The Heritage Foundation

ISSUE BRIEF

No. 4854 | MAY 18, 2018

Sharing the Skies: Liberalizing Flight-Sharing in the United States

Michael Sargent and John-Michael Seibler

Has the Federal Aviation Administration (FAA) taken its mission to "promote safe flight of civil aircraft" too far?[1] The FAA has shut down flight-sharing platforms by reinterpreting its own rules defining what is a "common carrier." This unilateral step, with no meaningful input from Congress or the public, effectively prohibited for air transportation the kind of beneficial innovation that ride-sharing and home-sharing companies brought to the ground transportation and hospitality markets.[2]

The FAA's regulatory change requires certified private pilots who operate small aircraft (six occupants maximum[3]), and wish to transport passengers in exchange for compensation, to comply with the same complex regulations as commercial air carriers, effectively killing a nascent industry with tremendous potential. However, current law already authorizes the underlying activity: private pilots transporting passengers in small aircraft.

The FAA's prohibition of online flight-sharing platforms is neither necessary nor sound policy. In order to reclaim the U.S.'s reputation as a world leader in aviation innovation, Congress should provide a framework to foster innovative flight-sharing arrangements that will benefit all Americans.

This paper, in its entirety, can be found at **http://report.heritage.org/ib4854**

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Defining the Term "Common Carrier"

Rather than a single definition for the term "common carrier," federal law provides multiple definitions scattered throughout various provisions of the U.S. Code.[4] The present meaning of the term was fleshed out over centuries as common law courts developed rules to apply in lieu of a contract between parties who agree to the transportation of passengers or property for compensation.[5]

In the Federal Aviation Act of 1958, Congress used but did not define the term "common carriage" regarding air transportation.[6] As a result, the FAA has relied for more than thirty years on its definition announced in one of its guidance documents known as an "advisory circular": "(1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation."[7] Because no statute controls that definition, the FAA has been able to play fast and loose with its definition of a common carrier in proceedings against private parties outside the formal rulemaking process required by the Administrative Procedure Act.[8] Thus, the FAA "has been able to deviate quite far from our basic understanding of what a common carrier is."[9]

Stifling Aviation Innovation: The Example of Flytenow

The FAA's reinterpretation of its own rules is a textbook case of how unilateral agency action can stifle innovation. Consider the agency's treatment of Flytenow, an online flight-sharing platform launched in 2014 to "share the joy of flying by allowing aviation enthusiasts to meet pilots and go flying together." Flytenow enabled people across the coun-

try to experience private flight, and even led some to obtain their own pilot certificates.[10]

The FAA issues several different types of pilot certificates, including "commercial" and "private." Commercial pilot certificate holders may transport property and passengers for profit,[11] while private pilot certificate holders generally may not.[12] Upgrading from a private to a commercial certificate requires pilots to commit substantial amounts of time and money to meet FAA and industry requirements.[13]

Flytenow was based on the long-standing, common practice of private pilots to split flight costs equally with any and all passengers in order "to make flights on small aircraft more accessible and cost-effective."[14] The FAA had long approved of that practice as an exception to the general ban on compensation for private pilots.[15]

For a small membership fee, Flytenow enabled would-be passengers and private pilots to post online the details of their future flight plans just as they had traditionally on bulletin boards and in other physical spaces.[16] Members could view the online postings and select flights—a much more efficient process then searching through local bulletin postings—but pilots ultimately decided who would and would not accompany them on their flights. After a flight, Flytenow split the pro rata shares of flight expenses among the pilot and passengers.

