

# Unreasonable Discrimination Against Air Travel Passengers

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## INTRODUCTION

The United States has implemented numerous fundamental changes in its policies to build greater national security in response to the events of September 11, 2001.<sup>1</sup> Observing many changes and implementations, “no aspect has been more drastically impacted than air travel.”<sup>2</sup> However, the greater change has come from individuals’ perceptions of outsiders and has manifested in forms such as xenophobia and Islamophobia.<sup>3</sup> As a result, racial, ethnic, and religious discrimination complaints have increased significantly in

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<sup>1</sup> Jason Villedomez, *9/11 to Now: Ways We Have Changed*, PBS NEWSHOUR (Sep. 14, 2011, 4:55 PM), <http://www.pbs.org/newshour/rundown/911-to-now-ways-we-have-changed/>.

<sup>2</sup> Mark C. Fava, *Post September 11 Aviation Law: A Proliferation of Litigation Allegations of Racial Discrimination and Prosecutions of Unruly Passengers*, 15 S.C. LAW. 34 (2004).

<sup>3</sup> See, e.g., Aliyah Frumin & Amanda Sakuma, *Hope and Despair: Being Muslim in America After 9/11*, NBC NEWS (Sep. 11, 2016, 10:03 AM), <http://www.nbcnews.com/storyline/9-11-anniversary/hope-despair-being-muslim-america-after-9-11-n645451>. Islamophobia is hatred or fear of Muslims or of their politics or culture. *Islamophobia* DICTIONARY.COM, <http://dictionary.reference.com/browse/islamophobia>.

the air transportation setting.<sup>4</sup> However, are these claims actionable?

Under 49 U.S.C. § 41310 (Discriminatory Statute 41310), “an air carrier or foreign air carrier may not subject a person, place, port, or type of traffic in foreign air transportation to unreasonable discrimination,”<sup>5</sup> and thereby unreasonable discrimination is actionable.<sup>6</sup> Air travelers continue to file complaints with the U.S. Department of Transportation (DOT) to report unreasonable discriminatory practices by airlines and their representatives.<sup>7</sup> The Discriminatory Statute 41310, however, does not define “unreasonable discrimination,” leading to ambiguity of actionable discriminatory conducts. Courts also tend to hold various actions as unreasonable discrimination without any additional analysis, without providing an exact definition of “unreasonable discrimination.”<sup>8</sup>

In the summer of 2015, one air passenger’s experience led to a social media firestorm.<sup>9</sup> A Muslim passenger, on a flight operated by

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<sup>4</sup> Fava, *supra* note 2; Fredrick Kunkle, *New Data Shows Airline Discrimination Complaints Jumped 37 Percent*, WASH. POST (Nov. 15, 2016), [https://www.washingtonpost.com/news/tripping/wp/2016/11/15/as-discrimination-complaints-rise-transportation-department-releases-more-data-on-airlines-treatment-of-passengers/?utm\\_term=.9f73cea23637](https://www.washingtonpost.com/news/tripping/wp/2016/11/15/as-discrimination-complaints-rise-transportation-department-releases-more-data-on-airlines-treatment-of-passengers/?utm_term=.9f73cea23637).

<sup>5</sup> 49 U.S.C. § 41310(a) (2000).

<sup>6</sup> *Id.*

<sup>7</sup> Monthly air travel consumer report reflects high volume of complaints that are filed by air travellers. *Air Travel Consumer Report*, U.S. DEP’T OF TRANSP., <https://www.transportation.gov/airconsumer/air-travel-consumer-reports> (last updated Mar. 14, 2017).

<sup>8</sup> See generally *Morales v. TWA*, 504 U.S. 374 (1992); *Nader v. Allegheny Airlines*, 512 F.2d 527 (D.C. Cir. 1975). In these cases, courts continue to use the language of “unreasonable discrimination” to describe certain conducts. However, they never seem to define the exact meaning of the definition.

<sup>9</sup> See Ray Sanchez, *United Apologizes After In-flight Discrimination*, CNN (June 3, 2015), <http://www.cnn.com/2015/05/30/us/united-flight-muslim-chaplain/>. See also Medha Imam, *Northwestern Chaplain Talks United Discrimination Incident, Islam and Sports*, USA TODAY C. (Oct. 27, 2015), <http://college.usatoday.com/2015/10/27/meet-tahera-ahmad>.

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United Airlines, asked a flight attendant for an unopened can of soda for hygienic reasons during the routine beverage service.<sup>10</sup> The flight attendant refused to give her one, “but then handed an unopened can of beer to a man seated nearby.”<sup>11</sup> When the Muslim passenger questioned the flight attendant, the flight attendant responded that, “we are unauthorized to give unopened cans to people because they may use it as a weapon on the plane.”<sup>12</sup> This Muslim passenger was treated differently from another passenger. And, the conduct of the flight attendant appears to constitute discrimination to an ordinary person,<sup>13</sup> but does this incident fall into the category of unreasonable discrimination to be actionable under the Discriminatory Statute 41310?

The purpose of this Note is to propose a preliminary test that the DOT could utilize to determine whether an alleged discriminatory conduct would be deemed unreasonable discrimination under aviation discrimination statutes. The preliminary test will provide the basic mechanism to evaluate whether air transportation incidents similar to the United Airlines incident are actionable. This Note first discusses the history of the development of Discriminatory Practices Statute 41310, as well as past court cases and consent orders of the DOT, to delineate how the courts and the DOT have generally interpreted the language “unreasonable discrimination” over time. The past interpretation of the language will show whether sufficient notice has been provided to airlines to be in compliance with discriminatory statutes, and to passengers to recognize unreasonable

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<sup>10</sup> Sanchez, *supra* note 9.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* Although the flight attendant had not explicitly stated that the refusal of an unopened can of soda was based on her status as a Muslim, the flight attendant’s response certainly implied a certain degree of Islamophobia.

<sup>13</sup> Discrimination is “the practice of unfairly treating a person or group of people differently from other people or groups of people.” *Discrimination*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/discrimination> (last visited Feb. 15, 2017).

discriminatory practices.

The second part of this Note focuses on the general use of “unreasonable discrimination” language in employment settings.<sup>14</sup> Aviation law is an area in which case law and interpretation of relevant statutes are scarce because of the “relatively ‘newness’ of aviation law and text on the subject.”<sup>15</sup> Therefore, this Note uses the method of borrowing the interpretations of analogous statutes<sup>16</sup> to understand what constitutes unreasonable discriminatory practices in the air transportation setting.

After a preliminary test is proposed, this Note will examine whether the protected classification list<sup>17</sup> enumerated in 49 U.S.C. § 40127 (Discriminatory Statute 40127) is exclusive. Discriminating

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<sup>14</sup> Title VII (Employment Discrimination Statute) is an employment discrimination statute that prohibits discrimination based on employee’s race, color, religion, sex, or national origin. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964). The U.S. Department of Transportation is aware of the limited case law that provides interpretation of aviation statutes, such as 49 U.S.C. § 41310 (2000). As a result, it is common and well-established practice at the DOT to base a claim on analogous statutes. Employment settings and public accommodation (Title II) are recognized to have the most similar fact patterns to those of air transportation. However, one must recognize that the fact patterns of employment setting and air transportation will never be exactly the same. *See also infra* note 93.

<sup>15</sup> Steve V. Dedmon, *Aviation Law: Cases and Materials*, 16 J. AVIATION/AEROSPACE EDUC. & RES. 15 (2007), <http://commons.erau.edu/cgi/viewcontent.cgi?article=1472&context=jaaer>.

<sup>16</sup> *See* J. Russell E. Carparelli, *The Rehnquist Court’s Canons of Statutory Construction*, NCSL, at 4 (2013), [http://www.ncsl.org/documents/lss/2013PDS/Rehnquist\\_Court\\_Canons\\_citations.pdf](http://www.ncsl.org/documents/lss/2013PDS/Rehnquist_Court_Canons_citations.pdf) (one of the statutory constructions is the borrowed statute rule: “when Congress borrows a statute, it adopts by implication interpretations placed on the statute, absent express statement to the contrary.”), *derived from* William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994).

<sup>17</sup> “[R]ace, color, national origin, religion, sex, [and] ancestry” are protected groups under the statute. 49 U.S.C. § 40127 (2000).

