

NOT SCHEDULED FOR ORAL ARGUMENT

In the
UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

**Nos. 07-1180; 07-1194; 07-1226; 07-1326; 07-1366;
07-1390; 07-1447; 07-1507; 07-1524; 08-1023
(consolidated)**

GRANT O. ADAMS, et al.,

Petitioners,

v.

**FEDERAL AVIATION ADMINISTRATION and
DEPARTMENT OF TRANSPORTATION,**

Respondents.

JOINT BRIEF OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

1. No. 07-1180

The Petitioners in this case are: Earl Myers, Jr.; Lorenzo Sein; James Owens; Stephen Avery; Jerry Pearson; Richard Morgan; Ivan Beach¹; Donald Krstich; Charles Hosmer; Norman Stocker; E. Allan Englehardt; Patrick Gravitt²; James Sullivan; Anthony Gentile; Larry I. Tubor; George M. Conway III; Wayne G. Savage; Charles Henry; Robert C. Ritchie; Frances van Cortlandt de Peyster; Tom N. Park; Lewis Tetlow III; Gary J. Casperson; Robert Howard Attaway; Jack Chapman; William Basil Mann, Jr.; Frank Malone³; James D. Hodgson; George V. Emory; Charles Robert Musick, Jr.; Gary C. Shepard; James Bertelson⁴; Steven P. Zandstra; Akeary G. Vick; Michael J. Peet; James R. Woody; Steven McBride; Robert Louis Reusche II; John L. Schiff; Kenneth Ciszek; Paul J. Rodgers, Jr.; George J. Walters; Kenneth Paul Shrum; Michael W. Ballard; Michael E. Newton; Bruce Davey; Robert Gibson; George Walters; Susan Williams Harrison; Richard

¹ Withdrawn as a party pursuant to Petitioners' motion.

² Petitioners' motion pending for withdrawal.

³ Petitioners' motion pending for withdrawal.

⁴ Withdrawn as a party pursuant to Petitioners' motion.

Land; David Graham; Thomas R. Bell; David Pelham; James A. Cantrell III;
David McCord; Irby R. McNerlin; Glen Kane; Jose R. Arias; Carl C. Chappell Jr.;
Randal E. Smith; Irwin Pentland; F. Theodore Schott; Abe R. Balderrama; Robert
W. Hickson; Grant O. Adams; Woodrow W. Friend, Jr.; Raymond O. Lysen; Lyle
M. Speace Jr.; Richard A. Hinnenkamp; Bradley V. Smith; Terrence Joseph Brady;
Dennis M. Cox; Gordon M. Cohen; Louis F. Zajicek, Jr.; Brian Wilson Wretschko;
David B. Mickle; and Karl E. Krumke, III.

Respondents:

The Respondents in this case are the Federal Aviation Administration and
the Department of Transportation.

2. No. 07-1194

Petitioners:

The Petitioners in this case are: Keith L. McCormick and David B. Patton

Respondents:

The Respondents in this case are the Federal Aviation Administration and
the Department of Transportation.

3. No. 07-1226

Petitioners:

The Petitioners in this case are: Donald N. Persky and James R. Sweller.

Respondents:

The Respondents in this case are the Federal Aviation Administration and the Department of Transportation.

4. No. 07-1326

Petitioners:

The Petitioners in this case are: Timothy Houghton; Dale Steele; James Mehew; James Ray Schaffran; William W. Struthers; Robert Dowgialo; James Bumford Montalbano; James Richard Collier; Scott Hein; Michael Lierly; Mark D. Thomas; Chris Hartle; James McStay; Dennis Pettet Bernick; John Lloyd Lee Nelson; Herbert Holland; William Ford⁵; and Larry Ayotte.

Respondents:

The Respondents in this case are the Federal Aviation Administration and the Department of Transportation.

5. No. 07-1366

Petitioners:

The Petitioners in this case are: Errol Mullins; Gene Carswell; Charles Chapas; DeLloyd Jacobsen; and Ronald Nielsen.

Respondents:

The Respondents in this case are the Federal Aviation Administration and the Department of Transportation.

⁵ Petitioners' motion pending for withdrawal.

6. No. 07-1390

Petitioners:

The Petitioners in this case are: Stephen Carignan; Terry Collette; Paul Holloway; and Joseph LoVecchio.

Respondents:

The Respondents in this case are the Federal Aviation Administration and the Department of Transportation.

7. No. 07-1447

Petitioners:

The Petitioners in this case are: Gary Hendrix; Gerard Lionetti; Joseph Miller and James McGrath.

Respondents:

The Respondents in this case are the Federal Aviation Administration and the Department of Transportation.

8. No. 07-1507

Petitioners:

The Petitioners in this case are: JoBeth Lynch and James Monbeck.

Respondents:

The Respondents in this case are the Federal Aviation Administration and the Department of Transportation.

9. No. 07-1524

Petitioners:

The Petitioners in this case are: Harold Schichtel and Norman Koerner.

Respondents:

The Respondents in this case are the Federal Aviation Administration and the Department of Transportation.

10. No. 08-1023

Petitioners:

The Petitioner in this case is Henry J. Weiland.

Respondents:

The Respondents in this case are the Federal Aviation Administration and the Department of Transportation.

There are currently no intervenors or amici curiae in any of these consolidated cases.

B. Rulings Under Review

Petitioners filed these cases originally before this Court pursuant to 49 U.S.C. § 46110. Thus, there is no district court ruling under review. Under review are the identical orders of the Federal Aviation Administration contained at

Addendum A (copy of Adam's order)⁶ and Addendum B (list of identical orders issued to the individual petitioners).

C. Related cases

Petitioners know of no related case pending before this Court at this time.

⁶ Since all of these orders were identical, the Adam's order is included in the Addendum A and the other orders are listed in Addendum B for efficiency.

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Respondents.

JOINT BRIEF OF PETITIONERS

JURISDICTIONAL STATEMENT

These consolidated cases were filed pursuant to 49 U.S.C. § 46110, seeking review of the identical orders in denial of their petitions for exemption from § 121.383(c) of Title 14, Code of Federal Regulations.

STATEMENT OF ISSUES

- I. Whether the Fair Treatment for Experienced Pilots Act is invalid as a deprivation of due process under the Fifth Amendment and, accordingly, cannot be the basis for a dismissal of the petitions.
- II. Whether the Fair Treatment for Experienced Pilots Act is invalid as a denial of equal protection of the laws and, accordingly, cannot be the basis for a dismissal of the petitions.
- III. Whether the Fair Treatment for Experienced Pilots Act is invalid under the prohibition against bills of attainder under Article I and, accordingly, cannot be the basis for a dismissal of the petitions.
- IV. Whether the Fair Treatment for Experienced Pilots Act is invalid under the prohibition against takings under the Fifth Amendment and, accordingly, cannot be the basis for a dismissal of the petitions.
- V. Whether, if constitutional, the Fair Treatment for Experienced Pilots Act renders these petitions moot.
- VI. Whether the federal government can deny an exemption under the Age 60 Rule without any individual determination of a pilot's capability, experience, or performance as it relates to air safety.
- VII. Whether the rule of blanket denials of exemptions based solely on age is a violation of the Age Discrimination in Employment Act (ADEA).

VIII. Whether the rule of blanket denials of exemptions based solely on age is a denial of the equal protection of the laws and the right to due process under the laws.

STATUTES AND REGULATIONS

A. The Fairness for Experienced Pilots Act 49 U.S.C. § 44729(e)(1):

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.

B. The Fairness for Experienced Pilots Act 49 U.S.C. § 44729(e)(2):

(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) . . . 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.

C. General Exemption Authority Under 49 U.S.C. § 44701(f):

(f) Exemptions. The Administrator may grant an exemption from a requirement of a regulation prescribed under subsection (a) or (b) of this section or any of sections 44702-44716 of this title [49 USCS §§ 44702-44716] if the Administrator finds the exemption is in the public interest.

