

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

GRANT O. ADAMS, et al.,)	
)	
Petitioners,)	
)	
v.)	No. 07-1180
)	(consolidated with
)	the cases below)
FEDERAL AVIATION ADMINISTRATION and DEPARTMENT OF TRANSPORTATION,)	
)	
Respondents.)	
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KEITH L. McCORMICK and DAVID B. PATTON,)	
)	
Petitioners,)	
)	No. 07-1194
v.)	
)	
FEDERAL AVIATION ADMINISTRATION and DEPARTMENT OF TRANSPORTATION,)	
)	
Respondents.)	
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DONALD N. PERSKY and JAMES R. SWELLER,)	
)	
Petitioners,)	
)	No. 07-1226
v.)	
)	
FEDERAL AVIATION ADMINISTRATION and DEPARTMENT OF TRANSPORTATION)	
)	
Respondents.)	
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(caption continued)

LARRY AYOTTE, et al.,)	
)	
Petitioners,)	
)	No. 07-1326
v.)	
)	
FEDERAL AVIATION ADMINISTRATION)	
and DEPARTMENT OF TRANSPORTATION,)	
)	
Respondents.)	
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GENE CARSWELL, et al.,)	
)	
Petitioners,)	
)	No. 07-1366
v.)	
)	
FEDERAL AVIATION ADMINISTRATION)	
and DEPARTMENT OF TRANSPORTATION,)	
)	
Respondents.)	
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STEPHEN CARNIGAN, et al.,)	
)	
Petitioners,)	
)	No. 07-1390
v.)	
)	
FEDERAL AVIATION ADMINISTRATION)	
and DEPARTMENT OF TRANSPORTATION)	
)	
Respondents.)	
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GARY HENDRIX, et al.,)	
)	
Petitioners,)	
)	No. 07-1447
v.)	
)	
FEDERAL AVIATION ADMINISTRATION)	
and DEPARTMENT OF TRANSPORTATION,)	
)	
Respondents.)	
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**PETITIONERS' OPPOSITION TO RESPONDENTS' MOTION TO DISMISS
CONSOLIDATED CASES AS MOOT IN LIGHT OF NEW STATUTE**

Respondents seek the dismissal of a series of petitions by pilots who challenge orders of the Federal Aviation Administration (FAA) denying exceptions under the “Age 60 Rule,” 14 C.F.R. 121.383(c). The FAA has barred pilots from flying in the United States without any individual consideration of the capabilities, health, or performance of individual pilots. The FAA now seeks dismissal on the basis of the enactment of the Fair Treatment for Experienced Pilots Act, Pub. L. No. 110-135, 121 Stat. 1450 (2007), which purportedly eliminated the discriminatory Age 60 Rule. However, rather than eliminating the Age 60 Rule, the rule has been effectively codified for pilots who turned 60 before December 13, 2007 and only modified for pilots who turned 60 after December 13, 2007.

A dismissal of these petitions would only be appropriate if (1) the law itself is legally enforceable, and (2) even if valid and enforceable, the law extinguished the entirety of the claims of all of the pilots in this litigation. Neither of these two criteria is met. The law is unenforceable as constitutionally flawed and, even if valid, the law should not necessarily extinguish these claims. This appeal, therefore, is not moot.

The new law violates a host of violations that range from the denial of equal protection to the denial of due process to the imposition of a bill of attainder and a takings under the United States Constitution. These violations should not be addressed within the sparse limitations of an opposition memorandum to a six-page motion. Rather, the Court should order full briefing and oral argument if it is going to entertain this demand for dismissal. These petitions are only moot if the underlying statute is valid, a question involves at least six significant constitutional and statutory questions.

