No. 13-597

In the Supreme Court of the United States

GRANT O. ADAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in dismissing as moot claims for equitable relief arising from a nonretroactivity provision of the Fair Treatment for Experienced Pilots Act, Pub. L. No. 110-135, 121 Stat. 1450, that no longer had any effect.

2. Whether the court of appeals erred in affirming dismissal of petitioners' equal protection and due process claims on the ground that the nonretroactivity provision of the Act has a rational basis.

3. Whether the court of appeals erred in affirming dismissal of petitioners' bill-of-attainder claim on the ground that the nonretroactivity provision of the Act does not impose punishment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-38) is reported at 720 F.3d 915. The order denying panel rehearing (Pet. App. 67-68) and the order denying rehearing en banc (Pet. App. 69-70) are unreported. The opinion of the district court (Pet. App. 45-66) is reported at 796 F. Supp. 2d 67. The order of the district court denying reconsideration (Pet. App. 39-44) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2013. A petition for rehearing and rehearing en banc was denied on August 14, 2013. The petition for a writ of certiorari was filed on November 12, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has charged the Federal Aviation Administration (FAA) with "promot[ing] safe flight of civil aircraft in air commerce." 49 U.S.C. 44701(a). In service of that goal, the agency must prescribe "minimum safety standards" for air carriers and, more specifically, promulgate "regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers." 49 U.S.C. 44701(a)(4)-(5) and (b). The agency must carry out these responsibilities "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation." 49 U.S.C. 44701(c); see 49 U.S.C. 44701(d)(1)(A) (stating that "[w]hen prescribing a regulation or standard" the FAA shall "consider * * * the duty of an air carrier to provide service with the highest possible degree of safety in the public interest").

Pursuant to those requirements, the FAA issued a regulation in 1959 to limit pilots' "periods of service." 49 U.S.C. 44701(a)(4); see 24 Fed. Reg. 5248 (June 27, 1959). That regulation, often referred to as the "Age 60 Rule," prohibited "any person 60 years of age or older from serving as a pilot in flights conducted under Part 121 of the Federal Aviation Regulations," which "governs the operations of most commercial airlines." Pet. App. 4 & n.3 (citation and internal quotation marks omitted); see 14 C.F.R. 121.1(a), 121.383(c) (2007). The age limitation was necessary, the agency explained, to guard against a significant "hazard to safety": the risk that a pilot might suffer a heart attack, stroke, or other "incapacitating attack" while flying a large commercial aircraft. 24 Fed. Reg. 9767 (Dec. 5, 1959); see *ibid.* (finding that "there is a

progressive deterioration of certain important [physiological] and psychological functions with age, that significant medical defects attributable to this degenerative process occur at an increasing rate as age increases, and that sudden incapacity due to such medical defects becomes significantly more frequent in any group reaching age 60" and "cannot be predicted accurately as to any specific individual"); see also 24 Fed. Reg. at 5248.

The Age 60 Rule remained in place for nearly fifty years, subject to periodic agency reevaluation, see *Professional Pilots Fed'n* v. *FAA*, 118 F.3d 758, 761-762 (D.C. Cir. 1997), cert. denied, 523 U.S. 1117 (1998), and surviving extensive litigation, see, *e.g.*, *Baker* v. *FAA*, 917 F.2d 318, 319-323 (7th Cir. 1990), cert. denied, 499 U.S. 936 (1991); *Air Line Pilots Ass'n, Int'l* v. *Quesada*, 276 F.2d 892, 898 (2d Cir. 1960). But it "cease[d] to be effective" on December 13, 2007, pursuant to the Fair Treatment for Experienced Pilots Act (Fair Treatment Act or Act), Pub. L. No. 110-135, 121 Stat. 1450 (2007). 49 U.S.C. 44729(d) (abrogating "section 121.383(c) of title 14, Code of Federal Regulations" as of the Act's "date of enactment"). That Act replaced the Age 60 Rule with a new age-limitation rule pursuant to which a pilot may "serve in multicrew covered operations until attaining 65 years of age."[1] 49 U.S.C. 44729(a); see 49 U.S.C. 44729(h) (imposing extra training and testing requirements on pilots over age 60); see also 49 U.S.C.

