No. 16-14

In The Supreme Court of the United States

FLYTENOW, INC.,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION, Administrator,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, THE BUCKEYE INSTITUTE, THE BEACON CENTER OF TENNESSEE, AND THOMAS P. GROSS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Petitioner presents this Court with three questions, the first of which is:

1. In deciding what level of deference is due an agency's interpretation when it predominantly interprets common law terms, five circuit courts of appeals have held no deference is due such an interpretation. Three others have held such an interpretation is "not entitled to great deference." The D.C. Circuit here afforded deference under *Auer v. Robbins*, 519 U.S. 452 (1997) to the Federal Aviation Administration's ("FAA") legal interpretation predominantly interpreting the common law term, "common carriage." What, if any, deference is due an agency's interpretation when it predominantly interprets terms of common law in which courts, not administrative agencies, have special competence?

Amici restate the second and third questions as follows:

2. Should the Court reconsider the practice of ceding judicial power to administrative agencies by granting "controlling deference" to agency interpretations of ambiguous regulations?

3. Should the FAA's legal interpretation of its arguably ambiguous regulations be set aside on the ground that it is arbitrary and capricious?

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INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the rigorous enforcement of constitutional limitations on the activities of federal and state governments. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court, including such cases as *Utility Air Regulation Group, et al. v. EPA*, 134 S. Ct. 2427 (2014).

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a non-profit public interest law firm established to provide legal resources and be the voice for small business in the nation's courts on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing 325,000 member businesses that span the spectrum ranging from sole proprietor enterprises to firms with hundreds of employees in every state and in Washington, D.C.

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[1] All parties have consented to the filing of this brief in letters on file with the Clerk of Court, and the parties were notified of *amici*'s intention to file this brief at least 10 days prior to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.

Founded in 1943 as a non-profit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

The Buckeye Institute was founded in 1989 as an independent research and educational institution – a think tank – to formulate and promote free-market solutions for Ohio's most pressing public policy problems. The staff at the Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization, as defined by I.R.C. § 501(c)(3). The Buckeye Institute files and joins *amicus* briefs that are consistent with its mission and goals.

The Beacon Center of Tennessee is a free market non-profit public policy organization and public interest law firm whose mission is to empower Tennesseans to reclaim control of their lives, so that they can freely pursue their version of the American Dream. Property rights, rule of law, and constitutional limits on governmental mandates are central to its goals. The Beacon Center litigates regularly in state and federal courts, and frequently files and joins *amicus* briefs with the Supreme Court.

Thomas P. Gross is an attorney in Washington, D.C., and a member of the Adjunct Faculty at The George Washington University where he teaches in the Graduate School of Business. In addition, Mr. Gross is a licensed private pilot with an Instrument Rating and has logged over 250 hours as Pilot-in-Command of single engine aircraft. As a private pilot, Mr. Gross is directly affected by the FAA Interpretation regarding Flytenow's operations and is substantially and adversely affected by the outcome of this case. In addition, as a member of the Adjunct Faculty at a well-known university, Mr. Gross has an academic interest in this matter.

This case is of particular interest to *amici* because the continued application of *Auer v. Robbins*, 519 U.S. 452 (1997), affords the Executive Branch with opportunities to usurp both judicial and legislative powers that the Constitution does not grant it. Combining that deference with a federal agency's power to "consider . . . its policy on a continuing basis," *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005), opens the door to arbitrary and capricious agency actions that will remain unchecked. This case presents the Court with an opportunity to preserve our structure of government and revisit the highly deferential standard set forth in *Auer*.

SUMMARY OF ARGUMENT

"The administrative state 'wields vast power and touches almost every aspect of daily life.'" *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010)). "[T]he authority administrative agencies now hold over our economic, social, and political activities" *id*., stands in stark contrast to the government of enumerated powers the Framers envisioned.