D. Exemption Provision from 14 C.F.R. § 11.81:

§11.81 What information must I include in my petition for an exemption?

You must include the following information in your petition for an exemption and submit it to FAA as soon as you know you need an exemption.

- (a) Your name and mailing address and, if you wish, other contact information such as a fax number, telephone number, or e-mail address;
- (b) The specific section or sections of 14 CFR from which you seek an exemption;
- (c) The extent of relief you seek, and the reason you seek the relief;
- (d) The reasons why granting your request would be in the public interest; that is, how it would benefit the public as a whole;
- (e) The reasons why granting the exemption would not adversely affect safety, or how the exemption would provide a level of safety at least equal to that provided by the rule from which you seek the exemption; you to do so, we will file a difference with ICAO. However, a foreign country still may not allow you to operate in that country without meeting the ICAO standard.
- (f) A summary we can publish in the FEDERAL REGISTER, stating:
 - (1) The rule from which you seek the exemption; and
 - (2) A brief description of the nature of the exemption you seek;
- (g) Any additional information, views or arguments available to support your request; and
- (h) If you want to exercise the privileges of your exemption outside the United States, the reason why you

need to do so.]

STATEMENT OF THE CASE

These consolidated Petitions for Review were timely filed to challenge the denials of exemptions under 49 U.S.C. § 44701(f) and 14 C.F.R. § 11.81(e). On February 21, 2008, the government sought the dismissal of these petitions due to the enactment of The Fair Treatment for Experienced Pilots Act, Pub. L. No. 110-135, 121 Stat. 1450 (2007). This Court referred this question of mootness, as well as Petitioners' challenge of the Act as unenforceable, to the merits panel in a per curiam order of April 24, 2008.⁷ Because such petitions are reviewed directly by this Court, there is no disposition or record below.

STATEMENT OF THE FACTS

This case originated as Petitions for Review by senior pilots who challenged orders from the FAA denying them exemptions to the Age 60 Rule without any consideration of their abilities, health, or experience. Since 1959, the FAA has barred pilots from flying commercial aircrafts 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

⁷ The Court previously issued a show cause order as to whether Petitioner Donald N. Persky (No. 07-1226) and Petitioner Lloyd Lee Nelson (No. 07-1326) should be dismissed as untimely in an order dated February 20, 2008. Petitioners responded to this show cause order on March 14, 2008 to show that these petitions were timely filed.

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 a federal regulation.⁸ *Id.* at 329.

The FAA promulgated the Age 60 Rule, barring any pilot who “has reached his 60th birthday.” 14 C.F.R. § 121.383(c) (2008). However, pilots are allowed an exemption 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) (2008). For many years, the FAA carried out the plain meaning of the exemption standard and issued individual exemptions based on showings that pilots are not a danger to air safety due to their age. It also allows commuter pilots over the age 60 to fly. *See Yetman v. Garvey*, 261 F.3d 664, 668 (7th Cir. 2001). However, in 1995, the FAA hardened its stance and announced a categorical rejection of exemptions. *See* 60 Fed. Reg. 65,980 (1995). Since then, the FAA has refused to consider any criteria

⁸ 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 found no scientific 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).

other than age – refusing to consider both these exceptions to the Age 60 rule and ignoring showings that individual exemptions “would not adversely affect safety.”

The Age 60 Rule put the United States in direct conflict with international standards and agreements. On March 10, 2006, the International Civil Aviation Organization’s (ICAO) governing Council adopted a recommendation from the Air Navigation Commission to use the age of 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 of 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 created a bizarre anomaly. 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. 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.

There has never been a single study that establishes a basis for the Age 60 Rule or explains how terminating pilots at 60 serves the interest of air safety. To the contrary, in a November 26, 2006 letter, the Equal Employment Opportunity Commission (EEOC) notified the FAA that it had concluded over two decades earlier that age was not a bona fide occupational qualification (BFOQ) for pilots.

Letter of Naomi C. Earp, Chair, EEOC, to the FAA, November 15, 2006 (finding that “[t]he Age 60 Rule runs counter to the narrow scope of the BFOQ defense and the fact-specific, case-by-case analysis it requires.”). Moreover, the FAA itself admitted that the rule was archaic and unnecessary. On January 30, 2007, the FAA administrator Marion Blakey spoke on 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 National Press Club Luncheon Address by Federal Aviation Administrator

Marion Blakey, Fed. News Service, January 30, 2007; *see also* Paul Beebe, *Pilots’ Age Rule Change Stirs Dissent*, Salt Lake Trib., 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 exemptions to the rule for individual pilots. *See, e.g., Prof’l Pilots Fed’n v. FAA*, 118 F.3d 758 (D.C. Cir. 1997). Petitioners have filed

ten petitions seeking relief in this case.⁹ Their claims are all the same. Petitioners maintain that these orders violate the United States Constitution; the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2000); the ADEA, 29 U.S.C. § 623(f) (2000); and the Rehabilitation Act, 29 U.S.C. § 794 (2000).

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. With this law, the FAA now accepts that the government has made a “safety determination that, generally speaking, pilots can serve up to age 65 in part 121 operations.”¹⁰ Addendum C (Question #8) (March 13, 2008 FAA statement). Nevertheless, this law replaced the age discriminatory rule with a series of age-discriminatory provisions barring benefits and procedural rights (hereinafter “the new Age 60 rule”). Despite its ironic title, the Fair Treatment for Experienced Pilots Act was enacted specifically to bar experienced pilots from being able to

⁹ On June 1, 2007 (No. 07-1180), a petition for dozens of pilots was filed. This petition was followed by identical claims 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). All ten petitions have been consolidated by order of the court.

¹⁰ Part 121 carriers were defined as those operating commercial aircraft with a seating capacity of more than 30 passengers. See 14 C.F.R. § 121.1(a)(5)(ii) (1995). Part 121 was amended in 1995, and certificate holders subject to Part 121 are now addressed in 14 C.F.R. § 121.1(a).

either fly or contest the denial of their seniority and 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 penalized on the sole basis of their age regardless of their individual capabilities, health, or experience. The new Age 60 rule was inserted after a lobbying effort by the Air Line Pilots Association (ALPA), which first opposed the elimination of the Age 60 Rule and then secured provisions that penalized senior pilots who sought continued employment.¹¹

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

¹¹ 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. See http://www.alpa.org/DesktopModules/ALPA_Documents/ALPA_DocumentsView.aspx?itemid=11636&ModuleId=506&TabId=93 (statement of ALPA president).

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)(A)-(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 barred 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 a pilot who turned 60 on December 14, 2007 is safe to fly, but another pilot who turned 60 on December 12, 2007 must be re-hired without seniority or benefits.

Congress not only negated seniority and benefits for older pilots, but it further barred any judicial relief for such losses.

(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) . . . 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.

49 U.S.C. § 44729(e)(2). Thus, the mere fact that a citizen turned 60 on December

12, 2007 rather than December 14, 2007 is the only criterion used for determining whether the citizen has access to the courts and judicial relief.

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 full eligibility to fly within the United States. A typical case involves Petitioner Herb Holland, a decorated Marine pilot from Vietnam, who was one of the most experienced and most respected pilots at US Airways.¹² Holland missed the statutory date under the 2007 law by 43 days. He lost his job, his benefits, and his status as a senior pilot. He is now living much of each month in Kazakhstan, where he is a pilot for Air Astana, away from his family living in the United States. Furthermore, the creation of this discriminatory class based on age was imposed without a single stated rationale by Congress and thus contravenes the Fifth Amendment of the Constitution.

Congress has not articulated a public policy basis for negating years of seniority and benefits in favor of younger pilots. Likewise, Congress has not offered any policy rationale for preventing companies from honoring prior contracts and agreements with older pilots.¹³ Instead, the language is a flagrant

¹² See <http://www.age60rule.com/docs/MEMORIAL%20DAY%20SHAME.pdf>.