[1] Petitioners confusingly refer to the statutory provision permitting pilots to fly until age 65 as the "new Age 60 rule" or sometimes even simply as the "Age 60 rule." See, *e.g.*, Pet. 13, 19. This brief uses the term "Age 60 Rule" to refer only to the now-abrogated FAA regulation that preexisted the Act.

44729(c) (setting forth limitations applicable to international flights); Age 60 Aviation Rulemaking Comm., FAA, *Report to the Federal Aviation Administration* iii, 1, 5 (Nov. 29, 2006) (*Report*) (explaining that the International Civil Aviation Organization had recently recommended that pilots be permitted to fly until age 65 in two-pilot international commercial air transport operations).

Under the "nonretroactivity" provision of the Act, the new age limit applies prospectively except in certain limited circumstances. 49 U.S.C. 44729(e)(1). A pilot who was already 60 years old when the Act became law (and therefore was barred by the Age 60 Rule from flying in Part 121 operations) may "serve as a pilot for an air carrier engaged in covered operations" only if he or she (1) "is in the employment of that air carrier in such operations on [the] date of enactment as a required flight deck crew member" or (2) "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." *Ibid.* In other words, the Act permitted pilots who had turned 60 before December 13, 2007 (and were not serving as "required flight deck crew member[s]" on that date) to be rehired without seniority to serve as commercial pilots for several more years—until they reached age 65. See 49 U.S.C. 44729(a) and (e)(1); Pet. App. 5.[2] By December 13, 2012, every pilot

[2] That provision was roughly consistent with a recommendation made by an advisory committee "representing pilot unions, airlines, the aeromedical community," and the FAA, which had agreed in 2006 that "[a]ny change to the Age 60 Rule should be prospective." *Report* 1, 31.

who was age 60 or older prior to December 13, 2007, was (if still living) at least 65 years old and therefore no longer eligible to pilot a commercial aircraft.

The Act also includes "[p]rotection" for employers for "compliance" with its provisions (or with implementing regulations or the Age 60 Rule). 49 U.S.C. 44729(e)(2). Such compliance "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." *Ibid.*

2. a. When the Fair Treatment Act was enacted, more than 100 pilots (including many who are petitioners here) had petitions for review pending in the D.C. Circuit to challenge FAA orders denying requests for exemption from the Age 60 Rule. See *Adams* v. *FAA*, 550 F.3d 1174, 1175 (D.C. Cir. 2008), cert. denied, 558 U.S. 821 (2009). Those pilots argued in the then-existing appellate proceedings that the Act's retroactivity provision was "a constitutionally-prohibited bill of attainder and a violation of their rights to due process and equal protection." *Id.* at 1176.

On December 19, 2008, the court of appeals ruled that any challenge related to the Age 60 Rule was moot and that it lacked jurisdiction over "constitutional questions unrelated to the FAA's order[s]," including attacks on a statute that post-dated such orders. *Adams*, 550 F.3d at 1176 (citing 49 U.S.C. 46110(a)). The court explained that arguments about the constitutionality of the Fair Treatment Act could be properly raised only by "fil[ing] a complaint in the district court." *Ibid.*

b. On September 28, 2010, nearly three years after enactment of the Fair Treatment Act and nearly two years after the D.C. Circuit's decision in the earlier *Adams* case, a group of pilots filed a complaint in district court naming various government defendants and asserting violations of the Constitution and the Administrative Procedure Act (APA). See Pet. App. 6. On July 11, 2011, the district court granted the government's motion to dismiss, rejecting petitioners' claims that the Act violated the Equal Protection Clause, the Due Process Clause, the Just Compensation Clause, the Bill of Attainder Clause, and the APA. See *id.* at 45-65; see also *id.* at 39-44 (denying motion for reconsideration). The court concluded that "the nonretroactivity provision is justified by, and rationally related to, a legitimate governmental interest in labor peace," *id.* at 52-53; see *id.* at 56-57; that petitioners had not established a protected property interest because they "had no legitimate reason to believe that they would be allowed to fly after their sixtieth birthdays at all, let alone with full seniority and benefits," *id.* at 55; see *id.* at 58; and that the Act was not punitive because it "entitle[d]" petitioners "to serve as pilots when they were not previously able to do so" and furthered a "nonpunitive" governmental interest, *id.* at 59-61.

