No. 10-962

IN THE

Supreme Court of the United States

ALASKA AIRLINES, INC.,

Petitioner,

v.

AZZA EID, AMRE R. GINENA, NAHID I. GINENA, REDA A. GINENA, SABRINA KOBERT, M. SAMIR MANSOUR, NAZMI M. NAZMI, M. MAGDY H. RASIKH, HEBA NAZMI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Article 10 of the Tokyo Convention of 1963 provides airlines a defense to liability in civil suits based on pilot actions during international flights if the actions are "taken in accordance with" the Convention. Article 8 of the Convention allows pilots to disembark passengers if the pilot "has reasonable grounds to believe" that the passengers have committed or are about to commit crimes or acts that jeopardize air safety, and Article 9 allows pilots to deliver passengers to law enforcement authorities if the pilot "has reasonable grounds to believe" that the passengers have committed "a serious offence." The question presented is:

Whether "reasonable grounds to believe," as used in Articles 8 and 9 of the Tokyo Convention, imposes a reasonableness standard, or a more deferential "arbitrary and capricious" standard.

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INTRODUCTION

Petitioner seeks review of the pre-trial judgment of the court of appeals, which held in part that an airline's alleged immunity from liability based on a pilot's acts against nine passengers on an international flight -- including ejecting them from the flight and delivering them to law enforcement on the baseless assertion they had committed felonies -- raised triable issues of material fact. There is substantial evidence, including testimony from an unaffiliated witness, that the passengers, respondents herein, had done nothing to warrant such treatment. "Even the story told by the flight crew at the time of the incident does not disclose any action on [respondents'] part that could amount to a crime," the court of appeals noted. Pet. App. 26a (Kozinski, C.J.).

The court of appeals held that petitioner's defense based on the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 (1969) (the "Tokyo Convention") -- which provides a defense to liability for international airlines for acts of pilots who disembark passengers, if the pilot has "reasonable grounds to believe" the passengers have committed or are about to commit crimes or acts dangerous to air safety, and pilots who deliver passengers to law enforcement, if they have "reasonable grounds to believe" that passengers have committed "a serious offense" -- would have to be presented at trial.

Petitioner has failed to show any compelling reason to grant the writ. The court of appeals' opinion – which no judge voted to rehear en banc – provides nothing more

than a straightforward reading of the plain language of the Tokyo Convention. The court's conclusion is supported by the drafting history of the Convention, and is consistent with the position of the United States and the history of Senate ratification.

Petitioner blatantly misstates the holding of the court of appeals. Other than simply recognizing that the word "reasonable" in the Tokyo Convention should be given its clear, usual meaning, the court's ruling was a narrow, fact-specific one. It made no sweeping pronouncements, and imposed no new duties.

There is no conflict in the courts on the proper interpretation of the Tokyo Convention. Both prior decisions applying the Tokyo Convention are consistent with the court of appeals' decision here, and with the Convention's plain language. The law has not changed in more than forty years.

Similarly, petitioner's hyperbolic assertion that the opinion poses a "threat to aviation security" -- which is necessarily premised on petitioner's mistaken notion that the court of appeals' opinion comprises a novel and unforeseeable interpretation of the Tokyo Convention – is without merit. Moreover, the concept that requiring airline pilots to act "reasonably" poses a threat to air safety is absurd.

Petitioner also insists this Court's intervention is warranted because the court of appeals' decision somehow "conflicts" with interpretations of a domestic statute by other courts of appeal. Pet. 27. But there is no actual conflict presented in this case.

This pretrial appeal is a particularly unsuitable candidate for certiorari, because even if petitioner were somehow correct that "reasonable grounds to believe" in the Tokyo Convention should be read as "perhaps unreasonable, but not arbitrary or capricious grounds," triable issues would nevertheless exist due to the captain's decision, once on the ground, to deliver the passengers to law enforcement, and his further refusal to allow them to re-board after police had informed him they were clear to fly.

