No.

IN THE
Supreme Court of the United States

JOHN D. CERQUEIRA,
Petitioner,
v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner John D. Cerqueira sued respondent American Airlines under 42 U.S.C. § 1981 after American removed Cerqueira from a flight and refused to rebook him after the police cleared him for travel. American claimed that both decisions were based on safety concerns; Cerqueira claimed that the decisions were motivated by discrimination. Cerqueira presented direct evidence of discriminatory animus by lower-level employees who influenced the decisions, and circumstantial evidence of discrimination by the formal decisionmakers. A jury found for Cerqueira but the First Circuit reversed, holding that the discretion granted airlines in 49 U.S.C. § 44902(b), to refuse to transport a passenger for safety reasons, precludes airline liability for decisions motivated by a passenger's race unless there is direct evidence of discriminatory animus by the formal decisionmaker. The questions presented are:

1) Whether, and in what circumstances, a defendant is liable for discrimination if its decisionmaker relied on information tainted by a subordinate's discriminatory animus;

2) Whether, and in what circumstances, a plaintiff may use indirect evidence to prove discrimination in activities other than employment; and

3) Whether the statutory discretion granted to airlines in 49 U.S.C. § 44902(b), to refuse to transport a passenger for safety reasons, immunizes airlines from liability for denial-of-service decisions motivated by race.

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PETITION FOR A WRIT OF CERTIORARI

A jury found that respondent American Airlines intentionally discriminated against petitioner John D. Cerqueira in violation of 42 U.S.C. § 1981 when it removed him from a flight and denied him further service. The district court upheld the verdict. The U.S. Court of Appeals for the First Circuit vacated the verdict and ordered that judgment be entered for American. The First Circuit rejected the application of respondeat superior and the use of indirect evidence outside the employment discrimination context, and held that the discretion granted to airlines in 49 U.S.C. § 44902(b), to refuse to transport a passenger for safety reasons, creates a conflict between safety and civil rights, and permits the use of racial profiling in airline denial-of-service decisions. The First Circuit's decision conflicts with the decisions of other courts of appeals on each of the three questions presented, each of which is of national importance. For the reasons that follow, this Court should grant review.

OPINIONS BELOW

The amended opinion of the U.S. Court of Appeals for the First Circuit (Pet. App. 1a) is reported at 520 F.3d 1. The Memorandum Opinion and Order of the U.S. District Court for the District of Massachusetts (Pet. App. 43a), upholding the jury verdict, is reported at 484 F. Supp. 2d 232. The First Circuit's order denying rehearing and rehearing en banc with two dissenting opinions (Pet. App. 63a) is reported at 520 F.3d 20. The Errata Sheet amending

the First Circuit's original opinion (Pet. App. 74a) is unpublished.

JURISDICTION

The judgment of the U.S. Court of Appeals for the First Circuit was entered on January 10, 2008. Petitioner timely sought rehearing, which was denied on February 29, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1981 provides:

> (a) All 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 . . . .
>
> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

49 U.S.C. § 44902(b) provides:

> 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.

STATEMENT

A. Factual Background

Petitioner Cerqueira is an American citizen of Portuguese descent. Cerqueira has dark hair and an olive complexion, and he is often mistakenly perceived to be Middle Eastern. App. 257, 281.[1] On December 28, 2003, Cerqueira was a ticketed passenger scheduled to fly from Boston to Ft. Lauderdale on American flight 2237. The flight was the return portion of a round-trip ticket.

1. Removal from Flight

On the morning of his flight, Cerqueira went to the airport, checked a bag curbside, received his boarding pass, and proceeded to the gate, passing through the security checkpoint without incident. At the gate, Cerqueira requested a seat change to an exit row or bulkhead for more leg room. The American employee at the gate counter was flight attendant Sally Walling. Walling told Cerqueira that she could not help him and asked him to sit down and wait. Cerqueira followed Walling's instructions, and, once a gate agent arrived, Cerqueira was assigned seat number 20F, which was a window seat in an exit row. Cerqueira boarded when his group was called, found his seat, stowed his carry-on items, used the

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[1] "App." refers to the appendix filed with American's appellate brief.

lavatory, and then returned to his seat and began working on his laptop computer. App. 257-58.

About ten minutes after Cerqueira took his seat, two men, Mr. Ashmil and Mr. Rokah, boarded and sat next to Cerqueira in seats 20D and 20E. Cerqueira did not speak to them or interact with them in any way. Ashmil and Rokah, like Cerqueira, had dark hair and olive complexions. Ashmil and Rokah were speaking loudly to each other, partly in English and partly in a foreign language. Cerqueira later learned that Ashmil and Rokah are Israeli. When the announcement was made to turn off electronic devices, Cerqueira stowed his laptop and fell asleep. App. 259.

Cerqueira was awakened by Mr. Ynes Flores, a customer service manager for American. Flores asked all three men in the row for their boarding passes. Cerqueira was unable immediately to locate his boarding pass, but he handed Flores his itinerary, and Flores indicated that it was sufficient. Flores left with Cerqueira's itinerary and the boarding passes of Ashmil and Rokah. Soon after Flores left, four uniformed troopers from the Massachusetts State Police boarded the airplane and, without explanation, demanded that Cerqueira, Ashmil, and Rokah immediately deplane with their carry-on bags. It was a full flight, but only Cerqueira, Ashmil, and Rokah were removed. App. 259-60; App. 310. The three men were questioned by the police on the jet bridge, then escorted to a small room where they were held and interrogated for about two hours.

Cerqueira repeatedly told the police that he was traveling home, by himself, after a family visit for the holidays, and that he did not know Ashmil or Rokah. App. 260. The troopers determined that there was no security threat and cleared the three men for travel. App. 262, 382, 443; Stipulation S, Joint Pretrial Mem. [Doc. 57] at 15.

