NO. 07-1824

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOHN D. CERQUEIRA,

Plaintiff-Appellee,

v.

AMERICAN AIRLINES, INC.,

Defendant-Appellant,

On Appeal from the United States District Court
For the District of Massachusetts
[Hon. William G. Young, U.S. District Judge]

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ASIAN AMERICAN JUSTICE CENTER, MEXICAN AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND PUERTO RICAN LEGAL DEFENSE FUND [SUPPORTING PLAINTIFF-APPELLEE JOHN D. CERQUEIRA AND AFFIRMANCE]

Michael Foreman*
Monica Saxena
Nicole Birch
**Counsel of Record*

Lawyers' Committee for Civil Rights
Under Law
1401 New York Ave., NW Suite 400
Washington, D.C. 20005-2124
Telephone: (202) 662-8600
Facsimile: (202) 783-0857

Attorneys for Amici Curiae
(*Additional Counsel Listed on Inside Cover*)

Vincent A. Eng
Aimee J. Baldillo
Asian American Justice Center
1140 Connecticut Ave., NW
Suite 1200
Washington, D.C. 20036
(202) 296-2300

Cynthia Valenzuela
The Mexican American Legal Defense & Educational Fund
634 South Spring Street
Los Angeles, CA 90014
(213) 629-2512

Angela Ciccolo
Anson Asaka
National Association for the Advancement of Colored People
4805 Mt. Hope Drive
Baltimore, MD 21215
(410) 580-5792

Foster Maer
Puerto Rican Legal Defense Fund
99 Hudson Street, 14th Floor
New York, NY 10013-2815
(213) 739-7507

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, The Lawyers' Committee for Civil Rights Under Law, the Asian American Justice Center, the Mexican American Legal Defense Fund, the National Association for the Advancement of Colored People, and the Puerto Rican American Legal Defense Fund are tax exempt non-profit organizations. They do not have any corporate parent. They do not have any stock, and therefore no publicly owned company owns 10% or more of the stock of any of the *amici*.

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INTEREST OF THE AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law, the Asian American Justice Center, the Mexican American Legal Defense and Education Fund, the Puerto Rican Legal Defense Fund, and the National Association for the Advancement of Colored People submit this brief as amicus curiae in support of Respondent's argument that the lower court appropriately harmonized this Nation's commitment to eradicating unlawful racial discrimination, in part effectuated through meaningful application of 42 U.S.C. § 1981, and the airline industry's important interest in ensuring airline passenger security reflected in the Air Transportation Security Act of 1974.

All *amici* are national civil rights organizations who are dedicated to achieving racial equality in our Nation and who have a keen interest in making certain that race or national origin are not used in a discriminatory or arbitrary or capricious manner as a means of profiling those traveling throughout our country. *Amici* strongly believe, and the language and intent of § 1981 recognizes, that the protections of § 1981 are vital to this country's commitment to eradicating racial discrimination, and are capable of being harmonized with air travel safety concerns. Because *amici* believe that the

District Court decision affirmed well-settled principles of anti-discrimination law, *amici* wish to present their views concerning the scope of § 1981's protections in this context.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee has been continually involved in cases before the Supreme Court and the United States Courts of Appeal involving the proper scope and coverage afforded to federal civil rights laws, including 42 U.S.C. § 1981.

The Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the civil and human rights of Asian Americans. Collectively, AAJC and its Affiliates the Asian Law Caucus, the Asian Pacific American Legal Center of Southern California, and the Asian American Institute have over 50 years of experience in providing legal public policy, advocacy, and community

education on discrimination issues. The question presented by this case is of great interest to AAJC because it implicates the availability of civil rights protections for Asian Americans in this country.

The Mexican American Legal Defense and Education Fund (MALDEF) is the leading national nonprofit Latino litigation, advocacy and educational outreach institution in the United States. MALDEF's mission is to foster sound public policies, laws and programs to safeguard the civil rights of the 48 million Latinos living in the United States and to empower the Latino community to fully participate in our society. The twenty-nine member board of directors is comprised of leaders from the public and private sector, government and law firms.

The Puerto Rican Legal Defense Fund ("PRLDEF") is a national non-profit civil right organization founded in 1972. PRLDEF is dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos through litigation and policy advocacy. Since its inception, PRLDEF has participated both as direct counsel and as *amicus curiae* in numerous cases throughout the country concerning the proper interpretation of the civil rights laws. The resolution of this case will have significant impact upon the extent to which PRLDEF and other civil rights organizations can protect the rights of their constituencies.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The NAACP has state and local affiliates throughout the nation, including the State of Maryland where it maintains its national headquarters. The fundamental mission of the NAACP includes promoting equality of rights, eradicating caste and race prejudice among the citizens of the United States and securing for African Americans and other minorities increased opportunities throughout society. The NAACP has appeared before courts throughout the nation in numerous important civil rights cases, including several addressing the proper application of 42 U.S.C. § 1981.

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

I. SUMMARY OF ARGUMENT

This appeal asks this Court to address the relationship between two compelling national interests: the security of airline passengers, and our nation's commitment to combating racial discrimination. Appellant American Airlines ("American") and *amicus* Air Transport Association of America ("ATA") claim there is a conflict between these interests, but application of well-settled principles of law shows that there is no such conflict. They argue that if the Court credits the trial court's application of

our longstanding anti-discrimination laws to airline passenger removal decisions, airline security will necessarily be compromised. Accordingly, American and ATA seek to evade the reach of 42 U.S.C. § 1981, one of this country's most venerable civil rights statutes, and to jettison well-established agency principles of corporate responsibility. Under their view of the law, federal aviation law permits racially discriminatory behavior, and gives flight attendants and other airline employees free reign to indulge any and all biases and discriminatory beliefs in their screening of passengers, so long as the airline purportedly insulates itself from this discriminatory animus by vesting passenger removal decision in the pilot, even if the pilot relies entirely on the other employees' actions or recommendations when deciding to remove a passenger from a plane.

This purported dichotomy between safety and racial equality is a false one, as these two goals are not in conflict. Airlines, like all corporate employers, must ensure that their employees make rational rather than racially discriminatory decisions when determining which passengers pose a potential threat to airline safety. The necessary mechanism for ensuring that such decisions are based on rational security concerns, instead of mere racial stereotypes, already exists in the law and was applied by the court below. Contrary to American's and ATA's novel and unsupported attempt to write

the concept of corporate responsibility out of aviation law, respondeat superior is an essential tool for ensuring that accountability extends down the chain of command, to foster dignity and respect in the interactions between corporate employees and customers,[1] and most importantly, to restrain racially discriminatory behavior.

Our nation's history teaches that predicating security policies on racial stereotypes creates an ineffective and unjust policy based on "misinformation, half-truths, and insinuations." *Korematsu v. United States*, 323 U.S. 214, 239 (1944) (Murphy, J. dissenting). This principle is as true today as it was in 1944, but sixty years of progress means that it is now expressed not in the pages of a dissent, but in the binding law of our nation, applied by the district court below.

The district court understood that airlines must harmonize their safety policies with existing civil rights and agency laws, to ensure that airlines rely on accurate information when making passenger removal decisions, rather than on the type of racially biased misinformation that history reveals to be

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[1] For example, racial profiling may inflict psychic or stigmatic injury, exacerbate tension between racial minorities and law enforcement agencies, and reinforce officers' tendency to base investigative decisionmaking on potential suspects' racial group membership. *See, e.g.*, Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 Stan. L. Rev. 571, 591 (2003).

untrustworthy. The court below, honoring our nation's interest in eradicating racial discrimination, harmonized this interest with the "arbitrary and capricious" standard set forth in 49 U.S.C. § 44902, the Air Safety Act of 1974. This Court should reject the false dichotomy offered by American and the ATA.

II. ARGUMENT

The Supreme Court has repeatedly emphasized the importance of eliminating racial discrimination. The Court has noted that there exists a "compelling constitutional interest of our nation in eliminating all forms of racial discrimination," *Rose v. Mitchell*, 443 U.S. 545, 578 (1979), and has recognized "society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989).[2] Section 1981 of the Civil Rights Act exemplifies this commitment.

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[2] *See also Johnson v. California*, 545 U.S. 162, 172 (2005) (making note of "the overriding interest in eradicating discrimination from our civic institutions"); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 779 (1976) (stating that "ameliorating the effects of past racial discrimination [is] a national policy objective of the 'highest priority[]'").

A. The national interest in eradicating racial discrimination as epitomized by one of this country's oldest and broadest civil rights statutes, 42 U.S.C. § 1981, can be harmonized with airline security concerns.

Section 1981 of the Civil Rights Act of 1866 effectuated the Thirteenth Amendment's promise of freedom to the newly emancipated slaves. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (providing an extensive review of the legislative history of the Civil Rights Act of 1866). It secured certain basic civil rights for all individuals, including the right to make and enforce contracts. *Id.* In pertinent part, 42 U.S.C. § 1981 instructs that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981. It is beyond dispute that § 1981's prohibition on racial discrimination in the making and enforcement of contracts includes purely private contractual relationships, such as the contract at issue here between Mr. Cerquiera and American Airlines. *Runyon v. McCrary*, 427 U.S. 160, 168 (1976) (declaring that "it is now well-established that section 1 of Civil Rights Act of 1866 prohibits racial discrimination in the making and enforcement of private contracts." (citations omitted)).

Although the immediate impetus for enacting § 1981 was to eradicate the severe discrimination plaguing the freed slaves during the Reconstruction era, the expansive language of § 1981 has been interpreted to extend beyond "the particular and immediate plight of the newly freed Negro slaves." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 296 (1976). Section 1981 has evolved into a broad statutory mechanism that embodies a wide-ranging principle of nondiscrimination in contracting that "proscribe[s] discrimination in the making or enforcement of contracts against, or in favor of, any race." *Id.* at 295. As recently as 1991, Congress reaffirmed § 1981's extensive reach, amending it to clarify that § 1981 forbids discrimination in "the making, performance, modification and termination of contracts, and the enjoyment of ***all*** benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b) (emphasis added). Congress explicitly noted that the intention of § 1981 was to "bar ***all*** race discrimination in contractual relations," H.R. Rep. No 102-40 at 92 (emphasis added), putting to rest once and for all any idea that this statute could be evaded in the making of private contracts. The lower court properly recognized the importance of § 1981 when it refused to exempt American from its coverage.

B. Corporate defendants are vicariously liable under respondeat superior for the discriminatory animus of subordinate employees when the subordinates taint the corporate decisionmakers' actions, even if the decisiomakers do not independently harbor any illicit discriminatory motivation.

It is well settled that respondeat superior applies in § 1981 actions against private corporations. This doctrine, indeed, is vital to effectuating § 1981's expansive mission of barring all race discrimination in contractual relations. Section 1981's broad mandate cannot be satisfied if corporations can circumvent its application simply by creating a protective shell around the ultimate decisionmaker who acts based on information provided by subordinates that is tainted by racial or otherwise improper bias.

Further, in the practical application of anti-discrimination law including § 1981, this Court, consistent with other Circuits, has long held that "the inquiry into a corporation's motivations need not artificially be limited to the particular officer who carried out the action." *Freeman v.*

Package Machinery Co., 865 F.2d 1331, 1342 (1st Cir. 1988).[3] Rather, as this Court later elaborated, the proper inquiry is into the discriminatory statements or conduct of "the key decisionmaker or those in a position to influence the decisionmaker." *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000). Thus, "corporate liability can attach

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[3] The availability of corporate liability based on respondeat superior exists in all circuits, albeit with some differences in the type or amount of influence that is required to create corporate respondeat superior liability. *See, e.g.*, *Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 161-162 (2d. Cir. 2001); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995) (finding liability if the biased subordinate influenced, played a role, or participated in the decision at issue); *Hill v. Lockheed Martin Logistics Mgmt, Inc.*, 354 F.3d 277, 290-291 (4th Cir. 2004) (finding liability when biased subordinate is principally responsible for the challenged decision); *Laxton v. Gap Inc.*, 333 F.3d 572, 584 (5th Cir. 2003) (finding liability if the biased subordinate had influence or leverage over the official decisionmaker); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998) (finding liability if a subordinate's discriminatory bias influenced or played a meaningful role in the challenged decision); *Brewer v. Bd. of Trs.*, 479 F.3d 908, 917-918 (7th Cir. 2007)(finding liability when subordinate with discriminatory animus exerts significant influence and is tantamount to being a functional decisionmaker); *Stacks v. S.W. Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323 (8th Cir. 1994) (finding liability when the facts on which the decisonmakers rely have been filtered by a subordinate exhibiting discriminatory animus); *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001) (finding liability if a subordinate with a retaliatory or discriminatory motive is involved in the challenged decision); *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 487-88 (10th Cir. 2006) (finding liability if the actions of the biased subordinate caused the alleged discriminatory action); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998) (finding liability if a biased subordinate manipulates the decisionmaker); *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308, 1312 (D.D.C. 1998) (finding liability if the ultimate decisionmaker is not insulated from the biased subordinate's influence).

when neutral decisionmakers rely on information that is manipulated by another employee who harbors illegitimate animus." *Cariglia v. Hertz Equipment Rental Corp.*, 363 F.3d 77, 86 (1st Cir. 2004). Examples of scenarios when a biased subordinate's behavior would impute liability to the corporation include those in which a biased subordinate conceals relevant information, or feeds false or inaccurate information to influence the decisionmaker's actions. *Id.* at 85-88.[4]

Well-settled case law also confirms that respondeat superior applies to corporations under § 1981. In *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 392-396 (1982), the Supreme Court noted that respondeat superior liability was applicable to § 1981 suits so long as the defendant had a recognized common law agency relationship (either principle-agent or master-servant) or employment relationship with the party

[4] American and ATA mischaracterize the corporate liability issue when discussing the "cat's paw" doctrine. The First Circuit has not adopted the extreme position, adopted by the Fourth Circuit in *Hill v. Lockheed Martin Logistics Mgmt, Inc.*, 354 F.3d 277, 290 (4th Cir. 2004), that the actual decisonmaker must be so reliant on the subordinate "that the subordinate is the actual decisionmaker." *Id.* at 289. The heightened standard for respondeat superior embodied in the decisions of the 4th Circuit is not the law of this Circuit, and not the issue before this Court. Rather, in this Circuit, the issue is whether the subordinate's improper bias influences the decisionmaker's actions.

harboring the discriminatory animus.[5] In the aftermath of *General Building Contractors Ass'n,* "[i]t is well-established that an employer may be liable under a respondeat superior theory for its employees' violations of § 1981." *Williams v. Cloverland Farms Dairy, Inc.*, 78 F. Supp. 2d. 479, 485 (D. Md. 1999). Numerous other courts, including the District Court of Massachusetts, have in turn found respondeat superior liability for private entities in § 1981 actions. *See, e.g, Jones v. City of Boston*, 738 F. Supp. 604, 606 (D. Mass. 1990) (allowing § 1981 claim for the discriminatory acts of a subordinate employee); *Fitzgerald v. Mountain States Telephone & Telegraph Co.*, 68 F.3d 1257, 1262-63 (10th Cir. 1995) (applying common-

[5] The Court later restricted the availability of the respondeat superior doctrine in § 1981 claims brought against local government entities. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989). *Jett* explains that respondeat superior could not be available against government actors under § 1981 because that would create a direct conflict with the closely related civil rights statute, 42 U.S.C. § 1983, in that § 1983 provides a federal remedy for civil rights violations committed by individuals or entities acting under the authority of state law but precludes attaching respondeat superior liability to those local governments. *See Jett*, 491 U.S. at 727-736. Tellingly, in 1990, in the immediate aftermath of *Jett*, the District Court of Massachusetts applied the doctrine of respondeat superior in a § 1981 case against a hotel for the discriminatory actions of its bartender. *Jones v. City of Boston*, 738 F. Supp. 604, 606 (D. Mass. 1990). *See also Von Zuckerstein v. Argonne National Laboratory,* 1996 U.S. App. LEXIS 4840, *3-4 (7th Cir. 1996) (unpublished) (explaining that *Jett* does not prohibit applying respondeat superior liability to private employers in § 1981 cases); *Vakharia v. Swedish Covenant Hosp.*, 824 F. Supp. 769, 785 n.1 (N.D. Ill. 1993) (noting that post-*Jett* respondeat superior liability survives for § 1981 claims against private companies).

law respondeat superior principles to a § 1981 claim); *Bobbitt by Bobbitt v. Rage Inc.*, 19 F. Supp. 2d 512, 520 (W.D.N.C. 1998) (finding that the doctrine of respondeat superior is applicable to § 1981 claims); *Wesley v. Don Stein Buick, Inc.*, 996 F. Supp. 1299, 1309 (D. Kan. 1998) (stating that the touchstone for respondeat superior liability under § 1981 is the agency relationship); *Yates v. Hagerstown Lodge No. 212*, 878 F. Supp. 788, 798 (D. Md. 1995) (applying common-law respondeat superior principles to a § 1981 claim); *Vakharia v. Swedish Covenant Hosp.*, 824 F. Supp. 769, 785 n.1 (N.D. Ill. 1993) (noting that respondeat superior liability exists for § 1981 claims against private companies). For § 1981 to have meaning in the aviation area, the doctrine of respondeat superior, as already recognized by this Court, must be a part of its application.

C. Statutory law regarding the airlines' latitude in deciding when a passenger may be removed from an airplane provides an important and necessary means for airlines to protect passenger safety, but it does not abrogate respondeat superior liability.

The district court below properly instructed the jury that the respondeat superior doctrine applied to appellee's § 1981 claim. In doing so, the lower court harmonized the very important national interest of eradicating racial discrimination embedded in § 1981 with the very important concern for passenger safety embodied in the Air Transportation

Security Act of 1974. There can be no meaningful dispute as to whether this was the correct application of the law. American and ATA are thus forced to argue for a novel and unsupported exception to respondeat superior in certain § 1981 suits that is contrary to a long legal tradition.

(i) *The Air Transportation Security Act of 1974 is Easily Harmonized with § 1981*

American and ATA urge that the Air Transportation Security Act of 1974, 49 U.S.C. § 44902, which allows an airline to remove a passenger it perceives as a safety threat, cannot coexist with § 1981. This is plainly incorrect. The protections of 49 U.S.C. § 44902 are both important and necessary, but they do not foreclose statutory anti-discrimination laws. Section 1981 can and should play a role in an airline's liability for its decision to remove a passenger from an airplane, and its mandate is easily harmonized with § 44902 without undermining the goals or operation of that statute.

Under 49 U.S.C § 44902(b), "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."[6] American maintains that the agency principles of respondeat superior are irreconcilable with § 44902 insofar as § 44902 does not explicitly establish any form of subordinate

[6] ATA incorrectly construes "carrier" in § 44902(b) to represent an individual person or limited set of persons rather than a collective entity. In fact, a plain reading of the statute reveals that the principle of respondeat superior is incorporated into its terms. ATA argues that the reasonableness of passenger refusal decisions must be judged based only on "what was known to the decision-makers" at the time of the 44902(b) action. In this framework, the authority to refuse passengers rests with the captain of the aircraft. *See* Brief for Air Transport Association of America (as Amicus Curiae Supporting Appellant, *Cerqueria v. American Airlines, Inc.*, at 24 (1st Cir. 2007) (No. 07-1924) ("ATA Brief")), at 15 (citing as supporting precedent "[s]everal cases involv [ing] airplane captains who relied on statements by flight attendants whose integrity was later called into question"). Once establishing the aircraft captain as the relevant decision-maker under § 44902(b), the airlines claim that the law requires juries to "exclude information not known to the decision-makers" in assessing the reasonableness of the decision. *Id.* at 24. Accordingly, the airlines argue, any such assessment must disregard any racial bias that tainted the decision to remove the passenger if the captain remains unaware of that bias. *See id.* at 24. But Congress chose in § 44902(b) to vest passenger refusal authority in the "carrier" as an entity, not in an individual "decision-maker" such as an aircraft captain. 49 U.S.C. § 44902(b) (2006) (in spite of FAA regulations establishing the commanding pilot as the "final authority as to, the operation of that aircraft", 14 C.F.R. 91.3(a) (2006)). Accordingly, courts must consider the information known to the "carrier" as a whole to determine if the decision of the "carrier" to remove a passenger is "arbitrary and capricious." A plain reading of § 44902(b) suggests the relevant universe of information for passenger refusal consists of what the "carrier" knows through its various agents, i.e. pilots, flight attendants, and other employees of the "carrier." Therefore, if any of the agents of the "carrier" supply information "'tainted' with racial animus" leading to passenger refusal under § 44902(b), then one must impute that knowledge to the "carrier" even if the ultimate decisionmaker remains unaware.