I. FACTUAL BACKGROUND

Due to the limitations of space and the narrow issue presented in this motion, the Petitioners will forego presenting the full history of the Age 60 rule. Since 1959, the FAA has barred pilots from flying commercial aircraft based solely on their age. The rule itself was not the result of any medical or scientific finding, but the outgrowth of a labor dispute between pilots and the airlines. American Airlines had failed to impose an early retirement rule through negotiations and arbitrations. *See generally* Geneve Dubois, *The Age 60 Rule*, 70 J. Air L. & Com. 319 (2005). When American Airlines lost a critical arbitration decision on the early retirement, it succeeded in getting the FAA to impose it through federal regulation.¹ *Id.* at 329.

The FAA promulgated the Age 60 Rule, which provides that "[n]o certificate holder may use" and "[n]o person may serve as . . . a pilot on an airplane engaged in operations under [14 C.F.R. Part 121] if that person has reached his 60th birthday." 14 C.F.R. 12. However, pilots are allowed an exception if they can show "why granting the exemption would not adversely affect safety" or how it would "provide a level of safety equal to that provided by the rule from which you seek the exemption." 14 C.F.R. 11.81(e). That exception is based on the individual capabilities and experience of the pilot. However, the FAA has refused to even consider such criteria and has uniformly denied pilots the ability to fly based on their age alone.

The FAA's policy has long been at odds with not just medical science but the views of other nations. On March 10, 2006, the International Civil Aviation Organization (ICAO)

¹¹ There was never a medical basis for the rule. Indeed, even at the time, FAA lawyers in 1959 found "[no] scientific or factual justification" for the rule. Likewise, in 1981, the National Institutes of Health (through the National Institute on Aging Panel on the Experienced Pilots Study) also found no scientific or medial basis for the FAA policy. *See generally* Adam Rowland, *Age Discrimination in Retirement: In Search of an Alternative*, 8 Am. J. L. and Med. 433 (1983). Yet, the FAA continued to impose the rule. In the meantime, other major industrialized countries rejected the Age 60 rule as unnecessary and discriminatory.

governing Council adopted a recommendation of the Air Navigation Commission to use the age 65 as the age limit for air carrier pilots-in-command. Under this standard, an older pilot may serve as a pilot-in-command on a multi-pilot crew so long as the co-pilot is under the age 60. Thus, the only limitation is that both pilot and co-pilot cannot be over the age of 60. This international standard became effective on November 23, 2006 and the United States must conform to the rule.

The international standard created a bizarre anomaly in the United States. As a member, the United States had to comply with the international agreement and thus has allowed older pilots to fly within the United States on foreign carriers despite the fact that they are over 60. However, U.S. airlines continued to be barred from using such pilots, even if every record and examination showed them to be fully capable. A pilot, therefore, could be fired by an airline under the Age 60 rule and immediately fly into the same airport as a pilot aboard a foreign carrier.

The FAA itself admitted that the rule was archaic and unnecessary. On January 30, 2007, the FAA administrator Marion Blakey spoke of the lack of support for the Age 60 rule at the National Press Club:

It's time to close the book on Age 60. The retirement age for airline pilots needs to be raised. So, the FAA will propose a new rule – to allow pilots to fly until they are 65.

When airlines back in the day [the 1950s] were forcing pilots to retire, the union took legal action. Arbitrators ruled for the pilots each time. ...American Airlines prevailed on the FAA for a rule. The man in charge at American, C.R. Smith, wrote to Pete Quesada, the administrator at the time. Less than four months later, the Federal Aviation Administration issued a proposed rule.... When you're 60, your career as an airline pilot would be over.

.... It's now a different day and age. The issues of experience, harmonization – and let's face it – equity – all have to be considered.