Capt. John Ehlers was the pilot of American Flight 2237, and he made the decision to have Cerqueira, Ashmil, and Rokah removed from the flight. App. 295. Ehlers claimed that he removed Cerqueira based on Walling's assertions that Cerqueira 1) requested a seat change in an insistent manner; 2) might have boarded early; and 3) used the lavatory. App. 300, 363. But Walling admitted that 1) she did not think her conversation with Cerqueira about the seat change was a security issue; 2) she did not hear the boarding announcements and thus did not know if Cerqueira had boarded out-of-turn; and 3) passengers often use the lavatory upon boarding. Walling further admitted that nothing she reported to Ehlers about Cerqueira ordinarily results in removal and denial of service. App. 366-70. Ehlers testified that he knew Walling was not in a position to know whether Cerqueira boarded early, and American made a judicial admission that "Mr. Cerqueira boarded the aircraft when his assigned group was called." App. 295. Ehlers also admitted that passengers commonly use the lavatory upon boarding and that the co-pilot

had checked the lavatory after Walling's report and found nothing wrong. App. 299-300.

Ehlers claimed that he removed Ashmil and Rokah from the flight because: 1) one of them had a conversation with Ehlers that Ehlers considered odd;[2] 2) Walling reported that they had wished other passengers a "happy new year" and were heard "speaking in a different language;" and 3) flight attendant Lois Sargent reported that they joked with her during the exit row briefing. It is undisputed that Cerqueira did not engage in any of these behaviors, and there was nothing that linked Cerqueira to Ashmil and Rokah other than his Middle Eastern appearance. Indeed, the flight attendants' trial testimony and written reports from the day of the incident showed that the flight attendants became concerned about the exit row passengers because of the flight attendants' perception that the three passengers were from the Middle East. Walling thought the three men looked similar because they were "dark," and, in her written report of the incident, she referred to the three passengers collectively as "them" and "they." App. 372, 428-30. Similarly, Sargent grouped the three men together

[2]Ehlers testified that, in the terminal before the flight, a passenger with a ponytail—either Ashmil or Rokah—asked Ehlers if he was the pilot to Fort Lauderdale. When Ehlers confirmed that he was, Ashmil or Rokah said: "That's good. I'm going with you. We're going to have a good trip today." App. 296.

in her reports and wrote that they "seemed to be foreign nationals (later confirmed/Middle East passports)" and noted (incorrectly) that "these 3 passengers had Israeli passports but Arabic names." App. 431-33, 452-54. Flight attendant Amy Milenkovic testified that all three men had dark hair, and she thought that Ashmil or Rokah might be Middle Eastern. Her report noted that Ahmil or Rokah spoke with a "heavy accent," and she testified that since the terrorist attacks of September 11th, she has paid close attention to whether a passenger has an accent. App. 376-79, 434-36.

2. Denial of Rebooking

After the police completed their investigation and cleared Cerqueira, Ashmil, and Rokah, the police escorted the three men to the American ticket counter and expected that the three would be rebooked. App. 443. The police told the ticket agent that Cerqueira and the other two men were "all set to go" (App. 286; *see also* App. 382), and the ticket agent told Cerqueira that he could be accommodated on a flight from Boston to Ft. Lauderdale departing that afternoon, but she had to check with a supervisor. App. 262. The supervisor, customer service manager Nicole Traer, told Cerqueira that American was refunding the cost of the Boston to Ft. Lauderdale portion of his ticket, that American had made a corporate decision to deny him service, and that she had no further information. Traer told Cerqueira that if he wanted further information he should contact American directly. Traer was unable to tell

Cerqueira how long the denial of service would last. The next day, Cerqueira flew home on another airline. App. 263-64, 285-86.

The decision not to rebook Cerqueira on any American flight was made by Mr. Craig Marquis, the manager on duty at American's System Operations Control (SOC) in Dallas. Ehlers testified that, after the police removed Cerqueira, Ashmil, and Rokah from the flight, Ehlers called Marquis and reported the crew's concerns. App. 302. Marquis testified that, although he made the decision to deny rebooking, he has no recollection of the reasons for his decision or when the decision was made. An entry in Cerqueira's computerized Passenger Name Record notes that Cerqueira was denied boarding on Flight 2237 due to unspecified "security issues" and that Cerqueira should not be rebooked on American. App. 321-23, 423. The police were called to remove Cerqueira at about 7:00 am, but the first computer entry reflecting the decision to deny rebooking was not made until 9:01 am, by which time Cerqueira had been cleared by the police. App. 443.

B. Procedural Background

Cerqueira filed a complaint in the federal district court of Massachusetts alleging that, by removing him from his flight and refusing to rebook him after he was cleared by the police, American twice discriminated against him because of his perceived race or ethnicity in violation of 42 U.S.C. § 1981. American claimed that its treatment of Cerqueira was

justified by security concerns; Cerqueira maintained that but for his Middle Eastern appearance, he would not have been removed from his flight or refused further service.

The case was tried to a jury. After the close of evidence, the district court instructed the jury that "Mr. Cerqueira bears the burden of proving by a fair preponderance of the evidence that he was intentionally discriminated against because of the perception of his race or ethnicity" and that if American's treatment of Cerqueira was motivated by rational security concerns, the jury should find for American. App. 394. The court explained that in determining why American treated Cerqueira differently from other passengers, the jury should "consider that American Airlines is expected to operate its airlines with the primary goal of the safety and well-being of the traveling public." *Id.* The court further explained that

> [W]e expect of American Airlines that they're going to behave themselves in a way that puts the safety of the traveling public and their employees first. But they cannot, they're forbidden by the law from acting to discriminate—let's use that word—to discriminate against someone based upon their perception that that person is a certain race or a certain ethnic heritage. If that's why they did what they did, that's forbidden by the law.

Id.

The court reiterated this instruction in response to a jury question:

> In this case, if you believe that Mr. Cerqueira was treated differently, taken off the plane, denied rebooking, that may be perfectly all right because the airline, as I've already told you, has every right; has the duty to ensure the safety of the flying public and its own ground and air crews. . . . [The issue is] why? Why did they do it? There may be an appropriate motivation: safety, security of the flight; there may be an inappropriate, indeed illegal motivation because there's the perception that—of the person's race or ethnic background.

