DOES EXPENSE-SHARING AMONG PRIVATE PILOTS CONSTITUTE "COMPENSATION" UNDER SECTION 61.113 OF THE FEDERAL AVIATION ACT OF 1958?

CARMEN E. WEITE*

I. INTRODUCTION

In times with constant changes and advances in technology, courts and legislators have the power to embrace and accept these innovations, or conversely, strictly regulate them to their ultimate demise. Ride-sharing mobile applications, such as Uber and Lyft, connect riders and drivers over the internet and have redefined the automobile transportation market. As a result of this innovation, legislatures have enacted new laws as well as broadened interpretations of existing laws that would otherwise prohibit the ride-sharing concept.[1]

Recently, AirPooler.com ("AirPooler") and Flytenow, Inc. ("Flytenow") expanded the ride-sharing concept from automobiles to general aviation by creating online platforms that connect private pilots to passengers who are willing to share the cost of the flight.[2] However, when confronted with interpreting the Federal Aviation Act of 1958 as applied to these companies, the Federal Aviation Administration ("FAA") concluded AirPooler and Flytenow allowed private pilots to act as "common carriers" without proper certification, and ultimately, the FAA forced AirPooler and Flytenow to shut down.[3] In

---

* Candidate, J.D., May 2018, Cumberland School of Law; B.S.B.A., Finance, University of Florida, 2015; FAA Licensed Private Pilot. The author would like to thank Professor Woodrow Hartzog for his guidance throughout the research, drafting, and revision stages of this comment as well as Rebecca MacPherson for her willingness to share her expertise and insight with regard to this topic. The author also wishes to thank her parents, James and Catherine Weite, for their endless encouragement and support.

[1] *See, e.g.*, Andrea Bolton, Comment, *Regulating Ride-Share Apps: A Study on Tailored Reregulation Regarding Transportation Network Companies, Benefiting Both Consumers and Drivers*, 46 CUMB. L. REV. 137, 155 (2016) (noting that Milwaukee adopted a new city ordinance that encouraged ride-sharing companies such as Uber and Lyft, rather than, as some cities did, imposed stringent regulations that ultimately ran these companies out of town).

[2] *See, e.g.*, Dave Carriere, *Flytenow Taking Case to the Supreme Court*, FLYING MAG. (June 28, 2016), http://www.flyingmag.com/flytenow-taking-case-to-supreme-court; Josh Constine, *AirPooler is Lyft For Private Planes*, TECHCRUNCH (Apr. 2, 2014), https://techcrunch.com/2014/04/02/airpooler/.

[3] Flytenow, Inc. v. FAA (*Flytenow I*), 808 F.3d 882, 885 (D.C. Cir. 2015); Jack Nicas, *Plane-Sharing Startup Sues FAA Over Ban on Service*, THE WALL ST. J. (Jan. 7, 2015), https://www.wsj.com/articles/flight-sharing-startup-sues-faa-over-ban-on-service-1420677000?mod=WSJ_hppMIDDLENexttoWhatsNewsSecond; Frederic Lardinois, *Flytenow Shuts Down After Court Rules Against Flightsharing Startups*, TECHCRUNCH

doing so, the FAA seemed to ignore its prior regulatory analysis under which expense-sharing platforms, such as AirPooler and Flytenow, are arguably permissible. Pilots using AirPooler and Flytenow were merely receiving a pro rata share of expenses rather than earning a profit as a result of conducting the flight.[4] Flytenow challenged the FAA's legal interpretation and filed a lawsuit in the United States Court of Appeals for the District of Columbia Circuit where the court agreed with the FAA.[5] The court held that Flytenow violated the Federal Aviation Act of 1958 because it allowed private pilots to act as "common carriers" without proper certification.[6] The court based this holding on the FAA's own assertion that expense-sharing constitutes compensation under FAA regulations.[7] Ultimately, Flytenow petitioned the appellate court's decision to the United States Supreme Court arguing that: (1) federal courts should not allow an agency to interpret common law terms contained in the agency's regulations; (2) The FAA's definition of common carrier is inconsistent with the common-law definition; and (3) The FAA's determination that pilots using Flytenow are "common carriers" violated pilots' First Amendment right to free speech.[8] However, the Supreme Court denied certiorari on January 9, 2017.[9]

The purpose of this comment is to analyze the FAA's regulatory history with regard to expense-sharing among pilots. Thus, the FAA's rule-making authority and relevant Federal Aviation Regulations will first be explored. Additionally, this comment will discuss Flytenow's appeal of the FAA's legal interpretation to the United States Court of Appeals for the District of Columbia Circuit and ultimately the Supreme Court of the United States. Finally, this comment will explain the author's views on the future of expense-sharing in general aviation via web-based platforms.

II. HISTORY OF THE FEDERAL AVIATION ADMINISTRATION AND

(Dec. 22, 2015), https://techcrunch.com/2015/12/22/flytenow-shuts-down-after-court-rules-against-flightsharing-startups/.

[4] Rebecca MacPherson, *Can't Get No Compensation: FAA's Interpretation of Expense Sharing*, 29 NO. 1 AIR & SPACE LAW 1, at 18 (2016); *see also* 14 C.F.R. § 61.113(c) (2017) (stating that "[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").

[5] *Flytenow I*, 808 F.3d at 885.

[6] *Id.*

[7] *Id.* at 886.

[8] Petition for Writ of Certiorari, Flytenow v. FAA (*Flytenow II*), No. 16-14, 2017 WL 69183 (Jan. 9, 2017).

[9] *Flytenow II*, 2017 WL 69183.

REGULATIONS

The modern era of aviation began in 1903 when the Wright brothers successfully completed a twelve-second flight in a plane they built.[10] In its early years, aviation was largely unregulated and fatal accidents were common.[11] In response, President Franklin enacted the Civil Aeronautics Act of 1938 in order to regulate as well as promote development and safety of civil aviation.[12] The Civil Aeronautics Act created the Civil Aeronautics Authority as well as an Air Safety Board responsible for investigating and recommending ways to prevent aviation accidents.[13] Moreover, the Civil Aeronautics Act largely expanded the federal government's role in civil aviation through, *inter alia*, giving the Civil Aeronautics Authority the power to regulate airline fares and carrier's flight routes.[14] Thereafter, in 1940 the Roosevelt administration created the Civil Aeronautics Board, giving it responsibility over "airman and aircraft certification, safety enforcement, . . . airway development[,] . . . safety rulemaking, accident investigation, and economic regulation of the airlines."[15] Subsequently, the Federal Aviation Act of 1958 (the "Act") created the Federal Aviation Agency in order to regulate civil aviation and promote safety therein.[16] When Congress created the Department of Transportation in 1967, the Federal Aviation Agency became the Federal Aviation Administration ("FAA") that exists today.[17]

Presently, the FAA's responsibility is to "promote safe flight of civil aircraft,"[18] and it maintains broad authority to create and enact Federal Aviation Regulations that regulate "nearly every aspect of private and commercial flight, including licensing and regulation of pilots and their operations."[19] When a pilot is unsure of a Federal Aviation Regulation's meaning or application, the pilot can request a Letter of Interpretation from the FAA's Office of Chief Counsel for clarification.[20] Once issued, the explanation contained in the Letter of

---

[10] *A Brief History of the FAA*, FED. AVIATION ADMIN. (Jan. 4, 2017), https://www.faa.gov/about/history/brief_history/.

[11] *Id.*

[12] Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973, 980 (1938).

[13] 52 Stat. at 980–81, 1012–1014.

[14] *Id.* at 988–89, 1018–20.

[15] FED. AVIATION ADMIN., *supra* note 10.

[16] Federal Aviation Act of 1958, Pub. L. 85–726, 72 Stat. 731, 731 (1958).

[17] 49 U.S.C. §§ 102, 106 (2016).

[18] 49 U.S.C. § 44701(a) (2000).

[19] *Flytenow I*, 808 F.3d at 885 (citing 49 U.S.C. §§ 44701(a); 44703; 44705).

[20] Lindsey McFarren, *FAA Legal Interpretations: Five Things You Need to Know*, MCFARREN AVIATION (October 23, 2015), https://mcfarrenaviation.wordpress.com/tag/faa-compliance/ (explaining the process and binding power of a "Letter of Interpretation").

Interpretation becomes the FAA's "official position" on the issue and has "FAA-wide application."[21]

Among the numerous Federal Aviation Regulations, is Part 61 which addresses pilot licensing and certification.[22] Part 61 provides for five different "airman certificates" that are based on the pilot's qualifications and training.[23] The most limited certificate issued by the FAA is the "student pilot certificate."[24] Eligibility for a student pilot certificate merely requires that an individual is at least sixteen years old and able to "read, speak, write, and understand" the English language.[25] As expected, the student pilot certificate comes with numerous limitations, including a prohibition against carrying passengers and receiving compensation for piloting services.[26] Pilots with a student pilot certificate become eligible for a "recreational pilot certificate" after logging at least thirty hours of flight time, including at least three hours of solo flight.[27] Furthermore, the pilot must pass a written aeronautical knowledge test.[28] Upon completion of these requirements, the pilot's instructor must endorse the pilot's logbook certifying that the pilot completed the training requirements and is prepared for a practical flight proficiency test, consisting of oral questioning as well as demonstration of flight maneuvers.[29] In contrast from the student pilot certificate, a recreational pilot is permitted to carry one passenger.[30] Additionally, the FAA allows a recreational pi-

---

[21] FAA Legal Interpretation to Darin M. Moody, at 2 (Feb. 3, 2015), https://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc200/Interpretations/data/interps/2015/Moody%20-%20(2015)%20Legal%20Interpretation.pdf, (citing FAA Legal Interpretation to Taylor S. Perry (July 28, 2010) ("A legal interpretation issued by the Office of the Chief Counsel is the FAA's official position concerning the meaning of a statute, regulation, or other legal requirement. The FAA has previously stated that validly adopted legal interpretations issued by the Regulations Division of the Office of the Chief Counsel are coordinated with relevant program offices at FAA Headquarters and have FAA-wide application." (internal quotation marks omitted)); *see also* McFarren, *supra* note 20.