The petition for writ of certiorari should be denied.

STATEMENT

A. Factual Background.

As this is an appeal from a ruling on a summary judgment motion, the facts must be viewed in the light most favorable to the non-moving parties. Unlike the opinion of the court of appeals, petitioner's "factual background" section is based only on the testimony of petitioner's witnesses and sets forth the facts in a light highly favorable to its own position. Petitioner ignores both the credibility issues of its own witnesses, and virtually all the other evidence against it, including, but not limited to, the testimony of unaffiliated witness Kimberlie Shealy (Excerpt of Record ("ER") 0287-0290), and the testimony of respondents' expert Captain Mark Swint, a United Airlines international pilot who found that the pilot's actions in this case violated the accepted standards of professional conduct for aircrews in the U.S. aviation industry, and were unreasonable in view of what the pilot knew when he took action (ER 0256-0270).

Nine passengers – five Egyptian businessmen, the Egyptian wives of three, and the Brazilian fiancée of a fourth, respondents herein – were traveling from Vancouver, Canada, to Las Vegas, Nevada on September 29, 2003 to attend an energy industry conference. They were first-class passengers on Petitioner's Flight 694. ER 0010.

They were ejected from the aircraft due to the discriminatory animus of petitioner's cabin crew. ER 0011, 0288-0289. According to unaffiliated first-class passenger Kimberlie Shealy of Las Vegas, at no point in the flight had Respondents done *anything* to cause any concern. ER 0309-0310, 0288, 0290. Yet one flight attendant, later identified as Robin Duus, displayed hostility to them (and not toward others) from the time they boarded the flight. ER 0288-0289.

One of the passengers was Reda Ginena, the 61-year old vice-chairman of National Gas of Egypt. In flight, Mr. Ginena stood in the aisle by his seat to relieve his chronic back pain. The lead flight attendant asked him to move to a wider part of the aisle, which he did. Flight attendant Duus then loudly demanded that he sit down, which he did. ER 0288-0289, 0315-0316, 0319.

After Mr. Ginena was seated, Duus demanded that he fill out and sign a form. Mr. Ginena's wife and son were seated with him; when his son asked his father about the form, Duus yelled at him to "zip it up, end of discussion." ER 0320. When Mr. Ginena pointed out that the form (ER 0335) was for crew use only; it had no place for a passenger's input or signature, Duus – in the words of non-party Kimberlie Shealy, seated one row behind –

"went ballistic," started "yelling at the top of her lungs," behaving in a "completely irrational" fashion. ER 0289, 0320.

According to Ms. Shealy,

> "the flight attendant [Duus] said 'that's it I'm taking this plane down[.'] All discussion and loud voices stopped. She went and got a phone and was standing for a second in the middle of the aisle by the galley . . . " ER 0289.

According to Mr. Ginena, Duus "literally screamed into the phone that she had lost control of the cabin and that the aircraft had to be landed immediately." ER 0320. The captain immediately made the decision to divert the aircraft.

At the time the captain made the decision to divert, all the passengers in the twelve-seat first-class section of the aircraft were sitting down. ER 0413, 0417D, 0289.

The incident occurred during the cruise portion of the flight, when the aircraft was on auto-pilot, with little pilot workload. ER 0153, 0260. Though Shealy testified that all discussion had stopped (ER 0289), Swanigan claims he heard shouting. ER 0265.

But there is no dispute that, when he received the call, Captain Swanigan asked no questions of the flight attendant who called.[1] ER 0265. He did not make any

1. Swanigan claims the flight attendant who called was not Duus, but the lead flight attendant, Callaway. Pet. App. 9a.

inquiry into the nature of the problem by asking anything of either of the other two flight attendants.

Captain Swanigan testified that he told first officer Roberts, "I don't know what's going on back there" (ER 0368); but Swanigan did not ask the first officer to assist him by finding out what was going on.

Nor did this captain turn around and look back into the first-class cabin through the viewing port that the FAA had specifically directed be installed, and which, according to petitioner's own press release, "allow[s] pilots to see into the cabin from either a seated or standing position." ER 0272. Nor did the captain direct the first officer to look into the cabin. Had they done so, they would have quickly determined that all first class passengers were seated, and that any shouting was solely by one flight attendant. ER 0264-0265, 0289, 0321-0322.

Instead, the captain abruptly diverted the plane to Reno. ER 0368, 0379. Once in Reno, the captain told a flight attendant:

> "I have no idea what went on back there." ER 0369.

It was not until *after* he had diverted the aircraft, landed, had the aircraft secured by local law enforcement, and walked into the terminal, that the captain finally asked a flight attendant: "What happened?" ER 0370.

At the Reno-Tahoe airport, police and TSA officials met the aircraft. ER 0380. Despite the fact that at most three respondents had been involved in a dispute about

forms with a flight attendant, the captain instructed airport police to remove all nine respondents from the aircraft. The police did so, including removing two who were asleep during all events on the aircraft (ER 0309-0310). The passengers were detained in a part of the airport terminal.

After delivering the passengers to police, the captain demanded that all nine be arrested and prosecuted for interference with a flight crew, a felony punishable by a 20-year sentence. 49 U.S.C. § 46504. ER 0441, 0371.

Reno/Tahoe Airport Police, aided by the TSA, quickly established that there had been no crime. The police refused to arrest the passengers, and so informed the captain. ER 0459, 0567. The FBI declined to send an agent to the scene. ER 0571.

The captain admitted to two respondents that he was ordered by a flight attendant to land and deplane respondents; he said he had no choice in the matter. ER 0298, 0311.

Yet -- even after respondents were cleared by law enforcement to continue flying -- the captain refused to carry respondents to their destination. ER 0120, 298.

Petitioner contacted America West Airlines, falsely stating that respondents had interfered with a flight crew, and asked that carrier not to transport respondents to Las Vegas. America West declined petitioner's request. ER 0131, 0101. Respondents flew to Las Vegas via a later America West flight, missing a critical business meeting. ER 0326.

As a direct consequence of petitioner's actions, respondents were seriously damaged. A major commercial relationship was jeopardized. On October 1, 2003, respondents were very publicly visited by the Joint Terrorism Task Force (JTTF) at their hotel in Las Vegas. ER 0312, 0327-0329. They were subjected to investigations by the FBI and the JTTF for possible terrorist activities. They were questioned by federal agents. Their mug shots were taken. Their hotel rooms were searched. They were publicly humiliated -- marched *en masse* through the Bellagio Hotel lobby, accompanied by a cohort of law enforcement. They were forced to explain themselves at an energy industry convention attended by prominent members of their industry. ER 0327-0329, 0301, 0545-0549.

Three respondents – Azza Eid, Sabrina Kobert and Heba Nazmi -- were deeply traumatized by this incident and its aftermath, requiring medical attention, including administration of prescription drugs, to deal with the trauma petitioner caused. ER 0417Q-0417R, 0312, 0417U, 0423-0424.

B. District Court Proceedings.

Respondents sued petitioner for damages due to delay under Article 19 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000 ("Warsaw Convention"), and a variety of state-law defamation and intentional infliction of emotional distress claims. ER 0008-0010.

The district court granted petitioner's motion to dismiss plaintiffs' state-law claims. Based on evidence

obtained during discovery, respondents sought leave to file a supplemental complaint under Fed. R. Civ. P. 15(d), alleging seven new defamation claims, and petitioner filed for summary judgment on plaintiffs' Warsaw Convention claim.

The district court denied respondents leave to file a supplemental complaint, and granted petitioner's motion for summary judgment on the Warsaw Convention claim on the ground that the airline was entitled to immunity under the Tokyo Convention.

