No. ______

In the Supreme Court of the United States

GRANT O. ADAMS, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, RAYMOND L. LAHOOD, SECRETARY OF TRANSPORTATION, J. RANDOLPH BABBIT, FAA ADMINISTRATOR,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Distict of Columbia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a challenge to a statute is properly declared moot due to delays in judicial review and a relatively short period adopted by Congress for the expiration of rights and property interests.

2. Whether a federal court must accept any stated purpose of a law by the government even if it contradicts the obvious and public purpose of the law and lacks a basis in fact for the industry.

3. Whether a federal court must first determine if a law is an effective bar on employment or if sponsors sought to bar employment of a disfavored group before establishing whether the law constitutes a bill of attainder.

PARTIES TO THE PROCEEDING

Petitioners are Grant O. Adams, Jimmy R. Anderson, Jose R. Arias, Robert H. Attaway, Stephen L. Avery, James V. Baird, Abe R. Balderrama, Robert Edward Balcom, Robert Lawrence Beavis, Dieter Beisiegel, Burton E. Beitz, John Bernick, Kenneth R. Bradley, Terrence J. Brady, Dale E. Brakhop, Peter E. Brennan, Robert G. Briggs, Don F. Brumbaugh, Courtney W. Brye, Horace Burnett, Robert O. Buschmann Jr., Anthony C. Campagna, James Alfred Cantrell III, Stephen Robert Carignan, Ernest A. Carpico, Gene Hamilton Carswell, Gary J. Casperson, Charles F. Chapas, Jack W. Chapman, Alfred Cisneros, Kenneth C. Ciszek, Gordon M. Cohen, Terry Lee Collette, Richard L. Collier, Steven E. Collins, George G. Corless Jr., Dennis M. Cox, Michael J. Crowe, David Harold Culp, Bruce C. Davey, Edward A. Davis Jr., Lynn C. Davison, Arnaldo L. DeLucca, Kenneth A. Dillard, John Martin Smokey Doll, Robert W. Dowgialo, Wayne Ronald Dye, George V. Emory, Arthur Randolph Erb, Robert L. Evert, Thomas J. Fox, Larry E. Freeman, Woodrow W. Friend Jr., Kenneth G. Frisard, Robert O. Fuhrmann, Kenneth R. Galloway, Louis Allen Garvin Jr., Ronald L. Geer, Robert Patton Gibson, Terrence Leslie Gillespie, Frank Michael Gonzalez, Richard W. Goudey, David Joseph Graham, James A. Grosswiler, Susan Harrison, Chris Hartle, Vincent L. Hayes Jr., Edward David Heilbrun Jr., Charles E. Henry, Nicholas J. Hinch, James D. Hodgson, Herbert Stanley Holland III, Samual J. Hooper Jr., Charles R. Hosmer, Timothy J. Houghton, Richard D. Hurst, Steven Reagan Jackson, Delloyd R. Jacobson, David R. Johnson, Lowell E. Johnston, Paul E. Kane, Mark D. Keaveney, Patrick F. Keeley, Roger

W. Kirchner, Kenneth Conway Kitchens, Joe A. Klutts, Robert Marshall Knapp, Joseph Andrew Kriss, Thomas J. Krueger, Richard F. Land, Robert A. Lawyer, Michael J. Lierley, Gerard D. Lionetti, Anthony E. Lorber, JoBeth G. Lynch, Margaret Emily Lynch, William B. Mann Jr., Stan H. Marsolan, Roger C. Martin, Roy Lee Martin, Wilfred Michael Martin, Thomas H. McCloud, Keith L. McCormick, Thomas H. McDermott, James R. McGrath, James William McStay, Hal J. Medling, James H. Mehew, William M. Meyer, Melvin H. Mickelson, William George Miller, Alan R. Mittelstaedt, James Harold Monbeck, Richard C. Morgan, Bruce R. Munroe, Charles Robert Musick Jr., Earl H. Myers Jr., Lloyd Lee Nelson, Michael E. Newton, Paul W. Nibur, Larry A. Norman, Samuel Clinton O'Daniel, Thomas Painter, Marc Pasewalk, Ven Ralf Patterson, Michael J. Peet, David E. Pelham, Irwin Pentland, Donald N. Persky, James A. Peters, Bertil R. Peterson, Dennis C. Pettet, Charles J. Pierce, James Malvin Potter, Gary L. Prosser, Charles Timothy Radcliff, Douglas Warren Richmond, Rudolph D. Richter, Donald E. Riebe, Robert C. Ritchie, Robert L. Roberts, Paul J. Rodgers Jr., Rudy James Rodriguez, William J. Rogalski, Edward P. Rosenthal, Daniel R. Roy, Wayne G. Savage, Harold S. Schichtel, David W. Schneider, Frank Theodore Schott, Jerome J. Schuck, Lorenzo M. Sein, Clifford J. Shabaz, Gary Shepard, Richard L. Skoog, Bradley V. Smith, Sidney F. Smith, William David Smith, Lyle M. Speace, Bruce L. Stover, William Wood Struthers, James P. Sullivan, James R. Sweller, Curtis L. Taylor, Lewis J. Tetlow III, Frank H. Tetrault Jr., Robert F. Thomas, Thomas James Tighe, Larry I. Tubor, Kenneth Wilson VanWormer, Frederick George Vernon III, Akeary G. Vick, Daniel Vogt, Wayne Walczak, George J. Walters, Thomas Henry

Ward III, Louis Richard Warfield, Ronny C. Watkins, Gary W. Webb, Henry J. Weiland, Christopher C. Wells, Iko Zakarija, and Steven Peter Zandstra.

Respondents are the Federal Aviation Administration and the United States Department of Transportation. Ray LaHood was sued in his official capacity as the Secretary of the Department of Transportation (DOT), and Michael P. Huerta was sued in his official capacity as acting Administrator of the Federal Aviation Administration. The original FAA defendant was Randy Babbitt, who has now left office.

