No. 08-1452

In the Supreme Court of the United States

GRANT O. ADAMS, ET AL., PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION, 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

Petitioners are pilots who petitioned for, and were denied, exemptions from the Federal Aviation Administration's "Age 60 Rule," 14 C.F.R. 121.383(c) (2007), which at the time of their petitions prohibited pilots from flying for commercial airlines after reaching age 60. Under the Fair Treatment for Experienced Pilots Act, Pub. L. No. 110-135, § 2(a), 121 Stat. 1450, the Age 60 Rule "cease[d] to be effective" on December 13, 2007. On direct review in the court of appeals, petitioners raised constitutional objections to a provision of the Act placing conditions on rehiring pilots over 60 years of age, but conceded that they did not challenge the provision abrogating the Age 60 Rule. The questions presented are as follows:

1. Whether petitions for review of an agency order denying exemption from a regulation become moot upon the enactment of a concededly valid statutory provision expressly abrogating that regulation.

2. Whether a court of appeals with jurisdiction only to review "an order issued by * * * the Administrator of the Federal Aviation Administration," 49 U.S.C. 46110(a), lacks jurisdiction to decide a constitutional challenge to a statute not implicated by the order under review.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 550 F.3d 1174. The relevant orders of the Federal Aviation Administration regarding the lead petitioner (Pet. App. 6a-8a, 9a-12a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2008. A petition for rehearing was denied on February 19, 2009 (Pet. App. 13a-14a). The petition for a writ of certiorari was filed on May 20, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

In addition to the provisions reprinted at Pet. 1-3, the Fair Treatment for Experienced Pilots Act, Pub. L. No. 110-135, § 2(a), 121 Stat. 1450 (adding 49 U.S.C. 44729(d)), provides:

> SUNSET OF AGE 60 RETIREMENT RULE.—On and after the date of enactment of this section, section 121.383(c) of title 14, Code of Federal Regulations, shall cease to be effective.

STATEMENT

1. Congress has charged respondent Federal Aviation Administration (FAA) with "promot[ing] safe flight of civil aircraft in air commerce by prescribing," among other things, "regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers," and with establishing of "minimum safety standards" for air carriers. 49 U.S.C. 44701(a)(4) and (b)(1). By statute, FAA "shall carry out [such responsibilities] in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation" and shall consider "the duty of an air carrier to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. 44701(c) and (d)(1)(A).

a. Under that mandate, FAA promulgated the so-called "Age 60 Rule" in 1959. The rule provided that "[n]o certificate holder may use," and "[n]o person may serve as," "a pilot on an airplane engaged in operations under [14 C.F.R. Pt. 121] if that person has reached his 60th birthday." 14 C.F.R. 121.383(c).[1] FAA adopted the

[1] Until 1995, Part 121 carriers were primarily those operating aircraft with a seating capacity of more than 30 passengers as commercial

Age 60 Rule out of concern for the danger to the public if the pilot of a commercial aircraft suddenly became incapacitated. See 24 Fed. Reg. 5248 (1959). In its original rulemaking, FAA found "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." *Id.* at 9767. It also found that such incapacity cannot be predicted accurately. *Ibid.* Accordingly, FAA decided to prohibit persons from piloting large commercial aircraft after reaching age 60. *Id.* at 9768.

b. The Age 60 Rule was soon challenged. In *Air Line Pilots Ass'n, International* v. *Quesada*, 276 F.2d 892, 898 (1960), the Second Circuit found "considerable support" for the rule, and upheld it as a reasonable exercise of FAA's authority to protect the public safety. Then, in 1970, the Air Line Pilots Association petitioned FAA to revoke the Age 60 Rule, but after informal public hearings, FAA denied the petition. The D.C. Circuit upheld FAA's decision not to revoke the rule, concluding that the agency's decision was not unreasonable, "[g]iven the inconclusiveness of appellants' evidence and the existence of contrary views." *O'Donnell* v. *Shaffer*, 491 F.2d 59, 63 (1974) (footnotes omitted).

In 1979, Congress directed the National Institutes of Health (NIH), in consultation with the Secretary of Transportation, to conduct a study of the Age 60 Rule.

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common carriers. See 14 C.F.R. 121.1(a)(5)(ii) (1995). Part 121 was amended in 1995, and now applies to the operations of the somewhat broader group of persons described in 14 C.F.R. Pt. 119. See 14 C.F.R. 121.1(a).

Act of Dec. 29, 1979, Pub. L. No. 96-171, 93 Stat. 1285. Although NIH found "no special medical significance to age 60 as a mandatory age for retirement of airline pilots," it recommended retaining the rule because there was no "medical or performance appraisal system that can single out those pilots who would pose the greatest hazard because of early, or impending, deterioration in health or performance." *Professional Pilots Fed'n* v. *FAA*, 118 F.3d 758, 761 (D.C. Cir. 1997) (quoting NIH, *Report of the National Institute on Aging, Panel on the Experienced Pilots Study* 1 (Aug. 1981)), cert. denied, 523 U.S. 1117 (1998).

The NIH study also recommended that FAA or another appropriate federal agency collect the medical and performance data necessary to consider changing the Age 60 Rule. Responding to that recommendation, FAA issued an advance notice of proposed rulemaking in 1982, seeking public input and data on the effects of aging on pilot performance. 47 Fed. Reg. 29,782. FAA proposed an eight-year experiment, using a select group of volunteer pilots who would continue flying until age 62 and would be subject to extensive quarterly testing. *Id*. at 29,783-29,784. After considering hundreds of comments, however, FAA withdrew the proposal. 49 Fed. Reg. 14,692 (1984). Among other things, FAA found no tests "that can adequately determine which individual pilots are subject to incapacitation" due to cardiovascular, cerebrovascular, or other disease, leaving it without "sufficient means for collecting quantitative medical and performance data on airline pilots over age 60 under conditions of actual operational stress and fatigue that do not introduce an unacceptable safety risk." *Id*. at 14,692, 14,693; see *id*. at 14,695. The following year, Congress held a hearing on the Age 60

Rule. *Age Discrimination & the FAA Age 60 Rule: Hearing Before the House Select Comm. on Aging*, 99th Cong., 1st Sess. (1985). The hearing resulted in no legislative action to rescind or alter the rule.

Several years later, prompted by a study expressing doubt about the correlation between accident data and pilot age, FAA announced it was considering whether to initiate a rulemaking on the Age 60 Rule. 58 Fed. Reg. 21,336 (1993); *id.* at 33,316. FAA held two days of hearings and received more than 3,000 comments in response. In the end, FAA decided not to initiate a rulemaking to change or repeal the rule. 60 Fed. Reg. 65,977 (1995). That decision was upheld in *Professional Pilots Federation*, *supra*.

Most recently, FAA established an Aviation Rulemaking Committee (ARC) to make recommendations on whether FAA should modify the Age 60 Rule to conform to the International Civil Aviation Organization's (ICAO) standard permitting two-pilot operations with one pilot up to 65 years of age, and one pilot up to 60 years of age. See 71 Fed. Reg. 62,399, 62,400 (2006).

c. Pilots have, over the years, petitioned for individual exemptions from the Age 60 Rule. FAA is permitted to grant such an exemption from its safety regulations and standards, if it "finds the exemption is in the public interest." 49 U.S.C. 44701(f). A petitioner must show "why granting the exemption would not adversely affect safety" or how it would "provide a level of safety at least equal to that provided by the rule from which you seek the exemption." 14 C.F.R. 11.81(e). No petitioner was able to satisfy that burden; accordingly, FAA denied all exemption requests. The courts of appeals have uniformly upheld those decisions. See, *e.g.*, *Butler* v. *FAA*, 109 Fed. Appx. 438 (D.C. Cir. 2004) (per curiam), cert.

denied, 544 U.S. 1027 (2005); *Yetman* v. *Garvey*, 261 F.3d 664 (7th Cir. 2001); *Baker* v. *FAA*, 917 F.2d 318 (7th Cir. 1990),[2] cert. denied, 499 U.S. 936 (1991); *Keating* v. *FAA*, 610 F.2d 611 (9th Cir. 1979); *Gray* v. *FAA*, 594 F.2d 793 (10th Cir. 1979); *Rombough* v. *FAA*, 594 F.2d 893 (2d Cir. 1979); *Starr* v. *FAA*, 589 F.2d 307 (7th Cir. 1978). The courts also held that FAA's policy of declining to grant exemptions from the Age 60 Rule was not an abuse of discretion. *Yetman*, 261 F.3d at 679; *Rombough*, 594 F.2d at 897-900; *Starr*, 589 F.2d at 311-314.