C. Proceedings on Appeal.

The court of appeals reversed the district court's grant of summary judgment to petitioner for damages for delay under the Warsaw Convention. The court ruled that petitioner was not entitled to judgment as a matter of law on its Tokyo Convention defense; there were contested issues of material fact.

The court of appeals turned first to the language of the Tokyo Convention, and to the argument of petitioner and its amici that an "arbitrary and capricious" standard was applicable. As discussed further below, the court found nothing in the text of the Convention to support this assertion, and found that the plain language of the Tokyo Convention was clear. The court considered the drafting history of the Convention, and found it "consistent with the treaty's plain language." Pet. App. 15a. The court further considered the President's message to the Senate concerning ratification of the Tokyo Convention, and the Senate Report, and found these sources also consistent with the plain language of the Convention. The court

looked to the "post-ratification understanding of signatory nations," here in the form of the opinion of an Israeli court in *Zikry v. Air Canada,* CF1716/05 (Haifa Magistrate Court 2006), and found this case – the only international court to previously apply the Tokyo Convention defense -- to be entirely consistent with the focus on reasonableness. Pet. App. 17a, 20a.

The court reasoned:

> ""Arbitrary and capricious," . . . is a standard normally applied to actions of government agencies or judicial officers; it is seldom used to judge the conduct of individuals in the real world. Juries determine whether conduct is reasonable many times every day but almost never whether conduct is "arbitrary and capricious." If "arbitrary and capricious" means something other than "reasonable grounds," we see no basis for adopting a standard that departs from that specified in the treaty. And, if "arbitrary and capricious" is the same as "reasonable grounds," using different language to express the same idea can only cause confusion.

Pet. App. 18a.

The court then turned to the application of the Tokyo Convention to this case. Based on a careful review of the evidence, including the expert testimony of Captain Mark Swint, a seasoned United Airlines international pilot, the court determined that "a fact finder here could conclude that Captain Swanigan did not have reasonable grounds

to believe that plaintiffs posed a threat to the security or order of the aircraft" (Pet. App. 21a); that "A jury could conclude that a reasonable captain should have tried to find out *something* about what was going on in the cabin before undertaking an emergency landing" (Pet. App. 22a); and that "A jury could plausibly conclude that Swanigan lacked reasonable grounds to believe plaintiffs had committed a 'serious offence,' first because he unreasonably failed to confirm his flight attendant's story, and second, because he had no grounds for believing that plaintiffs had violated 49 U.S.C. § 46504, even accepting everything the flight attendants told him" (Pet. App. 27a).

The court further found that "A jury could also conclude that, even if Captain Swanigan initially had grounds to believe that plaintiffs were disruptive or may have committed a serious offense, those grounds dissipated once the Reno police and TSA exonerated plaintiffs and cleared them to continue flying" (Pet. App. 27a-28a); and finally, that "a jury might well conclude that Captain Swanigan's refusal to let the Egyptians continue on to their destination had nothing to do with safety or order" but proceeded from the captain's desire to placate a flight attendant with discriminatory motives (Pet. App. 28a).

District Judge Otero, sitting by assignment, wrote separately because he was persuaded that the Tokyo Convention did require a deferential, arbitrary or capricious standard. Pet. App. 61a. But even under this deferential standard, Judge Otero found that the removal of respondents from the aircraft presented a triable issue of fact. Pet. App. 68a.

REASONS FOR DENYING THE PETITION

I. The appellate court properly interpreted the Tokyo Convention in accordance with its plain language.

A. The text of the Tokyo Convention.

The Tokyo Convention of 1963 was ratified by the United States in 1969. 20 U.S.T. 2941. Article 6 of the Tokyo Convention states:

> "1. The aircraft commander may, *when he has reasonable grounds to believe* that a person has committed, or is about to commit, on board the aircraft, a*n offence or act contemplated in Article 1, paragraph 1*, impose upon such person reasonable measures including restraint which are necessary:
>
> a) to protect the safety of the aircraft, or of persons or property therein; or
>
> b) to maintain good order and discipline on board; or
>
> c) to enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of this Chapter." (Emphasis added.)

