No. 16-14

IN THE

Supreme Court of the United States

FLYTENOW, INC.,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION, Administrator,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia

BRIEF FOR THE CATO INSTITUTE AND TECHFREEDOM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Berin N. Szoka
Thomas W. Struble
TECHFREEDOM
110 Maryland Ave. NE,
Suite 409
Washington, DC 20002
202-803-2867
bszoka@techfreedom.org
tstruble@techfreedom.org

Ilya Shapiro
Counsel of Record
Randal J. Meyer
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org
rmeyer@cato.org

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QUESTIONS PRESENTED

This brief addresses the first and second questions presented by the petition:

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 that no deference is due. 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 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?

2. Did the court below err when it held, contrary to this Court's long-standing definition of "common carrier," that pilots who use the Internet to communicate are "common carriers" when those pilots do not earn a commercial profit or indiscriminately offer to share their travel plans with the general public?

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INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Founded in 2010, TechFreedom is a non-profit, non-partisan think tank dedicated to educating policymakers, the media and the public about technology policy. TechFreedom advocates for policies that promote dynamism, entrepreneurship, and permissionless innovation in tech. TechFreedom supports innovative platforms like Flytenow, which empower consumers and democratize services like general aviation, once beyond the reach of most Americans.

This case concerns *amici* because it contravenes hundreds of years of well-established law to suppress the free market.

INTRODUCTION AND SUMMARY OF ARGUMENT

Flytenow's goal is to allow more pilots to fly more passengers for lower fares by making greater use of the FAA's compensation exemption for cost-sharing when private pilots and passengers share a bona fide

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[1] Rule 37 statement: All parties received timely notice of *amici*'s intent to file this brief; their consent letters have been lodged with the Clerk. Further, no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* funded its preparation or submission.

common purpose. This practice has been permissible for decades, but because Flytenow was trying to connect pilots and would-be passengers through the Internet (instead of a physical bulletin board), the FAA deems this impermissible.

Despite Flytenow's best efforts—including developing a platform that restricts entry—and allows pilots to reject would-be passengers for any reason or no reason at all, the FAA deemed Flytenow's service to be that of a common carrier. This essentially destroyed Flytenow's business model, as most private pilots are unwilling to jump through the extra hurdles to obtain and maintain the highest level of licensure just to be able to share costs on recreational flights. Meanwhile, instead of allowing the entrepreneurs behind Flytenow (or Airpooler, a similar company that received a similarly unfavorable letter of interpretation) to profit from their ingenuity—by collecting a small transaction fee for each flight—private pilots wishing to share vacant space on their planes with cost-sharing passengers 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.

The D.C. Circuit upheld the FAA's interpretation that private pilots using Flytenow's service would be acting as common carriers, while giving very broad deference to the agency. This was error.

First, "common carriage" is a term defined by common law, stretching back to *way* before the founding of the FAA—indeed before the Wright Brothers—and the FAA's interpretation here directly contravenes that established meaning. This alone is reason enough to overturn the decision below.

But second, there is also another, more glaring error in the opinion below: the D.C. Circuit granted very broad deference to the FAA's interpretation of what constitutes common carriage, despite that being a term defined at common law. Of the circuits to have considered the question of how much deference is owed to an agency interpreting predominantly common-law terms, most have said that no deference is owed, while three others have said essentially "not much." Yet the D.C. Circuit afforded the FAA the broadest deference possible, under *Seminole Rock* and *Auer*, and thereby upheld its interpretation. The Court should issue a writ of certiorari here, settle the split amongst the circuits, and overturn the FAA's damning interpretation of Flytenow's service.

ARGUMENT

I. THE DECISION BELOW CONTRAVENES 600 YEARS OF ANGLO-AMERICAN COMMON LAW ON WHAT DEFINES A COMMON CARRIER

While petitioners have made a clear argument that imposing common-carrier liability requires Flytenow to be an enterprise seeking profit, Pet. at 21–27, there is a clearer and more narrow basis for this Court to reverse the court below. 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. Flytenow pilots do not do this—they may reject would-be passengers for any reason *or no reason at all*. Accordingly, the lower court's ruling that the FAA did not err in finding that Flytenow pi-

lots are common carriers is the plainest of errors as a matter of centuries-established law. *See Flytenow, Inc. v. FAA*, 808 F.3d, 882, 889–92 (D.C. Cir. 2015). If allowed to stand, this holding would bifurcate regulatory law from the actual law of common carriers.