2. Petitioners are pilots who sought individual exemptions from the Age 60 Rule. The reasons they offered in support of an exemption were similar: they had a great deal of experience and should not be barred from flying commercial aircraft by a rule that did not take into account their individual ability to fly. Petitioners also raised a variety of legal objections to the Age 60 Rule itself. But petitioners submitted neither medical evidence supporting the claim that they individually deserved an exemption, nor a "proposed technique" not previously known to FAA "to assess an individual pilot's abilities and risks of subtle and sudden incapacitation." 60 Fed. Reg. at 65,980.

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[2] *Baker* was a second petition for review in the same proceeding. Earlier, in *Aman* v. *FAA*, 856 F.2d 946 (7th Cir. 1988), the court of appeals had reviewed several exemption denials, and while it had upheld FAA's conclusion that the petitioners had not shown an effective protocol to screen out all pilots with an increased risk of incapacitation, it had remanded for a more detailed response to the petitioners' claim that experience offsets undetected physical losses. *Id*. at 957. After FAA responded, the matter returned to the court of appeals in *Baker*, which upheld FAA's denial of the exemptions.

a. FAA denied the requested exemptions. FAA's substantially identical letter to each petitioner—the letter to lead petitioner Adams is found at Pet. App. 9a-12a—stated that the agency was then engaged in a rulemaking to consider whether to change the Age 60 Rule. FAA explained that the ARC had issued a report on whether FAA should move to the age-65 standard of the ICAO but had not reached a consensus on the point. *Id.* at 10a. The letter informed each petitioner that:

> The FAA recognize[s] that those persons approaching age 60 are, in general, experienced pilots. Thus, a general expansion of the current age limit may be appropriate. That proposal will be subject to public notice and comment, as required by the Administrative Procedure Act. However, the FAA has not yet changed the rule, and there is still an age limit of 60 for pilots serving in part 121 operations.

Id. at 11a. FAA further explained that, while it was sympathetic with pilots who were applying for an exemption during the rulemaking process, it could not "overturn more than 40 years of precedent in this area without a deliberative process," adding that the "situation is more appropriately addressed via general rulemaking for a class of individuals than via an individual exemption." *Id.* at 11a-12a. At the time, the ARC was considering whether to recommend conforming the Age 60 Rule to the ICAO standard (see p. 5, *supra*), and FAA explained that allowing exemptions during the ARC's process was being conducted "would circumvent the public notice and comment requirements of the Administrative Procedure Act." Pet. App. 11a. FAA thus concluded that an exemption "would not be in the public interest" and denied the request. *Id.* at 12a.

b. Petitioners asked FAA to reconsider its denials and, more or less simultaneously, filed petitions for review in the court of appeals in ten separate actions, which were then consolidated. FAA denied reconsideration to all petitioners, concluding that the Fair Treatment for Experienced Pilots Act (see pp. 8-9, *infra*) had abrogated the Age 60 Rule, and that it now lacked the authority to grant the requested exemptions. Pet. App. 6a-7a.

3. On December 13, 2007—after FAA's initial denial of petitioners' petitions for exemption and after seven of the ten petitions for review were filed, but while FAA's rulemaking was pending and before FAA responded to the petitions for reconsideration—the President signed into law the Fair Treatment for Experienced Pilots Act (Act), Pub. L. No. 110-135, § 2(a), 121 Stat. 1450 (adding 49 U.S.C. 44729). Section 44729(a) provides that the age limit for pilots in Part 121 covered operations is now age 65. Section 44729(d) expressly abrogates the Age 60 Rule: "On and after the date of enactment of this section, section 121.383(c) of title 14, Code of Federal Regulations, shall cease to be effective."

The Act creates a temporary transitional regime for pilots who were between the ages of 60 and 65 on December 13, 2007—that is, those pilots who would be eligible under Section 44729(a), but who had been subjected to the Age 60 Rule. The Act strikes a balance that, among other things, respects younger pilots' settled expectations of seniority due to retirements under the Age 60 Rule, by allowing pilots subjected to the Age 60 Rule to fly until age 65, but only if they satisfy either of two conditions:

> (1) NONRETROACTIVITY.—No person who has attained 60 years of age before the date of enactment

> of this section may serve as a pilot for an air carrier engaged in covered operations unless—
>
> (A) such person is in the employment of that air carrier in such operations on such date of enactment as a required flight deck crew member; or
>
> (B) such person is newly hired by an air carrier as a pilot on or after such date of enactment without credit for prior seniority or prior longevity for benefits or other terms related to length of service prior to the date of rehire under any labor agreement or employment policies of the air carrier.

