No. _____

In The

Supreme Court of the United States

ABDIKARIM KARRANI,

Petitioner,

v.

JETBLUE AIRWAYS CORPORATION,
A DELAWARE CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

49 U.S.C. § 44092(b) 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. § 40127(a) provides that an air carrier "may not subject a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry." Under current case law, the protections of 42 U.S.C. § 1981 are effectively unavailable to victims of discrimination who fly commercially, owing to judge-made limitations created interpreting 49 U.S.C. § 44092(b). The questions presented are:

1. Is 49 U.S.C. § 44092(b) inapplicable to 42 U.S.C. § 1981 cases?

2. Should the "cat's paw" analysis of *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011) be applied to 42 U.S.C. § 1981 cases where a pilot acts without further inquiry on reports from subordinates motivated by discrimination?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Abdikarim Karrani was the plaintiff-appellant below. Respondent JetBlue Airways Corporation was defendant-respondent below.

RELATED CASES

Abdikarim Karrani v. JetBlue Airways Corporation, Case No. 2:18-cv-01510-RSM, U.S. District Court for the Western District of Washington. Judgment entered July 31, 2019.

Abdikarim Karrani v. JetBlue Airways Corporation, Case No. 19-35739, U.S. Court of Appeals for the Ninth Circuit. Judgment entered October 16, 2020.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Abdikarim Karrani, respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The October 16, 2020 opinion of the court of appeals, which is reported at *Karrani v. JetBlue Airways Corp.*, 825 F. App'x 535 (9th Cir. 2020), is set out at App. 1-3. The November 25, 2020 order of the court of appeals denying rehearing and rehearing en banc, which is not reported, is set out at App. 48. The July 19, 2019 order of the district court granting defendant's motion for summary judgment, which is not reported but available at 2019 WL 3458536, is set out at App. 27-47. The November 19, 2019 order of the district court denying plaintiff's motion to alter or amend judgment and denying request for sanctions is set out at App. 4-26.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit was entered on October 16, 2020. Petitioner timely sought rehearing, which was denied on November 25, 2020. In light of the ongoing public health concerns relating to COVID-19, this Court extended the deadline to file a petition for writ of

certiorari to 150 days from the date of an order denying a timely petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1981 provides:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

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.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

49 U.S.C. § 44902 provides:

(a) Mandatory Refusal.—The Administrator of the Transportation Security Administration shall prescribe regulations requiring an air carrier, intrastate air carrier, or foreign air carrier to refuse to transport—

> **(1)** a passenger who does not consent to a search under section 44901(a) of this title establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive, or other destructive substance; or
>
> **(2)** property of a passenger who does not consent to a search of the property establishing whether the property unlawfully contains a dangerous weapon, explosive, or other destructive substance.

(b) Permissive Refusal.—Subject to regulations of the Administrator of the Transportation Security Administration, 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.

(c) Agreeing to Consent to Search.—An agreement to carry passengers or property in air transportation or intrastate air transportation by an air carrier, intrastate air carrier, or foreign air carrier is deemed to include an agreement that the passenger or property will not be carried if consent to search the passenger or property for a purpose referred to in this section is not given.

49 U.S.C. § 40127 provides:

(a) Persons in Air Transportation.—An air carrier or foreign air carrier may not subject a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry.

(b) Use of Private Airports.—Notwithstanding any other provision of law, no State or local government may prohibit the use or full enjoyment of a private airport within its jurisdiction by any person on the basis of that person's race, color, national origin, religion, sex, or ancestry.

STATEMENT

A. Factual Background

Abdikarim Karrani is a Black American citizen born in Somalia who resides in the state of Washington. App. 27-28. Mr. Karrani is currently 83 years old and speaks English with a Somali accent. On January 20, 2018, he boarded a flight operated by JetBlue Airways Corporation traveling to Seattle from New York. An unrelated medical issue required the plane to make an unscheduled landing in Billings, Montana. *Id*. at 28. Prior to landing in Billings, Mr. Karrani, owing to his age and diabetic condition, sought to use the lavatory at the front of the plane. The door was closed, but the sign said it was empty. *Id*. Mr. Karrani opened the door and saw a person standing inside the restroom. *Id*. He immediately closed the door and was waiting there to

use the restroom when one of the flight attendants, Cindy Pancerman, pushed him towards the back and, startled and anxious, Mr. Karrani attempted to brush her hand off him. *Id*. He said, "Please let me go." C.A. E.R. 503. Several passenger-witnesses corroborated Mr. Karrani's account of events—some with slightly different recollections of his statement, one being, "Don't touch me." *Id*. at 477.