Our Founding Fathers sought to create a government structure limited in nature – as James Madison explained in an effort to ease concerns that the proposed national government would usurp the People's power to govern themselves: "The powers delegated by the proposed Constitution to the federal government are few and defined . . . [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . ." The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961). Today's wide-reaching "'administrative state with its reams of regulations would leave [the Founders] rubbing their eyes.'" *City of Arlington*, 133 S. Ct. at 1878 (Roberts, C.J., dissenting) (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)). "It would be a bit much to describe the result as the very definition of tyranny, but the danger posed by the growing power of the administrative state cannot be dismissed." *Id*. at 1879 (citation and quotation omitted).

This case involves one such example of the Executive Branch's overreach and disregard for our carefully

crafted government structure, but there are many thousands of other examples affecting different industries in different ways. Thus the Federal Aviation Administration's (FAA) action at issue here is emblematic of a systemic problem in a system that no longer imposes any meaningful checks on executive action.

For decades, the FAA has permitted pilots to post their flight plans on bulletin boards to help share flight costs with others who want to join their flight. This act of cost sharing is permitted under the FAA's Expense-Sharing Rule. 14 C.F.R. § 61.113(c). In an about face, the FAA recently issued a final order interpreting its Expense-Sharing Rule, and necessarily the common law definition of "common carrier," as prohibiting the posting of flight plans on websites acting as virtual bulletin boards.

The D.C. Circuit applied *Auer* deference, upholding the FAA Interpretation. As discussed in the petition for writ of certiorari (Petition), the circuit court's application of *Auer* deference to a common law term creates a circuit split on the question of what, if any, deference is owed an agency's interpretation when it predominantly interprets terms of common law. Pet. at 9-20. Presumably, this is within the special competence of courts, not administrative agencies. *Id.*

In addition to providing this Court with an opportunity to resolve this well-ripened circuit split, this case also provides an opportunity to address the doubts raised by several members of this Court as to the continued validity of *Auer*. *See Perez v. Mortg.*

Bankers Ass'n, 135 S. Ct. 1199, 1213 (2015); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013); *Talk America, Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50 (2011) (Scalia, J., concurring).

Amici maintain that any deference afforded to a federal agency must be consistent with the Constitution and the Administrative Procedure Act (APA), 5 U.S.C. §§ 551, *et seq*. *Auer* deference offends the separation of powers principles embedded in our Constitution by enabling agencies to circumvent the APA's notice-and-comment procedures. As applied to this case, *Auer* deference gives the FAA license to issue arbitrary and capricious interpretations of its own regulations that carry the force of law. This halts evolution of the Internet sharing economy business model for general aviation in the United States.

ARGUMENT

I. Introduction.

Flying a private airplane is expensive. The FAA has long permitted pilots to defray operating expenses for pre-planned flights under its Expense-Sharing Rule, which provides 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 expenditure, or rental fees." 14 C.F.R. § 61.113(c). For decades, private pilots have posted their flight plans on old-fashioned bulletin

boards where others who wished to share the ride and the operating expenses could take notice.

With the advent of the Internet and the now ubiquitous use of apps, traditional bulletin boards are nearly obsolete. Accordingly, Petitioner created a website to facilitate more efficient communication and cost sharing between pilots – certified and licensed by the FAA – and passengers with similar flight plans.

In 2014, the FAA notified several pilots that by posting their flight plans on Flytenow's website they had held themselves out for illegal charter. Pet. at 5. Concerned about penalties the FAA could impose on its users, Flytenow sought a formal opinion from the FAA regarding its communication platform and the Expense-Sharing Rule. *Id*. In response, the FAA issued a final agency order in which it interpreted its own regulation to "*prohibit* even the most highly trained pilots in the world from *ever* sharing expenses." *Id*. at 6.

Flytenow filed a petition with the D.C. Circuit asking the court to review the FAA Interpretation. After improperly granting *Auer* deference, the court upheld the FAA Interpretation. The website is now shut down.