49 U.S.C. 44729(e)(1). The statute exempts air carriers from employment law liability for complying with the Act or any regulation carrying it out. 49 U.S.C. 44729(e)(2).

4. a. In the court of appeals, petitioners reformulated their challenge to the FAA orders denying them exemptions from the Age 60 Rule as a challenge instead to the constitutionality of the new statute. At oral argument, petitioners made clear that they were not challenging the Act *in toto*; rather they challenged only the loss-of-seniority provision in Section 44729(e)(1)(B) and the accompanying liability exemption of Section 44729(e)(2). Petitioners specifically conceded that they were *not* challenging the constitutionality of Section 44729(d), which abrogated the Age 60 Rule. App., *infra*, 1a-4a.

b. The court of appeals held that the petitions for review of the denial of exemptions from the Age 60 Rule were mooted by the Act's abrogation of the Age 60 Rule. Pet. App. 5a. The court of appeals stressed that "[p]etitioners do not * * * challenge the Act's abrogation of the Age 60 Rule," and explained that beyond that, it

could not address a broader constitutional challenge to the Act, because it lacked statutory jurisdiction to do so under 49 U.S.C. 46110(a), its only basis for direct review of FAA orders. Pet. App. 4a-5a (citing *Coalition of Airline Pilots Ass'ns* v. *FAA*, 370 F.3d 1184 (D.C. Cir. 2004)). The court noted that if petitioners wanted to challenge the constitutionality of the statute, they should bring an action in district court. *Id.* at 4a, 5a.

c. The court of appeals denied a petition for rehearing en banc on February 19, 2009. Pet. App. 13a-14a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of any other court of appeals or this Court. Moreover, petitioners principally seek review of a threshold jurisdictional issue, but their underlying claim is of limited and diminishing importance.

1. The orders on which jurisdiction was predicated in the court of appeals—orders that denied petitioners an exemption (or other relief) from the Age 60 Rule—are moot because the Act abrogated the Age 60 Rule in December 2007.

a. "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). Not only must there be an actual case or controversy at the outset of the litigation, but the case or controversy must also continue throughout the litigation. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) ("To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.") (internal quo-

tation marks omitted); *Coalition of Airline Pilots Ass'ns* v. *FAA*, 370 F.3d 1184, 1189 (D.C. Cir. 2004) (*Coalition*). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. . . . The parties must continue to have a personal stake in the outcome of the lawsuit." *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998) (internal quotation marks and citation omitted).

With exceptions not relevant here, when a statute or regulation that is the subject of legal challenge is repealed or abrogated, the legal challenge ceases to be a live controversy. "There must be a live case or controversy before this Court, and we apply the law as it is now, not as it stood below." *Kremens* v. *Bartley*, 431 U.S. 119, 128-129 (1977) (citation omitted) (new statute altering the rights of persons of a particular age group mooted their claims under an earlier statute). These "[m]ootness principles have direct and often obvious application in dealing with attacks on legislative rules that have expired or been repealed"; simply put, "[r]epeal * * * moots attacks on a statute." 13C Charles A. Wright et al., *Federal Practice & Procedure* § 3533.6, at 273, 277 (3d ed. 2008) (footnotes omitted); see *In re Bunker Ltd. P'ship*, 820 F.2d 308, 311 (9th Cir. 1987) ("Where intervening legislation has settled a controversy involving only injunctive or declaratory relief, the controversy has become moot.") (citing *Diffenderfer* v. *Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412 (1972) (per curiam)).

The decision on which the court of appeals relied, *Coalition*, 370 F.3d at 1190-1191, properly looked to these principles to hold that when a valid statute changes the requirements set forth in an agency regulation and there is no likelihood that the regulation will be en-

forced, the challenge to the regulation—or by extension here, a request for exemption from it—becomes moot. See Pet. App. 4a-5a. Petitioners cite, and we are aware of, no contrary authority.

b. The court of appeals likewise correctly applied that rule to this case. When all of FAA's orders were issued, the Age 60 Rule was still in effect.[3] But when the Act took effect, it "significantly alter[ed] the posture of this case." *Department of the Treasury* v. *Galioto*, 477 U.S. 556, 559 (1986) (statutory changes rendered action moot).

The Act provides that FAA's Age 60 Rule, which underlies all of the orders here, "shall cease to be effective" as of the date of enactment. 49 U.S.C. 44729(d). Because the orders being challenged denied exemptions from the Age 60 Rule, and because for some time now there has been no Age 60 Rule from which to exempt pilots, the orders themselves have no further effect. Stated otherwise, petitioners no longer have a "personal stake in the outcome of the lawsuit" because the relief they seek is an exemption from a rule that no longer exists. *Spencer*, 523 U.S. at 7 (internal quotation marks and citation omitted). The court of appeals thus correctly held that the petitions for review became moot with the passage of the Act.

2. Petitioners contend the court of appeals erred in concluding it could dismiss their petitions for review as moot "without consideration of the alleged unconstitutionality or invalidity of the [mooting] statute." Pet. i. That question is not presented here.

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[3] Indeed, most of the petitions for review were filed while the Age 60 Rule was still in effect. Only the petitions for review in Nos. 05-1507, 05-1524, and 08-1023 were filed after passage of the Act—on December 14, 2007, December 19, 2007, and January 22, 2008, respectively.

To be sure, petitioners raised constitutional objections in the court of appeals to the loss-of-seniority provision in Section 44729(e)(1)(B). But that provision was not the basis for the court of appeals' conclusion that the petitions for review had been mooted. Rather, it was Section 44729(d) that abrogated the Age 60 Rule (Pet. App. 3a), and as the court of appeals pointed out, "[p]etitioners do not * * * challenge the Act's abrogation of the Age 60 Rule." *Id.* at 4a.

The court of appeals accurately stated petitioners' position. At oral argument in the court of appeals, counsel for the government stated his understanding that petitioners did not take the "position * * * that the entire statute is unconstitutional." App., *infra*, 3a. Rather, counsel explained:

> MR. HIMMELFARB: Well, Your Honor, there's no challenge to the provision in the statute that says that the old rule shall cease to be in effect. * * * I don't think [petitioners'] attack on [Section 44729(e)(1)(B)] is going to put in question whether there's any problem with the portions of the statute that say as of the enactment date the old rule shall cease to exist.

Id. at 2a-3a.

When counsel for petitioners began his rebuttal, the court immediately asked whether this was correct. Counsel stated that petitioners "do not challenge the whole statute" but only "the discriminatory component of the statute." App., *infra*, 4a. In response to the court's next question, counsel made it even clearer that petitioners did not take issue with Section 44729(d)'s abrogation of the Age 60 Rule:

> THE COURT: So as far as the wipe out of the Age 60 Rule there's no attack on that, is that—
>
> MR. TURLEY: No, we take no position on that.

Ibid. This concession was confirmed in another exchange, where counsel reemphasized the limited reach of petitioners' challenge:

> THE COURT: * * * You contend the statute, everything in the statute is okay except for the seniority provision.
>
> MR. TURLEY: We're saying, it's certainly correct that we are *only* challenging those provisions that discriminate on the basis of age.
>
> THE COURT: Okay.

Ibid. (emphasis added).

Given petitioners' concession that they do not challenge the constitutionality of Section 44729(d), this case does not present a conflict (see Pet. 13-19) with decisions from other courts of appeals that have reviewed the constitutionality of new statutes. Petitioners cite several cases that they read to suggest that litigation is not moot unless the constitutionality of a new enactment is first established. See Pet. 14-17; *Continental Ill. Corp.* v. *Lewis*, 827 F.2d 1517, 1520 (11th Cir. 1987) ("This issue of mootness hinges, of course, on whether the amendment to § 664.02 is constitutional. If constitutional, then we agree with the defendant that the statute precludes effective relief and moots the case."), vacated, 494 U.S. 472 (1990). Assuming petitioners correctly characterize those cases, the decision below still is not to the contrary, because petitioners did not contest (and

thus conceded) that the Act's abrogation of the Age 60 Rule was constitutional.[4]

3. To the extent those cases from other courts of appeals instead stand for the proposition that a challenge to a superseded law can be recast as a challenge to the superseding law, the D.C. Circuit was correct to conclude that statutory limits on its jurisdiction precluded that approach here.

The court below exercised jurisdiction over petitions for review of FAA orders pursuant to 49 U.S.C. 46110(a), which grants jurisdiction to the courts of appeals in cases in which a person seeks "review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business." Section 46110(a) confers jurisdiction on the court of appeals only to review an "order," which includes (as here) "an order issued by the Secretary of Transportation (or * * * the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator)." The court of appeals has "exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order." 49 U.S.C. 46110(c).

But as the court of appeals correctly recognized below, Pet. App. 4a-5a, and in *Coalition,* 370 F.3d at 1191, nothing in Section 46110 authorizes it to address a free-standing constitutional challenge to a statutory provi-

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[4] Nor, for that matter, could petitioners fairly have argued that Section 44729(d)'s simple abrogation of the Age 60 Rule was invalid. "Congress, the source of [administrative] authority, can modify [administrative] rulings it considers improper." *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 596 (1983).

sion—at least not when the provision's validity *vel non* would not affect the court of appeals' decision to "affirm, amend, modify, or set aside any part of the order" of FAA under review, 49 U.S.C. 46110(c). Here, while Section 44729(e)(1)(B) may have a bearing on petitioners' seniority if they were rehired, it would have no bearing on the narrow question over which the court of appeals had jurisdiction, *i.e.*, how to dispose of a petition for review of an FAA order denying a request for exemption from a rule that no longer exists.[5]

Moreover, there is no apparent split of authority over whether a court of appeals has jurisdiction, on a petition for review of an agency order, to consider independent constitutional challenges to statutes not implicated by the order on review. Petitioners admit they "cannot find other cases with the identical case profile" to this case. Pet. 14 n.8. Similarly, the government knows of no case contrary to the decision below and *Coalition*. All the decisions cited by petitioners (see Pet. 14-17) arose in litigation in which the district court had general federal question jurisdiction under 28 U.S.C. 1331. That distinction makes all the difference, because unlike the court of appeals here, the district courts in those cases would

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[5] Petitioners also suggest that FAA has in fact granted exemptions from Section 44729(e)(1). See Pet. i, 25-33. They are mistaken. Although there has been some question over the interpretation of Section 44729(e)(1)(A) (which allows certain pilots over age 60 as of December 13, 2007, to serve in Part 121 covered operations without loss of seniority), FAA's authority to grant *exemptions* does not extend to the statutory requirements of Section 44729. See 49 U.S.C. 44701(f) (permitting exemptions only from *regulations* issued under certain statutory authorities). In all events, the court of appeals did not address any question concerning the availability of exemptions from Section 44729(e)(1), and that question presents no issue of broad significance that would warrant review by this Court at this time.

have broader latitude to take up a constitutional challenge to the superseding legislation just as they initially had jurisdiction to decide the constitutional challenge to the superseded law. Cf. *Diffenderfer*, 404 U.S. at 415 (vacating decision below as moot, but remanding "[b]ecause it is possible that appellants may wish to amend their complaint * * * to attack the newly enacted legislation").

4. Even if the threshold jurisdictional question petitioners raise were properly presented, review in this case would nonetheless be unwarranted because of the limited and diminishing importance of petitioners' underlying claim.

Petitioners' underlying claim is that Section 44729(e)(1)(B) impermissibly discriminates against specific pilots by depriving them of seniority on the basis of their age. Pet. App. 4a. By making certain pilots reeligible to serve in Part 121 covered operations, Congress created the potential for a clash of seniority between returning pilots over age 60, and younger pilots. Cf. p. 8, *supra*. To address that problem, Section 44729(e) sets up a temporary transitional regime for the narrow cohort of pilots born between December 13, 1942 and December 12, 1947. That is a small group relative to all commercial pilots; it is getting smaller as pilots become ineligible upon attaining age 65, see 49 U.S.C. 44729(a); and it will vanish in 2012. Moreover, petitioners do not even ask this Court to decide the underlying claim, but instead ask only that this Court determine that the court of appeals has jurisdiction to hear the claim—all of which counsels against review in this Court.