App. 412.

The district court also instructed the jury that a corporate defendant is vicariously liable for actions driven by the discriminatory animus of its employees. The court explained:

> Now, American Airlines is a 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 Air-

> lines. That is American Airlines. It's the sum total of the people that work for it.

App. 393-94.

The court instructed the jury to determine whether "American Airlines, through its agents, through the people who work for it, did they intentionally discriminate against Mr. Cerqueira on the basis of perceived race or ethnicity." App. 393. The court further explained:

> And let's say that's why a lower-level person acted as she did with 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 on the perceived race or ethnicity. The law forbids that.

App. 394; *see also* App. 397.

The jury returned a verdict for Cerqueira. App. 212. American filed two post-judgment motions: a renewed motion for judgment as a matter of law (App. 217) and a motion for a new trial (App. 221). The district court rejected all of American's arguments and concluded:

> This was a quintessential jury trial. Cerqueira and American were both ably represented by vigorous advocates and our system gave, as it ought, the final judgment on a difficult issue of

> racial discrimination to the trusted institution of collective wisdom—the jury. The jury spoke in favor of Cerqueira.

Pet. App. 62a.

American appealed and the First Circuit vacated the jury verdict and ordered that judgment be entered for American. The First Circuit held that the district court's *respondeat superior* instruction was reversible error because "[t]he biases of a non-decisionmaker may not be attributed to the decisionmakers" (Pet. App. 30a), and the removal decision would have to have been "*based only on the Captain's bias* toward persons who appeared to be of Middle Eastern descent" to result in liability (Pet. App. 37a) (emphasis added). The First Circuit also held that circumstantial evidence cannot be used to prove discrimination in an airline refusal-to-transport case because the *McDonnell Douglas* burden-shifting framework was developed in cases involving employment discrimination. Finally, the First Circuit concluded that the statutory discretion granted to airlines in 49 U.S.C. § 44902(b), to refuse to transport a passenger for safety reasons, creates a conflict between safety and civil rights and permits the use of racial profiling in airline denial-of-service decisions.

Cerqueira sought rehearing en banc, but his petition was denied by a three-to-two vote of the active judges of the First Circuit. Pet. App. 63a. The dissenting judges voiced strong disagreement with

the panel's opinion, especially as it relates to American's refusal to rebook Cerqueira on a later flight. Pet. App. 63a-73a (Torruella, J., and Lipez, J., dissenting from denial of reh'g en banc).

REASONS FOR GRANTING THE PETITION

I. The First Circuit's Rejection of Respondeat Superior Deepens an Already Intractable Conflict Among the Courts of Appeals on the Application of Agency Principles in Discrimination Cases.

The decision below deepens an entrenched conflict among the courts of appeals on the question of whether, and in what circumstances, a defendant is liable for discrimination if its decisionmaker relied on information tainted by a subordinate's discriminatory animus. In this case, the jury was presented with direct evidence that the flight attendants whose reports to Ehlers caused Cerqueira's removal were motivated by their perception that the exit row passengers were from the Middle East. Specifically, the evidence showed that the flight attendants thought Cerqueira was traveling with the other two men in his row solely because Cerqueira looked like them, and the flight attendants' written reports of the incident expressed their concerns about passengers with foreign appearances, Middle Eastern passports, Arabic names, and heavy accents. The district court instructed the jury that because a corporate defendant is vicariously liable for the acts of its employees acting within the scope of their

employment, American would be liable for discrimination if the decisions of Ehlers and Marquis were driven by the discriminatory animus of the flight attendants.

The First Circuit found that the district court erred by relying on the doctrine of respondeat superior because it "permitted liability of the air carrier to turn on the purported bias of non-decisionmakers." Pet App. 39a. According to the First Circuit, an air carrier cannot be liable for decisions that are driven by the discriminatory animus of subordinates; rather, the removal decision would have to be based only on the final decisionmakers' own bias to result in liability. As described immediately below, the First Circuit's wholesale rejection of the doctrine conflicts with the decisions of other courts that have considered the issue of subordinate bias liability, both generally and in the context of airline denial-of-service decisions. This Court should grant certiorari to resolve the conflict and provide guidance on this important issue.

Every circuit has recognized corporate liability based on respondeat superior, but there is an intractable conflict regarding the type or amount of influence a biased subordinate must exert over a decision to result in liability.[3] The Tenth Circuit

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[3] *See Cariglia v. Hertz Equip. Rental Corp.*, 363 F.3d 77, 83 (1st Cir. 2004) ("[C]orporate liability can attach if neutral

(continued...)

[3](...continued)
decisionmakers . . . rely on information that is inaccurate, misleading, or incomplete because of another employee's discriminatory animus."); *Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 161-62 (2d Cir. 2001) (finding liability where the biased subordinate "had enormous influence in the decision-making process"); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995) (finding liability if the biased subordinate played a role or participated in the decision at issue) ("Indeed, we have held that discriminatory comments by nondecisionmakers . . . may properly be used to build a circumstantial case of discrimination.") (citing *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 54 (3d Cir. 1989)); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 290-91 (4th Cir. 2004) (finding liability when biased subordinate "possessed such authority as to be viewed as the one principally responsible for the 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 decision"); *Brewer v. Bd. of Trs.*, 479 F.3d 908, 917-18 (7th Cir. 2007) (finding liability when a 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 aminus); *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.*, 450 F.3d 476, 487-88 (10th Cir. 2006) ("To prevail on a subordinate
(continued...)

examined this circuit conflict in *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d at 486-87. The Tenth Circuit rejected both the "lenient approach" of courts that have imposed liability where a biased subordinate had influence over the decisionmaker, *id.* at 486 (citing, among other cases, *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000)), and the "strict approach" of courts that require a subordinate to have controlled the decision, *id.* at 487 (citing, among other cases, *Hill*, 354 F.3d at 291), and held that liability attaches if the information provided by the biased subordinate "caused" the adverse action. *Id.* (expressing agreement with *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004)). To resolve the circuit conflict regarding the standard for subordinate bias liability, this Court granted certiorari in *BCI Coca-Cola Bottling Co. v. EEOC*, 127 S. Ct. 852 (2007), but the case was dismissed on petitioner's motion under Rule 46.2 of the Rules of this Court. 127 S. Ct. 1931 (2007). The Court should grant certiorari in this case to resolve

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[3](...continued)
bias claim, a plaintiff must establish more than mere 'influence' or 'input' in the decisionmaking process. Rather, the issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse [] 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.C. Cir. 1998) (finding liability "where the ultimate decision maker is not insulated from the subordinate's influence.").

the ongoing conflict among the courts of appeals regarding the circumstances under which a corporate defendant is liable under federal anti-discrimination laws based on a subordinate's discriminatory animus.

Further, the First Circuit's rejection of respondeat superior liability outside of the employment context, *see* Pet. App. 41a (limiting the application of the First Circuit's earlier decision in *Cariglia*, 363 F.3d at 87-88, to employment discrimination claims), puts the decision below in direct conflict with the Fifth, Sixth, and Eighth Circuits, all of which have applied respondeat superior to claims of discrimination in activities other than employment. *See Green v. Dillard's, Inc.*, 483 F.3d 533, 540 (8th Cir. 2007) (holding that retailer can be vicariously liable under § 1981 for the discriminatory acts of its employees); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 876-78 (6th Cir. 2001) (finding that retailer could be liable under § 1981 even where decisionmaker was unaware of plaintiff's race if lower-level employee's racial animus influenced the decision); *Arguello v. Conoco, Inc.*, 207 F.3d 803, 810-11 (5th Cir. 2000) (holding that corporate defendant in a public accommodations case under § 1981 could be vicariously liable for the discriminatory actions of a non-supervisory employee). This Court should grant certiorari to resolve the conflict.

Even if limited to airline denial-of-service cases, the decision below conflicts with decisions of other courts. The First Circuit's rejection of respondeat

superior where a pilot's removal decision is based on a flight attendant's bias rests on the court's recognition that a pilot may have to act quickly and without opportunity to conduct the independent investigation that would otherwise break the causal chain between the subordinate's animus and the removal decision. *See, e.g., BCI Coca-Cola Bottling Co.*, 450 F.3d at 488 ("[B]ecause a plaintiff must demonstrate that the actions of the biased subordinate caused the [adverse] action, a [defendant] can avoid liability by conducting an independent investigation of the allegations" because, as a result of such investigation, the defendant "has taken care not to rely exclusively on the say-so of the biased subordinate, and the causal link is defeated."). Thus, the First Circuit's rejection of respondeat superior was based on its holding that "[t]he Captain (or other decisionmaker) is entitled to accept at face value the representations made to him by other air carrier employees," even if those representations are false and motivated by bias. Pet. App. 30a. Several other courts have also held that a pilot is entitled to rely without further inquiry on information provided by a crew member despite any exaggerations or false representations. *See, e.g., Ruta v. Delta Airlines, Inc.*, 322 F. Supp. 2d 391, 397-98 (S.D.N.Y. 2004); *Al-Qudhai'een v. Am. W. Airlines, Inc.*, 267 F. Supp. 2d 841, 848 (S.D. Ohio 2003); *Christel v. AMR Corp.*, 222 F. Supp. 2d 335, 340 (E.D.N.Y. 2002). These decisions conflict with the decision of the Ninth Circuit in *Cordero v. Cia Mexicana De Aviacion, S.A.*,

681 F.2d 669, 672 (9th Cir. 1982), and the position of the U.S. Department of Transportation (DOT).

In *Cordero*, a pilot excluded a passenger based on a flight attendant's report that the passenger had uttered an obscenity and had raised his arm as if to strike the flight attendant. *Id.* at 671. The passenger claimed that he was the victim of mistaken identity, and the airline was held liable. Although the Ninth Circuit found that the pilot had "no duty to conduct an *in-depth* investigation," it concluded that the airline acted unreasonably in excluding the passenger "without even the most cursory inquiry into the complaint against him." *Id.* at 672 (emphasis added). Thus, the First Circuit's conclusion that an airline's decisionmaker has no duty to conduct any inquiry into a subordinate's report has created a split with the Ninth Circuit that should be resolved by this Court.

Moreover, the decision below conflicts with DOT's position on the issue. DOT brought an enforcement action against American based on eleven separate instances in which American unlawfully discriminated against passengers perceived to be of Arab, Middle Eastern, or South Asian descent by either removing them from flights or denying them boarding. The enforcement action was resolved by entry of a Consent Order finding that American acted in a manner inconsistent with the requirements of federal civil rights law. As noted in the Consent Order, DOT "strongly disagrees" with American's assertion "that the pilot-in-command

may rely without further inquiry upon the representations of other crewmembers," and DOT maintains that "a pilot-in-command's failure to inquire independently into the reasons for such action is inconsistent with carriers' legal obligations." App. 456.

This case presents an excellent vehicle for this Court to define the circumstances under which an airline is liable for discrimination where the formal decisionmakers acted on information tainted by the animus of lower-level employees, because the facts demonstrate the incongruity of applying blanket immunity to all such decisions. Immunity for pilot decisions to remove a passenger without further inquiry based on crewmember reports should be limited to situations where 1) the report of the biased subordinate—if true—would justify the pilot's removal decision, and 2) time constraints or security considerations prevent the pilot from making further inquiry. Neither circumstance is present here. First, the information reported to Ehlers by the flight attendants was insufficient on its face to support the removal decision because the flight attendants did not report that Cerqueira had engaged in any behavior that was irregular, threatening, or unusual. Rather, the flight attendants reported that Cerqueira had engaged only in common passenger behavior that does not ordinarily result in denial of service. Second, in this case, Ehlers had ample time to verify that Cerqueira posed no threat to safety. Cerqueira's flight departed about three hours late and only after

the police had concluded their investigation and cleared Cerqueira for travel.

Finally, as explained in the dissents from denial of rehearing en banc, there was no imperative for Marquis, the SOC manager, to make a decision to deny rebooking without further inquiry into the situation. Marquis had none of the time constraints or security considerations that might prevent a pilot from inquiring into the basis for crewmember reports. Rather, Marquis made his decision "without time pressure and with the benefit of additional information afforded by the police investigation." Pet. App. 66a (Torruella, J., dissenting from denial of reh'g en banc). Thus, although it may be reasonable in some circumstances to "remove any responsibility on the part of the Captain to conduct an inquiry into representations made by other air carrier employees, there is no convincing rationale for extending that consideration to decisionmakers such as the SOC manager who are not compelled by exigent circumstances." *Id.* at 69a; *see also id.* at 73a (Lipez, J., dissenting from denial of reh'g en banc) ("While the law affords the Captain great latitude because his decision must be made quickly, the SOC manager—and American Airlines as a whole—is not entitled to piggyback on that first decision and thereby multiply any discriminatory animus underlying it.").

II. The First Circuit's Bar On Use of Indirect Evidence to Prove Discrimination in Activities Other than Employment Conflicts with the Decisions of Other Courts of Appeals.

It is well-settled that a plaintiff can prove employment discrimination using indirect evidence under the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973), and refined in *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Under *McDonnell Douglas*, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. Establishment of a prima facie case creates a presumption of unlawful discrimination, and the burden of production then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the challenged act. If the defendant fails to carry its burden, the plaintiff is entitled to judgment as a matter of law. If the defendant meets its burden of production, the plaintiff must prove that the reasons proffered by the defendant are a pretext for discrimination. The burden of persuasion remains at all times with the plaintiff. *Id.*

In the decision below, the First Circuit held that circumstantial evidence cannot be used to prove discrimination in a refusal-to-transport case because the *McDonnell Douglas* framework was developed in cases involving employment discrimination. Pet. App. 38a-39a. This holding conflicts with the decisions of numerous other federal courts of appeals

that have used the *McDonnell Douglas* framework in cases alleging discrimination in activities other than employment.[4]

For example, in *Lindsay v. Yates*, 498 F.3d 434, 438 (6th Cir. 2007), the Sixth Circuit held that "[t]he familiar *McDonnell Douglas/Burdine* analysis applies to federal housing-discrimination claims, whether they are brought under the [Fair Housing Act (FHA)] or 42 U.S.C. §§ 1981 or 1982." The Ninth Circuit has applied the framework to a retaliation claim under the FHA, *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061-63 (9th Cir. 2004), and the framework has been applied in cases alleging discrimination in contracting for event space, *Lindsey v. SLT Los Angeles, LLC*, 447 F.3d 1138, 1144-45 (9th Cir. 2006), and leasing of commercial space. *Chauhan v. M. Alfieri Co., Inc.*, 897 F.2d 123, 126-27 (3d Cir. 1990). The Seventh Circuit has applied *McDonnell Douglas* burden-shifting to a claim of discriminatory application of a

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[4]The district court instructed the jury that Cerqueira had the burden of showing "by a fair preponderance of the evidence that he was intentionally discriminated against because of the perception of his race or ethnicity." App. 394. The First Circuit found that the district court erred by instructing the jury "that American Airlines had the ultimate burden of showing that its reasons for removing the plaintiff were legitimate" (Pet. App. 35a), but the instruction the First Circuit quotes was a mixed-motive instruction that closely tracked the instruction approved by this Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 96-97 (2003). American never objected to the mixed-motive instruction, and it was not an issue on appeal.

franchise agreement, *Elkhatib v. Dunkin Donuts, Inc.*, 493 F.3d 827, 829 (7th Cir. 2007), and a case alleging a discriminatory refusal to sell a medical practice. *Sanghvi v. St. Catherine's Hosp., Inc.*, 258 F.3d 570, 577 (7th Cir. 2001). Several courts have applied the framework to claims of discrimination in retail transactions, *see, e.g., Williams v. Staples, Inc.*, 372 F.3d 662, 667 (4th Cir. 2004); *Christian*, 252 F.3d at 868, including a claim of discrimination in food delivery. *Kinnon v. Arcoub, Gopman & Assocs., Inc.*, 490 F.3d 886, 893 (11th Cir. 2007). It has been used to assess the evidence in cases involving discrimination in competitive bidding, *Harris v. Hays*, 452 F.3d 714, 717-18 (8th Cir. 2006), hotel accommodations, *Murrell v. Ocean Mecca Motel, Inc.*, 262 F.3d 253, 257 (4th Cir. 2001), and education. *Williams v. Lindenwood Univ.*, 288 F.3d 349, 355 (8th Cir. 2002) (discrimination in expulsion from University); *Gant ex. rel. Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 146 (2d Cir. 1999) (discriminatory transfer from first grade to kindergarten). Indeed, on at least two occasions, the First Circuit has applied the burden-shifting framework in cases alleging discrimination outside the employment context. *See Mercado-Garcia v. Ponce Fed. Bank*, 979 F.2d 890, 893 (1st Cir. 1992) (applying the framework to claim of age discrimination in credit decision); *T & S Serv. Assocs., Inc. v. Crenson*, 666 F.2d 722, 724 (1st Cir. 1981) ("Though developed in the context of Title VII . . . , this procedural technique 'is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.'")

(quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978); *see also Loeb v. Textron, Inc.*, 600 F.2d 1003, 1015 (1st Cir. 1979) (noting that "*McDonnell Douglas* meets a problem of proof that may be present in any case where motivation is in issue.").

Even if the First Circuit's rejection of the *McDonnell Douglas* framework is limited to airline denial-of-service cases, the decision below conflicts with decisions of several other federal courts. The First Circuit acknowledged that its decision conflicts with *Dasrath v. Continental Airlines, Inc.*, 467 F. Supp. 2d 431, 445 (D.N.J. 2006). Pet. App. 39a n. 21 ("The district court in *Dasrath* . . . did use the *McDonnell Douglas* model, in our view incorrectly."). It conflicts with several other decisions as well. *See Simmons v. American Airlines*, 34 Fed. Appx. 573, 575-76 (9th Cir. 2002) (unpublished); *Thompson v. Southwest Airlines Co.*, No. 04-313, 2006 WL 287850, *5 (D.N.H. Feb. 6, 2006) (unpublished); *Huggar v. Northwest Airlines, Inc.*, No. 98-594, 1999 WL 59841, *3-4 (N.D. Ill. Jan. 27, 1999) (unpublished).

Although the First Circuit's rejection of the *McDonnell Douglas* framework is contrary to the weight of appellate authority, we acknowledge that the application of *McDonnell Douglas* outside the employment context has been a source of confusion for a number of other courts. For example, in *Christian v. Wal-Mart Stores*, the Sixth Circuit overturned a district court decision that omitted the traditional *McDonnell Douglas* framework from its analysis of a claim of discrimination in a retail establishment. 252

F.3d at 868. The Sixth Circuit noted that the district court had used an alternative three-part test fashioned by the Second Circuit and subsequently adopted by the Fifth, Seventh, and Tenth Circuits, which required the plaintiff to demonstrate an intent to discriminate rather than establish facts that, if unexplained, would support an inference of discrimination. *Id.* (citing *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993); *Green v. State Bar of Texas*, 27 F.3d 1083, 1086 (5th Cir. 1994); *Morris v. Office Max, Inc.*, 89 F.3d 411, 413 (7th Cir. 1996); *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091 (10th Cir. 2001)). The Sixth Circuit rejected the alternative test used by those courts because "it propagates the false notion that a plaintiff must provide direct evidence of the defendant's 'intent to discriminate'" and "would turn the purpose of the prima facie case on its head[.]" *Id.* at 872. *But see Bellows v. Amoco Oil Co.*, 118 F.3d 268, 274 (5th Cir. 1997) ("The plaintiff may establish a prima facie case by direct evidence or, more commonly, by circumstantial evidence of discriminatory motive."); *Daniels v. Advantage Rent-A-Car Inc.*, 80 Fed. Appx. 936, 940 n. 4 (5th Cir. 2003) (unpublished) (assuming, but not deciding, that the *McDonnell Douglas* framework applies outside the employment context). Further, the Seventh, First, and D.C. Circuit have split on whether *McDonnell Douglas* applies to credit discrimination cases. *Compare Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 714 (7th Cir. 1998) *with Mercado-Garcia*, 979 F.2d at 893, *and Crawford v. Signet Bank*, 179 F.3d 926, 928-29 n.5 (D.C. Cir. 1999)

(applying *McDonnell Douglas* to mortgage discrimination claim under § 1981 and acknowledging split with the Seventh Circuit).

This Court has applied the *McDonnell Douglas* framework in employment discrimination cases brought under statutes other than Title VII, *see Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989) (applying framework to employment discrimination claim under § 1981), *superseded on other grounds by* 42 U.S.C. § 1981(b) (enlarging the category of conduct subject to § 1981 liability); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) ("[W]e shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable" to claims under the Age Discrimination in Employment Act (ADEA)); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 n.1 (1993) ("[W]e shall assume that the *McDonnell Douglas* framework is fully applicable to racial-discrimination-in-employment claims under 42 U.S.C. § 1983."), but it has not addressed whether the model may be used outside the employment context. The Court should grant certiorari to provide guidance on this important issue.

This case is a particularly good vehicle for addressing the issue because it presents two separate claims of discrimination that would be resolved under different prongs of the *McDonnell Douglas* framework. With respect to Ehlers's decision to remove Cerqueira from flight 2237, American articulated a non-discriminatory reason—that Cerqueira's

behavior as reported by Walling raised security concerns—but the jury rejected that explanation as pretext and found that discrimination was the true motivation. The jury was entitled to disbelieve Ehlers's proffered explanation and infer discrimination because the evidence showed that Cerqueira did not engage in any behavior that is uncommon or that ordinarily results in denial of service. Further, Ehlers lacked credibility in general because his testimony was often at odds with that of other American Airlines employees, his own deposition testimony, and American's judicial admissions.[5] But

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[5]For example, Ehlers claimed that he did not see Cerqueira before deciding to have him removed from the flight (App. 312), but Ehlers's testimony was directly contradicted by that of two other airline employees who testified that, on two separate occasions, Ehlers pointed out the passengers in the exit row. App. 326, 334. When confronted with that testimony, Ehlers testified that he "may or may not have done that." App. 301. Similarly, Ehlers testified at trial that Walling had reported that the exit row passengers were "staring" at the flight attendants, but Ehlers never mentioned this at his deposition despite repeated inquiries (App. 315-16), and Walling did not claim to have made such a report. Indeed, Ehlers admitted at trial that several elements of his testimony had changed since the time of his deposition. App. 320. Ehlers also denied that he made the decision to have Cerqueira removed from flight 2237 (App. 317), but American made a judicial admission that he did (App. 295). Ehlers also testified that his only interaction with Ashmil or Rokah was in the terminal and that he did not notice an accent. App. 297. But Flight Attendant Milenkovic testified that Ashmil or

(continued...)

because the court below held that Cerqueira could prove discrimination only by presenting direct evidence of Ehlers's discriminatory animus, the jury's disbelief of Ehlers's explanation was rendered irrelevant.

With regard to American's refusal to rebook Cerqueira on any other flight even after he was cleared for travel by the police, American was unable to articulate any specific explanation for its decision.[6] Marquis testified that he has no recollection of the reasons for his decision, and an entry in Cerqueira's computerized Passenger Name Record states only that Cerqueira was denied boarding on Flight 2237 due to unspecified "security issues" and should not be rebooked. App. 321-23, 423. As explained by this Court in *Burdine*, American's silence in the face of Cerqueira's prima facie case "requires judgment for the plaintiff because no issue of fact remains in the

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[5](...continued)
Rokah spoke to Ehlers onboard the airplane, in the presence of Milenkovic, and that the passenger spoke with a heavy accent. App. 377.

[6]There is no evidence that the decision to deny rebooking was made "within minutes" of the decision to have Cerqueira removed for questioning and for the same reasons, as the First Circuit apparently believed. *See* Pet. App. 4a, 36a, 37a. The police were called to remove Cerqueira at about 7:00 am, but the first computer entry reflecting the decision to deny rebooking was not made until 9:01 am, by which time Cerqueira had been cleared by the police. *See* Pet. App. 17a, 69a n.2; App. 443.

case." 450 U.S. at 254; *accord St. Mary's Honor Ctr.*, 509 U.S. at 509-10. But by rejecting the *McDonnell Douglas* framework, the court below has made silence a defense in any case where the plaintiff lacks direct evidence. That holding alone warrants this Court's review.

III. This Case Presents Important Issues at the Intersection of Aviation Security and Civil Rights that Should be Settled by This Court.

A. The First Circuit's conclusion that safety must be prioritized over nondiscrimination conflicts with the decisions of other federal courts.

The permissive refusal provision of the Federal Aviation Act (FAA) provides that an "air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." 49 U.S.C. § 44902(b). The Act does not set forth a standard to assess whether an airline's refusal-to-transport decision is protected by § 44902(b), but the courts that have addressed the issue, including the courts below, have applied the arbitrary or capricious standard articulated by the Second Circuit in *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975) (holding that denial-of-service decisions are protected if "rational and reasonable and not capricious or arbitrary").[7] *See* Pet. App. 27a

[7] *Williams* involved the interpretation of 49 U.S.C. § 1511(a), (continued...)

("We agree with *Williams* and hold that an air carrier's decisions to refuse transport under § 44902(b) are not subject to liability unless the decision is arbitrary or capricious."); *Cordero*, 681 F.2d at 672 ("We believe there are persuasive reasons for adopting the *Williams* test."); Pet App. 45a ("Despite the lack of explicit statutory or controlling legal guidance, this Court is convinced by the weight of persuasive authority that the 'arbitrary and capricious' standard does in fact apply.") (citations omitted). Although the First Circuit correctly recognized that § 44902(b) does not protect decisions that are arbitrary or capricious, it rejected the district court's conclusion that a jury verdict based on a finding of intentional discrimination on account of race necessarily satisfies the arbitrary or capricious standard. Pet. App. 36a.

The First Circuit's rejection of the principle that decisions driven by racial animus are *per se* arbitrary and capricious creates a direct conflict with the decisions of several other federal courts. *See Shqeirat v. U.S. Airways, Inc.*, 515 F. Supp. 2d 984, 1004 (D. Minn. 2007) ("[A] refusal to board a passenger that is motivated by a passenger's race is inherently arbitrary and capricious."); *Dasrath*, 467 F. Supp. 2d at 434 ("A decision based on race would be arbitrary and capricious."); *Alshrafi v. American Airlines, Inc.*, 321 F. Supp. 2d 150, 162 (D. Mass. 2004)

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[7](...continued)
the predecessor to § 44902(b).

("[A]ctions motivated by racial or religious animus are necessarily arbitrary and capricious, and therefore beyond the scope of the discretion granted by Section 44902."); *Bayaa v. United Airlines, Inc.*, 249 F. Supp. 2d 1198, 1205 (C.D. Cal. 2002) (finding "no merit" to airline's argument that civil rights laws conflict with § 44902(b) and holding that § 44902(b) "does not grant [the airline] a license to discriminate"); *Chowdhury v. Northwest Airlines Corp.*, 238 F. Supp. 2d 1153, 1154 (N.D. Cal. 2002) ("[T]here is no apparent conflict between the federal statutes prohibiting racial discrimination and the federal law giving air carriers the discretion to refuse to carry passengers for safety reasons.").

Further, the First Circuit's conclusion that statutes protecting passengers from discrimination are subordinate to an airline's refusal rights under § 44902(b) is inconsistent with the Second Circuit's decision in *Williams* and the Ninth Circuit's decision in *Cordero*. In *Williams*, an airline denied service to a ticketed passenger whom the FBI reported was a dangerous fugitive known to carry firearms and who had been diagnosed as schizophrenic. 509 F.2d at 945. The passenger sued the airline alleging discrimination. The Second Circuit held that the airline's denial-of-service decision was protected by the permissive refusal provision of the FAA because the airline had a reasonable basis for its decision, and there was "no evidence that [the airline] was at any time influenced by race prejudice or discrimination in the slightest." *Id.* at 948. Thus, *Williams* does not

stand for the principle that anti-discrimination law is limited by § 44902(b); rather, *Williams* holds that where an airline acts "properly and reasonably" in denying service, the passenger will not be able to prove that discrimination motivated the airline's decision. *Id.* at 949. Likewise, if the passenger proves that discrimination motivated the decision, the decision will be arbitrary and capricious and the protection afforded by § 44902(b) for safety-related denials of service will not apply. The Ninth Circuit reached the same conclusion in *Cordero*, holding that the permissive refusal provision of the FAA does not "render[] immune from liability a carrier whose decision to deny passage is unreasonably or irrationally formed. While we agree with the district court that air safety is a paramount concern of air carriers and of the public generally, we do not believe that requiring carriers to act reasonably in formulating opinions to deny passage undercuts this concern." 681 F.2d at 671.[8]

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[8]The First Circuit claims agreement "with *Williams* that Congress did not intend the non-discrimination provisions of the FAA or of § 1981 to limit or to render inoperative the refusal rights of the air carrier" Pet. App. 28a (citing *Williams*, 509 F.2d at 948), but ignores the qualification in *Williams* that non-discrimination law does not limit refusal rights "in the face of evidence which would cause a reasonably careful or prudent 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 the flight.'" 509 F.2d at 948 (quoting the predecessor statute to § 44902(b)). *Cordero*

(continued...)

Because the First Circuit concluded that § 44902(b) can protect an airline's denial-of-service decision even where the decision violates anti-discrimination law, the decision below conflicts with the Second Circuit's decision in *Williams*, the Ninth Circuit's decision in *Cordero*, and the district court decisions in *Shqeirat*, *Dasrath*, *Alshrafi*, *Bayaa*, and *Chowdhury*. This Court should grant certiorari to resolve this conflict.

B. The decision below effectively endorses racial profiling.

This Court should also review the decision below because its rejection of the principle that decisions driven by racial stereotypes are irrational is an endorsement of racial profiling in airline denial-of-service decisions. Indeed, the First Circuit's original slip opinion stated explicitly that "[r]ace or ethnic origin of a passenger may, depending on context, be relevant information in the total mix of information raising concerns that transport of a passenger 'might be' inimical to safety." Slip. Op. of Jan. 10, 2008, at 38. The First Circuit later issued an Errata Sheet that eliminated this statement (Pet. App. 77a), but the First Circuit's conclusion that racial profiling is

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[8](...continued)
expressed the same principle this way: "We have not found, nor have we been shown, any legislative history indicating that in enacting [§ 44902(b)] Congress intended to limit the protections afforded ticket-holders under" anti-discrimination law. 681 F.2d at 672.

a legitimate security measure is implicit in its amended opinion. Although the court below agreed that "a reasonable decision is not arbitrary or capricious" and "a decision which is arbitrary is totally devoid of reason" (Pet App. 28a n.17 (citing *Williams* and *Cordero*)), it held that denial-of-service decisions based on race are not necessarily arbitrary or capricious. Pet. App. 36a (rejecting district court's reasoning that the "instruction on finding intentional discrimination was adequate to cover § 44902(b), because if there was intentional discrimination . . . that would itself per se be arbitrary or capricious."). Thus, the opinion below protects airline denial-of-service decisions that are based on stereotypes about the propensity of passengers with a Middle Eastern appearance to commit acts of terrorism.

By allowing racial profiling in airline denial-of-service decisions, the First Circuit goes further than courts that have sanctioned the use of race in investigative decisions where race is part of a description of a particular suspect, *see, e.g., Brown v. City of Oneonta*, 221 F.3d 329, 337-38 (2d Cir. 2000) (distinguishing between permissible use of race to identify suspect based on witness description and unlawful profiling based on racial stereotype); *United States v. Avery*, 137 F.3d 343, 353 (6th Cir. 1997) (holding that "the Fourteenth Amendment protects citizens from police action, including the decision to interview an airport patron, based solely on impermissible racial considerations"); *Buffkins v. City of Omaha*, 922 F.2d

465, 468 n.8 (8th Cir. 1990) (holding that detention of airport patron was not racial discrimination under § 1981 because she matched the racial description of the person described in a tip, but noting that its "conclusion would be very different if the officers, acting without a tip, focused their investigation on Buffkins solely because of her race."), and the First Circuit's opinion is in tension with this Court's rejection of racial stereotyping. *See, e.g., Shaw v. Reno,* 509 U.S. 630, 643-44 (1993); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991); *Batson v. Kentucky*, 476 U.S. 79, 85-88 (1986).

Nevertheless, the First Circuit is not alone. Since the terrorist attacks of September 11, 2001, many commentators have endorsed racial profiling as a tool in the fight against terrorism. *See, e.g.*, R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 Cornell L. Rev. 1201 (2004) (describing disagreement among commentators on legitimacy of racial profiling in antiterrorism efforts); Stephen J. Ellman, *Racial Profiling and Terrorism*, 19 N.Y.L. Sch. J. Hum. Rts. 305 (2003) (discussing whether racial profiling is justifiable as a response to terrorism).

The debate over the legality of racial profiling in aviation is an issue that will continue to arise with frequency and should be addressed by this Court. Indeed, DOT's Aviation Consumer Protection Division reports that, between January 1, 2001 and March 31, 2008, it received 953 complaints of discrim-

ination against U.S. airlines.[9] Further, in the months following the terrorist attacks of September 11, 2001, DOT's Office of Aviation Enforcement and Proceedings received numerous complaints alleging that airlines had unlawfully discriminated against passengers perceived to be of Arab, Middle Eastern, or South Asian descent by either removing them from flights or denying them boarding. These complaints resulted in administrative enforcement actions against four major air carriers, each of which was resolved by the entry of a Consent Order.[10] As these Consent Orders illustrate, this case presents issues

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[9]*See* Air Travel Consumer Reports published by U.S. Department of Transportation, Office of Aviation Enforcement and Proceedings, Aviation Consumer Protection Division, on February 2002, February 2003, February 2004, February 2005, February 2006, February 2007, February 2008, and May 2008, http://airconsumer.ost.dot.gov/reports/index.htm.

[10]*American Airlines, Inc.*, No. OST-2003-15046, Consent Order (DOT Feb. 27, 2004), http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=DOT-OST-2003-15046.; *Delta Airlines, Inc.*, No. OST-2004-16943, Consent Order (DOT June 21, 2004), http://www.regulations.gov/fdmspublic/component/main?main=Document/Detail&o=090000648031aaea; *Continental Airlines, Inc.*, No. OST-2004-16943, Consent Order (DOT Apr. 2, 2004), http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=090000648031aade; *United Air Lines, Inc.*, No. OST-2003-14194, Consent Order (DOT Nov. 19, 2003), http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=090000648030df3f.

"of exceptional importance . . . in light of the high-security environs in which we find ourselves today" (Pet. App. 64a (Torruella, J., dissenting from denial of reh'g en banc)), and the Nation's longstanding commitment to nondiscrimination in all walks of American life. The Court should grant review for that reason as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

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