A. From the Plantagenet Kings to the Founding, the English Common Law Defined Common Carriers as Persons Who Hold Themselves Out for Public Hire

Beginning with the rise of specific artisan trades in the 1300s and 1400s, courts imposed special duties on those engaged in "common" trades or callings—those who held themselves out to serve the public with ordinary skill and care. James B. Speta, A *Common Carrier Approach to Internet Interconnection*, 54 Fed. Comm. L. J. 225, 254 (2002). Those "common" tradespersons were liable for damages or loss in negligence *if* the tradesman held himself out to the public. *See, e.g.*, 19 Hen. 4 49, pl. 5 (1441) (Paston, J.) ("You have not shown that he is a common surgeon to cure such horses, and so, although he killed your horse by his medicines, you shall have no action against him without an assumpsit."); *accord The Innkeeper's Case*, 11 Hen. 4 45, pl. 8, 18 (1410); 48 Edw. 3 6, pl. 11 (1374). "[T]he innovation in the common law" in this period "was that, prior to the development of actions based on common callings, the law provided no relief from negligence unless the parties had specifically contracted for a particular result." Speta, *supra* at 254 n.141 (citing F. B. Ames, *The History of Assumpsit*, 2 Harv. L. Rev. 1, 58 (1888)); *see also* 3 William Blackstone, Commentaries *164. One of these "common callings" was that of "carrier" of goods and persons.

This differentiation between those who followed a common calling and those who were not tradesmen held out to the public provided the basis for the definition of a "common carrier" as the common law developed through the 1600s and 1700s. The law of bailments applied to certain common tradesmen who undertook for the general public's hire to transport, carry, or house goods. *See*, *e.g.*, *Southcote's Case*, 4 Coke Rep. 83[b] (K.B. 1600) (action against bailee in detinue) ("For if a factor does all that which he by his industry can do, he shall be discharged . . . but a ferryman, common innkeeper, or carrier who takes hire, ought to keep the good in their custody safely."); *accord Coggs v. Bernard*, 2 Ld. Raym. 909, 917-18, 92 Eng. Rep. 107, 109-10 (K.B. 1703) (Holt, C.J.) (affirming the heightened the duties of a bailee who holds himself out for "public employment"), *overruling on other grounds Southcote's Case*, 4 Coke Rep. at 83[b]. Application of bailment law created serious liability for those in "common" carrying or ferrying professions. *Southcote's Case* and *Coggs* were benchmark cases in bailment liability—and both affirmed that common carriers are, because of their holding out for public employment, subject to heightened liability. *Southcote's Case*, 4 Coke Rep. 83[b]; *Coggs*, 1 Ld. Raym. at 917-18, 92 Eng. Rep. at 109-10.

Particularly in the early-to-mid 1700s, the definition of a common carrier coalesced around its defining quality at common law—holding out to the public: "[A]ny man undertaking for hire to carry the goods of all persons indifferently . . . is . . . a common carrier." *Gisbourn v. Hurst*, 1 Salk. 249, 250, 91 Eng. Rep. 220, 220 (1710) (Hale, C.J.).[2] The pre-Revolutionary Eng-

[2] *Accord, e.g.*, Forward v. Pittard, 1 Term Rep. 27, 99 Eng. Rep. 953 (1785) (Mansfield, C.J.); Robert Hutchinson, *Treatise*

lish common law defining who was and who was not a common carrier was imported into American jurisprudence and reaffirmed in modern times.

B. American Jurisprudence Continually Affirms That English Common-Law Principle in Modern Times

American commentators and this Court from its own founding universally applied English common law as it related to defining common carriers.

"The definition of a common carrier, most usually adopted in this country, is that of C[hief] J[ustice]

