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Christina Sandefur[*] and Jon Riches[†]

I. Introduction

Innovative technologies that connect service providers to consumers are changing the way people live, work, and travel. From Uber and Lyft in transportation to Airbnb in lodging— and smaller platforms for everything from home cosmetology services to babysitters—people are finding and using new ways to trade goods and services. Consumers gain greater access to products and services at lower costs, and pioneering individuals and businesses are reaching markets they would not otherwise have reached.

Unfortunately, many state and local governments, as well as the federal government, have reacted not by welcoming these new developments, but rather by imposing antiquated or incongruent rules that shut down these innovative ways of communicating about and facilitating the exchange of goods and services.

Behind these restrictions is often the notion that new economic conditions require new forms of regulation. But in fact, much of the "sharing economy" is not really new at all. These businesses help *facilitate* transactions or *advertise* services that have themselves been around for a long time. Often, what makes the sharing economy unique is not that it sells new things—it usually does not—but that it helps people learn about or reduces the transaction costs involving things that are not new. But the sharing of information is different than other activities, particularly because the sharing of information is protected by the First Amendment. Thus, when discussing the regulation of the sharing economy it bears keeping in mind that just because the mode of *advertising* an activity has changed does not mean that government must impose new regulations on a long-standing activity. Likewise, government should not regulate purely communicative activities as if they were the same as the underlying practice being advertised—advertising a car ride is not the same thing as selling a car ride. Conversely, if one has a right to let a guest stay in one's home for money, that right does not change just because one advertises that fact in a new way. Ignoring these principles leads to regulatory mismatch. This article makes the case against this mismatch using three case studies.

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First, this article addresses homesharing, a new term for a centuries-old practice of homeowners allowing overnight guests in their homes. Lawmakers nationwide are cracking down on homeowners' ability to use the internet to offer their homes for rent. Next, this article discusses Angels on Earth, a dispatch service that connects people who are homebound due to age or medical condition with salon and spa services. Although its services only involved the exchange of information, bureaucrats tried to force Angels on Earth into the same regulatory framework as the cosmetologists the service deployed—a classic instance of regulatory mismatch. Finally, this article tells the story of Flytenow, an innovate startup that allows private pilots to share travel plans and trip expenses with passengers. Simply because Flytenow created a more efficient way to promote that longstanding and lawful practice, the federal government adopted new regulations that shut the business down completely.

These cases illustrate the absurdity of applying new regulations to longstanding practices—or shoehorning new businesses into old regulations—simply because technology has made the voluntary, harmless, and lawful exchange of goods and services more efficient.

II. HOMESHARING: Outlawing the Advertisement of Centuries-Old Practice

Homesharing—when homeowners let visitors stay in their homes in exchange for money or chores—is nothing new. For generations, Americans have opened their homes to travelers, students, and immigrants. During the Great Depression, homeowners would sometimes let people stay in their homes in exchange for doing chores. During the days of segregation, travelers sometimes spent the night with local residents because they were excluded from "white-only" hotels. Today, homesharing is experiencing a resurgence of popularity because it offers travelers a way to experience local atmosphere in a new way, without the sanitized, sometimes artificial feeling of staying at a hotel. Meanwhile, it allows property owners to exercise their basic right to choose whether or not to let someone stay in their home—a right the Supreme Court has called "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[1]

Homesharing is also a boon to local communities. People who take advantage of homesharing on average stay more than twice as long as they otherwise would, and some 35 percent of them say they would not have visited at all, or would have planned a shorter trip, were it not for homesharing.[2] These guests stay in neighborhoods they otherwise would not have visited, and they spend money at local businesses, especially restaurants. According to a 2016 report by Airbnb, homesharing guests spent $1.5 billion in restaurants in the past year, and nearly half of these guests spend their money in the neighborhoods where they are staying.[3]

[1] Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).
[2] Airbnb, *Shared Opportunity: How Airbnb Benefits Communities* at 2, https://www.ftc.gov/system/files/documents/public_comments/2015/05/01740-96152.pdf.
[3] Airbnb, *Generating $4.5 Billion for Restaurants* at 3, https://www.airbnbaction.com/wp content/uploads/2016/10/restaurant-report-final-10-14-16.pdf.