Mr. Karrani complied with Ms. Pancerman's instruction and used the back lavatory. After he complied, Ms. Pancerman began asking people nearby if they saw Mr. Karrani shove her, *id*. at 512-13, and called the pilot, Captain Mitchell Ouillette, claiming that Mr. Karrani was not following crewmember instructions. App. at 29; C.A. E.R. 442-43, 600. During final approach, when the plane was below 10,000 feet, Ms. Pancerman made a call to the cockpit requesting law enforcement. App. at 29; C.A. E.R. 424. Neither the pilot nor his co-pilot checked the plane's camera because neither believed the call raised serious issues. When the plane landed, Mr. Karrani was in his seat. C.A. E.R. 504. No decisions were made in the air regarding Mr. Karrani.

After the plane landed, the pilot learned that Mr. Karrani was "87 [sic] years old" and he had a "Middle Eastern" name from the manifest. *Id*. at 341. The pilot and Ms. Pancerman met with a police officer, and the pilot and Ms. Pancerman asked the officer to remove Mr. Karrani from the plane because "Cindy [Pancerman] was afraid of him." *Id*. at 724.

According to Ms. Pancerman and another flight attendant, laying one's hands on a passenger (or pushing a passenger) could result in termination. C.A. E.R. 534. The pilot testified that Ms. Pancerman told him in the air that she was "forcibly pushed"—not hit. *Id*. at 403. In her deposition, Ms. Pancerman testified that "I said he hit me," *id*. at 428, but in her summary judgment declaration Ms. Pancerman changed the story to: after "placing one arm behind him," Mr. Karrani "forcibly pushed my arm away." *Id*. at 591. In his deposition, the pilot testified that on the ground Ms. Pancerman admitted that she put her hand on Mr. Karrani's back "in a guiding manner, like you would to a child." *Id*. at 403.

Prior to the pilot directing the police to continue forward with Mr. Karrani's removal, the front row passengers called out Ms. Pancerman for lying and giving a completely different story. C.A. E.R. 515; *id*. at 486 (the officer testified he "went to the captain, hoping to get a bit of a voice of reason"). Ms. Pancerman wrote that the passengers "interfered" by telling the pilot "what to do and how to handle the situation." *Id*. at 596.

The officer told Mr. Karrani that he was "not under arrest," the officer was forced to remove Mr. Karrani from the flight. *Id.* at 489; App. 29. The pilot conducted no investigation (except to speak with Ms. Pancerman and one other flight attendant who as it turned out was Ms. Pancerman's friend and was at the other end of the plane). *See* C.A. E.R. 529, 531. After a three-hour delay, the other passengers flew back in a separate plane

with a completely different JetBlue crew because Ms. Pancerman claimed she could not work. *Id*. at 518-19, 448; App. 29. The pilot took the position that, "We had law enforcement on site, that's what he was there to deal with, that's not my job at that point." C.A. E.R. 404.

The officer told Mr. Karrani he would have "to sleep in the city" and "[t]hen come back tomorrow, [to] buy a ticket" to continue on to Seattle, as JetBlue would provide him no further passage. C.A. E.R. 505. JetBlue abandoned Mr. Karrani in Billings, marooning him on a cold winter night (Mr. Karrani was not dressed for the cold). Fortunately, Mr. Karrani was carrying enough cash to secure both a hotel ($76.90) and, the next day, a flight home with Delta Air Lines ($405.50); Mr. Karrani did not have a credit card. *Id*. 737, 718-22, 506. JetBlue did not refund Mr. Karrani, even after he reported what happened to a JetBlue supervisor at the Seattle Tacoma airport. App. 29.