¹³ Indeed, if economics were a concern in allowing senior pilots to fly, Congress would have left the decision up to the airlines to determine whether the

concession to powerful special interests that lobbied to disenfranchise older pilots in order to benefit younger pilots. The result is not only inequitable, but unconstitutional.

On February 21, 2008, the government filed a motion to dismiss these petitions as moot in light of the enactment of the Act. 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. Recently enacted, the Act has not been subject to final judicial review on any of the issues discussed below. The question of mootness, as well as Petitioners' challenge to the Act as unconstitutional, were referred by a per curiam order to the merits panel on April 24, 2008.

SUMMARY OF ARGUMENT

The government seeks to dismiss these consolidated petitions based on the enactment of the Fair Treatment for Experienced Pilots Act, Pub. L. No. 110-135, 121 Stat. 1450 (2007) (hereinafter "the Act"). The Court ordered briefing on this question, including Petitioners' argument that the Act contravenes a host of constitutional and statutory provisions. Under this Act, Congress sought to create a new Age 60 rule that wiped out the benefits and status of senior pilots to

skills and experience of these pilots outweighed any costs of continuing their service.

advantage younger pilots and the pilot union, ALPA. Not only did Congress not offer a single rationale for this punitive measure against senior pilots, but the measure was openly sought by ALPA to guarantee that younger pilots would be able to maximize their benefits and status vis-à-vis senior pilots.

With the Act, Congress established what the FAA expressly agreed, that there is no safety barrier or danger to pilots flying until age 65. Yet, in a purported effort to end the discriminatory Age 60 Rule, Congress adopted the worst possible means. The Act denies hundreds of senior pilots their due process rights by not only barring any opportunity to challenge the deprivations, but by denying the right of the pilots and airlines to contract for continued service at their prior benefits and status. It further denies a small group of pilots equal protection under the laws based solely on their age - a discriminatory treatment meant to secure a windfall for more politically powerful younger pilots. The unconstitutionality of the Act is also clear under the prohibition on bills of attainder. The Act seeks to impose a clearly punitive measure on a small group of individuals in order to favor a more powerful group of pilots. There are also serious questions raised under the Takings Clause given the decision of Congress to wipe out decades of benefits and status to the financial advantage of another group of pilots.

These constitutional infirmities make the Act unconstitutional and thus unenforceable in this case. Assuming that the Act is found unconstitutional, this

case would return to the original controversy: whether the government can refuse to consider the individual capabilities and experience of pilots when the regulation expressly states that exemptions are permissible if there is no threat to air safety. The blanket denial of exemptions based on age conflicts with the basic premise of the law that the Age 60 Rule is subject to individual exemptions where pilots can show that air safety would not be compromised by their continued service. Even if these pilots can show that their skills and performance are as good as or better than those of younger pilots, the government has maintained that it will not consider that information, despite the express language of the regulation that exemptions are based on pilots showing that they “would not adversely affect safety.” Given the fact that the international aviation community and the FAA have dismissed the notion that pilots become presumptively incapable or unqualified at age 60, the refusal to address the individual petitions on their merits constitutes an arbitrary and capricious denial of these exemptions – and ultimately the livelihood of these senior pilots.

PROCEDURAL POSTURE, STANDARD OF REVIEW, AND BURDEN OF PROOF

A. Procedural Posture

The pending petitions seek review of orders denying exemptions to the Age 60 Rule. The orders that are the subject of these petitions were identical. A

sample order and a list of the specific exemption orders are reproduced in the Addendum.

B. Standard of Review

In reviewing the findings of fact by the FAA in denying exemptions to the Age 60 Rule, courts have used the substantial evidence standard of review, where it is “the petitioners' burden to present persuasive evidence that granting exemptions would not impair safety.” *Baker v. FAA*, 917 F.2d 318, 322 (7th Cir. 1990); 49 U.S.C. § 46110(c) (2000). Pursuant to the generally applicable standard of review for administrative actions under 5 U.S.C. § 706(2)(A) (2000), the denial of an exemption may be set aside if “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A)-(C) (2000) (sub-sections 706 (A)-(C) provide that decisions should be set aside when (A) arbitrary or capricious; (B) “contrary to constitutional right, power, privilege, or immunity”; and, (C) “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”); *see Lun Kwai Tsui v. Attorney Gen. of United States*, 445 F. Supp. 832, 835 (D.D.C. 1978) (finding that a court is not permitted to make an independent inquiry into facts and try factual issues de novo in reviews brought under 5 U.S.C. § 706(2)(A)). However, a reviewing court may examine “the agency's decision to ensure that it was based on a consideration of the relevant

factors and articulated a rational connection between the facts found and the choice made.” *Yetman v. Garvey*, 261 F.3d 664, 669 (7th Cir. 2001).

C. Burden of Proof

The Court is conducting the original review of these petitions and whether the issues presented are legal questions on the application of constitutional and statutory provisions. The standard, therefore, is *de novo*. *J. Andrew Lange, Inc. v. FAA*, 208 F.3d 389, 391 (2d Cir. 2000); *Newton v. FAA*, 457 F.3d 1133, 1136 (10th Cir. 2006). In order to prevail on its motion for dismissal, the government must show that the Act is constitutional and thus enforceable against these pilots. *See Reid v. Engen*, 765 F.2d 1457, 1461 (9th Cir. 1985) (when constitutional questions are at issue, judicial review is presumed). Assuming the Act is found unconstitutional, the government must show how, even if a pilot can demonstrate that he or she is not a risk to air safety, it may refuse to consider such individual evidence in finding that an exemption would be a threat to air safety.

ARGUMENT

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, wipe out their earned seniority and benefits, and block 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.

The Act discriminates on the basis of age and denies older pilots equal protection under the due process clause of the Fifth Amendment. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, 116-17 (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 old before December 13, 2007; and (3) pilots who turned 60 years old after December 13, 2007. The first group is free of any impediments. The second group is effectively barred under the new Age 60 rule, absent re-hire without prior seniority

or benefits. The third group is barred from suing and must satisfy additional 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. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000); *see also Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (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 the achievement of any combination of legitimate purposes that [it is] irrational.” *Gregory v. Ashcroft*, 501 U.S. 452, 471 (1991). 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. Obviously, a court cannot take judicial notice of such rationales and supply a rational basis that Congress was unable or unwilling to articulate itself.

I. THE FAIR TREATMENT FOR EXPERIENCED PILOTS ACT DEPRIVES THE SENIOR PILOTS OF DUE PROCESS UNDER THE FIFTH AMENDMENT.

The Act further denies senior pilots due process under the Fifth Amendment. The Due Process Clause protects citizens from the deprivation of life, property, or liberty. *See Ky. Dep't of Corr. 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) (finding due process violations in the imposition of new pension obligations). The government makes plain the 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 these pilots an individual agency finding of whether they fall within any exemption criteria.

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, 266 (1994). The Court specifically raised the danger evident in this case:

[Congress’] unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its

responsivity 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 to their 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 benefits upon their return to service.

Retroactive termination of property interests receives added scrutiny by federal courts. As the Supreme Court noted in *Eastern Enters. v. Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J., concurring), “although [the Court has] been hesitant to subject economic legislation to due process scrutiny as a general matter . . . for centuries our law has harbored a singular distrust of retroactive statutes . . . The Court’s due process jurisprudence reflects this distrust.” *See also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976); *United States v. Carlton*, 512 U.S. 26, 31 (1994); *Landgraf*, 511 U.S. at 266.