See Paul Beebe, *Pilots' Age Rule Change Stirs Dissent*, Salt Lake Tribune, March 10, 2007, at 5. Despite such frank admissions, the FAA continued to fight efforts to challenge the Age 60 rule and continued to deny exceptions to the rule for individual pilots. *See, e.g., Professional Pilots Fed'n v. FAA*, 118 F.3d 758 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1117 (1998); *Yetman v. Garvey*, 261 F.3d 664,679 (7th Cir. 2001). Petitioners have filed ten petitions seeking relief in this case. On June 1, 2007 (No. 07-1180), a petition for dozens of other pilots was filed. This petition was filed by identical claims for other pilots on June 8, 2007 (No. 07-1194), June 22, 2007(No. 07-1126), August 16, 2007 (No. 07-1326), September 14, 2007 (No. 07-1366), October 1, 2007 (No. 07-1390), November 2, 2007 (No. 07-1447), December 14, 2007 (No. 07-1507), December 19, 2007 (07-1524), and January 22, 2007 (08-1023). Seven of these prior petitions have been consolidated by order of the court. There remain 3 petitions that have not yet been consolidated by the court, Nos. 07-1507, 07-1524, and 08-1023. Their claims are the same. Petitioners maintain that these orders violate federal law, including but not limited to the United States Constitution, the Administrative Procedure Act, the ADEA, 29 U.S.C. §623(f); and the Rehabilitation Act, 29 U.S.C. §794.

Congress finally acted on the long-standing controversy in passing the Fair Treatment for Experienced Pilots Act, Pub. L. No. 110-135, 121 Stat. 1450 (2007), (hereinafter “the Act”) which President Bush signed on December 13, 2007. This law, however, replaced the age discriminatory rule with a series of age-discriminatory provisions barring benefits and procedural rights. The government now seeks to have all of the above captioned cases dismissed on the basis of the Act. Thus, according to the government, even if the pilots were entitled to relief in

their challenge of the denial of waiver under the Age 60 rule, they are now barred from challenging the Act that replaced the rule.

As recently enacted legislation, the Fair Treatment for Experienced Pilots Act has not been subject to final judicial review on any of the constitutional and statutory issues discussed below.

II. THE FAIR TREATMENT FOR EXPERIENCED PILOTS ACT IS CONSTITUTIONALLY AND STATUTORILY FLAWED.

Despite its ironic title, the Fair Treatment For Experienced Pilots Act was enacted specifically to bar experienced pilots from being able to either fly or contest the denial of their seniority or benefits. Indeed, the younger and less experienced a pilot is, the more comparative benefits the pilot will receive under this Act. Conversely, the most experienced pilots are expressly penalized on the sole basis of their age with no consideration of their individual capabilities, health, or experience.

In a purported effort to end the discriminatory Age 60 rule, Congress adopted the worse possible means. In removing one discriminatory regulatory rule, Congress added multiple new statutory provisions penalizing older pilots in their ability to return to work, enforce prior contracts, and maintain a full eligibility to fly within the United States. Ironically, these arbitrary limitations make the “reform” worse than the original problem that they sought to address. For example, Congress has not, and cannot, articulate a public policy basis for negating years of seniority and benefits in favor of younger pilots. Likewise, it cannot offer any good policy rationale for preventing companies from honoring prior contracts and agreements with older pilots. Instead, the language is a flagrant concession to powerful special interests that lobbied to disenfranchise older pilots in order to benefit younger pilots. The result is not just inequitable, but unconstitutional.

A. The Act Unconstitutionally Discriminates Against Pilots on the Basis of Age.

The Fair Treatment For Experienced Pilots Act may be many things, but subtle is not one of them. The Act expressly uses age-discriminatory provisions to benefit younger pilots and penalize older pilots. These provisions bar older pilots from the cockpit based on their age, wipes out their earned seniority and benefits, and blocks access to the courts for relief. The law further imposes additional requirements on pilots based on their age without any factual support or individualized review. While the Medical Standards and Records section requires studies before “different medical standards” are imposed “on account of age,” the law imposes a specific first-class medical certificate on the basis of age after six months from the date of enactment. It further imposes special line evaluations on pilots older than 60 years. 49 U.S.C. 44729(g). Thus, regardless of their physical health or performance, older pilots will have to satisfy various administrative and medical requirements to keep flying solely due to the fact of their age.

These provisions are expressly relied upon by the government to seek dismissal of these petitions. As a result, the Court would have to first determine that the underlying law is valid and, if so, that the law applies to these petitioners.