RULE 29.6 STATEMENT

All of the petitioners are senior pilots and no petitioner has a parent company and no publicly-held corporation has a 10% or greater ownership interest in any petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Grant O. Adams and the other senior pilots respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia (App., *infra*, 1-36) is reported at *Adams v. United States*, 2013 U.S. App. LEXIS 16985 (D.C. Cir. Aug. 14, 2013). The final order denying a penal rehearing and hearing en banc were issued on August 14, 2013 (App., *infra*, 37, 39).

JURISDICTION

The court of appeals entered its judgment on August 14, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 9 states that "[n]o Bill of Attainder or ex post facto Law shall be passed."

The Fifth Amendment to the United States Constitution states that "[n]o person shall be . . . be deprived of life, liberty, or property, without due process of law."

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.

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.

STATEMENT OF THE CASE

INTRODUCTION

This case involves a challenge by senior pilots to the negation of their accrued status, salaries, and benefits under the Fair Treatment for Experienced Pilots Act (FTEPA), Pub. L. No. 110-135, 121 Stat. 1450 (2007). The senior pilots in this action have sought relief for roughly a decade after they were originally terminated under the original Age 60 rule that barred pilots on the basis of age as a matter of air safety. The Petitioners challenged that rule as lacking any scientific or medical foundation. Courts dismissed these challenges in deference to the agency on a matter of safety and declined to consider the evidence showing no foundation for the rule. While on appeal to the United States Court of Appeals for the District of Columbia, Congress agreed that the Age 60 rule was unfair and without foundation as a matter of air safety. It eliminated the Age 60 rule in FTEPA and said that pilots over age 60 presented no categorical safety or medical disqualification to fly commercial aircraft. However, a pilot union, the Air Line Pilots Association (ALPA), publicly assured its members that it would not allow the senior pilots to return to their prior positions. Using a member that the union publicly called "ALPA's Man" in Congress, the union drafted a new Age 60 rule that stripped the Petitioners of their accrued seniority, benefits, and status.

Despite arguments that the D.C. Circuit should rule on the underlying discriminatory and arbitrary treatment of the pilots under both the old and new Age 60 rule, the D.C. Circuit, in an opinion by Judge Brown, dismissed the appeal as moot in light of the

enactment of the FTEPA, *see Adams v. F.A.A.*, 550 F.3d 1174, 1176 (D.C. Cir. 2008). While expressing sympathy for the senior pilots, the panel indicated that the senior pilots would have to return to the district court and file a new challenge. After exhausting their appeal, the Petitioners filed this statutory and constitutional challenge. The district court then ruled that the Petitioners had not stated recoverable constitutional claims and did not have standing to challenge the Federal Aviation Administration's actions. *Adams v. United States*, 796 F. Supp. 2d 67 (D.D.C. 2011). The Petitioners appealed. Judge Brown again wrote the opinion for the appellate panel and again, while expressing sympathy for their position, ruled against the senior pilots. This included the dismissal of the majority of claims as now moot. As for the remaining counts, the Petitioners were told that Congress could statutorily negate their lifetime seniority, benefits, and status to achieve "workplace harmony" by protecting the union's membership from competition.

STATEMENT OF FACTS

A. The Original Age 60 Rule

Dating back to 1959, the FAA had prohibited pilots from flying after their sixtieth birthdays. *See* 14 C.F.R. § 121.383(c) (2006). Under the original Age 60 Rule, once a pilot "reached his or her 60th birthday," the pilot was barred from flying commercial aircraft under Part 121. *Id*. The rule was never based on any medical or scientific finding—a point later affirmed by Congress in rejecting the rule—and was generally administered with erratic interpretations and labyrinthine exceptions. *See* Compl. ¶¶ 228-34.

Many of the pilots in this case challenged the original Age 60 rule in federal court to show the obvious lack of any basis for the discriminatory treatment of pilots. While that case was still pending, Congress struck the rule and expressly accepted what the pilots were arguing in federal court—that there is no basis for excluding pilots over age 60 for reasons of safety. The original Age 60 Rule was also found to be a violation of human rights by the Canadian Human Rights Commission, which found no basis for barring pilots at the age of 60 and ordered the return of two Air Canada pilots to their former positions with their full seniority and benefits intact. *See* Pls.' Opp'n to Defs.' Mot. to Dismiss at 11 (Docket No. 11).

B. The New Age 60 Rule

With the rejection of the Age 60 Rule, FTEPA raised the maximum age limit to age 65, consistent with an international age 65 limit promulgated by the International Civil Aviation Organization, Compl. ¶¶ 235-37. With the FTEPA, however, the pilots faced a new Age 60 rule—inserted after a lobbying effort by ALPA— which first opposed the elimination of the Age 60 Rule and then secured provisions that blocked senior pilots who sought continued employment. *See* Compl ¶ 252. Former ALPA President John Prater publicly admitted that the FAA had decided that safety considerations did not bar senior pilots from retroactive relief and that senior pilots were likely to receive such retroactive benefits in light of the rejection of the original Age 60 rule. *See* Compl. ¶¶ 254-56. Prater and ALPA officials argued that stripping senior pilots of their accrued seniority and status would work to the financial benefit of younger pilots in their union.

Former Transportation Committee Chairman James Oberstar, a major recipient of ALPA campaign contributions, implemented the demands of ALPA and inserted its language without change or debate. The law includes a "nonretroactivity provision" that strips senior pilots who had attained the age of 60 before the date of the enactment of their accrued status, salaries, and benefits. 49 U.S.C. § 44729(e). Under the provision, the only way for a pilot born before December 13, 2007 ("senior pilots") to return to work is as a new hire unless he or she is a "required flight deck crew member." 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. 49 U.S.C. § 44729(e)(1)(B). Finally, under 49 U.S.C. § 44729(e)(2), Congress barred any judicial relief for such losses "brought under any employment law or regulation, before any court or agency of the United States or of any State or locality."

