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‘Uber of the Sky,’ Challenging the FAA, Gets Business Backing in SCOTUS

Marcia Coyle

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A group of pro-business organizations concerned about the future of the sharing economy is urging the U.S. Supreme Court to step into an internet company’s battle with the Federal Aviation Administration.

The U.S. Court of Appeals for the D.C. Circuit last year ruled against Flytenow Inc., a web-based service in which private pilots seek passengers who want to share the expenses of transportation on preplanned flights.

The deference the appeals court gave to the FAA essentially halted “the evolution of the Internet sharing economy business model for general aviation in the United States,” the business advocates contend in new filings in the high court.

The Cato Institute, Tech Forum, National Federation of Independent Small Business, Southeastern Legal Foundation, Buckeye Institute and others want the justices to grant review in *Flytenow v. Federal Aviation Administration*.

“Like the ridesharing company, Uber, Flytenow is in the business of communicating—although unlike Uber, the pilots do not, indeed cannot, profit—they only share the costs of a flight with passengers,” the company’s lawyers wrote in their high-court petition.

A unanimous three-judge panel of the D.C. Circuit in December deferred to an FAA regulation that essentially shut down the service by requiring those pilots to have commercial licenses.

Flytenow in 2014 sought a legal interpretation about its business plan’s compliance with the 1958 Federal Aviation Act and agency regulations. The FAA said pilots who offer flight-sharing services on the web would operate 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 letter from the aviation agency.

Before Flytenow’s service was available, private pilots generally posted requests for shared expenses on bulletin boards, which did not violate FAA regulations.

The D.C. Circuit panel agreed with the FAA that the flight-sharing services offered on the web met the definition of “common carrier.” It also held that the agency’s interpretation was entitled to so-called *Auer* deference, named after the high court’s 1997 decision *Auer v. Robbins*. Under *Auer*, an agency’s interpretation of its own ambiguous regulation is controlling unless it is “plainly erroneous or inconsistent” with the regulation.

The amicus briefs supporting Flytenow zero in on two of three issues presented by the web company's lawyers: *Auer*deference and the agency's definition of common carrier. The third issue in the case is a First Amendment speech challenge.

Ilya Shapiro, who wrote the brief for Cato and Tech Forum, argues the FAA regulation is "plainly erroneous" based on 600 years of common law.

"The question of whether an enterprise is a common carrier has been answered consistently by courts in Anglo-American jurisprudence—since the Plantagenet Kings ruled England through the Burger Court—by examining whether the transporter held itself out for indiscriminate public hire," Shapiro wrote. "Flytenow pilots do not do this—they may reject would-be passengers for any reason or no reason at all."

Private pilots who want to share space on planes "will be forced to either stick with the old bulletin board or migrate to other Internet platforms worse-suited to the service, like Facebook, reddit, or craigslist," Shapiro wrote.

Shapiro and John Park Jr. of Atlanta's Strickland Brockington Lewis, representing the National Federation of Independent Small Business and others, question the amount of deference given by the D.C. Circuit to the agency's interpretation.

Park urges the high court to reconsider *Auer v. Robbins*, saying the decision "affords the Executive Branch with opportunities to usurp both judicial and legislative powers that the Constitution does not grant it."

The amici and Flytenow said there is a circuit split over how much deference is owed an agency's interpretation of predominantly common-law terms. Five circuits, they say, have held that no deference is owed; four circuits say that "great deference is not required."

In terms of winning review, the *Auer* issue probably presents the best chance, said Jonathan Riches, a lawyer for Flytenow. Some members of the Supreme Court have raised concerns about the decision.

The FAA on Aug. 5 waived filing a response to Flytenow's petition. However, the high court could direct the agency to respond.

"We're hoping for a response," said Riches, director of national litigation for the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation. "The petition raises important issues for the broader sharing economy and frankly for free speech in the new tech economy. They should want resolution on this issue."