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Antidiscrimination Law - In the Face of Racial Profiling, the First Circuit Holds that Longstanding Antidiscrimination Principles Must Yield to Airline Safety: *Cerqueira v. American Airlines, Inc.*

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ANTIDISCRIMINATION LAW—IN THE FACE OF RACIAL PROFILING, THE FIRST CIRCUIT HOLDS THAT LONGSTANDING ANTIDISCRIMINATION PRINCIPLES MUST YIELD TO AIRLINE SAFETY: *CERQUEIRA V. AMERICAN AIRLINES, INC.*

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IN *CERQUEIRA V. American Airlines, Inc.*,[1] the First Circuit Court of Appeals lobbed a forceful blow against longstanding, well-regarded antidiscrimination law by holding that 49 U.S.C. § 44902(b)—a statute that permits air carriers to refuse to transport a ticketed passenger that the carrier decides "is, or might be, inimical to safety"[2]—eclipses the protections of 42 U.S.C. § 1981,[3] which proscribes racial discrimination in the making and performance of contracts.[4] The First Circuit's decision overturned a jury finding that American Airlines removed a passenger from one of its flights in violation of the antidiscrimination requirements of § 1981.[5] Based on an overly broad interpretation of § 44902(b), the court's holding will essentially allow a carrier to evade § 1981 liability for illegal racial discrimination in its passenger ticketing contracts by creating an all-en-

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[1] 520 F.3d 1 (1st Cir. 2008).

[2] 49 U.S.C. § 44902(b) (2000 & Supp. V 2005). Specifically, the statute provides that "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." *Id.*

[3] 42 U.S.C. § 1981 (2000). To prove unlawful discrimination in contracting under § 1981, a plaintiff must typically show (1) her membership in a racial minority; (2) that the defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned the right to make and enforce contracts. Dasrath v. Cont'l Airlines, Inc., 467 F. Supp. 2d 431, 444-45 (D.N.J. 2006) (citing Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 569 (3d Cir. 2002)).

[4] *See Cerqueira*, 520 F.3d at 13–14.

[5] *Id.* at 20.

compassing immunity under § 44902(b).[6] The court's decision, therefore, could spawn a host of deleterious civil rights consequences, including court-sanctioned racial profiling in airline operations, because the decision chips away at stalwart antidiscrimination law that was to this point a hallmark of our nation's civil rights framework.

In December 2003, John Cerqueira, a U.S. citizen of Portuguese descent with dark hair and an olive complexion,[7] was a confirmed airline passenger aboard American Flight 2237 from Boston to Ft. Lauderdale.[8] Seemingly innocuous events during and before the boarding phase of the flight apparently caused concern among some of the flight's crew. For example, before boarding, Cerqueira approached the boarding gate and asked the flight attendant if he could switch his seat assignment to a more desirable, roomier exit row seat.[9] The flight attendant would not help Cerqueira and instead asked him to sit down.[10] When Cerqueira later boarded the airplane, the flight attendant became concerned because Cerqueira immediately went to the lavatory.[11] Additionally, a man with a ponytail approached the flight's captain prior to departure and asked whether he would be piloting the Ft. Lauderdale flight.[12] The captain believed the exchange with the ponytailed man was unusual.[13] Importantly, the ponytailed man was not Mr. Cerqueira, but was an Israeli citizen who, along with his Israeli traveling companion was, by coincidence, ultimately assigned to the same row aboard the aircraft as Cerqueira.[14] Through a series of events principally involving the *two Israeli* men seated next to Mr. Cerqueira (including the ponytailed man), the flight crew became suspicious of *all three* men and ultimately notified the Massachusetts

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[6] *See* Cerqueira v. Am. Airlines, Inc., 520 F.3d 20, 22 (1st Cir. 2008) (Torruella, J., dissenting).

[7] *Cerqueira*, 520 F.3d at 5 n.2; *see also* Cerqueira v. Am. Airlines, Inc., 484 F. Supp. 2d 232, 233 (D. Mass. 2007). For an interesting discussion about Mr. Cerqueira's district court level case, see Jonathan E. DeMay, *Recent Developments in Aviation Law*, 73 J. AIR L. & COM. 131, 306–09 (2008).

[8] *Cerqueira*, 520 F.3d at 4–5.

