No. 07-1924

United States Court of Appeals for the First Circuit

JOHN D. CERQUEIRA
PLAINTIFF-APPELLEE,

v.

AMERICAN AIRLINES, INC.
DEFENDANT-APPELLANT

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. WILLIAM G. YOUNG, U.S. DISTRICT JUDGE]

BRIEF OF AIR TRANSPORT ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT AMERICAN AIRLINES, INC. AND REVERSAL OF THE DISTRICT COURT'S DECISION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Air Transport Association of America, Inc. states that it is a District of Columbia non-profit corporation and issues no stock.

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INTEREST OF *AMICUS CURIAE* AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

The Air Transport Association of America, Inc. (ATA) is the nation's oldest and largest airline trade association, representing the leading airlines of the United States.[1] Since its inception, ATA has played a major role in significant government decisions regarding the aviation industry and it regularly participates in litigation that impacts commercial air transportation.

ATA and its member airlines operate every day at the intersection of the two compelling interests in this case: the security of air travel and the civil rights of air passengers. The safety and security of commercial airplanes is essential to the nation's economic well-being, and ATA has been at the forefront of advancing the interests of aviation safety and security for over seventy years. ATA's representatives regularly testify before Congress on safety and security matters, and it works closely with member airlines and with federal agencies to regarding safety and security regulations and programs. At the same time, ATA and its

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1 ATA's airline members are: ABX Air, Inc.; Alaska Airlines, Inc.; Aloha Airlines, American Airlines, Inc.; ASTAR Air Cargo, Inc.; Atlas Air, Inc.; Continental Airlines, Inc; Delta Air Lines, Inc; Evergreen International Airlines, Inc.; Federal Express Corp., Hawaiian Airlines, JetBlue Airways Corp., Midwest Airlines, Inc.; Northwest Airlines, Inc.; Southwest Airlines, Co.; United Airlines, Inc.; UPS Airlines and US Airways, Inc.

members are cognizant of the need to protect the civil rights of passengers, and ATA has participated in the development and implementation of regulations that prohibit discrimination within the unique context of air travel.

By contemporaneous motion, ATA is requesting leave from the Court to file this *amicus curiae* brief.

ISSUE PRESENTED

Whether the decision of an airline employee to deny service to a passenger may create liability for the airline, when the decision was made based on a good-faith, reasonable belief that the passenger presented a safety risk, even assuming there is evidence that non-decision-making employees may have become concerned about that passenger's behavior in part because of the passenger's perceived race or national origin.

SUMMARY OF ARGUMENT

In 49 U.S.C. § 44902(b) and in numerous judicial opinions, Congress and the courts have recognized the pressing security concerns unique to commercial air travel and the compelling economic and civil rights of airline passengers. They have struck a considered and rational balance between these concerns: limited immunity for denial-of-service decisions made in good faith. So long as an airline's actual decision to remove a passenger or deny service was not arbitrary and capricious, and was based on the information available to the airline at the

time, it is not actionable at law. The analysis is limited to the facts known to the person making the decision, and there is no duty to mount an investigation before reaching a decision in order to vet or probe the motives of the various persons who might provide information upon which the actual decision is based. This immunity, rooted in the common law and in § 44902(b), was most prominently expressed by the Second Circuit in 1974, and it has been the law ever since.

In marked contrast to this sound and well-settled balance, the district court in this case completely disregarded the compelling security concerns relevant here, and instructed the jury to treat this as if it were a run-of-the-mill discrimination case, as if it had occurred in an office or in a restaurant. The jury instructions contained no explanation of the limited analysis imposed by § 44902(b), and in fact *encouraged* the jury to impute the alleged bias of non-decision-makers to the airline, in direct contradiction of the settled law. Thus, the verdict reached by this improperly instructed jury cannot stand. Furthermore, because the plaintiff introduced no evidence that the decision-makers did not act in good faith or that the decision itself was arbitrary and capricious, judgment in favor of American Airlines is appropriate as a matter of law.

ARGUMENT

Airlines faced complex and intense security pressures long before four commercial jet liners, including two flown by defendant-appellant American Airlines, were hijacked and used by terrorists as weapons on September 11, 2001. In the late 1960's and early 1970's, U.S. passenger aircraft were routinely hijacked and forced to land in Cuba. International terrorists have long favored attacks on aircraft, including well-known incidents such as TWA Flight 847 (held hostage in Beirut for two weeks in 1985) and the 1988 destruction of Pan Am Flight 103 over Lockerbie, Scotland. *See generally,* Department of State, *Significant Terrorist Incidents, 1961, 2003: A Brief Chronology* (2004). Accessible at http://www.state.gov/r/pa/ho/pubs/fs/5902.htm. American Airlines, as one of the world's largest airlines, has been involved in its share of these tragic events, including the loss of two planes on September 11, 2001 and narrow escapes from the "shoe bomber," Richard Reid (detained in-flight while attempting to destroy American Flight 63 in 2001) and the trans-Atlantic aircraft plot broken up by British law enforcement in 2006.