This was not the first time that Ms. Pancerman's false accusation caused a Black American passenger to be removed from a JetBlue flight. C.A. E.R. 462-67. In February 2016, Fatima Wachuku was removed from a flight after Ms. Pancerman made a similarly false "pushing" claim against her while the plane was on the ground. *Id*. at 684-86. JetBlue's Ground Security Coordinator found Ms. Wachuku was not "a threat" but "really nice and compliant," yet JetBlue removed her from the flight after Ms. Pancerman refused to fly unless Ms. Wachuku was removed. *Id*. at 655-56. Ms. Wachuku was removed and had to fly the next day. *Id.*

at 659. Neither the discriminatory removal of Mr. Karrani nor of Ms. Wachuku resulted in any discipline to Ms. Pancerman. *Id.* at 374-75; *see also id*. at 432.

B. Procedural Background

Mr. Karrani filed a complaint in the federal district court of the Western District of Washington alleging a violation of 42 U.S.C. § 1981 because JetBlue wrongly removed him from his flight and refused him further service on the basis of his race, national origin, and/or ethnicity.[1] App. 27. At summary judgment, JetBlue claimed that its treatment of Mr. Karrani was justified by security concerns. The district court granted summary judgment without oral argument, ruling that "[a] passenger's removal is proper under Section 44902 so long as the pilot's decision is not arbitrary or capricious," *id*. at 39-40 (citing *Cordero v. Cia Mexicana De Aviacion, S.A.*, 681 F.2d 669, 671-72 (9th Cir. 1982)), and "[a]s a matter of law, Captain Ouillette's decision to believe his flight attendants—without conducting his own factual investigation—was not arbitrary and capricious." *Id*. 43. The district court's order recognized that it was "dispute[d] . . . at what point the captain made his decision to remove Mr. Karrani—whether during the descent into Billings, or upon landing." *Id*. 41. The district court also ruled that Mr. Karrani

[1] After Mr. Karrani filed his opening brief at the Ninth Circuit, the Court clarified the causation standard for 42 U.S.C. § 1981 claims. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020).

"raised no material dispute that JetBlue exceeded its authority under Section 44902 in prohibiting Mr. Karrani from re-boarding." App. 43.

The district closed with this observation:

> Given the power held by flight attendants to report safety issues to a plane's captain, the disputed facts of this case raise the question of whether flight attendants who routinely request removal of passengers should be subject to closer scrutiny by an airline's management to ensure such issues are reported with honesty and integrity. However, such a question lies outside the scope of this case and is not within the province of this Court to answer.

App 46.

Mr. Karrani appealed the district court's grant of summary judgment.[2] The Ninth Circuit affirmed without oral argument in a concise memorandum opinion. *Id.* at 1-3. The Ninth Circuit assumed Mr. Karrani established a prima facie case of race discrimination, concluded "the district court correctly determined that JetBlue's reliance on 49 U.S.C. § 44902 constitutes a legitimate and non-discriminatory reason for its decisions," and held the airline pilot was "entitled to accept

[2] Mr. Karrani also sought review of the denial of his motion to alter or amend judgment based on excerpts of JetBlue's flight attendant manual that were not produced until after the summary judgment briefing was filed, along with excerpts of the pilot's manual that JetBlue never produced. It is no longer at issue.

the attendant's report when the pilot made the decision to refuse transport." *Id.* at 2. The Ninth Circuit decided as a matter of law that "the airline pilot's opinion under § 44902 was justified by a reasoned and rational appraisal of the facts known to the pilot at the time and was not arbitrary or capricious." *Id.* at 3. The Ninth Circuit denied rehearing. App. 48.

REASONS FOR GRANTING CERTIORARI

1. In Cases Involving Discrimination By Air Carriers Under Section 1981, The State Of The Law Is Unworkable And Has Been For Decades.

This case raises an important question of federal law that has not, but should be, settled by this court. Congress did not intend 49 U.S.C. § 44902(b) to eviscerate 42 U.S.C. § 1981 claims for an air carrier's discriminatory passenger removals from commercial flights. Our society committed to "the eradication of discrimination based on a person's race or color of his or her skin." *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989), *superseded on other grounds by* 42 U.S.C. § 1981(b) (enlarging the category of conduct subject to liability). The safety issues that concerned Congress in 49 U.S.C. § 44902 are not implicated here. 42 U.S.C. § 1981 does not entitle a carrier to accept a biased flight attendant's false report without accountability.