The Act denies a host of procedural and substantive rights. These include the right to contract with airlines, because the law prohibits employment at the earned levels of salary and benefits for senior pilots. Employment and other economic benefits are protected rights under the Due Process Clause. For example, a person receiving welfare benefits has a constitutionally protected

interest in continued receipt of those benefits. *See Atkins v. Parker*, 472 U.S. 115, 128 (1985) (food-stamp benefits); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits); *see also Flemming v. Nestor*, 363 U.S. 603, 611 (1960) (old-age insurance benefits under the Social Security Act). Thus, college professors and other teachers may seek review for dismissal regardless of whether they have tenure, *Slochower v. Bd. of Educ.*, 350 U.S. 551, 556 (1956), non-tenure contracts, *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952), or implied assurances of continued employment. *Connell v. Higginbotham*, 403 U.S. 207, 208 (1971). Such expectations are enforceable even if there are no express contractual obligations of employment like those of senior pilots. *See Perry v. Sindermann*, 408 U.S. 593, 602 (1972).

The expectation of these benefits and salary levels for the senior pilots is more than some “abstract need or desire for it.” *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 7 (1979). These benefits were accrued and realized property interests. If Congress wants to extinguish such benefits and status, it must allow for adequate procedures. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). It cannot, as here, move to dismiss a due process challenge by simply eliminating both the property interest and any process to challenge the deprivation. *See Logan*, 455 U.S. at 431-32 (quoting *Vitek v. Jones*, 445 U.S. 480,

491 (1980) (ruling that a due process claim is “not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.”); *Bennett v. Tucker*, 827 F.2d 63, 73 (7th Cir. 1987) (“a state may not deprive an individual of his or her property interest without due process, and then defend against a due process claim by asserting that the individual no longer has a property interest.”).

The Supreme Court has long maintained that “the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.” *Truax v. Raich*, 239 U.S. 33, 41 (1915); *see also Hampton*, 426 U.S. at 102 (holding that “ineligibility for employment in a major sector of the economy” implicates a fundamental liberty interest). Accordingly, “[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause.” *Schware v. Bd. of Bar Exam.*, 353 U.S. 232, 238 (1957); *see also Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 102 (1963); *Goldsmith v. U.S. Bd. of Tax Appeals*, 270 U.S. 117, 123 (1926).

Blanket denials of property in legislation are generally disfavored under due process analysis. For example, the Seventh Circuit in *Youakim v. McDonald* held that a statutory change was unconstitutional for discontinuing foster care benefits

to children living with relatives. *Youakim v. McDonald*, 71 F.3d 1274, 1291 (7th Cir. 1995). The Court held that “[r]ather than affording plaintiffs that opportunity prior to terminating their benefits, DCFS made the blanket determination that all approved and preapproved relative homes do not satisfy the new requirement because they currently are unlicensed.” *Id.*; see also *Greene v. Babbitt*, 64 F.3d 1266, 1273 (9th Cir. 1995) (“as a consequence of the narrowing of eligibility criteria, individual benefits may be lost [O]nce Congress has narrowed eligibility for fundamental health and welfare benefits by conditioning eligibility on tribal recognition, the due process clause requires a meaningful hearing to determine whether those previously eligible can meet the new and narrowed requirements.”).

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 . . . must be determined with reference to the rights and interests at stake in the particular case.”). The Court has applied the three-part balancing test adopted 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.

As to the first factor of the *Mathews* balancing test, the above analysis demonstrates that economic benefits such as earned salary levels and employment benefits represent a significant private interest affected by the official action.

Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970). As the Supreme Court has noted, discussing the difference in private interest between grant of parole and revocation, “there is a human difference between losing what one has and not getting what one wants.” *Greenholtz*, 442 U.S. at 10 (quoting Judge Henry Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1296 (1975)).

Regarding the second factor of the *Mathews* balancing test, the erroneous deprivation of such interest through the Act is unavoidable. In *Goldberg*, the Supreme Court struck down a New York program that provided for full trial-like hearings after the termination of welfare benefits, and limited procedural rights prior to termination. 397 at 266-67. In the instant case, the Act does not provide for such limited procedural rights. Because the Act bars any judicial relief for such losses and bars potential employers from voluntarily recognizing the seniority and status of the pilots, there are currently no procedures in place to allow the pilots to retain their constitutionally protected interests.

As to the third factor, the fiscal and administrative burden to the government

would be minimal. Further, the government has an interest in maintaining the fairness of its laws to its citizens. Here, the interest of the barred pilots in retaining their rights to their benefits and seniority far outweighs any fiscal and administrative burden of providing the pilots with an opportunity to demonstrate their continued capabilities and entitlement to their earned employment benefits and seniority status. As Justice Brennan articulated in *Goldberg*, “While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process.” *Goldberg*, 397 U.S. at 261.

Here, Congress has denied the barred pilots any opportunity to protect their right to earn a living as commercial pilots and their 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*, 239 U.S. at 41 ; *In re Griffiths*, 413 U.S. 717 (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 *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 643 (1974), the Supreme Court held that a mandatory maternity leave policy violated school teachers' substantive due process rights as the "arbitrary cut-off dates . . . have no rational relationship to the valid state interest . . ."

Furthermore, the cut-off dates created a:

. . . conclusive presumption that every pregnant teacher . . . is physically incapable of continuing. There is no individualized determination . . . by the teacher's doctor -- or the school board's -- as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.

Id. at 644. Here, the Act's arbitrary cutoff dates not only have no valid relationship to the government's interests in ensuring the safety of commercial flights and fundamental fairness to all pilots, but they deprive airlines of the valuable expertise of their most experienced pilots. Further, as held in *LaFleur*, "administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law." *Id.* at 647.

In this case, older pilots were disenfranchised to benefit younger pilots. The implications of allowing Congress to extinguish such property without legal recourse are difficult to overstate. The Supreme Court has long warned that, absent due process protections, Congress "would allow the State to destroy at will virtually any state-created property interest." *Youakim*, 71 F.3d at 1289 (citing

Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982)). To hold otherwise would sanction an arbitrary and unjustified elimination of individual property interests in contravention of the settled principle first recognized in *Goldberg v. Kelly*, that entitlement to fundamental benefits represents a property interest implicating the protection of the Due Process Clause. *See* 397 U.S. at 269. As the United States Court of Appeals for the Ninth Circuit noted:

The protections of the Fifth Amendment would be seriously impaired if this court allowed the government to cut off benefits without a hearing by creating new eligibility requirements and then summarily holding that current benefit recipients do not meet the new requirements. . . . Administrative agencies should not be allowed to cut off benefits to all recipients without procedural safeguards every time Congress alters the eligibility requirements of a government program.

Greene v Babbitt, 64 F.3d 1266, 1273-74 (9th Cir. 1995). In this case, the benefits are accrued property in the form of status, salary levels, and employment benefits that have been wiped out without either a hearing or even a statutory rationale.

The Act contravenes the rights of senior pilots under both procedural and substantive due process.

II. THE FAIR TREATMENT FOR EXPERIENCED PILOTS ACT DENIES THE SENIOR PILOTS EQUAL PROTECTION UNDER THE FIFTH AMENDMENT.

The new Age 60 rule was overtly designed to create two classes of pilots: those who turned 60 years old (1) before December 13, 2007, and (2) after

December 13, 2007. The significance of missing this date by just one day is catastrophic for a pilot: the total loss of decades of earned status, benefits, and privileges.

Age is currently not treated as the basis for a suspect class for the purposes of an equal protection analysis. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 63 (2000); *see also Gregory v. Ashcroft*, 501 U.S. 452, 453 (1991). Where legislation does not affect suspect classes or infringe fundamental constitutional rights, it must still satisfy a “rational basis” test. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). This test is meant to establish that legislation can be shown to have some rational purpose connected to a legitimate state interest. “[R]ational basis review, while deferential, is not toothless.” *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) (*citing Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998)). In this case, Congress chose to not only disenfranchise thousands of senior pilots but felt no compulsion to state any basis, let alone a rational basis. It simply gave a windfall benefit to younger pilots in a legislative deal openly struck with the pilots’ union.