c. On June 21, 2013, in a decision that also addressed an appeal from the dismissal of a related action brought by pilots against a private employer, see *Emory* v. *United Air Lines, Inc.*, 720 F.3d 915 (D.C. Cir. 2013), petition for cert. pending, No. 13-826 (filed Jan. 9, 2014),[3] the court of appeals affirmed. As

[3] In that action, the plaintiffs "supplemented their constitutional objections [to the Act] with a number of state and federal claims

an initial matter, the court noted that because petitioners' constitutional claims were grounded in the nonretroactivity provision and sought only equitable relief from the government, a "strong conceptual case for mootness" had arisen since the district court's decision. Pet. App. 8. Petitioners could not obtain effective equitable relief, the court reasoned, after "[t]he window on the nonretroactivity provision closed December 13, 2012"—the point at which petitioners had all reached 65 years of age and were barred from piloting Part 121 flights by the generally applicable age-65 limitation. *Id.* at 7; see *ibid.* (explaining that it was no longer the case that any "pilot will ever be kept from—or allowed to return to—piloting Part 121 flights by operation of" the nonretroactivity provision). The court dismissed petitioners' takings claim and APA claim on that basis. See *id.* at 10-12. But the court reached the merits of the claims that were raised in both this case and *Emory* (equal protection, due process, and bill-of-attainder claims). The court concluded that those claims were not moot in *Emory*, where the plaintiffs sought damages, and asserted that courts are free to bypass a jurisdictional question where "the merits question [is] decided *in a companion case*, with the consequence that the jurisdictional question could have no effect on the outcome." *Id.* at 9 (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 98 (1998)) (alteration in original); see *id.* at 10.

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against their employer * * * and their union." Pet. App. 3; see *id.* at 4 n.2 (explaining that the two appeals were not formally consolidated); *id.* at 8 (explaining that the actions had "two overlapping plaintiffs").

On the merits, the court of appeals agreed that dismissal of the equal protection, due process, and bill-of-attainder claims was warranted. As to equal protection, the court concluded that the Act's nonretroactivity provision had a "rational relationship to Congress's concern for workplace harmony, which is a legitimate legislative concern under federal labor law." Pet. App. 13 (internal quotation marks omitted). The court pointed out that if the new age limit had been given full retroactive effect then "the influx of senior pilots would have 'bumped' less senior pilots and potentially caused some of the most junior to be fired"—a result Congress could reasonably choose to avoid in view of an anticipated shortage of pilots with "experience flying large jets." *Id.* at 13-14. The court also emphasized that because Congress could have drafted the law entirely prospectively "it would be an odd thing indeed to hold the legislature has acted irrationally in attempting to strike a less draconian balance by providing *some* measure of protection to over-60 pilots." *Id.* at 14.

The court of appeals upheld the dismissal of petitioners' due process claims on similar grounds. The court explained that substantive due process "doctrine normally imposes only very slight burdens on the government to justify its actions" and found that "those burdens have been met" by the showing of a rational basis for the law. Pet. App. 15 (citation and internal quotation marks omitted). In addition, the court rejected any attack on Congress's procedure in enacting the challenged statute. *Id.* at 14-15.

Finally, the court of appeals concluded that the Act was not a bill of attainder because it did not impose punishment. The court carefully considered "(1)

whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute * * * reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish." Pet. App. 16 (quoting *Selective Service System* v. *Minnesota Pub. Interest Research Grp.*, 468 U.S. 841, 852 (1984)) (citation and internal quotation marks omitted). The court refused to treat the Act as a legislative barrier to employment, because it provided "pilots between the ages of 60 and 65 * * * with an opportunity to return as pilots on Part 121 flights, albeit without seniority." *Id.* at 16-17; see *id.* at 17 ("At bottom, there were more piloting opportunities available for over-60 pilots on * * * the day after [the Act] went into effect[] than * * * the day before."). "[R]eserv[ing] for a future case the question of whether a law fashioned as benefit-conferring could ever be deemed an unconstitutional bill of attainder" under a functional approach, the court explained that in this case the Act unquestionably furthered nonpunitive purposes. See *id.* at 18 & n.15. And the court found no evidence in the legislative record of any punitive intent, noting that any such intent was belied by Congress's emphasis on "[f]air [t]reatment" for pilots like petitioners. See *id.* at 18-19.