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against a person solely based on an enumerated classification constitutes a violation of Discriminatory Statute 40127.<sup>18</sup> There is a circuit split regarding whether the statute should protect other classified groups<sup>19</sup> beyond those classifications and the scope of the enumerated classifications.<sup>20</sup>

Finally, this Note will propose how the DOT and courts should interpret “unreasonable discrimination” in the context of air transportation. By examining previous air transportation discrimination cases and incidents, the proposal will establish a framework to categorize and distinguish unreasonable and reasonable discriminatory practices of airlines. This will require engendering a balancing test, because the justification of discriminatory practices provided by airlines is not genuine and often are pretexts for discrimination.

### I. HISTORY

Discrimination in transportation can be defined as the denial of

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<sup>18</sup> According to 49 U.S.C. 40127, 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.

<sup>19</sup> For example, there is a circuit split concerning whether discrimination based on sexual orientation constitutes sex discrimination. Title VII enumerates the same classification as in 49 U.S.C. 40127 (2000), but some circuits are not willing to include sexual orientation within the category of sex. *See Medina v. Income Support Div.*, 413 F.3d 1131 (10th Cir. 2005) (finding that discrimination based on sexual orientation does not constitute discrimination based on sex; therefore, the complainant’s claim was baseless); *see also Hively v. Ivy Tech Cmty. Coll.*, No. 15-1720, 2017 WL 1230393 (Apr. 4, 2017) (concluded that discrimination on the basis of sexual orientation is a form of sex discrimination). *But see Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (holding victims of discrimination based on sexual orientation may be able to assert a Title VII claim of sex discrimination).

<sup>20</sup> *Supra* note 22.

equal access, services, or treatment in modes of public transportation.<sup>21</sup> Not all discriminatory practices are considered illegal and prohibited by federal laws; only unreasonable discrimination is prohibited.<sup>22</sup> Unreasonable discrimination is unjust discrimination or unreasonable preference or prejudice, when used in transportation context.<sup>23</sup> Yet, the Code of Federal Regulations (C.F.R.) definition does not indicate the types of practices by an air carrier or foreign air carrier that may be considered unreasonable discrimination in the context of air transportation.<sup>24</sup> Unreasonable discrimination that is prohibited by federal law and enforced by the DOT is not limited to discrimination based on race.<sup>25</sup> However, the history of discriminatory practices manifests that public transportation was and continues to be the main area in which the members of minority groups, especially racial minorities, experience

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<sup>21</sup> DAVID BRADLEY & SHELLEY FISHER, *ENCYCLOPEDIA OF CIVIL RIGHTS IN AMERICA* 850 (Armonk, N.Y. Sharpe Reference, 1998). Throughout American history, members of minority groups, not limited to African Americans, have confronted systematic discrimination and segregation on modes of transportation. *Id.*

<sup>22</sup> *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412 (1937). “Proper and reasonable discrimination between classes to promote fair competitive conditions and to equalize economic advantages is therefore lawful.” *Id.* at 426.

<sup>23</sup> 14 C.F.R. § 399.36(a)(1) (1964).

<sup>24</sup> *Id.* “An air carrier or foreign air carrier may not subject a person, place, port, or type of traffic in foreign air transportation to unreasonable discrimination.” 49 U.S.C. § 41310(a) (2000).

<sup>25</sup> “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.” 49 U.S.C. § 40127(a) (2000). When an air carrier subjects a person to unreasonable discrimination, this leads to the violation of both 49 U.S.C. §§ 41310 and 40127 because the statutes protect persons from discriminatory practices. This is evidenced by the Consent Order (Docket OST-2011-0003) issued by the U.S. Department of Transportation against United Airlines on November 1, 2011. U.S. DEP’T OF TRANSP., *CONSENT ORDER* No. 2011-11-02 (Nov. 2, 2011).

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discrimination.<sup>26</sup>

*A. Interstate Commerce Act of 1887*

The legislative history of the Discriminatory Statute 41310 traces back to the Interstate Commerce Act of 1887 and its subsequent amendments, which regulated earlier modes of public transportation, especially railroads.<sup>27</sup> African Americans were systematically discriminated against in railroad transportation.<sup>28</sup> The prevalence and severity of discriminatory practices associated with transportation is reflected in the writings of Frederick Douglass.<sup>29</sup> According to Douglass, “a most unrighteous and proscriptive rule prevailed, by which colored men and women were subjected to all manner of indignity in the use of [railroads]” in 1849.<sup>30</sup> Although the movement of African Americans was extremely limited before the Emancipation Proclamation due to their status as slaves,<sup>31</sup> discriminatory practices based on race were prevalent in public transportation preceding the Civil War.<sup>32</sup> Southern states eventually formulated the “Jim Crow” notion, which existed long before the Civil War,<sup>33</sup> into a de jure racial segregation scheme in the public transportation setting, opening the Jim Crow Era, to perpetuate segregation after the War.<sup>34</sup> In other words, the Civil War, the Emancipation Proclamation, and

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<sup>26</sup> Bradley, *supra* note 21.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Frederick Douglass, *Prejudice Not Natural*, TEACHINGAMERICANHISTORY.ORG (June 8, 1849), <http://teachingamericanhistory.org/library/document/prejudice-not-natural/>.

<sup>30</sup> *Id.*

<sup>31</sup> Bradley, *supra* note 21. For example, a New Orleans Railroad in the 1830s instituted black only cars. *Id.* at 8.

<sup>32</sup> Bradley, *supra* note 21, at 8.

<sup>33</sup> The concept of Jim Crow was not novel. Bradley, *supra* note 21, at 7.

<sup>34</sup> *Id.*

the Reconstruction Amendments<sup>35</sup> that followed did not end discrimination in public transportation<sup>36</sup> because the start of the Jim Crow Era after the Civil War merely perpetuated discriminatory practices.<sup>37</sup>

The actual racial caste system of Jim Crow segregation was applied to the post-Reconstruction era beginning in 1877 when southern states took legal action to separate the races in public spaces,<sup>38</sup> including the modes of public transportation.<sup>39</sup> In response to segregation that was deemed legal<sup>40</sup> by states in the post-war era, Congress passed the Interstate Commerce Act of 1887 to combat deeply entrenched Jim Crow laws.<sup>41</sup> The passage of the Act,

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<sup>35</sup> *Reconstruction Amendments*, PBS: SLAVERY BY ANOTHER NAME, <http://www.pbs.org/tpt/slavery-by-another-name/themes/reconstruction-amendments> (last visited Apr. 13, 2017, 2:10 PM). The purpose of the Fourteenth Amendment was “to secure to a race recently emancipated and held in slavery through many generations, all the civil rights that the superior race enjoy and to prohibit the implication of inferiority. *Strauder v. W. Va.*, 100 U.S. 303, 306 (1879).

<sup>36</sup> *See generally* *Henderson v. United States*, 339 U.S. 816 (1950); *see also* *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342 (1914).

<sup>37</sup> Bradley, *supra* note 21. Jim Crow was named after a popular 19th-century minstrel song that stereotyped African Americans, and “Jim Crow” came to personify the system of government-sanctioned racial oppression and segregation in the United States. *The Rise and Fall of Jim Crow*, PBS, <https://www.pbs.org/wnet/jimcrow> (last visited Feb. 17, 2017).

<sup>38</sup> David Pilgrim, *Jim Crow Museum of Racist Memorabilia*, FERRIS ST. U. (Sept. 2000), <http://www.ferris.edu/jimcrow/what.htm>.

<sup>39</sup> *See, e.g., Segregation of Railroad Cars*, HISTORY ENGINE, <https://historyengine.richmond.edu/episodes/view/3273> (last visited Mar. 23, 2017) (Virginia’s segregated railroad law).

<sup>40</sup> The notion of separate but equal had long persisted in the post-Civil War era to continue justifying segregation. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896).