[22] "Certification: Pilots, Flight Instructors, and Ground Instructors," 14 C.F.R. § 61.

[23] Student Pilots, 14 C.F.R. § 61.81–95; Recreational Pilots, 14 C.F.R. § 61.96–101; Private Pilots, 14 C.F.R. § 61.102–117; Commercial Pilots, § 61.121–133; Airline Transport Pilots, 14 C.F.R. § 61.151–167.

[24] 14 C.F.R. § 61.81–95.

[25] 14 C.F.R. § 61.83 (explaining the eligibility requirements for a student pilot certificate).

[26] 14 C.F.R. § 61.89 (explaining the limitations accompanying a student pilot certificate).

[27] 14. C.F.R. § 61.96(b)–.99.

[28] 14 C.F.R. § 61.96(b)(4); *see also* 14 C.F.R. § 61.97 (describing the aeronautical knowledge required for a recreational pilot certificate).

[29] 14 C.F.R. § 61.96(b)(5)–.98; *see also* 14 C.F.R. § 61.43–.45 (explaining the procedures for a practical flight proficiency examination).

[30] 14 C.F.R. § 61.101(a)(1).

lot and his passenger to share the cost of the flight, as long as the pilot does "[n]ot pay less than the pro rata share of the operating expenses of a flight."[31] However, the regulations explicitly state that a recreational pilot is not permitted to carry "a passenger or property for compensation or hire," but do not provide an explanation for this distinction.[32]

Of particular relevance to this comment is the private pilot certificate. Pilots with a student or recreational pilot certificate become eligible for a private pilot certificate after completing several requirements.[33] For example, with regard to experience, a student or recreational pilot must log at least forty hours of flight time.[34] Of those forty hours, at least ten hours must be solo pilot-in-command flight time.[35] Thereafter, the pilot must pass a written aeronautical knowledge test, receive an endorsement from his instructor, and pass a practical flight proficiency test.[36]

Another certificate explained in Part 61, the commercial pilot certificate, requires a pilot log at least 250 hours of pilot-in-command flight time in order to be eligible for that certificate.[37] The most experienced pilots, those with at least 1,500 hours of pilot-in-command flight time as well as an instrument rating,[38] will receive an airline transport pilot certificate upon successfully completing stringent training and examination requirements.[39]

III. THE FINE LINE BETWEEN COMPENSATION AND A COMMERCIAL OPERATION

Although the various certificates differ significantly with regard to flight experience, it is worth noting that recreational pilots, private pilots, commercial pilots, and airline transport pilots are all allowed to

---

[31] 14 C.F.R. § 61.101(a)(2).

[32] 14 C.F.R. § 61.101(e)(3)–(4).

[33] *See* 14 C.F.R. § 61.103.

[34] 14 C.F.R. § 61.109(a).

[35] *Id*.

[36] 14 C.F.R. § 61.103; *see also* 14 C.F.R. § 61.105 (describing the aeronautical knowledge required for a private pilot certificate).

[37] 14 C.F.R. § 61.129(a).

[38] An instrument rating allows a pilot to fly in "a wider range of weather conditions," such as in the clouds as opposed to only in clear skies. JEPPESEN SANDERSON, INSTRUMENT/COMMERCIAL MANUAL 1-11 (Pat Willits, et al. eds., 5th ed. 2002). To be eligible for an instrument rating, a pilot must hold at least a private pilot certificate and complete an additional 40 hours of instrument flight training, at minimum. *See* 14 C.F.R. § 61.65(d)(2).

[39] 14 C.F.R. § 61.151–.160, .167.

carry passengers in some capacity.[40] Nonetheless, the type of certificate held by a pilot determines whether or not the pilot is permitted to receive compensation for carrying passengers or property. For example, in contrast from student, recreational, and private pilots, who are not permitted to receive compensation, FAA regulations allow commercial pilots and airline transport pilots to receive compensation.[41] Although Part 61 allows commercial and airline transport pilots to receive compensation, these pilots "may not conduct a commercial operation involving common carriage" without further licensing.[42] In other words, "[a] commercial pilot *certificate* [or airline transport pilot certificate] does not authorize a person to become a commercial *operator*."[43] This distinction is important because commercial operators are not permitted to conduct flights with solely a certificate under Part 61.[44] Instead, commercial operators must obtain certification as explained in Part 119 and comply with the "more stringent operating rules" therein.[45] Section 1.1 of the FAA regulations ("section 1.1") defines a "commercial operator" as "a person who, for compensation or hire, engages in the carriage by aircraft in air commerce[46] of persons or property . . . ."[47] In instances "[w]here it is doubtful that an operation is for compensation or hire," section 1.1 states that a pilot is considered a commercial operator when the operation is "a major enterprise for profit" rather than "merely incidental to the person's other business."[48]

---

[40] 14 C.F.R. § 61.101(a)(1), .113, .133, .167(a).

[41] *Compare* 14 C.F.R. § 61.133(a)(1) *and* § 61.167(a)(1) *with* 14 C.F.R. § 61.89(a), § 61.101(a)(2), *and* § 61.113(a).

[42] FAA Legal Interpretation to Rebecca B. MacPherson, at 3 (Aug. 13, 2014), https://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc200/Interpretations/data/interps/2014/MacPherson-JonesDay%20-%20(2014)%20Legal%20Interpretation.pdf; *see also* 14 C.F.R. § 119.21, .31 (explaining that a "commercial operator engaged in intrastate common carriage of persons or property for compensation or hire" must obtain certification under either Part 119, 121 or Part 135 of the Federal Aviation Regulations).

[43] Paul Greer, *Come Fly with Me. . . (But, Let Me Check the Rules before You Pay Me)*, FAA SAFETY BRIEFING, at 14 (Sept./Oct. 2010) (emphasis in original).

[44] *See* 14 C.F.R. § 119.21; FAA Legal Interpretation to Rebecca B. MacPherson, *supra* note 42, at 3.

[45] FAA Legal Interpretation to Rebecca B. MacPherson, *supra* note 42, at 2; *see* also 14 C.F.R. § 119.21 (asserting that airline transport pilots and commercial pilots conducting a commercial operation involving common carriage must obtain a Part 119 certificate).

[46] "Air commerce means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce." 14 C.F.R. § 1.1 (2017).

[47] 14 C.F.R. § 1.1.

[48] *Id.*

While the FAA does not define "common carriage" in its regulations, the administration recognizes it is a common-law term.[49] The FAA's accepted definition appears in a FAA Advisory Circular and explains that common carriage is a: "(1) holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation."[50] In *Woolsey v. National Transportation Safety Board*, the Court of Appeals for the Fifth Circuit concluded that the aforementioned guidelines are consistent with the common-law definition of common carriage, as well as appropriate within the aviation context.[51] Furthermore, the FAA has clarified that "[h]olding out to the public or a segment of the public is the 'crucial determination' in deciding if [a pilot] has engaged in common carriage or not."[52] Nonetheless, "holding out" is also left undefined within FAA regulations,[53] and instead, the FAA relies on the common-law definition:

> [H]olding out can be accomplished by any 'means which communicated to the public that a transportation service is indiscriminately available' to the members of that segment of the public it is designed to attract. FAA Advisory Circular 120-12A explains that a holding out may be accomplished through a variety of ways; signs and advertising are the most direct means, but not the only methods. There may also be a holding out without advertising, where a reputation to serve all is sufficient to constitute an offer to carry all customers. Whether or not the holding generates little success is not a factor.[54]

Essentially, if a pilot advertises, communicates, or otherwise of-

---

[49] FAA Legal Interpretation to Mark Haberkorn, at 2 (Oct. 3, 2011), https://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc200/interpretations/data/interps/2011/haberkorn%20-%20(2011)%20legal%20interpretation.pdf (citing Woolsey v. Nat'l Transp. Safety Board, 993 F.2d 516, 522 (5th Cir. 1993) (referencing *Private Carriage Versus Common Carriage of Persons or Property*, FAA Advisory Circular No. 120-12A, (Apr. 24, 1986) https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC%20120-12A.pdf)).

[50] *Private Carriage Versus Common Carriage of Persons or Property*, FAA Advisory Circular No. 120-12A, (Apr. 24, 1986) https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC%20120-12A.pdf.

[51] Woolsey v. Nat'l Transp. Safety Bd., 993 F.2d 516, 522-24 (5th Cir. 1993).

[52] FAA Legal Interpretation to Mark Haberkorn, *supra* note 49, at 2.

[53] *Flytenow I*, 808 F.3d at 892.

[54] FAA Legal Interpretation to Mark Haberkorn, *supra* note 49, at 2 (citing *Transocean Airlines*, Enforcement Proceeding 11 C.A.B. at 350 (1950); FAA Advisory Circular No. 120-12A).

fers piloting services to the public at large, the holding out element of common carriage is satisfied.