II. This Court should reconsider the *Auer*-sanctioned practice of ceding judicial power to administrative agencies.

There are now "over 430 departments, agencies, and sub-agencies in the federal government." *Hearing*

on "Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity" Before the Senate Comm. on the Judiciary, 114th Cong. 1 (2015) (statement of Senator Grassley) ("*Examining the Federal Regulatory System*"). As federal agencies grow in number, so does the Federal Register. For example, the Federal Register grew from 4,369 pages in 1993, to 49,813 pages in 2003, to 81,883 pages in 2012[2] – an increase of nearly 2,000% in just 19 years. By way of another example, from 2013 to 2014, "the federal bureaucracy finalized over 7,000 regulations." *Examining the Federal Regulatory System*. When one compares those 7,000 regulations to the 300 laws enacted by Congress during those same years, the growing power of the federal bureaucracy is undeniable. *Id*.

The number of official regulations tells only part of the story. As this Court is well aware, federal agencies issue, interpret, and enforce the rules that govern our lives. "[A]s a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules." *City of Arlington*, 133 S. Ct. at 1877-78 (Roberts, C.J., dissenting). The authority agencies have accumulated is startling.

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[2] Karen Kerrigan & Ray Keating, *Regulation and the 'Fourth Branch of Government*,' at 1 (2014), http://centerforregulatorysolutions.org/wp-content/uploads/2014/04/FourthBranchWhitePaper.pdf.

Not only do agencies' exercises of legislative authority go unchecked,[3] their regulatory interpretations often receive judicial deference under *Auer*. As Petitioner explains, such deference is granted to agencies on the presumption that they have unique expertise in the subject. Pet. at 9. However, because common law rules are properly within the judiciary's expertise and not that of the agencies, five courts of appeals have held that no deference is due to an administrative interpretation of predominantly common law terms. *Id*. at 10-13. And three courts of appeals have held that an agency's interpretation of predominantly common law terms is "not entitled to great deference." *Id*. at 13-16. Thus, as Petitioner notes, by applying *Auer* to the FAA's interpretation of common law terms – a power that is constitutionally granted to the judiciary – the D.C. Circuit afforded the FAA a level of deference far beyond what any other Article III court has done.

Moreover, the D.C. Circuit's erroneous application of *Auer* sheds light on the statutory and constitutional issues that arise when courts defer to agencies. *Auer* deference runs afoul of the APA because it allows federal agencies to side-step notice-and-comment procedures, and runs afoul of the Constitution because it is inconsistent with separation of powers principles.

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[3] The delegation doctrine has rarely been used to discipline Congress, or by extension, to rein in federal agencies. "Since 1935, the Supreme Court has not struck down an act of Congress on nondelegation grounds, notwithstanding the existence of a number of plausible occasions." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000).

These issues grow in importance with every page added to the Federal Register.

This case provides both an opportunity to address the circuit split and to reconsider *Auer* itself. The time has come to abandon *Auer* deference. Significantly, several members of this Court have pointed out *Auer*'s flaws, suggesting it be revisited. As the late Justice Scalia explained, jettisoning *Auer* would leave "[t]he agency . . . free to interpret its own regulations with or without notice and comment; but *courts will decide* – with no deference to the agency – whether that interpretation is correct." *Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring in the judgment) (emphasis added).

A. *Auer* deference is inconsistent with separation of powers principles.

As Justice Scalia noted, *Auer* deference is "contrary to [the] fundamental principles of separation of powers." *Talk America*, 564 U.S. at 68 (Scalia, J., concurring). The Constitution contemplates that each branch of government will jealously guard its own prerogatives, thereby protecting individual liberty. With *Auer* deference, the judiciary leaves the field resulting in the removal of an indispensable check on federal agency activities.

The rise of the administrative state may have tested the limits of the Constitution's separation of powers, but it does not change the judiciary's duty to "say what the law is." *See Marbury v. Madison*, 5 U.S.

(Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Accordingly, the APA instructs all reviewing courts to decide "all relevant questions of law . . . and determine the meaning or applicability of the terms of an agency action . . . and set aside agency action . . . found to be . . . arbitrary, capricious, or . . . without observance of procedure required by law. . . ." 5 U.S.C. § 706.