1. The Nonretroactivity Provision. The specific unlawful provisions include the nonretroactivity provision found at 49 U.S.C. 44729(e):

- 1) NONRETROACTIVITY- No person who has attained 60 years of age before the date of enactment of this section may serve as a pilot for an air carrier engaged in covered operations unless--
- (A) such person is in the employment of that air carrier in such operations on such date of enactment as a required flight deck crew member; or
 - (B) such person is newly hired by an air carrier as a pilot on or after such date of enactment without credit for prior seniority or prior longevity for benefits or other terms related to length of service prior to the date of rehire under any labor

agreement or employment policies of the air carrier.

49 U.S.C. 44729(e) (1)(B). This provision discriminates against anyone who attained 60 years of age before December 13, 2007. Even if such a pilot has decades of experience and seniority, the only way that he or she can return to active status must be as a new hire. This not only results in a considerable loss of pay that can easily exceed \$100,000 per pilot annually, but practically denies the most experienced pilots access to large jets, or even an opportunity to fly at all. Congress further bars companies from seeking to ameliorate this injustice by mandating that they cannot voluntarily give credit for “prior seniority or prior longevity” in service.

There is no explanation why such an age cut off is imposed so that one pilot (who turned 60 on December 14, 2007) is safe to fly, but another pilot who turned 60 on December 13, 2007 is a categorical danger.

2. The Immunity Provision. Congress not only seeks to negate years of seniority and benefits for older pilots, but it further seeks to bar any ability to seek judicial relief for such losses. Under the immunity provision, Congress mandates:

(2) PROTECTION FOR COMPLIANCE- An action taken in conformance with this section, taken in conformance with a regulation issued to carry out this section, or taken prior to the date of enactment of this section in conformance with section 121.383(c) of title 14, Code of Federal Regulations (as in effect before such date of enactment), may not serve as a basis for liability or relief in a proceeding, brought under any employment law or regulation, before any court or agency of the United States or of any State or locality.

Thus, the mere fact that a citizen turned 60 on December 13, 2007 rather than December 14, 2007 is the only criteria for determining whether the citizen has access to the court and judicial relief.

3. The Age Discriminatory Provisions Cannot Pass Constitutional Review.

While a motion to dismiss is hardly an adequate means to review the constitutional questions raised by this Act, it should be clear on its face that the government cannot sustain the Act under constitutional review. The most obvious reason is that no rationale has ever been offered for the age-related penalties. Rather, the provision appears to be a simple accommodation given to younger pilots, who are represented by the Air Line Pilots Association (ALPA). Both airlines and the union fought to prevent senior pilots from returning. *See* DeWayne Wickham, *Rule Grounding Pilots at Age 60 Requires Overhaul*, USA Today, May 15, 2007, at 11A (“In the case of the Age 60 Rule, the political muscle is being applied by the Air Line Pilots Association, an organization that represents more than 64,000 commercial pilots. A majority of ALPA's members oppose the rule change, which would make it harder for younger pilots to get the positions and favorable routes now held by more senior pilots.”); *see also* Liz Feder, *NWA Pilots Oppose Oberstar on Retirement; Northwest and its ALPA branch Sought to Keep it at Age 60*, Star Tribune, Dec. 12, 2007, at 1. The same organizations supported this legislation, which allowed some older pilots to return but without competing benefits and status. *See* http://www.alpa.org/DesktopModules/ALPA_Documents/ALPA_DocumentsView.aspx?itemid=11636&ModuleId=506&TabId=93 (*statement of ALPA president in support of the legislation*). The Act discriminates on the basis of age and denies older pilots equal protection under the due process clause of the Fifth Amendment. While the Fourteenth Amendment establishes equal protection rights for citizens vis-à-vis the states, the Supreme Court has held that the Fifth Amendment extends the same protections vis-à-vis the federal government. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

Congress chose to divide pilots into three groups: (1) pilots younger than 60 years of age; (2) pilots who turned 60 years ago before December 13, 2007; and (3) pilots who turned 60 years old after December 13, 2007. The first group is free of any impediments or penalties related to their age. The second group is entirely barred under the Age 60 rule. The third group is also penalized by having their seniority and benefits wiped out, barred from suing, and forced to meet additional testing and administrative requirements. Congress offers no explanation for the disparate treatment given to these groups.