ARGUMENT

Petitioners argue that the court of appeals erred in dismissing certain of their claims as moot and in rejecting their equal protection, due process, and bill-of-attainder claims. Petitioners do not contend that there is any circuit conflict or uncertainty in the law in these areas requiring clarification by this Court; they

simply claim that the court of appeals overlooked their arguments or misapplied the law. But the court below correctly applied well-established constitutional principles. This Court's review is not warranted.

1. Contrary to petitioners' contention (Pet. 12-20), the court of appeals correctly concluded that petitioners' takings and APA claims were moot as of December 13, 2012. Petitioners did not challenge the Act's "adjustment of the maximum flying age to 65," C.A. Reply Br. 16; rather, their claims arose from the nonretroactivity provision of the Act, which permitted persons who had already reached their sixtieth birthdays to serve as commercial pilots under limited circumstances for a limited period, see, *e.g.*, *ibid.*; Pet. App. 61-62.[4] As the court of appeals explained, "[t]he window on the nonretroactivity provision closed December 13, 2012." Pet. App. 7. After that date, every pilot who "ha[d] attained 60 years of age before the date of enactment" of the Act, 49 U.S.C. 44729(e)(1), had (if still living) become at least 65 years old and was therefore barred from piloting Part 121 flights by the generally applicable age-65 limitation. Pet. App. 7. Accordingly, the nonretroactivity provision no longer had any effect. See *ibid.* (explaining that it was no longer true that any "pilot will ever be kept from—or allowed to return to—piloting Part 121 flights by operation of" the nonretroactivity provision).

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[4] Given petitioners' disclaimer in the court of appeals of any attack on the "independently" operative age-65 limitation, *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987), their contention (Pet. 19-20) that a decision striking down the nonretroactivity provision could somehow result in invalidation of the entire Act rings hollow, see *Clarke* v. *United States*, 915 F.2d 699, 703 (D.C. Cir. 1990) (en banc).

Asserting that they raised challenges in various fora "for over six years" and therefore "have not waited idly by," petitioners suggest that the court of appeals should have reached their claims as a matter of equity and efficiency. Pet. 12, 14. But petitioners had every opportunity to litigate fully their challenge to the Fair Treatment Act during the five-year window in which a court could have granted effective equitable relief; they ran out of time because they proceeded in the wrong court in the first instance, see, *e.g.*, *Adams* v. *FAA*, 550 F.3d 1174, 1176 (D.C. Cir. 2008), cert. denied, 558 U.S. 821 (2009), and waited nearly two years after that decision and nearly three years after enactment of the Act before filing suit.[5] Because it is now "impossible for a court to grant any effectual relief whatever" to petitioners, their claims were properly dismissed. *Knox* v. *SEIU, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (citation and internal quotation marks omitted).

Petitioners invoke virtually every possible exception to the mootness doctrine, asserting that this case involves voluntary cessation of challenged conduct (Pet. 14), issues "capable of repetition, yet evading review" (Pet. 15), and collateral consequences (Pet. 16-18). But the court of appeals did not err in refusing to apply any of these exceptions. See Pet. App. 8, 11 (referring to petitioners' "scatter-shot" mootness arguments). First, the concept of voluntary cessation has no application here. The government did not attempt to "evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior" while remaining "free to return

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[5] Indeed, the plaintiffs in another case managed to obtain an appellate ruling on the constitutionality of the nonretroactivity provision with more than a year to spare. See *Avera* v. *Airline Pilots Ass'n Int'l*, 436 Fed. Appx. 969, 974-978 (11th Cir. 2011).