Oberstar admitted on the House floor that the Senators wanted to address the gross injustice of the original Age 60 rule and stated that the new language was used as "leverage" with the Senate to pass the transportation bill. He refused "to separate out this provision from our reauthorization bill . . . in hopes that we would use this provision, among others, as leverage and as part of our integral package on FAA reauthorization." 153 Cong. Rec. H15252-02 (daily ed. Dec. 11, 2007) (statement of Rep. Oberstar). The enactment of the FTEPA was never linked to an effort to avoid labor unrest. Rather, the stated purpose of the FTEPA was to allow the nation to benefit from the experience and skills of senior pilots by preserving

them in the ranks of active pilots. *Id.* (statements of Reps. Oberstar, Mica). It was also based on the desire to avoid the danger of a pilot shortage. *See, e.g., id.* (statement of Rep. Petri).

Under 49 U.S.C. § 44729(e)(A), a "required flight deck crew member" is not subject to the seniority- and status-stripping provisions of the FTEPA. Under preexisting and current federal aviation regulations (FARs), pilots are "required" flight deck crew members. However, senior pilots were denied the benefits of 49 U.S.C. § 44729(e)(A) through a series of conflicting interpretations by the FAA. The FAA first issued its position on the phrase on January 18, 2008 and limited the provision to flight engineers and second officers:

> FTEPA permits a person who reached age 60 before December 13 but who is serving on that date as a "required flight deck crew member" for a Part 121 carrier to serve as a pilot for that carrier without loss of prior seniority or longevity. For this purpose, a "required flight deck crew member" means a Flight Engineer or Second Officer, since only such person could have been serving as a "flight deck crew member" after reaching age 60.

This interpretation ignored the plain meaning of the statute that all "required" flight personnel would be exempted from the seniority- and status-stripping provision.

On March 13, 2008, the FAA changed its interpretation, declaring that required crew would include "those check airmen who were over Age 60 and conducting checks from the jumpseat of aircraft

operated by part 121 operators on and after enactment." This interpretation would extend the protections of 49 U.S.C. § 44729(e)(A) to some, but not all, pilots. On the nonretroactivity provision, the FAA implemented a policy that simply ratified any decision of the air carriers to either strip or recognize accrued seniority, salary, or status. As a result, some air carriers have been allowed by the FAA to classify senior pilots as engineers and thus allow them to continue to fly with full seniority and benefits. Compl. ¶¶ 284-97. Other air carriers have barred all senior pilots from serving as pilots with their earned seniority and benefits. *Id.* Furthermore, despite its long-standing role in mandating the conditions and exclusions for Part 121 pilots, the FAA has adopted a policy that it will not interpret or intervene in matters under subsection (e) of the new law, as declared in its March 13, 2008 statement. Compl. ¶ 298.

C. Proceedings Below

In 2007, senior pilots (including many of the Petitioners) filed a challenge to the original Age 60 Rule alleging violations of their constitutional and statutory rights. After considering the claims, Judge John Bates advised the pilots that they should first challenge the failure to grant exemptions under federal law before the United States Court of Appeals for the District of Columbia. Compl. ¶ 306. The senior pilots agreed to withdraw their lawsuit and filed petitions seeking relief from the Court of Appeals. In *Adams v. F.A.A.*, the D.C. Circuit ruled that the FTEPA had mooted their claims, as "[s]eeking initial review of the statute here extends beyond the jurisdictional grant of 49 U.S.C. §46110(a)." 550 F.3d 1174, 1176 (D.C. Cir.

2008). While the FTEPA had confirmed the position of the pilots that there was no safety justification for the original Age 60 Rule, the appellate court stated that the senior pilots would have to file again before the district court to seek review of their constitutional and statutory claims. *Id.*

The Petitioners filed a new action challenging the FTEPA under a variety of administrative and constitutional claims. The action challenged the FTEPA's nonretroactivity and protection-for-compliance provisions under the Equal Protection Clause, the Due Process Clause, the Takings Clause, and the Bill of Attainder Clause of the United States Constitution, and the FAA's interpretation of the FTEPA under the Administrative Procedure Act. Defendants filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The Honorable Henry H. Kennedy, Jr. declined Petitioners' request for oral argument and granted the motion. *Adams v. United States*, 796 F. Supp. 2d 67 (D.D.C. 2011). Petitioners then moved for reconsideration or amendment of Judge Kennedy's opinion. That motion was denied by Chief Judge Royce Lamberth after the resignation of Judge Kennedy.

This is an appeal from the panel decision of the D.C. Circuit rejecting all of the claims of the senior pilots and the later denial of motions pursuant to Fed. R. App. P. 35 Petition for Panel Rehearing and Fed. R. App. P. 40 Petition for Rehearing En Banc of the Court's Decision and Opinion dated June 21, 2013.[1]

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[1] That opinion was consolidated with *Emory v. United Air Lines*, No. 11-7142. 720 F.3d 915 (D.C. Cir. 2013). The cases were argued

The panel ruled that an array of claims were moot due to the passage of time under the theory that there was no effective relief that the Court could order since Petitioners had passed the limit of 65 years of age for all pilots. Under this mootness ruling, the panel dismissed a taking claims and every claim raised under the Administrative Procedures Act (APA). Relying on *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), the panel then reached the merits of the remaining claims raising challenges under equal protection, due process, and bill of attainder. Each of these were then dismissed after the court accepted without question the government's claim that effectively firing every senior pilot in the litigation was a legitimate means to achieve "workplace harmony." It refused to consider the stated purpose of the law as drafted by ALPA to advantage its member pilots by targeting the senior pilots.

REASONS FOR GRANTING THE WRIT

The D.C. Circuit departs from the rulings of this Court and lower courts in assuming contested facts to dismissing the claims against the government. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). These facts include how the contested provisions effectively bar senior pilots from being rehired due to how the industry is structured. Likewise, the panel adopted the government's claim

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together and linked by the panel in the resolution of the merits. Two of the Appellants are parties to both cases: George Emory and Lorenzo Sein. The Appellants in *Emory* are filing their own Petition for a Writ of Certiorari.

that FTEPA constituted a benefit despite ample evidence that the provisions were written by ALPA for the purpose (and had the effect) of stripping senior pilots of their livelihoods.

