carrier or commercial operator certificate is a prerequisite.

C. General (Part 91) versus Commercial Operating Rules (Part 119)

The General Operating and Flight Rules codified in 14 C.F.R. Part 91 "prescribes rules governing the operation of aircraft…within the United States." 14 C.F.R. § 91.1(a). These rules govern all elements of non-commercial flight operations, providing, *inter alia*, requirements for: preflight action (§ 91.103), use of safety belts and shoulder harnesses (§ 91.107), aircraft speed (§ 91.117),

[9] Parts 121, 125, and 135 prescribe operating requirements for scheduled airliners, large aircraft conducting for-hire private carriage operations, and commuter and on-demand operations, respectively. See 14 C.F.R. §§ 121.1, 125.1, 135.1.

minimum safe altitudes (§ 91.119), altimeter settings (§ 91.121), fuel requirements (§ 91.151), and weather minimums (§ 91.155).

On the other hand, when a pilot "operat[es] or intend[s] to operate civil aircraft … as an *air carrier or commercial operator, or both, in air commerce*," 14 C.F.R. § 119.1(a) (emphasis added) requires that the pilot, as operator of the the aircraft, must first obtain a Part 119 (Air Carriers and Commercial Operators) operating certificate,[10] and "[d]epending on the operation…must comply with more stringent operating rules than those in Part 91, for example, the requirements in Parts 121, 125, or 135." JA.058.[11]

D. The Expense Sharing Rule and Part 91

The Expense-Sharing Rule is codified in 14 C.F.R. Part 61 Subpart E – Private Pilots. The holder of a private pilot certificate may only conduct flight

[10] A Part 119 operating certificate is also required "when common carriage is not involved, in operations of U.S.-registered aircraft with a seat configuration of 20 passengers or more or a maximum payload capacity of 6,000 pounds or more." *See* 14 C.F.R § 119.1(a)(2). No aircraft meeting the larger seating and payload capacity can be listed on the Flytenow website, which ensures that this provision is not triggered. Indeed, the Flytenow website only supports operations of U.S.-registered aircraft with a seat configuration of 6 passengers or less and a maximum payload capacity of 6,000 pounds or less.

[11] The more stringent operating requirements under Parts 121 (airliner), 125 (private carriage), and 135 (charter) include, *inter alia*, increased experience (i.e., minimum of 1500 hours of logged pilot-in-command time), increased proficiency, aeronautical experience and training, specific aircraft rating requirements, special airworthiness and airport requirements, additional navigation aids, additional instrument and emergency equipment requirements, manual requirements, implementation of collision avoidance systems and safety management systems, increased maintenance requirements, crewmember and flight crew requirements, and FAA inspection authority.

operations under the General Operating Rules of Part 91. Thus, when a private pilot, indeed, any pilot, avails himself of the Expense-Sharing Rule, he does so under the operating rules applicable to a private pilot: the General Operating Rules of Part 91. Consequently, this case is not just about pilots who are certificated at the *private* pilot level *per se*, but rather, about how *all* pilots, irrespective of their certification level (i.e. private, commercial, or airline transport pilot), engage in expense-sharing pursuant to 14 C.F.R. § 61.113(c).[12]

E. The Legal Framework for Expense-Sharing

Flytenow built its website in contemplation, and reliance upon, statutory, judicial, and FAA legal interpretations included in the record. JA.001-62 and PA.001-6, 10-11, 15-18.[13] Together, this authority provided a comprehensive legal framework under which a pilot could lawfully share the operating expenses of a flight with passengers before the *MacPherson-Winton*

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[12] Indeed, while over 30% of pilots on the Flytenow website hold a commercial pilot or airline transport pilot certificate, PA.009, these pilots, when engaged in expense-sharing under 61.113(c), conduct a Part 91 operation, rather than a Part 119 commercial operation. The operating rules applicable to a particular flight "[d]epend[s] on the operation," JA.058, and not on the type of certificate the pilot holds. "The FAA has consistently noted that the privileges and limitations conferred upon pilots are a separate and distinct issue from whether a particular flight would be considered a commercial operation for which a Part 119 air carrier or commercial operator certificate is required." JA.057.

[13] *See also* Legal Interpretation to Ron Levy from Loretta E. Alkalay, Eastern Region Regional Counsel (October 25, 2005), in which the FAA addressed "the posting of offers of transportation by air on [a] website," for an analogous web-based expense-sharing platform, www.pilotsharetheride.com, holding, "We do not view such a solicitation by itself as running afoul of the regulations [and] [...] [w]e perceive nothing in the *sharetheride* program itself that indicates the unlawful offer of air transportation." PA.010-11.

Interpretation radically altered it. The pre-*MacPherson-Winton* Interpretation framework consisted of (1) a prohibition on engaging in "common carriage" and (2) the Expense-Sharing Rule and "common purpose" test. *See* JA.059 (*Haberkorn* Interpretation); JA.039 (*Bobertz* Interpretation); JA.035-37 (*Mangiamele* Interpretation) (applying the common purpose test to determine whether receipt of the pro rate share of expenses constitutes compensation).

1. "Common Carriage"

The Federal Aviation Act of 1958 uses the term "common carriage" but does not define it. *See* 49 U.S.C. §§ 40102(a)(23), (a)(25), (a)(27). FAA Advisory Circular No. 120-12A defines common carriage as: (1) a "holding out[14] of a willingness to (2) transport persons or property (3) from place to place (4) for compensation" or hire. JA.030-32.

Private pilots may not act as pilot in command of an aircraft for compensation or hire, nor may they engage in common carriage without obtaining a Part 119 certificate. 14 C.F.R. § 61.113(a). JA.059-60. Similarly, while "airline transport pilots and commercial pilots may act as pilot in command on an aircraft carrying passengers for compensation or hire, they may not conduct a commercial operation involving common carriage without obtaining a part 119 certificate." JA.059; *see also* 14 C.F.R. §§ 61.167(a)

[14] "[H]olding out can be accomplished by any 'means which communicates to the public that a transportation service is indiscriminately available' to the members of that segment of the public it is designed to attract. *See* Transocean Airlines, Enforcement Proceeding, 11 C.A.B. 350, 353 (1950)"; JA.004.

(airline transport pilot privileges and limitations), 61.133(a) (commercial pilot privileges and limitations).

2. The Expense-Sharing Rule and Common Purpose Test

The Expense-Sharing Rule "allows a private pilot to receive a pro rata reimbursement from his passengers for fuel, oil, airport expenditures, or rental fees, so long as the pilot and his passengers share a bona fide common purpose for conducting the flight."[15] JA.041 ("*Haberkorn* Interpretation"); 14 C.F.R. § 61.113(c); *see also* JA.039; JA.035-37.

Indicia of common purpose include: (1) the destination is dictated by the pilot, not the passenger,[16] (2) specificity as to date or points of operation,[17] and (3) the pilot is flying to a destination where the pilot has particular business to conduct.[18]

Keeping the foregoing in mind, Flytenow designed its website to permit pilot and passenger participation only if the following requirements are met:

1. Pilots and passengers (collectively, "members") apply for membership to the website.

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[15] Note that common purpose need not be the same purpose. See JA.041-44 (holding that a pilot and his passengers had common purpose where the pilot travelled to Long Island for a wedding but his passengers expressed interest to go to Long Island for a baseball game).

[16] JA.043; JA.033 ("*Bunce* Interpretation") (finding no common purpose where the choice of destination was dictated by the passenger, not the pilot).

[17] PA.010 ("The ability of pilots to list flights with no specificity as to date or points of operation would appear to ignore the common purpose requirement.").