The following example illustrates the holding out concept: Jim holds a commercial pilot certificate issued under Part 61. Jim is also a member of a local country club as well as an avid (not necessarily talented) golfer. Two of Jim's long-time social friends, Michael and Tony, are members of the same country club and also enjoy playing golf. Michael and Tony want to go on a golf trip to Grandfather Golf and Country Club in Linville, North Carolina but do not want to invite Jim because they do not want to be slowed down by Jim's unfortunate golf game. Nonetheless, Michael and Tony want Jim to fly them to North Carolina. Michael and Tony offer to rent a plane, pay the flight expenses, and compensate Jim $300 per day for his piloting services. Because Jim knows Michael and Tony socially, Jim did hold out piloting services to the public. Moreover, Jim holds a commercial pilot certificate, so the $300 per day compensation is permissible.

On the other hand, if the facts changed and Jim advertised his piloting services via business cards and newspaper advertisements to people that he did not know, Jim would be holding out services to the public. If this were the case, Jim would satisfy the FAA's definition of a commercial operator engaged in common carriage because he: (1) held out a willingness; (2) to transport persons; (3) from place to place; (4) for compensation.[55] Accordingly, Jim's operation in this case would not be permissible with a Part 61 commercial pilot certificate. Instead, Jim would need to comply with the licensing requirements contained in Part 119.

IV. THE FINE LINE BETWEEN COMPENSATION AND EXPENSE-SHARING

All certificates issued under section 61, with the exception of the student pilot certificate, allow a pilot to carry passengers in some capacity.[56] However, commercial pilots and airline transport pilots are allowed to receive compensation in exchange for doing so, whereas recreational and private pilots are not.[57] Despite the general rule that private pilots are not allowed to receive compensation, section 61.113 of the Federal Aviation Regulations ("section 61.113"), titled "Private Pilot Privileges and Limitations: Pilot in Command," enumerates instances when a private pilot "may act as pilot in command of an air-

---

[55] *See* FAA Advisory Circular No. 120-12A, *supra* note 50.

[56] 14 C.F.R. § 61.101(a)(1), .113, .133, .167(a).

[57] *Compare* 14 C.F.R. § 61.133 *and* § 61.167(a) *with* 14 C.F.R. § 101(a)(2) *and* § 61.113(a).

craft carrying passengers or property for compensation or hire."[58] The focus of this comment is section 61.113(c), which states that "[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."[59] Private pilots and passengers alike have relied on the right to share the operating expenses of a flight for decades.[60] Although the FAA prohibits holding out piloting services to the public, the FAA previously allowed private pilots "to post [their travel plans] on community college bulletin boards" as a means of finding a passenger willing to share flight expenses.[61] Furthermore, the FAA allowed passengers to send a private pilot their share of the flight expenses "via a third-party site like PayPal, including any commission levied by that site . . . ."[62]

Nonetheless, in applying section 61.113(c), the FAA limits a pilot's right to share pro rata expenses with the "common-purpose test."[63] Under this test, "private pilots and their expense-sharing passengers"[64] must "share a bona fide common purpose for conducting the flight."[65] The following example illustrates an appropriate application of section 61.113(c) with regard to the common purpose test and element of holding out a willingness to transport passengers: Cathy is a private pilot. Both Cathy and her roommate Grace want to go to a University of Florida football game next Saturday in Gainesville, Florida. As a private pilot, Cathy can rent a plane and fly Grace and herself to the football game. Cathy and Grace know each other as roommates; thus, Cathy did not hold out piloting services to the public. Additionally, Cathy and Grace are both taking the flight to go to a University of Florida football game; thus, they share a bona fide common purpose. Accordingly, Grace can reimburse Cathy for exactly one-half of the total cost for fuel, oil, airport expenditures (*e.g.*, ramp, tie down, and overnight fees), and renting the plane under section 61.113(c). Consistent with a prior FAA legal interpretation,

---

[58] 14 C.F.R. § 61.113(a).

[59] 14 C.F.R. § 61.113(c).

[60] *See* 29 Fed. Reg. 4717, 4718 (Apr. 2, 1964) (referring to expense-sharing as a "traditional right").

[61] MacPherson, *supra* note 4, at 19 (citing FAA Legal Interpretation to Paul D. Ware (Feb. 13, 1976); FAA Legal Interpretation to Mark Haberkorn (Oct. 3, 2011)).

[62] *Id.* (citing FAA Legal Interpretation to Mark Haberkorn (Oct. 3, 2011)).

[63] *Flytenow I*, 808 F.3d at 886 (citing FAA Legal Interpretation to Mark Haberkorn (Oct. 3, 2011)).

[64] *Id.* (citing FAA Legal Interpretation to Mark Haberkorn (Oct. 3, 2011)).

[65] FAA Legal Interpretation to Mark Haberkorn, *supra* note 49, at 1–2 (citing FAA Legal Interpretation to Don Bobertz (May 18, 2009); FAA Legal Interpretation to Guy Mangiamele (Mar. 4, 2009)).

Grace can do so using a third-party platform such as PayPal, even if that site charges a commission fee.[66]

On the other hand, a bona fide common purpose does not exist when the pilot would not have taken the flight absent a passenger sharing expenses as well as when the pilot's sole purpose is to "transport . . . passengers from one point to another."[67] Thus, the FAA has deduced that when a private pilot shares pro rata expenses without a bona fide common purpose, the arrangement becomes a commercial operation, and is impermissible for pilots licensed under section 61.[68] For example, Jim's scenario would not satisfy the common purpose test because the sole reason Jim took the trip to Linville, North Carolina, was to fly his friends to Grandfather Golf and Country Club, and Jim would not have taken the trip otherwise.

V. "UBER IN THE SKY:"[69] AIRPOOLER AND FLYTENOW'S BUSINESS MODELS

More recently, AirPooler and Flytenow expanded the well-recognized aviation expense-sharing concept in section 61.113(c) to the Internet. Both companies created online platforms that connected private pilots to passengers who were willing to share the cost of the flight.[70] The key difference between these platforms and the traditional expense-sharing concept is that AirPooler and Flytenow's websites were able to "match pilots with large numbers of prospective passengers."[71] Although comparable to Uber or Lyft, AirPooler and Flytenow are distinguishable because pilots cannot—and do not—earn a profit, but rather, are merely limited to expense-sharing in order to comply with FAA regulations.[72] Pilots using AirPooler's platform entered "the type of plane, [and] the number of available seats," as well as the "pilot's credentials and experience."[73] In order to calculate the cost per seat on a flight, AirPooler totaled the flight's fuel cost and airport expenses, then divided that amount by the number of passengers, including the pilot.[74] Prospective passengers would then

---

[66] *See* MacPherson, *supra* note 4, at 19 (citing FAA Legal Interpretation to Paul D. Ware (Feb. 13, 1976); FAA Legal Interpretation to Mark Haberkorn (Oct. 3, 2011)).

[67] Greer, *supra* note 43, at 13.

[68] FAA Legal Interpretation to Mark Haberkorn, *supra* note 49, at 1–2 (citing FAA Legal Interpretation to Don Bobertz (May 18, 2009)).

[69] MacPherson, *supra* note 4, at 18.

[70] *See, e.g.*, Carriere, *supra* note 2; Constine, *supra* note 2.

[71] MacPherson, *supra* note 4, at 18.

[72] *Id.*

[73] Constine, *supra* note 2.

[74] *Id.*

choose from the available flights listed on AirPooler's website.[75]

Similarly, "Flytenow allowed pilots to post an 'Aviation Adventure' with a specific date, time, and point of operation" on the company's website.[76] Flytenow members, "general aviation enthusiasts,"[77] could view the flights posted and "request to participate in the planned Aviation Adventure."[78] Pilots using Flytenow "initially and unilaterally dictate[ed] the time, date, and points of operation" of the flight and could "accept or reject an enthusiast's request . . . for any or no reason."[79] Additionally, Flytenow "reportedly receive[d] a [ten-dollar] commission for each pairing it arranged."[80] AirPooler and Flytenow took steps to ensure that pilots using their platforms were complying with section 61.133(c) "to the maximum extent possible."[81] Notably, virtually identical platforms are permissible and utilized in the European Union and Canada.[82]

VI. THE FAA'S LEGAL INTERPRETATIONS TO AIRPOOLER AND FLYTENOW

In an attempt to ensure their platforms complied with FAA regulations, AirPooler and Flytenow each requested a legal interpretation from the FAA regarding the FAA's regulations as applied to their business models.[83] The FAA issued a legal interpretation to AirPooler on August 13, 2014, and to Flytenow on August 14, 2014.[84] Ultimately, both interpretations concluded that AirPooler and Flytenow's platforms constituted a commercial operation involving common car-

---

[75] *Id.*

[76] MacPherson, *supra* note 4, at 18.

[77] *Flytenow I*, 808 F.3d at 885.

[78] MacPherson, *supra* note 4, at 18.

[79] *Flytenow I*, 808 F.3d at 885 (internal quotation marks omitted).

[80] Jeff Wieand, *A Flight-Sharing Scheme Collides with Federal Regulations*, BUS. JET TRAVELER (July 2016), https://www.bjtonline.com/business-jet-news/a-flight-sharing-scheme-collides-with-federal-regulations.

[81] MacPherson, *supra* note 4, at 18.

[82] Jared Meyer, *Uber For Planes?*, FORBES.COM (May 31, 2016, 7:30 PM), http://www.forbes.com/sites/jaredmeyer/2016/05/31/uber-for-planes/#54a5cf5c383f ("Unfortunately, the FAA has taken such a hardline approach when the exact same flight-sharing activity is now completely legal in the European Union."); *see , e.g.*, Claudia Oliveira, *Is This Kind of Flight Legal?*, SKYUBER, (Sep. 2, 2017, 1:09 PM), https://support.skyuber.com/hc/en-us/articles/203687022-Is-this-kind-of-flight-legal-; JETTLY, https://jettly.com.

[83] *Flytenow I*, 808 F.3d at 885.

