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FAA Tells Justices to Pass on Flight-Sharing Startup's Case

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The U.S. Supreme Court should decline to take up a pioneering flight-sharing startup's battle with federal regulators, the Obama administration told the justices on Monday.

Flytenow Inc. is a web-based service in which private pilots fill seats among passengers who want to share the expenses of transportation on pre-planned flights. The plight of the company has captured the attention and support of pro-business groups that view Flytenow's service as another step in the sharing economy.

The government, directed by the Supreme Court to respond to Flytenow's petition, argued that the Federal Aviation Administration and the U.S. Court of Appeals for the D.C. Circuit, which ruled for regulators, were correct that pilots who solicit passengers using Flytenow are "common carriers" who must satisfy the more stringent aviation rules.

"At base, petitioner's argument is that the FAA and the court of appeals erroneously applied a long-established and legally appropriate definition of 'common carrier' to its particular business model," Ian Gershengorn, the acting solicitor general, wrote in the government's response. "That fact-bound and case-specific argument does not warrant this court's review."

Before Flytenow's service was available, private pilots generally posted requests for shared expenses on bulletin boards, which did not violate FAA regulations. In early 2014, Flytenow sought a legal interpretation from the FAA about its business plan's compliance with the 1958 Federal Aviation Act and agency regulations.

The FAA in response said pilots offering flight-sharing services on the website would be operating as "common carriers," requiring them to have commercial pilot licenses. Pilots with only private licenses would violate FAA regulations if they offered their services on Flytenow, according to the agency's letter.

A three-judge panel on Dec. 18 unanimously agreed with the FAA, holding that the flight-sharing services offered on the website met the definition of "common carrier." After the ruling, Flytenow said it was left with no choice but to shut down.

In *Flytenow v. FAA*, Flytenow, represented by Jonathan Riches of the Goldwater Institute, raised three issues: what level of deference is owed an interpretation of common-law terms; whether the D.C. Circuit was wrong to apply the common carrier definition to pilots who used the internet to communicate and do not earn a commercial profit; and whether the FAA violated the First Amendment by discriminating against these communications.

The government, in its Supreme Court filing, acknowledged that numerous decisions defining "common carrier" are "somewhat less than harmonious." But, the Justice Department argued, whatever the particular test, "some type of holding out to the public is the sine qua non of the act of providing transportation of passengers or property by aircraft as a common carrier."

The government rejected Flytenow's First Amendment argument, saying that the right does not prohibit the FAA "from requiring that persons who offer flight services to the general public, whether on the Internet or otherwise, must satisfy more stringent certification and safety standards than persons who are engaged in purely private operations."

The government's interest in promoting safe flight of civil aircraft justifies any incidental burden on speech, the Justice Department argued.

The Cato Institute, Tech Forum, National Federation of Independent Small Business, Southeastern Legal Foundation, Buckeye Institute and others are asking the justices to take the case.