[9] *Id.* at 5. Presumably, such requests are not uncommon given the desirability of exit row seating. It is therefore curious that the request would be cause for alarm.

[10] *Id.*

[11] *Id.* at 6.

[12] *Id.* at 4–5.

[13] *Id.*

[14] *See id.* at 5.

State Police.[15] American then removed Cerqueira and the two Israelis from the aircraft.[16] The captain never interviewed any of the three men himself and testified that the first time he ever saw the plaintiff was at trial.[17]

Once the police removed the three men, the captain phoned American's control center in Texas and advised supervisory personnel of the "security issues" surrounding the flight.[18] American delayed the flight for more than three hours while security personnel re-screened all of the remaining passengers and cargo and searched the aircraft with dogs.[19] Importantly, after questioning the three men separately, the police determined they were not a threat and were "free to go."[20] Even though police cleared all three men before Flight 2237's eventual departure, airline personnel would not allow the men back aboard the flight.[21] Even more troubling, American informed Cerqueira that it would not allow him to fly aboard *any* American flight and refunded the cost of his ticket.[22] Cerqueira was forced to find travel on another carrier.[23] Several days later, and in response to an e-mail from Cerqueira to American asking about the reasons for his removal from the aircraft and the denial of travel on any American flight, American answered that its "personnel perceived certain aspects of [Cerqueira's] behavior which could have made other customers uncomfortable."[24] American did not mention any safety concerns when it ex-

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[15] *Id.* at 7.

[16] *Id.* The removal decision was based in part on the flight attendants' concerns. *Id.* The flight attendants were concerned because, among other things, the two Israelis seated in Cerqueira's row were behaving "boisterous[ly]" and wishing the other passengers "Happy New Year." *Id.* Although the facts showed that Cerqueira was not participating in this behavior, the flight attendants were nonetheless worried because at least one of them believed Cerqueira was feigning sleep. *Id.*

[17] *Id.* at 7, 9. One interesting question that arises involves how the captain could have missed seeing three men being removed from his aircraft by the state police, particularly in light of the fact that it was he who made the initial removal decision.

[18] *Id.* at 9.

[19] *Id.* at 8–9.

[20] *Id.* at 10.

[21] *Id.* at 9–10. The men were cleared by the police at approximately 9:00 a.m. *Id.* at 10. The original flight departed for Ft. Lauderdale at 9:33 a.m. *Id.* at 9.

[22] *Id.* at 9–10.

[23] *Id.* at 10.

[24] *Id.*

plained to Cerqueira the reasons for its decision to remove him and to deny him future service.[25]

Cerqueira sued American, urging that the carrier wrongfully discriminated against him in violation of § 1981 based upon his perceived race.[26] After trial in federal court, the jury found that the airline had indeed acted improperly and awarded Cerqueira $130,000 compensatory damages plus $270,000 punitive damages.[27] American sought both a judgment notwithstanding the verdict and a new trial based on its assertion that there was insufficient evidence of intentional discrimination.[28] The district court denied both of American's motions, concluding that the case "was a quintessential jury trial" in which both parties were "ably represented by vigorous advocates."[29] The district court noted that, after hearing all of the testimony and after weighing the credibility of the witnesses, the jury found that American's actions were motivated by racial discrimination.[30] Despite this, the First Circuit overturned the jury verdict and ordered the district court to vacate the judgment for Cerqueira.[31]

At the center of the First Circuit's holding was the intersection between § 44902(b), which permits a carrier to refuse transport to a passenger it decides poses a safety risk, and § 1981, which prohibits racial discrimination in contracting.[32] In the circuit court's view, unless the carrier's decision to refuse transport is arbitrary or capricious, then its removal authority under § 44902(b) will trump its § 1981 liability.[33] The First Circuit held that because the district court's jury instructions did not delineate the arbitrary and capricious standard specifically enough, the instructions were perforce faulty.[34] The court found that the district court's jury instructions wrongfully subordinated Congress's assignment of safety as the "highest priority

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[25] *See id.* American's only response was that it had "fully reviewed the decision" to prohibit Cerqueira back onboard and found that he was removed and denied further boarding because "other customers" were "uncomfortable" with him. *Id.* There was no mention of safety concerns or that American had determined Cerqueira to be inimical to safety. This is unsurprising given that the state police determined Mr. Cerqueira was not a security threat.

[26] *Id.* at 4.

[27] Cerqueira v. Am. Airlines, Inc., 484 F. Supp. 2d 232, 233 (D. Mass. 2007).

[28] *Id.*

[29] *Id.* at 240.

[30] *Id.*

[31] *Cerqueira*, 520 F.3d at 20.

[32] See *supra* notes 2–3 and accompanying text.

[33] *Cerqueira*, 520 F.3d at 14.

[34] *Id.* at 16–17.

in air commerce"[35] to antidiscrimination law.[36] The court based its decision on a finding of "no evidence" that the captain or supervisory personnel acted with any "discriminatory animus"[37] and therefore held that "no properly instructed jury could return a verdict against the air carrier."[38] Cerqueira filed a motion for rehearing en banc but was denied.[39]

The First Circuit relied on *Williams v. Trans World Airlines*[40] as authority for the arbitrary and capricious standard of liability imposed on a carrier exercising its discretion to refuse to transport under § 44902(b).[41] In *Williams*, Trans World Airlines (TWA) denied passage to an FBI fugitive on a flight from London to Detroit.[42] TWA's president made the decision to deny passage to Williams after the FBI contacted the airline and warned it that Williams allegedly possessed a large number of firearms, was a diagnosed schizophrenic, and was to be considered "armed and extremely dangerous."[43] TWA's president invoked the discretionary powers afforded an airline under the predecessor statute to § 44902(b),[44] but even so, the airline offered Wil-

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[35] *Id.* at 11 (quoting 49 U.S.C. § 40101(a)(1) (2000)).

[36] *Id.* at 16.

[37] *Id.* at 17.

[38] *Id.* at 4. This is true even though a First Circuit dissenting judge noted that "[t]rial testimony and record evidence indicated that at least one flight attendant's information may have been race-based." Cerqueira v. Am. Airlines, Inc., 520 F.3d 20, 23 (1st Cir. 2008) (Torruella, J., dissenting).

[39] *Id.* at 20–21.

[40] 509 F.2d 942 (2d Cir. 1975).

[41] *Cerqueira*, 520 F.3d at 14. The court was right to employ the *Williams* test. It has become the seminal test in airline removal cases generally. *See, e.g.*, Cordero v. CIA Mexicana de Aviacion, S.A., 681 F.2d 669, 671–72 (9th Cir. 1982) (applying the *Williams* test to a situation in which a passenger was removed from a flight after the crew misidentified him as the individual who caused a disturbance onboard the aircraft); Shqeirat v. U.S. Airways Group, Inc., 515 F. Supp. 2d 984, 1004 (D. Minn. 2007) (noting that courts routinely use the *Williams* test to interpret § 44902(b)); Dasrath v. Cont'l Airlines, Inc., 467 F. Supp. 2d 431, 443 (D.N.J. 2006) (defining the *Williams* case as "one of the leading cases" on passenger removal decisions); Ruta v. Delta Airlines, Inc., 322 F. Supp. 2d 391, 397–98 (S.D.N.Y. 2004) (employing the *Williams* test in a passenger removal case); Al-Qudhai'een v. Am. West Airlines, Inc., 267 F. Supp. 2d 841, 846–47 (S.D. Ohio 2003) (same).

[42] *Williams*, 509 F.2d at 945.

[43] *Id.* at 945 n.5 (quoting an FBI Bulletin sent by the FBI to TWA in advance of Williams's flight from London to Detroit).

[44] *Id.* at 945. The statute, 49 U.S.C. § 1511(a), which was substantively similar to its successor § 44902(b), allowed a carrier "to refuse transportation to a passenger when, in the opinion of the air carrier, such transportation would or might be inimical to safety of the flight." *Id.* at 946 (internal quotations omitted).

liams transport on other TWA flights conditioned on Williams's agreement to certain safety precautions.[45] Ultimately, TWA *did* transport Williams between London and Detroit.[46] In the suit against TWA, Williams argued that TWA should not have been allowed to take the FBI's comments about Williams's dangerousness at face value and should have instead conducted a complete investigation itself into Williams's "background and personal history."[47] The *Williams* court, in affirming the district court's holding, found that TWA did not act arbitrarily or capriciously in relying on the FBI's warnings and conclusions.[48] Moreover, the court further found that "TWA more than amply fulfilled its [contractual] obligation to transport Williams" between London and Detroit by offering him later transport on a different flight.[49]