Neither the federal nor the state governments may discriminate on the basis of age without showing that the policy or law is “rationally related to a legitimate [governmental] interest.” *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000); *see also Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *Vance v. Bradley*, 440 U.S. 93, 97 (1979). The Act constitutes a case where the “varying treatment of different groups or persons is so unrelated to achievement of any combination of legitimate purposes that [it is] irrational.” *See Gregory v. Ashcroft*, 501 U.S. 452, 471, (1991) (citing *Vance*, 440 U.S. at 97). Here, the senior pilots have articulated an obvious case of disparate treatment based on their age. With regard to the Age 60 rule, the orders refusing their exemptions are based openly on their age. Congress made the earlier arbitrary age limit even more arbitrary by denying pilots within the “over 60 category” relief based on the month of their birth. Congress has not articulated *any* rationale for the distinction based on age, let alone a rational basis connected to a legitimate governmental interest. Congress essentially left it to the courts to come up with a rationale. Obviously, a court cannot take judicial notice of such rationales and supply a rational basis that the Congress was unable or unwilling to articulate itself.

4. The Act Would Further Create a Conflict with the Age Discrimination in Employment Act.

Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621, *et seq.*, prohibits age discrimination by employers on the basis of age. Thus, an employer cannot use the fact that someone is over forty years to discriminate against them absent a *bona fide* occupational qualification. The Fair Treatment For Experienced Pilots Act does not simply allow such discrimination by employers, it actually orders airline companies to deny seniority and benefits to pilots based on their age. Under 49 U.S.C. 44729(e), pilots can only be re-hired if they return “without credit for prior seniority or prior longevity for benefits or other terms related to length of service prior to the date of rehire.” 49 U.S.C. 44729(e). There is no record or support for such discrimination as tied to a *bona fide* occupational qualification.

The Act would constitute a major rollback on the statutory and regulatory scheme in place to enforce the ADEA. Congress has stated that the ADEA is intended “to promote employment of older persons based on their ability rather than their age; [(2)] to prohibit arbitrary age discrimination in employment; [and (3)] to help employers and workers to find way of meeting problems arising form the impact of age on employment.” 29 U.S.C. §621 (b) (2000). The Fair Treatment For Experienced Pilots Act not only would negate the policies and provisions of the ADEA, but it would prevent pilots and companies from “find[ing] ways of meeting problems” over the age question through their past and future contractual agreements. *Id.*

Courts have rejected similar age based provisions in other areas as insufficient to establish *bona fide* occupational qualifications. One federal court, for example, rejected an effort to dismiss an age discrimination claim filed by a harbor pilot who was denied a license by

the Puerto Rico Ports Authority due to the fact that he was over 70. *Camacho v. Puerto Rico Ports Authority*, 254 F. Supp. 2d 220 (D. P.R. 2003). The court found that the authority could not simply find that anyone over 70 was a danger or not qualified to be a harbor pilot. *Id.* at 230 (finding that “the mandatory license expiration provided for [in this Act] contravenes the ADEA as an adverse employment action motivated by age.”). The court noted that such mandatory retirement rules trigger “fact-intensive inquiry.” *Id.* (citing *Gately v. Massachusetts*, 2 F.3d 1221, 1227 (1st Cir. 1993)). *Cf. EEOC v. Aikens*, 306 F.3d 794 (9th Cir. 2002) (upholding district court’s rejection of monocular drivers as ineligible to drive vans as disable; requiring individual determinations of skills and capacity).