The court of appeals also expressed the view that, "if petitioners wish to challenge the constitutionality of

[Section 44729(e)(1)(B)] on its face, they should—assuming they can show Article III standing—file a complaint in the district court." Pet. App. 5a. The Attorney General has been notified that litigation between private parties in district court may draw the constitutionality of Section 44729(e)(1)(B) and (2) into question. Pl.'s Notice of Compliance with Fed. R. Civ. P. 5.1 at 1, *Emory* v. *United Air Lines*, No. 08-cv-2227-RBW (D.D.C. filed Mar. 27, 2009). Indeed, petitioners Emory and Sein in this Court are also plaintiffs in *Emory*. Those proceedings are an additional reason this Court's intervention is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2009

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1180

GRANT O. ADAMS, ET AL., PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.,
APPELLANTS [SIC]

Monday, Nov. 10, 2008

TRANSCRIPT

APPEARANCES:

ON BEHALF OF PETITIONERS:
Jonathan Turley, ESQ.

ON BEHALF OF RESPONDENTS:
Edward Himmelfarb, ESQ. (DOJ)

* * * * *

[13]

THE COURT: I'm sorry, I'm puzzled about your mootness argument. You said that a statute has mooted the prior procedure and the petitioners say the statute is unconstitutional. So, and we have to decide the constitutional question en route to deciding the mootness question?

MR. HIMMELFARB: Well, I think, Your Honor, in the Coalition of Airline Pilots Association of four years ago, this Court held that you do not do that because of the peculiar differences in jurisdiction.

THE COURT: Well, I don't think there they were claiming that once the statute was adopted the prior set of agency rules had any effect going forward, right?

MR. HIMMELFARB: I think that statute—

THE COURT: I think it was not contested that the statute stopped the effect of the agency rules. While here it is contested because the theory is that the statute unconstitutionally brought the Age 60 Rule to end.

MR. HIMMELFARB: Well, Your Honor, there's no challenge to the provision in the statute that says that the old rule shall cease to be in effect. The challenge is to the substantive conditions that are attached to having you know—that statute deals with two groups of pilots. One group of pilots are people under age 60 who are still employed by the air carriers. The other group is the people who have already [14] passed age 60 and therefore under the old rule are out and it deals with those two groups. Now with respect to the latter group, the people who are over 60 and are out, no longer employed

by air carriers, it says you can come back and fly till age 65 if one of the two conditions applies. And the first one is not particularly relevant to this case. The second condition is really where the constitutional challenge of the petitioners here goes. And I don't think that attack on that is going to put in question whether there's any problem with the portions of the statute that say as of the enactment date the old rule shall cease to exist. And in fact as Professor Turley has already suggested, they're claiming an affirmative reliance on portion of the statute, namely the—

THE COURT: It's not unusual to.

MR. HIMMELFARB: I beg your pardon?

THE COURT: It's not unusual to find one part of the statute that's helpful and one part of the statute that's not only helpful but invalid.

MR. HIMMELFARB: I was not suggesting that, Your Honor. What I was suggesting is I don't believe their position is that the entire statute is unconstitutional. They're focusing on a specific provision, namely the part that says—

THE COURT: Well, we'll ask Mr. Turley exactly what his position is, * * *

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[22] * * * Thank you, Mr. Himmelfarb.

MR. HIMMELFARB: Okay, thank you, Your Honor.

THE COURT: So Mr. Turley did I (indiscernible) argument for you?

MR. TURLEY: No, Your Honor, we do not challenge the whole statute. In fact the rule governing all courts is to try to minimize the effect of a challenge on a statute and we do that in our brief. We challenge the discriminatory component of the statute.

THE COURT: You told me that.

MR. TURLEY: Yes, I mean—

THE COURT: So as far as the wipe out of the Age 60 Rule there's no attack on that, is that—

Mr. TURLEY: No, we take no position on that. If we go back to the Age—

THE COURT: Okay—

MR. TURLEY: We believe that whether this provision can be removed and is severable, the Court can make its decision. We do not ask for the entire statute to be struck down. We tried to minimize the impact on the statute as courts do. I would like to respond to a couple of things that my esteemed counsel has said.

THE COURT: Okay, so your first position is—and this is sort of looking ahead—you look forward to the statute. You contend the statute, everything in the statute [23] is okay except for the seniority provision.

MR. TURLEY: We're saying, it's certainly correct that we are only challenging those provisions that discriminate on the basis of age.

THE COURT: Okay.

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