basis liability. American asks the Court to create a new standard by which there is a blanket immunity for a pilot's decision to remove a passenger even if the decision was tainted by racial discrimination. In other words, under American's and ATA's proposed new rule, if airline employees act with express discriminatory animus, but do not communicate such animus to a pilot who then removes a passenger from the airplane, then an airline could easily escape liability under § 1981, even though the decision to remove the passenger was motivated solely by discriminatory animus. The district court rejected this construction of the law, which would provide the airlines an exemption to the coverage of § 1981 where Congress did not provide one. This Court should likewise refuse to engage in the legislative function of rewriting § 1981 as requested by American and ATA.

Adoption of this proposed standard would establish a loophole for airlines, who could evade liability for intentional discrimination by divorcing racial animus from the actions of the formal decisionmaker. Indeed, such a rule would have the perverse effect of discouraging the ultimate decisionmaker from ever seeking to form a basis for a decision to exclude a passenger from a flight: a pilot or other ultimate decisionmaker who ensured that he or she knew nothing about the alleged suspicious circumstances before removing a passenger would protect his or her

employer from exposure to liability, whereas a pilot or other ultimate decisionmaker who actually sought to use his or her independent judgment to determine whether a passenger should be removed from a flight would render the airline potentially liable under § 1981. This proposed perverse incentive system must be rejected, as it would rob airlines, and the passengers who depend on those airlines for their safety in the skies, of the informed judgment of the very individuals tasked with exercising and applying that judgment in time-sensitive and potentially dangerous circumstances.

As a legal matter, American's and ATA's novel concept that § 44902 erases or trumps any sort of corporate liability for discrimination finds no support in either §1981 or § 44902. If Congress wished to exempt airlines from liability under § 1981, it could have done so.[7] Instead, it reiterated the reach of § 1981 when it amended the statute in 1991. *See supra* p. 9. In addition, Congress has not amended § 1981's broad mandate in the years following the September 11, 2001 terrorist attacks, and there is nothing in the legislative history of § 1981 to indicate that Congress sought to provide

[7] Congress has excluded certain entities from the reach of anti-discrimination statutes. For example, Indian tribes are not subject to liability under Title VII of the Civil Rights Act of 1974. *See* 42 U.S.C. § 2000e (b).

an exemption to from this law for airlines. Congress' last and enduring statement on the scope of § 1981 is that it is meant to "bar ***all*** race discrimination in contractual relations." H.R. Rep. No 102-40 at 92 (emphasis added).

Similarly, Congress has not significantly redrafted § 44902 since its inception in 1958, notably including since the terrorist attacks of 2001. Congress' inaction, further, is in the face of two judicially imposed restrictions on the authority of airlines to exercise broad discretion in determining which passengers can be removed from an airplane.

First, courts have held that § 44902 does not sanction decisions to remove passengers that are unreasonable, irrational, arbitrary or capricious. *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d. Cir. 1975); *Cordero v. CIA Mexicana de Aviacion, S.A.*, 681 F. 2d. 669, 671 (9th Cir. 1982); *Dasrath v. Continental Airlines, Inc.*, 467 F. Supp 2d. 431, 443-44 (D.N.J. 2006); *Alshrafi v. American Airlines, Inc.*, 321 F. Supp. 2d 150, 164 (D. Mass. 2004); *MacIntosh v. Interface Group Massachusetts-Com Inc.*, No. 96-01321, 1999 WL 26914, at 6-7 (Mass. Super. Jan 15, 1999); *Schaeffer v. Cavallero*, 54 F. Supp. 2d 350, 351 (S.D.N.Y. 1999); *Adamsons v. American Airlines, Inc.*, 58 N.Y.2d 42, 48, 444 N.E 2d 21, 457 N.Y.S. 2d 771 (N.Y. 1982).

Second, courts -- including the district court below -- have further ruled that any decisions that were motivated by racial animus are *per se* arbitrary and capricious. As the district court explained, "actions motivated by racial or religious animus are necessarily arbitrary and capricious, and therefore beyond the scope of discretion granted by Section 44902." *Cerquiera v. American Airlines*, 484 F. Supp. 2d 232, 234 (2007) (*citing Alshrafi*, 321 F. Supp. 2d at 162.)[8] As the district court noted, the arbitrary and capricious standard integrates § 44902 with Congress' intent to protect against racial discrimination: "[T]his standard likely comports with the policy behind the statutory regime that provides airlines with much discretion when they must engage in the difficult decision whether to refuse service to passengers." *Id.* (*citing Williams'* conclusion that another anti-discrimination statute, the Federal Aviation Act of 1568 as amended, 49 U.S.C § 1374, applies to decisions to remove passengers under § 44902's predecessor statute, 49 U.S.C. § 1511.) The district court below and the Second Circuit in *Williams* both noted that statutory anti-discrimination laws