Rather than welcoming companies like Airbnb and Homeaway—internet-based platforms that connect homeowners and guests better than ever before—many cities nationwide have responded by imposing draconian new rules that deprive Americans of some of their most basic constitutional rights, including the right to share information. A new ordinance in Chicago, for instance, imposes a base fee of $10,000 plus a $60.00 per unit fee on rental hosting platforms like Airbnb.[4] In New York, people who advertise that they will allow guests to stay in their apartments face fines of up to $7,500.[5] And in Anaheim, California, homesharing companies face fines of $2,000 per offense, simply for *hosting* a listing of an outlawed rental.[6]

In addition to fining homeowners who rent their homes, the cities of San Francisco,[7] Santa Monica,[8] and Anaheim[9] have also enacted new ordinances that force homesharing platforms like Airbnb and Homeaway to police homeowners who use their websites. San Francisco's 2016 law threatens these companies with $1,000 daily fines and misdemeanor penalties for each rental listing that does not conform to the City's regulations.[10] Airbnb filed a lawsuit challenging that ordinance.[11] In addition, the New York law that fines people up to $7,500 for conveying information about their willingness to let guests stay in their apartments[12] also holds platforms accountable for hosting such information.[13] But ordinances that punish internet platforms for messages communicated by others violate the Federal Communications Decency Act.[14]

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[4] Chi. Ordinance No. O2016-5111 (2016).

[5] Greg Bensinger, *New York Governor Signs Bill Authorizing Fines for Airbnb Rentals*, WALL ST. J., Oct. 21, 2016, http://www.wsj.com/articles/new-york-governor-signs-bill-authorizing-fines-for-airbnb-rentals-1477079740.

[6] Anaheim Mun. Code § 4.05.130.0103.

[7] S.F. Admin Code. Ch. 41.A (2016).

[8] In May 2015, Santa Monica approved an ordinance banning renting units for fewer than 30 days and holding platforms accountable for unlawful listings. Airbnb filed a lawsuit against the City on September 2, 2016. That lawsuit has been stayed pending City action on proposed amendments to the ordinance. Airbnb, Inc. v. City of Santa Monica, No. 2:16-CV-06645 (C.D. Cal. 2016).

[9] In July 2016, Anaheim approved an ordinance outlawing homesharing and fining platforms up to $2,000 per listing of outlawed properties. Anaheim Mun. Code § 4.05.130.0103. Only a month later, after Airbnb and Homeaway filed a lawsuit against the City, Anaheim agreed not to enforce the ordinance against the online rental sites and the platforms dismissed the lawsuit. Hugo Martin, *Anaheim Won't Fine Short-Term Rental Companies for Hosts' Violations,* L.A. TIMES, Aug. 22, 2016, http://www.latimes.com/business/la-fi-anaheim-airbnb-20160823-snap story.html.

[10] S.F. Admin Code. Ch. 41.A. While San Francisco permits homesharing if the homeowner is present during the rental period, it caps "unhosted rentals" at 90 days a year. Mollie Reilly, *San Francisco Mayor Rejects Tough Restrictions On Airbnb*, HUFFINGTON POST, Dec. 9, 2016, http://www.huffingtonpost.com/entry/san-francisco airbnb-regulations_us_584af753e4b04c8e2bafabbc.

[11] Bigad Shaban, *Airbnb's New Rules Abroad Could Impact San Francisco,* NBC BAY AREA, Dec. 1, 2016, http://www.nbcbayarea.com/news/local/Airbnb-Announces-New-Rules-for-Users-Abroad-Could-Impact-Hosts-in US-404125246.html. That lawsuit is still pending. Airbnb, Inc. v. City & Cty. Of San Francisco, No. 3:16-CV 03615-JD, 2016 WL 6599821 (N.D. Cal. Nov. 8, 2016).

[12] Bensinger, *New York Governor Signs Bill*, *supra* note 5.

[13] N.Y. Mult. Dwell. Law §§ 120-121 (2016). Airbnb sued both New York State and City over the provisions holding platforms accountable for unlawful listings but has dismissed both lawsuits after the State and City both promised not to enforce the laws against platforms. Greg Bensinger, *Airbnb Won't Pursue Legal Case Against New York City Over Rental Law*, WALL ST. J., Dec. 2, 2016, http://www.wsj.com/articles/airbnb-wont-pursue-legal-case against-new-york-city-over-rental-law 1480738473?emailToken=JRrzdvt9ZHSThdUzbsw11UciaKNNFOiPWhbPMWrRJ0WJsHHaqObkzK wuip6+rmqu Q11motYJ8CsuQifSxWFrQN7UnKByixK+dn9Bp5WB1QSUfx2HzBbVJrpA6fI.