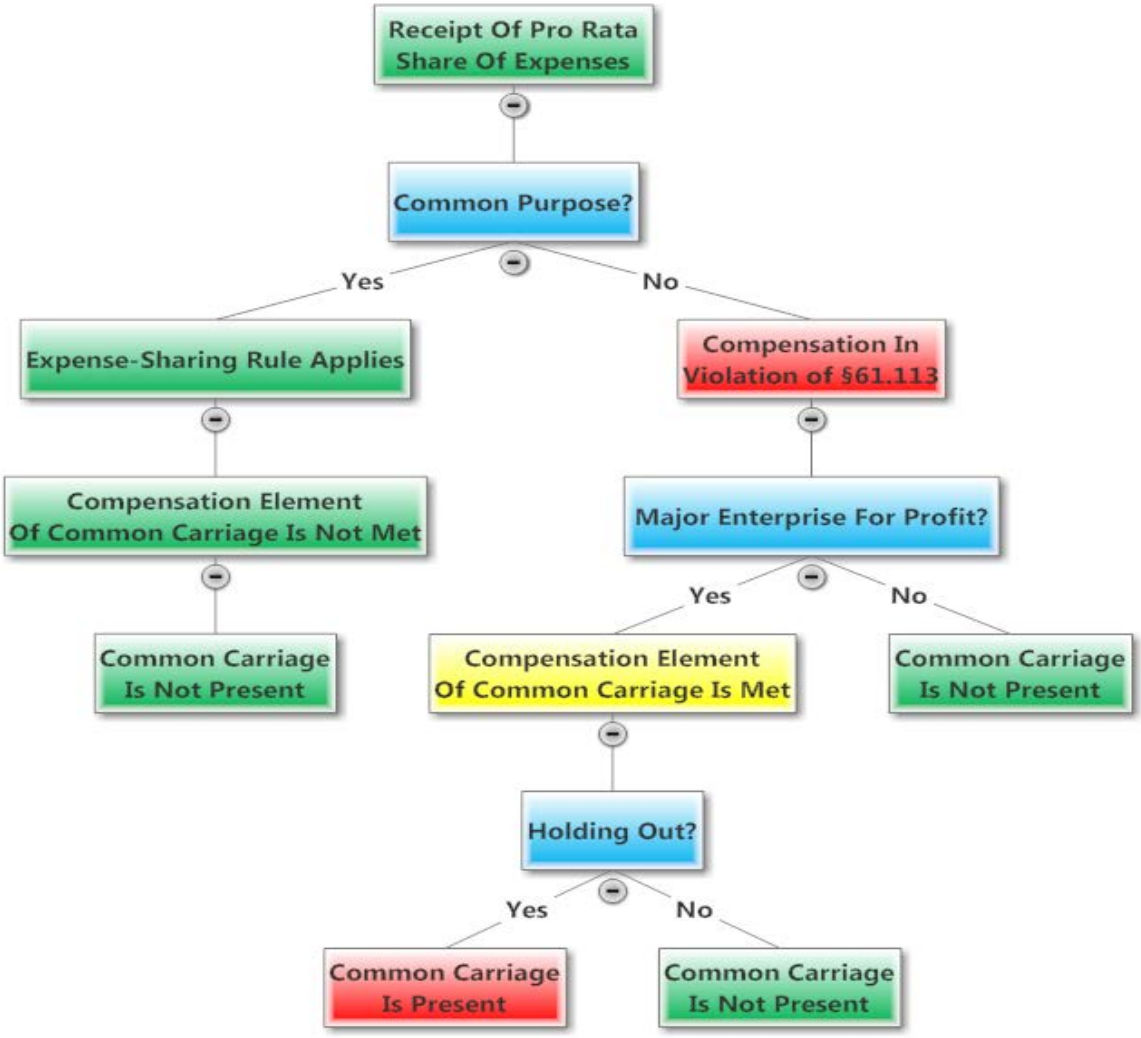
[18] JA.043; JA.033; JA.036-37 (recognizing there is no common purpose if the pilot is flying and transporting passengers to a destination where the pilot has no particular business to conduct); *see also* JA.039 (finding no common purpose where pilot made nine trips to transport his canoe club to a race).

2. Flytenow only accepts a pilot who has a verifiable FAA pilot certificate to act as pilot in command of an aircraft and carry two or more passengers.
3. Upon acceptance to the website, members have access to an exclusive, non-public network.
4. The website allows a pilot to ***unilaterally*** post a planned flight, if and only if, such flight contains: (1) the specific date and time, (2) the points of operation, and (3) the purpose of the flight. Passengers are prohibited from requesting a destination.
5. The website allows a member to view a pilot's planned flight that adheres to the requirements in point 4 above.
6. The website then permits a member to select and request to share expenses of the planned flight.
7. Flytenow allows pilots to accept or reject such member's request to join the planned flight, for any or no reason, and at any time.
8. At the conclusion of the flight, pilots are required to reconcile the actual operating expenses of the flight. Only then, does Flytenow transfer the pro-rata reimbursement of operating expenses from the passenger to the pilot in compliance with the Expense-Sharing Rule. *See also* Winton Request, JA.047-50.

The *MacPherson-Winton* Interpretation tacitly overrules all of the FAA's prior interpretations by creating a *per se* rule that "pilots participating in the [Flytenow] website require[] a part 119 [air carrier or commercial operating] certificate." JA.061. This is a sudden and dramatic departure in the FAA's position, articulated for the first time in the *MacPherson-Winton* Interpretation, and applicable to *all* "web-based expense-sharing scheme[s]," *Id.*, including Flytenow's.

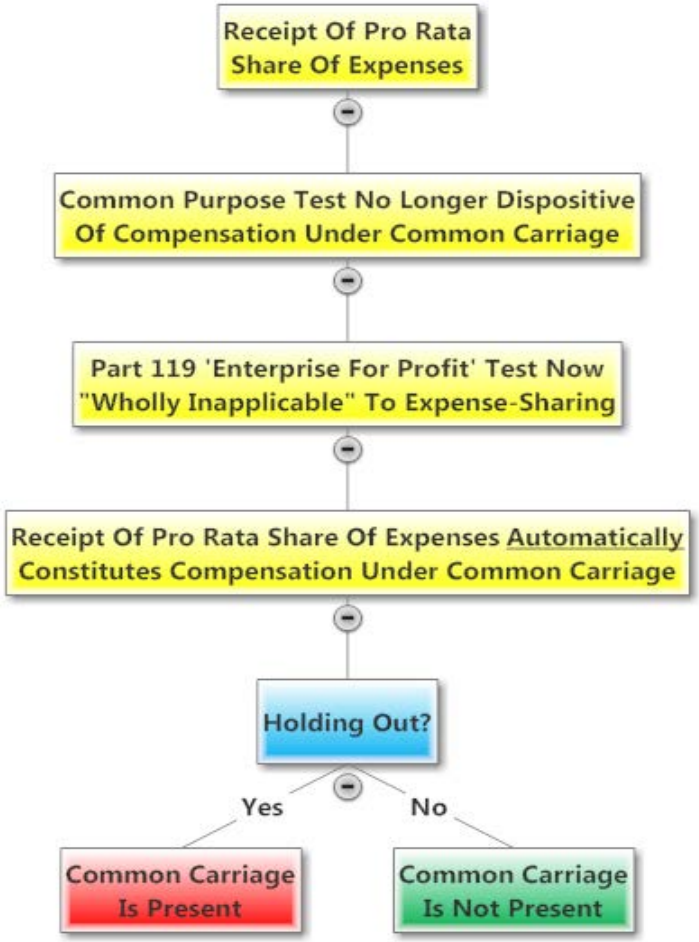
The following model captures the legal framework for expense sharing prior to the *MacPherson-Winton* Interpretation:

Pre-*MacPherson-Winton* Interpretation Expense-Sharing Framework



The following model captures the apparent new legal regime for expense sharing under the *MacPherson-Winton* Interpretation.

Post-*MacPherson-Winton* Interpretation Expense-Sharing Regime



SUMMARY OF ARGUMENT

Flytenow is a travel facilitator and a communications hub, not an airline company. Yet, in the *MacPherson-Winton* Interpretation, the FAA upends over four decades of established legal precedent and promulgates a new regulatory regime for expense-sharing that directly contradicts 14 C.F.R. § 61.113(c). Under the *MacPherson-Winton* Interpretation, the FAA has now taken the position that all that is needed for the agency to determine that a pilot has

engaged in "common carriage," is a mere communication of a pilot's personal expense sharing travel plans. Under this new regime, the FAA extinguishes the common purpose test, traditionally used to determine whether receipt of the pro rata share of expenses constitutes compensation, and instead, declares all expense-sharing to constitute compensation. Additionally, the FAA forecloses to expense-sharing pilots the only remaining test – the "enterprise for profit test" – under 14 C.F.R. Part 119 to determine whether compensation exists for the purposes of determining common carriage. The FAA's reworking of the elements of common carriage in the *MacPherson-Winton* Interpretation, moreover, applies a regulatory framework – the purpose of which was to limit advertising for *commercial* common carrier operations under Part 119 – to private pilots who do not fall within the sweep of those regulations. In other words, under the *MacPherson-Winton* Interpretation, if pilots use Flytenow's exclusive website to communicate their expense sharing travel plans, the FAA now requires the same commercial certification for flights operated by non-commercial private pilots flying a four-passenger Cessna aircraft as commercial pilots flying Boeing 747 aircraft.