[8] The district court also cited *Dasrath v. Continental Airlines*, 228 F. Supp. 2d 531, 539-40 (D.N.J. 2002), for the proposition that when passenger removal from an airline is allegedly because of "intentional racial discrimination, not of a rational determination that the [the passenger's] presence was "inimical to safety[,]" "the [p]laintiff ha[s]... pleaded sufficiently that the removal was not the sort of rational safety measure shielded by §44902."

are not only reconcilable with § 44902, but operate in harmony. *See Cerquiera*, 484 F. Supp. 2d at 234; *Williams*, 509 F.2d at 948 ("Congress did not intend that the provisions of § 1374 would limit or render inoperative the provisions of § 1511 in the face of evidence which would cause a reasonably careful and prudent air carrier of passengers to form the opinion that the presence aboard a plane of the passenger-applicant" would or might be inimical to safety of flight.).

Congress' choice to allow such judicial restrictions without amending the statute to supersede otherwise applicable anti-discrimination law undermines American's and ATA's arguments that the statute must be read to accomplish that extreme end.

(ii) *Respondeat Superior Does Not Require an "Intensive Investigation"*

American's and ATA's principal argument against the application of respondeat superior in the context of airline security decisions is that it would necessarily require a pilot to make an in-depth investigation into the reported safety concern, and that such an investigation would be infeasible in the aviation context. This is a straw man. The safety concerns of airlines are not incompatible with a *reasonable* investigation into perceived safety threats. The cases cited by American and ATA reject the idea that there is a

duty to conduct an *in-depth* investigation into the information supplied by airline personnel due to the complex safety considerations and time constraints posed by airline travel, but they do not come close to supporting the extreme conclusion that absolutely *no* investigation of subordinates' reports is warranted.

American first cites *Williams,* an early case on this issue, where the court held that there was no Congressional intention for airlines to make a "thorough inquiry." *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d. Cir. 1975). In *Williams*, the airline had received a warning from the FBI that an individual was "known to carry firearms, was schizophrenic and a dangerous person and that his arrival at the Detroit airport was likely to produce a mass demonstration." *Id.* at 947. The plaintiff argued that having received this information, the airline was required to perform a "thorough and complete investigation of the plaintiff's record, background and personal history." *Id. Williams* rejected the plaintiff's specific request for an in-depth investigation as unreasonable given the narrow time frame in which pilots must conduct removal decisions, particularly given that the information was coming from a government agency. *Id.* Here, of course, the information supplied to the pilot was not from a government agency, but from an airline employee, and the record gives no indication of *any* piece of objective

information transmitted to the pilot that could provide the basis for a non-arbitrary determination that the appellee was a security threat. *Williams* cannot be read to excuse an airline from making any type of reasonable examination to ensure that a flight attendant is not acting merely from discriminatory animus.

The other cases cited by American and ATA similarly go no further than rejecting a requirement that airlines engage in an *extensive* investigation. They certainly do not reject reasonable inquiry into flight attendant safety reports by more senior airline staff. *Cordero v. CIA Mexicana de Aviacion, S.A.* 681 F.2d 669, 671 (9th Cir. 1982) and *Zervigon v. Piedmont Aviation*, 558 F. Supp. 1305, 1306 (S.D.N.Y. 1983), merely hold that there is no duty to complete an ***in-depth*** investigation. Similarly, *Sedigh v. Delta Airlines*, 850 F. Supp. 197, 202 (E.D.N.Y. 1994), holds only that the "airline was not obligated to make a ***more thorough*** investigation into *Sedigh*'s background before making its determination that he posed a threat to the airplane." And to the extent that *Christel v. AMR Corp.*, 222 F. Supp. 2d 335, 340 (E.D.N.Y. 2002), and *Al-Qudhai'een v. American West Airlines*, 267 F. Supp. 2d 841, 847 (S.D. Ohio 2003), suggest that a pilot can rely entirely on flight attendants' representations about passengers in making decisions as to passenger removal, they are based on a misreading of the

cases discussed above, which do not deny the feasibility of undertaking limited investigatory duties.[9]

Finally, *Dasrath v. Continental Airlines, Inc.* 467 F. Supp. 2d. 431 (D.N.J. 2006), *Norman v. Trans World Airlines*, 98 Civ. 7419 (BSJ), 2000 U.S. Dist. LEXIS 14618 (S.D.N.Y. Oct. 6, 2000), and *Huggar v. Northwest Airlines, Inc.*, 1999 U.S. Dist. LEXIS 1026 (N.D. Ill Jan. 26, 1999) are inapposite. In *Dasrath*, the pilot's *own observations* were influential in the decision to remove the passengers. 467 F. Supp. 2d at 437-439. *Dasrath* provides no support whatsoever for arguments regarding respondeat superior liability, as the decisionmaker's decision was based on his own investigation. Similarly, the pilot in *Huggar* did in fact conduct an investigation into the flight attendants' statements, including interviewing other passengers on the flight to confirm the reported incidents. 1999 U.S. Dist. Lexis 1026 at * 4-5. Lastly, in *Norman*, the removal was based not solely upon the flight attendant's representations, but also on FAA safety regulations requiring a minimum number of flight attendants on every flight. 2000 U.S. Dist. LEXIS 14618 at * 11.