Even so, this Court's precedents create separation of powers issues by giving the agencies, not the judiciary, the primary role in determining the meaning of ambiguous regulations.[4] *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Auer*, 519 U.S. at 461-62. It is "contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *Talk America*, 564 U.S. at 68 (Scalia, J., concurring). Thus, *Auer* deference directly contradicts the Constitution when it hands the judicial role of interpretation to a federal agency that itself has promulgated an ambiguous regulation.

B. *Auer* deference deprives Congress and the People the benefits of the APA's notice-and-comment procedures.

The hazard that agencies pose to the democratic process and liberty was not lost on Congress. For over

[4] As Petitioner explains, this Court's precedents do not extend deference to an agency's interpretation of the common law. Pet. at 16-18.

20 years, "a succession of bills offering various remedies appeared in Congress," *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37-38 (1950), culminating in the APA. The law was then, and is today, "a 'working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.'" *FCC v. Fox Television Stations*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (quoting Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1248 (1982)).

The APA's chief procedural safeguard, Section 553, requires administrative agencies to provide "notice of proposed rulemaking" and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or argument with or without opportunity for oral presentation." 5 U.S.C. § 553(b)-(c). Congress understood that if agencies were going to wield legislative power, their procedures must "giv[e] adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses." S. Doc. No. 77-8, Final Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, at 102 (1941). Public notice-and-comment was seen as "essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests." *Id*.

In notice-and-comment procedures, Congress sought to hold agency heads accountable to both Congress and the public. Congress also sought to foster

predictability and stability in the administrative arena and to establish a baseline against which future agency action would be measured.

Auer deference effectively exempts agencies from the APA's notice-and-comment requirements. This undermines Congress' objectives and leaves agencies free to promulgate ambiguous regulations and later interpret them, all the while knowing that their interpretation will never be subject to judicial review. *See Decker*, 133 S. Ct. at 1341 (Scalia, J., dissenting in relevant part) (internal quotation marks omitted) ("Then the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a flexibility that will enable clarification with retroactive effect."). It leaves them free "to control the extent of [their] notice-and-comment-free domain." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgement). And it provides them the opportunity "[t]o expand this domain, . . . [by] writ[ing] substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment." *Id*.

Rather than help secure consent of the governed, *Auer* deference relieves an agency of the burden of the "imprecision that it has produced." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 617 (1996). The burden instead falls on the regulated community. Because of *Auer*, there is no incentive for "an agency [to] give clear notice of its policies either to those who participate in the rulemaking

process prescribed by the Administrative Procedure Act (APA) or to the regulated public." *Id.*; *see Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 524-25 (1994) (Thomas, J., dissenting) (noting that *Auer* deference undermines the objective of providing regulations that are "clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law").

Furthermore, legal regimes are more likely to endure if aggrieved parties believe that they had an adequate opportunity to voice objections and that the disappointing result was the product of a fair fight. Popular acceptance of agency rules depends on the "legitimacy that comes with following the APA-mandated procedures for creating binding legal obligations." *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 268 (D.D.C. 2015).

Agency actions that proceed without notice-and-comment, as in this case, put the regulated community at risk. If an agency advances an interpretation of its regulations that requires the regulated community to take, or refrain from taking, a particular action, that interpretation becomes de facto – if not de jure – law on the matter, regardless of the form the interpretation takes. The regulated community must either conform to the interpretation or risk an enforcement action, administrative or judicial, predicated on alleged noncompliance.[5] As Justice Scalia explained:

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[5] *See generally* NFIB Small Business Legal Center, *The Fourth Branch & Underground Regulations* (2015), http://

> [I]f an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law.

Perez, 135 S. Ct. 1212. (Scalia, J., concurring in the judgment). Indeed, in this case, the FAA Interpretation has had a chilling effect on pilots who would otherwise post their pre-planned flights on the Internet, and the website has been shut down.

The FAA Interpretation is but one example of how federal agencies disregard the APA when they interpret their own regulations – the effect of the FAA Interpretation, and the D.C. Circuit's application of *Auer*, is to shut down an emerging sector of the economy without any public participation. This is precisely the type of abuse Congress sought to prevent with the APA. Until this Court demands that the Executive Branch abide by the APA, federal agencies will continue their unconstitutional usurpation of power, which as evidenced in this case, can detrimentally impact entire industries.