The panel's decision also adopted a highly abridged approach to a rational basis review, in contrast to the recent rulings in such cases as *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Shelby Cnty., Ala. v. Holder,* 133 S. Ct. 2612 (2013), where the Court declined to accept express purposes and statistical analysis from Congress in striking down two laws. In this case, Congress never uttered a word about "workplace harmony," and the ALPA publicly admitted to drafting the two provisions to strip senior pilots of their status, benefits, and seniority. The panel instead declared the favoritism shown one group to be nothing more than achieving "harmony" by eliminating a competing group of pilots.

The panel's decision also stands in direct contradiction of rulings of the Supreme Court in defining the three tests for the punishment component in Bill of Attainder analysis. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 475 (1977); *see also Foretich v. United States*, 351 F.3d 1198, 1217 (D.C. Cir. 2003). Indeed, the panel curiously reserves the very question raised under one of the three tests by the Petitioners while finding that test not satisfied. App., *infra*, at 18 n.15. On the remaining two tests, the panel adopts an approach that would have allowed past unconstitutional legislation with merely rhetorical changes in language. The decision below nullifies the protections against bills of attainder and virtually invites Congress to use the same technique in the

future to curry favor with powerful groups by stripping competitors of benefits and status. History has shown Congress seldom needs a second invitation when given such opportunities by the courts.

I. DISMISSAL OF FEDERAL CLAIMS IS INAPPROPRIATE WHEN A CASE HAS BEEN PENDING JUDICIAL REVIEW FOR YEARS AND A RULING WOULD RESOLVE LONG-STANDING AND ON-GOING INJURIES.

The lower court found that a variety of claims survived a mootness challenge from the government due to the consolidation with the *Emory* case and the application of the ruling in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). However, since APA and takings claims were not raised in both cases, it ruled that the denial of flying privileges at age 65 barred any recovery on mootness grounds. App., *infra,* at 7.

In dismissing the APA claims and takings claim on mootness, the lower court stated "[a]n old axiom reminds us that time and tide wait for no man. Or pilot, we add." App., *infra,* at 7. This rather flippant reference to the Petitioners ignored that these pilots have not waited idly by as Congress wiped out their employment benefits, status, and seniority. Rather, these pilots have sought a review of their constitutional and statutory claims for over six years and previously fought to vindicate their rights administratively. This was obviously known to the author of the opinion below since Judge Brown was the author of the prior refusal to consider the merits of these challenges and sent the pilots back to the district court after the enactment of

the FTEPA. The time referenced by the panel has been spent on the dockets of the federal court as the pilots have sought final rulings from the federal courts, only to be told in the end that the process took too long for their claims to be heard by the D.C. Circuit.

The dismissal of these claims penalized the pilots for the time taken for judicial review and the statutory period selected by Congress to extinguish the rights and property of the Petitioners. The senior pilots spent years challenging the original Age 60 rule in the United States District Court for the District of Columbia. That court, however, advised the pilots that they should first challenge the failure to grant exemptions before the D.C. Circuit. Accordingly, the senior pilots agreed to withdraw their lawsuit and filed petitions seeking relief from the Appellate Court. Despite the FTEPA's vindicating the long-held position of these pilots, the second case was dismissed at the behest of the government after oral argument in light of the enactment of the FTEPA. *See Adams v. F.A.A.*, 550 F.3d 1174, 1176 (D.C. Cir. 2008). Petitioners included a challenge to the FTEPA in that appeal since it imposed a new Age 60 rule with the same practical effect on the pilots as the original Age 60 rule. The pilots appealed the panel decision, but in 2009 they were denied any further review. After conferring with hundreds of pilots, Petitioners filed again in 2010. The district court then ruled that the pilots lacked either viable constitutional claims or lacked standing to challenge the Act. *Adams v. United States*, 796 F. Supp. 2d 67 (D.D.C. 2011). The Petitioners timely appealed and the D.C. Circuit then dismissed the majority of the counts on the ground that it took too long to bring up the matter for appellate review.

While a court has allowed for a review "*sua sponte* whenever a doubt arises as to the existence of federal jurisdiction," *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977), the lower court ignored the countervailing considerations in such a review. This Court has noted "the description of mootness as 'standing set in a time frame' is not comprehensive." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 190 (2000). Indeed, the mootness doctrine's purpose of achieving judicial efficiency is often opposite to that of the standing doctrine: "[t]o abandon the case at an advanced stage may prove more wasteful than frugal." *Id.* at 191–92. There is ample reason to use that inherent authority to reach the merits in this case. An industry has struggled with these questions, which affect a myriad of contracts and policies and, given the years of deliberations, it was inefficient and inequitable to withhold a ruling that would bring clarity to these questions at this "advanced stage." *Id.* This Court has expressed skepticism of changes cutting off review that allow future abuses along the same lines. *See, e.g.*, *Friends of Earth, Inc.*, 528 U.S. at 189 (Courts are not "compelled to leave 'the defendant . . . free to return to his old ways.'"); *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66–67 (1987) ("Mootness doctrine . . . protects plaintiffs from defendants who seek to evade sanction by predictable 'protestations of repentance and reform.'"). The enactment of FTEPA constituted a voluntary cessation of the prior discriminatory rule against the pilots—affirming their long-held argument that there was no safety basis for barring the senior pilots. Here, the government first abandoned the original Age 60 rule only after the pilots brought the prior litigation.

It then established a new Age 60 rule with a five-year period for service after age 60. If successful here, the merits of the case would once again be avoided. As with more conventional cessation cases, these litigants would be denied a final ruling based on continually shifting conditions and changes by the government.