to [its] old ways," *City News & Novelty, Inc.* v. *City of Waukesha*, 531 U.S. 278, 284 n.1 (2001) (citations and internal quotation marks omitted); rather, by mere passage of time, a statutory provision that petitioners claimed was causing them harm ceased to have any effect. Second, there is no dispute here that is "capable of repetition, yet evading review." *United States* v. *Juvenile Male*, 131 S. Ct. 2860, 2865 (2011). That exception to mootness applies when "there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again," *ibid.* (citation and internal quotation marks omitted; alterations in original), but here petitioners will never again be subject to any provision that governs pilots who are between ages 60 and 65, see *ibid.* Finally, petitioners are not aided by the collateral-consequences exception. Even assuming that the exception is applicable in civil cases (other than habeas proceedings), see, *e.g.*, *Bass* v. *Butler*, 238 Fed. Appx. 773, 777 n.4 (3d Cir. 2007) (noting doubt on that issue), the consequences on which petitioners appear to rely—for instance, lack of seniority and benefits for time spent working outside of Part 121 operations (*e.g.*, Pet. 17-18)—assume that they should have been rehired along the way in some capacity by private employers. Such consequences could not be remedied in this case by means of equitable relief against the government.

Accordingly, the court of appeals did not err in dismissing petitioners' takings and APA claims as moot, and its decision in that regard does not conflict with any decision of this Court or another court of appeals.[6] This Court's review of that issue is not warranted.

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[6] In addition, for the reasons set forth by the district court, petitioners' takings and APA claims lack merit, see Pet. App. 58 (ruling that the Act "took nothing from" petitioners and that they had

2. Petitioners also attack the merits of the court of appeals' decision affirming the dismissal of their equal protection, due process, and bill-of-attainder claims. None of those issues warrants this Court's review either.

a. As an initial matter, this case is not a proper vehicle for reaching the merits of any of those claims. Like the takings and APA claims, petitioners' other claims all challenge the nonretroactivity provision and seek only equitable relief from the government. Accordingly, those other claims are all moot for the reasons discussed above.

The court of appeals declined to dismiss the equal protection, due process, and bill-of-attainder claims as moot in reliance on the principle that a court can reach a merits question before reaching an Article III question if the merits issue "was decided *in a companion case*." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 98-99 (1998) (discussing *Norton* v. *Mathews*, 427 U.S. 524 (1976), a case involving a question of statutory rather than Article III jurisdiction); see Pet. App. 8-10. But that principle has no application where, as here, the court actually *decided* the Article III question. See *Steel Co.*, 523 U.S. at 98 (explaining that in the companion-case situation it might be possible to "decid[e] the cause of action *before* resolving Article III jurisdiction") (emphasis added). Having ruled that the takings and APA claims were moot, and having identified no mootness-related distinction between those claims and petitioners' other claims beyond the fact that the latter claims were

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therefore "identified no interest that could serve as the basis for a takings claim"); *id.* at 61-65 (ruling that petitioners lacked standing to challenge an FAA "Q&A" that was expressly "advisory" and caused them no harm), and petitioners therefore could not benefit from a decision in their favor on mootness in any event.

being decided in a related case, the court of appeals should have applied its jurisdictional conclusion more broadly.

b. Even assuming that the mootness question need not be reached with respect to the equal protection, due process, and bill-of-attainder claims, petitioners do not allege that courts have disagreed about whether the Fair Treatment Act is susceptible to such challenges, and no conflict on that issue exists. Indeed, the decision below is fully consistent with the only other court of appeals decision addressing the constitutionality of the Act (which petitioners never mention): the Eleventh Circuit's decision in *Avera* v. *Airline Pilots Ass'n Int'l*, 436 Fed. Appx. 969 (2011). In that case, the Eleventh Circuit affirmed the dismissal of claims that the Act "violates the Due Process and Equal Protection Clauses of the Fifth Amendment, violates the prohibition against bills of attainder, and effects an unconstitutional taking without compensation," *id.* at 973-974—and the Eleventh Circuit rejected those claims for reasons virtually identical to those relied upon by the D.C. Circuit in the instant case, see *id.* at 974-978.[7] The fact that the Eleventh Circuit and the D.C. Circuit have reached such similar conclusions counsels strongly against review here.

c. Finally, contrary to petitioners' contentions (Pet. 21-33), the reasons given by the court of appeals for affirming the dismissal of petitioners' equal protection,