Congress did not amend the ADEA in the enactment of this recent Act. There is no indication that members sought to curtail the ADEA, which constitutes one of the core civil rights measures of the last 100 years. A court must, therefore, resolve the conflict. It may do so by constructively amending the ADEA or it can avoid the conflict by enforcing the statutory negation of the Age 60 Rule while striking the discriminatory provisions. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”).

The problem here is that the two statutes are in direct contradiction but there is no legislative intent for the latter enacted statute to amend the former enacted statute. The court could simply apply the later enacted statute despite the fact that Congress clearly did not intend to amend the ADEA. *See, e.g., Natural Resources Defense Council, Inc. v. EPA*, 824 F.2d 1258,

1278 (1st Cir. 1987) ("Using familiar statutory interpretation, when there is such a conflict, the most recent and more specific congressional pronouncement will prevail over a prior, more generalized statute."). However, to judicially amend the ADEA would do great violence to one of the most important and widely applied laws in the country.² Faced with such a prospect, the court can find that the Fair Treatment For Experienced Pilots Act stands in open conflict with existing laws. Presumably, under these circumstances the Court could uphold part of the new Act where it is consistent with the ADEA. While the negation of the Age 60 rule could still be enforced *as to all pilots*, the Court can decline to enforce the discriminatory provisions as in conflict with constitutional and statutory standards. This is admittedly a difficult question and it is precisely why full briefing on these questions should occur.

B. The Act Unconstitutionally Negated Prior Contractual Obligations and Denied Pilots the Due Process of Law.

The Act further denies pilots the protections of the due process clause in barring one group of older pilots under the age 65 from flying commercially and stripping the group of eligible older pilots their seniority and benefits. For both groups, these deprivations occur without a hearing or any ability to contest that punitive action. The due process clause protects citizens from the deprivation of life, property or liberty. *See Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 459-60 (1989). This action directly denies the pilots the benefits of prior and future contracts without a hearing or compensation. *Cf. R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 348-50 (1935) (holding that Congress violated due process in imposing new pension obligations with respect to past service by employees). The government makes plain the

² Indeed, it would be surprising if the government will maintain in this litigation such an intent to amend the ADEA, but it is a question that should be asked in a full briefing of these issues.

absence of any due process protections in its filings. It simply states that any prior claims are now moot because of the cessation of the Age 60 rule and any future claims are barred under the new Act. The result is that decades of accrued seniority and benefits would simply vanish into the vapor of an abusive congressional mandate. Moreover, the government would deny all of these pilots without a finding of whether they fall within these criteria; again, applying a categorical dismissal of cases without individual review.

The Supreme Court has emphasized that “[t]he Due Process Clause . . . protects the interests in fair notice and repose that may be compromised by retroactive legislation.” *Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). The Court specifically raised the danger evident in this case:

These provisions demonstrate that retroactive statutes raise particular concerns. The Legislature’s unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsiveness to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.

Id. In the instant case, Congress sided with younger pilots who could be displaced by returning older pilots in the seniority and benefits. The only way to protect this favored group was to negate the rights and benefits of the disfavored group of older pilots by barring many under a continuing Age 60 rule and forcing the remainder to lose all seniority and benefit upon their return to service.

The Act violates both concepts of procedural and substantive due process. As a matter of procedural due process, the pilots have been denied a property interest without a hearing or opportunity to be heard. This inquiry is a highly fact specific one. *See Washington v. Harper*, 494 U.S. 210, 220 (1990) (“The procedural protections required by the Due Process Clause must be determined with reference to the rights and interests at stake in the particular case.”). The

Court has applied a three-part balancing test adopted by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976):

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Here, Congress has denied the barred pilots any opportunity to protect the right to earn a living as a commercial pilot and the ability to prove their continued capabilities. It has denied the eligible group of older pilots (who turned 60 after December 13, 2007) any opportunity to protect valuable seniority status and benefits – even if their employers are supportive of protecting such interests.