<sup>41</sup> The Interstate Commerce Act of 1887 was implemented to regulate the railroad industry, including regulating how railroad companies conducted their business, controlling rail rates, and preventing monopolies



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however, did not result in a dramatic change as expected because the Interstate Commerce Commission (ICC) subsequently acknowledged the notion of “separate but equal” that had been embraced by the federal courts.<sup>42</sup> The ICC continued to conclude that separate and unequal facilities and accommodations did not violate Section 3 of the Interstate Commerce Act of 1887.<sup>43</sup> However, in 1941, the U.S. Supreme Court ruled that discriminatory practices in interstate travel, which had long been supported by the separate but equal doctrine, violated the Interstate Commerce Act.<sup>44</sup>

In *Mitchell v. United States*, the Supreme Court used the term

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by the promotion of fair markets and competition. Also, the Act established the Interstate Commerce Commission as a regulatory agency to implement the law. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887). The Act included provisions for regulating railroad travel, and Section 3 of the act required carriers to provide equal facilities for all passengers. Bradley, *supra* note 21, at 15.

<sup>42</sup> Robert W. Steele, *Constitutional Law: Interstate Commerce: Validity of Segregation in Interstate Railway Facilities*, 54 MICH. L. REV. 1175, 1176 (1956) (“the federal courts and the ICC have interpreted section 3 (1) to allow carriers to segregate races so long as equal facilities were supplied to all passengers”). See also Mark V. Tushnet, *Segregation*, GALE, [http://ic.galegroup.com/ic/uhic/ReferenceDetailsPage/ReferenceDetailsWindow?zid=ec317786f6e0d24f6124a3982518bc78&action=2&catId=GALE%7C00000000MXNC&documentId=GALE%7CCX3401803794&userGroupName=mclin\\_s\\_ccreg&jsid=4d647bb20e73906a0a4f88072e81205b](http://ic.galegroup.com/ic/uhic/ReferenceDetailsPage/ReferenceDetailsWindow?zid=ec317786f6e0d24f6124a3982518bc78&action=2&catId=GALE%7C00000000MXNC&documentId=GALE%7CCX3401803794&userGroupName=mclin_s_ccreg&jsid=4d647bb20e73906a0a4f88072e81205b) (last visited Mar. 25, 2017) (“Many southern states adopted laws expressly requiring racial segregation in transportation, schools, and elsewhere. The Supreme Court upheld such laws in *Plessy v. Ferguson* (1896) . . . but no state took the requirement of equality seriously . . .”).

<sup>43</sup> Steele, *supra* note 42.

<sup>44</sup> *Mitchell v. United States*, 313 U.S. 80 (1941). The procedural history of *Mitchell* is that the plaintiff, a black passenger who had purchased a first-class ticket, filed a complaint with the ICC. The plaintiff’s allegation was unjust (unreasonable) discrimination based on his race. The ICC dismissed the complaint, and when he brought the case to a federal district court, the court affirmed the decision of the ICC. *Id.*

“unjust discrimination,”<sup>45</sup> which is interchangeable with unreasonable discrimination, and repeatedly labeled the discriminatory practice to be “unjust.”<sup>46</sup> Even after *Mitchell*, the Interstate Commerce Commission ruled that segregation in the railway industry did not violate the Interstate Commerce Act. Therefore, African Americans who encountered discrimination in the railroad context could not file complaints to bring actionable discrimination claims.<sup>47</sup> The Supreme Court once again had to reverse the ICC’s decisions.<sup>48</sup> The Supreme Court upheld its interpretation of the Interstate Commerce Act from *Mitchell*, to affirm protection from unreasonable discrimination.<sup>49</sup> Because Section Three of the Interstate Commerce Act invalidated the discriminatory rules and practices,<sup>50</sup> discrimination based solely on race was unreasonable.<sup>51</sup>

#### *B. Statutes Beyond Interstate Commerce Act of 1887*

The Interstate Commerce Act was intended primarily to regulate the railroad industry.<sup>52</sup> Yet, as new alternative modes of transportation—such as motor vehicles and airplanes—opened up, the Interstate Commerce Act broadened. In 1935, Congress amended

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<sup>45</sup> *Id.* at 88, 92–94, 97.

<sup>46</sup> “‘Unreasonable discrimination’ means unjust discrimination or unreasonable preference or prejudice[.]” 14 C.F.R. § 399.36(a)(1) (1980).

<sup>47</sup> *Henderson v. United States*, 339 U.S. 816 (1950) (the Interstate Commerce Commission found that the implemented regulation that segregated the dining area of the railroad car was not a violation of the Interstate Commerce Act).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 824.

<sup>50</sup> *Id.* at 825.

<sup>51</sup> “Where a dining car is available to passengers holding tickets entitling them to use it, each such passenger, regardless of race, is equally entitled to its facilities in accordance with reasonable regulations.” *Id.* at 824.

<sup>52</sup> Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379.

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the Interstate Commerce Act to grant expanded authority to the ICC to regulate buses and trucks.<sup>53</sup> In addition, the basis of the Interstate Commerce Act as incorporated into various federal transportation regulations, such as Title 49 of the United States Code.<sup>54</sup> This leads to a reasonable presumption that the Supreme Court’s interpretations of discriminatory practices in railroad transportation under the Interstate Commerce Act remained true to other modes of transportation, which are protected by Title 49.<sup>55</sup>

Unlike the Interstate Commerce Act, the Civil Aeronautics Act of 1938<sup>56</sup>—another statute regulating air transportation—does not confer the power to grant monetary damages or reparations for past

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<sup>53</sup> Motor Carrier Act of 1935, Pub. L. No. 74-255, 49 Stat. 543, ch. 498, approved 1935-08-09. This Act was an amendment to the Interstate Commerce Act. Under the Motor Carrier Act, Congress recognized trucking and bus lines as common carriers. This reflects the continuous expansion of what modes of transportation qualify as common carriers. *Id.* Common carrier is a carrier offering its services at published rates to all persons for interstate transportation. *See Common Carrier*, FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Common+Carrier> (last visited at Mar. 23, 2017). Also, a common carrier that unjustifiably refuses to carry a particular person or cargo may be sued for damages. Motor Carrier Act, Pub. L. No. 74-255, 49 Stat. 543 (1935).

<sup>54</sup> Title 49 of the United States Code enumerates transportation regulations. These regulations do not specifically state that the regulations are successors of the Interstate Commerce Act of 1887. However, the “Reference in Text” and “Clarification of Congressional Intent” sections mention the Interstate Commerce Act and how some clauses arise under the provisions of the Interstate Commerce Act. *Title 49—Transportation*, U.S. GOV’T PRINTING OFF., <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title49/html/USCODE-2011-title49.html> (last visited Mar. 25, 2017); *see also* L. Revision Couns. of the H.R., *United States Code 1988 Edition*, U.S. GOV’T PRINTING OFF. (1989), <https://www.ferc.gov/legal/maj-ord-reg/ica.pdf>.

<sup>55</sup> *Id.*

<sup>56</sup> Civil Aeronautics Act of 1938 (CAA), Pub. L. No. 75-706, 52 Stat. 973.

misconduct of the carrier upon an administrative agency.<sup>57</sup> In addition, there is a lack of direct evidence,<sup>58</sup> such as traceable legislative history, that the Civil Aeronautics Act was one of the successor acts of the Interstate Commerce Act.<sup>59</sup> However, not only did a district court use the Interstate Commerce Act to analyze Civil Aeronautics Act,<sup>60</sup> but also another district court stated that the Civil Aeronautics Act is one of the developments of the Interstate Commerce Act in legislating controls over the newer air transportation.<sup>61</sup>

However, in *Fitzgerald v. Pan American World Airways, Inc.*, the plaintiff filed a claim against the Pan American air carrier for racial discrimination in the context of air transportation.<sup>62</sup> The Second Circuit Court of Appeals construed the Civil Aeronautics Act in light of the recent Supreme Court decision, *Henderson v. United States*, which viewed the question of railroad discrimination under the Interstate Commerce Act.<sup>63</sup> In addition, the Supreme Court concluded in *Pan Am. v. United States* that the Interstate Commerce Act of 1887's regulatory scheme is no less pervasive than that which

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<sup>57</sup> See *Fitzgerald v. Pan Am. World Airways, Inc.*, 229 F.2d 499, 502 (2d Cir. 1956). Initially, the Court of Appeals highlights the difference between the Interstate Commerce Act and Civil Aeronautics Act. However, the court eventually states that it must apply the Supreme Court's decision and interpretation of the Interstate Commerce Act even with the apparent differences. *Id.* at 501–02.