[84] *See* FAA Legal Interpretation to Rebecca B. MacPherson, *supra* note 42, at 1; FAA Legal Interpretation to Gregory S. Winton, at 1 (Aug. 14, 2014) https://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc200/Interpretations/data/interps/2014/Winton-AviationLawFirm%20-%20(2014)%20Legal%20Interpretation.pdf.

riage, and therefore, that FAA regulations required pilots offering services via these platforms to hold a Part 119 certificate.[85] In the August 13, 2014 interpretation to AirPooler, the FAA reasoned that sharing flight expenses is a form of compensation falling within an exception to the "general prohibition against private pilots acting as pilot in command for compensation or hire."[86] The FAA supported this conclusion with text from a Notice of Proposed Rule Making ("NPRM") from 1963, where the FAA stated:

> The ordinary meaning of "compensation" includes the act of making up for whatever has been suffered or lost through another, and the act of remuneration. Sharing expenses would appear to be prohibited when "for hire or compensation" is prohibited, so that an exception to the rule is necessary to preserve the traditional right to share expenses, and which right has not been found objectionable.[87]

Moreover, as an alternative analysis in the event the FAA found that pilots using AirPooler were receiving compensation, AirPooler asked the FAA to address whether its platform constituted a "major enterprise for profit" that would make AirPooler a commercial operator under section 1.1.[88] The FAA refused to consider this issue, concluding that the "major enterprise for profit test" was "wholly inapplicable" because the administration "view[ed] expenses-sharing as compensation," and therefore, "compensation [was] not in doubt."[89] Accordingly, the FAA found that all four elements of common carriage were satisfied, stating that AirPooler pilots were "holding out to the public to transport passengers for compensation in the form of a reduction of the operating expenses [the pilots] would have paid for the flight."[90]

In the August 14, 2014 interpretation to Flytenow, the FAA incorporated by reference the aforementioned interpretation to AirPool-

---

[85] *Flytenow I*, 808 F.3d at 887–88; FAA Legal Interpretation to Rebecca B. MacPherson, *supra* note 42, at 2–4; FAA Legal Interpretation to Gregory S. Winton, *supra* note 84, at 1.

[86] FAA Legal Interpretation to Rebecca B. MacPherson, *supra* note 42, at 3.

[87] *Id.* (quoting 28 Fed. Reg. 8157 (Aug. 8, 1963)).

[88] 14 C.F.R. § 1.1; *see also* FAA Legal Interpretation to Rebecca B. MacPherson, *supra* note 42, at 2–3 (MacPherson urged that "the major enterprise for profit" test is the test for compensation in commercial operations).

[89] FAA Legal Interpretation to Rebecca B. MacPherson, *supra* note 42, at 3–4.

[90] *Id.* at 4.

er.[91] Flytenow claimed that pilots using its platform were not required to hold a Part 119 certificate based on the absence of holding out rather than absence of compensation.[92] Nonetheless, the FAA disagreed with Flytenow's argument, finding that Flytenow's website was "designed to attract a broad segment of the public interested in transportation by air."[93] The FAA explained that "[h]olding out can be accomplished by any 'means which communicates to the public that a transportation service is indiscriminately available' to the members of that segment of the public it is designed to attract."[94] Without discussing the other three elements of common carriage, the FAA concluded that pilots using Flytenow without a Part 119 certificate could not share pro-rata expenses under section 61.113(c).[95] As a result of the foregoing FAA legal interpretations, AirPooler and Flytenow were ultimately forced to cease operations.

Although the FAA's logic seems to be plausible, it is problematic based on FAA documents issued prior and subsequent to the 1963 NPRM that the FAA relied on to support its contention that expense-sharing is a form of compensation.[96] To illustrate, in 1950, the Civil Aeronautics Board ("CAB")[97] clarified the flight expense-sharing rule governing at that time, section 43.60 of the Civil Air Regulations ("section 43.60"),[98] in its preamble to the amendment of that rule ("1950 Preamble"): "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."[99] The CAB went on to explain other permissible arrangements that were not considered compensation under section 43.60.[100] When section 43.60 was ultimately amended, the amendment was silent with regard to expense-sharing based on the CAB's view that expense-sharing was not compensation; and as such, expense-sharing did not require an excep-

---

[91] *Flytenow I*, 808 F.3d at 887.

[92] *See* FAA Legal Interpretation to Gregory S. Winton, *supra* note 84, at 2.

[93] *Id.*

[94] *Id.* (quoting Transocean Airlines, Enforcement Proceeding, 11 C.A.B. at 350 (1950)).

[95] *See id.* at 1–2.

[96] MacPherson, *supra* note 4, at 21.

[97] The CAB was "a predecessor to the FAA." *Id.* at 20.

[98] "A private pilot shall not pilot aircraft for hire. Note: This rule permits sharing the expenses of a flight or piloting aircraft in furtherance of a business when the flight is made solely for the personal transportation of the pilot." Civil Air Regulations § 43.60 (1945), http://www.intrepidcreativity.com/aviation/CAR-20-43-60-1945.pdf.

[99] 15 Fed. Reg. 5219, 5226 (Aug. 12, 1950).

[100] *See id.*

tion.[101]

After the Federal Aviation Agency[102] came into existence in 1958, the Agency recodified section 43.60 as section 61.101 of the Federal Aviation Regulations.[103] Section 61.101 governed the "[g]eneral privileges and limitations" of a private pilot certificate, which is today governed by section 61.113.[104] While section 61.101 was initially silent regarding expense-sharing based on the well-established view from the 1950 Preamble that expense-sharing was not compensation, the 1963 NPRM, cited by the FAA in its interpretation to AirPooler, sought to change that.[105] However, a NPRM is merely the Agency's "proposal to amend" an existing regulation and is in no way a binding law or regulation.[106] Not only is the Agency's position in the 1963 NPRM contrary to the CAB's position articulated in 1950, the 1963 NPRM's position was not even adopted in the final amendment.[107] Subsequently, in the preamble to the 1964 section 61.101 amendment ("1964 Preamble"), the Agency maintained the view that expense-sharing was not compensation:

> In this connection, sharing of expenses might appear to be prohibited as involving "for compensation or hire." However, since 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, this interpretation now will appear as an exception in paragraph (a)(2) [of section 61.101] in order to assure the preservation of this traditional right.[108]

The FAA revised the rule again in 1997.[109] In doing so, the FAA

---

[101] *Id.* ("A private pilot shall not pilot [an] aircraft for compensation or hire; except that he may pilot [an] aircraft in connection with any business or employment, if the flight is merely incidental thereto and does not involve the carriage of persons or property for compensation or hire, and an aircraft salesman holding a private pilot rating may demonstrate aircraft in flight to a prospective purchaser if he has at least 200 hours of flight time credited in accordance with the provisions of Part 43.").

[102] The Federal Aviation Agency became the Federal Aviation Administration in 1967. *See* FEDERAL AVIATION ADMINISTRATION, *supra* note 10.

[103] *See* 14 C.F.R. §61.101.

[104] 29 Fed. Reg. at 4718 (stating the amended version of 14 C.F.R. § 61.101 regulates the "[g]eneral privileges and limitations" of a private pilot certificate).

[105] *See* Fed. Aviation Admin., Notice of Proposed Rule Making (1963).

[106] *See id.*

[107] *See* 29 Fed. Reg. at 4718.

[108] *Id.*

[109] *See* 62 Fed. Reg. 16262, 16263, 16266 (Apr. 4, 1997) (available at

"provided a detailed list of the types of direct expenses that could be shared among a private pilot and any passengers" under section 61.113(c).[110] In its explanation, the FAA indirectly indicated that the administration still did not view expense-sharing as compensation ("1997 Preamble"):

> To avoid a pilot receiving compensation for a flight, indirect operating costs, such as maintenance expenses, are not permitted to be shared. In response to the comment regarding the equal sharing of expenses, the FAA has determined that a pilot may not pay less than the pro rata share of operating expenses. The rationale is that if pilots pay less, they would not just be sharing expenses but would actually be flying for compensation or hire.[111]

In other words, a pilot sharing flight expenses with passengers does not receive compensation unless a passenger pays for indirect operating costs or the pilot pays less than his pro rata share of expenses.[112] Nonetheless, in its interpretation to AirPooler, the FAA only referred to the 1963 NPRM and essentially ignored any authority taking a contrary position.[113] Arguably, the FAA failed to include the 1997 Preamble because its position is somewhat inconsistent with the FAA's articulation of expense-sharing in its letter to AirPooler where the FAA stated:

> [A] pilot may accept compensation in the form of a pro rata share of operating expenses for a flight from his or her passengers as an exception to the compensation or hire prohibition. If a private pilot accepts more than a pro rata share, that pilot has violated the limits of the expense-sharing exception.[114]

The FAA further claimed that without compensation, there

---

https://www.gpo.gov/fdsys/pkg/FR-1997-04-04/pdf/97-7450.pdf).

[110] MacPherson, *supra* note 4, at 20; *see also* 62 Fed. Reg. at 16263 (listing the types of expenses that can be shared by recreational pilots under § 61.101(a)); 62 Fed. Reg. at 16266 (stating that the proposed change to § 61.101(a) also applies to the expense-sharing provision for private pilots, § 61.113(c)).

[111] 62 Fed. Reg. at 16263, 16266.

[112] *See id*.

[113] FAA Legal Interpretation to Rebecca B. MacPherson, *supra* note 42, at 3.

