NATIONAL REVIEW

Uber in the Air

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Flying commercial airlines is increasingly difficult. Long TSA lines this summer only compound peoples' anger over high fees and cramped seats. Much better to fly private — that is, if you can afford it. But is it even possible to bring private air travel to the masses?

Flytenow was designed to do just that. The company's founders, Alan Guichard and Matt Voska, developed an online platform to match individual pilots with passengers willing to share the expenses of flying. (See Jared Meyer's interview with Flytenow's founders.) While Flytenow was in operation, people could fly in private planes from, for example, Boston to Martha's Vineyard in under an hour and for less than $70.

The Federal Aviation Administration shut Flytenow down. The FAA determined that pilots who partner with Flytenow are "common carriers" (the same classification for United Airlines, JetBlue, and other commercial airlines), even though the pilots could not make a profit from passengers — they could only defray a proportional amount of flight expenses. Common-carrier designation comes with myriad onerous regulations, including expensive licensing fees and heightened liability, forcing Flytenow to close.

Flytenow is not the only flight-sharing start-up that has been opposed by regulators. Wingly, Europe's leading flight-sharing company, is under attack in its home country, France. French aviation regulators are creating new rules to prevent it from operating there.

In Europe, France stands alone in this fight against affordable private air travel. Emeric de Waziers, one of Wingly's founders, told us that the company entered the German market in February 2016, and the U.K. market in July 2016, to prove to the French government that there is nothing crazy or dangerous about an online platform for sharing flight expenses. Not only did the aviation administrations of Germany and the United Kingdom confirm that Wingly was legally allowed to operate, but the EU's European Aviation Safety Administration gave its seal of approval as well. If France continues to place restrictive laws on flight sharing, EU law requires the French government to prove that doing so is a response to a direct public-safety problem.

One of the French government's main complaints against Wingly is that online flight-sharing services do not provide adequate information to passengers, leading to their possible endangerment. While advertising shared flights over beers at a bar or through a paper pinned to a bulletin board is still completely legal in France (as it is in the United States), apparently an online platform that offers verified information on passengers and pilots poses a threat to public safety. (Check out Wingly's Safety & Trust page.)

A decision on whether Wingly can operate will be handed down by France's aviation regulators at the end of August. If they ban Wingly and other flight-sharing companies, a long court battle will ensue over which regulations apply, France's or the EU's.

In the United States, aviation regulators are trying to outdo their French counterparts in hostility toward innovators. After several denied appeals in federal circuit courts, Flytenow is now taking its legal case against the FAA and seeking review before the Supreme Court. In a recently filed amicus brief to the Supreme Court, the Cato Institute and TechFreedom argue that, given the historical definition of "common carrier," pilots who use Flytenow should not be treated the same as commercial airlines.

The FAA's Flytenow ruling was irrational and confused because, in English common law, "common carriers" are persons or entities considered out for hire to the public, and they do not discriminate when it comes to whom they chose to transport. That definition's origin dates back to the 15th and 16th centuries, when courts established a difference between those who sought to be carriers for public hire and those who did not. Today, this distinction can be seen in the difference between a taxi driver and two friends who carpool together and split fuel expenses.

The definition eventually became enshrined in American law. But the FAA overlooked the most recent legal precedent, by the U.S. Court of Appeals for the Fifth Circuit, which ruled that "only those carriers who affirmatively hold themselves out to the public, either by advertising or by a course of conduct evincing a willingness to serve members of the general public (or a segment thereof) indiscriminately, so long as they are willing to pay the fee of the carrier, will qualify as common carriers."

Pilots who advertise on Flytenow do not meet this definition of "common carriers" by any stretch of the imagination. They can agree or decline to provide service to someone who wants to fly with them — for any reason or no reason at all. They are not for public hire. Moreover, pilots who partner with Flytenow do not earn a profit when flying. The direct costs of flying are split proportionately between the pilot and passengers.

When an agency's interpretation of law flies counter to established common law, courts are not supposed to show deference to the misinterpretation. "There is no greater expert in the common law than the courts, and the FAA lacks the expertise to engage in judicial decisionmaking," Ilya Shapiro and Randal Meyer, two of the authors of amicus brief, write at the Cato Institute site.

Because the FAA applies the common-carrier requirement only to pilots using online-flight sharing platforms, Flytenow is contesting the agency's decision also on First Amendment, free-speech grounds. The "common carrier" designation does not apply to pilots who use other mediums of communication, such as e-mail, Facebook, online message boards, or physical bulletin boards. These other forms of communication between pilots and cost-sharing passengers have been and continue to remain legal under FAA regulations as long as pilots and passengers have a "common purpose" in flying to their destination.

With the sharing economy expanding beyond for-hire vehicles and unused homes, innovative services will continue to emerge across many more sectors of the economy, including aviation. But the FAA is not on board with opening up to more people the benefits of aviation beyond what commercial airlines provide; it has misused its regulatory authority in grounding Flytenow. It is now up to Congress or the Supreme Court to stand up for innovation and overrule the FAA.