The lower court specifically refused to address the exception based on conduct capable of repetition, yet evading review. *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911). This exception has been found when two elements are met: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). The first element is easily met in this case. The senior pilots faced a moving target in this litigation with different interpretations of the Age 60 Rule and then the substitution of a new Age 60 rule under FTEPA. After the pilots were barred in seeking relief with the passage of FTEPA, they filed a new action the following year. However, under the Petitioners' interpretation, pilots had only a few years to vindicate their constitutional and statutory claims on the district court and appellate court levels. Thus, so long as the government creates a short period of viable service, it could strip anyone of employment and benefits by running out the clock under the very statutory scheme challenged in the case. The Petitioners have been diligently seeking an appellate ruling on their claims for years. As for the second element, courts can look at a likelihood of repetition of the case between the defendant and other plaintiffs. *See Honig v. Doe*, 484

U.S. 305, 335–36 (1988) (Scalia, J., dissenting) (explaining focus "upon the great likelihood that the issue will recur between the defendant and other members of the public at large"). The likelihood of Congress stripping others of their employment and benefits to please a powerful group will only increase with the dismissal of this case. Indeed, even without considering other fields, the age 65 criteria itself could be challenged on some of the same lines by pilots. The exception does not require that repetition be inevitable, only that it be possible. *See Roe v. Wade*, 410 U.S. 113, 125 (1973) (applying the doctrine without speculating whether the plaintiffs would actually become pregnant again). Mandatory retirement is not unique to the airline industry. The success of ALPA in disenfranchising non-ALPA members will inevitably draw others seeking the same economic windfalls. Moreover, by simply selecting a relatively brief statutory window before the termination of all rights, the Congress can effectively insulate laws from challenge. Under the same logic, Congress could have set the termination date for pilots at age 61 to guarantee that "time does not wait" for any litigant.

The panel also failed to consider the full range of harm caused by the FTEPA, including on-going harm from the operation of the statute. The Petitioners argued that the mootness doctrine was abridged in cases like this one with "collateral consequences." The exception recognizes that cases can present very real "cases and controversies" even when the original legal issue is no longer present. Thus, an appeal of a criminal conviction is not moot even if the convict has served his sentence because "other disabilities or burdens may flow from the judgment, improperly

obtained." *Fiswick v. United States*, 329 U.S. 211, 222 (1946). While Petitioners are obviously not felons, such collateral consequences are clearly present. These pilots have had a large period of earnings and benefits wiped out under the Act. They were terminated unlawfully and forced to the "back of the line" for any new positions. The lingering effects of that mistreatment are detailed in the Complaint and prior filings. *See* Compl. at ¶¶ 22-80.

FTEPA has an impact not only on "revenue-producing aircraft" but also on a pilot's effective ability to fly under Parts 135 and 91 because of how the industry and these contracts are structured. Under the old Age 60 rule, some pilots could fly in other operations, including those under Part 91 operations, which cover ferry flights and "non-revenue" operations. Since such operations fell outside of the Age 60 rule, pilots could continue with seniority and status intact while operating corporate jets (Part 91), or non-Part 121 aircraft. The Petitioners were generally treated as Part 121 pilots and denied seniority and status under 49 U.S.C. § 44729(e). Once "put outside the fence," they then had to apply for any new positions under any category as new hires without seniority as pilots in their sixties. Indeed, even though some companies have both Part 121 and Part 91 operations, these pilots were treated as Part 121 pilots in negating their status and benefits. If FTEPA is struck down in part or in whole, these pilots should not have been barred from service under their original Part 121 designations and should have retained their seniority and status. Thus, if they are retained under other parts, they would do so with prior seniority and status. The panel simply

ignored these arguments without any finding of fact on the collateral impact of FTEPA on senior pilots.

The lower court ruling also ignores the ongoing negative impact on future contractual negotiations in terms of their expected benefits and status. It would also affect their status with regard to agency actions, such as claiming benefits or assistance under laws like the Vietnam Era Veteran Readjustment Assistance Act, 38 U.S.C. §§ 4211-4215 (2002 & Supp. 2011), which concerns the contractual protections for veterans like many of the pilots. Likewise, the claim of prior seniority and status can be factored into union positions and priority lists for pilots as well as claims under pension funds. This is an industry based on seniority lists and status that affect every aspect of a pilot's professional life, from aircraft selection to union benefits to pensions to retirement benefits to free travel policies. The panel again ignored these factual arguments.

Striking down the Act in part or in full would return these pilots to their prior status in terms of their retirement, pensions, and benefits for not just purposes of retirement, but also to fly under the various parts of the federal code with their prior benefits and seniority. As detailed below, these losses often amounted to over a million dollars for many individual pilots in lost wages, retirement, and pensions. Even if these pilots were barred from flying after reaching the age of 65, striking down these provisions would have a direct impact on their pension funds and social security. The age 65 criteria is not some magic line where all prior property and rights evaporate. There is an array of different pilot and co-pilot positions, as discussed

above. These rules have changed and will continue to do so. Yet FTEPA continues to mandate that, regardless of any future position, pilots terminated under the law will continue to be treated as new hires with neither prior accrued benefits nor seniority or status. Contracts with pilots in this industry will continue to reflect this "baseline" under federal law, as well as the bar on seeking judicial relief. Striking down the federal position stripping these pilots of their prior status, benefits, and seniority would have a material impact on pilots seeking either new positions or entitlement to past benefits or pension amounts.[2]

Finally, the lower court assumed that the Age 65 provision would not be affected by a ruling striking down the Age 60 rule. It is ultimately a decision of the Court as to whether unconstitutional provisions can be removed in part or whether the Act as a whole should be struck. This often turns on the centrality of the provisions to the function or purpose of the Act as a whole. *See Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684 (1987) (stating that a legislature "could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the

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[2] The relief requested under the Complaint also included injunctive relief, Compl. at ¶ 105. This would include an array of agency actions to remedy the prior denial of property interests by the pilots, including a countervailing FAA publication on the status of these pilots. For example, the FAA established a policy that allowed air carriers full discretion to strip senior pilots of their seniority and benefits or to retain their seniority and benefits. *See* Compl. at ¶¶ 282-292. Clearly, a similar policy that federal law does not negate past seniority, status, and benefits would have the same impact for the pilots.

balance of the legislation is incapable of functioning independently"). The Supreme Court has stressed that the "relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent" of the legislature after the court severs the unconstitutional provisions. *Id.* at 685. *See also Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 330 (2006) (stating that the "touchstone" of such analysis is "legislative intent."). The entire Section 44729 ("Age Standards For Pilots") links the new Age 60 rule in subsection (a) with the applicability rules in subsection (e), including the nonretroactivity provision and protection-for-compliance provision. If subsection (e) is found unconstitutional, the Court could clearly view the section's interrelatedness as necessitating an order striking down Section 44729 as a whole. Such a decision can only be made after the Court decides the merits and then decides whether subsection (a) must be struck as part of the same age-based regimen. Any mootness decision must be based on the potential scope of judicial relief and, if the Age 60 rule is unconstitutional under such claims as equal protection, the Age 65 rule would likely be also unsustainable.