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[7] The various district courts to have considered attacks on the Act's constitutionality have likewise rejected them. See *Weiland* v. *American Airlines, Inc.*, No. 8:10-cv-1451, 2011 WL 925408 (C.D. Cal. Feb. 18, 2011); *Jones* v. *Air Line Pilots Ass'n, Int'l*, 713 F. Supp. 2d 29 (D.D.C. 2010), aff'd on other grounds, 642 F.3d 1100 (D.C. Cir. 2011).

due process, and bill-of-attainder claims were not erroneous.

i. With respect to petitioners' equal protection and due process claims, the court of appeals correctly concluded that the Act's nonretroactivity provision has a rational basis. See Pet. App. 12-15; *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 83 (2000) (explaining that age classifications are subject to rational-basis review); see also *Gregory* v. *Ashcroft*, 501 U.S. 452, 470-473 (1991) (upholding requirement that state judges retire at age 70); *Vance* v. *Bradley*, 440 U.S. 93, 111-112 (1979) (upholding requirement that Foreign Service officers retire at age 60); *Massachusetts Bd. of Ret.* v. *Murgia*, 427 U.S. 307, 312-317 (1976) (per curiam) (upholding requirement that state police retire at age 50). That provision made the new age limitation nonretroactive with limited exceptions; greater retroactivity would have resulted in changing the established order of seniority and perhaps even in the firing of junior pilots, thus upsetting settled expectations. See Pet. App. 13; see also *Report* 31; cf. *Rakestraw* v. *United Airlines, Inc.*, 981 F.2d 1524, 1533 (7th Cir. 1992) (discussing labor practice of "endtail[ing]" seniority lists), cert. denied, 510 U.S. 861, and 510 U.S. 906 (1993). Accordingly, as the court of appeals explained, the nonretroactivity provision rationally reflected concern about disharmony in the workplace and "potential disruption to labor relations." Pet. App. 13; see also generally *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law.").[8]

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[8] Contrary to petitioners' argument (*e.g.*, Pet. 23-24, 26), whether Congress expressly articulated that rationale has no bearing on the analysis. This Court has made clear that on rational basis review, "it is entirely irrelevant for constitutional purposes wheth-

Petitioners are wrong to suggest that this rationale is somehow insufficiently "credible" (Pet. 24) to amount to a rational basis. First, this Court's decisions in *United States* v. *Windsor*, 133 S. Ct. 2675 (2013), and *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), do not indicate that the court of appeals' inquiry should have been more searching. See Pet. 25. Neither of those decisions altered the principle in a case such as this that "those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 314-315 (1993) (citation and internal quotation marks omitted).

Second, contrary to petitioners' contention (Pet. 21-24), the rationale accepted by the court of appeals did not rest on resolution of contested facts. Petitioners' argument in this regard is difficult to understand; it appears to relate to the question of exactly when the industry would reasonably have believed that the Age 60 Rule was going to be replaced or changed in some way. See *ibid.* But regardless of when air carriers might have been on notice that the Age 60 Rule might (or was likely to) change, there is no question that in the period leading up to enactment of the statute new Part 121 pilots were hired, and existing Part 121 pilots gained additional seniority, as pilots affected by the age-60 limitation left that workforce. See Pet. App. 13. Accordingly, as the court of appeals observed, reintroducing "a significant number of over-60 pilots

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er the conceived reason for the challenged distinction actually motivated the legislature," *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993), or was ever stated in the legislative record, see *Nordlinger* v. *Hahn*, 505 U.S. 1, 15 (1992).

back into the Part 121 workforce with full seniority" would have "'bumped' less senior pilots and potentially caused some of the most junior to be fired." *Ibid.*; accord *Avera*, 436 Fed. Appx. at 975. That result would have exacerbated concerns about a potential shortage of pilots in coming years as commercial passenger carriage increases. See Pet. App. 13-14.