Petitioner Abdikarim Karrani received services in a markedly hostile manner that a reasonable person would find objectively discriminatory, and although the Ninth Circuit assumed Mr. Karrani established a prima facie case of discrimination, it erroneously affirmed the district court's summary judgment determination, under the second step of the *McDonnell Douglas*[3] burden-shifting framework, that "JetBlue's reliance on 49 U.S.C. § 44902 constitutes a legitimate and non-discriminatory reason for its decisions." App. 2.

49 U.S.C. § 44902 has no place in the analysis in applying the *McDonnell Douglas* burden-shifting framework. Under the proper analysis, JetBlue had to produce evidence that the plaintiff was removed for a legitimate, nondiscriminatory reason. *See Reeves v. Sanderson Plumbing Prod., Inc*., 530 U.S. 133, 142 (2000) (quoting *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 254 (1981)). JetBlue produced the false statements of the two flight attendants to satisfy that requirement and argued 49 U.S.C. § 44902(b) protected the pilot's decision. This is wrong as a matter of law because *McDonnell Douglas* requires evidence, not opinions. *Id.* Had the proof been limited to the evidence—without the injection of §44902(b)—then the numerous statements of witnesses and Mr. Karrani would have supported pretext:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if

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[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

> disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.

Reeves, 530 U.S. at 147 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)). The Ninth Circuit erroneously modified the *McDonnell Douglas* burden-shifting standard, making the burden of persuasion insurmountable. *Contra Adamsons v. Am. Airlines, Inc.*, 58 N.Y.2d 42, 50, 444 N.E.2d 21 (1982) ("A carrier who uses the safety issue as a sham in order to accomplish another purpose will not be insulated from liability.").

The Ninth Circuit's decision cuts off all 42 U.S.C. § 1981 claims for victims of discrimination who fly on commercial airlines so long as a crew member lies about events on a plane. The Ninth Circuit's decision does not apply cat's paw liability even though the pilot effectively delegated factfinding to a biased crewmember. Additionally, the state of the law now focuses exclusively on 49 U.S.C. § 44902(b) and ignores 49 U.S.C. § 40127(a), which provides, "An air carrier or foreign air carrier may not subject a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry." Treating 49 U.S.C. § 44902(b) as inapplicable to 42 U.S.C. § 1981 claims is the only interpretation of the law that "produces a substantive effect that is compatible with the rest of the law." *See United Sav. Ass'n of Texas v.*

Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988). Under the court's analysis, pretext never gets presented or evaluated as required by *Reeves*. This Court must grant the writ of certiorari to correct the Ninth Circuit's errors and prevent improper reliance on 49 U.S.C. § 44902(b).

The state of the law at present is intolerable. One other circuit has addressed the intersection of 42 U.S.C. § 1981 and 49 U.S.C. § 44902(b) in a similar way—but at trial and not at summary judgment—both cases are riddled with judge-made hurdles that eviscerate 42 U.S.C. § 1981. *See Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 1 (1st Cir. 2008).

In *Cerqueira*, the First Circuit overturned a jury verdict in favor of the plaintiff, who brought a discrimination claim pursuant to 42 U.S.C. § 1981, after he and two others in his row were removed from a flight from Boston to Fort Lauderdale. *Id.* at 4. He was not allowed to board another flight. *Id.* The plaintiff was awarded compensatory and punitive damages. *Id.* at 11. The district court did not give an instruction regarding 49 U.S.C. § 44902(b). *See Cerqueira v. American Airlines, Inc.*, 484 F. Supp. 2d 232, 234 (D. Mass. 2007), *vacated*, 520 F.3d 1 (1st Cir. 2008).