In *Craigmiles v. Giles*, the Sixth Circuit faced an analogous case. 312 F.3d at 221-223. In that case, the legislature limited the sale of funeral caskets to licensed funeral directors. The court held, however, that the actual purpose of this statute was to protect a discrete interest group from economic competition, and found the

statute to be unconstitutional.¹⁴ *Id.* At 228. In the instant case, the record speaks loudly to the economic motivation of ALPA in seeking this provision: to advantage younger pilots from the competition for pilot seats and benefits.

Another analogous case can be found at *Gault v. Garrison*, 569 F.2d 993 (7th Cir. 1977). In that case, the Seventh Circuit reviewed a mandatory retirement scheme for teachers. As here, there was no basis stated by the school board. *Id.* at 996 (“The defendants have not identified the purpose of the requirements in question; their briefs only hint that the purpose may be to remove unfit teachers . . . without such a purpose demonstrated in the instant case, we cannot, absent further

¹⁴ State courts have also struck down such unsupported age-based criteria. For example, in *Willoughby v. Dept. of Labor and Indus. of Wash.*, 147 Wash. 2d 745 (2002), the Supreme Court of Washington held, en banc, that a state statute in effect barring disbursement of disability benefits to prisoners who had no statutory beneficiaries and were unlikely to be released from prison to be a violation of the prisoners’ equal protection rights. In *Doersam v. Indus. Com’n of Ohio*, the Supreme Court of Ohio held that a statute limiting death benefits to next-of kin based on the date of the initial injury was unconstitutional. *Doersam v. Indus. Com’n of Ohio*, 45 Ohio St. 3d 115 (Ohio 1989); *see also Indus. Claim Appeals Office v. Romero*, 912 P.2d 62 (Colo. 1996) (statute disqualifying employees 65 or older from receiving total disability workers’ compensation benefits invalidated under a rational basis test, despite budgetary interests and the potential for duplicative Social Security benefits); *State ex rel. Boan v. Richardson*, 198 W. Va 545, 482 S.E.2d 162 (1996) (workers’ compensation provision reducing total disability benefits by where claimant simultaneously received Social Security unconstitutional as no reasonable relation to interest of avoiding duplication of benefits and preserving fiscal integrity of workers’ compensation fund as the two programs are different). In *Doersam*, 45 Ohio St. 3d 115, the Ohio Supreme Court based its finding of unconstitutionality in part on the fact that it could not find a legitimate government interest that was furthered by the legislation.

proceedings, justify the challenged provisions.”). In reviewing the record, the court found that “there has been no evidence presented to indicate any relationship between the attainment of the age of 65 and a schoolteacher's fitness to teach.” *Id.* Here, Congress has adopted a new Age 60 rule without any explanation or rationale as to why a pilot is presumptively incapable despite the fact that pilots are routinely subject to physicals and annual performance evaluations. Indeed, under the other provisions of the Act, senior pilots are subject to additional testing on an annual basis.

In enacting the new Age 60 rule, Congress attempts to do what private employers are barred from doing: using age arbitrary and determinative criteria. In its decision this month in *Meacham v. Knolls Atomic Power Laboratory*, __U.S.__ WL 2445207 (2008), the Supreme Court in a 7-1 decision ruled that employers must provide “reasonable factors other than age” under the ADEA for terminations – absent a showing of a bona fide occupational qualification (BFOQ). The international aviation community and the FAA Administrator have dismissed any notion that age is a BFOQ for pilots. Yet, Congress would wipe out employment, benefits, and status based solely on age without a single line of explanation in the bill or the record.

If the rational basis test has any substance, it should require at a minimum a

stated basis.¹⁵ In this case, the open purpose of the law was to offer a windfall to younger pilots, which is neither a rational basis nor part of a legitimate interest of the government. Should Congress want to force fully capable pilots out of the cockpit, it should state a reason and create a record for such a discriminatory provision. At present, the discriminatory treatment of senior pilots is a baseless and arbitrary denial of earned benefits and status. As such, it violates the guarantee of equal protection under the Constitution.

III. THE FAIR TREATMENT FOR EXPERIENCED PILOTS ACT CONSTITUTES A BILL OF ATTAINDER UNDER ARTICLE I.

The Fair Treatment for Experienced Pilots Act constitutes a bill of attainder in violation of Article I, section 9. U.S. Const. art. I, § 9, cl. 3. The Constitution prohibits Congress from enacting "a law that legislatively determines guilt and

¹⁵ 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) ("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 Res. Def. Council, Inc. v. EPA*, 824 F.2d 1258, 1278 (1st Cir. 1987). However, to judicially amend the ADEA would do great violence to one of the most important and widely applied laws in the country.

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). The Act imposes punitive measures upon a small, definable group of older pilots who turned 60 years before December 13, 2007. See *BellSouth Corp. v. FCC*, 144 F.3d 58 (D.C. Cir. 1998) ("*BellSouth I*"). Congress may find novel forms of punishment, but the courts have maintained the constitutional prohibition by focusing on the effect rather than the form of the punishment. *Foretich v. United States*, 351 F.3d 1198, 1216 (D.C. Cir. 2003) ("The infrequency with which courts have relied upon this provision to invalidate legislation has not prevented its meaning from evolving to fulfill this purpose.") (citing *Bell South Corp. v. FCC*, 162 F.3d 678, 683 (D.C. Cir. 1998) ("*BellSouth II*")).

A. The Act Expressly Singles Out an Easily Ascertainable Group and Satisfies the Specificity Prong of Attainder Analysis.

Recently, this Court ruled that the bill of attainder prohibition applies to legislation negating prior legal benefits or rights acquired in litigation. *Foretich*, 351 F.3d at 1226. 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. II*, 162 F.3d at 683. 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). The Supreme Court has downplayed the significance of specificity, as has this Court. See *Nixon*, 433 U.S. at 469-73;

Foretich, 351 F.3d at 1217-18; *BellSouth I*, 144 F.3d at 63. Here, an easily ascertainable group was targeted by Congress for punitive measures: pilots who turned 60 years old before December 13, 2007. Not only was this small class of fewer than three thousand pilots expressly singled out in legislation, but it was clear that this group was the target of the legislative efforts of ALPA and its allies in Congress. The legislation clearly satisfies the specificity prong of attainder analysis.

B. The Termination of Employment, Status, and Benefits for Senior Pilots Constitutes Punishment.

As this Court has held, “the principal touchstone of a bill of attainder is punishment.” *BellSouth I*, 144 F.3d at 63; *Foretich*, 351 F.3d at 1218. The Act 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 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.3d at 1218 (citing *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 852 (1984) (quoting *Nixon*, 433 U.S. at 473, 475-

76, 478)). These tests are defined separately and an Act need satisfy only one to constitute a bill of attainder. *Consol. Edison Co. v. Pataki*, 292 F.3d 338, 350 (2d Cir. 2002). However, a court will often “weigh these factors together in resolving a bill of attainder claim.” *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 673 (9th Cir. 2002); see also *Foretich*, 351 F.3d at 1218; *Consol. Edison Co.*, 292 F.3d at 350. 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.” *Foretich*, 351 F.3d at 1218 (quoting *BellSouth I*, 144 F.3d at 65).

Case law makes clear that “our inquiry is not ended by the determination that the Act imposes no punishment traditionally judged to be prohibited by the Bill of Attainder Clause.” The Supreme Court has stressed that courts need to avoid rigid definitions and should focus on the purpose of the prohibition. Otherwise, it noted “new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee.” *Nixon*, 433 U.S. at 475. As shown below, this Act satisfies all three tests for punishment.

1. The Historical Test.

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 Court has repeatedly noted that barriers to employment constitute a classic historical form of punishment under attainder analysis.

Foretich, 351 F.3d at 1218. The Supreme Court finds an historical punishment when the legislative measures impose conditions or penalties that are neither necessary nor proportional to achieve a legitimate purpose. *See Nixon*, 433 U.S. at 473 (describing historically recognized bills of attainder as "deprivations and disabilities *so disproportionately severe and so inappropriate to nonpunitive ends* that they unquestionably have been held to fall within the proscription of Art. I, § 9") (emphasis added). Under this standard, legislative efforts to bar a class of individuals from holding union positions, *see United States v. Brown*, 381 U.S. 437, 458-60 (1965), or practicing in a profession, *see Lovett*, 328 U.S. at 316, have been treated as historical punishment.

The Act effectively bars senior pilots from employment in the United States by imposing prohibitive penalties and barriers. It took pilots years to earn sufficient seniority to fly large aircrafts. *See Cummings v. Missouri*, 71 U.S.277 320 (1866) (defining historical punishment as including "disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment."). However, even if they are rehired, they will have to start as new pilots "at the back of the line." In the five

years left in their careers, this is an obvious practical barrier to flying these aircrafts. Moreover, even if they are re-hired, they would have to agree to start work at a fraction of their prior salaries – accepting a salary of a pilot who just learned to fly as opposed to someone who has decades of experience. It is no surprise, therefore, that only roughly two percent of the affected pilots have been re-hired and others must move to third-world countries to find employment.¹⁶

2. The Functional Test.

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. This Court has stressed that the functional test serves to catch bills of attainder that might not satisfy the other two tests:

Our cases have noted . . . that the second factor - the so-called "functional test" - "invariably appears to be 'the most important of the three.'" *BellSouth II*, 162 F.3d at 684 (quoting *BellSouth I*, 144 F.3d at 65). Indeed, compelling proof on this score may be determinative. In *BellSouth I*, we explained that where an enactment falls outside the historical definition of punishment, therefore failing to satisfy the first test, the legislation may still be a bill of attainder under the functional test if no legitimate nonpunitive purpose appears. 144 F.3d at 65.

¹⁶ See generally *Memorial Day Shame: Only 2 Percent of Veteran Airline Pilots Grounded By Congress Are Rehired, Many Forced to Work for Foreign Carriers*, Health Business Week, June 6, 2008, at 1; available at <<http://www.seniorpilotscoalition.org>>..

This ensures that Congress cannot "circumvent[] the clause by cooking up newfangled ways to punish disfavored individuals or groups." *Id.*

Foretich, 351 F.3d at 1219. The clearly disfavored group in this legislation is composed of fewer than 3,000 senior pilots who saw their earned status and benefits terminated to benefit the more powerful younger pilots, as represented by ALPA. Congress set out to guarantee that any senior pilot who tried to come back to work would face financial and practical penalties. First, it stripped them of their earned benefits and salaries – even barring employers from contracting to continue such status and salary levels. Second, it forced them to apply as new pilots – a condition that makes it extremely unlikely that they would ever fly large aircrafts again – assuming that they were even allowed in a cockpit. Third, if they were rehired, they would face increased testing and physicals. The conditions were clearly designed to punish any senior pilots who did not yield their positions and status to younger pilots. It is a scheme that manifests the same attainder characteristics as the statute in *Consol. Edison Co.*, 292 F.3d at 354, where “the legislature piled on a burden that was obviously disproportionate to the harm caused.”

The Supreme Court has stressed that “[i]n determining whether a legislature sought to inflict punishment on an individual, it is often useful to inquire into the existence of less burdensome alternatives by which that legislature . . . could have

achieved its legitimate nonpunitive objectives.” *Nixon*, 433 U.S. at 482; *see also SeaRiver*, 309 F.3d at 677-78; *Consol. Edison Co.*, 292 F.3d at 354. This task is obviously made more difficult by the complete failure of Congress to state the purpose behind this punitive legislation. The most obvious purpose – to advantage younger pilots by imposing prohibitive conditions and penalties on older pilots – would clearly establish an attainder. In the past, the question of age has been loosely connected to air safety. However, this legislation does little for air safety since there are no studies showing that senior pilots are less capable than younger pilots in the operation of modern aircrafts. More importantly, the legislation itself imposes additional testing requirements – an obvious alternative approach to any question of capability or incapacity. Congress “made no attempt whatsoever to ensure that the costs imposed . . . were proportional to the problems that the legislature could legitimately seek to ameliorate.” *Consol. Edison Co.*, 292 F.3d at 354.

As this Court has stressed, “to avoid designation as a bill of attainder, a statute that burdens a particular person or class of persons must serve purposes that are not only nonpunitive, but also rational and fair.” *Foretich*, 351 F.3d at 1222 (citing *Selective Serv. Sys.*, 468 U.S. at 854; *Nixon*, 433 U.S. at 483; *BellSouth II*, 162 F.3d at 680, 686-88). It is hard to imagine how wiping out the status and benefits of senior pilots to benefit younger pilots would be rational or fair. Rather,

it constitutes a raw exercise of power by a favored class to secure a windfall benefit from Congress. It is not enough to simply claim a relationship to some purpose when the means are so punitive and grossly unfair to a closed class of identified individuals. *Foretich*, 351 F.3d at 1222 (“A grave imbalance or disproportion between the burden and the purported nonpunitive purpose suggests punitiveness, even where the statute bears some minimal relation to nonpunitive ends.”) (citing *Nixon*, 433 U.S. at 473; *Consol. Edison Co.*, 292 F.3d at 354). The Act in this case clearly satisfies the functional test of a bill of attainder.

3. The Motivational Test.

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.3d at 1225 (citing *Selective Serv. Sys.*, 468 U.S. at 855 n.15; *Nixon*, 433 U.S. at 478-82). Ordinarily, a pilot’s capabilities would be determined by standard annual testing and, when challenged, by the courts. In this case, Congress wanted to impose its own judgment for the courts while at the same time barring any recourse to the courts. As such, Congress strove to “encroach[] on the judicial function.” *Nixon*, 433 U.S. at 479. This inquiry often is conducted by court with

“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.3d at 1222 (citing *Selective Serv. Sys.*, 468 U.S. at 855 n.15; *Nixon*, 433 U.S. at 478-82). The Supreme Court has stressed that there is no need for “a formal legislative announcement of moral blameworthiness or punishment” to satisfy this test for an unlawful bill of attainder. *Nixon*, 433 U.S. at 480; *see also Foretich*, 351 F.3d at 1226.

In the instant case, the timing of the legislation occurred when Petitioners brought these petitions and organized a nationwide challenge to the Age 60 Rule. Congress notably sought to bar any further recourse to the Courts while bestowing on younger pilots the full benefits of prevailing against the senior pilots. Virtually immediately upon enactment, the government carried out this intent by moving for these petitions to be dismissed on the basis of the new Age 60 rule. The legislation was clearly targeting the Petitioners and seeking to destroy their chances for prevailing in the court system. As such, the motivation to supplant the judicial process and penalize the Petitioners was clear.

4. Conclusion

In light of the foregoing, the Act satisfies the three tests for an unlawful bill of attainder and should be declared unconstitutional on that ground. The use of this legislation by ALPA to destroy the status and benefits of senior pilots was

precisely the type of legislative abuse that the prohibition on bills of attainder was meant to prevent. Congress sought to first give a windfall benefit to younger, more powerful pilots. It then sought to effectively bar senior pilots from seeking or obtaining new positions by forcing them to re-apply as new pilots. If Congress can get away with such an undisguised attack on a small group like the senior pilots, it could carry favor with other groups to strip competitors of benefits and status in the very same fashion. Indeed, if successful, the new Age 60 rule would invite such pandering to powerful interests in the future.

IV. THE FAIR TREATMENT FOR EXPERIENCED PILOTS ACT CONSTITUTES A TAKING UNDER THE FIFTH AMENDMENT.

The Fair Treatment for Experienced Pilots 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 their vested property interests in their seniority and benefits 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).