<sup>58</sup> *Slick Airways, Inc. v. Am. Airlines, Inc.*, 107 F. Supp. 199, 212 (D.N.J. 1951).

<sup>59</sup> *Records of the Civil Aeronautics Board*, NAT'L ARCHIVES, <http://www.archives.gov/research/guide-fed-records/groups/197.html> (last visited Mar. 25, 2017).

<sup>60</sup> *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360, 363 (S.D. Cal. 1961).

<sup>61</sup> *Slick Airways*, 107 F. Supp. at 212; *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 (1963).

<sup>62</sup> *Fitzgerald*, 229 F.2d 499, 500–01 (2d Cir. 1956).

<sup>63</sup> *Id.*

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governs the airline industry.<sup>64</sup> Hence, it is beyond the mere reasonable presumption that the Supreme Court's interpretations of railroad discriminatory practices under the Interstate Commerce Act continue to apply in air transportation.<sup>65</sup>

*C. The Development of 49 U.S.C. § 41310*

Other than the Interstate Commerce Act, there is no legislative history of the Discriminatory Statute 41310.<sup>66</sup> Case law interpreting the Discriminatory Statute 41310 is scarce, and the Supreme Court and federal courts have not determined the exact meaning of unreasonable discrimination.<sup>67</sup> The D.C. Circuit concluded that intent to discriminate is not required under the Discriminatory Statute 41310;<sup>68</sup> disparate impact<sup>69</sup> is sufficient.<sup>70</sup> However, even when

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<sup>64</sup> Pan Am. World Airways, 371 U.S. at 313.

<sup>65</sup> *Id.*

<sup>66</sup> Title 49 of U.S.C. provides “Historical and Revision Notes” of 49 U.S.C. § 41310. However, the section merely provides amendments and revisions to the statute. The section does not even state the Interstate Commerce Act. Therefore, it can only be inferred that Title 49 of U.S.C. is one of the successor statutes of the Interstate Commerce Act by observing the Title 49 of the United States Code in its entirety. Although Title 49 of the U.S.C. does not contain the Clarification of Congressional Intent section, the Interstate Commerce Act is repeatedly mentioned throughout Title 49 of the United States Code. 49 U.S.C. § 41310 (2000).

<sup>67</sup> Only a few district courts and courts of appeals have interpreted 49 U.S.C. § 41310, but most of the cases are not on point to provide guidance of how the court will distinguish certain discriminatory practices as unreasonable or not.

<sup>68</sup> *Aerolineas Argentinas S.A. v U.S. Dep’t Of Transp.*, 415 F.3d 1, 6–7 (D.C. Cir. 2005); 49 U.S.C. § 41310.

<sup>69</sup> In the context of employment, a facially neutral employment practice may be deemed to violate Title VII of the Civil Rights Act of 1964 without evidence of the employer’s subjective intent to discriminate that is required in a disparate-treatment case. *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 645 (1989). Borrowing the interpretation from the

claimants can establish a prima facie case of disparate impact, they will not be protected under the Discriminatory Statute 41310 unless the discriminatory action is unreasonable.<sup>71</sup>

The consent orders issued by the DOT manifest that the Department often views the discriminatory Statutes 41310 and 40127<sup>72</sup> in conjunction.<sup>73</sup> The DOT states that an airline's refusal of passage to an individual because of the person's race, color, national origin, religion, sex, or ancestry violates the Discriminatory Statute 40127.<sup>74</sup> This type of discrimination also violates the Discriminatory Statute 41310, indicating unreasonable discrimination.<sup>75</sup>

For example, in a consent order issued on May 2, 2012 for violations by Atlantic Southeast Airlines Inc., the airline denied boarding to two religious leaders for a secondary screening.<sup>76</sup> The enforcement office of the DOT concluded that the initial decision to

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employment discrimination statute, it could be interpreted that airlines need not have subjective intent to discriminate against passengers. Hence, the practices may constitute unreasonable discrimination even if certain practices of the aircrafts seem neutral on their face.

<sup>70</sup> *Aerolineas Argentinas S.A.*, 415 F.3d at 6.

<sup>71</sup> *Id.* at 7.

<sup>72</sup> “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.” 49 U.S.C. § 40127(a) (2000).

<sup>73</sup> U.S. DEP'T OF TRANSP., CONSENT ORDER No. 2012-5-2 (May 2, 2012) [hereinafter Consent Order Against Atlantic Southeast Airlines], [https://www.transportation.gov/sites/dot.gov/files/docs/eo\\_2012-5-2.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/eo_2012-5-2.pdf); U.S. DEP'T OF TRANSP., CONSENT ORDER No. 2011-02-10 (Feb. 10, 2011), [http://airconsumer.ost.dot.gov/files/docs/eo\\_2011-02-10.pdf](http://airconsumer.ost.dot.gov/files/docs/eo_2011-02-10.pdf); U.S. DEP'T OF TRANSP., CONSENT ORDER No. 2011-11-02 (Nov. 2, 2011), [https://www.transportation.gov/sites/dot.gov/files/docs/eo\\_2011-11-02.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/eo_2011-11-02.pdf).

<sup>74</sup> U.S. DEP'T OF TRANSP., CONSENT ORDER No. 2012-5-2 (May 2, 2012) [hereinafter Atlantic Southeast Airlines Consent Order], [https://www.transportation.gov/sites/dot.gov/files/docs/eo\\_2012-5-2.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/eo_2012-5-2.pdf).

<sup>75</sup> 49 U.S.C. § 41310 (2000).

<sup>76</sup> Atlantic Southeast Airlines Consent Order, *supra* note 74.

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remove<sup>77</sup> those passengers was not discriminatory,<sup>78</sup> implying it did not constitute unreasonable discrimination. Yet, the conduct by the airline failed to comply with the Discriminatory Statutes 41310 and 40127 when the passengers were still denied boarding even after the security clearance.<sup>79</sup> A consent order issued on November 1, 2011 concerning the violations by United Airlines had similar facts.<sup>80</sup> “Six member of a United Arab Emirates (UAE) armed forces delegation were removed from and denied re-boarding” on the flight.<sup>81</sup> The basis of the removal was their perceived Arab or Middle Eastern descent.<sup>82</sup> The DOT, just as in the consent order for Southeast, stated that United Airline’s conduct constituted violation of the air transportation discrimination statutes.<sup>83</sup> However, the DOT once again concluded that the initial decision to remove the six passengers for an additional screening was not discriminatory.<sup>84</sup>

The Discriminatory Statute 41310 prohibits unreasonable discrimination in air transportation.<sup>85</sup> Nonetheless, the highest

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<sup>77</sup> Atlantic Southeast Airlines Consent Order, *supra* note 74. “Permissive Refusal—subject to regulations of the Under Secretary of Transportation, 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.” 49 U.S.C. § 44902(b) (2001). “Highest priority in air commerce is assigned to safety.” 49 USCS § 40101(a)(1) (2000).

<sup>78</sup> Atlantic Southeast Airlines Consent Order, *supra* note 74.

<sup>79</sup> *Id.* Once an individual who has been removed from an aircraft because of security concerns has been found to not be a security threat, the carrier must allow that individual to re-board the same aircraft and take his/her flight so long as the aircraft has not yet departed unless a valid safety or security concern exists. *Id.*

<sup>80</sup> U.S. DEP’T OF TRANSP., CONSENT ORDER No. 2011-11-02 (Nov. 2, 2011).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Consent Order Against Atlantic Southeast Airlines, *supra* note 73.

<sup>84</sup> *Id.*

<sup>85</sup> 49 U.S.C. § 41310(a) (2000).

priority is assigned to safety.<sup>86</sup> Thus, airline or airport representatives may discriminate passengers when the safety reasons are predominant.<sup>87</sup> Pursuant to 49 U.S.C. § 44902, air carriers are given authority to make the judgment of refusing to transport passengers.<sup>88</sup> To prevent arbitrary or capricious action, which is used interchangeably with “unreasonable” by courts,<sup>89</sup> the decision is reviewed based on the actual knowledge of the decision makers, usually captains, at the time of the decision.<sup>90</sup> “Because the decision must be made in an expedient manner, there is no obligation on the part of the captain (or other decision-maker) to make a thorough inquiry into the information received, the sources of that information, or to engage in an investigation.”<sup>91</sup> The judgments are protected as long as they were made in good faith—not arbitrarily or capriciously.<sup>92</sup>

#### A. Unreasonable Discrimination in the Context of Employment

Because aviation law has sparse case law and legislative history, the DOT commonly references analogous statutes, such as Title VII and Title II, and case law to provide a basis for the department’s interpretation of aviation statutes, including the specific language of the statutes.<sup>93</sup> Therefore, observing the history of how courts have

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<sup>86</sup> 49 U.S.C. § 40101(a)(1) (2000).

<sup>87</sup> 49 U.S.C. § 40101(a)(1) (2000).

<sup>88</sup> 49 U.S.C. §44902(b) (2011). 49 U.S.C. §44902, just as 49 U.S.C. §§ 41310 and 40101, is under Title 49 of the U.S. Code to regulate transportation.

<sup>89</sup> See generally *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142 (Cal. 1991).

<sup>90</sup> *Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 1 (1st Cir. 2008).

<sup>91</sup> *Id.* at 15. The captain is “entitled to accept at face value the representations made to him by other air carrier employees” and his decision should not be based on what he should have known at the time of the decision-making. *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> From my summer employment with DOT, I observed that it was a well-established practice for the attorneys to refer to case law from different



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interpreted unreasonable discrimination in the employment setting will provide a general understanding of how courts tend to distinguish between reasonable and unreasonable discrimination.

Although comparing courts' statutory interpretation is useful, there is a crucial point to keep in mind while conducting the statutory interpretation comparing analysis.<sup>94</sup> Interpretation of employment discrimination statutes cannot always be applied to aviation discrimination statutes.<sup>95</sup> "When conducting statutory interpretation, [it is important to] be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."<sup>96</sup>

Just as Discriminatory Statutes 41310 and 40127, employment discrimination statutes prohibit "unreasonable discrimination." The Americans with Disabilities Act of 2003 is an employment discrimination statute that prohibits discrimination based on disabilities.<sup>97</sup> And, Title VII of the Civil Rights Act of 1964

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areas other than aviation law, such as *Brown v. Board of Education*, 345 U.S. 972 (1953), when considering the issues of discrimination.

<sup>94</sup> *Gross v. FBL Financial Services, Inc.*, U.S. 129 S. Ct. 2343 (2009).

<sup>95</sup> Just because employment discrimination statutes use the "unreasonable discrimination" language, statutory interpretation of employment statutes do not necessarily apply to other discrimination statutes. Although Title VII and the ADEA share the same "because of" language, the Supreme Court gave different meaning in each context. Thus, "the Court's interpretation of the ADEA is not governed by Title VII decision." *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (2013). It is important to look at the ADA, for 49 U.S.C. § 41310 prohibits unreasonable discrimination in general without enumerating the basis. Under Title 49, § 40127 prohibits discrimination based on race, color, national origin, religion, sex, or ancestry and § 41705 prevents discrimination based on disability. Therefore, the interpretation of "unreasonable discrimination" in the air transportation setting in regards to disability should be analyzed by observing the ADA.

(Employment Discrimination Statute) also prohibits employment discrimination based on race, color, religion, sex and national origin.<sup>98</sup> Within these statutes, there is no such usage of “unreasonable discrimination” language. Yet, in many Title VII claim cases, courts continue to implement the language of unreasonable discrimination to describe prohibited conduct by employers.<sup>99</sup> The interpretation of “unreasonable discrimination” in the employment discrimination cases could, therefore, be analyzed to understand the use of the same language in the Discriminatory Statute 41310.

The DOT consent order states that removal of a passenger based on reasonable suspicion is not a discriminatory practice.<sup>100</sup> The removed passenger may argue that the removal caused humiliation and intangible harms.<sup>101</sup> Nevertheless, not all intangible harms are

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<sup>98</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

<sup>99</sup> See *Miller v. Indus. Comm’n*, 480 P.2d 565, 568 (Colo. 1971) (upholding the denial of unemployment benefits to a female employee separated from her job because pregnancy does not constitute *unreasonable discrimination* against female employees); *McCarthy v. Burkholder*, No. 75-136-C6, 1977 U.S. Dist. Lexis 16299, at \*5 (D.C. Kans.1977) (“the mere fact leave with pay is denied those taking leave due to pregnancy, while pay is allowed those taking sick leave generally, does not constitute an invidious or unreasonable discrimination”).

<sup>100</sup> U.S. DEP’T TRANSP., CONSENT ORDER No. 2012-5-2 (May 2, 2012), [https://www.transportation.gov/sites/dot.gov/files/docs/eo\\_2012-5-2.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/eo_2012-5-2.pdf) (the Enforcement Office found that the initial decision to remove the passengers from the aircraft “to conduct secondary screening was not discriminatory”).

<sup>101</sup> See generally *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); see also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); Nick Visser, *Muslim Woman Says Plane Crew Denied Her Unopened Soda Can Because It Could Be Used ‘As A Weapon,’* HUFFINGTON POST (May 31, 2015), [http://www.huffingtonpost.com/2015/05/31/tahera-ahmad-soda-united\\_n\\_7479464.html](http://www.huffingtonpost.com/2015/05/31/tahera-ahmad-soda-united_n_7479464.html); Associated Press, *Iraqis men sues American Air for Discrimination*, NBC NEWS (Nov. 11, 20017), <http://www.nbcnews.com/id/21587579/ns/travel-news/t/iraqis-men-sue-american-air-discrimination/#.WPDsOneZPdQ>.

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actionable in the employment context.<sup>102</sup> Because the case law in aviation law is scarce, this Note analogizes aviation discrimination statutes to Title VII to observe how the courts have intangible harms in an employment setting.<sup>103</sup>

Title VII prohibits covered employers from discriminating against employees based on protected classifications. It acknowledges that intangible harms that result from unreasonable discrimination are actionable.<sup>104</sup> The Supreme Court, however, imposed limits on actionable intangible harms, such as a hostile work environment leading to emotional distress.<sup>105</sup> In order for a discriminatory practice to rise to the level of Title VII discrimination, the practice must be “sufficiently severe or pervasive to [have] altered the conditions of victim’s employment and create an abusive work environment.”<sup>106</sup> This approach to intangible harm could probably be applied in the aviation sector, for it is a well-established practice for the DOT to view analogous statutes to support its legal stances.<sup>107</sup> Nevertheless, the patterns of the consent orders and practices of the DOT seem to

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<sup>102</sup> *Vinson*, 477 U.S. 57; *see also Harris*, 510 U.S. 17; Visser, *supra* note 101.

<sup>103</sup> *Supra* note 93.

<sup>104</sup> *See Vinson*, 477 U.S. at 57; *see also Harris*, 510 U.S. at 17.

<sup>105</sup> *Supra* note 104. *See also Enforcement Guidance*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N (last visited Apr. 14, 2017, 5:32 PM), <https://www.eeoc.gov/policy/docs/damages.html> (damages are available for the intangible injuries of emotional harm such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life). *See generally Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984).

<sup>106</sup> *Harris*, 510 U.S. at 21–22. Alleged discriminatory practice by an employer must be more than mere annoyance to constitute a Title VII violation. The conduct or practice must be severe or pervasive enough to have created an objectively, according to a reasonable person, hostile or abusive work environment. Also, the conduct reaches a level that the employee, who is the victim of the discrimination, must subjectively perceive the workplace environment to be hostile or abusive. *Id.*

<sup>107</sup> *See Supra* note 93.

reflect the department's hesitance to recognize intangible harms as an actionable claim in air transportation setting.<sup>108</sup> Unlike Title VII intangible discriminatory claims, interactions between passengers and airline representatives are very limited in that there lacks a continuous relationship like the one between employers and employees.<sup>109</sup>

## II. ANALYSIS AND PROPOSAL

The gradual development of Discriminatory Statutes 41310 and 41217 from the enactment of the Interstate Commerce Act manifests a legislative effort to ban discrimination in the transportation realm.<sup>110</sup> Even with the legislative effort, the ambiguity of "unreasonable discrimination" continues to prevail. When interpreting the Discriminatory Statute 41310 to determine whether an airline has engaged in unreasonable discrimination, the DOT usually studies each topic<sup>111</sup> mentioned in the History section to identify the legislative intent of the statutes.<sup>112</sup> This method of

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<sup>108</sup> See *supra* note 73. Over the course of my summer employment at the DOT, intangible harms were not treated as actionable claims if certain thresholds were satisfied.

<sup>109</sup> In general, isolated incidents do not rise to the level of actionable discrimination in an employment setting unless the complainant can establish that the conduct by the employer was extremely serious. *Harassment*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (last visited Apr. 14, 2017, 5:50 PM), <https://www.eeoc.gov/laws/types/harassment.cfm>. Usually, the interactions between airline representative and passengers usually do not continue long term. The duration of interactions ranges between several minutes to a couple of hours.

<sup>110</sup> *Supra* note 54; see also *supra* note 66.

<sup>111</sup> Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887); Civil Rights Acts of 1964, 42 U.S.C. § 2000e *et seq.*

<sup>112</sup> Over the course of my summer employment at the DOT, different statutes, unrelated to aviation law, were researched and studied to interpret aviation statutes.

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statutory interpretation is inefficient and unproductive. Although the Interstate Commerce Act of 1887 is, without a doubt, the fundamental basis of the Discriminatory Statute 41310, the applications have been mostly limited to railroad and patent racial discrimination circumstances, such as segregated facilities.<sup>113</sup> Air transportation discrimination often involves latent discrimination—meaning airlines do not outright discriminate against passengers by creating segregated facilities—and many passengers encounter discrimination based on classification other than race.<sup>114</sup> Thus, comparing the Interstate Commerce Act and the Discriminatory Statute 41310 to discern a universal meaning for unreasonable discrimination seems infeasible.

In addition to the Interstate Commerce Act, Title VII (Employment Discrimination Statute) and relevant case law are used by the DOT to interpret the Discriminatory Statutes 41310 and 41270, because both employment and air transportation statutes cover the same protected groups.<sup>115</sup> Nevertheless, the standards of the Employment Discrimination Statute<sup>116</sup> to distinguish unreasonable discrimination from lawful discrimination seem to harbor too high of burden for them to be implemented in air transportation context.<sup>117</sup> One of the well-known standards in employment setting is that employers may not commit “intangible” discrimination that is “sufficiently severe or pervasive to alter the conditions of the victim’s

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<sup>113</sup> *Supra* notes 42, 66 and accompanying text.

<sup>114</sup> Fredrick Kunkle, *New Data Shows Airline Discrimination Complaints Jumped 37 Percent*, WASH. POST (Nov. 15, 2016), [https://www.washingtonpost.com/news/tripping/wp/2016/11/15/as-discrimination-complaints-rise-transportation-department-releases-more-data-on-airlines-treatment-of-passengers/?utm\\_term=.c2a86f8cc660](https://www.washingtonpost.com/news/tripping/wp/2016/11/15/as-discrimination-complaints-rise-transportation-department-releases-more-data-on-airlines-treatment-of-passengers/?utm_term=.c2a86f8cc660).

<sup>115</sup> Both Title VII and Discriminatory Statutes 40127 enumerate the following as protected classes: “race, color, religion, sex, [and] national origin.” 42 U.S.C. § 2000e-2(a)(1); 49 U.S.C. § 40127.

<sup>116</sup> Severity or pervasiveness standard. *Infra* note 118.

<sup>117</sup> Compare 42 U.S.C. § 2000e-2(a)(1), with Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379, and 49 U.S.C. § 40127.

employment and create an abusive working environment.”<sup>118</sup> In air transportation setting, however, airline representatives, who may engage in discriminatory conduct, and passengers are limited to one or two interactions, whereas continuing interactions are formed between employers and employees. The difference in the degree of interaction causes different forms and extent of discrimination. Hence, the DOT should not rely solely on the Employment Discrimination Statute and its relevant common law standards to determine when certain conducts constitute unreasonable discrimination. Trying to enforce the Discriminatory Statutes without complete understanding of meaning of “unreasonable discrimination” that is tailored to the air transportation context is problematic.

The myriad of discrimination complaints filed by passengers<sup>119</sup> each year is unlikely to decrease because passengers lack knowledge of what constitutes actionable discrimination. Airlines may also take an economic approach to argue that violating the Discriminatory Statutes will cost less than trying to prevent or alter every conduct, service, and policy that may constitute unreasonable discrimination because of lack of definite standards.

As it appears, courts repeatedly utilized the language of unreasonable or unjust discrimination without further analysis to determine whether the airlines were in violation of discriminatory statutes.<sup>120</sup> Conversely, the courts have yet to provide guidance or certain standards of what types of discriminatory practices are considered reasonable or unreasonable.<sup>121</sup> The lack of guidance is problematic because when complainants either file complaints with

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<sup>118</sup> *Harris*, 510 U.S. at 21.

<sup>119</sup> *See, e.g.*, AIR TRAVEL CONSUMER REPORT, *supra* note 7.

<sup>120</sup> *See generally* *Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 1 (1st Cir. 2008). *But see* *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360, 363–64 (S.D. Cal. 1961) (analogizing the Interstate Commerce Act’s interpretation of “unjust discrimination” to analyze the meaning of “unjust discrimination” under the Civil Aeronautics Act).

<sup>121</sup> *Id.*

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the DOT or file a lawsuit against an airline in court, both parties cannot make general prediction of the outcomes.

The lack of predictability leads to two extreme positions. First, baseless complaints could continuously be filed with the DOT.<sup>122</sup> The language of unreasonable discrimination is very ambiguous, subjective, and without any guidance or standard.<sup>123</sup> Therefore, a complainant may have a meritless and non-actionable claim, but may still be filed with the DOT via email, phone call, or agency's website.<sup>124</sup> Obviously, the human and financial resources of the DOT are limited, and the inundation of meritless complaints will likely to avert the necessary resources to the complaints with merit.

Second, the lack of predictability may lead parties to avoid the formal justice system to resolve violations of fundamental rights. Complainants and respondents (airlines) may decide to agree on settlements via different means of alternative dispute resolution instead of actual adjudication. This may seem to bring positive outcomes by lightening caseloads and conserving the litigation costs of both parties. However, circumventing the courts means that the judicial system may be deprived of chances to develop important case law in these areas since settlement agreements are almost always kept private.<sup>125</sup> There may be incidents, such as *Brown v. Board of*

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<sup>122</sup> Not every complaint alleging discrimination by airlines will lead to enforcement actions. *Processing of Complaints Alleging Discrimination by Airlines Based on Race, Color, National Origin, Sex, Religion or Ancestry*, U.S. DEP'T TRANSP. (last updated Jan. 15, 2015), <https://www.transportation.gov/airconsumer/processing-complaints-alleging-discrimination-airlines-based-race-color>.

<sup>123</sup> *Supra* note 67.

<sup>124</sup> *Id.*; *File a Consumer Complaint*, U.S. DEP'T TRANSP. (last updated Jan. 12, 2017), <https://www.transportation.gov/airconsumer/file-consumer-complaint>.

<sup>125</sup> "The voluntary nature of mediation and confidentiality obligations means that companies can remove themselves at will and their information will be kept private." Aaron Murphy, *Alternative Dispute Resolution for Startups: Mediation and Arbitration*, SPZ (July 21, 2015),

*Education*,<sup>126</sup> when working within the judicial system is necessary in order to bring necessary societal changes and reforms.<sup>127</sup> In addition, there is a power imbalance between the complainant and the airlines. Because complainants will not have the concrete idea of what constitutes unreasonable discrimination, the airlines may try to persuade the complaints to believe that its discriminatory practice was not severe or outrageous and have the complaint agree to lesser remedies. If there is a guidance that provides the concrete understanding of unreasonable discrimination, both parties will likely to have an equal footing during the negotiation and settlement even when they resort to keep the matter in private. To prevent these two extreme results from occurring, some guidance or standard of unreasonable discrimination in the aviation setting should be established by the DOT.

There may be certain advantages for the Supreme Court to provide a clear definition of unreasonable discrimination. Yet, benefits of permitting the DOT to establish guidance, which specifies which set of conducts constitutes unreasonable discrimination in air transportation setting, appear to outweigh those of case law guidance. The DOT employs many subject matter experts, and these specialized employees can better tailor the meaning of unreasonable

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<http://www.spzlegal.com/social-enterprise/arbitration-mediation/>.

<sup>126</sup> 345 U.S. 972 (1953). This case “declared a great principle—non-discrimination and racial equality—but the principle did little to change the day-to-day lives of most African Americans in the 1950s.” WILLIAM N. ESKRIDGE, JR. ET AL., *CASE AND MATERIALS ON LEGISLATION AND REGULATION 2* (5th ed. 2007). The application of the case was limited to public institutions. *Id.* However, the impact of the case extended beyond the public institution setting. *Id.* *Brown* acted as the fundamental platform to bring other major social changes by the enactment of the Civil Rights Act of 1964. *Id.*

<sup>127</sup> See J. Thelton Henderson, Symposium, *Social Change, Judicial Activism, and the Public Interest Lawyer*, 12 WASH. U. J.L. & POL’Y 33, 42 (2003). Social change through judicial activism is not always effective and efficient. The ability of courts alone to achieve social change is limited. *Id.*



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discrimination within the air transportation setting. Also, the DOT could use the guidance to channel airlines to practice certain practical safety and accommodation standards that the DOT wishes to promote.

The agency, of course, cannot abuse its authority to prescribe a meaning that is beyond the legislation's purpose.<sup>128</sup> The agency has authority to create new rules and guidance based on future development rather than to have Congress write general guidance, regulations, or standards to further the DOT's agenda.<sup>129</sup> There will always be an embedded scope of uncertainty within the enabling legislations.<sup>130</sup> Nevertheless, guidance set forth by the DOT can spell out and enumerate specific standards and requirements that distinguish unreasonable and reasonable discrimination. This will allow the general public, especially passengers and airlines, to know where they stand with some degree of certainty. Also, if the guidance is not followed, the agency may implement simpler processes to sanction the airlines.

In addition, the Administrative Procedure Acts (APAs) "require agencies to give public notice of proposed rules, invite public comment, and to consider and respond to the public's input," and the DOT "must publish the rules after they are adopted."<sup>131</sup> This will facilitate transparency that may eventually lead to legitimization of

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<sup>128</sup> "[T]he validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purpose of the enabling legislation.'" *Mourning v. Family Pubs. Serv., Inc.*, 411 U.S. 356, 369 (1973).

<sup>129</sup> MICHAEL ASIMOW & RONALD M. LEVIN, *STATE AND FEDERAL ADMINISTRATIVE LAW* 230–31 (4th ed. 2014).

<sup>130</sup> Congress drafts vague statutory language to authorize (explicitly or implicitly) government agencies to fill statutory gaps. Mathew C. Stephenson, *Statutory Interpretation by Agencies*, HARVARD LAW, <http://www.law.harvard.edu/faculty/mstephenson/2011PDFs/Statutory%20Interpretation%20by%20agencies.pdf> (last visited Apr. 14, 2017, 5:07 PM); see also *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984).

<sup>131</sup> *Id.* at 6.

the guidance and acceptance by the general population.

Although the DOT has rulemaking power, there are constraints that prevent the abuse of power by the department.<sup>132</sup> One important constraint is that if complainants or respondents do not fit within the guideline established by the DOT or deem they should be exempted, they could always file a lawsuit in the court as a potential protection.<sup>133</sup> Even when the DOT does not exceed the granted rulemaking power, the legislative and judicial branches have various methods to alter the guideline if they do not agree with the DOT's interpretation of unreasonable discrimination.<sup>134</sup> The legislative branch could make an amendment to the statutes to clarify the meaning of unreasonable discrimination.<sup>135</sup> When the courts encounter the issue, they could establish common law that may contrast the guidance.<sup>136</sup> Thus, it seems most ideal for the DOT to establish a guideline rather than waiting for an unreasonable discrimination in aviation issue to eventually reach the Supreme Court.

As a result of tragic terrorist attacks that occurred in 2001, air transportation security intensified.<sup>137</sup> From various consent orders

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<sup>132</sup> See generally Neil Eisner, *Rulemaking Requirements*, U.S. DEP'T TRANSP. (Mar. 2012), <https://www.transportation.gov/regulations/rulemaking-requirements-2012>. This document enumerates various constraints and requirements that the DOT must satisfy in its rulemaking process.

<sup>133</sup> *Id.* at 8. If challenged in court under the APA, an agency rulemaking action is subject to standards whereby it can be held unlawful and set aside if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" unconstitutional; or in violation of statute or a procedural law. The court can also "compel agency action unlawfully withheld or unreasonably delayed." *Id.*

<sup>134</sup> *Id.* See also 5 U.S.C. §§ 801–808 (1996).

<sup>135</sup> 5 U.S.C. §§ 801–808.

<sup>136</sup> *Supra* note 133. See also *Mourning*, 411 U.S. at 369.

<sup>137</sup> Jason Villemez, *9/11 to Now: Ways We Have Changed*, PBS NEWS (Sept. 14, 2011, 4:55 PM), <http://www.pbs.org/newshour/rundown/911-to->

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published by the DOT, the initial removal of a person from an aircraft or initial denial of service because of security concerns seems to be acceptable even when the decision was based on race, national origin, or religion.<sup>138</sup> These current practices by airport enforcement officers seem to abrogate the right to be free from discrimination in the air transportation setting based on the protected group that is enumerated in the Discriminatory Statute 41310. When airline representatives become suspicious merely based on a passenger's protected classification, the DOT appears to deem this as unreasonable discrimination.<sup>139</sup> Airline representatives could make the initial decision to single out that passenger based on the protected classifications, such as race and sex, of the passenger. This may cause inconvenience and even humiliation for the singled out passenger.<sup>140</sup>

In the current climate of the fear of terrorists' threats and threat to security,<sup>141</sup> this initial singling out of individuals for a second screening could be seen as acceptable and not discriminatory.<sup>142</sup> However, this does not mean that singling out a passenger is permitted at any time.<sup>143</sup> The flight attendants or airline representatives must have reasonable suspicion of believing a

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<sup>138</sup> See *supra* note 73 and accompanying text. "Highest priority in air commerce is assigned to safety." 49 USCS § 40101(a)(1) (2000).

<sup>139</sup> In consent order against Atlantic Southeast Airlines, two passengers were removed from the aircraft based on their religion. Atlantic Southeast Airlines Consent Order, *supra* note 74.

<sup>140</sup> See Ray Sanchez, *United Apologizes After In-flight Discrimination Claim*, CNN (June 3, 2015), <http://www.cnn.com/2015/05/30/us/united-flight-muslim-chaplain/> ("I am sitting on a United airlines flight in the air 30,000ft above and I am in tears of humiliation from discrimination").

<sup>141</sup> See Erroll Southers, *Why Planes Remain a Terrorist Target*, CNN (Nov. 20, 2015, 8:38 PM), <http://www.cnn.com/2015/11/20/opinions/southers-isis-bomb-claim/>.

<sup>142</sup> See *supra* note 73 and accompanying text.

<sup>143</sup> *Supra* note 73 and accompanying text.

passenger may pose a threat.<sup>144</sup> The standard of reasonable suspicion should not mean an ordinary<sup>145</sup> and personal fear. The suspicion should be justified only if the suspicion is objectively reasonable. In other words, another reasonably prudent person would have perceived a similar threat.<sup>146</sup>

Once a passenger is removed from the airline based on a reasonably objective suspicion, a second screening should be done to confirm whether the suspicion translates to actual security concerns. If the law enforcement officials lack sufficient evidence of a threat to security and clear the passenger for travel, “the carrier must allow that [passenger] to re-board the same aircraft and take his/her flight so long as the aircraft has not yet departed.”<sup>147</sup> The passenger still has an actionable discrimination claims under the Discriminatory Statutes 41310 and 41270 against the airline if the passenger was denied boarding back on his original aircraft after the additional security clearance.<sup>148</sup>

In order to avoid arbitrariness and unreasonableness of the initial decision by airline representatives and enforcement officials, the DOT should provide more concrete standards and procedures for the airlines to follow. However, the establishment of a concrete procedure appears to be impractical because the interaction between

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<sup>144</sup> *Supra* notes 73, 100 and accompanying text.

<sup>145</sup> Ordinary fear is often described to be subjective fear or nebulous fear. *Reed v. MNA Mktng. Sys., Inc.*, 333 F.3d 27 (1st Cir. 2003). *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261 (4th Cir. 2001).

<sup>146</sup> This will prevent incidents certain prevents incidents in which a flight attendant refusing to serve a Muslim passenger a can of soda in fear of the passenger to use the can as a weapon. *See Imam, supra* note 8.

<sup>147</sup> Consent Order Against Atlantic Southeast Airlines, *supra* note 73.

<sup>148</sup> Consent Order Against Atlantic Southeast Airlines, *supra* note 73. The U.S. Department of Transportation, however, has not explicitly stated in the Consent Order that this is the basic guideline to distinguish when unreasonable discriminatory act has occurred in the air transportation setting. It may be inferred from the published consent orders that this is the general custom and practice followed by the agency. *Id.*

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the airline representatives and passengers are limited to one or two encounters during the flight.<sup>149</sup> Thus, possessing actual knowledge of how a passenger may impose a threat is almost impossible.

Proponents of a strict interpretation of the Discriminatory Statute 40127 may argue that any discrimination or even singling out passengers based on protected characteristics is actionable.<sup>150</sup> These supporters will probably argue that the initial decision to remove passengers should be considered discriminatory even when the passengers are allowed to re-board the aircraft because the practice has led to humiliation and stigma.<sup>151</sup> Nevertheless, air transportation is a sensitive issue. Second screenings for the purpose of security do not seem much different from extra security procedures, such as pat-downs by TSA officers after going through a metal detector.

The advancement of technology, especially with new modes of transportation and the age of globalization, has led to the frequent use of air transportation.<sup>152</sup> Consequently, the increase in passengers and airline business has led to various issues and incidents related with transportation.<sup>153</sup> However, even with the significant increase in the number of reported discrimination incidents, scarcity of case law and legislative guidance in air transportation continues.<sup>154</sup> To clarify the

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<sup>149</sup> *Supra* note 109.

<sup>150</sup> In the consent orders, complainants argued that they experienced unlawful discrimination by being singled out based on the protected classes regardless of the safety issues that were alleged by the airline representatives. *Supra* note 73.

<sup>151</sup> *Supra* note 73.

<sup>152</sup> See Dan-Cristian Ion, *Impact of Globalization on Airport Industry*, INT'L CONF. SCI. PAPER, at 67 (May 2011), <http://www.afahc.ro/ro/afases/2011/manag/Ion.pdf> (figure 1. delineates increase in both passenger and cargo traffics).

<sup>153</sup> For a current list of complaints, see *Aviation Enforcement Orders*, U.S. DEPT. TRANSP., <https://www.transportation.gov/airconsumer/enforcement-orders> (last visited Mar. 25, 2017).

<sup>154</sup> Dedmon, *supra* note 15.

meaning of unreasonable discrimination and the application of 49 U.S.C. § 41310, additional guidance ought to be provided.<sup>155</sup> The issuance of guidance and clarification would help potential complainants determine whether their alleged discrimination claims are actionable. Eventually, this should reduce the number of complaints filed with the Department of Transportation.

Just as the U.S. Equal Employment Opportunity Commission has provided a guideline about the Americans with Disabilities Act,<sup>156</sup> the DOT should draft enforcement guidance on what constitutes unreasonable discrimination in the context of air transportation under the Discriminatory Statute 41310. Issuing guidance on aviation rules and statutes is not novel.<sup>157</sup> New guidance, interpreting the Discriminatory Statute 41310 will aid potential complainants in determining the viability of their claims. Then, they can determine whether to file the complaint with the agency or attempts to bring a claim of action in court for violation of federal law. In addition, such guidance will provide claimants with general predictability of their

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<sup>155</sup> 49 U.S.C. § 41310 (2000) does not have a congressional finding. This will lead to a very broad interpretation of the application of the statute regardless of what the congressional intent might have been. For example, even with some concrete guidance of the congressional finding, courts interpreted the congressional intent of the Americans with Disabilities Act of 1990 with discretion. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). Therefore, Congress enacted the ADA Amendment Act of 2008 (Public Law 100-325) in response to Sutton to reject the Court's interpretation. This manifests that without sufficient guidance, courts and the DOT may interpret unreasonable discrimination with a wide range of discretion.

<sup>156</sup> See U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), <http://www.eeoc.gov/policy/docs/accommodation.html>.

<sup>157</sup> *Guidance on Aviation Rules and Statutes*, U.S. DEP'T OF TRANSP., <https://www.transportation.gov/airconsumer/guidance-aviation-rules-and-statutes> (last visited Mar. 24, 2017).

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unreasonable discrimination claims. Of course, the agency or court should still determine whether a discrimination claim is actionable on an individual basis. Without individual inquiry, the agency and courts will be making a “determination based on general information.”<sup>158</sup>

Even if the DOT publishes guidance document, they will not be a binding source just as the guidance document of other agencies is not binding.<sup>159</sup> The guidance document will merely represent the DOT’s current thinking.<sup>160</sup> If the unreasonable discriminatory practice falls under 49 U.S.C. § 41310 (c), the practice will become actionable even when the practice is of first impression and has not been specified by the guidance.<sup>161</sup> If courts do not agree that the interpretation reflects the true congressional intent of the Discriminatory Statute 41310, the courts can take a different stance in interpreting the meaning of unreasonable discrimination.<sup>162</sup> If Congress determines that the courts are implementing either too narrow or broad an interpretation of the meaning of unreasonable discrimination, Congress should enact an amendment to the

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<sup>158</sup> See *Sutton*, 527 U.S. at 483. The logic comes from *Sutton* when the Supreme Court was interpreting the meaning of disability under the ADA. According to the Supreme Court, the lack of individualized inquiry will “often require courts and employers to speculate about a person’s condition and would, in many cases, force them to make a disability determination based on general information” *Id.*

<sup>159</sup> See, e.g., 21 C.F.R. § 10.115 (d)(3) (2000) (Food and Drug Administration good guidance practices).

<sup>160</sup> See, e.g., *id.*

<sup>161</sup> 49 U.S.C. § 41301(c) (2000). When an unreasonable discriminatory practice is a question of public interest, the DOT’s answer in the public interest is subjected merely to the limited view by the President and to judicial review under the Administrative Procedure Act. *Aerolineas Argentinas S.A. v. U.S. Dept. of Transp.*, 415 F.3d 1 (D.C. Cir. 2005).

<sup>162</sup> In *Sutton*, the Supreme Court decided the EEOC guidance on the ADA was contrary to the congressional intent for enacting the ADA and abandoned the guidance. *Sutton*, 527 U.S. at 471.

Discriminatory Statute 41301 for clarification.<sup>163</sup>

#### CONCLUSION

The demand for air transportation will continue to increase over time.<sup>164</sup> This will lead to more incidents of discriminatory practices. “Unreasonable discrimination,” as stated in the Discriminatory Statute 41310, prohibits discrimination in the air transportation context, but it remains ambiguous to pinpoint which discriminatory practices qualify as unreasonable discrimination. By establishing a basic guideline for determining unreasonable discrimination by the DOT, meritless claims would likely decrease, for the potential complainants may identify actionable discriminatory claims by referring to the guidance. In addition, the airline industry and airport enforcement officials will have preliminary but concrete instruction to guide their practices and prevent unreasonable discriminatory conduct.

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<sup>163</sup> This is not an abnormal act of Congress. In 2008, Congress passed the ADA Amendment Act of 2008 (ADAAA) to broaden the coverage of the ADA after the series of the Supreme Court decisions that narrowly interpreted the meaning of disability under the ADA. ADA Amendment Act of 2008, Pub. L. No. 110-325, 122 Stat. 3554 (codified at 42 U.S.C. 12101 *et seq.* (2009)).

<sup>164</sup> See Press Release, Fed. Aviation Admin., Airline Passenger Travel to Nearly Double in Two Decades (Mar. 8, 2012), [https://www.faa.gov/news/press\\_releases/news\\_story.cfm?newsId=13394](https://www.faa.gov/news/press_releases/news_story.cfm?newsId=13394) (“The Federal Aviation Administration (FAA) released its annual forecast today projecting airline passenger travel will nearly double in the next 20 years.”).