As a matter of substantive due process, Congress has denied these pilots their right to work and earn a livelihood. *Cf. Truax v. Raich*, 239 U.S. 33, 41, 36 S. Ct. 7, 60 L. Ed. 131 (1915). *See In re Griffiths*, 413 U.S. 717, 93 S. Ct. 2851, 37 L. Ed. 2d 910 (1973). This protection is meant to prevent "governmental power from being 'used for purposes of oppression,'" *Daniels v. Williams*, 474 U.S. 327, 331 (1986) and irrational or abusive governmental action. *See, Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981); *Kindem v. City of Alameda*, 502 F. Supp. 1108, 1113-14 (N.D. Cal. 1980). In this case, older pilots have been disenfranchised in an open legislative favor to younger pilots. Under both procedural and substantive due process analysis, the actions of Congress violate the due process rights of older pilots.

C. The Act Constitutes an Impermissible Bill of Attainder.

The Fair Treatment For Experienced Pilots Act also constitute a bill of attainder in violation of Article I, section 9 of the Constitution provides that "no Bill of Attainder . . . shall

be passed." U.S. CONST. art. I, § 9, cl. 3. The Act imposes punitive measures upon a small, definable groups of older pilots who turned 60 years before December 13, 2007, but who are both younger than 65 years and seeking continued service as a pilot. For the group of eligible older pilots, the Act imposes heavy financial and administrative penalties based on their age.

Congress cannot enact "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977). Recently, this Court ruled that the bill of attainder prohibition applies to legislation negating prior legal benefits or rights acquired in litigation. *Foretich v. United States*, 351 F.3d 1198 (2003).

The courts will strike down a law as a bill of attainder "if it (1) applies with specificity, and (2) imposes punishment." *See BellSouth Corp. v. FCC*, 333 U.S. App. D.C. 253, 162 F.3d 678, 683 (D.C. Cir. 1998). Specificity is satisfied if the statute singles out a person or class by name *or* applies to "easily ascertainable members of a group." *United States v. Lovett*, 328 U.S. 303, 315 (1946). In this case, an easily ascertainable group is expressly targeted by Congress for punitive measures: pilots who (1) turned 60 years old before December 13, 2007, (2) are below the age of 65 years, and (3) who are seeking to maintain their flight privileges.

The instant legislation also constitutes obvious punishment. As in *Foretich* where a father's prior legal status was wiped out and made unenforceable by Congress, the pilots in this case have seen decades of seniority and benefits wiped out while other younger pilots are allowed to keep the entirety of both their seniority and benefits. This punishment is made equally plain by the three-part inquiry often employed by courts:

(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish."

Foretich, 351 F.3rd at 1218 (citing *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 852, 82 L. Ed. 2d 632, 104 S. Ct. 3348 (1984) (quoting *Nixon*, 433 U.S. at 473, 475-76, 478)). The Court does not require that legislation satisfy all three criteria, but they are indicators of punishment. *Foretich*, 351 F.3rd at 1218; see also *Consol. Edison Co. v. Pataki*, 292 F.3d 338, 350 (2d Cir.), cert. denied, 537 U.S. 1045, 154 L. Ed. 2d 517 (2002) ("[A] statute need not fit all three factors to be considered a bill of attainder; rather, those factors are the evidence that is weighed together in resolving a bill of attainder claim."). Of the three, the second factor – the functional test – is the most important. *Foretich*, 351 F.3rd at 1218 (citing *BellSouth II*, 162 F.3d at 684. Courts are careful to identify instances where Congress seeks to "circumvent[] the clause by cooking up newfangled ways to punish disfavored individuals or groups." *Id.*

This Act satisfies all three tests for punishment. Under the first "historical test," "legislative bars to participation in specified employments or professions" was a historical form of punishment. See *BellSouth II*, 162 F.3d at 685. This is precisely what this Act constitutes in barring pilots from flying. Likewise, under the "functional test," the Supreme Court has stressed that "[w]here such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers." *Nixon*, 433 U.S. at 476. In this case, Congress has not even attempted an explanation of why it would strip older pilots of their seniority and benefits.