Soon after its creation, Flytenow asked the FAA whether its operations were legal. In a letter interpreting its own advisory circular, the FAA concluded that pilots participating in Flytenow were violating the limits of their private pilot certificate by acting as common carriers.[17] According to the FAA, pilots and passengers using Flytenow could not share expenses unless the pilots obtained a certificate for commercial operations and adhered to the same rules that apply to commercial pilots who fly large aircraft like a Boeing 747 as a full-time job.[18] That decision

1. 49 U.S.C. § 44701 (2000).
2. *See generally*, Christopher Koopman, *Defining Common Carriers—Flight Sharing, the FAA, and the Future of Aviation*, Mercatus Working Paper, Mercatus Ctr. at Geo. Mason Uni., https://bit.ly/2KajPky (visited Apr. 23, 2018).
3. 14 CFR § 61.113(h)(1).
4. *See, e.g.*, 47 U.S.C. § 153(11) (pertaining to telecommunications); 15 U.S.C. § 375 (pertaining to cigarette trade); 49 U.S.C. § 10102(5) (pertaining to rail carriers).
5. *See generally*, Koopman, *supra* note 2; Brief for the Cato Inst. and TechFreedom as Amici Curiae Supporting Petitioner, Flytenow, Inc. v. Federal Aviation Administration, 137 S.Ct. 618 (2017) (No. 16-14), 2016 WL 4268635.
6. 49 U.S.C. §§ 40102(a)(23)-(27). Congress did, however, define the term "air carrier" as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." 49 U.S.C. § 40102.
7. FAA Advisory Circular 120–12A (April 26, 1986), available at: https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC%20120-12A.pdf.
8. That statute requires agencies to notify the public of, and consider public comments on, forthcoming rules before they are promulgated (unless a limited exception applies, such as an emergency rulemaking). 5 U.S.C. § 553 (2000).
9. *See* Federalist Society, *How the FAA Defines a Common Carrier*, https://fedsoc.org/commentary/videos/how-the-faa-defines-a-common-carrier (last visited Mar. 15, 2018).
10. Matt Voska, *The Beginning of the End*, Flytenow Blog (Dec. 22, 2015), https://bit.ly/1NB2o8U.
11. 14 C.F.R. § 61.133 (2016) (available at https://bit.ly/2Hj8oZU).
12. 14 C.F.R. § 61.113 (2017) (available at https://bit.ly/2K6heIi); *see also* Kathy Yodice, *Compensation: The FAA Knows It When They See It*, Aircraft Owners and Pilots Assoc. (Dec. 2, 2013), https://bit.ly/2F9x15x; Phillip J. Kolczynski, *Traps For The Unwary: Business Flying And The "Compensation Or Hire" Rule*, AVweb (Dec. 24, 2003), https://www.avweb.com/news/avlaw/186346-1.html.
13. 14 C.F.R. § 61.123 (commercial pilot eligibility requirements); Patrick Smith, *The Pilot Shortage Is Real and Airlines Must Change before It Becomes a Full-blown Crisis*, Bus. Insider (Jul. 20, 2017), https://read.bi/2vS7DNx; Claire Trageser, *The Cost of Becoming a Pilot is Making the Job a Pipe Dream*, Mashable (Apr. 20, 2016), https://on.mash.to/2FacHAQ.
14. Goldwater Inst., *Flytenow V. FAA*, https://bit.ly/2jChnHo (last visited Apr. 23, 2018).
15. 14 C.F.R. § 61.113(c); 29 Fed. Reg. 4717, 4718 (1964); 62 Fed. Reg. 16220, 16263 (1997).
16. "[I]n its 1976 Ware Interpretation…the FAA opined that posting on a bulletin board is permitted in certain circumstances." Flytenow, Inc. v. F.A.A., 808 F.3d 882, 892 (D.C. Cir. 2015).
17. *Id.*
18. *Id.*; 14 C.F.R. § 119.

contradicted decades of precedent, enshrined in federal regulations, that "one or more passengers contribut[ing] to the actual operating expenses of a flight is not considered the carriage of persons for compensation or hire."[19]

Flytenow sought review of the FAA's letter in the U.S. Court of Appeals for the District of Columbia Circuit, arguing in part that the FAA's novel interpretation of its own common carrier provisions was arbitrary and capricious; that it had the effect of a substantive rule and therefore should have been issued in compliance with the Administrative Procedure Act;[20] and that Flytenow-member pilots could not reasonably be characterized as common carriers because they do not hold themselves out to the general public for transportation for profit. For those and additional reasons, Flytenow argued that the FAA's letter effectively banning online flight-sharing platforms should be overturned.

Flytenow's position was bolstered by the fact that courts typically do not defer to an agency interpretation of common law terms like those at issue in *Flytenow v. FAA* which pertain to common carriage.[21] Legal experts serving as federal judges, not technical experts serving in the federal bureaucracy, should be responsible for determining the meaning of common law terms. An agency's interpretation of common law terms provided in opinion letters and other guidance documents, rather than through formal rulemaking and adjudication, are "'entitled to respect'...but only to the extent that those interpretations have the 'power to persuade.'" [22]

The DC Circuit, however, rejected Flytenow's arguments and deferred to the FAA's interpretation of its own common carrier provisions under the doctrine of *Auer* deference.[23] Under *Auer v. Robbins* (1997), courts defer to agency interpretations of their own regulations so long as the agency's interpretation is not plainly wrong or inconsistent with the text of the regulation.[24] The practice of giving executive branch bureaucrats broad legislative authority is well known,[25] but *Auer* deference may be "'on its last gasp.'"[26] Justices Clarence Thomas and Neil Gorsuch addressed this issue in a dissent from the Court's decision not to review the case of *Garco Construction Inc. v. Secretary of the Army*, which asked whether *Auer* should be overruled in light of an Air Force policy change that overrode the terms of a construction contract. Justices Thomas and Gorsuch wrote that *Auer* deference "results in an 'accumulation of governmental powers' by allowing the same agency that promulgated a regulation to 'change the meaning' of that regulation 'at [its] discretion.'"[27] This not only allows agencies to create an uncertain regulatory environment, but also "undermines 'the judicial check on the political branches' by ceding the courts' authority to independently interpret and apply legal texts."[28]

Flytenow's case, like *Garco* after it, might have ushered in *Auer*'s demise. Instead, the full DC Circuit refused to review the case en banc, and the U.S. Supreme Court denied Flytenow's petition for review. That left Flytenow (and other online flight-sharing platforms) right where the FAA's guidance letter put them: out of operation.[29]

Flight-Sharing: Grounded in the U.S., Soaring in Europe

The FAA's treatment of Flytenow stands in stark contrast to the actions taken by its European

19. 29 Fed. Reg. 4717, 4718 (April 2, 1964); *see also* 14 C.F.R. § 61.113(c) (authorizing pro rata cost sharing).
20. 5 U.S.C. § 553 (2000).
21. Such deference is inappropriate because the "determination of pure [common] law involve[s] no special administrative expertise that a court does not possess." N. L. R. B. v. United Ins. Co. of Am., 390 U.S. 254, 260 (1968).
22. Christensen v. Harris County, 529 U.S. 576, 587 (2000).
23. Voska, *supra* note 10.
24. 519 U.S. 452 (1997); *see also* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).
25. Elizabeth Slattery, *Doomed Deference Doctrines: Why the Days of Chevron, Seminole Rock, and Auer Deference May Be Numbered*, Heritage Foundation Legal Memorandum No. 221 (Dec. 14, 2017), https://www.heritage.org/sites/default/files/2017-12/LM-221.pdf.
26. Garco Const., Inc. v. Speer, 138 S. Ct. 1052, 1053 (2018).
27. *Id.* at 1052–53.
28. *Id.* at 1053.
29. Voska, *supra* note 10.

counterpart—the European Aviation Safety Agency (EASA)—when faced with the same prospect of Internet-enabled flight-sharing. The European Union has nearly identical regulations regarding private pilots' ability to share the costs of their flights. EASA regulations permit

> cost-shared flights by private individuals, on the condition that the direct cost is shared by all the occupants of the aircraft, pilot included and the number of persons sharing the direct costs is limited to six.[30]

Although the EASA's rule is virtually identical to the FAA's regulations, the agency proved much less hostile to innovative flight-sharing platforms. Wingly, a U.K.-based flight-sharing start-up with a business model similar to Flytenow's, launched in Europe, and similarly sought to clarify that its operations were legal. The EASA confirmed that Wingly's online flight-sharing system was indeed legal under existing cost-sharing regulations.[31] Since then, Wingly has grown to a community of 10,000 pilots serving 150,000 users primarily in Western and Southern Europe. The company has raised more than 2 million euros in seed funding and is rapidly expanding its team with the intention of expanding operations in other parts of Eurasia.[32] While the FAA's arbitrary judgment stifled innovation, safety regulators abroad applying essentially the same regulations permitted the same activity.[33]

Getting to "Wheels Up" on Flight-Sharing

In the 2018 legislation to reauthorize the FAA,[34] Congress has asked the FAA for insight into how flight-sharing might work. Specifically, Congress asked the FAA to list examples of the following operations:

> (A) Flights for which pilots and passengers may share expenses; (B) flights for which pilots and passengers may not share expenses; (C) the methods of communication that pilots and passengers may use to arrange flights for which expenses are shared; and (D) the methods of communication that pilots and passengers may not use to arrange flights for which expenses are shared.

Such examples might provide Congress and the public with more information about the FAA's perspective on cost-sharing, but much more work remains to be done if flight-sharing is going to take off. Opening the skies to the kind of innovation that Uber and Lyft brought to the roadways is an idea that deserves open-minded debate in Congress.

The FAA could act unilaterally to reverse its previous decision to apply common-carriage regulations to online flight-sharing; however, establishing clear standards by statute would provide much needed certainty. On April 11, Senator Mike Lee (R–UT) introduced a bill, the Aviation Empowerment Act (AEA), which would ensure that flight-sharing companies who want to help private pilots transport would-be passengers and their property will not be left waiting in the wings.[35]

The AEA would adopt the FAA's traditional definition of common carrier, expressed in its 1986 advisory circular,[36] and also authorize private pilots to share their flight plans and offer to transport property and no more than 8 people at a time. This would expressly allow pilots who want to share the costs of flying to communicate their intentions to the public, thus ending the administrative ban on flight-sharing. The AEA would not block the FAA from redefining common carriage if and when that became necessary. It would, however, require the agency to do so through the lawful rulemaking process established by the Administrative Procedure Act.

30. Commission Regulation (EU) No 965/2012 Article 6 Paragraph 4(a), http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1499960916767&uri=CELEX:02012R0965-20170322.
31. Letter from Patrick Ky, Executive Director, EASA, to Emeric Waziers, Wingly co-founder, on Cost-shared Flights, Mar. 14, 2016, available at https://en.wingly.io/media/doc/en/EASA_140316.pdf.
32. Jonathan Keane, *Wingly Raises €2 Million for its Carpooling for Flights Service*, TechEU (Mar. 5, 2018), http://tech.eu/brief/wingly-funding/.
33. European regulators, nonetheless, which are widely perceived to enforce a stricter regulatory regime than American regulators.
34. *See* H.R. 4, § 516, as drafted on April 19, 2018, which passed the House on April 27, 2018.
35. Press Release, Sen. Mike Lee, *Sen. Lee Introduces Aviation Empowerment Act* (Apr. 11 2018), https://bit.ly/2IideXf.
36. *Supra* note 7.

The AEA would also create a new category of "personal operator" allowing a certified private pilot to both receive compensation for flying persons or property and avoid certain commercial airliner operating regulations, as long as that private pilot only flies an aircraft with eight or fewer seats. This measure may generate controversy, including opposition from existing airlines, and their associated pilots' unions, who may fear a loss of market share.