[114] *Id*. at 2.

would be no need for an exception.[115] Nonetheless, although the FAA historically only found compensation when a flight did not fall within one of the enumerated exceptions,[116] some exceptions in present-day section 61.113 expressly acknowledge that the pilot is receiving compensation. For example, subsection (b) provides that:

> A private pilot may, *for compensation or hire*, act as pilot in command of an aircraft in connection with any business or employment if: (1) The flight is only incidental to that business or employment; and (2) The aircraft does not carry passengers or property for compensation or hire.[117]

In contrast, subsections (c), (d), (e), (f), and (h) do not explicitly reference compensation.[118] Subsection (e) allows a pilot to be "reimbursed for aircraft operating expenses that are directly related to search and location operations . . . ."[119] While it is well-established that reimbursement is a form of compensation,[120] this proposition is supported by the same authority that indicates expense-sharing is not compensation.[121] Without an indication of whether or not each subsection constitutes compensation within section 61.113 itself, the FAA should consistently rely on its statements in previous rule making documents. In finding that expense-sharing is a form of compensation, the FAA failed to do so. Moreover, while expense-sharing does appear in section 61.113(c) as an exception to the general bar on private pilots receiving compensation, the 1964 Preamble makes clear that expense-sharing is listed as an exception for clarity rather than to assert that expense-sharing is a form of compensation.[122] Consequently, the FAA's position in its letter to AirPooler, and the position that also applies to Flytenow, seems inconsistent. The proposition that expense-sharing constitutes compensation creates a greater likelihood that a pilot sharing flight expenses under section 61.113(c) will be considered a commercial operator because beyond compensation, the only remaining element of common carriage that must be established

---

[115] MacPherson, *supra* note 4, at 21.

[116] *See* Civil Air Regulations § 43.60 (1945); 15 Fed. Reg. at 5226; *see also* MacPherson, *supra* note 4, at 21.

[117] 14 C.F.R. § 61.113(b) (emphasis added).

[118] *See* 14 C.F.R. § 61.113(c)–(h).

[119] 14 C.F.R. § 61.113(e).

[120] *See e.g.*, 62 Fed. Reg. at 16262 (stating that a pilot receives compensation when he shares "indirect operating costs" or pays less than his pro rata share of expenses).

[121] *See id.*

[122] *See* 29 Fed. Reg. at 4718.

is holding out.

VII. FLYTENOW CHALLENGES THE FAA'S LEGAL INTERPRETATIONS

Unsatisfied with the FAA's legal interpretation, Flytenow filed suit in the United States Court of Appeals for the District of Columbia Circuit, alleging, *inter alia*: (1) the FAA's conclusion in its legal interpretations to AirPooler and Flytenow ("MacPherson-Winton Interpretation")—that pilots using those platforms are common carriers—was "arbitrary, capricious, or otherwise not in accordance with the law;" (2) the FAA's MacPherson-Winton Interpretation violated the Administrative Procedures Act; and (3) the court should not defer to the FAA's interpretation of common carriage, a common law term, in the MacPherson-Winton Interpretation.[123] With regard to Flytenow's first argument, Flytenow maintained that "its pilots [did] not engage in common carriage."[124] In support, Flytenow argued that the FAA misinterpreted its own rule, section 61.113(c), in finding that pilots sharing expenses received compensation.[125] Additionally, Flytenow asserted the FAA erroneously concluded that pilots using Flytenow were holding out.[126] However, the court found the arguments presented by Flytenow unconvincing, and held that the FAA correctly interpreted section 61.113.[127] The court's rationale for its holding was that section 61.113(c) "did not redefine expense sharing as something other than compensation," but instead, "creates a category of compensated flight that is permitted."[128] In support, the court relied on the FAA legal interpretations presented by the FAA, stating that "[s]ince at least the 1980s, the FAA has explained that 'any payment for a flight, even a partial payment, means that the flight is for compensation or hire.'"[129] According to the 1985 FAA legal interpretations, the foregoing holds true "even if the payment is made under the 'expense sharing' provisions."[130] The court went on to agree with the FAA's assertion that the administration "construes the term compensation very broadly; any reimbursement of expenses, including pro rata share of operating expenses, constitutes compensation."[131] Addi-

---

[123] Petitioner's Opening Brief at 1–2, *Flytenow I*, 808 F.3d at 892 (No. 14-1168).

[124] *Flytenow I*, 808 F.3d at 889 (internal quotation marks omitted).

[125] *Id.* at 890.

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* (quoting FAA Legal Interpretation to Hal Kee (undated, identified by FAA as 1985)); *see also* Brief for the Respondent at 20, *Flytenow I*, 808 F.3d 882 (No. 14-1168).

[130] *Flytenow I*, 808 F.3d at 890–91 (citing FAA Legal Interpretation to Hal Kee; FAA Legal Interpretation to Thomas Chero (Dec. 26, 1985)).

[131] *Id.* at 891 (citing FAA Legal Interpretation to Mark Haberkorn, at 2 n.1 (Oct. 3,

tionally, the court indicated that a common purpose shared among Flytenow pilots and passengers was irrelevant because the common-purpose test is only "part of an exception under which the FAA permits private pilots to receive compensation," and therefore, "has no bearing on whether compensation in the form of passengers' expense sharing, together with holding out to the general public, tends to show that a private pilot is operating as a common carrier."[132]

The court next addressed Flytenow's argument that pilots were not holding out, noting that Flytenow's argument erroneously relied on section 119.5(k) of the Act, which provides: "No person may advertise or otherwise offer to perform an operation subject to this part [governing air carriers] unless that person is authorized by the [FAA] to conduct that operation."[133] Essentially, section 119.5(k) prohibits pilots from advertising unauthorized services and neither defines common carrier nor codifies the holding out requirement.[134] The court relied on the definition of holding out articulated by the FAA in Advisory Circular 120-12A and had "no trouble finding that Flytenow's pilots would be doing so" based on the fact that "[a]ny prospective passenger searching for flights on the Internet could readily arrange for travel via Flytenow.com."[135] Although Flytenow required membership in order to use the platform, the FAA concluded pilots using Flytenow were holding out because "membership require[d] nothing more than signing up."[136] Accordingly, because the court established that Flytenow pilots were receiving compensation as well as holding out, it had "no difficulty upholding" the FAA's conclusion that Flytenow pilots were acting as common carriers and were required to obtain a certificate as provided in Part 119.[137] Flytenow raised other procedural and constitutional arguments, but the court nonetheless remained unconvinced.[138]

With regard to Flytenow's first line of argument, that pilots using the Flytenow platform were neither holding out services to the public nor receiving compensation, it is worth noting that the court's analysis seemed "both sparse and superficial."[139] Despite Flytenow's ref-

---

2011)).

[132] *Id.*

[133] 14 C.F.R. § 119.5(k); *see also* 14 C.F.R. § 119.1(a)(1) ("This part applies to each person operating or intending to operate civil aircraft . . . [a]s an air carrier . . . .").

[134] *Flytenow I*, 808 F.3d at 892.

[135] *Id.*

[136] *Id.*

[137] *Id.* at 889–92.

[138] *Id.* at 892–95.

[139] MacPherson, *supra* note 4, at 22.

erence to the 1964 and 1997 Preambles in its Brief,[140] the court nonetheless relied on, without further analysis, the FAA's pronouncements in legal interpretations from 1985 that were cited solely in the FAA's Brief.[141] Additionally, the FAA failed to discuss "the FAA's previous statements in contemporaneous rulemaking documents"[142] that provided support for Flytenow's position that accepting pro rata share of operating expenses was not compensation.[143] This is problematic given the fact that the 1997 Preamble is more recent than the 1985 FAA legal interpretations relied on by the FAA and the court. Although the court cited facts that seem to plausibly establish holding out, the court ignored the FAA's historic position "that physical bulletin board postings to wide segments of the population do not qualify as holding out."[144] The court did not address the FAA's conceivably conflicting position that "Internet postings to wide segments of the population" constitute holding out.[145] The FAA has made clear that holding out turns on the size of the audience the post is intended for.[146] However, the FAA has failed to provide any guidance or bright-line rule concerning when a social media post will cross the line and be considered holding out. Consequently, pilots are left with "no meaningful standard [of what constitutes holding out] in the context of social media postings."[147] Although it is arguably the FAA's role to clarify this issue, "the court offered no parameters for the FAA to consider."[148]

A. Did the FAA Comply with The Administrative Procedure Act?

The Administrative Procedure Act ("APA") "establishes the procedures federal administrative agencies use for 'rule making,' defined

---

[140] Petitioner's Opening Brief, *supra* note 123, at 3, 6, 21–22.

[141] *Flytenow I*, 808 F.3d at 890–91 (citing FAA Legal Interpretation to Hal Kee; FAA Legal Interpretation to Thomas Chero (Dec. 26, 1985)); *see also* Brief for the Respondent, *supra* note 129, at 20.

[142] MacPherson, *supra* note 4, at 22 (referring to 62 Fed. Reg. at 16263, 16266; 29 Fed. Reg. at 4718).

[143] *Id.*

[144] *Id.*; *see also* FAA Legal Interpretation to Paul D. Ware (stating that a private pilot is allowed to post a trip on a community college bulletin board in order to find passengers willing to share operating expenses for that flight).

[145] MacPherson, *supra* note 4, at 22; *see also* FAA Legal Interpretation to Mark Haberkorn, *supra* note 49 (stating that a Facebook post could constitute holding out "if it expresses a willingness to provide transportation for all within this class or segment to the extent of its capacity").

[146] *See e.g.*, FAA Legal Interpretation to Mark Haberkorn, *supra* note 49.

[147] MacPherson, *supra* note 4, at 22.