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www.nfib.com/pdfs/fourth-branch-underground-regulations-nfib.pdf.

C. Members of this Court have expressed doubts about *Auer* deference.

This case presents the Court with the opportunity and ideal vehicle to reconsider the continued application of *Auer* deference. This is an issue that various Justices of this Court have said should be reexamined. The Court's 2015 decision in *Perez* only underscores the need for clarification as to what – if any – deference is owed to an agency's interpretation of its own regulations.

Writing for the majority, Justice Sotomayor explained that rules issued through the notice-and-comment process are referred to as "legislative rules" because they have the "force and effect of law." *Perez*, 135 S. Ct. at 1203-04 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979)). The plain implication is that rules pronounced outside the notice-and-comment process are entitled to little or no deference.[6] This line

[6] This makes sense because *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), is rooted in a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency . . . to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996). But in so vesting agencies with authority to fill in ambiguous gaps, Congress is essentially vesting agencies with a limited legislative authority – which may only be exercised through the notice-and-comment process – precisely because in exercising that authority, the agency is making rules that carry the force of law. *See United States v. Mead*, 533 U.S. 218, 299 (2001) ("Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure. . . .").

of analysis necessarily calls into question the judicial practice of deferring to rules pronounced through agency letters or other guidance materials, since they are developed without any transparency, opportunity for public input, or even basic assurances that the agency has thoroughly considered policy implications and alternatives.

Justices Alito, Thomas, and Scalia were more direct – each explicitly argued that it was time to reconsider the continued viability of *Auer*. Justice Alito observed that there is "an understandable concern about the aggrandizement of the power of administrative agencies" that stems, in part, from "this Court's cases holding that courts must ordinarily defer to an agency's interpretation of its own ambiguous regulations." *Id*. at 1210 (Alito, J., concurring in part and concurring in the judgment). He continued: "I await a case in which the validity of [*Bowles v*.] *Seminole Rock* [*& Sand Co*., 325 U.S. 410 (1945),] may be explored through full briefing and argument." *Id*. at 1210-11. Similarly, Justice Thomas concluded: "By my best lights, the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case." *Id*. at 1225 (Thomas, J., concurring in the judgment). And Justice Scalia stated that he would "restore the balance originally struck by the [Administrative Procedure Act] . . . by abandoning *Auer* and applying the Act as written." *Id*. at 1213. (Scalia, J., concurring in the judgment).

Even before *Perez*, Justice Scalia expressed doubts about the validity of *Auer*. In his concurring opinion in *Talk America* he noted that he had "become increasingly doubtful of [*Auer*'s] validity[.]" 564 U.S. at 68 (Scalia, J., concurring). Accordingly, he was "comfort[ed] to know that [he] would reach the Court's result even without *Auer*." *Id*.

In *Decker*, members of the Court openly acknowledged that, under the right circumstances, it might be time to reconsider *Auer*. In his concurring opinion, Chief Justice Roberts, joined by Justice Alito, wrote that *Seminole Rock* (and, by inference, *Auer*) raises an issue that is "a basic one going to the heart of administrative law." *Decker*, 133 S. Ct. at 1339 (Roberts, C.J., concurring). He continued: "Questions of *Seminole Rock* and *Auer* deference arise as a matter of course on a regular basis. The bar is now aware that there is some interest in reconsidering those cases. . . . I would await a case in which the issue is properly raised and argued." *Id*.

Even beyond express calls to reconsider *Auer*, the limitations to its applicability illustrate the Court's struggles with it. For example, in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), the Court found application of *Auer* deference inappropriate where an agency's interpretation is "plainly erroneous or inconsistent with the regulation" or where there are grounds to believe that an interpretation "does not reflect the agency's fair and considered judgment of the matter in question." *Id*. at 2166 (internal quotation marks omitted).