[14] 47 U.S.C. § 230 (2012) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."). *See generally* Christina Sandefur, Turning *Homeowners into Outlaws: How Anti-Homesharing Regulations Chip Away*

Among the most extreme anti-homesharing localities is Miami Beach, Florida, which now imposes fines of $20,000 on home-sharers who rent outside of a zone where rentals are permitted, or who fail to comply with the myriad of rules within that zone.[15] One of those rules prohibits homeowners from placing a sign on the exterior of the building, on the right-of-way, or in a manner viewable from the right-of-way[16] to advertise a home as a rental. Yet the city allows other types of signs in these areas, such as political signs[17] and signs advertising garage sales.[18]

Such a discriminatory rule raises the specter of a content-based restriction on speech. The right to share information freely is protected by the Constitution, which does not differentiate in its protections between kinds of speech.[19] Punishing people for sharing truthful information about their homes' rental availability—while allowing people to post signs that say "Vote for Smith" or "Yard Sale"—imposes restrictions on speech based on the content of that speech. Such rules specifically target communications about renting a home for money.[20] As the Supreme Court has recently explained, any law that "applies to particular speech because of the topic discussed or the idea or message expressed" is a content-based speech restriction, and therefore almost never constitutionally permissible.[21] Furthermore, the government may not impose burdens on speech based on the speaker's identity,[22] or commercial motive,[23] or the content of the message.[24] Indeed, the Court has held that the First Amendment *protects* sharing information solely for marketing purposes.[25] In *Sorrell v. IMS Health, Inc.*, the Court struck down a Vermont law that prohibited the transmission of information relating to doctors' prescribing practices for commercial use by pharmaceutical companies. The Constitution protects the conveying of information even if it "results from an economic motive."[26]

True, the Supreme Court has held that the Constitution does not protect *commercial* speech—speech that advertises a product or service—as much as it protects other types of speech. Under the *Central Hudson* test, government may censor lawful, non-

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at the Foundation of an American Dream, 39 U. Haw. L. Rev. __ (forthcoming, 2017), https://ssrn.com/abstract=2908248.

[15] Chabeli Herrera, *How Much Has Miami Beach Left on the Table by not Signing Airbnb Deal? A Lot*, MIAMI HERALD, Feb. 8, 2017, http://www.miamiherald.com/news/business/article131560879.html; Chabeli Herrera, *How $20,000 Fines Have Made Miami Beach an Airbnb Battleground*, MIAMI HERALD, Nov. 27, 2016, http://www.miamiherald.com/news/business/biz-monday/article117332773.html.

[16] Miami Beach City Code § 142-1111(c)(6).

[17] *Id.* § 138-134.

[18] *Id.* § 138-138.

[19] U.S. CONST. Amend. I.

[20] Indeed, the Supreme Court struck down an ordinance that prohibited residential real estate signs in order to curb white homeowners from leaving a racially integrated community as violating the First Amendment. Linmark Assocs., Inc. v. Willingboro Twp., 431 U.S. 85 (1977). The Court found it inappropriate that the government "proscribed particular types of signs based on their content because it fears their 'primary' effect that they will cause those receiving the information to act upon it." *Id.* at 94.

[21] Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2227 (2015).

[22] Sorrell v. IMS Health, 564 U.S. 552, 579-80 (2011).

[23] *Id.* at 566, 570 (rejecting government's argument "that heightened judicial scrutiny is unwarranted in this case because sales, transfer, and use of . . . information are conduct, not speech," because "the creation and dissemination of information are speech within the meaning of the First Amendment").

[24] *Reed*, 135 S. Ct.at 2226-27.

[25] *Sorrell*, 564 U.S. at 576-78.