[148] *Id.*

as the process of 'formulating, amending, or repealing a rule.'"[149] The APA embraces a broad definition of the word "rule," encompassing the term to include "statement[s] of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[150] Section 553 of the APA ("section 553") requires agencies to engage in "notice-and-comment rulemaking" before circulating final rules and articulates a three-step procedure for doing so.[151] First, the agency must issue and publish a "[g]eneral notice of proposed rule making."[152] Second, if notice is required, the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . . ."[153] The agency is subsequently required to "consider and respond to significant comments received during the period for public comment."[154] Third, after considering material presented during the second step, the agency promulgates the final rule along with "a concise general statement of [the rule's] basis and purpose."[155] However, some agency rules are not required to be issued through the section 553 notice-and-comment process.[156] Specifically, the notice-and-comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."[157] The Supreme Court of the United States recognizes that an interpretative rule is something "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[158] However, the term "interpretative rule" is left undefined in the APA, and "its precise meaning is the source of much scholarly and judicial debate."[159]

In *Flytenow v. FAA*, Flytenow argued that the FAA violated the Administrative Procedure Act by failing to comply with section 553's notice-and-comment requirement because the MacPherson-Winton

---

[149] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015) (quoting 5 U.S.C. § 551(5) (2000)).

[150] 5 U.S.C. § 551(4).

[151] 5 U.S.C. § 553 (2000).

[152] 5 U.S.C. § 553(b).

[153] 5 U.S.C. § 553(c).

[154] *Perez*, 135 S. Ct. at 1203 (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); Thompson v. Clark, 741 F.2d 401, 408 (D.C. Cir. 1984)).

[155] 5 U.S.C. § 553(c).

[156] *Perez*, 135 S. Ct. at 1203.

[157] 5 U.S.C. § 553(b)(A).

[158] *Perez*, 135 S. Ct. at 1204 (quoting Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995)).

[159] *Id.* (citing Richard J. Pierce, *Distinguishing Legislative Rules*, 52 ADMIN. L. REV. 547, 549 (2000); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 929 (2004)).

Interpretation constituted a "significant deviation from the Administration's prior interpretation of its own regulations . . . ."[160] In its opinion, the court dismissed Flytenow's argument in a single paragraph based on the foregoing interpretative rule exception to section 553's notice-and-comment requirement.[161] While it seems likely that a FAA legal interpretation constitutes an interpretative rule within the meaning of the exception, the court ignored the fact that the FAA's original position, that expense-sharing is not compensation, appeared in the preamble to a FAA regulation amendment rather than a legal interpretation.[162] In fact, the Supreme Court of the United States, in *Perez v. Mortgage Bankers Association*, expressly rejected the contention that an agency's "definitive interpretation of a regulation" is the same as an amendment.[163] The Court recognized that in both "ordinary parlance and legal usage," the word "amend" "has its own meaning [that is] separate and apart from" the word "interpret."[164] Accordingly, the *Perez* court held that "an agency can 'interpret' a regulation without 'effectively amend[ing]' the underlying source of law."[165]

Furthermore, in *Perez*, the Court maintained that "[b]ecause an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretative rule."[166] It follows that the alternative is also true. If an agency issues a rule that is subject to section 553 notice-and-comment, any subsequent changes to that rule must follow the same notice-and-comment requirements, regardless of how the rule is changed. If the foregoing proposition is accepted, Flytenow was correct in claiming that the FAA violated the APA by failing to comply with section 553's notice-and-comment requirements when the administration changed its interpretation of expense-sharing. Although the FAA's proposition that expense-sharing is compensation appeared in the MacPherson-Winton Interpretation and is likely not subject to section 553's notice-and-comment re-

---

[160] *Flytenow I*, 808 F.3d at 889.

[161] *Id.*

[162] 15 Fed. Reg. at 5226; 29 Fed. Reg. at 4718.

[163] *Perez*, 135 S. Ct. at 1207–08.

[164] *Id.*; *compare* BLACK'S LAW DICTIONARY 98 (10th ed. 2014) (defining "amend" as "[t]o change the wording of" or "formally alter . . . by striking out, inserting, or substituting words") *with Perez*, 135 S. Ct. at 943 (defining "interpret" as "[t]o ascertain the meaning and significance of thoughts expressed in words").

[165] *Perez*, 135 S. Ct at 1208.

[166] *Id.* at 1206; *see also* F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (stating that the APA "makes no distinction . . . between initial agency action and subsequent agency action undoing or reversing that action").

quirement on its own, the predecessor to that rule originated in a preamble to an amendment of the corresponding FAA regulation.[167] Hence, any subsequent changes to the FAA regulation at issue arguably require notice-and-comment under section 553. This would also hold true for the 1985 legal interpretations relied upon by the court in *Flytenow*. To illustrate, in the event that the FAA, in its 1985 legal interpretations, intended to change its position from the 1964 Preamble, then the FAA needed to comply with section 553 because the position that the administration sought to alter was formulated in a preamble rather than an interpretative rule. Although this is a meritorious debate, the court in *Flytenow*, and ultimately the United States Supreme Court, declined to address it.

B. Was the FAA's MacPherson-Winton Interpretation entitled to Deference?

Flytenow challenged the level of deference the FAA is entitled to when defining the historically common-law term, "common carriage," that is left undefined in the FAA's regulations.[168] Similar to notice-and-comment, the court only briefly entertained Flytenow's challenge in a single paragraph.[169] In dismissing Flytenow's challenge, the court applied "the familiar . . . framework" articulated by the Supreme Court through Justice Scalia's opinion in *Auer v. Robbins*, requiring a court to "treat the agency's interpretation as controlling unless 'plainly erroneous or inconsistent with the regulation.'"[170] The court went on to say that even without *Auer* deference, it had "no difficulty upholding the FAA's interpretation of its regulations in this case."[171]

Auer v. Robbins addressed a challenge to the Fair Labor Standards Act of 1938 ("FLSA").[172] Specifically, employees of the St. Louis Police Department sued the St. Louis Board of Police Commissioners, "seeking payment of overtime that they claimed was owed under [the FLSA]."[173] The case turned on whether or not the police department employees were "paid on a salary basis" as defined and interpreted by the Secretary of Labor.[174] Ultimately, the employees petitioned the United States Supreme Court, and the Court upheld the

---

[167] 15 Fed. Reg. at 5226; 29 Fed. Reg. at 4718.

[168] *See Flytenow I*, 808 F.3d at 889–90; *see also* Brief for Petitioner at 29–36, *Flytenow I*, 808 F.3d at 892 (No. 14-1168.

[169] *See Flytenow I*, 808 F.3d at 889–90.

[170] *Id.* (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).

[171] *Id.* at 890.

[172] Auer v. Robbins, 117 S. Ct. 905, 908 (1997).

[173] *Auer*, 117 S. Ct. at 908.

[174] *Id.*

Secretary of Labor's interpretation because Congress had not "directly spoken to the precise question at issue," and the interpretation was "based on permissible construction of the statute."[175] In other words, the Court ultimately deferred to the Secretary's interpretation. Remarkably, the Court recognized that, "[a] court may certainly . . . disregard an agency regulation that is contrary to the substantive requirements of the law, or one that appears on the public record to have been issued in violation of procedural prerequisites, such as the 'notice and comment' requirements of the APA."[176] Although the Court rejected Petitioners' challenge in *Auer*, it appears that the result of the case would change if some of the foregoing material facts differed.[177]

The notice-and-comment requirements discussed in *Auer* are the same procedural requirements that the FAA arguably violated.[178] Based on the foregoing, and assuming *arguendo* that the FAA needed to and failed to comply with section 553's notice-and-comment requirements, the court in *Flytenow* should not have deferred to the FAA's contention that expense-sharing is compensation, even under *Auer*. Nonetheless, the *Flytenow* court did not discuss this segment of the *Auer* opinion. More noteworthy is the fact that almost a decade after the *Auer* opinion, Scalia's concurrence in the *Perez* opinion argues for the Court to abandon the opinion he wrote in *Auer* and instead, "apply[] the [APA] as written."[179] In support, Scalia noted that "[d]ecid[ing] that the text [of an agency's rule] means what the agency says" is tantamount to saying that one litigant is wrong because the adversary says so.[180] Nonetheless, the *Flytenow* court also declined to discuss Scalia's rejection of a concurring opinion he wrote.

Furthermore, Flytenow cited to other deference cases in its brief that the court declined to discuss.[181] Flytenow proposed the court apply deference to the FAA in accordance with either *Skidmore v. Swift & Co.* or *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.[182] In *Skidmore*, the Court employed a balancing test for agency deference and stated that an agency's "judgment in a particular case [depends on] the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronounce-

---

[175] *Id.* at 909 (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

[176] *Id.* at 910.

[177] *See Auer*, 117 S. Ct. at 910.

[178] *See id.*

[179] *Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring).

[180] *Id.* at 1212 (Scalia, J., concurring).

[181] Brief for Petitioner, *supra* note 168, at 29–36.

[182] *Id.*

ments, and all [the] factors which give it power to persuade, if lacking power to control."[183] If an agency changes its position with regard to a certain rule, the agency "must supply a reasoned analysis establishing that prior policies and standards are being deliberately changed."[184] Hence, the result when applying *Skidmore* deference will largely depend on the facts of each case.