The pilot investigated, removing the three men for further questioning by appropriate authorities and delayed the flight for three hours to empty the aircraft and have it searched by dogs. *Cerqueira*, 520 F.3d at 8. "The decision not to reboard the plaintiff on the flight was made by the State Police and accepted by the

Captain. The Captain did not see the plaintiff and thus was unaware of his appearance, whether Middle Eastern or not, until the time of the trial." *Id*. at 17. In overturning the jury's verdict, the First Circuit made several holdings:

- "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" under 49 U.S.C. § 44902(b). *Id*. at 14 (citing *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975)).
- An "air carrier's decisions to refuse transport under § 44902(b) are not subject to liability unless the decision is arbitrary or capricious." *Id*. (citing *Williams*, 509 F.2d at 947-49).
- "[T]he statute is an affirmative grant of permission to the air carrier. . . . It is the plaintiff who carries the burden to show that § 44902(b) is inapplicable." *Id*. at 13-14.
- "Review of a decision to refuse transport is restricted to what information was actually known by the decisionmaker at the time of the decision. The test is not what the Captain reasonably *should* have known." *Id*. at 14-15 (emphasis in original).
- "The Captain (or other decisionmaker) is entitled to accept at face value the representations made to him by other air carrier employees. Thus, even mistaken

> decisions are protected as long as they are not arbitrary or capricious." *Id*. at 15 (citing *Cordero*, 681 F.2d at 672).
>
> - The biases of a non-decisionmaker may not be attributed to the decisionmakers. *Id*. (citing *Al-Qudhai'een v. Am. W. Airlines, Inc.*, 267 F. Supp. 2d 841, 848 (S.D. Ohio 2003))
> - "The jury must be instructed that the Captain has the power to refuse transport because transport of a passenger 'might be' inimical to safety unless that decision was arbitrary or capricious." *Id*. at 18 (citing *Cordero*, 681 F.2d at 672).
> - "The test we have outlined under § 44902(b) is inconsistent with the use in Title VII cases of prima facie case methodology and the burden-shifting test." *Id*. (citing *McDonnell Douglas*, 411 U.S. 792).

The *Cerqueira* reasoning leaves no room for a 42 U.S.C. § 1981 discrimination claim based on the decision of an air carrier's biased pilot or biased flight crew member to succeed.

This case, *Karrani v. JetBlue Airways Corp.*, was dismissed at summary judgment and affirmed on appeal. Although this case is unpublished, it adopted the reasoning of published non-42 U.S.C. § 1981 cases (*Cordero*, 681 F.2d 669 and *Williams*, 509 F.2d 942, which were brought under 49 U.S.C. § 1374(b)), addressing parallel concerns when a plaintiff's discrimination claims for removal intersect with application of

49 U.S.C. § 1511(a), the predecessor to 49 U.S.C. § 44902(b). *See also* App. 40 (citing unpublished case *Shaffy v. United Airlines, Inc.*, 360 F. App'x 729 (9th Cir. 2009) as "binding precedent").

In affirming summary judgment for the airline, the Ninth Circuit made several holdings:

- The Court assumed that Mr. Karrani established a prima facie case pursuant to the *McDonnell Douglas* burden-shifting framework. App. 2.
- The Court affirmed that JetBlue's reliance on 49 U.S.C. § 44902 satisfies its burden under *McDonnell Douglas* to produce evidence that Mr. Karrani was removed for a legitimate, nondiscriminatory reason. App. 2; *see also Reeves*, 530 U.S. at 142. "JetBlue's reliance on 49 U.S.C. § 44902 constitutes a legitimate and non-discriminatory reason for its decisions." App. 2.
- The Court did not discuss pretext under *McDonnell Douglas. See Reeves*, 530 U.S. at 147.
- "§ 44902 provides an air carrier with permissive authority to 'refuse to transport a passenger or property the carrier decides is, or *might be*, inimical to safety.' " App. 2 (emphasis in original).
- "The airline pilot was entitled to accept the attendant's report when the pilot made the decision to refuse transport.

> *See*, *Cordero v. Cia Mexicana De Aviacion, S.A.*, 681 F.2d 669, 672 (9th Cir. 1982) ('[T]he test . . . 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. . . .' (quoting with approval *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975) (internal quotation marks omitted))." *Id*. at 2-3.
>
> - "Considering the attendant's report even if, on hindsight, it is exaggerated, the airline pilot's opinion under § 44902 was justified by a reasoned and rational appraisal of the facts known to the pilot at the time and was not arbitrary or capricious." *Id*. at 3.
> - The Court did not discuss the implications of *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011) regarding reliance on the statements of a biased subordinate.

The *Karrani* reasoning leaves no room for a valid 42 U.S.C. § 1981 discrimination claim based on the decision of an air carrier's biased pilot or biased flight crew member to succeed at summary judgment.

The Ninth Circuit's decision in *Karrani* and the First Circuit's decision in *Cerqueira* demonstrate that once 49 U.S.C. § 44902 is injected into a discrimination case, the case outcome is known at the outset. The plaintiff will fail at summary judgment and at trial as a matter of law unless this Court intervenes to bring reason and clarity to the process as Congress intended.

If the Court accepts review and holds 49 U.S.C. § 44902(b) is inapplicable to the analysis in 42 U.S.C. § 1981 claims, this case and others like it will go to the jury. *See* App. 46 (" . . . the disputed facts of this case raise the question of whether flight attendants who routinely request removal of passengers should be subject to closer scrutiny. . . .").

Applying the straightforward test from *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020), here, the jury considers what would have occurred if "John Smith" (a white octogenarian who speaks English without an accent) acted how Mr. Karrani acted. A jury may find JetBlue would have "tolerated" Mr. Smith's conduct and would not have reported the elderly white man to the police for assault, nor removed him from the flight. *Id.* at 1742. Because a jury may find JetBlue would have left Mr. Smith alone after he returned to his seat and that Mr. Karrani's race was a but-for cause of his removal, 49 U.S.C. § 44902(b) is inapplicable.

2. The Court Should Grant Certiorari Because An Air Carrier Must Be Held Accountable For The Discrimination Of Its Agents

This case presents an excellent vehicle to resolve whether an airline may escape liability where a pilot acts without further inquiry on reports from subordinates motivated by discrimination. *See Cerqueira v. American Airlines, Inc.*, 520 F.3d 20, 24 (1st Cir. 2008) (Lipez, J., dissenting from the denial of rehearing en banc) (decisionmaker "may have relied . . . on

information tainted by a flight attendant's racial animus."). The effective administration of antidiscrimination laws against air carriers depends on a flight attendant's racial animus being imputable to the carrier. *See Staub*, 562 U.S. at 421-22. In the employment context, the Court in *Staub* held that, "if [management] relies on facts provided by the biased supervisor—as is necessary in any case of cat's-paw liability—then the employer (either directly or through the ultimate decisionmaker) will have effectively delegated the factfinding . . . to the biased supervisor. *Id*. at 421; *see also E.E.O.C. v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 484-88 (10th Cir. 2006) (explaining that a defendant may be liable even though the decisionmaker lacked discriminatory intent, if the decisionmaker acted on information supplied by a biased subordinate), *cert. dismissed*, 127 S. Ct. 1931 (2007); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 878 (6th Cir.) (citing *Shager v. Upjohn Co.*, 913 F.2d 398, 405-06 (7th Cir. 1990)), *opinion supplemented on denial of reh'g*, 266 F.3d 407 (6th Cir. 2001).

The *Staub* analysis should apply in this context. Its adoption in cases like this would give airlines and passengers a level playing field to ensure that airline employees are accountable when they misuse their power, which will encourage all persons to travel on our commercial airlines free from fear of flight crew bias. *See*, *e.g.*, *Green v. Dillard's, Inc.*, 483 F.3d 533, 540 (8th Cir. 2007) (holding that retailer can be vicariously liable under 42 U.S.C. § 1981 for the discriminatory acts of its employees when they are acting within the

scope of their duties if they knew or should have known of the employee's hostile propensities); *Christian*, 252 F.3d at 876-78 (finding that retailer could be liable under 42 U.S.C. § 1981 even where decisionmaker was unaware of plaintiff's race if lower-level employee's racial animus influenced the decision). An airline must be liable for the wrongful removal of a passenger when its decisionmaker acts on information supplied by a biased subordinate and does not make even a cursory inquiry into the veracity of the complaint.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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