[26] *Id.* at 567.

misleading commercial speech if that censorship directly serves a substantial government interest and is not more extensive than necessary.[27] Thus, officials in Miami Beach and elsewhere might argue that homesharing advertisements are not entitled to the same level of constitutional protections as other speech because the information is being shared in order to make money—a commercial purpose. But the kind of blanket prohibitions imposed by Miami Beach and other local communities run afoul of the rules regarding commercial speech[28]—assuming that the commercial/non-commercial distinction can even stand in today's world.[29] Local officials also sometimes contend that they may prohibit homesharing advertisements altogether and compel homesharing platforms to enforce those prohibitions because the cities have outlawed homesharing itself.[30] But some cities, including Miami Beach, outlaw such ads even in areas where homesharing is lawful.[31] And while courts have held that speech about unlawful or criminal activities can be regulated or limited,[32] the government cannot criminalize harmless behavior that is a deeply rooted American tradition in order to empower itself to censor people.[33]

Indeed, lawmakers sometimes justify anti-homesharing laws by claiming that commercial activity is just never appropriate in residential neighborhoods. But the question should not be whether an owner is running a business, but whether an owner is using his home for a residential purpose. And homesharing *is* a residential purpose. Rented homes are a common feature of residential neighborhoods—but that hardly makes them anything other than residences. Homeowners often let people stay in their homes in exchange for non-monetary compensation— washing dishes, preparing meals, or providing nanny services—and that does not mean the owner is using the home in a non-residential way. If a homeowner has the right to decide whether to allow someone to stay in her home for free, or in exchange for non-monetary compensation, then the homeowner should have a right to receive payment in exchange. In other words, "the

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[27] Central Hudson Gas & Elec. v. Public Svc. Comm'n, 447 U.S. 557, 566 (1980).

[28] *See, e.g.,* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 773 (1976) (even under commercial speech doctrine, states may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients.").

[29] *See generally* Deborah J. La Fetra, *Kick it Up A Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205 (2004) (detailing why commercial speech categorization is inherently content-based). *See also Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1999 (2016) (bemoaning the fact that "[w]ith *Reed*, the Court risked imposing a unitary standard of strict scrutiny for nearly all regulations of speech," and that the result may be to increase constitutional protection for communication classified as commercial.).

[30] Jessica Soultanian-Braunstein, *Legislation Proposed in NY State Assembly Would Put an End to Online Advertising of Illegal Short-Term Apartment Rentals*, CITY LAND (Mar. 1, 2016) http://www.citylandnyc.org/23749- 2/ (Assemblywoman Rosenthal said of New York's ban on homesharing advertisements, "This legislation targets serial illegal hotel kingpins who advertise and rent out multiple units by providing enforcement entitles with strong new tools to crack down on this egregious law-breaking."); Mike Vilensky, *Albany Approves Airbnb Penalties*, WALL ST. J., June 17, 2016, http://www.wsj.com/articles/albany-approves-airbnb-penalties-1466206171. http://fortune.com/2016/09/07/airbnb-sues-new-york-state/ (Assemblywoman Deborah Glick was surprised that the New York law was controversial, because, "You can't advertise an illegal activity.").

[31] *See supra* notes 7-10 and accompanying text.

[32] Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 563-64 (1980).

[33] Byrum v. Landreth, 566 F.3d 442, 447 (5th Cir. 2009) (state's claim that calling oneself an "interior designer" without receiving a government license is unprotected speech is circular and would "authorize legislatures to license speech and reduce its constitutional protection by means of the licensing alone.").

market does not transform what were permissible acts into impermissible acts."[34]

The most essential point is that homesharing is nothing new, and there is nothing qualitatively non-residential about it. Local governments maintain the right and the obligation to prevent neighbors from violating each other's rights—by committing nuisances, trespassing on each other's property, having raucous parties or clogging up the streets with traffic—but to ban homesharing across the board on that account is nonsensically overbroad. Local governments do not ban all backyard barbecues just because some of them get rowdy or ban people from selling homemade items on eBay on the theory that this is somehow "commercial" behavior rather than "residential" behavior.[35] To crack down on this centuries-old practice simply because the market innovations have made it more efficient undermines a host of rights, including the right to share information. If they are genuinely concerned with nuisances, cities should focus on enforcing reasonable rules that protect quiet, clean, and safe neighborhoods, instead of limiting choices, hindering the tourism industry, and depriving people of the rights—and the incentives—to use their property and speak as they see fit.

III. COSMETOLOGY BOOKING: Applying Salon Regulations to a Telephone Booking Service

In addition to imposing new rules on established activities simply because communication about those activities has become more efficient, governments sometimes unreasonably apply old rules governing established practices to new businesses, resulting in a regulatory mismatch that stifles innovation.