In 2012, the Court applied *Skidmore* deference, rather than *Auer* deference, in the case *Christopher v. SmithKline Beecham Corp.* In *Christopher*, the Court found the Department of Labor's ("DOL"), interpretation of its regulations unpersuasive.[185] In *Christopher*, the statute at issue was a portion of the Fair Labor Standards Act ("FLSA") that required employers to comply with minimum wage and maximum hour requirements.[186] However, the requirements did not apply to "outside salesm[e]n," and accordingly, the Court addressed the DOL's interpretation of the term as applied to pharmaceutical sales representatives.[187] The DOL argued that pharmaceutical sales representatives did not constitute outside salesmen under the regulation because no property title was transferred; however, the Court disagreed.[188] In reaching its conclusion, the Court stated that its "practice of deferring to an agency's interpretation of its own unambiguous regulations undoubtedly has important advantages, but this practice creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes of rulemaking.'"[189] If this were the case, regulated parties would essentially be required to speculate how the agency would interpret a broad regulation if deference to the agency were given.[190] In refusing to apply *Auer* deference, the Court acknowledged that such deference is not warranted in cases where the agency interpretation "does not reflect the agency's fair and considered judgment,"[191] "conflicts with a prior

---

[183] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[184] Verizon Tel. Cos. v. FCC, 570 F.3d 294, 301 (D.C. Cir. 2009) (internal quotation marks omitted).

[185] *See* Christopher v. Smith Kline Beecham Corp., 132 S. Ct. 2156, 2169–70 (2012).

[186] *Christopher*, 132 S. Ct. at 2161 (citing 29 U.S.C. §§ 206–207 (2006 ed. and Supp. IV)).

[187] *Id.* (citing 29 U.S.C. § 213(a)(1) (2017)).

[188] *Id*. at 2169.

[189] *Id.* at 2168 (quoting Talk America, Inc. v. Michigan Bell Telephone Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (footnote omitted)); *see also* Stephenson & Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1461–62 (2011); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 655–68 (1996).

[190] *Christopher*, 132 S. Ct. at 2168 (2012).

[191] *Id*. at 2166 (quoting *Auer*, 117 S. Ct. at 905).

interpretation,"[192] or "is nothing more than a 'convenient litigating position.'"[193] Furthermore, a court should not defer to an agency's interpretation when doing so would result in "unfair surprise"[194] or "seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"[195] Notably, the court cited to the preamble of the regulation at issue to support its finding that "[t]he statute and regulations d[id] not provide clear notice" that the pharmaceutical industry's "longstanding practice of treating retailers as exempt outside salesman transgressed the FLSA."[196]

After refusing to apply *Auer* deference, the Court analyzed the first factor from *Skidmore* as applied to the facts in *Christopher*.[197] Subsequently, the Court concluded that the DOL's interpretation lacked thoroughness because the DOL "first announced its view that pharmaceutical sales representatives do not qualify as outside salesman in a series of *amicus* briefs."[198] Next, the Court found that the DOL's interpretation was inconsistent with the FLSA.[199] Because the FLSA defined a "sale" as, *inter alia*, a "consignment for sale" in its regulations, the Court concluded that the definition did not involve a transfer of title.[200] After the Court concluded "the DOL's interpretation [was] neither entitled to *Auer* deference nor persuasive in its own right," the Court employed "traditional tools of interpretation" to determine the proper interpretation of the term "outside salesmen," as applied to the case.[201] The Court focused on the text and word choice of the FLSA, noting that the definition of "outside salesman" used the word "includes" rather than "means."[202] Hence, the enumerated ex-

---

[192] *Id.* (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994)).

[193] *Id.* (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988)).

[194] *Id.* at 2167; *see also* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170–71 (2007) (deferring to an agency's new interpretation because the agency proceeded through section 553 notice-and-comment rule making and the new interpretation "create[d] no unfair surprise"); Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 158 (1991) (identifying "adequacy of notice to regulated parties" as one factor relevant to the reasonableness of the agency's interpretation).

[195] *Christopher*, 132 S. Ct. at 2167 (quoting Gates & Fox Co. v. Occupational Safety and Health Review Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1996)).

[196] *Id.*

[197] *See id.* at 2169.

[198] *Id.*

[199] *Id.*

[200] *Id.* (citing Sturm v. Boker, 150 U.S. 312, 330 (1893); Rio Grande Oil Co. v. Miller Rubber Co. of N.Y., 250 P. 564, 565 (1926); Hawkland, *Consignment Selling Under the Uniform Commercial Code*, 67 COM. L.J. 146, 147 (1962)).

[201] *Christopher*, 132 S. Ct. at 2170.

[202] *Id.*

amples were "illustrative, not exhaustive."[203] Further, the reasonable interpretation of "other disposition," the "broad catchall phrase" used in the FLSA, included "those arrangements that are tantamount, in a particular industry, to a paradigmatic sale of a commodity."[204] Essentially, the Court articulated its own interpretation for the term "outside salesmen" that was contrary to the interpretation provided by the DOL.[205] Accordingly, the Court held that the "most reasonable interpretation" of the DOL's regulation was that pharmaceutical sales representatives qualified as "outside salesmen," and thus were exempt from the FLSA's minimum wage and maximum hour requirements.[206]

Applying the analysis from *Christopher* to Flytenow's case, the FAA arguably lacked thoroughness and valid reasoning in determining that expense-sharing did not constitute compensation. To illustrate, the FAA's MacPherson-Winton Interpretation merely cited the 1963 NPRM.[207] Flytenow's brief to the court identified that the 1963 NPRM was ultimately not adopted,[208] and further argued that:

> [T]he 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.[209]

Moreover, the MacPherson-Winton Interpretation is also inconsistent with the FAA's position that expense-sharing is not compensation as articulated in the 1964 and 1997 Preambles.[210] Hence, the first three *Skidmore* factors indicate that the MacPherson-Winton Interpretation also lacked "power to persuade,"[211] and accordingly, the Washington D.C. Circuit Court should not have afforded deference to the FAA with regard to its MacPherson-Winton Interpretation.

---

[203] *Id.* (citing Burgess v. United States, 553 U.S. 124, 131 n.3 (2008)).
[204] *Id.* at 2171–72.
[205] *Id.* at 2174.
[206] *Id.*
[207] *See* FAA Legal Interpretation to Rebecca B. MacPherson, *supra* note 42, at 3.
[208] Brief for Petitioner, *supra* note 168, at 29–36.
[209] Brief for Petitioner, *supra* note 168, at 32–33.
[210] *See* 62 Fed. Reg. at 16263, 16266; 29 Fed. Reg. at 4718.
[211] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

In the alternative, Flytenow argued that the court should apply *Chevron* deference, where a court reviewing an agency interpretation of its own regulation analyzes the following questions:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[212]

Ultimately, the *Chevron* court concluded that when Congress is silent on defining a term within an agency's regulation, a court should defer to an agency's interpretation as long as the interpretation "represents a reasonable accommodation of manifestly competing interests,"[213] provided "the regulatory scheme is technical and complex,"[214] "the agency considered the matter in a detailed and reasoned fashion,"[215] "and the decision involves reconciling conflicting policies."[216] Even if the court were to apply *Chevron* deference, it is debatable whether the FAA's MacPherson-Winton Interpretation would be entitled to deference. Congress has not directly spoken to whether expense-sharing constitutes compensation within the meaning of section 61.113.[217] Thus, the FAA's interpretation should stand under *Chevron* as long as it is "permissible."[218] The competing interests in

---

[212] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 104 S. Ct. 2778, 2781–82 (1984) (footnotes omitted).

[213] *Id.* at 2792–93.

[214] *Id.* at 2793 (citing Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist., 467 U.S. 380, 390 (1984)).

[215] *Id.* (citing SEC v. Sloan, 436 U.S. 103, 117 (1978); Adamo Wrecking Co. v. United States, 434 U.S. 275, 287 n.5 (1978); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[216] *Id.* (citing Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699–700 (1988); United States v. Shimer, 367 U.S. 374, 382 (1961)).

[217] *See* Brief for Petitioner, *supra* note 168, at 34–35, *Flytenow I*, 808 F.3d 882.

[218] *Chevron*, 104 S. Ct. at 2782.

this context are essentially the FAA's interest in promoting safety among all parties involved in general aviation and a private pilot's interest in using Flytenow to generate opportunities for expense-sharing under section 61.113. In essence, the FAA's concern with regard to platforms similar to AirPooler and Flytenow did not match the response embodied in the MacPherson-Winton Interpretation, and therefore does not represent a "reasonable accommodation"[219] of the parties' competing interests. Furthermore, while the FAA routinely administers a "technical and complex" regulatory scheme, the expense-sharing concept at issue is neither technical nor complex.[220] Lastly, the FAA's basis for asserting that expense-sharing is not compensation is merely rooted in a notice of proposed rule making that was never actually adopted.[221] Consequently, the FAA's MacPherson-Winton Interpretation arguably should not be afforded deference under the *Chevron* standard, however, the *Flytenow* court failed to discuss such a scenario.

VIII. FLYTENOW'S PETITION TO THE SUPREME COURT OF THE UNITED STATES

Unsatisfied with the court of appeals opinion, Flytenow's attorneys petitioned the United States Supreme Court to grant certiorari and hear the case.[222] In its brief to the Supreme Court, Flytenow's argument seemed to focus on the term "common carrier" rather than "compensation."[223] First, Flytenow argued that federal courts should not allow an agency to interpret common law terms that are contained in the agency's regulations, specifically the term common carrier.[224] Flytenow argued that the court of appeals incorrectly applied *Auer* deference to the FAA's interpretation of common carrier.[225] In support, Flytenow also noted a circuit split regarding what deference, if any, is owed to an agency's interpretation of common law.[226] Alternatively, Flytenow contended that the court of appeals definition of "common carrier" constituted a departure from the common law definition, and such a departure warranted remand.[227]

It is well established, and recognized by the FAA, that common

---

[219] *Id.* at 2792–93.

[220] Brief for Petitioner, *supra* note 168, at 35–36.