In so doing, the FAA has exceeded its regulatory authority. 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, or

at most, limited *Skidmore* deference. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944).

Moreover, the *MacPherson-Winton* Interpretation violates the constitutional rights of Flytenow and its members. First, the FAA's application of the holding out element of common carriage restricts expense-sharing pilots' ability to communicate their own travel plans using an "Internet-based" platform, thus acting as a prior restraint on their communicative activities and a content-based restriction on their speech in violation of the First Amendment to the U.S. Constitution. This restriction likewise fails as a permissible content-based restriction on commercial speech because the FAA has not, and cannot, assert a significant government interest in restricting only one means of communication – i.e., communication over the Internet. Second, in treating different things as if they were the same; viz., by treating expense-sharing private pilots of small aircraft like air carriers commercially operating large aircraft, the FAA has violated the Equal Protection and Due Process rights of Flytenow and its members. Finally, the FAA's definition of holding out under the common carriage rule as set out in prior FAA regulatory interpretations, and as applied to private pilot members of Flytenow, is impermissibly vague because it does not provide fair warning of what communicative activities of non-commercial expense-sharing pilots are prohibited.

As set out below, for these reasons, the *MacPherson-Winton* Interpretation fails, and must be set aside by this Court.

STATEMENT OF STANDING

The *MacPherson-Winton* Interpretation has led to a virtually complete stop of the pilot/passenger expense-sharing operations by any and all individuals utilizing Flytenow's Internet-based platform, directly and irreparably injuring Flytenow.

Additionally, because pilots and passengers are members of Flytenow's Internet-based platform (PA.019-30), Flytenow asserts representational and associational standing to bring all claims on behalf of its member pilots and member passengers. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). Pilots and passengers "would otherwise have standing to sue in their own right," because the *MacPherson-Winton* Interpretation injures their Internet-based communications. *Id.* at 343. The "interests" Flytenow "seeks to protect are germane to [Flytenow's] purpose," *id.*, because Flytenow's entire business model consists of pilots and passengers being able to communicate using an Internet-based platform.

Furthermore, as here, when pilots and passengers communicate through Flytenow's website—Flytenow is merely receiving communications from one speaker and forwarding them to another recipient—the First Amendment "protection afforded is to the communication, to its source and to its recipients both." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). Flytenow, therefore, asserts both its rights as a recipient of communication and communications facilitator, and the rights of

the speakers who communicate using Flytenow's website. *See id.* at 757 n.15; *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

ARGUMENT

I. THE *MACPHERSON-WINTON* INTERPRETATION MUST BE SET ASIDE BECAUSE IT IS ARBITRARY, CAPRICIOUS, OR OTHERWISE NOT IN ACCORDANCE WITH THE LAW.

A. The FAA failed to apply the common purpose test to pilot participation on the Flytenow website.

In the *MacPherson-Winton* Interpretation the FAA failed to apply the common purpose test (i.e., a dispositive factor in determining whether a pilot has received "compensation" for a flight operation), in direct violation of governing directives and decades of the FAA's own precedent. "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." JA.039; *see also*, JA.041; PA.011. The "existence of a bona fide common purpose is determined on a case-by-case basis." JA.043. *See also*, JA.039. Indicia of common purpose include: (1) the destination is dictated by the pilot, not the passenger, JA.043; JA.033, (2) specificity as to date or points of operation, PA.010, and (3) the pilot is flying to a destination where he or she has particular business to conduct.[19]

[19] JA.043; JA.033; JA.036-37; *See also* JA.039 (finding no common purpose where pilot made nine trips to transport his canoe club to a race).

In the *Winton* Request, Flytenow stated that: "l) pilots, rather than aviation enthusiasts [i.e., passengers], initially and unilaterally dictate the time, date, and points of operation, and 2) aviation enthusiasts [i.e., passengers] subsequently express shared interest in the specific time, date, and points of operation," JA.048, thus plainly establishing a common purpose.

The *MacPherson-Winton* Interpretation, however, failed to apply the above-referenced indicia of common purpose between a pilot and a passenger participating on the Flytenow website when it rendered its decision, and thus, arbitrarily and capriciously concluded that Flytenow-participating pilots were *per se* engaged in commercial common carriage.

Indeed, in the *Levy* Interpretation, the FAA addressed an identical web-based expense-sharing platform, www.pilotsharetheride.com, "concern[ing] the posting of offers of transportation by air on the website," concluding:

> "We do not view such a solicitation by itself as running afoul of the regulations... [w]e perceive nothing in the *sharetheride* program itself that indicates the unlawful offer of air transportation." [20]

PA.010-11.

The *MacPherson-Winton* Interpretation, however, summarily concludes, "with regard to pilots using the [Flytenow] website, all four elements of common carriage are present." JA.059-60. But nowhere does the FAA apply the common purpose test, which would permit a pilot to lawfully engage in

[20] Like Flytenow, www.pilotsharetheride.com has shut down as a result of the FAA's issuance of the *MacPherson-Winton* Interpretation, PA.013-14.

expense-sharing under 14 C.F.R. § 61.113(c). The FAA's failure in this regard leads to the nonsensical conclusion that a pilot flying for personal reasons must now adhere to the stringent requirements of a scheduled commercial air carrier (Part 121), or an on-demand commuter/charter operation (Part 135), when sharing costs with passengers. Such an interpretation directly contradicts 14 C.F.R. § 61.113(c).

B. Receipt of the pro rata share of expenses under 14 C.F.R. § 61.113(c) does not constitute compensation within the meaning of common carriage.

The *MacPherson-Winton* Interpretation contradicts the plain language of 14 C.F.R. § 61.113(c), which expressly exempts a pilot's receipt of a pro rata share of flight operating expenses from the definition of compensation.

The *MacPherson-Winton* Interpretation concludes:

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

JA.059.

The conclusion that expense-sharing automatically constitutes compensation, not only renders the common purpose test moot, but also directly contradicts the intent and plain meaning of 14 C.F.R. § 61.113(c).

The best articulation of the FAA's intent in adopting what is now the Expense-Sharing Rule in §61.113(c), is found in the final rule issued in 1964, when Part 43 of the Civil Aviation Regulations was recodified as 14 C.F.R. Part 61. 29 Fed. Reg. 4717, 4718 (April 2, 1964); PA.002. The FAA noted in the

preamble to that rule that over the years the FAA had adopted language that proved difficult to interpret, "in many instances [...] unduly restrict[ing] the operations of private pilots." *Id*. In specifically listing shared operating expenses in the newly codified regulation, the FAA correctly noted:

> [T]he fact [is] that one or more passengers contribut[ing] to the actual operating expenses of a flight *is not considered* the carriage of persons *for compensation or hire.*

Id. (emphasis added).

Accordingly, the *MacPherson-Winton* Interpretation's new arbitrary determination that expense-sharing always constitutes compensation, is in direct contradiction to the intent and plain meaning of 14 C.F.R. § 61.113(c), as well as the regulatory interpretations from the last 40 years.

C. The major enterprise for profit test should not be foreclosed to pilots engaged in expense-sharing.

The *MacPherson-Winton* Interpretation goes further than the blanket determination on compensation. More specifically, it forecloses to pilots engaged in expense-sharing, the FAA's established test for determining compensation or hire, by concluding, "'the major enterprise for profit' test in [14 C.F.R.] § 1.1 is wholly inapplicable" to expense-sharing operations. JA.060.

The historical test for determining compensation under 14 C.F.R. Part 119 is established in the definition of "commercial operator," meaning, "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 persons' other business or is, in itself, a *major enterprise for profit*." *See* 14 C.F.R § 1.1 (emphasis added).

The major enterprise *for profit* test could not possibly be met if a pilot accepts only the pro-rata cost reimbursements allowed under the Expense-Sharing Rule. In fact, a pro rata reimbursement cannot be characterized as a major enterprise for profit.

In sum, by first declaring expense-sharing to automatically constitute compensation; and second, by foreclosing the major enterprise for profit test to pilots engaged in expense-sharing, the FAA has created a scenario where all pilots will now unavoidably fulfill the compensation element of common carriage when merely engaging in expense-sharing that has always been expressly permissible under § 61.113(c). Thus, the *MacPherson-Winton* Interpretation creates a new and unlawful regulatory regime, whereby a pilot who avails himself of the Expense-Sharing Rule always meets the compensation element of common carriage. As a result, under such a regime, all that is required for a pilot to engage in common carriage is a "holding out."