Entrepreneur Lauren Boice, a former hospice nurse's assistant and cancer survivor, experienced firsthand the difficulties of being restricted to one's home and having to depend on the services and schedules of others—both through serving her patients and during her own recovery. She also discovered that there is a real value to cosmetology services even for those who do not leave the home. "[E]levating the self-image of an individual regardless of their medical prognosis," can help that patient's "perception of feeling and being well."[36] When she discovered that there were no businesses in Arizona that provided salon services to homebound people, Lauren decided to start her own business, Angels on Earth Home Beauty, to connect the elderly and terminally ill with independent, licensed cosmetologists who could perform haircuts, manicures, or

[34] JASON F. BRENNAN & PETER JAWORSKI, MARKETS WITHOUT LIMITS: MORAL VIRTUES AND COMMERCIAL INTERESTS 10 (Routledge: 2016).

[35] Actually, during the late nineteenth and early twentieth centuries, efforts were undertaken by local governments to ban home-based businesses despite the fact that they did not disturb neighboring property owners—most notably, efforts to stamp out home-based cigar-rolling businesses. *See, e.g.*, In re. Jacobs, 98 N.Y. 98 (1885). These efforts were undertaken for two reasons, primarily: first, because such businesses were overwhelmingly engaged in by immigrants, so that such bans served racist goals of excluding disfavored minorities, and second, because existing businesses sought to ban competition from home-based firms. *See generally* DAVID E. BERNSTEIN, REHABILITATING LOCHNER 138 n. 85 (2011). This is one indication of how restrictions on economic opportunity and private property rights are often undertaken—notwithstanding claims to the contrary—for improper discriminatory motives. *See also State* v. Houghton, 144 Minn. 1 (1920) (Brown, C.J., dissenting) (zoning restriction banning mixed-use residential/commercial buildings was unconstitutional disguised effort to forbid undesirables from the neighborhood).

[36] Angels on Earth Home Beauty, LLC, "About the Founder," http://www.angelsonearthhomebeauty.com/about.html.

massages for them right in their homes.[37] Lauren herself did not practice cosmetology or treat clients. Her business merely provided a means of communication between homebound customers and licensed cosmetologists. Thereafter, the Arizona Board of Cosmetology (the Board) threatened to shut down Lauren's business and subject her to fines and even jail time unless she complied with a host of cosmetology regulations.[38] First, the Board ordered Lauren to obtain a salon license[39] which, under Arizona law, meant she would also have to open a physical salon,[40] even though nobody would ever use that location. Board rules also required that she maintain cosmetology instruments at the location—and keep them sterilized— and to place a sign in the window of that location and display the licenses of all of her service providers.[41] But these regulations made no sense in the context of Lauren's business: Lauren did not provide cosmetology services, did not use instruments, and her homebound clients could not come down to a salon even if she did. The Board did offer her one other option: she could rent a booth in an existing salon. But then she would also have to let that salon's owner oversee her appointments.42

Lauren Boice is not a cosmetologist and never offered to perform cosmetology services for her clients. She was running a telephone dispatch service, merely serving as a *facilitator* between clients and independent cosmetologists, each of whom carries their own liability insurance, their own tools, and abides by Board rules and sanitation requirements.[43] Governments can, of course, regulate professions, but any occupational licensing law that restricts a person from practicing a trade must have a rational relationship to a legitimate public interest.[44] For the state to subject Lauren to a host of cosmetology regulations when she was not a cosmetologist, was irrational. Indeed, it was as irrational as an effort by the California Board of Barbering and Cosmetology to impose cosmetology regulations on the practice of hair braiding—an almost entirely different business, that does not involve the cutting of hair or treatment of the scalp, and which a federal court in California found unconstitutional.[45]

As is often the case when it comes to the sharing economy, Angels on Earth engaged in only one thing—expressing and exchanging information. Lauren received appointment requests and then contacted independent cosmetologists with the appointment time and location—nothing more. As such, her business was purely an information assembly and dissemination service. By classifying and regulating it as "cosmetology," the Board was imposing a burden on her free speech.

[37] *Id.*
[38] Boice v. Aune, CV2011-021811 (Maricopa Cty Super. Ct. Apr. 30, 2012) Amend. Compl. ¶¶ 24-7, https://goldwater-media.s3.amazonaws.com/cms_page_media/2016/10/18/3Complaint.pdf.
[39] *Id.* ¶ 31.
[40] *Id.* ¶ 33.
[41] *Id.* ¶¶ 31, 47.
[42] *Id.* ¶44.
[43] *Id.* ¶¶ 21-2.
[44] Schware v. Bd. of Bar Exam. of State of N.M., 353 U.S. 232, 239 (1957).
[45] Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1108 (S.D. Cal. 1999). *See also* Craigmiles v. Giles, 312 F.3d 220, 225 (6th Cir. 2002) (requiring coffin-sellers to obtain funeral director licenses, when they did not direct funerals, was unconstitutional and irrational). *Contra* Powers v. Harris.