However, individuals should be able to evaluate and accept the risks, either real or perceived, of flying with certified private pilots who are already permitted by the FAA to carry passengers. That mode of transportation promises comparable benefits to Uber and Lyft, and may be an incentive for positive changes in the aviation industry.

The Economic and Safety Implications of Flight-Sharing

Allowing flight-sharing either on an expense-sharing or a for-profit basis will yield numerous benefits for consumers and the aviation industry without jeopardizing safety. The most notable of these benefits include:

- Addressing the industry-wide pilot shortage;
- Increasing choice and competition in air travel;
- Improving access to rural areas without costly federal subsidies; and
- Maintaining safety standards.

Addressing the Industry-wide Pilot Shortage. One of the most pressing issues facing the aviation industry is the decline in the number of certified pilots. From 2008 to 2017, the number of certified private airplane pilots declined by 60,000 pilots, or 27 percent, while the number of pilots certified for commercial (non-airline) operations likewise declined by 26,585 pilots, or 21 percent.[37] This shortage is expected to grow in coming years, as the Boeing Pilot Outlook predicts the North American aviation industry faces an unmet need for 117,000 new pilots between 2017 and 2036.[38] This lack of qualified pilots has not yet affected major commercial airlines, but has upset regional airline operations, even causing some to suspend operations entirely.[39]

Because general aviation serves as a pipeline to the regional air carriers, there have been many calls to reverse the decline in the number of pilots who obtain private and commercial certification. The president of the Regional Airlines Association has called the shortage of qualified pilots "endemic throughout the regional airline industry," while the Aircraft Owners and Pilots Association (a nonprofit representing general aviation pilots) has said that "we need to do everything we can to increase the general aviation pilot population."[40]

Allowing pilots with a private certification to engage in flight-sharing has the potential to remedy the shortage. Allowing pilots to receive compensation (or a reduction in the cost of their flights) would reduce the high cost of obtaining and maintaining pilot certificates. Those costs are high indeed: Obtaining a private pilot certification costs an average of $9,500, while the total cost of obtaining commercial certification can cost $100,000 and as much as $200,000.[41] Even at the low end of nearly $10,000, the expense constitutes a prohibitive burden for the median American family.

Enabling private pilots to defray the cost of achieving certification by hosting paying or cost-sharing customers could help attract more entrepreneurial potential pilots unable to afford the cost of certification. Such is the case in Europe, where, under a limited cost-sharing basis, Wingly has generated nearly $600,000 in savings for pilots over a

37. U.S. Dep't of Transportation, Fed. Aviation Admin., *U.S. Civil Airmen Statistics*, https://www.faa.gov/data_research/aviation_data_statistics/civil_airmen_statistics/ (last visited May 7, 2018).

38. Kelly Burke, *Airlines Battle Growing Pilot Shortage that Could Reach Crisis Levels in a Few Years*, Fox News, December 20, 2018, https://fxn.ws/2BPI32i.

39. Press Release, Regional Airline Association, Statement on Great Lakes Suspension of Operations (March 28, 2018), https://bit.ly/2jI4mfj.

40. Rod Machado, *The Pilot Shortage: A Practical Solution*, Aircraft Owners and Pilots Assoc. (July 6, 2015), https://www.aopa.org/news-and-media/all-news/2015/july/06/ltl; *see also* Regional Airline Assoc., *supra* note 38.

41. U.S. Gov't Accountability Off., GAO-14-232, Aviation Workforce: Current and Future Availability of Airline Pilots (2014), https://www.gao.gov/assets/670/661243.pdf; *see also* Regional Airline Assoc., *supra* note 38.

two-year period.[42] Furthermore, it would lower the cost of maintaining the requisite number of flight hours and mitigate the cost of obtaining the additional hours necessary to pursue commercial and air carrier certifications.

In addition, giving more Americans the opportunity to experience flight in a small aircraft may entice some to pursue a private pilot's license and further expand the pool of potential pilots. While this effect may be difficult to measure, the "thrill of flight" has long attracted Americans to the skies.[43] If the industry seeks to do everything it can to mitigate the pilot shortage, lowering the financial and experiential barriers to becoming a private pilot are a good place to start.