D. "Holding Out" does not apply to a pilot communication for the purpose of identifying a common purpose in a flight.

In the *MacPherson-Winton* Interpretation, the FAA has misapplied the

"holding out"[21] element of *commercial* common carriage to private pilots posting personal travel plans on the Flytenow website in order to communicate solely for the purpose of identifying passengers with a common purpose to share expenses.

The "holding out" element of common carriage is codified in 14 C.F.R. Part 119:

> No person may advertise or otherwise offer to perform an operation *subject to this part*[22] unless that person is authorized by the Federal Aviation Administration to conduct that operation.

14 C.F.R. § 119.5(k) (emphasis added).

With respect to the holding out element of common carriage, the *MacPherson-Winton* Interpretation concludes:

> By posting specific flights to the [Flytenow] website, a pilot participating in the [Flytenow] service would be holding out to transport persons or property.

JA.060.

The holding out element of common carriage, however, simply does not apply to expense-sharing pilots. Specifically, an expense-sharing operation necessarily occurs under the General Operating Rules of 14 C.F.R. Part 91, whereas the holding out restriction for determining common carriage under 14

[21] Holding out can be accomplished by any "means which communicates to the public that a transportation service is indiscriminately available" to the members of that segment of the public it is designed to attract. *See Transocean Airlines*, Enforcement Proceeding, 11 C.A.B. 350, 353 (1950); JA.004.
[22] *See* 14 C.F.R. §§ 119.1(a)(1) & (a)(2).

C.F.R. Part 119 only applies to a flight "operation subject to" Part 119. *See* 14 C.F.R. § 119.5(k).

Both *Transocean Airlines* (JA.001-22) and FAA Advisory Circular No. 120-12A (JA.030-32) address the holding out element for determining common carriage in its only rightful context: i.e., the differentiation between private carriage for hire[23] versus common carriage. While holding out is the "crucial determination" in differentiating between private carriage and common carriage, JA.042 (citing *Woolsey v. Nat'l Transp. Safety Bd.*, 993 F.2d 516, 523 (5th Cir. 1993)), there is no single regulatory prohibition on "holding out" in the absence of compensation or hire under 14 C.F.R. Part 119 as "[p]art 119 would not cover…an operation involving the genuine sharing of expenses." PA.011.

Under the FAA's new regulatory regime, however, any pilot communicating an expense-sharing flight, for the sole purpose of identifying a common purpose, will now be considered holding out to provide common carriage. Such a misapplication of the Expense-Sharing Rule is arbitrary, capricious, and cannot be reconciled with the plain language of 14 C.F.R. § 61.113(c). Pilots are now left in the strange conundrum of attempting to engage in expense-sharing without being able to communicate the details of a planned flight to a passenger.

[23] "Private carriage for hire is carriage for one or several selected customers, generally on a long-term basis." JA.031.

II. THE FAA'S *MACPHERSON-WINTON* INTERPRETATION IS A SUBSTANTIVE RULE OR A CHANGE IN INTERPRETATION PROMULGATED WITHOUT THE REQUIRED NOTICE-AND-COMMENT RULEMAKING PROCESS.

Section 553 of the Administrative Procedure Act ("APA") requires agencies to engage in notice-and-comment rulemaking before promulgating final rules. 5 U.S.C. § 553(b) (2000). An agency may not escape notice-and-comment rulemaking by labeling a new substantive legal requirement as a mere interpretation of an existing rule. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000); *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (*citing Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997)).

Under the *MacPherson-Winton* Interpretation, the FAA has violated the plain language of the governing regulation, 14 C.F.R. § 61.113(c), and upended more than 40 years of agency precedent under the guise of a mere interpretation of an existing rule. The FAA may not engage in substantive rule-making in this manner. *See generally* 14 C.F.R. Part 11 (FAA Rulemaking Procedures).[24]

III. ABSENT EXPRESS CONGRESSIONAL AUTHORIZATION, THE FAA DOES NOT HAVE THE AUTHORITY TO REGULATE PRIVATE COMMUNICATIONS OVER THE INTERNET.

An administrative agency may exercise only the authority that is delegated to it by Congress in the agency's mandate statute. The FAA lacks

[24] This question is before the Supreme Court in *Perez v. Mortgage Bankers Assoc.*, Nos. 13-1041, 13-1052, 134 S.Ct. 2820 (June 16, 2014) (oral argument held December 1, 2014).

authority and jurisdiction to shoehorn an Internet-based website, and communications taking place on it, under the purview of FAA regulations. To be sure, "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'" under 49 U.S.C. §§ 40102(a)(25), and 41101(a)(1). *CSI Aviation Servs., Inc. v. U.S. Dept. of Transp.*, 637 F.3d 408, 415 (D.C. Cir. 2011) (emphasis and alteration in original). However, the FAA lacks authority to interpret key terms of 49 U.S.C. §§ 40102(a)(25) and 41101(a)(1) in such a manner that it runs afoul of the First Amendment and the Equal Protection and Due Process components to the Fifth Amendment of the United States Constitution. By interpreting that all Internet-based communications by a pilot, concerning a proposed expense-sharing flight, are necessarily "holding out," JA.062, and consequently, by concluding that anyone who engages in such holding out "require[s] a part 119 certificate," JA.061, the *MacPherson-Winton* Interpretation asserts that the FAA has authority to inquire into private Internet-based communications to determine which one of the two sets of FAA regulations (Part 91 or Part 119) apply to particular flight operations, based solely on the content of the pilot's Internet-based communication. In so concluding, the FAA necessarily oversteps its authority.

There is nothing in the mandate statutes of the FAA that gives it authority to regulate private Internet-based communications. The situation presented here is not one involving agency interpretation of a statutory ambiguity. *See, e.g.*,

City of Arlington, Tex. v. FCC, 133 S.Ct. 1863 (2013). Here, regulation of Internet-based communications are so obviously beyond the scope of the Federal *Aviation* Administration, that even under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the FAA has overstepped the scope of its delegated authority. *See also City of Arlington*, 133 S.Ct. at 1875-77 (Breyer, J., concurring in part and concurring in the judgment) (applying the *Mead* and *Skidmore* framework in this context); *id.* at 1880 (Roberts, C.J., joined by Kennedy, Alito, JJ., dissenting) ("Whether Congress has conferred such power is the 'relevant question[] of law' that must be answered before affording *Chevron* deference."); 5 U.S.C. § 706 ("hold unlawful and set aside agency action … contrary to constitutional right, power, privilege, or immunity; [or] in excess of statutory jurisdiction, authority, or limitations").

The question of whether the FAA can regulate Internet-based communications by pilots is necessarily a threshold question, and must be answered before answering what, if any, deference is due to the agency's interpretation of whether it has such delegated authority. *See Zivkovic v. Holder*, 724 F.3d 894, 897 (7th Cir. 2013) (reviewing *de novo*, and declining to apply *Chevron*) ("No one thinks that the Board of Immigration Appeals has the authority to set the boundaries of the term 'crime of violence' for every criminal prosecution in the United States; the great majority of these cases are entirely unrelated to immigration law.").

Through the *MacPherson-Winton* Interpretation, the FAA has asserted authority to regulate all manner of a pilot's Internet-based communications—via email, Facebook, Twitter, or online bulletin boards like that of Flytenow. Under this interpretation, every time a pilot operates a small airplane for non-commercial purposes, and it appears that additional passengers are accompanying the pilot, the *MacPherson-Winton* Interpretation gives FAA field inspectors authority to investigate whether the pilot communicated with the passengers over the Internet, and what the contents of that communication were. According to the FAA's *MacPherson-Winton* Interpretation, if the pilot used the Internet to communicate, FAA field inspectors now have apparent authority to require a 14 C.F.R. Part 119 air carrier or commercial operating certificate. Because the FAA lacks such unbridled authority to regulate Internet-based communications between pilots and their passengers, the *MacPherson-Winton* Interpretation must be vacated.

IV. NO DEFERENCE IS OWED TO THE *MACPHERSON-WINTON* INTERPRETATION.

Because the *MacPherson-Winton* Interpretation applies only common law terms such as "holding out," "common carriage," and "common purpose," no deference is owed to the FAA's interpretations. At most, the measure of deference due to the FAA's interpretations should be analyzed under the *Skidmore* test. "[W]hen confronted with a question regarding the meaning of [a statutory] provision incorporating common law … principles, we need not defer

to the agency's judgment as we normally might under the doctrine of *Chevron*[.]" *Int'l Longshoremen's Ass'n v. NLRB*, 56 F.3d 205, 212 (D.C. Cir. 1995) (citations omitted). Here, the key terms that the FAA had to interpret and apply to Flytenow's facts ("compensation or hire," "holding out," "common carriage," and "common purpose") are, by the FAA's own admission, all common law terms. JA.001-22, JA.030-32. "A determination of pure [common] law involve[s] no special administrative expertise that a court does not possess." *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 260 (1968); *see also Zivkovic*, 724 F.3d 894 (agency's interpretation of the term "crime of violence"). Thus, no deference should be afforded to the FAA's interpretation of purely common law terms.