Third, petitioners' caricature of the workplace harmony rationale (*e.g.*, Pet. 26-27) depends on a false premise. Petitioners insist that there was "obvious disharmony produced by stripping senior pilots of the benefits and status that they worked for years to accrue." Pet. 27. But the Act did not strip petitioners of anything. The Age 60 Rule took away petitioners' ability to serve as Part 121 pilots after their sixtieth birthdays; the Act gave them the ability to be rehired to work as Part 121 pilots until age 65, subject to certain limitations. The court of appeals correctly understood Congress's solution to the problem of how to treat pilots between the ages of 60 and 65 who wished to reenter a workforce that they had already left as a rational one.[9]

ii. Petitioners' arguments about the bill of attainder issue are equally without merit. Petitioners agree that the court of appeals employed the correct test for ascertaining whether a law constitutes punishment. See Pet. 28-29. But see Pet. 11. They contend, how-

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[9] In addition, petitioners are wrong to suggest that enactment of the age-65 limitation was equivalent to a determination that "there was never a [safety-related] basis for the original Age 60 Rule." Pet. 27; see Pet. 4, 5, 21. The new statute, which imposed various safety-related requirements applicable only to pilots age 60 or older, see 49 U.S.C. 44729(g)-(h), did not question the rationale for the Age 60 Rule.

ever, that the court of appeals "[e]rroneously [a]pplied" that test, *e.g.*, Pet. 29, 31-32, based on their understanding of allegedly "contested facts" in this particular case, *e.g.*, Pet. 29. Such a case-specific claim of error does not warrant this Court's review. In any event, the court of appeals did not err in affirming dismissal of petitioners' bill-of-attainder claim.

A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Selective Service System* v. *Minnesota Pub. Interest Research Grp.*, 468 U.S. 841, 846-847 (1984). "[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute" as a bill of attainder based on "[j]udicial inquiries into Congressional motives." *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960); see *id.* at 619; see also *Selective Service System*, 468 U.S. at 855-856 n.15.

As the court of appeals correctly recognized (Pet. App. 16-19), the flaw in petitioners' bill-of-attainder challenge here is simple: nothing in the challenged provisions can plausibly be characterized as "punishment." For example, a law cannot be said to "punish" those who are subject to it unless, at a bare minimum, it "depriv[es]" them of "rights * * * previously enjoyed." *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 320 (1867); see, *e.g.*, *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 474-475 (1977). The Fair Treatment Act does not meet that threshold requirement because it does not deprive petitioners of any right they previously possessed. Indeed, because the Act lifted the absolute bar imposed by the Age 60 Rule, "there were more piloting opportunities availa-

ble for over-60 pilots on December 14, 2007, the day after [the Act] went into effect, than December 12, 2007, the day before." Pet. App. 17; see *Avera* v. *United Airlines*, 686 F. Supp. 2d 1262, 1276 (N.D. Fla. 2010), aff'd, 465 Fed. Appx. 855 (11th Cir. 2012).

Petitioners nevertheless insist that the Act resulted in a "loss of employment position" and "loss of a lifetime of accrued benefits and seniority." Pet. 29; see Pet. 30-33. That argument cannot be reconciled with the plain meaning of the Act's provisions and the backdrop against which the Act operated. Petitioners suffered the consequences of which they complain under a prior rule that had been in effect since 1959, and the Act ameliorated the effects of that rule. And even if it were true that because of industry "structure[]" the Act effectively formed a barrier to rehiring (Pet. 30)—an argument that petitioners did not press in the district court, and as to which their complaint made no factual allegations—that still would not have made petitioners worse off than they were before the law was enacted.

In addition, even assuming that it were possible to conceive of the Act as depriving petitioners of some right, "[t]he question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation." *Flemming*, 363 U.S. at 614. Here, petitioners as a group have engaged in no past activity that could be considered wrongdoing giving rise to guilt, and the

legislative record does not indicate that Congress believed otherwise.[10]

Accordingly, Congress's choice to give the change in age limitation a limited retroactive effect cannot be recast, under any view of the facts, as anything other than a "legitimate regulation." *Nixon*, 433 U.S. at 476 n.40.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] See *De Veau* v. *Braisted*, 363 U.S. 144, 160 (1960) ("The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt."); see also *United States* v. *Brown*, 381 U.S. 437, 453, 461-462 (1965) (invalidating as bill of attainder statute that imposed punitive disabilities on adherents of a despised political movement); *United States* v. *Lovett*, 328 U.S. 303, 314-315 (1946) (same); *Pierce* v. *Carskadon*, 83 U.S. (16 Wall.) 234, 239 (1873) (same); *Cummings*, 71 U.S. (4 Wall.) at 316, 331-332 (same); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377-378 (1867) (same).