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[9] American also cites to *Rubin v. United Airlines Inc.*; 117 Cal. Rptr. 2d. at 119. *Rubin* does not involve a claim of racial profiling, but instead a lawsuit brought by a passenger who was removed from an airplane after she became unruly because she did not receive a seat in the first class cabin. This case is irrelevant for the present analysis.

None of the cases cited by American or ATA establish that the unique safety considerations of air travel are incongruous with a *reasonable* investigation into lower-level airline employees' reports that certain passengers should be removed. As demonstrated by the record in this case, it can often be feasible to complete an investigation in less time than it takes to remove the passenger and their luggage from the plane. Although it is true that the exigencies of air travel do not permit the sort of investigation that might be undertaken with the luxury of unlimited time, common sense dictates that a more limited method of investigation exists that is consistent with the requirements of air travel, and none of American's and ATA's cases undermines this conclusion.

Such limited inquiry into a subordinate's report promotes the two interests at stake in this appeal. First, such an inquiry supports the nation's interest in promoting civil rights, because the pilot can identify a subordinate's irrational bias, and prevent such bias from improperly influencing the decisionmaking process. Second, such investigations are also in the interests of airline security, because they encourage airlines to determine if there is credible information independent of any tainted information provided by discriminatory subordinates. This aids in establishing whether a real safety threat exists, and allows airlines to focus

their limited time and resources on actual threats, rather than on wild goose chases triggered by racist or paranoid employees.[10]

D. The existence of a separate administrative agency process to review acts of discrimination by air carriers does not diminish the statutory duty to safeguard civil rights through § 1981.

American and ATA also argue that existing administrative procedures are sufficient to safeguard against discrimination by airlines. The review offered by FAA procedures for violation of anti-discrimination laws by air carriers, however, complements remedies available through § 1981, rather than renders them superfluous. Although Congress created a limited agency enforcement regime to punish air carriers for engaging in discrimination against their passengers, it eschewed preempting parallel § 1981 claims arising from the same set of facts, instead creating an additional channel under federal aviation law to address the societal interest in violations of civil rights laws. Because the function of administrative penalties is

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[10] Such investigations would also help airlines avoid liability for the irrational racial biases of their subordinate employees, because a limited investigation could establish untainted facts that could form the basis for decisions to remove passengers. *See Zades v. Lowe's Home Centers, Inc.*, 446 F. Supp. 2d 29, 40 (D. Mass. 2006) (explaining that decisionmakers' independent investigation into a biased subordinates report breaks the causal link between the tainted information initiating the decisionmaking process and the ultimate decision reached); *see also BCI Coca-Cola*, 450 F.3d at 488.

deterrence, and fines levied pursuant to these provisions are payable to the federal government, victims of discrimination still require § 1981 remedies to redress their injuries.

Title 49 U.S.C. § 40127(a) prohibits an air carrier from "subject[ing] a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry." 49 U.S.C. § 40127(a) (2006). ATA suggests that the accompanying administrative enforcement mechanism to § 40127(a), located in 49 U.S.C. § 46301, sufficiently addresses the interest in eliminating racial discrimination for passengers "wrongfully excluded from air travel on the basis of race" through exercise of § 44902(b). *See* ATA Brief at 24.

This position directly conflicts with the plainly stated view of Congress. Specifically, Congress declared, under the very same "Air Commerce and Safety" part of the Code that contains penalties for violations of § 40127(a), that "[a] remedy under this part is *in addition* to any other remedies provided by law." 49 U.S.C. § 40120(c) (emphasis added). Through this provision, Congress unequivocally affirmed the integral role of existing federal laws in protecting the civil rights of airlines passengers. We agree with ATA that § 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." ATA Brief at 18. But Congress established § 1981 as a core component of that "system" through § 40120(c), and courts must consider and apply § 1981 as well when air carriers discriminate against passengers.

In some circumstances, a reviewing court may find that the availability of a "private judicial remedy" indicates a "congressional intent to preclude" a civil rights statute. *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 121-22 (2005) (decided in a § 1983 context).[11] But when Congress explicitly precludes preemption, as in § 40120(c), any preemption inquiries are foreclosed. Therefore, the remedy offered by the FAA anti-discrimination framework, no matter how robust, remains irrelevant to judicial consideration of passengers' claims under other federal civil rights laws such as § 1981.