Moreover, *Chevron* deference does not apply. Insofar as the FAA classifies expense-sharing by private, commercial, or air transport rated pilots as common carriage, the *MacPherson-Winton* Interpretation is very much like "classification rulings" which are "beyond the *Chevron* pale." *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000)). In *Christensen*, 529 U.S. at 587, the Supreme Court provided a bright-line rule when an agency interprets its own non-ambiguous regulation, as here, an interpretation of the Expense-Sharing Rule under 14 C.F.R. § 61.113(c): "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant

Chevron-style deference…. Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore*[], but only to the extent that those interpretations have the 'power to persuade.'" *See also In re Sealed Case*, 223 F.3d 775, 779-80 (D.C. Cir. 2000) (discussing the deference framework, and standard of review).

A. At most *Skidmore* deference is owed to the *MacPherson-Winton* Interpretation.

If any deference is afforded to the FAA's *MacPherson-Winton* Interpretation, it should be *Skidmore* deference. *Skidmore* provides a sliding-scale of deference owed to agency interpretations. The "measure of deference" under *Skidmore*, 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, on evaluating the four *Skidmore* factors, as here, the agency's interpretation is not "thorough[]," or, as here, the validity of the agency's reasoning is suspect, or, as here, the agency's interpretation is a sudden departure from and not consistent with its long-standing position, then, a court gives *no deference* to the agency interpretation—no deference being the appropriate level of "respect" that the agency's interpretation is "entitled to" under *Skidmore*. *Id.; see also Gonzales v. Oregon*, 546 U.S. 243, 256 (2006) ("[T]he [agency's] interpretation is 'entitled to respect' *only to the extent it has the 'power to persuade.'*") (emphasis added); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 109

(1993) ("'[N]o deference is due to agency interpretations at odds with the plain language.'"); *Fox v. Clinton*, 684 F.3d 67, 80 (D.C. Cir. 2012) ("Department can claim no deference for its [unpersuasive] interpretation [in the Betancourt Letter] under either *Chevron* step two or *Skidmore*.").

In order to meet the first *Skidmore* factor, the "thoroughness" of the agency's "judgment" must be "*evident in its consideration*." *Skidmore*, 323 U.S. at 140 (emphasis added). As for the validity of the FAA's reasoning in this case, the Supreme Court has held that agencies must apply their rules consistently, and if they change course, they "'must supply a reasoned analysis' establishing that prior policies and standards are being deliberately changed." *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 302 (D.C. Cir. 2009) (citation omitted). With the *MacPherson-Winton* Interpretation, the FAA flipped its long-held position that expense sharing is a "traditional right" of pilots, without supplying a reasoned analysis. 29 Fed. Reg. at 4718 (1964); PA.002.

The FAA's legerdemain is especially obvious as it cites in the *MacPherson* Interpretation its 1963 Notice of Proposed Rulemaking ("NPRM") as authority for its reasoning. JA.059. But the NPRM is just that: a notice of *proposed* rulemaking. It merely expresses the FAA's desire, in 1963, to amend the Expense-Sharing Rule; it is neither binding authority, nor persuasive authority, on what the Expense-Sharing Rule means. A drafter's account of what a proposed draft-form amendment is intended to accomplish, especially if

such account was published *before* the amendment was fully debated and edited, cannot be considered controlling or persuasive authority.

Moreover, the NPRM itself states repeatedly that a "private pilot may share the actual operating expenses incurred during a flight. The fact 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." 28 Fed. Reg. at 8158 (quoting Amendment 43-3, August 7, 1950, effective September 11, 1950); PA.005. Indeed, the FAA admitted in the 1964 notice of final rulemaking that followed the 1963 NPRM that expense-sharing was recognized as a "traditional right" before the 1950 Amendment 43-3 expressly acknowledged and codified the right of pilots to share expenses with passengers. 29 Fed. Reg. at 4718; PA.002.

Both the 1950 and 1963 attempts by the FAA to eliminate this "traditional right" failed and the FAA capitulated to a flood of public comment overwhelmingly favoring rights of pilots to share expenses with passengers "similar to those granted private operations of automobiles." *Id.*

Indeed, in 1997, in its notice of final rulemaking, when the FAA recodified the expense-sharing rule from 14 C.F.R. § 61.118 to 14 C.F.R. § 61.113, the FAA documented overwhelming support from major stakeholders in the aviation industry for expanding the expense-sharing rule. As a result, the FAA at that time, substantially increased the vitality of the Expense-Sharing Rule. PA.016.

Therefore, the FAA's formal response to public comments, as documented in the FAA's 1964 and 1997 notices of final rulemaking, demonstrate that (1) it was settled practice as early as the 1940s, for pilots to share operating expenses with passengers, and (2) the FAA did not consider this expense-sharing practice as being "for compensation or hire." PA.017.

Thus, what is "evident in its consideration," of Flytenow's business model in the *MacPherson-Winton* Interpretation is a *lack* of "thoroughness." *Skidmore*, 323 U.S. at 140. The "validity of its [the FAA's] reasoning," *id.*, is not only suspect but there is some degree of desperation involved in the FAA's attempts to grapple with and provide a purportedly reasoned decision, given that the *MacPherson* Interpretation cites a 1963 notice of *proposed* (and unadopted) rulemaking to provide a reason and rationale for its conclusion. As discussed, the *MacPherson-Winton* Interpretation is grossly "[in]consisten[t] with earlier … pronouncements" on the Expense-Sharing Rule. For these reasons also, the *MacPherson-Winton* Interpretation lacks the "power to persuade." *Id.*

B. The *MacPherson-Winton* Interpretation fails even if *Chevron* deference were applied.

The *MacPherson-Winton* Interpretation fails even if *Chevron* deference were applied. *Chevron*, 467 U.S. 837.

Chevron step one requires a court to "question whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. In this case, Congress has *not* directly spoken to the precise question of expense-sharing

between pilots and their passengers, or communication bans or burdens imposed by the FAA. Furthermore, Congress has *not* directly spoken to the precise question of what constitutes "holding out," the definition of "compensation or hire," as it relates to non-commercial flight operations involving shared expenses, and what, if any, criteria exist(s) for classifying a flight operation as "common carriage" as opposed to private carriage. These are purely common law terms.

As in *Zivkovic*, *supra*, and *Longshoremen's*, *supra*, because courts are better situated to interpret and apply common law terms, an agency's interpretations of common law terms must get substantially less deference than *Chevron* deference. Even if the FAA's use of these common law terms is viewed as the agency's attempt to "fill the gap," *Chevron*, 467 U.S. at 847, in an ambiguous statute, the question here is not whether the FAA exercised its so-called gap-filling authority in a "permissible," *id.* at 843, manner; the question is whether the FAA exercised its gap-filling authority in a constitutional manner.

Even if this Court were to view the question here as whether the FAA's *MacPherson-Winton* Interpretation is permissible, under *Chevron*, a permissible interpretation is one that "represents a reasonable accommodation of manifestly competing interests," where "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." *Id.* at 865. The manner in

which this test is applied in *Longshoremen's*, *supra*, and *United Insurance Company of America*, *supra*, indicates a ruling in favor of Flytenow and against the FAA.

The regulatory scheme that the FAA routinely administers is technical and complex, but the question of interpreting the term "common carrier" under 49 U.S.C. § 40102(a)(25), and the question of interpreting the Expense-Sharing Rule of 14 C.F.R. § 61.113(c) is not. In this case, the FAA did not consider the matter in a detailed, much less reasoned, manner. Consequently, the *MacPherson-Winton* Interpretation fails even under *Chevron*.