Security is of paramount concern to everyone involved in air travel, and public confidence in airline security is critical to the industry. Accordingly, all participants play an active role, and a complex body of security measures had been developed. The federal government is heavily invested in airline security through

the Department of Homeland Security and the Transportation Security Administration. Airlines and airports work closely with these agencies to execute security programs. Passengers and airline employees are continually urged to be security conscious and to report suspicious persons or items, while law enforcement monitors passenger behavior to detect threats. Armed security personnel, x-ray machines, metal detectors and security cameras are a familiar presence at airports. But the most important safety tool is the exercise of human judgment. Because ultimately all of these measures come down to a single decision: to board or deny a suspicious passenger.

It is in the moment of that decision (typically made with limited information, with no time to conduct further investigation, and in the face of potentially catastrophic consequences) that intense security concerns must be reconciled with our nation's deeply-held convictions on civil rights and freedoms. And as they have in similar areas of law enforcement and government action, Congress and the courts have responded with a limited immunity that protects airlines from second-guessing and hindsight with regard to these critical judgments. *For over thirty years, good faith decisions by airlines to deny boarding because of security risks have not been actionable at law.* This compromise, struck in statute (49 U.S.C. § 44902(b) and repeatedly reaffirmed in court decisions gives airline decision-makers the needed assurance that their real-time decisions will not be questioned

months or years after the fact by lawyers and juries, but also ensures that our citizens are not subject to malicious harassment and discrimination.[2]

Unfortunately, the district court in this case disregarded that reasoned reconciliation of these important interests, and in doing so, ignored the will of Congress and committed reversible error. In its jury instructions, the court stated the law as it applies outside the airline context, as if this were a run-of-the-mill case of employment discrimination or refusal of service in a hotel or restaurant. Moreover, the court's error was not merely one of omission. Not only did it fail to instruct the jury about the limited immunity afforded airlines by section 44902(b), it encouraged the jury to pierce that immunity by explaining in detail the mechanism of *respondeat superior*.

A review of the record can lead to only one conclusion: the jury's verdict was entirely dependent on the flawed instructions. No evidence was introduced that the decision-markers in this case, Captain Ehlers and Craig Marquis, harbored

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[2] Tellingly, Congress has recently *increased* the protection afforded airline employees and other persons in civil aviation security-related situations following the terrorist attacks of September 11, 2001. *See* 49 U.S.C. §44921(h) (limitations on liability for Federal flight deck officers, air carriers, and Federal Government); 49 U.S.C. §44922(e) (application of Federal Tort Claims Act to federally deputized state and local law enforcement officers); 49 U.S.C. §44941(a) (immunity for airlines and their employees for reporting suspicious activity). *See also* 49 U.S.C. §44944(b) (post-9/11 immunity for voluntary provision of emergency services on commercial flights).

any racial bias of their own or understood that such bias may have been present in the crew. There was nothing to suggest that their judgment was anything but a good-faith decision in a difficult situation. The plaintiff's case was built on entirely upon the testimony and records of the flight attendants, and no evidence was introduced that any of the flight attendants communicated overtly race-biased information to either decision-maker. A properly instructed jury would have known that whatever the alleged bias on the part of the flight attendants, they were not permitted to impute it to the actual decision-makers under § 44902(b). The only proper resolution of this matter is judgment as a matter of law in favor of American Airlines.

I. Airlines have broad discretion to refuse service to passengers for safety reasons, including security risks, provided that the decision to refuse service is grounded in a good faith concern and therefore not arbitrary and capricious.

A. 49 U.S.C. § 44902(b) protects airline denial-of-service decisions from suit except where the decision is arbitrary and capricious when considered in light of the information known to the decision makers at the time of the decision.

Courts have uniformly held that pilots have very broad discretion in deciding to remove a passenger for safety and security reasons[3] under 49 U.S.C. § 44902(b)

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[3] There is no doubt that the term "safety" in § 44902(b) encompasses security concerns. Many of the opinions considering § 44902(b) have

[Footnote continued on next page]

, and have accordingly held that such decisions are afforded a limited immunity from subsequent civil actions. As the Fourth Circuit has observed, "[p]ursuant to 49 U.S.C. § 44902(b) , airlines must be accorded broad discretion in making boarding decisions related to safety." *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998). "Airlines might hesitate to refuse passage in cases of potential danger for fear of . . . actions claiming refusal to transport." *Id.* (affirming summary judgment in favor of airline on basis of federal pre-emption of state-law claims). Section 44902(b) reads as follows:

> Permissive Refusal. Subject to regulations of the Under Secretary, an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety.

This discretion and protection is best analyzed under the test of *Williams v. TWA*. In that case, now widely cited, the Second Circuit (considering the statutory predecessor to § 44902(b), 49 U.S.C. § 1511) held that immunity could only be pierced where the denial-of-service decision was deemed arbitrary and capricious, based on the information available to the airline at the time of the decision.

[Footnote continued from previous page]

> dealt with "security" related fact patterns, including *Williams* itself (in which a passenger was excluded from a flight due to his presence on the FBI's Most Wanted List). It is a notable illustration of the unique safety risks inherent to air travel that it is virtually impossible to identify "security" concerns that do *not* present dangers to the safety of the passengers and crew of an airplane. There are no minor safety risks at 35,000 feet.

Williams, 509 F.2d 942, 948 (2d Cir. 1975). The court based this holding on several factors. First, it noted that the statutory text explicitly refers to the *air carrier's* opinion: "Section 1511 expressly leaves the ascertainment of the necessity for denying passage to one seeking it, to the 'opinion of the air carrier' within the terms of the statute."[4] *Id.* Second, the court recognized the exigent circumstances inherent to the airline denial-of-service context: "Congress was certainly aware that decisions under § 1511 would in many instances probably have to be made within minutes of the plane's scheduled take-off time, and that the carrier's formulation of opinion would have to rest on something less than absolute certainty." *Id.* The court noted that "[t]he statute did not contemplate that the flight would have to be held up or cancelled until certainty was achieved." *Id.* And the court emphasized that this urgent decision making had to be conducted against a backdrop of the most pressing security concerns. "One of the greatest

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[4] When it re-enacted § 1511 as § 14902(b) in 1993, Congress changed the language from "in the opinion of the carrier," to "the carrier decides is." The Act is clear that the modification was not meant to work a substantive change in the law. "Sections 1-4 of this Act restate, without substantive change, laws enacted before July 1, 1993, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced." U.S. Transportation Laws, Pub. L. No. 103-272, § 6(a), 108 Stat. 745, 1378. The current text plainly retains the provision's focus on the decision made by the carrier, as opposed to any *ex post* evaluation of that decision.

hazards besetting the commercial transportation of passengers by air in the past fifteen years has been the hijacking of passenger planes." *Id.* at 946. The court considered it relevant that the defendant had experienced numerous hijackings in the year before the plaintiff was denied boarding.[5] *Id.* at 945 n.6. Third, the court noted that this approach was "consonant with the common law rule" that a carrier who believes that a passenger represents a danger "'may refuse to accept such person for transportation and is not bound to wait until events have justified its belief.'" *Id.* at 948 n.10 (quoting 14 Am. Jur. 2d *Carriers* § 865, at 309 (2000)). Thus the court held that denial of service decisions were protected by two elements: the limit of the analysis to the decision itself, based on the available information, and the arbitrary and capricious standard.

Williams has been widely cited and universally followed. *See* Kristine Cordier Karnezis, *Propriety of Air Carrier's Refusal for Safety Reasons to*

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[5] Today's backdrop is even more threatening. Two American Airlines planes were hijacked in the terror attacks of September 11, 2001, including Flight 11, which departed out of Logan International Airport. The 9/11 Commission Report, at 1. Richard Reid (the "shoe bomber") was caught attempting to destroy an American Airlines aircraft. Five American Airlines flights, including one bound for Logan Airport, were reportedly targeted in the 2006 liquid explosive plot disrupted by British law enforcement. *See generally*, Fact Sheet: Guidance for Airline Passengers (2006), http://www.dhs.gov/xnews/releases/pr_1158348944783.shtm (explaining heightened security requirements).

Transport Passengers or Property, 192 A.L.R. Fed. 403. Not only is it a sound interpretation of the statute and a just balance of competing interests, it draws on well-settled principles of American jurisprudence. All of its elements are familiar in other contexts. In law enforcement, which faces the same intersection of security concerns and civil rights protections, the limitations to available information and the focus on the decision itself are traditional tools. *See, e.g. Saucier v. Katz,* 533 U.S. 194, 205 (2001) (reasonableness of use-of-force decision is to be judged based on the "on-scene perspective" not with "20/20 vision of hindsight"). Qualified immunity protects police officers who act in good faith, cloaking the decisions of "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). As the Supreme Court has stated, the "accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (internal quotations and citations omitted). And in another parallel context, the Supreme Court has refused to apply *respondeat superior* to § 1983 suits against government agencies. *Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 403 (1997) ("We have consistently refused to hold municipalities liable under a theory of *respondeat superior*"); *Monell v. Dept. of Social Servs. of the City of New York*, 436 U.S. 658, 694 (1978)

(actions of government employees do not create liability for employer unless the actions were taken pursuant to official policy).

There should be no dispute that § 44902(b), *Williams*, and its progeny apply to this case; even the district court, noting the "weight of persuasive authority," (citing *Williams* and subsequent cases) acknowledged that the "'arbitrary and capricious' standard does in fact apply." Memorandum and Order (April 9, 2007) reported at *Cerqueira v. American Airlines, Inc.*, 484 F. Supp. 2d 232, 234 (D. Mass. 2007). The source of the dispute, and the heart of the district court's error, is the extent of the protection afforded American by the provision. The district court's position, as stated in its order and implicit in its jury instructions, is that § 44902(b) establishes merely an evidentiary standard, which can be satisfied by a finding of intentional discrimination. *Id.* ("since this Court did instruct the jury that American's liability depended upon a finding of intentional discrimination on account of race, the jury verdict necessarily satisfied the standard of 'arbitrary and capricious'"). However, this position does not recognize the second element of *Williams*, which limits the analysis to information known to the decision-maker.

The district court's construction of the law cannot be right. As discussed in I.B. *infra*, the district court's construction represents a clearly a flawed reading of *Williams* and subsequent cases which unequivocally hold that there are two elements to § 44902(b): the evidentiary standard of arbitrary and capricious *and*

the limitation of the analysis to the information known to the decision-maker. The district court offers no explanation as to why it ignored the second element. But even without the *Williams* line of cases, we know that the district court is wrong because its interpretation effectively means that § 44902(b) is meaningless in the face of any claim of intentional discrimination. Consider that if § 44902(b) did not exist, the district court's jury instructions in this case could have been used *without changing a single word*. If this had been a suit by an employee suing an employer, or a customer suing a restaurant owner, the district court could have instructed the jury precisely as it did. But airplanes are not flying restaurants, and § 44902(b) does exist. It *must* have an impact on the law as explained to the jury in a lawsuit to which it applies, or it has no meaning.

There can be no argument that that Congress did not intend § 44902(b) to operate in the context of discrimination lawsuits, nor did the district court attempt to defend such an impossible position (even as its ruling established it). Courts have routinely applied § 44902(b) in just that context, without any apparent trouble. *See, e.g., Williams; Dasrath v. Continental Airlines, Inc.*, 467 F. Supp. 2d 431 (D.N.J. 2006); *Al-Qudhai'een v. Am. W. Airlines, Inc.*, 267 F. Supp 2d 841 (S.D. Ohio 2003). It is well-settled that as general matter, a specific provision such as § 44902(b) has priority over general statutes such as 42 U.S.C. § 1981 or 42 U.S.C. § 2000d. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S.

365, 375 (1990) ("a specific statute will not be controlled or nullified by a general one") (citation omitted). And discrimination suits are an obvious and unavoidable risk whenever airline personnel must make quick decisions about boarding passengers based only on a swift assessment of their behavior and appearance.

Section 44902(b) *does* apply against discrimination claims of course, and what gives it force is in that context is the second element of *Williams*: the limitation of the analysis to information known to the decision maker. The following section I.B. discusses that element in detail.

B. Analysis of a § 44902(b) decision is limited to the information possessed by the decision maker, and an airline is not required to investigate the source of that information nor can it be held liable for any flaws it contains.

Courts have faithfully enforced the limitations placed on the analysis by *Williams*. They have restricted their consideration (and that of juries) to the decision itself, requiring that it be evaluated only on the basis of the information available to the decision-maker at the time the decision was made. Improper motivations or conduct on the part of those providing the information has been rigorously excluded, when unknown to the decision-maker. Furthermore, courts have been clear that the decision maker is under no duty to investigate or rule out any such flaws in the information, and that § 442902(b) does not allow for an inquiry into the reasonableness of the decision-maker's reliance beyond that

embodied in the arbitrary and capricious standard. Thus, § 44902(b) immunity protects airlines from suit even where the information underlying a decision is the product of an actionable bias or discrimination.

Several cases have involved airplane captains who relied on statements by flight attendants whose integrity was later called into question. Uniformly, courts have followed the *Williams* approach and excluded information not actually known to the captains in those cases. In *Christel*, a confrontation between a flight attendant and a passenger resulted in the flight attendant's call to the cockpit and request for the passenger's removal. *Christel v. AMR Corp.*, 222 F. Supp. 2d 335, 338 (E.D.N.Y. 2002). The captain, relying exclusively on the statements of the flight attendant, decided to remove the passenger. *Id.* Later investigation revealed that the confrontation may very well have been instigated and escalated by the flight attendant: "thirteen passengers gave Christel their names and addresses to back him up in the event he wanted to complain about [flight attendant] Mathieson's behavior." *Id.* Citing numerous precedents in accord with its approach, including *Williams*, the court held that "[e]ven if the battle of the egos escalated to Mathieson making exaggerated or even false representations to the captain, Captain Nelson did not have an obligation to leave the cockpit and investigate the truthfulness of Mathieson's statements." *Id.* at 340. Rather, the court looked only at the captain's mental state: "[s]ince the record is devoid of any

indications that Captain Nelson's decision to refuse Christel transportation was 'retaliatory or malevolent' such decision was not arbitrary and capricious." *Id.* (internal citation omitted).

In *Al-Qudhai'een*, a case involving similar facts to the instant appeal, the court faced disputed facts concerning the conduct of the plaintiffs that led up to the captain's decision to remove them from the plane and request a search of the baggage. *Al-Qudhai'een*, 267 F. Supp. 2d at 841. However, relying on *Williams* and citing *Christel*, the court held that the plaintiff's *actual* conduct was not material, because the analysis was limited solely to "what was known to Captain Patterson at the time he made the decision." *Id.* at 847 n.4. The plaintiff's contention that "defendants allegedly relayed false information based on racial stereotypes" was simply irrelevant, because the captain "is entitled to rely on the information provided to him by his crew despite any exaggerations or false representations." *Id.* at 848. In another similar case, *Dasrath*, the court dismissed a claim against an airline by a plaintiff who was incorrectly linked to two other passengers, allegedly on the grounds of his perceived race. *Dasrath*, 467 F. Supp. 2d at 435. Again, the court limited its analysis to the captain's decision itself. "This inquiry ... is not solely about what happened; the inquiry is what Capt. Hamp reasonably believed had happened.... if Capt. Hamp reasonably believed that something had taken place (even if it had not), his reasonable belief is what is

critical, not what actually took place." *Id.* at 446. Both cases were dismissed on summary judgment, because no evidence had been introduced which suggested racial bias on the part of the decision-maker. *Id.* at 449; *Al-Qudhai'een*, 267 F. Supp. 2d at 848.

Finally, in *Norman*, the court faced an unusual case in which the reporting flight attendant was not only alleged to have misrepresented the facts to the captain, but effectively forced the captain to exclude the objectionable passenger by refusing to fly when there were no backup flight attendants available to replace him. As in *Christel* and *Al-Qudhai'een*, the court ruled that "Captain Thornhill was entitled without further inquiry to rely upon Wisdom's representations." *Norman v. Trans World Airlines, Inc.*, 98 Civ. 7419 (BSJ), 2000 U.S. Dist. LEXIS 14618, *10 (S.D.N.Y. Oct. 6, 2000). Section 44902(b) immunity protected the captain's decision in *Norman* despite the fact that not only was the information upon which it was based suspect, but the flight attendant employed significant leverage directly on the captain, indisputably influencing the decision with his threat to leave the plane ("Captain Thornhill was *forced* to remove Norman." *Id.* at 11. (emphasis added)). Nonetheless, the court properly limited its analysis to the narrow evaluation of the captain's decision itself, which it deemed not arbitrary and capricious, thus holding that "§ 44902(b) forecloses any claims for recovery based on that decision." *Id.*

C. Section 44902(b) does not undermine the important government interest of eliminating racial discrimination, because its protection is limited and an alternative means of deterrence and redress is available.

Section 44902(b) does not operate in isolation, but within a system that Congress devised to balance the unique issues of the airline industry and the compelling policy goals of equal access and fair competition. In this system, persons who believe that they have been wrongfully excluded from an airplane on the basis of their race are not without remedy under federal law, nor are airlines immune from civil rights concerns under § 442902(b). On the contrary, civil rights lawsuits against airlines may proceed where the decision-maker's conduct was arbitrary and capricious, and furthermore, as demonstrated by the record in this case, the Department of Transportation ("DOT") maintains an active civil rights enforcement regime.