In 2011, Lauren filed a lawsuit challenging the Board's authority to impose a licensing requirement on her.[46] After a year and a half of litigation, the Board backed down and agreed to cease regulating Angels on Earth and other services that simply connected cosmetologists to patients confined to their homes or care facilities. Sadly, Lauren spent years battling the cosmetology board, in and out of court, just to arrive at the commonsense conclusion that a cosmetology board does not have the power to regulate a phone dispatch business. But, fortunately, Angels on Earth continues to operate today—and, as Lauren says, "to provide pinnacle beauty and wellness services that encourage a stronger self-image and self-esteem, elevate the spirit, and touch the soul of each person we visit."[47]

IV. FLIGHT-SHARING: Banning Pilot Ride- and Expense- Sharing Because it is Conducted Online

For general aviation enthusiasts and travelers seeking an affordable and novel mode of transportation, the start-up company Flytenow offered a great new opportunity. Since almost the beginning of aviation, pilots and flight enthusiasts have gotten together to share the expenses of a flight with passengers to make flights on small aircraft more accessible and cost-effective. The way it works is simple: a pilot planning to fly from one place to another pins a notice of a planned flights on a local airport bulletin board or a community center, and anyone interested in tagging along can contact the pilot, ask to join the flight, and split the costs of fuel and maintenance.

Since at least 1964, the Federal Aviation Administration (FAA) has explicitly recognized the "traditional right"48 of pilots and passengers to share the operating expenses of flights49 in accordance with longstanding rules and regulations.50 As technology progressed, pilots and passengers connected with one another in different ways—by telephone, email, and, thanks to Flytenow, by the use of smart phone technology.

Northeastern students and private pilots Alan Guichard and Matt Voska were looking for an easier way to offset the costs of their own flights. They established Flytenow as an online bulletin board that allows FAA-certified private pilots to post their travel plans in order to more effectively and efficiently connect with passengers who may wish to join them and share expenses. This was simply a 21st century version of the bulletin board at the local airport.

The FAA allows expense-sharing, although it does regulate commercial aviation. The Agency draws the distinction based on whether the pilots and passengers are paying an equal share of gasoline costs, fees, and other expenses, and are traveling to the same location for independent purposes. By contrast, commercial aviation passengers pay an

[46] Boice v. Aune, CV2011-021811 (Maricopa Cty Super. Ct. Dec. 13, 2011).
[47] Angels on Earth Home Beauty, LLC, http://www.angelsonearthhomebeauty.com/.
[48] 29 Fed. Reg. 4717, 4718 (April 2, 1964) (referring to the sharing of operating expenses with a pilot's passengers as a "traditional right.").
[49] *See id.*; 62 Fed. Reg. 16220, 16263 (April 4, 1997).
[50] *See* 14 C.F.R. § 61.113(c).

airline for the service of flying them to a destination.[51] But in 2013, the FAA set that rule aside and told Flytenow that private pilots and passengers could *not* share expenses if the sharing is facilitated using Flytenow's internet-based communications platform.[52] This order directly contradicted the FAA's own rules and violated the constitutional free speech rights of private pilots and passengers who sought to use the internet to communicate with one another.

But the FAA did not treat Flytenow as it had treated its non-digital predecessors. Instead, it declared that private pilots operating small planes fell under the same rules as commercial airline carriers like Delta because, by using Flytenow, they were advertising flights for compensation. Yet the only difference between the expense-sharing the FAA recognizes as a "traditional right" and the activity that it considers unlawful is the use of the internet to convey the message.

The traditional legal framework under which private pilots share operating expenses with their passengers begins with the "common carriage rule." As a general matter, private pilots are not allowed to "hold out" to the public a willingness to transport persons for "compensation" without having a permit to engage in commercial aviation.[53] Sharing travel expenses, however, is not a form of compensation, and is thus permitted,[54] so long as the pilot and passengers share a common purpose in the destination of the flight, and each have an independent reason for traveling to the destination.[55]

Flytenow's creators facilitated rides under the same regulatory framework that protected pilots who advertise expense-sharing opportunities on airport billboards – they simply adjusted for the digital age. Yet rather than applying the traditional "common purpose" test, the FAA instead summarily concluding that expense-sharing arrangements facilitated through Flytenow's platform are "compensation," and that pilots using the website were "holding out" to the public their willingness to provide flights for compensation.[56] In other words, the FAA deemed Flytenow pilots "common carriers," even though those pilots were not commercial operators and their services were not "indiscriminately available" to the public.