V. THE *MACPHERSON-WINTON* INTERPRETATION VIOLATES THE FIRST AMENDMENT FREEDOMS OF FLYTENOW AND ITS MEMBERS.

Everyone, including the FAA, agrees that expense-sharing among pilots is perfectly permissible and in accordance with current Federal Aviation Regulations. The only thing that has changed in this case is the means of communication. Rather than pilots sharing their travel plans via the phone, e-mail, or a bulletin board at a regional airport, they now communicate those plans via the Internet. This communication is unquestionably protected speech. Flytenow has a First Amendment right to disseminate information and be a communications facilitator for pilots and passengers who wish to communicate using Flytenow's website. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Kleindienst v. Mandel*,

408 U.S. 753 (1972); *New York Times Co. v. United States*, 403 U.S. 713 (1971).[25]

A. The *MacPherson-Winton* Interpretation imposes a prior restraint on the speech of Flytenow and its members.

The *MacPherson-Winton* Interpretation's circular logic leads to a prior restraint on the free speech rights of Flytenow and its members. The *MacPherson-Winton* Interpretation states that private pilots engage in forbidden common carriage merely "[b]y posting specific flights to the [Flytenow] website," JA.060, and concludes that "pilots participating in the [Flytenow] website require[] a part 119 certificate *because* they were engaged in common carriage." JA.061 (emphasis added). To be sure, on its face, the *MacPherson-Winton* Interpretation does not ask pilots to obtain a Part 119 certificate before they communicate using Flytenow's website. But by concluding that "pilots participating in the [Flytenow] website require[] a part 119 certificate," *id.*, the FAA necessarily makes all operations that result from such communications subject to Part 119, particularly to 14 C.F.R. § 119.5(k). That provision states: "No person may advertise or otherwise offer to perform an operation subject to this part unless that person is authorized by the Federal Aviation Administration to conduct that operation." Application of § 119.5(k) to Flytenow and its members renders the *MacPherson-Winton* Interpretation a prior restraint on

[25] An administrative action may be set aside where it is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

their speech. As discussed in Section I, *supra*, all pilots are now left in one or both of the following situations: either expense-sharing is completely barred, or a pilot is prohibited from communicating with passengers via the Internet in order to engage in expense-sharing.

Moreover, "inspectors within the FAA … intimidate[d] pilots who were listing flights on the … site, claiming that headquarters was insisting that the mere posting of a potential flight was illegal." JA.055. As a result, pilots were intimidated into obtaining a Part 119 certificate before they could communicate using Flytenow's website.

"[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.… A prior restraint … has an immediate and irreversible sanction…. [P]rior restraint 'freezes' [speech]." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). A prior restraint "describe[s] administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citations omitted; emphasis in original). "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance." *Christopher* 132 S.Ct. at 2168. There is a "heavy presumption against [the] constitutional validity" of a prior restraint. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *see also Bantam Books*,

Inc. v. Sullivan, 372 U.S. 58, 69 (1963). In this case, the FAA "carries a heavy burden of showing justification for the imposition of such a restraint." *New York Times*, 403 U.S. at 714; *see also Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419-420 (1971).

By concluding that all expense-sharing flight operations resulting from Internet-based communications are *per se* "common carriage," thereby requiring an air carrier or commercial operating certificate under 14 C.F.R. Part 119, the FAA not only chills, but freezes out Internet-based speech that could otherwise occur unhindered under the FAA's own interpretations issued before the *MacPherson-Winton* Interpretation. Additionally, Flytenow's business is grievously affected because its entire business operation depends on the ability of pilots to freely and openly communicate their future travel plans with prospective passengers on the Internet. Thus, the *MacPherson-Winton* Interpretation imposes a prior restraint on both Flytenow and its members.

Through the *MacPherson-Winton* Interpretation, the FAA now claims that a pilot's mere *online posting* is what makes an expense-sharing operation illegal if the pilot fails to first obtain an air carrier or commercial operator certificate pursuant to 14 C.F.R. Part 119. However, the Supreme Court has held that licensing laws require neutral criteria leaving almost no discretion to the licensing authority. *City of Lakewood v. Plain Dealer Publishing*, 486 U.S. 750, 751 (1988) (invalidating a law that required a permit for newspaper boxes

being placed on public sidewalks where the law gave a great deal of discretion to the mayor).

Unfortunately, the *MacPherson-Winton* Interpretation, combined with the prior *Levy* Interpretation that requires a case-by-case determination,[26] vests, as in *Lakewood*, a great deal of discretion in FAA field inspectors to intimidate and threaten pilots into obtaining a Part 119 certificate which in turn requires compliance with 14 C.F.R. Parts 121 and 135. The chilling effect of this excessive discretion is precisely the type of harm that the First Amendment is designed to prevent because "[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973); *see also Riley v. National Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988); *Lowe v. SEC*, 472 U.S. 181 (1985). Indeed, Pilotsharetheride.com voluntarily stopped communications similar to Flytenow's on its website after the FAA issued the *MacPherson-Winton* Interpretation. PA.013-14.

[26] "The commission of a violation will depend on the details of the operation flown by the posting pilot." PA.011; "We do not view [posting of offers of transportation by air on the website] by itself as running afoul of the regulations, although individual postings may raise issues of potential violations." PA.010.

Determination by the FAA regarding a communication as to (1) whether a pilot is holding out, (2) whether a pilot is flying for compensation or hire, (3) whether a pilot is engaged in a flight operation involving common carriage, or (4) whether there is a common purpose between a pilot and passenger, are all determinations that depend on both what the pilot says and what the pilot does *not* say. For that reason, such determinations are required to comport with the First Amendment guarantees of freedom of speech. *Riley*, 487 U.S. at 796-97.

The *MacPherson-Winton* Interpretation chills pilots' speech, and Flytenow's dissemination of such speech, and fails to give any standards to determine what forms of communication concerning a shared flight are permissible. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (holding that compelling "a newspaper to print that which it would not otherwise print" violates the First Amendment). The *MacPherson-Winton* Interpretation also chills speech and compels silence by placing a prior restraint on a pilot's speech if a particular avenue of speech (i.e., Internet-based communication) is utilized. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (First Amendment protects "the right to speak freely and the right to refrain from speaking at all" and protecting a private property owner's, like Flytenow's, First Amendment right to be free from government-compelled speech and government-compelled silence).

B. The FAA imposed a content-based restriction on the speech of Flytenow and its members.

The *MacPherson-Winton* Interpretation "singles out speech of a particular content"—pilots communicating their travel plans and their willingness to share expenses of the flight by using an "Internet-based" platform, JA.062—"and seeks to prevent its dissemination completely," thus imposing a content-based restriction on Flytenow and its members. *Virginia State Bd. of Pharmacy*, 425 U.S. at 771.

The only manner in which the FAA can determine whether a pilot is "holding out" is by looking at the content of the pilot's speech. PA.011, JA.062. In this case, what constitutes "holding out," and therefore, "common carriage," "[can]not [be] 'justified without reference to the content of the regulated speech.'" *United States v. Playboy Entertainment Grp., Inc.*, 529 U.S. 803, 811 (2000). (citation omitted). The *MacPherson-Winton* Interpretation "focuses *only* on the content of the speech and the direct impact that speech has on its listeners;" viz., Flytenow and its passenger members. *Id.* (emphasis in original).[27] The Supreme Court has held this to be "the essence of content-based regulation," which "can stand only if it satisfies strict scrutiny." *Id.* at 812-13. If speech is regulated based on its content, "it must be narrowly tailored to

[27] In 2005, in its *Haberkorn* Interpretation, JA.041-44, the FAA stated that "advertising, on Facebook, … may be construed as holding out," JA.042, but did not go so far as to say that such speech is *per se* holding out because it occurs over the Internet.

promote a compelling Government interest." *Id.* at 813. "If a less restrictive alternative would serve the Government's purpose, … that alternative" "must [be] use[d]." *Id.*

The FAA, through its *MacPherson-Winton* Interpretation, is foreclosing the Internet as an avenue for speech. In doing so, the FAA does not give any standards whatsoever in outlining what avenues of communication constitute holding out, and are thus forbidden, and what avenues of communication do not, and are thus permitted. In *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653, 2663 (2011), the challenged statute "disfavor[ed] marketing, that is, speech with a particular content." In that case, the Supreme Court struck down the state's attempt to regulate commercial speech because it was a content- and speaker-based restriction on speech. The Court held: "An individual's right to speak is implicated when information he or she possesses is subjected to restraints on the way in which the information might be used or disseminated." *Id.* at 2665 (quotations omitted). Similarly, the FAA has restricted the right of pilots to use the Internet to communicate their travel plans. Thus, the restriction is content-based and impermissible.

C. The *MacPherson-Winton* Interpretation cannot be considered a permissible content-based restriction on commercial speech.