Other cases since *Williams* support the proposition that while an airline's initial decision to remove a passenger based on safety concerns is given great deference under § 44902(b), *continued* refusal to provide transport even after the safety concerns have been dispelled may not be entitled to the same deference. For example, in *Dasrath v. Continental Airlines, Inc.*, the court noted that airline personnel have "broad, *but not absolute*, discretion to remove passengers for safety reasons."[50] In that case, three brown-skinned men behaved suspiciously during the boarding of a Tampa-bound flight.[51] Based upon that behavior, the captain made a decision to remove the three men from the

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[45] *Id.* at 945. For example, TWA offered to transport Williams if he would agree to be accompanied in flight by a legal attaché of the U.S. Embassy. *Id.*

[46] *Id.* at 945–46.

[47] *Id.* at 947.

[48] *Id.* at 948. Specifically, the *Williams* test for determining whether a § 44902(b) removal decision was a proper exercise of airline authority

> rests upon the facts and circumstances of the case as known to the airline at the time it formed its opinion and made its decision and whether or not the opinion and decision were rational and reasonable and not capricious or arbitrary in the light of those facts and circumstances. They are not to be tested by other facts later disclosed by hindsight.

Id. If an airline's decision to deny boarding to a passenger is indeed found to be motivated by race, such decision will fail the *Williams* test because the decision "is inherently arbitrary and capricious." Shqeirat v. U.S. Airways Group, Inc., 515 F. Supp. 2d 984, 1004 (D. Minn. 2007) (citing Bayaa v. United Airlines, Inc., 249 F. Supp. 2d 1198, 1205 (C.D. Cal. 2002)).

[49] *Williams*, 509 F.2d at 949.

[50] 467 F. Supp. 2d 431, 445 (D.N.J. 2006) (emphasis added).

[51] *See id.* at 435–36.

aircraft.[52] Applying the *Williams* standard to Continental's removal decision, the court granted Continental's summary judgment motion, holding that the removal decision was not arbitrary or capricious.[53] Importantly, however, after the men were removed from the Tampa-bound aircraft—and with no further security or screening—Continental promptly rebooked the men on a later Orlando flight (the last Tampa flight of the evening had already departed) and provided a limousine to drive the men from Orlando to Tampa.[54] Similarly, in *Cordero v. CIA Mexicana de Aviacion, S.A.*, a passenger was removed from a Mexicana flight after the flight crew mistakenly identified the passenger as one who was causing a disturbance onboard the aircraft.[55] Importantly, similar to the *Dasrath* case, the airline in *Cordero* rebooked the passenger for a flight departing soon after the original flight.[56] The Ninth Circuit, in applying the predecessor statute of §44902(b), adopted the *Williams* test and upheld a jury verdict for the plaintiff.[57] The court noted that although "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."[58] The *Cordero* court noted that

> the *Williams* test takes into account the fact that air carriers often must make decisions within moments of take-off and with less than perfect knowledge. [Thus, t]he reasonableness of the carrier's opinion . . . is to be tested on the information available to the airline *at the moment a decision is required.*[59]

In another case similar to *Cerqueira*, the court refused to grant summary judgment to the airline for its decision to remove six Islamic Imams from one of its flights.[60] In *Shqeirat*, the airline

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[52] *Id.* at 437.

[53] *Id.* at 433–34, 449.

[54] *Id.* at 437.

[55] 681 F.2d 669, 670–71 (9th Cir. 1982). Although neither racial discrimination nor § 1981 claims were at issue in this case, *Cordero* is nonetheless instructive because it employs the *Williams* test to a set of facts involving an airline's decision to promptly rebook a removed passenger. *See id.* at 671–72.

[56] *Id.* at 670.

[57] *Id.* at 671–72. The court, however, reversed the jury's award of punitive damages to the plaintiff, finding that the defendant airline's conduct did not rise to the level required for such an award. *Id.* at 672–73.

[58] *Id.* at 671.

[59] *Id.* at 672 (emphasis added).