II. THE RATIONAL BASIS TEST REQUIRES SOME JUDICIAL INQUIRY INTO A CLAIMED PURPOSE OF LEGISLATION WHEN IT CONFLICTS WITH THE LEGISLATIVE RECORD AND THE REALITIES OF A REGULATED INDUSTRY.

A. The Lower Court Relied On Contested Facts To Establish A Rational Basis.

In addressing the equal protection claim under the Fifth Amendment, the panel expressly relied on contested facts in violation of fundamental rules of appellate practice. *See Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). These facts were determinative for the panel's view of the property interests in the case. First, the panel states that "[a]ir carriers hired new pilots in anticipation of the Age 60 Rule remaining in effect." App., *infra* at 13. That factual statement was directly contested by the Petitioners and went to the merits of the case. After this age limit was first promulgated, the government and the industry went through a series of different interpretations and policies, including waivers for senior pilots. In the meantime, the rule was challenged as lacking any scientific or medical basis. Many of the pilots in this case challenged the original Age 60 Rule, but, while that case was still pending, Congress struck the rule and expressly accepted what the pilots had been arguing in federal court for years—that there is no justification for excluding pilots over age 60 on the basis of safety. In addition to these challenges and the ultimate recognition by Congress of their validity, the

United States, in March 2006 (ICAO Treaty), officially rejected the Age 60 rule in the United States as of November 23, 2006. *See* Report to the Federal Aviation Administration, at 1 (Nov. 29, 2006) ("ARC Report"). Many senior pilots continued to fly within the United States under the ICAO rule. Even if the panel ignores the years of waivers, different interpretations under the original Age 60 Rule, and the rejection of the Age 60 Rule, any reliance on the rule as an anticipatory bar ended in January 2007. On January 30, 2007, FAA Administrator Marion Blakey publicly announced that, just as long asserted by the senior pilots in court, there was no scientific or medical support for the Age 60 Rule at the National Press Club. *See* Marion Blakey, FAA Adm'r, Address at Nat'l Press Club, Fed. News Service (Jan. 30, 2007); *see also* Paul Beebe, *Pilots' Age Rule Change Stirs Dissent*, Salt Lake Trib., March 10, 2007, at 5. The panel adopted the false premise that the Age 60 Rule was expected to govern all hires different interpretations and the rejection internationally in 2006.[3] If anything, the industry had a reasonable

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[3] The panel also relied on a false statement of intent by a member and declined to correct that part of the opinion. The panel cited Petri as explaining Congress chose "the path in which fewer junior pilots — those who will be around to meet the rising demand — would be denied experience flying large jets." App., *infra,* at 14. Rep. Petri never made such a claim about junior pilots and no such rationale was ever stated as a basis for the FTEPA. To the contrary, Rep. Petri insisted that the Congress "must do everything we can to ensure that our most experienced pilots are able to continue to fly as long as safety is not compromised." 153 Cong. Rec. H15252-02, 2007 WL4325399 (daily ed. Dec. 11, 2007). The purpose of the provisions was openly acknowledged as a bar on senior pilots by ALPA. Petri was clearly speaking of the injustice committed against these senior pilots and the need to

expectation that the court would recognize pilots' claims given a long-standing Equal Employment Opportunity Commission finding that age was not a bona fide occupational qualification, Compl. ¶ 241: an admission by the FAA Administrator that the age 60 limit had no scientific or medical support, Compl. ¶ 242, a NIH study that found no diminishment of pilots' abilities at age 60, Compl. ¶ 243, and research that showed older pilots actually had fewer accidents, Compl. ¶ 244.

The panel chose to ignore this openly stated purpose of the challenged provisions and instead embraced a rationale of "workplace harmony" that was never mentioned in the legislative history. App., *infra,* at 13. That history is replete with statements from members recognizing the unfairness of the treatment of these senior pilots. There is no suggestion that this unfairness would be eliminated only to bar the same pilots based on their age by a new Age 60 Rule. Moreover, the very member cited by the panel admitted that the Senators wanted to address the gross injustice of the original Age 60 Rule and stated that the new language was used as "leverage" with the Senate to pass the transportation bill. Oberstar refused "to separate out this provision from our reauthorization bill . . . in hopes that we would use this provision, among others, as leverage and as part of our integral package on FAA reauthorization." 153 Cong. Rec. H15252-02 (daily ed. Dec. 11, 2007) (statement of Rep. Oberstar). The language was not presented as an effort at "harmony" among pilots, but rather as a bargaining

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guarantee their return—not endorsing the two ALPA provisions inserted to prevent their return.

chip with the other chamber of Congress. The panel ignored this express statement and instead read into the legislation a purpose that was neither stated nor credible.

These factual assumptions are particularly troubling in a complex industry with different operations under Parts 121, 135, and 91. The Petitioners maintained below that the challenged sections were poison pill provisions recognizable to anyone in the industry. The panel ignored that key factual dispute and insisted that the provisions were a benefit to senior pilots. *See Oscarson v. Office of the Senate Sergeant At Arms*, 550 F.3d 1, 5 (D.C. Cir. 2008) (determining that, in an interlocutory case, the presumption is in favor of the non-moving party without making assumptions in a complex area); *see also id*. at 5 (citing the "mingling of preliminary and merits issues" and the "tightly meshed" facts and claims).

B. The Rational Basis Test Requires Inquiry Into The Basis For The Claimed Purpose of a Challenged Law.

In dismissing counts on the merits, the panel applied a rational basis test under *Kimel v. Fl. Bd. of Regents*, 528 U.S. 62, 83 (2000). To be upheld, "[a] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed v. Reed*, 404 U.S. 71, 76 (1971) (internal quotation marks omitted). In this case, the classification made by Congress simply favored one group of pilots over another group of pilots despite the

recognition that both are qualified to fly. Petitioners presented direct public statements as to the purpose of the drafters of this legislation as well as the obvious effect of the change to favor members of the ALPA union.