As a general matter, and as discussed above, "'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' With respect to

noncommercial speech, this Court has sustained content-based restrictions only in the most extraordinary circumstances." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983) (quoting *Police Dept. v. Mosley*, 408 U.S. 92, 95 (1972)).

But even if pilots' communications of their travel plans on Flytenow's website could be viewed as commercial speech, the *MacPherson-Winton* Interpretation does not meet the test articulated by the Supreme Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). The *MacPherson-Winton* Interpretation fails to state why the conclusion it reached advances a "substantial governmental interest." *Id.* at 569. The *MacPherson-Winton* Interpretation fails to state why the regulation of pilots who use Flytenow's website—the requirement to obtain a part 119 air carrier or commercial operating certificate—is "not more extensive than … necessary to serve that interest." *Id.* at 566.

Thompson v. Western States Medical Center, 535 U.S. 357 (2002) is analogous. In that case, the FDA asserted that "as long as pharmacists do not advertise particular compounded drugs, they may sell compounded drugs without first undergoing safety and efficacy testing and obtaining FDA approval." *Id.* at 370. The Court, however, held that "the Government has failed to demonstrate that the speech restrictions are 'not more extensive than is necessary to serve'" the FDA's asserted interests, *Id. at* 371, and concluded that FDA's advertising ban did not meet the *Central Hudson* test.

Similarly, the most benign interpretation of the *MacPherson-Winton* Interpretation seems to be that as long as pilots do not communicate using Flytenow's website, they may conduct expense-sharing flight operations without having to obtain an air carrier or commercial operator certificate pursuant to 14 C.F.R. Part 119. However, the *MacPherson-Winton* Interpretation fails to provide a reasoned explanation as to why foreclosing this one avenue of communication (i.e., the Internet) advances a significant governmental interest. Moreover, the Government has failed to demonstrate that the speech prohibitions of pilots to *post* expense-sharing flights on the Flytenow website, or otherwise obtain an air carrier or commercial operator certificate, are not more extensive than necessary to serve the FAA's interests. The *Central Hudson* interests that the FAA could assert (those that haven't already been struck down as impermissible justifications for imposing advertising bans or burdens)[28] are fully addressed by an expense-sharing pilot who uses Flytenow's website and complies with Part 91.

In fact, the FAA's interests have historically been served by pilots conducting expense-sharing flights pursuant to 14 C.F.R. § 61.113(c) without the need for such pilots to obtain an air carrier or commercial operator

[28] *See Thompson*, 535 U.S. at 375; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) ("[B]ans against truthful, nonmisleading commercial speech … usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth…. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.") (citations omitted).

certificate pursuant to 14 C.F.R. Part 119. Thus, the *MacPherson-Winton* Interpretation's new distinction that the same expense-sharing flights somehow require a more restrictive regulatory requirement because such flights were communicated via the Internet is an unconstitutional restriction on speech because the restriction is more extensive than necessary to serve the Government's interests.

VI. THE FAA'S *MACPHERSON-WINTON* INTERPRETATION VIOLATES THE EQUAL PROTECTION AND DUE PROCESS COMPONENTS OF THE FIFTH AMENDMENT BECAUSE OF ITS BROAD DEFINITION OF "COMMON CARRIAGE" AND UNEQUAL TREATMENT OF FLYTENOW AND ITS MEMBERS.

The FAA's sweeping *MacPherson-Winton* Interpretation treats an occasional expense-sharing pilot the same as it treats commercial air carriers like American or Delta Airlines. Thus, the FAA's definition of "common carriage" in that interpretation is so broad that it violates the Equal Protection and Due Process components of the Fifth Amendment.[29]

"[S]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jennes v. Fortson*, 403 U.S. 431, 442 (1971). Every time a pilot communicates his expense-sharing travel plans on the Internet, the *MacPherson-Winton* Interpretation classifies that pilot's flight operation as requiring a Part 119 certificate. In eviscerating any meaningful distinction between private and commercial flight operations, and

[29] An administrative action may be set aside where it is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C.§ 706(2)(B).

treating them as though they were exactly alike, the FAA "attempts to squeeze two [different operations] into a single, identical mold." *Cornwell v. Hamilton*, 80 F.Supp.2d 1101, 1103 & n.4 (S.D. Cal. 1999) ("The constitutional violation [is] in drawing the classification so broadly that the requirement for such a license is irrational because the [operations] are different").

"A [regulatory agency] can require high standards of qualification when regulating a profession but any qualification must have a rational connection with the applicant's fitness or capacity to engage in the chosen profession." *Id.* at 1105. However, in the present case, the *MacPherson-Winton* Interpretation's new requirement for an expense-sharing private pilot to meet the FAA's air carrier or commercial operator qualifications, merely because the pilot communicated a proposed flight over the Internet, does not have a rational connection with the pilot's fitness or capacity to engage in an expense-sharing flight, which is permissible under 14 C.F.R. § 61.113(c).

The *MacPherson-Winton* Interpretation creates a newly pronounced FAA regulatory requirement that if a pilot communicates a flight by posting it over the Internet in order to identify passengers(s) with a common purpose to share expenses, then the pilot needs to meet the FAA's more stringent air carrier or commercial operator qualifications pursuant to 14 C.F.R. Part 119. However, if the same pilot communicates the same flight, using the same aircraft, in order to identify the same passenger(s) with the same common purpose to share expenses of the flight, but *does not* communicate over the Internet, then the

pilot no longer needs to meet the FAA's air carrier or commercial operator qualifications, but rather, can operate the flight legally under 14 C.F.R. § 61.113(c) and Part 91. The FAA's *MacPherson-Winton* Interpretation, therefore, has no rational connection with the pilot's fitness or capacity to engage in the expense-sharing flight.[30]

Of course, the FAA is free to not issue a license to a pilot it thinks will engage in unsafe flight operations. The *MacPherson-Winton* Interpretation does not, however, make this distinction. Instead, it requires certification pertaining to commercial air carriers when a private pilot communicates his travel plans on the Internet, even if the ability of the pilot to fly an airplane, or that pilot's FAA certification is beyond reproach. The reasoning under the *MacPherson-Winton* Interpretation is similar to a state department of motor vehicles requiring the holder of a regular driver's license to receive a commercial truck driver's license and comply with all regulations thereunder if the private driver wanted to share his travel plans and split gasoline expenses with fellow passengers. This logic turns every 4-seat Cessna aircraft into, and treats it as a commercial

[30] The act of cost-sharing in no way enhances or reduces the safety of the flight. If this were not the case, 14 C.F.R. § 61.113 would presumably not have listed specific instances completely unrelated to the FAA's safety concern where private pilots are expressly allowed to carry passengers; for example, in connection with any business or employment, for charitable purposes, to conduct search and rescue operations, as salesmen demonstrating aircraft to prospective buyers, to tow glider and unpowered ultralight vehicles, and conduct production flight testing.

flight involving a Boeing 747aircraft, if and only if the pilot of the Cessna shares his travel plans with others over an exclusive website.

In Flytenow's case, the ability and fitness of pilots to operate an airplane for which they possess the requisite airman rating is not in issue. "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). The classification drawn by the *MacPherson-Winton* Interpretation (i.e., all common carrier operations versus expense-sharing operations not resulting from pilots who communicate their travel plans using a dedicated Internet-based platform like Flytenow's) should be rationally related to a legitimate governmental interest. In the *MacPherson-Winton* Interpretation, the FAA has not, and cannot, state any legitimate governmental interest in transforming all private pilots communicating their travel plans on Flytenow's website into commercial pilots, and subjecting the resulting flight operation to Part 119. *See Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

In other words, the classification made by the *MacPherson-Winton* Interpretation does not "rationally advance[] a reasonable and identifiable governmental objective." *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981). In *City of Cleburne*, as here, "the record does not reveal any rational basis for believing" that the communication facilitated by Flytenow and the sometimes, but not always, resulting expense-sharing flight operation "pose[s] any *special*

threat to the [Aviation Administration's] legitimate interests." 473 U.S. at 448 (emphasis added).

Moreover, the *MacPherson-Winton* Interpretation, by and through its newly pronounced application of the Expense Sharing Rule, irrationally treats certain flight operations as common carriage, requiring air carrier and commercial operator qualifications, merely because the pilot communicates the expense-sharing travel plans on Flytenow's website. As a result, the new regulatory requirement unfairly subjects pilots who communicate expense-sharing flights over the Internet to commercial regulatory burdens that are not imposed on other similarly situated pilots conducting similar expense-sharing flight operations. Although the pilots are similarly situated, they are treated differently by the FAA under the law, merely because one set of pilots communicated shared flights without use of the Internet. *See Romer v. Evans*, 517 U.S. 620, 632 (1996) ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause.").