[60] *See* Shqeirat v. U.S. Airways Group, Inc., 515 F. Supp. 2d 984, 1004–06 (D. Minn. 2007).

based its removal decision on the fact that, among other reasons, some of the Imam passengers switched seats onboard, requested seatbelt extensions, prayed in the boarding lounge, and possessed one-way tickets.[61] Although the six Imams were interviewed and released by the FBI and the Secret Service, the airline's ticketing agents nonetheless refused to rebook them.[62] On these facts, the district court denied the airline's summary judgment motion and allowed the Imams to proceed with discovery.[63] In *Ruta v. Delta Airlines, Inc.*, the airline removed a Florida-bound passenger when she arguably yelled at the airline's employees, used foul language, kicked a gate agent, and generally appeared to be intoxicated.[64] Despite being removed from the flight, the passenger was accommodated on another flight the next day at no additional cost.[65] Although this case centered principally on preemption matters,[66] it nonetheless is instructive for the proposition that a court, in considering the span of immunity for air carriers under § 44902(b) and in evaluating the arbitrary and capricious standard set out in *Williams*, should take into account whether or not the removed passenger is quickly accommodated on another flight once the situation prompting the removal de-escalates. Finally, in *Al-Qudhai'een v. America West Airlines, Inc.*, the airline removed Saudi Arabian passengers when the airline perceived the passengers' behavior onboard the first segment of their flight to be suspicious.[67] After the FBI questioned the Saudi passengers, the FBI determined they were not a threat and released them.[68] The airline then promptly rebooked the Saudis on the next flight, apologized, and upgraded them to first class.[69] Applying the *Williams*

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[61] *Id.* at 1004.

[62] *Id.* at 990. This is true despite the fact that an agent for the FBI spoke directly to the airline's ticketing agent and gave the ticketing agent assurances that the Imams did not pose a security threat. *Id.*

[63] *Id.* at 1005–06. As of March 20, 2009, the case is still pending in the District Court of Minnesota. *See* Shqeirat v. U.S. Airways Group, Inc., No. 0:07-CV-01513 (D. Minn. filed Mar. 12, 2007).

[64] 322 F. Supp. 2d 391, 394–95 (S.D.N.Y. 2004). In *Ruta*, the plaintiff's race was not at issue. Instead, the plaintiff argued various state law causes of action and also contended that she was wrongfully removed from the aircraft in violation of the Americans with Disabilities Act. *Id.* at 394.

[65] *Id.*

[66] The court found that Ruta's state law claims were preempted by the Federal Aviation Act including § 44902(b). *Id.* at 397–401.

[67] 267 F. Supp. 2d 841, 843–44 (S.D. Ohio 2003).

[68] *Id.* at 844.

[69] *Id.*

test, the court noted that the airline's initial decision to remove the Saudi passengers was not arbitrary and capricious and that the airline was therefore entitled to § 44902(b) immunity.[70] The court thus granted the airline's summary judgment motion.[71]

Based upon the evolution of passenger-removal case law, the First Circuit seems to ignore the teaching of *Williams*. Looking through the *Williams* lens, the *Cerqueira* court found that a faulty jury instruction wrongfully subordinated § 44902(b) to the discrimination protections of § 1981.[72] The court, though, misapplied the *Williams* test in two important ways. First, the record shows that state authorities cleared Cerqueira even before his original flight's actual departure;[73] however, American nevertheless prohibited Cerqueira from reboarding that flight. Second, and as noted in a well-reasoned dissent by one judge in a denial of Cerqueira's request for rehearing en banc, no court has ever stretched § 44902(b) so far as to encompass a carrier's refusal to *rebook* a passenger on *subsequent* flights after being cleared to travel by the authorities.[74] In effect, American made at least two—arguably three—removal decisions in Cerqueira's case: (1) the initial removal decision made by the captain when his suspicions were first aroused; (2) the decision by American's employees to prohibit Cerqueira from reboarding his original flight even though the state police cleared him before that flight's departure; and (3) the airline's decision to not rebook Cerqueira on any future American flight, forcing him to find alternative transportation on his own. The First Circuit, though, seems to judge all three of these independent decisions based upon the circumstances of the captain's initial removal decision. This approach is in plain contradiction to *Williams*—as refined by *Cor-*

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[70] *Id.* at 848.

[71] *Id.* at 843.

[72] Cerqueira v. Am. Airlines, Inc., 520 F.3d 1, 16 (1st Cir. 2008). The district court instructed the jury that it was "entitled to consider that American Airlines is expected to operate its airlines [sic] with the primary goal of the safety and well-being of the traveling public," but that the airline "*cannot, they're forbidden by the law from acting to discriminate.*" *Id.* (quoting the jury instruction).

[73] *See* Cerqueira v. Am. Airlines, Inc., 520 F.3d 20, 21 n.1 (Torruella, J., dissenting). Cerqueira was cleared by state police at approximately 9:00 a.m. and his original flight departed at 9:33 a.m. *Cerqueira*, 520 F.3d at 9–10.

[74] *Cerqueira*, 520 F.3d at 21 (Torruella, J., dissenting). Indeed, in *Williams*, TWA offered the plaintiff other options for travel to Detroit, and in the end, flew the plaintiff to Detroit aboard one of its own later flights. Williams v. Trans World Airlines, 509 F.2d 942, 945 (2d Cir. 1975).

dero—which calls for testing the reasonableness of the carrier's decision by the information available "to the airline at the time it formed its opinion."[75] Thus, the First Circuit's holding extends beyond those fast-paced, hurried decisions made in the few remaining minutes before departure time and reaches even those removal decisions made with the benefit of time and police investigation.[76] Moreover, in *Williams*, TWA's removal decision was found *not* arbitrary and capricious because it was based on warnings from governmental policing authorities.[77] In *Cerqueira*, on the other hand, the First Circuit found American was not liable even though the carrier acted—not in concert with the police's information—but in plain *contradiction* to it. The court does not explain how the carrier, acting in defiance of Cerqueira's clearance by the state police, was not arbitrary and capricious in its removal decision, and instead the court dismisses away the jury's finding of discrimination by holding that "no properly instructed jury could return a verdict against the air carrier."[78] By unconditionally allowing § 44902(b) to trump § 1981 under the facts of the *Cerqueira* case, the court does violence to the arbitrary and capricious standard and permits a carrier to now make passenger removal decisions (not limited to immediate removal decisions, but extending as well to future rebooking decisions) even though governmental agencies have decided the passenger is not a security risk.[79]

Allowing an airline to override a properly authorized government security agent's determination that a passenger poses no threat could not have been the intention of Congress in enacting § 44902(b), even if airline safety is of paramount priority. Cases applying the *Williams* test demonstrate this principle. In *Ruta*, *Cordero*, *Dasrath*, and *Al-Qudhai'een*, all of the removed passengers were rebooked by the respective airlines and allowed to continue their travels either on the same day or the following

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[75] Cordero v. CIA Mexicana de Aviacion, S.A., 681 F.2d 669, 672 (9th Cir. 1982).

[76] *See Cerqueira*, 520 F.3d at 22 (Torruella, J., dissenting).

[77] *Williams*, 509 F.2d at 948. In *Williams*, the Second Circuit reasoned that the carrier—acting on information from a reliable government agency—was not arbitrary or capricious where the FBI's information was not facially "absurd, bizarre, [or] inaccurate." *Id.*

[78] *Cerqueira*, 520 F.3d at 4.

[79] *See Cerqueira*, 520 F.3d at 21–22 (Torruella, J., dissenting). Indeed, the state troopers that interviewed and cleared Mr. Cerqueira assumed that he would be rebooked by American and noted such in the police's administrative log. *Cerqueira*, 520 F.3d at 10.

one.[80] In light of this precedent, then, once the police determined that Cerqueira was not a security threat, American's continued refusal to provide him transport on either his original, yet-to-depart flight or on any remaining American flight seems per se arbitrary and capricious, since any rational safety concerns related to Cerqueira's presence aboard the aircraft had been, or should have been, extinguished. Thus, the district court's jury instruction, which properly balanced the deference due an airline in its removal decisions with the prohibition on racial discrimination in contracting, should have been allowed to stand. Indeed, given these facts and their instruction, the jury found, not that American had acted merely arbitrarily or capriciously, but that it had acted with *intentional* discrimination against Cerqueira, thereby de facto satisfying the *Williams* standard.[81] By extending the immunity afforded air carriers under § 44902(b) to cover post-clearance rebooking situations, however, the First Circuit has transformed what was otherwise intended as an "*exceptional* immunity [for airline security-related removal decisions] into a legal framework that may apply in *all* airline [refusal-to-transport] decisions."[82] Instead of working to

