No. 02-856

In the Supreme Court of the United States

FEDERAL AVIATION ADMINISTRATION, PETITIONER

v.

CITY OF ALAMEDA, CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY, BERKELEY KEEP JETS OVER THE BAY, PORT OF OAKLAND, AND COMMISSIONERS, PORT OF OAKLAND

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

MOTION TO VACATE

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TABLE OF AUTHORITIES

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MOTION TO VACATE

The Solicitor General, on behalf of the Federal Aviation Administration (FAA), respectfully moves that the judgment of the court of appeals be vacated as moot.

1. This case concerns the scope of the courts of appeals' jurisdiction under 49 U.S.C. 46110(a) to review orders of the Federal Aviation Administration (FAA).

Subtitle VII of Title 49, the "Aviation Programs" subtitle, is divided into five parts. Part A is designated "Air Commerce and Safety." The remaining Parts are designated "Airport Development and Noise" (Part B), "Financing" (Part C), "Public Airports" (Part D), and "Miscellaneous" (Part E).

Part A contains its own provision governing judicial review, which states in relevant part:

> [A] person disclosing a substantial interest in an order issued by * * * the Administrator of the Federal Aviation Administration * * * under this part may apply for review of the order by filing a petition for review in the United States Court of Appeals. * * * The petition must be filed not later than 60 days after the order is issued [unless] there are reasonable grounds for not filing by the 60th day.

49 U.S.C. 46110(a). In such a case, the court of appeals has "exclusive jurisdiction" to review "any part of the order." 49 U.S.C. 46110(c).

No analogous provision vests the courts of appeals with exclusive jurisdiction to review all FAA orders issued under Parts B through E. Consequently, the district courts retain federal-question jurisdiction to review most orders issued exclusively under those Parts. Such review is subject to the general judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and to the six-year limitations period generally applicable to actions against the United States, see 28 U.S.C. 2401(a).

2. a. In December 2000, the FAA issued a Finding of No Significant Impact and Record of Decision (Order), which approved an airport development program for the Oakland International Airport in California. See Pet. App. 6a-40a. The Order recites that it is being issued "pursuant to 49 U.S.C. 40101 [contained in Part A] and 49 U.S.C. 47101 [contained in Part B]," and is "subject to review by the Courts of Appeals" under 49 U.S.C. 46110. Pet. App. 40a. The Order contains determinations under Part A, including determinations

regarding air commerce and air safety. The Order also contains analyses of issues under statutory provisions other than those in Part A. In particular, in the exercise of its airspace management authority under 49 U.S.C. 40103(b), a provision of Part A, the FAA approved the airport layout plan (which depicts the various components of the airport development program for the Airport), determining that the plan would involve a safe and efficient use of navigable airspace. Pet. App. 38a-39a. The Order also contains analyses of issues under statutory provisions other than those in Part A. Thus, the FAA also approved the airport layout plan under 49 U.S.C. 47107(a)(16), a provision of Part B. Pet. App. 39a. And as relevant here, the FAA prepared an environmental assessment, as required under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332, to determine whether a full environmental impact statement was required for the airport development program for the Airport. The FAA determined that the program would not have a significant impact on the environment, thereby relieving the FAA of the obligation to prepare an environmental impact statement. Pet. App. 40a.

b. The City of Alameda, a California municipality, and two private associations, the Citizens League for Airport Safety and Serenity and Berkeley Keep Jets Over the Bay Committee, challenged the Order by filing a petition for review, pursuant to 49 U.S.C. 46110(a), in the United States Court of Appeals for the Ninth Circuit.[1] The petition did not indicate the nature of the challenge. It became evident during briefing that the petitioners (respondents here) were challenging the

[1] The petition, as amended, named the Port of Oakland and its Board of Commissioners as respondents along with the FAA.

Order solely on the ground that the FAA had allegedly failed to conduct a suitable environmental evaluation under NEPA in connection with its approval of the project in the Order. Pet. App. 4a-5a n.3. As relief, the petitioners asked the court of appeals to hold that the Order violated NEPA and to suspend the FAA's approval of the airport layout plan (except its airport roadway component) until the FAA prepared an environmental impact statement that complied with NEPA. City of Alameda, et al., C.A. Br. 66.

The court of appeals held, *sua sponte*, that it lacked appellate jurisdiction under 49 U.S.C. 46110(a) and directed that the case be transferred to the district court. Pet. App. 1a-5a. The court concluded that the fact that the FAA had acted, in part, under Part A was insufficient to establish jurisdiction under Section 46110(a). *Id.* at 4a. The court observed that "[t]he FAA actions *challenged by petitioners* * * * concern themselves with matters covered by Part B, Airport Development and Noise, rather than Part A, that concerns Air Commerce and Safety." *Ibid.* Accordingly, the court concluded that the petitioners in that court had "fail[ed] to disclose a 'substantial interest' in an order issued under Part A," as required by Section 46110(a). *Ibid.* The court denied the FAA's petition for rehearing en banc. *Id.* at 41a.

c. On December 6, 2002, the Solicitor General, on behalf of the FAA, filed a petition for a writ of certiorari to review the court of appeals' decision in this case. The petition explains that the court of appeals departed from the most sensible construction of Section 46110(a) as providing for review of all aspects of orders issued, in whole or in part, under Part A, regardless of the particular portion of the order that is challenged or the particular ground on which the order is challenged.