In *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008), the court struck down a regulatory scheme that "specifically single[d] out" certain pest controllers for adverse treatment. Flytenow's case is analogous; "while a government need not provide a perfectly logical[ ] solution to regulatory

problems, it cannot hope to survive *rational* basis review by resorting to irrationality." *Id.* (emphasis in original). The FAA's change in the interpretation and application of the Expense Sharing Rule irrationally treats operations resulting from communication of travel plans on a privately moderated Internet-based platform as common carriage, and irrationally subjects pilots who so communicate to regulatory burdens not imposed on other similarly situated operations.

VII. THE FAA'S INTERPRETATION OF THE "HOLDING OUT" ELEMENT OF COMMON CARRIAGE AND APPLICATION OF THE HOLDING OUT ELEMENT TO PRIVATE FLIGHT OPERATIONS IS UNCONSTITUTIONALLY VAGUE.

The definition of "holding out" under the "common carriage rule" as set out in FAA regulatory interpretations, and as applied to private pilot members of Flytenow, is impermissibly vague because it does not provide fair warning of what communicative activities are prohibited. JA.030-32.[31]

It is a basic principle of due process that a government enactment is unconstitutionally vague if it does not give fair warning of prohibited conduct. *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of*

[31] An administrative action may be set aside where it is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

Rockford, 408 U.S. 104, 108 (1972). The standards for evaluating vague enactments are heightened when a government prohibition "'abut(s) upon sensitive areas of basic First Amendment freedoms,' [such that] it 'operates to inhibit the exercise of (those) freedoms.'" *Id.* (internal citations omitted). "If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). *See also Bryant v. Gates*, 532 F.3d 888, 893 (D.C. Cir. 2008) ("Our concern about vagueness is elevated when the law regulates speech because it may 'operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked'") (internal citations omitted)). As the Eleventh Circuit held in the context of federal regulations: "To pass constitutional muster a regulation must provide a fair and reasonable warning of what it prohibited." *Georgia Pac. Corp. v. Occupational Safety & Health Review Comm'n*, 25 F.3d 999, 1004 (11th Cir. 1994).

As a threshold matter, the FAA's *MacPherson-Winton* Interpretation and its significant expansion of the term "holding out" is patently arbitrary and impermissibly vague. The FAA distinguishes a *commercial* common air carrier from a non-commercial carrier if there is: "(1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation." JA.030. The FAA further restricts advertising of commercial operations involving common carriage: "[n]o person may advertise or otherwise offer to

perform an operation *subject to this part* unless that person is authorized by the Federal Aviation Administration to conduct that operation." 14 C.F.R. §119.5(k) (emphasis added). However, this advertising restriction expressly applies *only* to commercial operations under 14 C.F.R. Part 119, and then to only certain types of commercial operations.[32] 14 C.F.R. § 119.1(a)(1) – (2). In other words, the FAA prohibits advertising of commercial operations involving common carriage unless approved by the FAA. Therefore, and as described *supra*, the provisions of 14 C.F.R. Part 119 do not even apply to private, expense-sharing pilots operating under 14 C.F.R. § 61.113(c) because those pilots are not engaged in *commercial* operations for compensation, let alone common carriage.

Nonetheless, in the *MacPherson-Winton* Interpretation, the FAA has applied the "holding out" element of common carriage to private pilot members participating in Flytenow's Internet-based website. "By posting specific flights to the [Flytenow] website, a pilot participating in the [Flytenow] service would be holding out to transport persons or property from place to place." JA.060. "We concluded that pilots participating in the [Flytenow] website required a part 119 certificate because they were engaged in common carriage." JA.061.

[32] Only pilots that do not fit this definition are allowed by Flytenow to communicate their travel plans using Flytenow's website. JA.049.

The FAA offered no additional explanation as to *how* Flytenow's service, or Flytenow members' use of that service, was holding out and thus common carriage, requiring an air carrier or commercial operating certificate. Importantly, the FAA does not address *why* the *commercial* common carriage element of holding out is now applied to private pilots. The *MacPherson-Winton* Interpretation was merely conclusory on the issue of holding out, without any explanation whatsoever.

More disturbingly, the FAA applied a regulatory framework – the purpose of which was to limit advertising for *commercial* operations under Part 119 – to private pilots who do not fall within the sweep of those regulations. This type of arbitrary and discriminatory enforcement and application of 14 C.F.R. §119.5(k) to private pilots offends precisely those values the Supreme Court outlined in evaluating vague enactments. *See Vill. of Hoffman Estates*, 455 U.S. at 498.

Even if the "holding out" element of common carriage did apply to expense-sharing private pilots, the *MacPherson-Winton* Interpretation's interpretation of "holding out" is unconstitutionally vague because the FAA itself cannot define what activities constitute holding out prior to those activities being conducted. The FAA has asserted that "holding out can be accomplished by any 'means which communicate[] to the public that a transportation service is *indiscriminately available*.'" JA.042 (emphasis added) (citation omitted). However, in that same regulatory interpretation, the agency asserts, "the FAA

cannot determine or approve in advance what type of advertising or soliciting are considered a holding out of air transportation service without all available facts concerning a specific situation." *Id.* In other words, the FAA will not, or cannot, provide standards as to what forms of communicative conduct constitute holding out prior to those activities actually occurring. If the FAA cannot determine what forms of communication are "holding out," and what types of communication are not considered "holding out," prior to those communications actually occurring, it is patently unreasonable to expect a pilot of ordinary intelligence "to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108. The FAA's interpretation of holding out under the common carriage rule, therefore, is quintessentially vague and thus, constitutionally impermissible. *See Christopher*, 132 S.Ct. at 2168, ("It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.").

Moreover, by stretching the definition of "common carriage" in the *MacPherson-Winton* Interpretation to reach private pilots, the FAA has invoked inapplicable prohibitions regarding advertising of *commercial* common carriage operations to restrict a private pilot's ability to communicate the details of his own personal travel plans. For example, will the actions of a private pilot

phoning his friends to inform them of his expense-sharing travel plans be considered holding out? How about the same communication done by e-mail? Or Facebook? Or what if a private pilot made a flyer with information about an expense-sharing flight and posted it on a bulletin board at the airport? The FAA does not answer these questions, and in demurring on these incredibly important issues, the FAA leaves pilots and members of Flytenow unable to determine which of their communications are prohibited.

As described in Section V, *supra*, private pilots have a plain and obvious First Amendment right to communicate their expense-sharing travel plans with others. When the FAA asserts in the *MacPherson-Winton* Interpretation that the holding out element of common carriage applies to private pilots sharing expenses, the FAA is not-so-tacitly asserting that private pilots may not communicate their travel plans, lest they face enforcement action for doing so without the proper air carrier certification. This plainly chills a pilot's constitutionally protected right to free speech because a pilot seeking to lawfully share expenses under 14 C.F.R. § 61.113(c) does not know what forms of communications he may engage in without fear of enforcement action by the FAA.

The FAA's application of the holding out element of common carriage in the *MacPherson-Winton* Interpretation to non-commercial flight operations, therefore, produces precisely the types of ambiguous prohibitions that the Constitution prohibits. *See Bryant*, 532 F.3d at 893. Pilot members of

Flytenow have a right to know which of their communications are protected and which are prohibited. The FAA's vague and arbitrary interpretation leaves such pilots unable to do so, and in the process, interferes with Flytenow and its members' freedom of expression under the First Amendment.

REQUEST FOR ATTORNEYS' FEES AND COSTS

Under the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2321 (1980), if Flytenow, Inc. is the prevailing party, it requests reasonable fees and expenses including reasonable attorney's fees. *See* 28 U.S.C. § 2412(d). Flytenow, Inc., is a corporation with a net worth of less than $7 million. *See* 28 U.S.C. § 2412(d)(2)(B).

CONCLUSION

For the foregoing reasons, this Court should hold unlawful and set aside the Respondent's *MacPherson-Winton* Interpretation under 5 U.S.C. § 706.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THE ATTACHED FILING, JOINT APPENDIX, AND PETITIONER'S APPENDIX OF EXHIBITS WERE ELECTRONICALLY FILED AND SERVED BY ECF AND SENT BY U.S. MAIL upon the persons identified in the below Services List on January 5, 2014.

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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 13,084 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.

/s/ Jonathan Riches