Increasing Choice and Potential Competition in Air Travel. The airline deregulation that has led the U.S. aviation industry to be the largest in the world has been a success for consumers, leading to a substantial reduction in fares and greater array of destinations.[44] However, U.S. airlines still receive ample government protections that inhibit a more competitive aviation industry at the expense of consumers. Foreign airlines, for example, are prohibited from operating point-to-point flights in the U.S. All airlines operating in the U.S. must be at least 75 percent owned by American citizens.[45] As a result, Americans do not have the option of flying low-cost Ryanair or high-amenity Emirates from New York to Chicago.[46]

Furthermore, federal restrictions on airport funding, which are unique to the U.S., also benefit established airlines by empowering them to shut out competition through agreements with airports that give them exclusive or preferential access.[47] This lack of competition ends up costing consumers through higher fares, which one study estimated to be more than $5 billion higher per year than if airports allowed new entrants into the market.[48]

Flight-sharing would not likely compete with direct airline service in major metropolitan markets. However, flight-sharing could present the option of more direct service to rural or exurban areas, or provide an alternative to scheduled flights that may be inconvenient for the traveler. Further, even the threat of increased competition from small flight-sharing services may prompt major commercial airlines to rein in practices that customers find objectionable, like certain ancillary fees. Authorizing flight-sharing would be a simple way for policymakers to begin increasing choice for air travelers.[49]

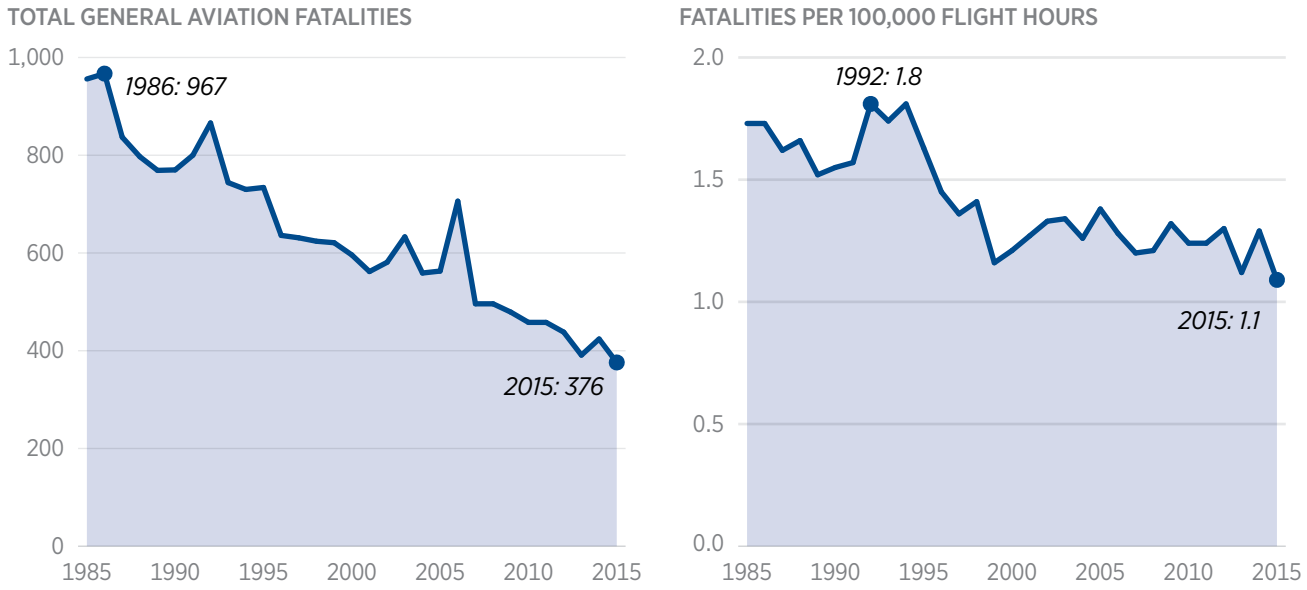
Improving Access to Rural Areas Without Federal Subsidies. Currently, the federal government spends more than $300 million annually on the Essential Air Service (EAS) program, which heavily subsidizes flights to 113 rural airports in the Continental U.S. and others in Hawaii and Alaska.[50] The program was intended to provide temporary aid to rural areas fearing immediate service cuts following airline deregulation in the late 1970s, but it continues to divert hundreds of millions of dollars to a select few flyers. In fact, the EAS's budget has increased by 600 percent over the past 20 years.[51]