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on the Law of Carriers, § 45 & n.1 (1879) (collecting authorities) ("These definitions are substantially the same and are adopted and used indifferently."); Tompson Chitty & Leofric Temple, *A Practical Treatise on the Law of Carriers of Goods and Passengers By Land, Inland Navigation, and in Ships* 223-24 (1857) ("To render the master and owners of a ship liable as common carriers, it must appear that the ship is a general ship, or employed for the carriage of goods for all persons indiscriminately, who offer goods for carriage to the place of destination, such as vessels employed in the coasting trade or in a foreign trade."); 3 William Blackstone, Commentaries *164 ("There is also in law always an implied contract with a common inn-keeper, to secure his guest's goods in his inn; with a common carrier or bargemaster, to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a common taylor, or other workman, that he performs his business in a workmanlike manner: in which if they fail, an action on the case lies to recover damages for such breach of their general undertaking. But if I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such general undertaking."); Matthew Hale, *The Analysis of Law: Being a Scheme or Abstract of the Several Titles and Partitions of the Law of England Divided Into Method* 108 (2d ed. 1716) ("In persons that undertake a common trust, it is implied, that they perform it; otherwise, an action on the case lies."); *see also* Joseph H. Beale, Jr., *The Carrier's Liability: Its History*, 11 Harv. L. Rev. 158, 163 (1897).

Parker in *Dwight v. Brewster*." Hutchinson, *supra* at § 45 n.1 (citing *Dwight v. Brewster*, 18 Mass. (1 Pick.) 50, 53 (1822)). *Dwight*, relying on the English common-law authorities—including Lord Hale, *see supra* note 2—established that "[a] common carrier is one who undertakes, for hire or reward, to transport the goods of such *as choose to employ him*, from place to place." *Dwight*, 18 Mass. at 53 & n.1 (emphasis added). Justice Story, in his work on bailments, notes that that common carriers "must exercise it as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation *pro hac vice*." Joseph Story, *Commentaries on the Law of Bailments* § 495 (1st ed. 1832). Moreover, Story continues, "not (as we have seen) every person who undertakes to carry goods for hire . . . is deemed a common carrier. A private person may contract with another for the carriage of his goods, and incur no responsibility beyond . . . the responsibility of ordinary diligence." *Id.* Suffice it to say, the definition of a common carrier from common law and the distinction upon which it was based were well incorporated into early American jurisprudence.

This Court has contributed much to that legacy. From Chief Justice John Marshall onwards, it has repeatedly incorporated the applicable English common law, noted that carriers are those who hold themselves out for public hire, and distinguished between common carriers and private persons. *See, e.g.*, *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) ("A common carrier service . . . is one that "makes a public offering to provide [services] . . . whereby all members of the public who choose to employ such fa-

cilities may . . . [do so] of their own design and choosing. . . .'"); *United States v. Contract Steel Carriers, Inc.*, 350 U.S. 409, 411-12, 410 n.1 (1956) (per curiam) (holding that "the fact that appellee has actively solicited business within the bounds of his license does not support a finding that it was 'holding itself out to the general public'" and noting that "[a] common carrier is one 'which holds itself out to the general public to engage in the transportation by motor vehicle of passengers or property.'"); *Munn v. Illinois*, 94 U.S. 113, 125-32 (1877) (quoting extensively Lord Hale's work on the subject, *see supra* note 2, and noting that "the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises 'a sort of public office,'"); *Stokes v. Saltonstall*, 38 U.S. (13 Pet.) 181, 191-93 (1839) (applying the English common law of common carriers to then-famous transportation firm Stockton & Stokes); *Boyce v. Anderson*, 27 U.S. (2 Pet.) 150, 154-56 (1829) (Marshall, C.J.) (importing English common law as of *Coggs*; finding that carriers of slaves are not subject to suit in strict liability, only negligence).

Accordingly, it is well-established at law that private transporters who do not hold themselves out for public hire are *not* common carriers.

C. Flytenow Pilots Plainly Are Not Common Carriers

Pilots using the Flytenow service to share costs are not holding themselves out to the public. They are "only individuals sharing expenses . . . they are not engaged in commercial activity, and cannot ever earn a profit." Pet. at 23. Specifically, the "Flytenow-

subscribing pilots . . . can refuse passengers for any reason, or no reason at all." Pet. at 25. Accordingly, they are not common carriers under the common law.

The common law from the Plantagenets to now plainly holds that Flytenow pilots would need to hold themselves out for public hire in order to be common carriers. *See, e.g.*, *Contract Steel Carriers, Inc.*, 350 U.S. at 410 n.1 ("A common carrier is one 'which *holds itself out to the general public* to engage in the transportation by motor vehicle of passengers or property.'") (emphasis added); *Dwight*, 18 Mass. at 53 ("A common carrier is one who undertakes, for hire or reward, to transport the goods of such *as choose to employ him*, from place to place.") (emphasis added); Gisbourn, 1 Salk. at 250, 91 Eng. Rep. at 220 ("[A]ny man *undertaking for hire to carry the goods of all persons indifferently* . . . is . . . a common carrier.") (emphasis added); Story, *supra* at § 495 ("[H]e must undertake to carry goods for persons generally.").