Finally, under the third "motivational test," a court must inquire "whether the legislative record evinces a congressional intent to punish." *Nixon*, 433 U.S. at 478. In trying to understand the motivation of Congress, "[c]ourts conduct this inquiry by reference to legislative history, the context or timing of the legislation, or specific aspects of the text or structure of the disputed

legislation.” *Foretich*, 351 F.3rd at 1225 (citing *Selective Serv. Sys.*, 468 U.S. at 855 n.15; *Nixon*, 433 U.S. at 478-82). In this case, as noted above, Congress responded to lobbying from the ALPA and airlines, which sought to bar older pilots from threatening the status of younger pilots by returning and claiming their seniority.

As a bill of attainder, the Act cannot be enforced and thus cannot be the basis for this motion to dismiss.

D. The Act Violated the Takings Clause of the Fifth Amendment.

While admittedly more novel than the other constitutional violations discussed above, the Fair Treatment for Experienced Pilot Act also contravenes protections under the Takings Clause of the United States Constitution. U.S. Const. amend. V cl. 4. The clause prohibits the deprivation of private property interests for “public use” absent payment of “just compensation.” The older pilots have alleged that they have vested property interests in their seniority and benefits that have been extinguished by this Act. Congress negated these property interests to favor younger pilots who could be displaced or negatively affected by the returning pilots. *Cf. Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997). Indeed, the result is that Congress forced older pilots who are returning to service to yield their status and benefits as a pre-condition for employment. As for pilots barred under the new law, they were entirely denied such property interests. Congress took these property interests and effectively shifted their value to a favored group of younger pilots. It then extinguished any right of the disenfranchised pilots to seek judicial relief over the deprivation. The Takings Clause was created as one of the protections against such retroactive denials of vested property interests. *Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994).

III. EVEN IF VALID, THE ACT DOES NOT RENDER THESE CLAIMS MOOT.

The Court must first decide if the law invoked by the government is valid before using it to extinguish dozens of petitions from older pilots. However, if the Court finds that the law passes constitutional muster, it would not necessarily moot the petitions. Petitioners recognize that a federal court cannot render a decision on a matter made moot during the course of the proceedings. *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992). Moreover, Petitioners concede that there is a valid mootness question if the law is upheld and interpreted to have the scope suggested by the government. Read broadly, the law would appear to bar exemptions under the old rule.

However, the pilots are seeking a determination that they were denied the right to fly on the basis of their age alone. Even if the government has replaced the old Age 60 rule with a new Age 60 rule, a finding that the FAA improperly denied their exceptions would still constitute tangible relief for the petitioners. With such a finding, the pilots can seek relief from the agency for the loss of employment and other costs associated with the deprivation. Had the agency acted properly, many of these pilots would have been eligible to continue to fly for their respective airlines. The government is now arguing that, even if it did cause such injuries, the Petitioners could never seek compensation for the costs associated with the improper actions of the FAA. Whatever relief may be available to the pilots from either the government or their companies, such relief would depend on a determination on the merits of their petitions before this Court.

Finally, absent a ruling on the constitutionality and retroactive application of this Act, there remains a question as to whether it would extinguish the rights of individual petitioners. The FAA itself is likely to issue regulations and interpretations tied to this new law, which may

be relevant to the status of older pilots. Given the early stage of this law, the Court could still rule on that these orders were improper and leave it to the FAA to issue address these cases in light of the new law and any related regulations.

IV. CONCLUSION

In light of the foregoing, Petitioners respectfully ask the Court to deny the Motion for Dismissal. In the alternative, if the Court is not ready to deny the motion, Petitioners request the opportunity to fully brief these questions and for oral argument before the Court.

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March 7, 2008

CERTIFICATE OF SERVICE

I hereby certify that, on March 7, 2008, true and correct copies of the foregoing Petitioners' Opposition to Respondents' Motion to Dismiss Consolidated Cases as Moot in Light of New Statute were sent by first-class United States mail, postage pre-paid, upon counsel for the Federal Aviation Administration at the address listed below.

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