The EAS program is both wasteful and inefficient. Many EAS flights fly half-empty or even with a sin-

42. Jonathan Keane, *Wingly Raises €2 Million for its Carpooling for Flights Service*, TechEU (Mar. 5, 2018), http://tech.eu/brief/wingly-funding/.
43. T.A. Heppenheimer, Turblent Skies: The History of Commercial Aviation (1995).
44. U.S. Dep't of Transportation, Bureau of Transportation Statistics, Annual U.S. Domestic Average Itinerary Fare in Current and Constant Dollars (Apr. 18, 2018), https://www.bts.gov/content/annual-us-domestic-average-itinerary-fare-current-and-constant-dollars; *see also* Adam Thierer, *20th Anniversary of Airline Deregulation: Cause For Celebration, Not Re-regulation*, Heritage Foundation Backgrounder No. 1173 (Apr. 22, 1998), https://bit.ly/2wljW9R.
45. 49 U.S. Code § 40102(a)(15)(C).
46. 49 U.S. Code § 41703.
47. Michael Sargent, *End of the Runway: Rethinking the Airport Improvement Program and the Federal Role in Airport Funding*, Heritage Foundation Backgrounder No. 3170 (Nov. 23, 2016), https://bit.ly/2HXLEiE.
48. *Ibid.*
49. Bart Jansen, *Lawmakers Blast Airlines, Which Say They're Fixing Problems*, USA Today (May 2, 2017), https://www.usatoday.com/story/news/2017/05/02/airline-customer-service-house-hearing/101196992/.
50. Heritage Foundation calculations based on data in U.S. Department of Transportation, "Subsidized Essential Air Service Communities (not in Alaska)," January 2018, https://bit.ly/2jCNVB7.
51. Rachel Y. Tang, Cong. Res. Serv., R44176, Essential Air Service (EAS) (2017), https://fas.org/sgp/crs/misc/R44176.pdf.

CHART 1

General Aviation Operations Have Become Significantly Safer



SOURCE: General Aviation Manufacturers Association, "U.S. General Aviation Accidents, Fatal Accidents, and Fatalities (1985–2016)," https://gama.aero/wp-content/uploads/2016-GAMA-Databook_forWeb.pdf (accessed May 14, 2018).

IB4854 ☎ heritage.org

gle passenger.[52] Subsidies can eclipse $500 or even $600 per passenger for a single flight, an astonishing amount given the average *round trip* fare in the U.S. is around $340.[53] Because of political considerations, the service even subsidizes flights to airports that are in the vicinity of major airports, such as Lancaster, PA (roughly 40 miles from Harrisburg International Airport), or Morgantown, WV (70 miles from Pittsburgh International Airport).[54] While federal law states that subsidies cannot exceed $200 per passenger and that airports that receive EAS subsidies must serve a minimum average of 10 passengers per day, extensive lobbying efforts have resulted in the Secretary of Transportation waiving these common-sense requirements.

Allowing flight-sharing could let private pilots service many rural areas and replace routes served by the EAS, reducing the need for wasteful and distortionary federal subsidies. This would benefit travelers to these destinations as well as the pilots, who can benefit financially and gain experience necessary for certification. Thus, flight-sharing would be a win for travelers, pilots, rural areas, and taxpayers, if increasing access to rural areas helps reduce wasteful EAS spending.