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[80] In *Cordero* specifically, the airline's prompt rebooking was not enough to save it from a jury verdict for the plaintiff. *See Cordero*, 681 F.2d at 672 (reinstating the jury's verdict for a damage award for plaintiff). Notably, however, there are at least two cases in which removed passengers were denied rebooking by the airlines even after the passengers were cleared by authorities. In *Shqeirat v. U.S. Airways Group, Inc.*, 515 F. Supp. 2d 984 (D. Minn. 2007), U.S. Airways continued to prohibit the six Imams from boarding despite assurances from the FBI that the Imams were not a security threat. *Id.* at 990. The district court denied defendant's motion for summary judgment and allowed the parties to commence discovery. *Id.* at 1005–06. A final decision, however, has not been reached (as of March 20, 2009) in that case. *See supra* note 63. Similarly, in *Chowdhury v. Northwest Airlines Corp.*, 238 F. Supp. 2d 1153 (N.D. Cal. 2002), a U.S. citizen of Bangladeshi ancestry was denied boarding on a Northwest flight even after the FBI, Northwest itself, and airport security had determined the passenger did not pose a threat to security. *Id.* at 1154. In considering the airline's motion to dismiss the passenger's § 1981 claims, the court noted that the airline could not show that § 1981 conflicted with § 44902(b), and thus the court refused to dismiss the plaintiff's civil rights claims. *Id.* Notably, however, because Northwest Airlines filed for bankruptcy protection on September 14, 2005, the court closed the *Chowdhury* case but left open the possibility that the parties could reopen it later, if desired. *See* Chowdhury v. Nw. Airlines Corp., No. 3:02-cv-02665-CRB (N.D. Cal. Oct. 7, 2005) (order closing the case upon notice of Northwest's bankruptcy filing).

[81] *See* Cerqueira v. Am. Airlines, Inc., 484 F. Supp. 2d 232, 234 (D. Mass. 2007).

[82] *Cerqueira*, 520 F.3d at 22 (Torruella, J., dissenting) (emphasis added); *see also Shqeirat*, 515 F. Supp. 2d at 1004 (noting that a removal decision based on race is arbitrary and capricious).

fit a carrier's removal power into the longstanding civil rights framework espoused by § 1981 the court regrettably eroded that framework by diluting its potency.

While the safety of the traveling public is an unquestionably noble goal,[83] it should not, as a matter of policy, come part and parcel with court-sanctioned racial discrimination, especially in a scenario in which government security authorities determine that an individual is safe to fly. In a world in which terrorism—particularly aimed at the U.S. transportation industry—is a regrettable reality, airlines must no doubt be afforded the leeway to operate safely. The safe operation of an airline should not—if we are to preserve the underpinnings of our nation's deeply rooted antidiscrimination principles—come at the expense of civil rights infringements, however. In *Cerqueira*, the jury found that, despite American's wide discretion to operate its airline safely, its decision to remove Cerqueira was motivated, at its core, by the racial animus of one or more of American's employees.[84] While split-second removal decisions are an inevitability in the fast-paced airport environment, it is difficult to understand how a decision in conflict with trained law enforcement personnel who have investigated the matter is not arbitrary, and therefore violative of § 1981. If, under these facts, a court will permit a carrier to seek § 44902(b) immunity from § 1981 racial discrimination liability, then it is difficult to imagine any scenario where liability would attach—other than perhaps an employee's outright confession that her removal decision was motivated by racial animus. Since the outcome of this case almost certainly does not reflect true congressional intent with respect to an airline's passenger-removal powers, the First Circuit has stretched § 44902(b) untenably—and unfairly—far.

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[83] *See Cerqueira*, 520 F.3d at 11 (citing 49 U.S.C. § 40101(a)(1) (2000) and noting that Congress has declared that safety is "the highest priority in air commerce").

[84] *See Cerqueira*, 484 F. Supp. 2d. at 234, 240.