[221] FAA Legal Interpretation to Rebecca MacPherson, *supra* note 42, at 3 (Aug. 13, 2014); *see also* Fed. Aviation Admin., Notice of Proposed Rule Making (1963).

[222] *Flytenow II*, 2017 WL 69183.

[223] *See* Brief for Petitioner at 46–56, *Flytenow II*, 2017 WL 69183 (No. 16-14).

[224] Brief for Petitioner, *supra* note 223, at 29–30.

[225] *Id.*

[226] *Id.*

[227] *Id*. at 21.

carrier is predominately a common-law term, referring to "a commercial transportation enterprise that 'holds itself out to the public' and is willing to take all comers who are willing to pay the fare, 'without refusal.'"[228] Justice Joseph Story defined the term in 1832, stating that a service must be offered to the public at large on demand and the carrier "must hold himself out as ready to engage in the transportation of goods for hire, as a business, not a casual occupation . . . ."[229] A common carrier cannot make "individualized decisions" to either accept or deny a passenger on a case-by-case basis.[230] These definitions also hold true specifically in the aviation context, "[i]t is generally recognized that an air carrier, within the limits of its accommodations, must not discriminate in providing transportation for those who apply for it; that is, it may not accommodate one and arbitrarily refuse another."[231] Moreover, the FAA has made clear that "holding out," as described by Justice Story, is an element of common carriage.[232]

Oddly enough, the authority cited in Flytenow's brief for the most part seems consistent with the position articulated by the FAA and accepted by the court of appeals regarding the definition of common carrier. Flytenow merely focused on the fact that, in contrast to major airline companies, Flytenow pilots did not have to accept every passenger that requested to share expenses.[233] Based on that alone, the FAA's interpretation does not appear to be, as Flytenow contended, a drastic departure[234] from the common law meaning of common carrier. More noteworthy, is the fact that Flytenow did not raise any direct questions regarding the FAA and lower court's interpretation of expense-sharing and compensation within section 61.113. As established through the analysis and sources cited *supra*, this author believes that Flytenow's argument would have been stronger, possibly rendering a different result, if Flytenow focused their appeal on compensation alone rather than the definition of common carrier. Likewise, because the *Perez* Court did not address whether an agency was required to comply with section 553 notice-and-comment when the initial rule is rooted in a preamble and a subsequent alteration to that

---

[228] C.S.I. Aviation Servs. v. United States Dep't of Transp., 637 F.3d 408, 415 (D.C. Cir. 2011) (quoting BLACK'S LAW DICTIONARY 226 (8th ed. 2004)).

[229] J. STORY, COMMENTARIES ON THE LAW OF BAILMENTS § 495 (8th ed. 1832).

[230] *See* FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979).

[231] Kristine Cordier Karnezis, Annotation, *Propriety of Air Carrier's Refusal for Safety Reasons to Transport Passenger or Property Under 49 U.S.C.A. § 44902(b)*, 192 A.L.R. Fed. 403 § 2[a] (2004).

[232] *Private Carriage Versus Common Carriage of Persons or Property*, FAA Advisory Circular No. 120-12A (Apr. 24, 1986).

[233] Brief for Petitioner, *supra* note 223, at 24–25.

[234] *Id*. at 16.

rule occurred through a legal interpretation, the Court could have addressed this issue in *Flytenow*.[235] This author proposes that when the initial rule required section 553 notice-and-comment, any subsequent changes to said rule must also comply with section 553, regardless of the means the agency uses to change the rule. However, Flytenow failed to advance this argument, and consequently, provided the Court with no authority to address section 553 in the aforementioned context. Ultimately, the Court denied Flytenow's petition for certiorari.[236] As a result, Flytenow, AirPooler, and other similar platforms remain inoperative until the Supreme Court addresses this issue or the FAA changes its position.

IX. THE FUTURE OF EXPENSE-SHARING IN AVIATION

Although the FAA declined to embrace technological innovation with regard to AirPooler and Flytenow, "the issue might not be fully settled."[237] Upon hearing about *Flytenow*, Congressman Mark Sanford from South Carolina began working on an amendment to the FAA Reauthorization Act of 2016[238] so that the FAA will be required "to issue new regulations to facilitate operation of flight-sharing websites such as Flytenow."[239] Specifically, Sanford intends to "make it easier for private pilots to communicate with the public about opportunities to share flights and split costs."[240] Based on the nature of Sanford's intentions, "[h]e should expect no help from the FAA."[241] This proposed amendment appears to address the "holding out" element at issue in the *Flytenow* case, rather than compensation. If passed, Sanford's amendment would allow a private pilot to "communicate with the public, in any manner the person determines appropriate, to facilitate a covered flight," effectively abolishing the holding out element.[242] Although this amendment specifically relates to private pilots, it is unclear how it will play out among commercial

---

[235] *See Perez*, 135 S. Ct. 1199.

[236] *Flytenow II*, 2017 WL 69183.

[237] Chad Trautvetter, *U.S. Supreme Court Declines To Hear Flytenow Case*, AIN ONLINE (Jan. 10, 2017), http://www.ainonline.com/aviation-news/general-aviation/2017-01-10/us-supreme-court-declines-hear-flytenow-case.

[238] Matt Thurber, *Sanford Amendment Supports Aircraft Ridesharing Sites*, AIN ONLINE, (Apr. 19, 2016), http://www.ainonline.com/aviation-news/general-aviation/2016-04-19/sanford-amendment-supports-aircraft-ridesharing-sites (stating that representative Mark Sanford submitted the amendment to H.R. 4441, the Aviation Innovation, Reform and Reauthorization Act of 2016).

[239] Wieand, *supra* note 80.

[240] Emma Dumain, *Sanford backs flight sharing Supports Uber-style services based on web*, POST AND COURIER, (Apr. 25, 2016).

[241] Wieand, *supra* note 80.

[242] Thurber, *supra* note 238.

and airline transport pilots who are likewise presently prohibited from "holding out" plane and piloting services under Federal Aviation Regulations.[243] If passed, the amendment will likely render the FAA's finding that pilots using Flytenow were "holding out" obsolete and irrelevant. In other instances, it has been the FAA rather than Congress, that altered their own regulations to conform to advancements in technology. For example, the FAA issued new commercial drone rules in 2016 that allowed "a broad range of businesses to use drones" and "made it much easier for [those] companies to use drones."[244] Quite the contrary is true with regard to ride-sharing in general aviation via Internet platforms such as AirPooler and Flytenow.

One justification for FAA regulations over ride-sharing is to prevent "'unsuspecting' members of the public from paying to fly with non-commercially certified pilots or operations," and therefore, "'[r]egulators have good reasons to distinguish between pilots who are licensed to offer services to the public and those who are not.'"[245] The FAA's rationale behind all of this is safety–to prevent general aviation accidents. However, when the FAA issues a private pilot certificate, the FAA has already concluded that the pilot can safely operate the aircraft and carry passengers therein. To illustrate, the training requirements for a private pilot certificate include at least 40 hours of flight training (much more in most cases), including 10 hours of solo flight, as well as ground instruction.[246] Upon completion of the training, the pilot must satisfactorily pass three separate tests before the FAA issues a private pilot certificate: (1) a written multiple-choice test; (2) an oral examination administered by a FAA examiner; and (3) a practical knowledge test where the pilot acts as pilot-in-command of an aircraft while a FAA examiner observes the pilot perform various flight maneuvers.[247] A distinction is often drawn between ride-sharing in automobiles and flight-sharing in general aviation based on the view that cars are inherently safer.[248] Yet, the

---

[243] *See e.g.*, Greer, *supra* note 43, at 14 (noting that pilots with a commercial pilot certificate should "be particularly careful" if they are "both the pilot and provider of an aircraft to someone for compensation," and that "the FAA will look at the actual nature of the relationship" rather than "any written agreements").

[244] Cecilia Kang, *F.A.A. Issues Commercial Drone Rules*, N.Y. TIMES (June 21, 2016), https://www.nytimes.com/2016/06/22/technology/drone-rules-commercial-use-faa.html?_r=1.

[245] Matt Thurber, *AIN Blog: Is Flight-sharing Dead? (It's all Uber's Fault Part 2)*, AIN ONLINE (Jan. 17, 2017, 11:35 A.M.).

[246] *See* 14 C.F.R. §61.109(a).

[247] *See* 14 C.F.R. § 61.103; *see also* 14 C.F.R. § 61.105 (describing the aeronautical knowledge required for a private pilot certificate).

[248] *See e.g.*, Thurber, *supra* note 245.

extensive training and examinations required to obtain a private pilot license are often overlooked. Flight training takes months and sometimes years, whereas a driver's license can simply be obtained in a few hours.

If the FAA possesses a reasonable and legitimate concern that private pilots cannot safely carry passengers in a ride-sharing situation, the FAA should respond in a manner that balances the concern. When confronted with Flytenow and AirPooler's platforms, the FAA's response equated to a complete ban on all ride-sharing web-based platforms that seems somewhat extreme. On the other hand, a much more appropriate response from the FAA could have been something analogous to creating another pilot certificate that falls in between a private pilot certificate and a commercial pilot certificate with regard to the training requirements and examination standards. Another option would be for the FAA to require a logbook endorsement, signed by a FAA instructor, indicating that the private pilot received additional training regarding ride-sharing, and/or that the FAA instructor verifies that the private pilot is able to safely participate in ride-sharing. In response to the FAA's interest in protecting unsuspecting passengers who think they are flying with a more qualified and experienced pilot, the FAA should simply require any web-based ride-sharing platforms to notify the passenger of the pilot's training and experience before the passenger agrees to participate in the flight. In sum, although the FAA does not permit internet platforms that facilitate expense-sharing in general aviation at present, this could likely change in the coming years.