The protection of § 44902(b) is a *limited* immunity because plaintiffs can overcome its protections where appropriate and successfully prosecute a lawsuit and obtain damages. It offers no protection to a decision-maker, or that person's airline-employer, who acts arbitrarily and capriciously in denying service to a passenger. A captain whose decision to deny boarding to a passenger is motivated by racial animus acts arbitrarily and capriciously and neither the captain nor the captain's employer is shielded from suit by § 44902(b).

Furthermore, § 44902(b) is not an isolated provision, but part of a broader scheme of federal regulations. Those regulations include significant safeguards for the civil rights of passengers. Under 49 U.S.C. § 40127(a) air carriers "may not subject a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry." Similar provisions prohibit discrimination on the basis of physical handicaps (49 U.S.C. § 41705), deceptive trade practices (49 U.S.C. § 41712), and discriminatory practice by foreign airlines (49 U.S.C. § 41310). The DOT is empowered to accept consumer complaints (49 U.S.C. § 46101) and has sought to enforce these provisions through civil penalties (49 U.S.C. § 46301). The DOT promotes and initiates this important enforcement function through its web site and through a toll-free telephone number. *Air Travel Service Problems: How complaints are handled*: http://airconsumer.ost.dot.gov/problems.htm.

Reliance on an administrative enforcement approach has important advantages. The DOT has obvious expertise in air transport issues, and can consider and implement airline-wide and industry-wide programs. It can also obtain substantial leverage over an air carrier by aggregating many individual complaints and pursuing a large-scale investigation and enforcement action. At the same time, because the DOT is also responsible for safety and security issues, its

proceedings and remedies can be expected to keep in mind the chilling effect on security procedures risked by unpredictable jury verdicts and punitive damages.

As suggested by the record in this very case, the DOT has actively fulfilled this enforcement duty. Between November, 2003 and June, 2004, the DOT issued consent orders against four major air carriers for violations of § 40127 and related provisions.[6] These orders arose out of DOT investigations into consumer complaints of alleged racial discrimination similar to the events that gave rise to this litigation. They required that the four air carriers implement civil rights training programs for all of their customer-facing employees at a minimum expense of between $500,000 and $1.5 million dollars per airline. The DOT's order covering American was issued just two months *after* Mr. Cerqueira was denied service on Flight 2237. Record at 455-59. As these enforcement actions illustrate, the *overall* Congressional scheme, including the protections of § 44902(b), balance the competing interests of airplane security and civil rights in a

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6 The air carriers were: American, United Airlines, Delta Air Lines, and Continental Airlines. Record at 455-59; Consent Order (Nov 19, 2003, http://dmses.dot.gov/docimages/pdf88/260047_web.pdf; Consent Order (June 21, 2004), http://dmses.dot.gov/docimages/pdf89/275482_web.pdf; Consent Order (April 2, 2004), http://dmses.dot.gov/docimages/pdf91/284555_web.pdf.

fair and just manner. Judgments such as the one allowed in the instant case undermine this scheme and thwart the will of Congress.

II. This court should reverse the district court's denial of the motion for judgment notwithstanding the verdict, because the jury was improperly instructed and there was no evidence sufficient to pierce § 44902(b) immunity.

A. The district court erred in its jury instructions because it not only failed to limit the jury's inquiry to information available to the decision-makers, but impermissibly *required* the jury to consider the motivations of the flight attendants.

The jury instructions in this case are utterly incompatible with § 44902(b) and the deep and uniform body of case law interpreting that provision. They contain no discussion of the limits placed on the analysis by § 44902(b): they do not explain the arbitrary and capricious standard, they do not focus the analysis on the denial-of-service decision and they do not exclude information unavailable to the makers of that decision. Instead, the court explicitly instructed the jury to consider allegations of bias by flight attendants and other non-decision making parties, and to hold American liable if its decision was in fact based on such "tainted information." This instruction is in direct and total contradiction with § 44902(b) and the entire body of relevant case law.

Jury instructions properly limiting the analysis to the decision itself are readily available and simple to administer. In *Cordero*, the Ninth Circuit approvingly quoted the district court's jury instructions, and affirmed a verdict for

the plaintiff-passenger, when the court "properly instructed the jury in the precise language of the *Williams* test." *Cordero v. Cia Mexicana de Aviacion, S.A.*, 681 F.2d 669, 672 (9th Cir. 1982). The approved jury instruction was 140 words long; it simply stated simply that the jury was to consider "the facts and circumstances as they appear to the pilot at the time that the decision was made" and that the decision was reasonable unless "the opinion of the pilot is arbitrary or capricious." *Id.* at 681 n.2. By contrast, the district court in this case, which throughout the trial was admirably thorough in explaining all relevant points of law and procedure to the jury, and which provided detailed jury instructions running several dozen transcript pages, entirely omitted the limitations placed on the jury by § 44902(b).

Instead of accurately stating the limitations of the proper analysis, the district court erroneously commanded the jury to undertake a far more searching analysis, and to consider the alleged bias and misrepresentations of the flight attendants. This incorrect approach ignores every available judicial opinion on the matter, and renders § 44902(b) a dead letter.

The district court's initial charge to the jury included the first improper instruction, requiring the jury to impute the conduct of any American Airlines opinion to the company:

> Now, American Airlines is a company. I can't go anywhere—I can't go to Texas and shake Mr. American Airlines' hand. I can't find the company. Companies are people and they're bureaucracies and

> they operate hierarchically; in other words, there are higher-ups in the company and lower down people. But all are employees of the company and they're—if you think they're acting within the scope of their employment and they're doing what they are doing as employees of American Airlines, then that conduct is attributed to American Airlines. That is American Airlines. It's the sum total of the people that work for it... *And let's say [racial bias is] why a lower level person acted as she did in respect to this. If that action is transformed into the action of the higher corporate people, if that's what drives the action of the higher corporate people, American's stuck with it because American should take care that they're not acting against a person based upon the perceived race or ethnicity.* The law forbids that.

Record at 393-94 (emphasis added).

The court expanded on this incorrect instruction in response to a question from the jury:

> So the actions of each level of person, so long as they're employed by American, those are American's actions. So one, you want to say is: at each level was that person -- why was that person motivated to make the recommendations to say the things that that person said or ordered?
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> ...
>
> *And we'll start at the lowest level. The flight attendant level.* Would that person have acted the way they acted, said the things they said even without taking into account the perception of that person that one of the things they were thinking about was perceived race or ethnic background?
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> ...
>
> *Did the captain act the way he did because of what he was told on account of someone below him acting with improper motivation*? Now, if that was not the only thing that persuaded him, if other people who were not acting from improper motivation, if they also gave him

> information and he had a bunch of information, some of it tainted, I will assume, and improper, but some of it all right, then the question is -- once you've got that taint in there, it's American Airlines that has to do the proving by a fair preponderance of the evidence, would he have acted that way anyway even if he didn't have the tainted or improper piece.
>
> ...
>
> *And if that improper data, that illegal belief, if that's what causes the decisions to be made, American Airlines is responsible for it; American Airlines is liable for that.*

Record at 412-13 (emphasis added).

In thorough and unmistakable terms, the court directed the jury to conduct the precise analysis which § 44902(b), *Williams*, and the entire body of relevant case law explicitly forbid. Section 44902(b) requires the jury to exclude information not known to the decision-makers. These instructions require the opposite approach: they exclude information that was known to the decision-makers, indeed was the basis of their decisions, if the jury believes that, unbeknownst to those decision-makers, that information was "tainted" by racial bias. The court's theory is that the airline must justify its decision based only on information that turns out after-the-fact to be true and free of racial bias, with no consideration of what was actually known about the information to the decision-maker at the time. This turns *Williams* on its head and reads § 44902(b) entirely out of the U.S. Code.

B. Judgment in favor of American Airlines is appropriate because no evidence was introduced tending to show a wrongful motive on the part of any American Airlines decision maker, thus no reasonable jury, properly instructed, could find in favor Mr. Cerqueira.

Because no evidence was introduced that would permit a reasonable jury to find that any American Airlines decision-makers discriminated against Mr. Cerqueira on the basis of his perceived race, it is proper for this Court to enter judgment in favor of American Airlines as a matter of law. The only evidence related to race were observations made by the flight attendants, and that evidence has no relevance to a proper analysis under § 44902(b). Even if this Court determines that this case merits jury consideration, it cannot find that the flawed jury instructions did not prejudice American. The district court explained at great length the exact mechanism of imputed racial bias, explicitly calling out the employment relationship between the flight attendants and the captain. Record at 413. At a minimum, this court should vacate the judgment below, and remand for a new trial.

Mr. Cerqueira can point to no evidence that any of the decision makers in this affair acted with the slightest hint of racial bias. The only references to race made by any American Airlines employee were brief notations on two of the three reports prepared after the fact by the flight attendants. The first stated: "[s]eemed to be foreign nationals (later confirmed/Middle East Passports)." Record at 432.