The Supreme Court recently showed that such blind acceptance of rational basis claims is not sufficient, even in cases where the purpose is expressly stated by Congress. This Court recently applied the rational basis test in striking down the Defense of Marriage Act (DOMA) in *United States v. Windsor*, 133 S. Ct. 2675 (2013). The Court did not opt to apply a heightened standard of review for sexual orientation discrimination. While *Windsor* concerned the Fifth Amendment's Due Process Clause, the Court has acknowledged that Fifth Amendment due process includes an equal protection component. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The Court relied on equal protection analysis to find Section 3 of DOMA unconstitutional and rejected the stated purpose of protecting the institution of marriage and children. Instead, the Court looked at the obvious effort to favor one group over another: "This is strong evidence of a law having the purpose and effect of disapproval of that class . . . to impose a disadvantage, a separate status . . ." *Id*. at 2693. The Court did not just accept an implied purpose of achieving "harmony" in marriage. Instead, the Court looked at the obvious purpose of the law and its impact on a disfavored group.

The Supreme Court also faced a rational basis challenge in *Shelby Cnty., Ala. v. Holder,* 133 S. Ct. 2612 (2013), where the Court invalidated part of the Section 4 of the Voting Rights Act. As stressed by

Justice Ginsburg, the legislation in question came to the Court with a record going back decades. *Id*. at 2638 (Ginsburg, J., dissenting) (noting the "legislation *re*authorizing an existing statute is especially likely to satisfy the minimal requirements of the rational-basis test [particularly when] Congress has already assembled a legislative record justifying the initial legislation"). The Court not only rejected the statistical data supporting the critical criteria, but some members rejected the argument that they should defer to the overwhelming vote and claims of Congress to reauthorize the law. *See, e.g.*, Adam Liptak, *Voting Rights Law Draws Skepticism From Justices*, New York Times, Feb. 27, 2013. Even with a statistical basis for the calculation, the Court demanded more of a basis for the law.

Petitioners are not suggesting that these laws raise identical questions, but rather that the panel denied them the same type of substantive analysis of the record. The "workplace harmony" theory was introduced in litigation to avoid addressing an ALPA-written amendment designed to protect its own workforce. The panel wrongly concludes that simply favoring one group over another can be a rational and not an arbitrary choice. The same "harmony" could be achieved in any case of competing groups where Congress favors the more politically powerful group. The panel would allow the government to simply recast an effort at open favoritism as a desire for "harmony." This preference splinters the workforce—promoting more disharmony than harmony. This interest fails the requirement of *Romer v. Evans*, 517 U.S. 620, 633 (1996), that "classifications are not drawn for the purpose of disadvantaging the group burdened by the

law." *Id*. That is precisely what the "workplace harmony" rationale seeks to do by shifting valuable employment and property interests from one group to a more favored group. Even if the lower court was not inclined to consider the actual purpose of the new rule, it could not ignore the obvious disharmony produced by stripping senior pilots of the benefits and status that they worked for years to accrue. Under the same rationale, Congress could preserve "harmony" by wiping out the pension funds of any employees who have birthdays on Mondays and Tuesdays. Simply declaring worker harmony through age discrimination is no substitute for a rational basis.

After succeeding in establishing that there was never a basis for the original Age 60 Rule, these pilots have been told that they can be denied their accrued benefits and status on the basis for a rationale that is not only at odds with the public record but an open effort to favor another group of pilots. While litigants in other cases such as the recent Supreme Court cases were given a full and frank review of the bases for such classifications, the pilots here are being told that Congress is assumed to have a good purpose in negating their livelihoods.

The panel's due process reasoning suffers from the same flawed analysis. The panel reaffirmed that it was only required to impose "very slight burdens on the government to justify its actions." App., *infra,* at 15 (citation omitted). In this case, however, that burden only amounted to the government's stating that it was probably simpler to effectively bar one group of pilots rather than have competition for positions with another group of pilots. Both were qualified to fly.

Both earned their status and benefits. Yet, Congress simply extinguished the rights of one group in favor of a powerful union's efforts to protect its pilots. By extension, Congress could negate the rights of any group of professionals to achieve "harmony" by declaring another group the victors. It is understandable why this "slight burden" appears more like willful blindness for these pilots in the loss of their livelihoods.

III. THE LOWER COURT DISMISSED A BILL OF ATTAINDER WITHOUT DETERMINING IF THE FTEPA IS AN EFFECTIVE BAR ON EMPLOYMENT OR IF THE CONGRESS SOUGHT TO STRIP A DISFAVORED GROUP OF PROPERTY INTERESTS.

A bill of attainder exists if the law: (1) applies with specificity, and (2) imposes punishment. Op. at 15 (citing *Foretich v. United States*, 351 F.3d 1198, 1217 (D.C. Cir. 2003)). The panel dismissed the claim under the punishment prong, but did so by dramatically reworking the standards articulated used to define such violations. The panel adopted an exceptionally narrow interpretation of the three tests for punishment, including: "(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." *Id*. (quoting *Foretich*, 351 F.3d at 1218) (internal quotation marks omitted). The panel's interpretation would allow Congress to

extinguish the property interests of any disfavored group in favor of a more politically powerful group like ALPA. By refusing to look beyond the rhetoric of the provisions, the panel did precisely what the Supreme Court warned against in *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 475 (1977) when stating that courts had to be alert to new ways of fashioning bills of attainder so that "new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee." *Id*.