Congress took these property interests and effectively shifted their value to the favored group of younger pilots. It then barred 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*, 511 U.S. at 266. While admittedly more novel than the traditional occupation of land without compensation, the Supreme Court has defined property for the purpose of takings analysis on a case-by-case basis. *See, e.g., Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986); *Eastern Enters. v. Apfel*, 524 U.S. 498, 523 (1998) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)) (“the determination whether “justice and fairness” require that economic injuries caused by public action [must] be compensated by the government, rather than remain disproportionately concentrated on a few persons’ is essentially ad hoc and fact intensive”). Thus, in *Eastern Enters.*, the Supreme Court struck down the Coal Act of 1992 as unconstitutional, holding that Congress’ redistribution of benefits for retired coal miners, although well-intentioned, violated the Takings Clause. *Id.* at 538. Furthermore, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), the Supreme Court defined interest from interpleader funds as property for purposes of the Takings Clause. The Court found that “earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property.” *Id.* at 164; *see also Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998) (defining interest on lawyer’s trust account as property for the purposes of the Takings Clause and holding that it is a “fundamental maxim of property law

that the owner of a property interest may dispose of all or part of that interest as he sees fit.”).

Courts will often look to three factors in determining if there is a taking of property: the economic impact of the regulation on the claimant, the extent to which the regulation interfered with reasonable investment-backed expectations, and the character of the governmental action. *Connolly*, 475 U.S. at 225.

The senior pilots were in the process of seeking redress for their forced termination under the old Age 60 Rule when Congress agreed that pilots should be able to continue to fly after age 60. Had their exemptions been granted, they would have continued at their prior levels of seniority and salaries under the older Age 60 Rule. The recent legislation only confirmed that there was no age-based BFOQ for pilots. It also terminated the old Age 60 Rule – a provision that the senior pilots are not challenging. As such, pilots had a vested interest in not only continuing their employment but in receiving the benefits of their accrued seniority and salary levels. There was nothing uncertain about the seniority and benefits. They were accrued like the interest in these prior cases. *Cf. In re Aircrash In Bali, Indo. on Apr. 22, 1974*, 684 F.2d 1301, 1312 (9th Cir. 1982) (finding that claims for compensation qualify for takings analysis since “claims for compensation are property interests that cannot be taken for public use without compensation.”).

In conducting such an inquiry, the three factors have particular significance: the economic impact of the regulation on the claimant, the extent to which the regulation interfered with reasonable investment-backed expectations, and the character of the governmental action. *Connolly*, 475 U.S. at 225. In the instant case, the economic impact on the senior pilots is a total loss of their status, benefits, and salary levels. They had every expectation to be able to secure considerable value from these salaries and status benefits so long as their capabilities were maintained – at least until age 65. Finally, the character of the government action is a total deprivation of their earned benefits and status. While not a classic occupation of land, it is a classic example of the government taking the entirety of value of their property.

The property interest of the senior pilots is reinforced by the fact that, under the exemption process, they would have been allowed to continue to fly at their earned salaries, benefits, and status. Thus, under the government's arguments, the Act not only bars the future re-hiring of senior pilots at their earned status and benefits but also extinguishes the prior right to retain that status and benefits under the exemption process.

If successful in this effort, Congress could effectively circumvent the Takings Clause and enact legislation that can take away employment benefits and status without recourse for the affected citizens. In this case, Congress took the

property of the senior pilots for the purpose of giving the equivalent value of this property to the favored group of younger pilots. Younger pilots and their representative in ALPA wanted to guarantee that competitors for pilot seats would be penalized so severely that they would not be able to challenge them for seniority or positions. They succeeded. Not only were the benefits and salaries of senior pilots taken away, but only roughly two percent have been re-hired. That two percent cannot challenge the younger pilots for access to the captain's seat or benefits. *See First Nat. Bank of Lamarque v. Smith*, 610 F.2d 1258 (5th Cir. 1980). Thus, Congress used the property of the senior pilots to achieve its purpose of protecting a different class of pilots. As such, Congress violated the Takings Clause and the Act should be struck down as an uncompensated taking of property from the senior pilots.

V. THE ACT DOES NOT MOOT THE CONSOLIDATED PETITIONS, EVEN IF IT IS FOUND TO BE ENFORCEABLE.

The government maintains that, if the law passes constitutional muster, the Court must dismiss the petitions as moot. Petitioners recognize that a matter may be made moot during the course of the proceedings. *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992). However, courts render decisions on original complaints even after the enactment of later statutes. *Cf. Jicarilla Apache Nation v. Rio Arriba County*, 440 F.3d 1202, 1208 (10th Cir. 2006); *Kirchberg v. Feenstra*,

450 U.S. 455, 458 (1981). In the instant case, a determination eliminating the original Age 60 rule would not render this case moot.

The government itself appears to be uncertain as to what remains of the original rule and process after the enactment. On March 13, 2008, the FAA issued an advisory opinion on the status of various pilots who turned 60 before the enactment date but were performing flight checks on aircrafts rather than flying the planes. While the FAA believes that these pilots were “required flight crewmembers” and indistinguishable from other pilots, it said that airline companies, not the FAA, would make such decisions on “economic issues” such as continued benefits and seniority. *See* Addendum C. As a result, eleven were allowed to continue to remain employed at their prior salary and benefit levels as if exempted from both the old and the new Age 60 rule. They did not have to re-apply or lose such benefits despite the express language of the Act.

Moreover, even if the exemption process is terminated for the future, there remains the question of whether the senior pilots were improperly denied exemptions. The senior pilots seek to show that they are fully qualified to continue to serve as pilots. Prevailing on the claim will allow them to preserve their right to seek relief for the wrongful denial. If indeed a new exemption process has been implemented, formally or informally, such a determination would be relevant in seeking an exempted status under the post-enactment process. It would also be

material to possible litigation over the denial of exempted status in light of the post-enactment exemptions.

Obviously much will have to be worked out over the status of senior pilots after this litigation, regardless of whether the law is struck down or legislatively modified. If these pilots were improperly denied exemptions, their timely petitions would be relevant in seeking reinstatement with full benefits and status. Had they received exemptions pre-enactment, they would have argued that their exempted status entitled them to continue under their prior status – just as the group of post-enactment pilots was allowed to do. In the end, there is likely to be considerable negotiations and even litigation over the status of these pilots if they were improperly denied exemptions pre-enactment. In such a circumstance, it is unfair and premature to state conclusively that it would have no bearing on their status to show that they were improperly denied review before the enactment of the Act.

VI. THE FEDERAL GOVERNMENT MUST MAKE AN INDIVIDUAL DETERMINATION OF WHETHER A PILOT’S EXEMPTION WOULD CONTRAVENE AIR SAFETY.

The government’s blanket denial of petitions facially contradicts the exemption standard established under 14 C.F.R. § 11.81(e) (2008). Under this process, pilots are entitled to an exemption if they can show that “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). However, once pilots petitioned to show that their continued service “would not adversely affect safety,” the government refused to consider such evidence. Thus, under this circular process, a pilot could not continue to fly without showing that he was safe to fly, but, no matter what a pilot produced to establish this fact, the government would not consider it. While the law mandates an exemption process, the government has effectively adopted an absolute age-based barring rule since no evidence that a pilot can produce will be considered. A senior pilot under this approach can literally have the highest level of skills and performance of all pilots in an airline of any age. Yet, even a demonstrably proven case of air safety and undiminished capability is discarded under these blanket denials.

Not only do the government’s orders violate the stated exemption standards, but they are contradicted by the government’s own actions. First, the Act establishes that pilots over 60 years old are safe to fly.¹⁷ Congress has thus determined that it is safe for a pilot to continue to fly until the age of 65. Second, Congress has recognized, and the President agreed, that it is possible to evaluate

¹⁷ The express statutory finding that pilots over Age 60 are safe to continue as pilots alters the record that existed before the rulings cited by the government in other circuits. *See, e.g., Yetman v. Garvey*, 261 F.3d 664 (7th Cir. 2001); *Rombough v. FAA*, 594 F.2d 893 (2d Cir. 1979); *Starr v. FAA*, 589 F.2d 307 (7th Cir. 1978); *see also Baker v. FAA*, 917 F.2d 318 (7th Cir. 1990); *Prof'l Pilots Fed'n v. FAA*, 118 F.3d 758 (D.C. Cir. 1997).

senior pilots individually on an annual basis. This is evident in the Act, which contains a program of enhanced testing and monitoring. Finally, the government itself has stated that some pilots may be exempted on an individual basis and allowed to continue at their prior seniority and status – even after the enactment of the Act.

Federal law allows for a pilot to continue if he can show that he is not a threat to air safety. It is obvious that in the class of senior pilots, most would satisfy this standard. The government cannot turn the exemption process into a regulatory Potemkin Village with the outward appearance of a petition process but without any substance or true review. The government can seek to have the exemption process eliminated or it can perform individual reviews. What it cannot do is retain the exemption review process while refusing to actually review exemption petitions.

VII. THE ORDERS DENYING EXEMPTION SOLELY BASED ON AGE DENY THE SENIOR PILOTS EQUAL PROTECTION UNDER THE LAWS.

Assuming that the Court agrees that the Act is unenforceable vis-à-vis the Petitioners, the analysis returns to the original question of whether an age-based exemption is itself enforceable. The blanket rejection of anyone over age 60 without consideration of individual capabilities violates the Equal Protection

Clause of the Fifth Amendment to the Constitution. *See Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

Without repeating the analysis above, the constitutional infirmity of these orders is due to the fact that there is no rational basis for treating senior pilots differently from younger pilots. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *see also Gregory v. Ashcroft*, 501 U.S. 452 (1991). This flaw was magnified by the enactment of the Act, where Congress clearly established that age is not a BFOQ and that it is safe for pilots above the age of 60 to fly. Congress has determined through this enactment that there is no safety danger for such senior pilots to fly. As such, the case is now in a materially different position than it was in past challenges. The refusal to consider the individual capabilities of these pilots constitutes an arbitrary and baseless denial of equal treatment.

While courts will accord agencies deference in agency actions, they have also insisted that agency action “should not be equated with a license to issue inconsistent determinations.” *Aman v. FAA*, 856 F.2d 946, 957 (7th Cir. 1988). Notably, younger pilots are routinely given exemptions for physical or mental disabilities through a process of individual evaluation. *See Yetman v. Garvey*, 261 F.3d 664, 671 (7th Cir. 2001). However, the same review has been denied to these senior pilots despite the fact that they represent only a few thousand potential cases. Moreover, the new law increases individual monitoring of pilots on an

annual basis – recognizing that individual evaluation is not only possible but preferable to a blanket denial of review. These facts show that the government has maintained completely inconsistent and unsupported positions. This is most evident in the fact that, after the enactment of the Act, the government allowed one airline, Continental, to retain roughly a dozen pilots without forcing them to re-apply as new pilots – retaining both their status and benefits. *See* Addendum C (Answer to Question 8) (leaving such “economic” questions to the airlines).

The recent legislation puts the lack of a rational basis for the old Age 60 rule into sharp relief. If the government wishes to deny an exemption on the basis of air safety for a senior pilot, it must consider the individual capabilities and experience of the petitioner. This record is replete with existing annual testing and monitoring systems, which will now be augmented by individual testing imposed upon senior pilots flying until age 65.¹⁸

¹⁸ This includes such testing as the CogScreen Aeromedical Edition (“CogScreen-AE”) which has been used successfully for years for neuropsychological diminishment. *See generally* <http://www.cogscreen.com/overview.shtml>. Notably, the government previously insisted that it would consider individual petitions if such testing was developed. The Seventh Circuit noted in *Yetman* that CogScreen-AE could be such a test but since it was new, the Court stated that it needed to be validated. *Yetman*, 261 F.3d at 674. That was over seven years ago and tests like CogScreen-AE are well-established.

VIII. THE ORDERS DENYING EXEMPTION SOLELY BASED ON AGE VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

It is axiomatic that in the exemption process, senior pilots should be entitled to some minimal form of process. Without repeating the due process analysis above, the blanket denial of exemption is a classic example of the denial of due process on both a substantive and procedural level. As discussed earlier, the Petitioners have a property interest in their accrued benefits and status. The orders show how the government can “sweep away settled expectations suddenly and without individualized consideration.” *Landgraf*, 511 U.S. at 266. Here, no matter what a pilot can show in terms of his or her capabilities to fly, it will not be considered by the government in its exemption review. This denial of due process is made all the more acute by the government’s recognition, as previously discussed, that individual evaluations are possible and that it is indeed safe for pilots over the age 60 to fly.

The senior pilots are entitled to review to determine if they are safe to fly. The categorical age-based orders of denial contradict the guarantee of due process under the Fifth Amendment.

IX. THE BLANKET DENIAL OF EXEMPTIONS BASED SOLELY ON AGE IS A VIOLATION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

The challenged orders violate the ADEA through the blatant discrimination

against pilots on the basis of age without a BFOQ or statutory exemption. The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (2000), prohibits age discrimination by employers on the basis of age. Thus, an employer cannot use the fact that someone is over forty years old to discriminate against his or her 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.” *Id.* There is no record of support for such discrimination as tied to a *bona fide* occupational qualification.

Congress has stated that the ADEA is intended “[(1)] 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 ways of meeting problems arising from the impact of age on employment.” 29 U.S.C. § 621(b).¹⁹ The ADEA prohibits the employer from

¹⁹ Courts have rejected similar age based provisions in other areas as insufficient to establish *bona fide* occupational qualifications. One federal court 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, 230 (D.P.R. 2003), *rev'd on other grounds*, 369 F.3d 570 (1st Cir. 2004). The court noted that mandatory retirement rules trigger “fact-intensive inquiry.” *Id.*; *Cf.*

discharging an individual because of his age. *See* 29 U.S.C. § 623(a)(1) and (f)(1). As the Supreme Court established this month in *Meacham v. Knolls Atomic Power Laboratory*, __U.S.__ WL 2445207 (2008), an employer must state “reasonable factors other than age” for actions to successfully defend itself against an age discrimination lawsuit.

Age is not a BFOQ for pilots. *See EEOC v. Boeing Co.*, 843 F.2d 1213, 1220 (9th Cir. 1988); *Hahn v. City of Buffalo*, 770 F.2d 12, 15-16 (2d Cir. 1985) (“Congress has not provided for agency determination of whether a particular age is a BFOQ for a particular occupation.”). Indeed, the FAA Administrator previously denied the basis for such age-based BFOQ. It cannot be shown that a categorical age-based denial of employment “is reasonably necessary to the essence of the business” 29 C.F.R. § 1625.6(b)(1) (2008). The disconnection between this categorical denial and air safety is now undeniable with the enactment of the Act. Congress expressly found that pilots can fly until age 65 without a risk to air safety and that individual determinations can be made on the capabilities of individual pilots.

The record is now fully at odds with the position of the government that it must deny all pilots exemptions on the basis of age alone. The government is not

EEOC v. Aikens, 306 F.3d 794 (9th Cir. 2002) (upholding district court’s requirement individual determinations of skills for monocular drivers).

only capable of making individual evaluations, it is now statutorily ordered to oversee a system of such evaluations for all pilots continuing to fly until age 65. This record demands a reversal of the denial of petitions in these consolidated cases as a violation of the ADEA.

CONCLUSION

In light of the foregoing, Petitioners respectfully ask the Court to reverse the denials of the consolidated petitions.²⁰

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²⁰ Petitioners believe that oral argument would assist the Court in addressing the myriad of issues presented in this appeal.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE STYLE
REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) and the Court's order in these cases, because this brief contains 12,833 words, excluding the parts of the brief exempted by Fed.R.App.P.; 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5), as modified by Circuit Rule 32, and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in the Times New Roman font. All text is in 14-point type.

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CERTIFICATE OF SERVICE

I hereby certify that, on June 26, 2008, true and correct copies of the foregoing Petitioners' Opening Brief 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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