It is especially noteworthy that the most recent precedent on point—and the only case cited in the FAA's opinion letter—makes this distinction: "Only those carriers who *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 [specific] segment thereof) *indiscriminately*, so long as they are willing to pay the fee of the carrier, will qualify as common carriers." *Woolsey v. Nat'l Transp. Safety Bd.*, 993 F.2d 516, 525 n.24 (5th Cir. 1993) (emphasis added). The FAA simply misreads this case. Indeed, it misreads its own regulations that restate the common law. Federal Aviation Administration, Advisory Circular: Private Carriage versus Common Carriage of Persons or Property 1, AC No. 120-12A (Apr. 24, 1986) ("A carrier becomes a

common carrier when it 'holds itself out' to the public or to a segment of the public, as willing to furnish transportation within the limits of its facilities to any person who wants it.").

That Flytenow cost-sharers use the Internet to communicate is of no moment. The flights are not held out to the public "indiscriminately"; a pilot may reject any member of the public for any reason or no reason. *Cf. Woolsey*, 993 F.2d at 516 (holding that the FAA's revocation of a private pilot's license was proper when the pilot and its corporate enterprise had been advertising and holding themselves out to serve part of the general population—musicians and their road crews—and had never declined to fly anyone). That right to decline all comers resolves the question: a carrier with such a right cannot be a common carrier. All the Internet does in this case is make it easier for private individuals to connect rather than posting an ad for a private, discriminate "planepool" on a bulletin board or in a newspaper. The only differences between Flytenow and the classic college ride-share board is that the car is a plane and the board is much more efficient at reaching people. These differences are legally irrelevant and cannot justify treating these pilots as common carriers even though carpool drivers who coordinate their rides through a bulletin board are clearly not. *See generally* FAA Legal Interpretation Letter from Kenneth E. Geier, Regional Counsel, to Paul D. Ware (Feb. 13, 1976).

The lower court plainly erred as a matter of centuries-old law. This Court should not allow such a radical departure from generations of common law by imposing common-carrier liability on transporters that do not seek indiscriminate public hire.

II. THE COURT BELOW ERRED IN GIVING *AUER* DEFERENCE TO THE FAA'S INTERPRETATION OF WHAT CONSTITUTES COMMON CARRIAGE

In the opinion below, the D.C. Circuit granted broad deference to the FAA's interpretation of what constitutes a "common carrier" under the precedent set in *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410 (1945), and affirmed in *Auer v. Robbins*, 519 U.S. 452 (1997), thereby upholding the determination that private pilots using Flytenow would be acting as common carriers. *Flytenow, Inc.*, 808 F.3d, at 889–92.

While the court below suggested that it would have upheld the FAA's interpretation even without applying *Auer* deference, *id*. at 890, that statement was mere *dicta*. By refusing to undertake a more searching inquiry into the permissibility of an agency interpretation, the court committed multiple errors.

A. Why Judges Generally Defer to Agencies' Interpretations of Their Own Regulations and, by This Court's Precedent, Cannot Defer to Agency Interpretations of the Common Law

When considering the permissibility of an agency's interpretation of an administrative regulation, courts must look to the administrative construction of the regulation if any word meanings are in question. *Seminole Rock,* 325 U.S. at 413–14 (1945). Generally speaking, the administrative interpretation will be controlling unless it is "plainly erroneous or inconsistent with the regulation." *Id*.; *see supra* Part I (arguing that the regulation is plainly erroneous based on 600 years of common law).

In some circumstances, however, constitutional principle or congressional intent may be relevant in choosing among possible word meanings, *Seminole Rock,* 325 U.S. at 413–14, and this Court has previously refused to grant deference under *Seminole Rock* and *Auer* in certain cases. *See infra* Part II.B.

The rule on deference in these cases is clear: agencies get *de novo* review on questions of law because courts are experts in law and agencies—by their nature—are not. Courts only defer to agencies as quasi-judicial bodies because they are, as quasi-judicial bodies, experts in a particular subject matter. If the question before the administrative body is one of judicial doctrines or common law, however, this Court has clearly indicated that no deference is due. *See, e.g.*, *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960) ("Therefore, since the Commission professed to dispose of the case solely upon its view of the result called for by the application of canons of contract construction employed by the courts, and did not in any wise rely on matters within its special competence, the Court of Appeals was fully justified in making its own independent determination of the correct application of the governing principles."); *id.* ("'Since the decision of the Commission was explicitly based upon the applicability of principles [of contract interpretation] announced by courts, its validity must likewise be judged on that basis.'" (quoting *SEC v. Chenery*, 318 U.S. 80, 87 (1943))).