The second noted that one of the three passengers involved (not Mr. Cerqueira) had a "pony tail and heavy accent." *Id.* at 435. There is no evidence that even these small observations were communicated to Captain Ehlers or Mr. Marquis. And neither man saw Mr. Cerqueira before making any decisions about him. Of course, even if they had seen Mr. Cerqueira, merely being aware of a person's race is not evidence of racial bias, though it is plainly impossible absent such awareness. Captain Ehlers' detailed write-up of the event, the most comprehensive contemporaneous record we have, does not mention the passengers' appearance or race at all. *Id.* at 437. And his subsequent conduct belies any theory that he used security as a pretext for the removal of Mr. Cerqueira on the basis of race: he ordered all passengers, regardless of race, off the plane, had all passengers, regardless of race, re-screened, and ordered the plane searched with security dogs.[7]

Mr. Cerqueira's counsel plainly had no illusions about the basis of his case. He referred to the flight attendants' notations and testimony about appearance four times in his closing argument (Record at 403, 404, 406) and went into detail about the inconsistencies in the flight attendants' testimony and prior statements (*Id.* at

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[7] The subsequent behavior of the flight attendants is even more confounding to a theory of racial discrimination. They refused to fly on the plane at all, even without the three passengers on board. Record at 313.

404-06). There is relatively little discussion of Captain Ehlers or Mr. Marquis. In the absence of any evidence whatsoever that Captain Ehlers ordered Mr. Cerqueira off the plane because of his appearance, and in the absence of any evidence whatsoever that Mr. Marquis denied Mr. Cerqueira rebooking on account of his appearance, Mr. Cerqueira's claim against American Airlines must fail as a matter of law.

Should this Court perceive sufficient evidence of racial animus on the part of Captain Ehlers or Mr. Marquis for this case to reach a jury, it must recognize that *this* jury, instructed as it was, could not reach a just verdict. "An erroneous jury instruction warrants a new trial if the preserved error, based on a review of the entire record, can fairly be said to have prejudiced the objecting party." *Goodman v. Bowdoin College*, 380 F.3d 33, 47 (1st Cir. 2004) (internal quotations and citation omitted). Contrary to the district court's conclusion in its order, there can be little doubt that the district court's instructions unfairly prejudiced American Airlines. *Cerqueira* 484 F. Supp. 2d at 234. Not only did the district court incorrectly inform the jury that it could impute the flight attendants' alleged bias to American, it expressly and repeatedly encouraged it do so. The court explained in detail how the jury should evaluate the decisions of the flight attendants, and then follow their "tainted" information "up the ladder." Record at 412-14. "Did the

captain act the way he did because of what he was told on account of someone below him acting with improper motivation?" *Id.* at 413.

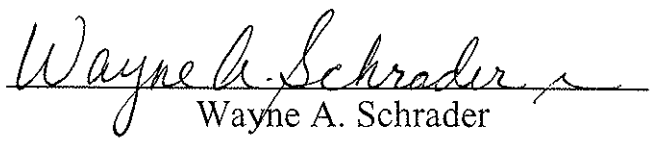
Plaintiff's counsel, delivering his closing argument after the court had instructed the jury, took care to pick up on this theory. "If the decision-makers relied on information, such as information from the flight attendants who did have a chance to perceive Mr. Cerqueira's characteristics, then American Airlines can be held liable." *Id.* at 403. "Of course whether Captain Ehlers actually saw Mr. Cerqueira or not doesn't matter if you find that he relied on information from people who did, and those people reported concerns because of bias." *Id.* at 405. The district court's incorrect jury instructions did not merely *prejudice* the jury, the formed the very basis for the plaintiffs' erroneous theory of liability.

CONCLUSION

For these reasons, American's prayer for relief on appeal should be granted, and this Court should reverse the decision of the district court; or in the alternative grant American a new trial.

Dated: August 2, 2007

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE

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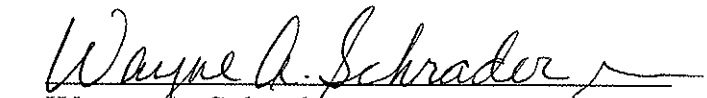

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Air Transport Association Of America, Inc. as *Amicus Curiae* was served on this 2nd day of August 2007, via overnight delivery on each of the following counsel of record for the parties:

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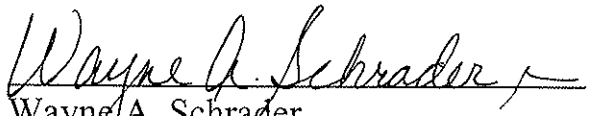

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