The petition further explains that the court of appeals' decision squarely conflicts with the decisions of two other circuits applying the statutory predecessor of Section 46110(a), see *Sutton* v. *United States Dep't of Transp.*, 38 F.3d 621, 624-625 (2d Cir. 1994); *National Parks & Conservation Ass'n* v. *FAA*, 998 F.2d 1523, 1526-1528 (10th Cir. 1993), and threatens to complicate and prolong the review of time-sensitive orders approving airport development projects.

d. On December 18, 2002, the petitioners below (respondents City of Alameda, Citizens League for Airport Safety and Serenity, and Berkeley Keep Jets Over the Bay Committee) filed a Notice of Voluntary Dismissal With Prejudice (Notice) in the district court to which this case had been transferred. App. A, *infra*, 1a-2a. The Notice recites that it is given "pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure and the settlement agreement between petitioners and respondent Port of Oakland." *Id.* at 2a. Neither the FAA nor any other component of the United States government is a party to the settlement agreement or participated in its negotiation.

On December 20, 2002, the district court ordered the dismissal of this case with prejudice. App. A, *infra*, 2a. On December 30, 2002, counsel for respondents served notice of the dismissal on the FAA.

3. The voluntary dismissal of this case by the petitioners below (who are respondents herein), and the district court's order dismissing the case with prejudice, have rendered this case moot, thereby precluding any review by this Court of the court of appeals' *sua sponte* jurisdictional ruling. That ruling, however, retains the potential to create significant difficulties in the Ninth Circuit for the FAA (and other components of the Department of Transportation), as well as for

local airport authorities, with respect to the expeditious resolution of all challenges to orders issued under both Part A and other Parts of Subchapter VII of Title 49.

As a result of the court of appeals' ruling, when a party challenges such an order in the Ninth Circuit based only on the FAA's exercise of authority over matters outside Part A (such as NEPA), the challenge would not be subject to the 60-day limitation period of Section 46110(a). That would, as the D.C. Circuit has observed, "completely undo [the] act's requirement of a timely petition for review." *City of Rochester* v. *Bond*, 603 F.2d 927, 935 (D.C. Cir. 1979). It would also subject portions of the order to an additional level of judicial scrutiny, thereby "requiring duplication of the identical task in the district court and in the court of appeals," *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985), and delaying the date on which the order as a whole would become final. Moreover, if one party challenged the order as inconsistent with the requirements of Part A, while another party challenged the order as inconsistent with the requirements of Part B or NEPA, the court of appeals and the district court could, simultaneously or serially, be adjudicating the validity of different portions of the same order, producing "[t]he likelihood of duplication and inconsistency." *City of Rochester*, 603 F.2d at 936. As other circuits have recognized, the rationale for special statutory review provisions "is that coherence and economy are best served if all suits pertaining to designated agency decisions are segregated in particular courts." *Sutton*, 38 F.3d at 625 (quoting *City of Rochester*, 603 F.2d at 936); cf. *Florida Power*, 470 U.S. at 742 (noting the "seeming[] irrational[ity]" of a "bifurcated system" in which "some final orders in licensing proceedings receiv[e] two layers of judicial review and some receiv[e]

only one"). Unless the Ninth Circuit's decision in this case is vacated, however, the government (or other parties) will face the prospect of duplicative judicial proceedings and prolonged uncertainty with respect to the finality of FAA orders involving airport development and safety programs in the States of the Ninth Circuit.

4. This Court's "established practice * * * in dealing with a civil case from a court in the federal system which has become moot while on its way [to the Court] or pending [its] decision on the merits is to reverse or vacate the judgment below." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see, *e.g.*, *NTA Graphics, Inc.* v. *NLRB*, 511 U.S. 1124 (1993); *Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324, 329-331 (1961). The Court has followed that course in cases pending on petition for a writ of certiorari. See, *e.g.*, *Board of Governors* v. *Security Bancorp*, 454 U.S. 1118 (1981); see generally *Munsingwear*, 340 U.S. at 39-40; R.L. Stern et al., *Supreme Court Practice* 327 (8th ed. 2002).