This principle finds its basis in the fundamental separation-of-powers doctrine regarding the nature of the judicial branch. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.) ("It is emphatically the province and duty of the judicial department to say what the law is."). Accordingly, Con-

gress may not delegate away from "'[Art. III] judicial cognizance *any* matter which, *from its nature*, is the subject of a suit at the common law, or in equity, or admiralty.'" *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 & n.23 (1982) (plurality opinion) (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)). It is not a stretch to say that giving agencies *Auer* deference on questions of law ratifies an executive usurpation of the judicial role. *Cf. City of Arlington v. FCC*, 133 S.Ct. 1863, 1877-88 (2013) (Roberts, C.J. dissenting, joined by Kennedy & Thomas, JJ.) (citing The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison); *see also* John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 639 (1996) (arguing that deference under *Seminole Rock* and *Auer* is inappropriate because there is no independent interpretive check on agency lawmaking).

Moreover, the D.C. Circuit's radical expansion of the degree to which federal courts should defer to agencies' interpretations of common law is contrary to this Court's recent signaling that deference should be applied more judiciously in general, *see e.g.*, *City of Arlington*, 133 S.Ct. at 1877-88 (Roberts, C.J. dissenting, joined by Kennedy & Thomas, JJ.) (citing The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison)), particularly deference of the *Auer* kind. *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1210-11 (2015) (Alito, J., concurring); *id.* at 1211-13 (Scalia, J., concurring); i*d.* at 1213-25 (Thomas, J., concurring); *see also Decker v. Nw. Envtl. Def. Council*, 133 S.Ct. 1326 (2013) (Scalia, J., concurring in part and dissenting in part); *Talk America v. Michigan Bell Tel. Co.*, 131 S.Ct. 2254 (2011) (Scalia, J., concurring).

B. *Auer* Deference for Interpreting Common Law: The Majority Rule, Minority Rule, and D.C. Circuit Anomaly

In recent years the Court has been walking back *Auer* deference and limiting the instances in which it applies. *See, e.g.*, *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (refusing to apply *Auer* deference to agency interpretation that ran contrary to a regulation's plain meaning); *Gonzales v. Oregon*, 546 U.S. 243, 256–69 (2006) (refusing to apply *Auer* deference to agency's interpretation of its own ambiguous regulation when the regulation at issue merely parroted statutory text). More applicable here, though, is the Court's opinion in *Texas Gas Transmission Corp.*, which held that, when an agency interpretation is based on canons of construction—judge-made, common-law doctrines—rather than on the agency's expertise, no deference is due and courts should engage in *de novo* review of the permissibility of the interpretation based on the common law. 363 U.S. at 270.

Nine federal circuits have now considered the question of how much deference is owed to agencies when they interpret predominantly common-law terms—as in this case—resulting in two prominent rules. The majority of circuits (five) have held that in this circumstance, a reviewing court should afford no deference to the agency's interpretation, and review *de novo* the permissibility thereof. Pet. at 10–13. The rationale for *de novo* review is that expertise in interpreting common-law terms "falls outside the area generally entrusted to the agency," and "is one in which the courts have a special competence[,]" so "there is little reason for judges to subordinate their own competence to administrative 'expertness.'" *Hi-*

Craft Clothing Co. v. NLRB, 660 F.2d 910, 915 (3d Cir. 1981).

The Third, Fourth, Fifth, Sixth, and Ninth Circuits have all adopted this rule, finding that no judicial deference is owed to an agency's interpretation of common-law terms. *See, e.g.*, *id*; *West Virginia Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239, 245 (4th Cir. 2003); *White v. INS*, 75 F.3d 213, 214–15 (5th Cir. 1996); *NLRB v. Fullerton Transfer & Storage Ltd.*, 910 F.2d 331, 343 (6th Cir. 1990) (Engel, J., concurring); *Oil, Chemical, & Atomic Workers Int'l Union, Local 1-547 v. NLRB*, 842 F.2d 1141, 1144 n.2 (9th Cir. 1988). These circuits all review the permissibility of such agency interpretations *de novo*.