Maintaining Safety Standards. Opponents of flight-sharing may maintain that such activity could be dangerous for flyers. However, the underlying activity of a private pilot carrying passengers is already permitted under current law and FAA regulations. Furthermore, both the number and rate of general aviation fatalities is at its lowest point in decades. In fact, the rate of general aviation fatalities is likely at its lowest point ever. Since

52. Philip Wegmann, *Flights From Nowhere: John Murtha's Federally Subsidized Airport Could Die Under Trump Budget*, Wash. Examiner (Mar. 21, 2017), https://washex.am/2roKxhI.
53. *See* U.S. Dep't of Transportation, *$200 Per Passenger Compliance Status Report - 12 Months Ended September 30, 2016* (Nov. 27, 2017), https://bit.ly/2KmTBuu; Heritage Foundation calculations based on data in U.S. Department of Transportation, "Subsidized Essential Air Service Communities (not in Alaska)," January 2018, available at https://bit.ly/2jCNVB7.
54. Ibid.

1985, the number of general aviation fatalities has declined by more than 60 percent and the fatality rate per 100,000 flight hours has declined by nearly 40 percent.[55]

Comparisons of general aviation fatality rates to those of other modes of transportation are difficult. General aviation fatality rates cover numerous types of activities with varying degrees of risk and are recorded as a function of flight hours, whereas those for other modes of transportation are recorded on the basis of passenger miles. However, a gross comparison shows that the annual number of general aviation fatalities in 2016 (372) was drastically lower than those recorded for highway travel (37,461) and rail transportation (791).[56] Even while the fatality *rate* for traveling by small aircraft may be higher than that of flying commercially or perhaps driving, it is apparent that general aviation flight has long demonstrated a safety record acceptable to regulators and general aviation pilots, and has improved to its safest point ever. Travelers should be able to assess the risks accordingly and weigh them against convenience, timesaving, and any other benefit flight-sharing may offer. Current law in the U.S. and in Europe already allows passengers to weigh risks and benefits when they fly with private pilots, and simply allowing pilots and passengers to arrange their flights on the Internet instead of bulletin boards would not alter safety considerations in any meaningful way.

Conclusion

The FAA's uncertain mode of regulating flight-sharing through guidance documents has negatively affected innovation. In the absence of the U.S. Supreme Court overturning its *Auer* decision, the FAA and other regulatory agencies are free to reinterpret their own regulations and change their guidance materials. In the context of online flight-sharing platforms, Congress should step in and provide statutory certainty.

Language in the House-passed 2018 FAA reauthorization offers a small step toward permitting the kind of flight-sharing operations that the FAA has abolished, but more needs to be done if Americans are to enjoy the benefits of flight-sharing innovation. The Aviation Empowerment Act would clarify the meaning of common carriage for purposes of air transportation and require the FAA to follow formal rulemaking procedures; offer more Americans greater choice to fly on private aircraft; and increase profitability of operation for current private pilots. These policies are deserving of genuine debate in Congress instead of being stifled through bureaucratic interpretation.

*—**Michael Sargent** is Policy Analyst for Transportation and Infrastructure in the Thomas A. Roe Institute for Economic Policy Studies, of the Institute for Economic Freedom, at The Heritage Foundation. **John-Michael Seibler** is Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies, of the Institute for Constitutional Government, at The Heritage Foundation.*

55. General Aviation Manufacturers Assoc., 2016 General Aviation Statistical Databook & 2017 Industry Outlook, at Table 8.1 (2017), available at https://bit.ly/2DnbZ6D.

56. U.S. Dep't of Transportation, Bureau of Transportation Statistics, *Transportation Fatalities by Mode*, https://www.bts.gov/content/transportation-fatalities-mode (last visited May 7, 2018).