The deficiencies and harms of *Auer* deference are most evident in this case. The FAA's Interpretation fails to provide any fair or considered judgment on private pilots' use of the Internet to post pre-planned flights. The FAA simply cites interpretations and enforcement decisions made at a time when the Internet either did not exist or was in its early developmental stages, ignoring significant technological changes since those cited orders were issued. With the emergence of sharing economies represented by Internet models such as AirBnB, Uber and more – which have had significant and revolutionary impacts on our economy – the FAA's use of an interpretive rule and the D.C. Circuit's upholding that rule violates the APA's notice-and-comment procedures. Simply stated, *Auer* allows lower courts to "rubber stamp" these defective decisions.

III. The FAA Interpretation is arbitrary and capricious.

The FAA Interpretation is arbitrary and capricious for three reasons: it is internally inconsistent; it fails to consider the regulated aviation community; and insofar as it allows cost sharing through physical boards and not the Internet, it is out of step with the 21st Century and frustrates the evolution of an important business model.

A. The FAA's reasoning is internally inconsistent.

In *National Cable & Telecommunications*, this Court observed that an agency's "inconsistent" interpretation of its regulations that goes unexplained "is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act." 545 U.S. at 981.

The FAA Interpretation reads the Expense-Sharing Rule out of the regulation. In its interpretation, the FAA notes that, while private pilots may not "as a general rule" command an aircraft that is carrying passengers or property for compensation or hire, there are exceptions to that general rule. Pet. App. at 34. The FAA continues to explain that those exceptions include the previously discussed Expense-Sharing Rule: "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." *Id*. at 34-35 (discussing 14 C.F.R. § 61.113(c)).

Notwithstanding the Expense-Sharing Rule, when presented with an Internet-based flight sharing platform that allows pilots to share costs with passengers, the FAA pointed to opinions from 1976 and 1985. It declared that those opinions put Flytenow's cost-sharing model into a prohibited for-profit holding out operation. Pet. App. at 39-40. In so doing, the FAA read

the safe harbor for cost-sharing flights out of the regulation.

B. In its interpretation, the FAA blurs its own distinction between general and commercial aviation.

The FAA breaks regulated manned aviation into two distinct categories – commercial aviation and general aviation. Commercial aviation, comprised of national, international and charter airlines, consists of for-profit activities and entails rigorous pilot qualification standards. In contrast, general aviation pilots do not fly for profit, and the FAA's regulations allow them to defray certain operating costs by sharing flights with passengers and using physical bulletin boards to find those passengers.[7] Despite the distinctions between the two categories in its own regulations, the FAA Interpretation blurs the line, treating general aviation as commercial.

The European Aviation Safety Agency (EASA), which is the FAA's European counterpart, has counseled against treating general aviation like commercial aviation. In a 2012 paper, the EASA pointed to five

[7] While the use of physical bulletin boards is generally permitted, the FAA's rules are vague, and that vagueness has a chilling effect on both pilots and passengers because pilots are unable to understand when their conduct could result in a violation.

major differences between the two practices.[8] The EASA observed that it is "essential" to avoid "placing undue burden" that "might threaten the very existence of" general aviation activities. *Id.* at 1. Significantly, the EASA found that any flight activity other than commercial activity has the purpose that is "not to transport fare-paying passengers, but moreover to offer specific activities to the participants in the flight (e.g. sports, recreation); or in the case of aerial work, to provide professional services in which the transported persons are involved participants." *Id*. at 4.

In its interpretation, the FAA fails to recognize this critical distinction, partly because it bypassed the notice-and-comment requirement of the APA. Had it given the public the chance to comment, there is no doubt the public would have highlighted these distinctions, the economic impact, and new technologies. In other words, the FAA would have developed a rule based on rational decisionmaking and substantial evidence in the developed record, not a convoluted and unsupported interpretation of the common law.

[8] *See* European Aviation Safety Agency, *European General Aviation Safety Strategy*, at 2-5 (2012), https://www.easa.europa.eu/system/files/dfu/European%20GA%20Safety%20Strategy.pdf.

C. The FAA Interpretation constitutes a barrier to progress.

This Court has noted that "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis." *Nat'l Cable & Telecomms.*, 545 U.S. at 981 (quoting *Chevron*, 467 U.S. at 863-64). Had the FAA done so in this case, it would not have applied a pre-Internet rule to a post-Internet world.

In its letter to AirPooler, the FAA points to a 1963 Notice of Proposed Rulemaking entitled "Clarification of Private Pilot Privileges" (NPRM). Pet. App. at 37. In part, the NPRM recognized the need to "preserve the traditional right to share expenses, and which right has not been found objectionable." *Id*. Nonetheless, the FAA takes a cost-sharing proposal which would match private pilots who have their own reasons for traveling to a particular destination with passengers who have similar travel plans and turns it, by *ipse dixit*, into a common carrier scheme subject to rules intended to apply to for-profit entities and activities (i.e., commercial aviation).

The FAA declares that its position is "fully consistent with prior legal interpretations related to other nationwide initiatives involving expense-sharing flights," one from 1976 and two from 1985. *Id*. at 39. Stated differently, the FAA is relying on three pre-Internet legal interpretations to control and dictate a result for an Internet-based activity.

The FAA's decision effectively bars private pilots from using the regulatory safe-harbor "without obtaining a part 119 [commercial carrier] certificate" and corresponding commercial license. *Id*. That certificate and the continuing regulatory obligations are far more rigorous than those applicable to Part 61 and general aviation. The effect is to limit private pilots to utilizing pre-Internet physical bulletin boards if they wish to find passengers willing to travel on a cost-sharing basis.

Others in the global community acknowledge the evolving technological environment and regulate accordingly. The FAA's action stands in marked contrast with the European Community. Significantly, the EASA has approved the cost-sharing Internet model for use in the European Union, superseding laws of the member states as of August 26, 2016.[9] In pertinent part, that regulation allows "cost-shared flights by private individuals, on the condition that the direct cost is shared by all of the occupants of the aircraft, pilot included, and the number of persons sharing the direct costs is limited to six." *Id*. at 11.

Moreover, since the issuance of the cost-sharing rule, the EASA has issued at least one interpretative letter to a website similar to Flytenow's model.[10] The model that Flytenow is trying to implement in the

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[9] *See generally* European Aviation Safety Agency, *Flying in the EU: OPS is in the Air* (2016), https://www.easa.europa.eu/system/files/dfu/208598_EASA_LEAFLET_02_AIR_OPS.pdf.

[10] Letter from EASA to Emeric Waziers (Mar. 14, 2016), https://fr.wingly.io/media/doc/en/EASA_140316.pdf.

United States is operating[11] as a valid and legal industry in the European Union.

In other words, the EASA has determined that a rational basis exists for the Flytenow model. The FAA may have reached a similar conclusion if it had followed the statutorily-mandated APA notice-and-comment procedures and engaged in the rational decisionmaking intended by that statute. But this result is frustrated by the "rubber stamping" effect of *Auer*. Reexamining *Auer* will prevent this type of arbitrary and capricious result.

Furthermore, the rational basis applied in the European Union is being used to embrace the "sharing economy" model, while the FAA's rulings are inconsistent with this model. This model promotes economic efficiency. There are other companies that use this sharing model, including Uber for transportation and AirBnB for lodging. Whether done for a profit or cost-sharing reasons, the model is one for the future and is permeating economies around the world.

The FAA is decidedly in the past. Its determination to remain there is nothing less than arbitrary and capricious and, in direct violation of the APA's notice-and-comment requirements. Deference to its final

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[11] *See, e.g.*, wingly, www.en.wingly.io (offering a flight from Prague to Linz on August 27, 2016, as of July 25, 2016); *see also* www.skyuber.com (offering a flight from Zurich to Denham on July 26, 2016 as of July 25, 2016).

interpretation jeopardizes the separation of powers and the protections that the courts are intended to provide its citizenry.

CONCLUSION

For the reasons stated in the Petition for Certiorari and this *amici* brief, this Court should grant the writ of certiorari and, on review, reverse the decision of the Court of Appeals for the District of Columbia Circuit.

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