The Second, Eighth, and Tenth Circuits have taken a slightly different approach, deviating from *Texas Gas*. While they agree that broad deference under *Auer* is not due to an agency's interpretation of its own regulations when that predominantly involves interpreting common-law terms, they stop short of *de novo* review, and simply say that "great deference is not required." *Jicarilla Apache Tribe v. FERC*, 578 F.2d 289, 292–93 (10th Cir. 1978) (citing *Texas Gas*, 363 U.S. at 270); *accord Grossman v. Bowen*, 680 F. Supp. 570, 575 (S.D.N.Y. 1988) (citing *Jicarilla*, 578 F.2d at 292); *Brewster ex rel. Keller v. Sullivan*, 972 F.2d 898, 901 (8th Cir. 1992) (citing *Edwards v. Califano*, 619 F.2d 865, 869 (10th Cir. 1980)).

Instead of following the majority rule—or trying to suss out the minority rule—the D.C. Circuit struck out on a new path and gave unprecedented deference to the FAA's interpretive letter.

C. The D.C. Circuit's Application of *Auer* Deference to an Agency's Interpretation of Common-Law Terms Contradicts This Court's Precedents and Goes Far Beyond Either the Majority or Minority Rule

Instead of deferring to the FAA, upholding the agency's interpretation and treating it as controlling unless "plainly erroneous or inconsistent with the regulation[,]" *Flytenow*, 808 F.3d at 889–90 (citing *Auer*, 519 U.S. at 461), the D.C. Circuit should have applied the rule adopted by the majority of circuit courts to have considered the question—and by this Court in *Texas Gas*—affording the FAA no deference whatsoever and reviewing its interpretation *de novo*.

At the very least, the lower court should have applied the rule adopted by the minority of circuits to have considered the question, deferring to the FAA's interpretation only to the extent that it brought its unique expertise to bear on the question at hand. *See Martin v. Occup. Safety & Health Rev. Comm'n*, 499 U.S. 144, 157 (1991) (suggesting, in dicta, that reviewing courts should afford only *Skidmore* deference to agency interpretations that are contained in interpretive rules and other agency actions that are less formal than rulemakings and adjudications).

Under either of these two less-deferential standards of review, the FAA's determination of whether Flytenow's pilots were engaged in "common carriage" should have been struck down. Indeed, the FAA's interpretation was plainly erroneous" and "inconsistent" *with its own regulations*—and thus should have failed even under *Auer* because it was *a fortiori* unreasonable and in direct contravention to established common law precedent. *See supra* Part I.

But instead of applying any existing law on the none-to-some deference that is due to agencies interpreting common-law terms, the D.C. Circuit went off on a doctrinal frolic entirely of its own invention, applying *Auer* deference to an interpretation of common-law terms *in a page-and-a-half opinion letter*. This action directly contradicted not only this Court's precedent on what deference is due to interpretative letters in *Christensen*, but also *all* existing precedent on what deference to give common-law interpretations. By doing so, the court plainly delegates to the FAA what is "the province and duty of the judicial department," which is "interpret[ing]" the common law and to "say what the law is." *Marbury*, 5 U.S. (1 Cranch), at 177; *Texas Gas*, 363 U.S. at 270 (judicial province and duty extends to common law). The rationale by which courts defer to agencies rests, ultimately, on their supposed deference in complex areas of law. But if there is one body of law in which American courts are clearly the experts, it is the common law. As discussed above in Part II.A, the FAA has no expertise in the common law when juxtaposed with this Court's "emphatic[]" pronouncements about the judicial function. *Marbury*, 5 U.S. (1 Cranch), at 177.

This Court must grant certiorari to preserve the integrity of the judicial function itself and of its controlling precedents in *Christensen* and *Texas Gas*. It ought also to grant certiorari to resolve the underlying split in favor of the majority rule of *de novo* review, which best preserves the role of the federal judiciary in interpreting laws.

CONCLUSION

For the foregoing reasons, and those stated by the petitioners, the Court should grant the petition.

Respectfully submitted,

Berin N. Szoka
Thomas W. Struble
TECHFREEDOM
110 Maryland Ave. NE,
Suite 409
Washington, DC 20002
202-803-2867
bszoka@techfreedom.org
tstruble@techfreedom.org

Ilya Shapiro
Counsel of Record
Randal J. Meyer
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org
rmeyer@cato.org

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