The limited scope of the FAA anti-discrimination regime helps illustrate the continued necessity of providing redress under § 1981 to victims of airline discrimination. The FAA imposes civil penalties on air carriers for violations of § 40127(a), which prohibits discrimination against passengers. 49 U.S.C. § 46301(d)(2). But those fines are payable to the

[11] To consider the FAA regime a viable substitute for § 1981 relief, a private right of action must exist under § 40127. Most jurisdictions have yet to rule on the validity of this notion. *See* 5 Fed. Proc. Forms § 10:179.50.

federal government, and not to the victims of such acts of discrimination. *See id.* §46301(a)(1), (f)(2). This system conforms to the well-established principle in this jurisdiction that deterrence of potential violators, rather than compensation of past victims, represents the implicit goal of FAA civil penalty provisions. *United States v. Emerson*, 927 F. Supp. 23, 25 (D.N.H. 1996), *aff'd*, 107 F.3d 77 (1st Cir. 1997), *cert. denied*, 522 U.S. 814 (1997). The FAA anti-discrimination regime provides neither compensatory nor punitive damages for victims of air carrier discrimination.[12] *See* 49 U.S.C. § 46301 (codifying civil penalties for "Air Commerce and Safety").

In contrast, § 1981 provides a private right of action and a full panoply of redress for victims of air carrier discrimination. A valid § 1981 claim entitles an airline passenger to both equitable and legal relief. *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454, 460 (1975) (abrogated on other grounds). This "includes compensatory and, under certain circumstances, punitive damages." *Id.* If victims relied on the FAA anti-discrimination scheme to address grievances, they would not receive a single penny for

[12] The Court has held that the standard for awarding punitive damages is a higher threshold than mere compensatory damages and that Congress intended to limit the class of individuals who could qualify for such damages to those where defendants acted with "malice or indifference to federally protected rights" of the plaintiff. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 534-535 (1999). However, when such a standard is met, punitive damages are readily available. *See* Restatement (Second) of Agency § 217.

their injuries. None of the recent consent orders issued by the Department of Transportation against national air carriers and referenced by the ATA, *see* ATA Brief at 20-21, for example, included damages for respective discrimination complainants. The orders consisted only of injunctive relief compelling the airlines to implement internal civil rights training programs to reduce the incidence of *future* discrimination. *See id.* The lack of any personal redress and the limited scope of action the FAA can take against discriminating airlines under § 46301 demands the availability of a § 1981 claim for victims of airline discrimination.

III. CONCLUSION

This Court need not choose between airline security and long-standing legal principles of anti-discrimination. Further, this court need not write the concept of respondeat superior out of the law to harmonize § 1981 and the provisions of the Air Transportation Safety Act of 1974. The district court below properly harmonized § 44902 and our country's commitment to eradicating racial discrimination in its instructions to the jury, and this Court should reject American's and ATA's novel and misguided proposed restriction on the application of respondeat superior in decisions to remove passengers from airplanes. By doing so, this Court should uphold the district court's apt harmonizing of airline safety and racial equality.

For the foregoing reason, the decision below should be affirmed.

Michael Foreman /JSK

Michael L. Foreman
Counsel of Record
Monica R. Saxena
Nicole Birch
Lawyers' Committee for Civil Rights Under Law
1401 New York Ave. NW
Suite 400
Washington, D.C. 20009

Vincent A. Eng
Aimee J. Baldillo
Asian American Justice Center
1140 Connecticut Ave., NW
Suite 1200
Washington, D.C. 20036
(202) 296-2300

Cynthia Valenzuela
The Mexican American Legal
Defense & Educational Fund
634 South Spring Street
Los Angeles, CA 90014
(213) 629-2512

Angela Ciccolo
Anson Asaka
NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215
(410) 580-5792

Foster Maer
Puerto Rican Legal Defense Fund
99 Hudson Street, 14th Floor
New York, NY 10013-2815
(213) 739-7507

CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,981 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in 14-point, Times New Roman.

DATED: September 18, 2007

Michael Foreman /JSK

Michael Foreman

CERTIFICATE OF SERVICE RE: AMICUS CURIAE BRIEF

The undersigned counsel certifies that on September 18, 2007, copies of this Amicus Curiae Brief were served by first-class U.S. mail, postage prepaid, on the following counsel of record:

Michael A. Fitzhugh
FITZHUGH, PARKER & ALVARO LLP
155 Federal Street, Suite 1700
Boston, Massachusetts 02110-1727
(617) 695-2330

[Attorneys for Defendant-Appellant American Airlines, Inc.]

Michael V. Powell
LOCKE LIDDELL & SAPP PLLC
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-7726
(214) 740-8520

[Attorneys for Defendant-Appellant American Airlines, Inc.]

Michael T. Kirkpatrick
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington DC 20009
(202) 588-1000

[Attorneys for Plaintiff-Appellee John D. Cerqueira]

David S. Godkin
Darleen F. Cantelo
BIRNBAUM & GODKIN, LLP
280 Summer Street
Boston, Massachusetts 02210
(617) 307-6100

[Attorneys for Plaintiff-Appellee John D. Cerqueira]

Katherine Andrus
AIR TRANSPORT ASSOCIATION OF AMERICA, INC.
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 626-4000

[Attorneys for Amicus Curiae Air Transport Association of America, Inc.]

Wayne A. Schrader
Jason B. Stavers
GIBSON DUNN & CRUTCHER L.L.P.
1050 Connecticut Ave., N.W.
Washington D.C. 20036
(202) 955-8500

[Attorneys for Amicus Curiae Air Transport Association of America, Inc.]

_____

Myrna G. Perez