In 2014, Flytenow appealed the FAA ruling to the United States Court of Appeals for the District of Columbia Circuit. The company argued that the FAA's application of common carrier advertising regulations to Flytenow's cost-sharing private pilots violates the pilots' First Amendment right to communicate their travel plans with others. When the FAA restricted Flytenow and its members from communicating those plans simply because they did so via the internet, that restriction acted as a content-based restriction on free speech.[57] Flytenow has a FFirst Amendment right to disseminate information and

[51] 14 C.F.R § 61.113(c) ("[A] pilot may accept compensation in the form of a pro rata share of operating expenses for a flight from his or her passengers.").
[52] *MacPherson-Winton Interpretation*, Letter from FAA to Rebecca B. MacPherson and Gregory Winton, August 14, 2014, on file with Goldwater Institute.
[53] FAA Advisory Circular No. 120-12A (April 24, 1986).
[54] 14 C.F.R. § 61.113(c).
[55] FAA Bobertz Interpretation (May 18, 2009); FAA Mangiamele Interpretation (March 4, 2009).
[56] *MacPherson-Winton Interpretation*, *supra* note 52.
[57] *See generally* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976). Indeed, the fact that the FAA rule discriminated against a particular medium of expression raises a distinct First Amendment

serve as a communications facilitator for pilots and passengers who wish to communicate using Flytenow's website.[58]

Most significantly here, prohibiting Flytenow from operating directly conflicts with the rule that the government may not impose different restrictions on different utterances based on the content of the communication.[59] To reiterate, "a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed."[60] The FAA's ban on Flytenow is content-based because it prohibits Flytenow pilots from communicating about their travel, at least, when they choose to do so on the internet.[61] Yet when considering whether the FAA violated the First Amendment, the D.C. Circuit did not apply strict scrutiny.[62] Instead, it upheld the FAA's decision to shut down Flytenow, holding that the regulations imposed a mere "incidental burden . . . on pilots' speech," which is permissible because they "further an important government interest [flight safety] unrelated to the suppression of free expression."[63] The problem with that conclusion is that the FAA's speech regulations have nothing to do with flight safety. When the FAA certifies a private pilot to carry passengers, it determines that the pilot has enough training to do so safely.[64] This includes training on preflight action, use of equipment, knowledge of fuel requirements and weather conditions, and so forth.[65] In other words, the FAA has *already* determined that all Flytenow-subscribing pilots can safely transport passengers and share operating expenses with those passengers. For the FAA to restrict their speech in *addition* to these safety regulations is not "incidental" to the FAA's safety purpose—it is *extraneous* to that purpose.

Even if the restriction on the pilots' speech *had* been partly due to the FAA's public safety goal, the Supreme Court has held that "an innocuous justification" such as safety "cannot transform a facially content-based law into one that is content neutral,"[66] and "at the first step, the government's justification or purpose in enacting the law is irrelevant."[67] Thus, prohibiting activity-related speech *is* a content-based speech restriction that should trigger First Amendment scrutiny.[68]

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concern. *See* City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994) ("Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech.").

[58] *See* Kliendienst v. Mandel, 408 U.S. 753, 762 (1972) (referring to the First Amendment "right to receive ideas"); Memoirs v. Massachusetts, 383 U.S. 413, 420-21 (1966) (publisher had First Amendment right to challenge ban on books).

[59] 135 S. Ct. 2218 (2015).

[60] *Id.* at 2231.

[6161] True, the FAA characterized their speech as being motivated by a commercial purpose, but, again, the First Amendment also bars the government from restricting speech based on commercial motive. *Sorrell*, 564 U.S. at 576-78. Flytenow, of course, contended that it was improper to characterize the pilots' speech as commercial, since that is actually the opposite of what it was, but as *Sorrell* shows, even if that communication had been commercial, the FAA's ruling should have triggered First Amendment scrutiny.

[62] Flytenow, Inc. v. F.A.A., 808 F.3d 882, 894 (D.C. Cir. 2015).

[63] *Id.*

[64] 14 C.F.R. Part 61.

[65] *Id.*

[66] 135 S. Ct. at 2222.

[67] Cahaly v. Larosa, 796 F.3d 399, 405 (4th Cir. 2015).

[68] Norton v. City of Springfield, 806 F.3d 411, 413 (7th Cir. 2015) (Manion, J., concurring

The censorship involved in the FAA's restriction of Flytenow became clearer when the FAA argued before the D.C. Circuit that pilots can expense-share only if the audience to which they communicate is "sufficiently limited."[69] But how does one judge whether a communication is "sufficiently limited"? And why does the size of the audience matter? The FAA's argument here sounded remarkably similar to what the Supreme Court has declared unconstitutional: "suppress[ing] the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients."[70] The FAA may not keep willing recipients of truthful information "in the dark for what the government perceives to be their own good."[71]

Ironically enough, if safety concerns really did justify restricting the size of the audience receiving flight-sharing information, that argument actually ran against the FAA. Allowing pilots to post flight information on a physical bulletin board—which the FAA does not purport to ban—is arguably *more* risky than allowing them to share the same information on Flytenow because the audience of a physical bulletin board is potentially *unlimited*. In contrast, Flytenow controls visitors and members, maintains and makes available pilot training and flight history information, and thus limits who may view the message.

The irrationality of the Flytenow ban becomes clear if one considers: What happens if someone takes a *picture* of the bulletin board at a local airport, and posts *that* online? What if someone other than a pilot does so? Again, neither the FAA nor the D.C. Circuit provide an answer, but what the Supreme Court has said in defense of political speech is equally true here:

> While some means of communication may be less effective than others at influencing the public in different contexts, any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux.[72]

The FAA's ban violates the First Amendment because discriminates against the means of communication chosen by the speaker. Unfortunately, the Supreme Court declined to hear Flytenow's case.[73] But Congressman David Schweikert (R-AZ) introduced a bill to legalize flight-sharing websites like Flytenow.[74] If successful this legislation would clarify that private pilots may communicate with their passengers using any form of communication they desire in order to facilitate flight sharing. In other words, this bill would bring flight sharing, a practice that has occurred since the beginning of general

[69] Brief of Respondent, *Flytenow v. F, A.A.*, at 30 (on file with Goldwater Institute).
[70] *Virginia Bd. of Pharmacy*, 425 U.S. at 773.
[71] 44 Liquor- mart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996).
[72] Citizens United v. Federal Election Comm'n, 558 U.S. 310, 326 (2010).
[73] Flytenow, Inc. v. F.A.A., 137 S. Ct. 618 (2017) (cert. denied).
[74] H.R. 3593, the Aviation Cost and Expenses Sharing Act.

aviation, into the 21st Century.

V. Conclusion

As the sharing economy paves the way for innovations across nearly all industries, courts should heed this fundamental principle: Entrepreneurs and consumers have a fundamental right to use new technologies to communicate about lawful activities without first having to ask the government's permission and be free from unreasonable regulatory interference. Unfortunately, government is typically several steps behind as the economy grows and technology changes. As Michael Beckerman, President and CEO of the internet advocacy group @internetassn, observes:

> Innovation often precedes government regulation. The car was invented before the driver's license and Orville Wright flew from Kitty Hawk before the Federal Aviation Authority was created. Likewise, new innovations from Silicon Valley, such as ridesharing and homesharing platforms, pre-date regulations, even if black cars and short-term rentals have existed for decades.75

More disturbingly still, these regulatory mismatches often interfere with one of the most treasured rights in our constitutional jurisprudence: the right to communicate information. As regulators and courts classify the communication of information as a type of business that can be regulated rather than as speech that enjoys full constitutional protection, sharing economy businesses are increasingly put at risk—and with them, the innovations and opportunities that drive our economy. Rather than utilizing outmoded regulatory frameworks to regulate new technologies, government should allow people to develop new ways to enjoy their private property rights and to communicate about economic opportunities—whether they involve overnight guests staying in one's home, offering people rides, or booking a cosmetology appointment. When approaching any new business, government should not ask, "How do we regulate?" without first asking, "Should we regulate?"

[75] Michael Beckerman, *L.A. Needs to be A-OK with Innovation*, MEDIUM, July 27, 2016, https://medium.com/@MichaelBeckerman/la-needs-to-be-a-ok-with-innovation-70e7e958c1f6#.q9i0k1ku3.