Vacatur is especially warranted here because the parties who filed a petition for review in the court of appeals have since voluntarily dismissed the action, and the district court (to which the case was transferred pursuant to the Ninth Circuit's jurisdictional ruling) has entered an order of dismissal. In other cases in which the party that initiated proceedings in federal court withdrew or abandoned its request for relief while the case was pending before this Court, the Court has vacated the judgment below as moot. See, *e.g.*, *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 512-513 (1989); *Frank* v. *Minnesota Newspaper Ass'n*,

490 U.S. 225, 227 (1989) (per curiam); *Deakins* v. *Monaghan*, 484 U.S. 193, 199-201 (1988).[2]

The government is equitably entitled to the remedy of vacatur, because it has been prevented from obtaining review of the court of appeals' jurisdictional ruling for reasons not of its own making. See *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). As noted above, the underlying case became moot as a result of the voluntary dismissal of the action by the parties challenging the FAA's order—a dismissal that was, in turn, based on those parties' settlement with respondent Port of Oakland. All of those non-federal parties were also parties to a related state court case, in which they agreed to the entry of judgment as part of the settlement. Phase Two Agreement ¶ 4.3 (Oct. 8, 2002). The government was not a party to the settlement. Nor did the government participate in the negotiations that produced it. In such circumstances, the government "ought not in fairness be forced to acquiesce in the judgment," *Bonner Mall*, 513 U.S. at 25, which was made unreviewable entirely by the actions of others.[3]

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[2] The United States has previously taken the position that the Court should deny certiorari, even when the case has become moot, if the case would not otherwise warrant review. See Br. in Opp., *Velsicol Chemical Corp.* v. *United States*, 435 U.S. 942 (1978) (No. 77-900); see *Supreme Court Practice*, *supra*, at 327, 830 & n.30. Here, if respondents' dismissal of their petition for review had not rendered the case moot, the Ninth Circuit's jurisdictional ruling would merit the Court's review. As explained above and in the petition for certiorari (at 6-13), the court of appeals' ruling is incorrect, is contrary to the decisions of two circuits (and in tension with the decisions of two others), and presents a question of considerable importance in the expeditious review of FAA orders.

[3] In *Bonner Mall*, the Court denied the petitioner's motion to vacate the judgment below, where the case had become moot by

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Accordingly, the petition for a writ of certiorari should be granted and the judgment of the court of appeals should be vacated as moot.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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General Counsel
Department of Transportation

FEBRUARY 2003

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virtue of a settlement entered into between the petitioner itself and the respondent. The Court observed, however, that its decision should not be understood to mean "that vacatur can never be granted when mootness is produced in that fashion." 513 U.S. at 29. It follows *a fortiori* that vacatur may be granted where, as here, the party seeking such relief did not participate in the settlement that mooted the case.

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Case No. C-02-1780 PJH

CITY OF ALAMEDA, A MUNICIPAL CORPORATION;
CITIZENS LEAGUE FOR
AIRPORT SAFETY AND SERENITY, A NOT-FOR-PROFIT
CORPORATION;
BERKELEY KEEP JETS OVER THE BAY, AN
UNINCORPORATED ASSOCIATION, PETITIONERS

v.

UNITED STATES DEPARTMENT OF
TRANSPORTATION; NORMAN Y.
MINETA, IN HIS OFFICIAL CAPACITY
AS SECRETARY OF THE DEPARTMENT
OF TRANSPORTATION; FEDERAL
AVIATION ADMINISTRATION; JANE
F. GARVEY, IN HER OFFICIAL
CAPACITY AS ADMINISTRATOR OF THE
FEDERAL AVIATION ADMINISTRATION;
WILLIAM WITHYCOMBE, IN HIS
OFFICIAL CAPACITY AS REGIONAL
ADMINISTRATOR OF THE FEDERAL
AVIATION ADMINISTRATION; PORT
OF OAKLAND; AND BOARD OF PORT
COMMISSIONERS, PORT OF
OAKLAND, RESPONDENTS

NOTICE OF VOLUNTARY DISMISSAL WITH PREJUDICE AND [~~PROPOSED~~] ORDER

NOTICE IS HEREBY GIVEN that pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure and the settlement agreement between petitioners and respondent Port of Oakland, petitioners respectfully request an order voluntarily dismissing the above-captioned action WITH PREJUDICE, with each party to bear its own costs and attorneys' fees.

CITY OF ALAMEDA and CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY

Dated: [12/17/02] By: /s/ [E. CLEMENT SHUTE, JR.]
E. CLEMENT SHUTE, JR.

Dated: [12/18/02] By: /s/ [STEVEN F. PFLAUM by OLA]
STEVEN F. PFLAUM

Dated: [12/18/02] By: /s/ [JOHN SHORDIKE by OLA]
JOHN R. SHORDIKE

IT IS SO ORDERED

/s/ PHYLLIS J. HAMILTON
PHYLLIS J. HAMILTON
United States District Judge

[12/20/02]
Date

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Case No. C-02-1780 PJH

CITY OF ALAMEDA, A MUNICIPAL CORPORATION;
CITIZENS LEAGUE FOR
AIRPORT SAFETY AND SERENITY, A NOT-FOR-PROFIT
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ADMINISTRATOR OF THE FEDERAL
AVIATION ADMINISTRATION; PORT
OF OAKLAND; AND BOARD OF PORT
COMMISSIONERS, PORT OF
OAKLAND, RESPONDENTS

NOTICE OF ENTRY OF ORDER DISMISSING ACTION WITH PREJUDICE

NOTICE IS HEREBY GIVEN that the Court has entered the attached order dismissing the above-captioned action with prejudice.

Dated: [12/30/02] /s/ By: [E. CLEMENT SHUTE, JR.]
E. CLEMENT SHUTE, JR.
Attorney For CITY OF ALAMEDA and CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY