

**Civil Rights**—First Circuit Incorrectly Adopts Arbitrary-or-Capricious Standard for Reviewing Airliner’s Decision to Remove Passengers—*Cerqueira v. American Airlines, Inc.*, 520 F.3d 1 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 111 (2008)

In response to increasing acts of piracy on commercial airlines, Congress enacted the Federal Aviation Act (FAA), which established regulations to improve and maintain safety standards in commercial aviation.<sup>1</sup> Although the FAA includes an anti-discrimination provision, section 44902(b) of the Act grants air carriers broad discretion to refuse transportation to any passenger a “carrier decides is, or might be inimical to safety.”<sup>2</sup> In *Cerqueira v. American Airlines, Inc.*,<sup>3</sup> the Court of Appeals for the First Circuit, in a case of first impression, considered the proper standard for a passenger’s discrimination claim against an air carrier that relies on the protection under section 44902(b) to refuse passengers transportation.<sup>4</sup> The First Circuit held that the plaintiff passenger must show the air carrier’s decision to refuse transportation and rebooking is arbitrary or capricious based on the information known to the decision-maker at the time of the refusal.<sup>5</sup>

On December 28, 2003, John D. Cerqueira planned to fly from Boston to Fort Lauderdale on American Airlines (AA) flight 2237.<sup>6</sup> Prior to boarding, the captain had a disturbing conversation in the terminal with an Israeli passenger, who later appeared to be Cerqueira’s flying companion.<sup>7</sup> Later, in the gate

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1. See Federal Aviation Act, 49 U.S.C. § 40101(a)(1) (2000) (declaring safety as “highest priority in air commerce”); *Williams v. Trans World Airlines*, 509 F.2d 942, 946 (2d Cir. 1975) (describing historical background for congressional action in FAA).

2. See 49 U.S.C. § 40127(a) (2000) (prohibiting discrimination based on “race, color, national origin, religion, sex or ancestry”); 49 U.S.C. § 44902(b) (2000) (granting air carrier’s permissive refusal of passengers and property if adverse to safety); see also 8A AM. JUR. 2D *Aviation* § 73 (2008) (describing air carrier’s discretion to remove passengers for perceived security threats). Under 14 C.F.R. § 91.3, “the pilot in command” is “the final authority as to, the operation of that aircraft,” and according to 49 U.S.C. § 44902(b), may decide to remove passengers from the plane. See 14 C.F.R. § 91.3(a) (2008); 49 U.S.C. § 44902(b) (2000).

3. 520 F.3d 1 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 111 (2008).

4. See 520 F.3d at 4 (stating fundamental issue in case). The plaintiff, John D. Cerqueira, claimed that American Airlines (AA) “violated his rights under 42 U.S.C. § 1981 to be free of race discrimination in contracting.” *Id.*; see also 42 U.S.C. § 1981 (2000) (prohibiting discrimination based on race in contract creation and enforcement); H.R. REP. NO. 102-40(II), at 37 (1991), as reprinted in 1991 U.S.C.A.A.N. 549 (describing congressional intent to strengthen existing discrimination laws in private contracts).

5. See 520 F.3d at 14 (adopting arbitrary-or-capricious standard developed by Second Circuit).

6. See *id.* at 4-5 (explaining Cerqueira’s presence at Logan Airport). Cerqueira is an American citizen of Portuguese ancestry. See *Cerqueira v. Am. Airlines, Inc.*, 484 F. Supp. 2d 232, 233 (D. Mass. 2007), *vacated*, 520 F.3d 1 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 111 (2008).

7. See 520 F.3d at 4-5 (describing conversation where Israeli man stopped captain and told him they would have a good flight).

area, Cerqueira showed hostility toward a flight attendant while requesting an exit-row seat, then boarded the plane early, going immediately to the restroom for an extended period of time.<sup>8</sup> In addition, the two Israeli passengers who appeared to be traveling with Cerqueira acted suspiciously during the safety presentation.<sup>9</sup> Based on these events, along with other passengers' discomfort with these men, the captain decided to remove Cerqueira and the two Israeli passengers from the plane.<sup>10</sup>

After removal, the state police questioned Cerqueira and the two Israeli passengers for over two hours.<sup>11</sup> During this time, the captain called the AA's systems operations control (SOC) manager in Dallas and gave him a full report of the morning's events.<sup>12</sup> After the police released him, Cerqueira attempted to rebook a later AA flight, but the SOC manager denied Cerqueira's rebooking.<sup>13</sup> In the fall of 2004, Cerqueira filed a complaint with the Massachusetts Commission Against Discrimination (MCAD), and after the MCAD determined he had a valid claim, he brought suit in the United States District Court for the District of Massachusetts in 2005.<sup>14</sup>

After trial in district court, the jury returned a verdict for Cerqueira and awarded him compensatory damages of \$130,000 and punitive damages of \$270,000.<sup>15</sup> AA then filed a motion for judgment notwithstanding the verdict and a motion for a new trial.<sup>16</sup> The district court denied both motions and rejected AA's argument that Cerqueira failed to produce sufficient evidence of intentional discrimination pursuant to 49 U.S.C. § 44902(b).<sup>17</sup> Although the district court found the arbitrary-or-capricious standard applied to claims

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8. See *id.* at 5-6 (expressing flight attendant's concern for Cerqueira's suspicious behavior). Cerqueira also showed undue interest in the flight attendant's duties once he was on board the aircraft. *Id.* at 6.

9. See *id.* at 6 (detailing Israeli passengers' bizarre behavior and Cerqueira's amusement with their behavior).

10. See *id.* at 7 (describing captain's reasons for removing Cerqueira from the plane). According to a flight attendant, several passengers expressed unease with flying aboard the same plane as Cerqueira and the other two men. *Id.*

11. 520 F.3d at 7-8, 10 (outlining removal and interview process). The state police administrative log read that the passengers were "denied boarding [and] will be re-booked." *Id.* at 10.

12. *Id.* at 9 (detailing AA safety procedures). The SOC manager held final authority over whether a removed passenger could be rebooked on an AA flight. *Id.*

13. *Id.* at 9-10 (describing plaintiff's rebooking attempt). Based on the information communicated to him by the captain, the SOC manager told the customer-service manager in Boston to deny Cerqueira rebooking. *Id.* at 9. Cerqueira was able to book a flight on another airline the following day. *Id.* at 10.

14. *Id.* at 10-11 (providing procedural background to discrimination claim). Cerqueira's theory of discrimination was that the flight attendant who complained to the captain was racial profiling based on his "dark hair" and "olive complexion." *Id.* at 5 n.3.

15. 520 F.3d at 11 (describing jury verdict).

16. See *id.* (arguing court gave erroneous jury instructions and AA's decision not arbitrary or capricious). In particular, AA argued the court erred in refusing to give the jury specific instructions on 49 U.S.C. § 44902(b). *Id.*

17. See *Cerqueira v. Am. Airlines, Inc.*, 484 F. Supp. 2d 232, 234 (D. Mass. 2007) (concluding jury instructions proper because "jury verdict necessarily satisfied" arbitrary-or-capricious standard), *vacated*, 520 F.3d 1 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 111 (2008).

involving section 49902(b), the court also held that the failure to give an explicit instruction respecting this standard was not a prejudicial error.<sup>18</sup> On appeal, however, the First Circuit reversed and remanded the case with instructions to vacate the judgment after concluding that no properly instructed jury could return a verdict against AA.<sup>19</sup>

For more than seven decades, terrorist attacks have wreaked havoc on commercial aviation throughout the world.<sup>20</sup> Since the first hijacking of a U.S. commercial aircraft in 1961, the federal government has passed a surplus of laws designed to combat aerial terrorism.<sup>21</sup> Unfortunately, as a result of the terrorist attacks on September 11, 2001, air carriers increasingly rely upon authority derived from 49 U.S.C. § 44902(b) to refuse passenger transportation due to security concerns, some of which are unfounded.<sup>22</sup> In turn, passengers object to the refusals as racially motivated and rely upon civil-rights protections granted by another federal statute, 42 U.S.C. § 1981.<sup>23</sup> Discrimination claims brought by passengers raise important public-policy concerns regarding the intersection of aviation security and civil rights.<sup>24</sup>

The proper legal standard for passenger claims of air-carrier discrimination

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18. See *Cerqueira v. Am. Airlines, Inc.*, 484 F. Supp. 2d 232, 234 (D. Mass. 2007) (recognizing intentional racial discrimination qualifies as arbitrary-or-capricious behavior), *vacated*, 520 F.3d 1 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 111 (2008). The district court reasoned that instructing the jury that “[AA’s] liability depended upon a finding of intentional discrimination on account of race” satisfies the “arbitrary or capricious” standard. *Id.* Therefore, the district court applied instructions from Title VII employment discrimination cases to AA’s duty not to discriminate. See 520 F.3d at 18.

19. See 520 F.3d at 4 (summarizing court’s decision and directions to lower courts). The First Circuit determined the district court failed to give instructions on the statutory permission afforded air carriers under section 44902(b) and gave instructions inconsistent with that statute. *Id.*

20. See Paul Stephen Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 COLUM. J. TRANSNAT’L L. 649, 650-54 (2003) (examining rise of aerial terrorism and governmental attempts to prevent future incidents); see also *Smith v. Comair, Inc.*, 134 F.3d 254, 258 (4th Cir. 1998) (recognizing compelling safety and security concerns in modern commercial aviation).

21. See Dempsey, *supra* note 20, at 694-726 (detailing decades long development of federal legislation attempting to combat aerial terrorism); Kent C. Krause, *Putting the Transportation Security Administration in Historical Context*, 68 J. AIR L. & COM. 233, 234-42 (2003) (providing overview of FAA’s decades-long response to aerial terrorism, including passenger and baggage screening).

22. See Geoffrey A. Hoffman, *Racial Profiling in the Air After Sept. 11*, N.Y. L.J., Apr. 15, 2002, § 3, at 1 (providing examples of erroneous refusals based on racial profiling and explaining carriers rely on section 44902 to justify refusing transportation); Krause, *supra* note 21, at 242-47 (describing heightened security measures in response to post September 11, 2001 terrorist attacks); Charu A. Chandrasekhar, Note, *Flying While Brown: Federal Civil Rights Remedies to Post-9/11 Airline Racial Profiling of South Asians*, 10 ASIAN L.J. 215, 216-19 (2003) (highlighting racial discrimination in civil aviation post-9/11).

23. See Chandrasekhar, *supra* note 22, at 227, 233-40 (detailing plaintiffs efforts to bring section 1981 claims against airlines for racial discrimination); William Mann, Comment, *All The (Air) Rage: Legal Implications Surrounding Airline And Government Bans on Unruly Passengers in the Sky*, 65 J. AIR L. & COM. 857, 879-80 (2000) (describing controversy over proper interpretation of section 44902(b)).

24. See *Dasrath v. Cont’l Airlines, Inc.*, 467 F. Supp. 2d 431, 433 (D.N.J. 2006) (emphasizing conflicting public-policy concerns of preventing racial discrimination while protecting passenger security); see also Elbert Lin, Comment, *Korematsu Continued . . .*, 112 YALE L.J. 1911, 1912-13 (2003) (comparing post-September 11, 2001 judicial deference toward national security to post-Pearl Harbor judicial deference); *supra* notes 22-23 and accompanying text (highlighting racial discrimination in commercial aviation).

is the subject of considerable dispute.<sup>25</sup> Normally, claims filed pursuant to section 1981 are for employment discrimination, and courts consistently analyze these claims by applying the *McDonnell Douglas* test.<sup>26</sup> Under the *McDonnell Douglas* test, first announced in *McDonnell Douglas Corp. v. Green*,<sup>27</sup> the plaintiff has the initial burden of establishing a prima facie case of discrimination.<sup>28</sup> Once that burden is established, the burden shifts to the defendant to articulate a “legitimate, nondiscriminatory reason” for its adverse action.<sup>29</sup> If the defendant meets this burden, the burden shifts back to the plaintiff to show the stated reason was mere pretext, or a “coverup for a racially discriminatory decision.”<sup>30</sup>

It is well-settled that a plaintiff may bring a claim against an airline under section 1981 for racial discrimination in making and enforcing private contracts.<sup>31</sup> Outside of the employment context, a majority of federal courts consistently apply the arbitrary-or-capricious standard to discrimination claims against air carriers rather than the *McDonnell Douglas* test.<sup>32</sup> Most notably, in

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25. See *infra* notes 26-38 and accompanying text (considering whether courts apply arbitrary-or-capricious standard or *McDonnell Douglas* test for race-based passenger removals).

26. See, e.g., *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1105-06 (9th Cir. 2008) (noting *McDonnell Douglas* framework typically applies to section 1981 claims); *Somoza v. Univ. of Denver*, 513 F.3d 1206, 1211 (10th Cir. 2008) (stating *McDonnell Douglas* test standard for retaliation claims); *Michael v. Caterpillar Fin. Serv. Corp.*, 496 F.3d 584, 593 (6th Cir. 2007) (following *McDonnell Douglas* framework for employee’s racial discrimination case against employer).

27. 411 U.S. 792 (1973).

28. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (originating burden-shifting analysis and requiring complainant to satisfy initial burden).

29. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (stating burden shifts to employer once plaintiff establishes prima facie case of racial discrimination).

30. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973) (allowing plaintiff to rebut employer’s non-discriminatory actions as pretext).

31. See 42 U.S.C. § 1981 (2000) (amended in 1991 to include making, performance, modification, and termination of contracts); *Dasrath v. Cont’l Airlines, Inc.*, 467 F. Supp. 2d 431, 444-45 (D.N.J. 2006) (describing requirements for section 1981 claim); *Al-Qudhai’een v. Am. W. Airlines, Inc.*, 267 F. Supp. 2d 841, 846 (S.D. Ohio 2003) (demonstrating courts hear actions involving section 44902(b) brought under section 1981); *Huggar v. Nw. Airlines, Inc.*, No. 98 C 594, 1999 WL 59841, at \*3-4 (N.D. Ill. Jan. 27, 1999) (describing section 1981 claim against air carrier); H.R. REP. NO. 102-40(II), at 37 (1991), as reprinted in 1991 U.S.C.A.A.N. 549 (describing congressional intent behind 1991 amendments to ensure racial discrimination prohibited in making contracts); see also Stephen W. Dummer, Comment, *Secure Flight and Data Veillance, a New Type of Civil Liberties Erosion: Stripping Your Rights When You Don’t Even Know It*, 75 MISS. L.J. 583, 616 (2006) (describing right to file racial-discrimination claim under section 1981).

32. See *Cordero v. Cia Mexicana de Aviacion, S.A.*, 681 F.2d 669, 672 (9th Cir. 1982) (adopting arbitrary-or-capricious test from *Williams* for air carrier’s defense to racial discrimination claims); *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975) (articulating arbitrary-or-capricious test as standard for section 1511 defense claims). But see *Dasrath v. Cont’l Airlines, Inc.*, 467 F. Supp. 2d 431, 445 (D.N.J. 2006) (applying *McDonnell Douglas* test to passenger’s discrimination claim against air carrier for transportation refusal); *Huggar v. Nw. Airlines, Inc.*, No. 98 C 594, 1999 WL 59841, at \*4 (N.D. Ill. Jan. 27, 1999) (utilizing *McDonnell Douglas* approach where only indirect evidence of discrimination exists). A minority of federal appeals courts apply the *McDonnell Douglas* test to discrimination claims outside of the employment context. See *Lindsay v. Yates*, 498 F.3d 434, 438 (6th Cir. 2007) (applying *McDonnell Douglas* test to federal housing discrimination claims); *Elkhatib v. Dunkin Donuts, Inc.*, 493 F.3d 827, 829 (7th Cir. 2007) (applying *McDonnell Douglas* test to discriminatory application of a franchise agreement); *Lindsey v. SLT Los Angeles*,

*Williams v. Trans World Airlines*,<sup>33</sup> the Second Circuit held that the FAA permissive refusal authority under section 44902(b) overrides the protections of section 1981 and grants air carriers broad authority in refusing to transport passengers for security reasons, unless the decision is proven to be arbitrary or capricious.<sup>34</sup> Similarly, the Ninth Circuit in *Cordero v. Cia Mexicana de Aviacion*,<sup>35</sup> adopted the *Williams* court's reasoning in requiring airlines denial of transportation of passengers to be reasonable.<sup>36</sup> When applying the arbitrary-or-capricious standard, courts review the facts and circumstances known to the air carrier at the time of the decision to refuse passage.<sup>37</sup> The majority of federal courts have held that the arbitrary-or-capricious standard is best suited to reconcile the conflicting policy concerns of safety in commercial aviation and the right to be free from racial discrimination.<sup>38</sup>

In *Cerqueira v. American Airlines, Inc.*, the First Circuit vacated the

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L.L.C., 447 F.3d 1138, 1144-45 (9th Cir. 2006) (applying *McDonnell Douglas* test to discrimination in contracting for event space). At least two First Circuit decisions applied *McDonnell Douglas* to discrimination claims beyond the employment field. See *Mercado-Garcia v. Ponce Fed. Bank*, 979 F.2d 890, 893 (1st Cir. 1992) (applying *McDonnell Douglas* test to discrimination in credit decision); *T & S Serv. Assocs., Inc. v. Crenson*, 666 F.2d 722, 724 (1st Cir. 1981) (applying *McDonnell Douglas* test to discrimination in awarding federally funded school-lunch contracts). In *Crenson*, the First Circuit explained that while the *McDonnell Douglas* test originated in the context of Title VII and employment discrimination, its framework provides courts with a well-structured means to resolve discrimination questions. See *T & S Serv. Assocs., Inc. v. Crenson*, 666 F.2d 722, 724 (1st Cir. 1981).

33. 509 F.2d 942 (2d Cir. 1975).

34. See *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975) (holding air carrier's decision to refuse transportation authorized by section 1511(a) and not arbitrary). The court further explained that section 1511(a) is consistent with the common-law rule regarding an air carrier's right to refuse transportation. *Id.* at 948 n.10 (citing 14 AM. JUR. 2D *Carriers* § 865 (2008)). The statutory provision prohibiting discrimination does not prevent an air carrier from refusing to transport a passenger when, in its opinion, the passenger posed a security threat. See *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975) (citing 49 U.S.C. § 1511(a) (1961), current version at 49 U.S.C. § 44902(b) (2000)). *But see* *Bayaa v. United Airlines, Inc.*, 249 F. Supp. 2d 1198, 1205 (C.D. Cal. 2002) (holding section 44902(b) does not grant air carriers "a license to discriminate").

35. 681 F.2d 669, 672 (9th Cir. 1982).

36. *Cordero v. Cia Mexicana De Aviacion*, 681 F.2d 669, 672 (9th Cir. 1982) (concluding *Williams* test provides appropriate balance between passengers' rights and airline safety concerns). The *Cordero* court, like *Williams*, held the reasonableness of the carrier's decisions is based upon the information known to the airline at the time. *Id.* Further, there is no duty to conduct an in-depth investigation into the passenger's potential danger to the airline. *Id.*

37. See *Cordero v. Cia Mexicana De Aviacion, S.A.*, 681 F.2d 669, 672 (9th Cir. 1982) (explaining no duty to conduct extensive investigation); *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975) (holding carrier's decision of reasonableness based upon carrier's time constraints and facts known at that time); see also *Christel v. AMR Corp.*, 222 F. Supp. 2d 335, 340 (E.D.N.Y. 2002) (holding no obligation to leave cockpit to investigate truthfulness of flight attendant's statements); *Sedigh v. Delta Airlines, Inc.*, 850 F. Supp. 197, 202 (E.D.N.Y. 1994) (citing *Williams v. Trans World Airlines*, 509 F.2d 942, 947-948 (2d Cir. 1975)) (reaffirming no duty to conduct thorough background investigation of passenger). *But see* *Huggar v. Nw. Airlines, Inc.*, No. 98 C 594, 1999 WL 59841, at \*5 (N.D. Ill. Jan. 27, 1999) (suggesting captain should investigate passenger's explanation before refusing to transport).

38. See *Cordero v. Cia Mexicana de Aviacion, S.A.*, 681 F.2d 669, 672 (9th Cir. 1982) (balancing safety concerns with freedom from discrimination); *Dasrath v. Cont'l Airlines, Inc.*, 467 F. Supp. 2d 431, 433-34 (D.N.J. 2006) (describing intersection of aviation security with freedom from discrimination).

plaintiff's jury verdict and held "no properly instructed jury could return a verdict against the air carrier."<sup>39</sup> Relying on the reasoning and standards established in *Williams*, and later adopted in *Cordero*, the First Circuit held an air carrier is immune from liability stemming from its decision to refuse to transport a passenger, unless that decision is arbitrary or capricious.<sup>40</sup> In doing so, the First Circuit aligned with the Second and Ninth Circuits in rejecting the *McDonnell Douglas* burden-shifting analysis in favor of the arbitrary-or-capricious standard for section 1981 claims against air carriers.<sup>41</sup> The court determined that Congress did not intend section 1981 to "limit or to render inoperative" the permissive refusal rights granted air carriers under section 44902(b).<sup>42</sup>

In addition to adopting the arbitrary-or-capricious standard, the First Circuit established four guiding principles for evaluating an air carrier's refusal to transport under section 44902(b).<sup>43</sup> First, the captain's decision to refuse transportation is equated with a decision by the air carrier.<sup>44</sup> Second, a review of the captain's decision to refuse transportation is limited to the information "actually known by the decisionmaker at the time of the decision."<sup>45</sup> Third, the decision-maker is "entitled to accept at face value the representations made to him by other air carrier employees."<sup>46</sup> Fourth, the prejudices of air carrier personnel other than the decision-maker are not imputed to the decision-maker.<sup>47</sup> In light of these principles, the First Circuit concluded that, as a

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39. See 520 F.3d at 4 (rejecting district court's jury instructions). The court explained that the district court based its instructions on the incorrect assumption that instructions from employment discrimination cases were appropriate. *Id.* at 18. Therefore, the court held the district court erred in refusing to instruct the jury on section 44902(b). *Id.* at 4.

40. See *id.* at 14 (determining arbitrary-or-capricious test applies when analyzing air carrier's permissive refusal decision). The court reasoned the arbitrary-or-capricious standard reconciles the safety concerns in commercial aviation with prohibitions on racial discrimination. *Id.* The court also explained that Congress "specifically authorized permissive refusals by air carriers." *Id.* Furthermore, the court held the arbitrary-or-capricious standard applies to the decisions of the captain and the SOC manager. *Id.* at 15. The court stated, "there is absolutely no evidence that either the captain himself or the SOC manager had discriminatory animus." *Id.* at 17.

41. See *id.* at 17 (overruling district court's reliance on *McDonnell Douglas* burden-shifting analysis in its jury instructions). The First Circuit held that the district court improperly applied the *McDonnell Douglas* burden-shifting analysis to areas outside of employment discrimination. See *id.* at 17-18.

42. See *id.* at 14 (examining congressional intent and concluding courts "limited to review for arbitrariness or capriciousness").

43. See 520 F.3d at 14-15 (setting forth principles clarifying arbitrary-or-capricious standard). The court explained that the arbitrary-or-capricious standard is not the same as reasonableness under a negligence standard or reasonableness in the context of Fourth Amendment rights. See *id.* at 14 n.17.

44. See *id.* at 14 (describing congressional intent behind section 44902(b) to protect airlines overall and their decision-makers). Focusing on the actual decision-maker, the court extended the protection provided by section 44902(b) to any decision-maker who refuses transport to a passenger based on safety concerns. See *id.*

45. See *id.* at 14-15 (stressing standard not what captain reasonably should have known in hindsight).

46. See *id.* at 15 (placing no obligation on decision-makers to investigate thoroughly information received from air carrier personnel). The First Circuit further explained decision-makers' mistakes receive protection if they meet arbitrary-or-capricious standard. *Id.*

47. See 520 F.3d at 15 (permitting decision-makers to rely on credible information despite non-decision-

matter of law, AA is immune from section 1981 liability because the captain's refusal to transport and the SOC manager's denial of rebooking were neither arbitrary nor capricious.<sup>48</sup>

The *Cerqueira* court, in relying on *Williams* and *Cordero*, mistakenly determined that the district court erred in applying the *McDonnell Douglas* test.<sup>49</sup> The court neglected to recognize that the Supreme Court established the *McDonnell Douglas* burden-shifting analysis precisely for situations such as the *Cerqueira* incident, where there is no direct evidence of discrimination.<sup>50</sup> In accordance with the Supreme Court's decision in *McDonnell Douglas*, numerous federal appeals courts have applied the *McDonnell Douglas* test to discrimination cases outside the employment context.<sup>51</sup> If the First Circuit applied the *McDonnell Douglas* analysis to the SOC manager's decision to deny *Cerqueira* rebooking, AA would have had difficulty proving a legitimate non-discriminatory reason for the denial.<sup>52</sup> By refusing to apply the *McDonnell Douglas* test to the SOC manager's decision, the *Cerqueira* court ignored both Congress's intent and the intent behind the *McDonnell Douglas* framework to bolster discrimination laws.<sup>53</sup>

The First Circuit properly concluded that the captain's decision to refuse transportation was not arbitrary or capricious as a matter of law; unfortunately, the court carelessly applied the same reasoning to the SOC manager's decision

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makers' adverse motivations). In addition, the First Circuit held that the district court erroneously instructed the jury to focus on the flight attendant's bias in providing information to the captain. *Id.* at 18-19.

48. *See id.* at 15-16 (concluding insufficient evidence to find AA's decision arbitrary or capricious).

49. *See id.* at 17-18 (explaining district court's reasoning confused jury instructions from employment-discrimination claims with transport refusals). The circuit court determined that the *McDonnell Douglas* test applies to employment discrimination claims and is inapplicable to refusal-to-transport cases under section 44902(b). *See id.*

50. *See Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 20, 22 (1st Cir. 2008) (Torruella, J., dissenting), *denying petition for reh'g of* 520 F.3d 1 (1st Cir. 2008) (indicating *McDonnell Douglas* test appropriate for evaluating section 1981 claims); *see also supra* notes 28-30 and accompanying text (setting forth *McDonnell Douglas* burden-shifting framework).

51. *See supra* note 32 (listing federal decisions utilizing *McDonnell Douglas* test in non-employment situations). The majority failed to mention this line of cases in its analysis. *See* 520 F.3d at 17-20.

52. *See Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 20, 22-23 (1st Cir. 2008) (Torruella, J., dissenting), *denying petition for reh'g of* 520 F.3d 1 (1st Cir. 2008) (noting reasonable jury could conclude AA lacked legitimate reason to deny *Cerqueira*'s rebooking request); *see also supra* notes 26-30 and accompanying text (describing *McDonnell Douglas* burden-shifting analysis).

53. *See Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 20, 22 (1st Cir. 2008) (Torruella, J., dissenting), *denying petition for reh'g of* 520 F.3d 1 (1st Cir. 2008) (interpreting section 44902(b)'s congressional intent and Supreme Court's intent regarding *McDonnell Douglas* analysis). Congress's 1991 amendments to section 1981 forbid racial discrimination in making and enforcing contracts, and that section is closely associated with employment discrimination and the *McDonnell Douglas* analysis. *See supra* note 31 and accompanying text (discussing congressional intent behind 1991 amendments); *see also* *Dasrath v. Cont'l Airlines, Inc.*, 467 F. Supp. 2d 431, 445 (D.N.J. 2006) (concluding courts need to apply *McDonnell Douglas* framework when federal statutes tackle "vital public concerns"); *Huggar v. Nw. Airlines, Inc.*, No. 98 C 594, 1999 WL 59841, at \*3-4 (N.D. Ill. Jan. 27, 1999) (applying *McDonnell Douglas* test to section 1981 discrimination claim against air carrier for transportation refusal).

to deny rebooking.<sup>54</sup> By applying the arbitrary-or-capricious standard to the SOC manager's decision, the majority misinterpreted the congressional intent behind section 49902(b).<sup>55</sup> Without any precedential or statutory support, the *Cerqueira* court improperly applied the reasoning in *Williams*, which held that the captain has no obligation to make a thorough inquiry into the information received, to the SOC manager's decision.<sup>56</sup> Contrary to the *Cerqueira* court's argument, while the captain is afforded broad discretion in refusing to transport Cerqueira because of limited information and time constraints, it does not follow that the SOC manager's decision, made two hours after the captain's decision and after the state police interviewed and cleared the three passengers, should be reviewed under the same guidelines.<sup>57</sup> Thus, the court inexplicably failed to recognize that the *Williams* analysis was contingent upon the notion that an air carrier makes decisions in time-pressured situations and with little opportunity to conduct a thorough investigation.<sup>58</sup>

The First Circuit's improper application of the arbitrary-or-capricious standard to the SOC manager's decision transforms section 44902(b) from a limited exception into overbroad immunity for air carriers.<sup>59</sup> Congress enacted section 44902(b) to give air carriers broad discretion when making time-pressured decisions.<sup>60</sup> Congress did not intend to immunize airline managers' rebooking decisions that are not under similar time constraints and pressures.<sup>61</sup>

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54. See *Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 20, 21 (1st Cir. 2008) (Torruella, J., dissenting), *denying petition for reh'g of* 520 F.3d 1 (1st Cir. 2008) (criticizing *Cerqueira*'s analysis of SOC manager's decision). In opposing the expansion of the arbitrary-or-capricious standard, Judge Torruella noted that the denial of rebooking "is a separate and independent decision made by the SOC manager," which does not deserve the generous protection given to the captain. *Id.* at 21.

55. Compare 520 F.3d at 15 (explaining SOC manager's "prompt" decision receives same deference as captain), with *Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 20, 21-22 (1st Cir. 2008) (Torruella, J., dissenting), *denying petition for reh'g of* 520 F.3d 1 (1st Cir. 2008) (contending section 44902(b) immunity not intended to protect decisions "made without time pressure").

56. See 520 F.3d at 15 (equating decisions of airline captains with those of SOC manager without statutory references or precedent); *Williams v. Trans World Airlines, Inc.*, 509 F.2d 942, 945, 948 (2d Cir. 1975) (imposing no obligation on captain's decision because of time constraints and limited information).

57. See *Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 20, 21 (1st Cir. 2008) (Torruella, J., dissenting), *denying petition for reh'g of* 520 F.3d 1 (1st Cir. 2008) (noting no time pressure for SOC manager to make decisions and therefore section 44902(b)'s deference inapplicable).

58. See *Williams v. Trans World Airlines, Inc.*, 509 F.2d 942, 947-49 (2d Cir. 1975) (analyzing air carrier's decision to refuse initial transport, without considering air carrier's decision on rebooking); see also *supra* note 37 and accompanying text (discussing extent of *Williams* analysis application to air carriers' transport refusals).

59. See *Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 20, 22 (1st Cir. 2008) (Torruella, J., dissenting), *denying petition for reh'g of* 520 F.3d 1 (1st Cir. 2008) (arguing Congress never intended section 44902(b) immunity to extend to decisions made hours after refusal); see also Lin, *supra* note 24, at 1913-14 (cautioning danger of denying civil rights in exchange for increased national security).

60. See 520 F.3d at 12 (describing congressional intent to afford air carriers broad discretion to ensure passenger safety); see also *supra* note 37 (explaining time constraints typically effect air carrier's decision).

61. See *Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 20, 22-23 (1st Cir. 2008) (Torruella, J., dissenting), *denying petition for reh'g of* 520 F.3d 1 (1st Cir. 2008) (arguing congressional intent ignored because SOC manager's decision not compelled by exigent circumstances).

While safety in commercial aviation is a compelling government interest, extending the application of the arbitrary-or-capricious standard to the SOC manager's decision unjustifiably infringes upon passengers' civil rights and inadvertently contributes to the acceptance of racial profiling by air carriers.<sup>62</sup>

In *Cerqueira v. American Airlines, Inc.*, the First Circuit decided whether to apply the arbitrary-or-capricious standard to a passenger's discrimination claim brought under 42 U.S.C. § 1981 against an air carrier who is protected by 49 U.S.C. § 44902(b). While the First Circuit correctly applied the arbitrary-or-capricious standard to the captain's decision to refuse transportation, the court erred in preventing a jury from considering the SOC manager's decision to deny rebooking. In vacating the jury verdict against the air carrier, the court failed to recognize the fundamental distinction between the captain and the SOC manager regarding the availability of time and information. By enacting 49 U.S.C. § 44902(b), Congress granted air carriers with extensive discretion in refusal to transport decisions; however, Congress did not intend to provide air carriers with discriminatory immunity when making informed decisions with ample time. Therefore, the First Circuit's holding regarding the SOC manager's denial of rebooking undermines congressional intent and grants air carriers broad discretion to discriminate with immunity.

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62. See *Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 20, 22 (1st Cir. 2008) (Torruella, J., dissenting), *denying petition for reh'g of* 520 F.3d 1 (1st Cir. 2008) (noting no court, prior to *Cerqueira*, had decided whether denial of rebooking reviewed under arbitrary-or-capricious standard). The *Cerqueira* court also fails to recognize that in *Williams*, the air carrier offered alternate flight arrangements to the passenger after refusing to transport him on his original flight. See *Williams v. Trans World Airlines*, 509 F.2d 942, 945 (2d Cir. 1975). Judge Torruella argues that "the [majority] opinion transforms section 44902(b)'s exceptional immunity into a legal framework that may apply in all airline decisions." *Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 20, 22 (1st Cir. 2008) (Torruella, J., dissenting), *denying petition for reh'g of* 520 F.3d 1 (1st Cir. 2008); see also *supra* notes 22-24 and accompanying text (describing detrimental effect of airline security on passengers civil rights).