A. The Panel Erroneously Applied the Historical Test.

The panel bases its rejection of the historical test not only on a factually incorrect premise but read contested facts against the non-moving party in this summary judgment case. In their Complaint and prior briefing, the pilots sought the opportunity to show how anyone familiar with the airline industry would recognize that these provisions were clearly and intentionally drafted to deny employment. While the senior pilots were never given a hearing by the district court to establish this and other facts, the panel simply read such facts against them and concluded that the pilots still could be rehired and "[t]he Act did not prevent pilots between the ages of 60 and 65 from seeking and obtaining employment in Part 121operations; it provided them with an opportunity to return as pilots on Part 121 flights, albeit without seniority." App., *infra,* at 17. Putting aside the effective denial of employment, the panel fails to weigh the substantial loss of employment position as itself a bill of attainder. In dismissing the loss of lifetime of accrued benefits and seniority, the panel runs afoul of

Supreme Court precedent stressing that bills of attainder are not simply the denial of employment but also those "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." *Nixon*, 433 U.S. at 473 (emphasis added).

The panel simply accepts without foundation the government's argument that senior pilots have opportunities under FTEPA despite the absence of rehiring and prior briefing explaining how these provisions work in this complex industry. These pilots should have been afforded the opportunity to prove the effective bar created by the law. While the panel insisted that "[i]f Congress intended the legislation to serve as a barrier to employment, it failed miserably by doing the very opposite: increasing and extending employment opportunities," App., *infra,* at 17-18, this statement can only be maintained by completely ignoring the factual assertions of the Plaintiffs and, frankly, the reality of how pilots are selected in this industry for Part 121 operations. The panel's refusal to give weight to the factual representations of the pilots about how this industry is structured directly contradicts the Supreme Court's requirement that the government must show a "rational relation to some legitimate end" that is "grounded in a sufficient factual context for [the Court] to ascertain some relation between the classification and the purpose it served." *Romer v. Evans*, 517 U.S. 620, 631, 633 (1996).

The panel also misconstrues the relevant criteria for the historical test. First, the panel insists that any opportunity for rehire necessarily means that there is

no "paradigmatic 'barrier'" to employment. App., *infra,* at 16. However, the relevant job for these pilots was their position as senior aircrew— a status eradicated by the Act. The ALPA provisions barred these pilots from ever flying again as senior pilots. Second, the panel refuses to consider how these provisions were written to bar rehiring (as it achieved) without expressly barring rehires. This would reduce the constitutional guarantee against bills of attainder into a paper tiger allowing Congress to achieve unconstitutional ends simply by creating criteria that bars employment rather than outright barring employment.

B. The Panel Erroneously Applied The Functional Test.

The panel uses the same factual assumption (made against the non-moving party below) to resolve the functional test. The panel ignores the factual assertions of the petitioners and expressly embraces the "notion of FTEPA as benefit-conferring— the government's leitmotif on appeal." App., *infra,* at 18. The pilots did not ask the panel to resolve this question but to simply allow them to prove that these are not "benefit-conferring" but job-stripping provisions. Particularly troubling is the panel's statement that "[a]lthough over-60 pilots would have doubtless preferred fully retroactive legislation, there is no reason to believe they were entitled to it." App., *infra,* at 18. The contractual system treats seniority as a negotiable and valuable asset. For example, it transfers with pilots during mergers and acquisitions. *See Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1533 (7th Cir. 1992)). Moreover, the panel looked only

at whether employment is expressly barred and not whether it effectively banned or, alternatively, disproportionately burdened the pilots. *See Consol. Edison Co. of New York, Inc.*, *v. Pataki*, 292 F.3d 338, 354 (2d Cir. 2002), *cert. denied*, 537 U.S. 1045 (2002) (holding that a bill of attainder may include a circumstance where "the legislature piled on a burden that was obviously disproportionate to the harm caused"). While Congress acknowledged that the pilots were wrongly denied their employment, the panel states that there is no reason why they would have expected to have their accrued seniority and status recognized. To the contrary, once Congress recognized the invalidity of the original rule, the pilots had every reason to expect to have their accrued status return with their flying privileges.

What is curious about the panel decision is that the court reserves the very question presented on appeal: whether such a purported benefit can be a denial of employment. *See* App., *infra,* at 18 n.15 ("We reserve for a future case the question of whether a law fashioned as benefit-conferring could ever be deemed an unconstitutional bill of attainder under the Supreme Court's functional test."). Since that was the question presented by the senior pilots, it is not clear what or why the lower court would wait to answer it in another case.

C. The Panel Erroneously Applied The Motivational Test.

Each of the three aforementioned tests can serve as an indicator of punitiveness, *see Foretich*, 351 F.3d at 1218, and the Petitioners maintain that there was a sufficient showing on the first two tests to warrant a

remand. However, the third test also militates in favor of such a decision on the ground that the FTEPA "evinces a congressional intent to punish." *Nixon*, 433 U.S. at 478. Once again, the panel used the factual assumptions stated in the first test to conclusorily dismiss the third test, finding no intent to punish the record. App., *infra,* at 18. However, the senior pilots alleged and cited parts of the record showing that ALPA had drafted the provisions and publicly stated an intention to bar the senior pilots. This intent was carried out by a powerful congressman, Rep. Oberstar, who was publicly declared "ALPA's Man" on Capitol Hill, as discussed in the Complaint. The panel simply assumes all facts against the senior pilots and actually cites the very member responsible for inserting the ALPA language as proof of a benign congressional intent: "To the contrary, speakers such as Representative Oberstar, sponsor of FTEPA, celebrated senior pilots and even moved to expedite the legislation so fewer pilots approaching 60 would find themselves on the opposite side of the retroactivity line." App., *infra,* at 19 (citing 153 Cong. Rec. H15252-02). The panel then added that "[s]uch effusive praise, of course, could only be expected in the debates for the [FTEPA]." App., *infra,* at 19. The meaning of that last line is hard to discern. Indeed, it is expected that a bill of attainder would be accompanied by effusive praise by its sponsor rather than self-condemnation. Clearly, the Congress would not herald the enactment "Unfair Treatment for Experienced Pilots Act." Instead, Congress drafted a law that claimed to treat pilots fairly while stripping them of their livelihoods. What was not expected was the judicial silence that followed such legislative abuse.

CONCLUSION

For the reasons stated above, Petitioners respectfully submit that their petition for a writ of certiorari should be granted.

Respectfully submitted,

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