The pilot's authority to eject or "disembark" passengers, when "necessary," is described in Article 8(1).

> "The aircraft commander may, in so far as it is *necessary* for the purpose of subparagraph

> a) or b) of paragraph 1 of Article 6, *disembark* in the territory of any State in which the aircraft lands *any person who he has reasonable grounds to believe has committed, or is about to commit, on board the aircraft* an act contemplated in Article 1, paragraph 1 b)." (Emphasis added.)

Article 1, paragraph 1 b) applies to "acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board."

The captain may lawfully "deliver" passengers to law enforcement only under narrow circumstances – when the captain reasonably believes the passenger actually has committed a serious crime onboard the aircraft. Article 9(1) authorizes the captain to

> "deliver to the competent authorities . . . *any person* who he has *reasonable grounds to believe* has committed on board the aircraft an act which, in his opinion, is *a serious offence* . . ." (Emphasis added.)

Though sometimes referred to as an immunity, Article 10 provides a specific defense to liability:

> "For *actions taken in accordance with this Convention*, neither the aircraft commander . . . [nor] the owner or operator of the aircraft . . . shall be held responsible in any proceeding . . ." (Emphasis added.)

B. The court of appeals' straightforward reading of the Tokyo Convention.

The Tokyo Convention provides a defense from liability for actions taken by the captain against passengers in accordance with its provisions. Those provisions require that, to disembark a passenger, the captain have "reasonable grounds to believe" a passenger has committed or is about to commit a crime or act injurious to air safety, and to deliver a passenger to local authorities, the captain must have "reasonable grounds to believe" the passenger has committed, on the aircraft, a serious crime.

Petitioner and its amici argued that "reasonable grounds" must be construed to mean "not arbitrary and capricious." Pet. App. 14a. The court of appeals, in an opinion by Chief Judge Kozinski, rejected that argument.

The appellate court looked first to the most fundamental principle of treaty interpretation, as enunciated by this Court:

> "It is well settled that the '[i]nterpretation of [a treaty] . . . must, of course, begin with the language of the Treaty itself.'" *Medellin v. Texas*, 552 U.S. 491, 518-19 (2008) (quotation and citation omitted) (alterations in original).

Pet. App. 15a. While the court of appeals begins with this principle, petitioner fails to mention it.

The court of appeals found the text of the Tokyo Convention to be clear:

> "The treaty here clearly provides immunity to the airline only if the pilot has 'reasonable grounds' to support his actions. '[W]here the text is clear, as it is here, we have no power to insert an amendment.' *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989)."

Pet. App. 15a. Petitioner does not explain why the plain language should not control, and makes no attempt to demonstrate that the language chosen by the drafters of the Tokyo Convention is ambiguous.

The text of the Tokyo Convention is unambiguous. The Convention does not use the words "discretion" or "deference" anywhere in its text. The Tokyo Convention does not use the words "arbitrary" or "capricious." Nor is there any provision in the Convention that expresses, in different language, these concepts.

The drafters could have expressly immunized airlines for all actions that were not arbitrary or capricious. They did not. They could have directed that the captain's decisions be reviewed with deference. They did not.

Petitioner would have this Court read into the Tokyo Convention a "deferential arbitrary and capricious" standard, without any anchor to these concepts in the text of this international treaty.

In fact, the Tokyo Convention sets forth clear standards in plain language. The court of appeals properly refused petitioner's invitation to rewrite the treaty. This Court should do so as well.

II. Petitioner has misstated the holding of the Court of Appeals.

Petitioner misstates the holding of the appellate court. Petitioner asserts, at page 2 of its petition:

> The Ninth Circuit held that a captain, in order to have "reasonable grounds to believe" that action is appropriate, must independently investigate the existence and scope of a disruption in the cabin before crediting his flight crew's reports to that effect.

The court of appeals held no such thing. Instead, the court expressly held:

> We are bound by . . . the language of the Tokyo Convention . . . and therefore conclude that airlines are immune from liability for conduct covered by the Tokyo Convention only to the extent flight commanders act reasonably in exercising the powers granted to them under the treaty.

Pet. App. 19a. The appellate court's opinion says *nothing* about any supposed categorical duty of a captain to "independently investigate" disruptions in the cabin. Those words, and that concept, simply do not appear in the opinion.

There may be situations in which it is reasonable for a captain to rely without further inquiry on a report from a crew member, but what is reasonable depends on the facts. What the appellate court decided was that, in the specific

factual context of *this* case, a jury could reasonably find that "Captain Swanigan did not have reasonable grounds to believe that plaintiffs posed a threat to the security or order of the aircraft." Pet. App. 21a.

The evidence showed that when the captain made the decision to divert the aircraft based on a flight attendant's claim she had "lost control of the first-class cabin," all raised voices and discussion had ended, and all passengers in the first-class cabin were seated. Pet. App. 9a; ER 0289. This occurred during the cruise portion of the flight, when pilot workload was light. ER 0153, 0260. Yet the captain

> . . . asked no questions and did nothing else to confirm or clarify this statement. Neither he nor his co-pilot looked into the cabin through the cockpit window which, as plaintiffs' expert witness Captain Mark Swint explained, is a "thick acrylic window" that "is significantly larger tha[n] the common 'peep hole' of the average hotel room . . . provides a significantly clearer view . . . is mounted in the door . . . within arm's reach of the pilots when seated" and is "designed to give the pilots an adequate idea of the circumstances on the other side of the door." Swint Declaration at ¶¶ 47, 48. Indeed, immediately after landing, Captain Swanigan told one of the flight attendants that he "ha[d] no idea what went on back there." Swanigan Deposition at 115. A jury could conclude that a reasonable captain should have tried to find out *something* about what was going on in the cabin before undertaking an emergency landing.

Pet. App. 21a-22a (original emphasis). As the court noted, Captain Swint testified that the captain here violated fundamental principles of Crew Resource Management (CRM), training in which is mandated by the FAA:

> CRM provides guidance on how the crew should communicate with each other and deal with problems; it is mandated by the FAA. *See* FAA Advisory Circular 120-51E (January 22, 2004). CRM's emphasis on clear communications and coordination among crew members is at the heart of the FAA's Advisory Circular: "*The importance of clear and unambiguous communication must be stressed in all training activities involving pilots, flight attendants, and aircraft dispatchers. The greater one's concern in flight-related matters, the greater is the need for clear communication.*" *Id.* at ¶ 12a. *Captain Swint points out that the crew of Alaska Airlines Flight 694 failed to follow these principles*, so the flight commander had no idea what the problem was in his cabin and decided to divert the plane to Reno with insufficient knowledge of the situation.

Pet. App. 23a, n. 10 (emphasis added).

Thus, contrary to petitioner's repeated assertion, the court of appeals simply did not hold that an airline captain has a duty to "independently investigate the existence and scope of a disruption in the cabin before crediting his flight crew's reports." Rather, what the court held was that under the Tokyo Convention, a captain must have reasonable grounds to believe that a

passenger or passengers have engaged in, or are about to engage in, conduct that could threaten air safety, before disembarking them from an international flight, and that here, under these specific circumstances in which fundamental principles were violated, a jury could find the captain had no such reasonable grounds.

The appellate court further held that, before delivering passengers to law enforcement, the captain must have reasonable grounds to believe that have committed a "serious offense," and here, the captain had no basis to conclude that any of the passengers had committed any offense whatsoever. "Even the story told by the flight crew at the time of the incident does not disclose any action on [respondents'] part that could amount to a crime," the court of appeals stated. Pet. App. 26a.

The court of appeals made no sweeping pronouncements of the sort suggested by petitioner's rhetoric, and created no categorical rule. Rather, the court crafted a fact-specific opinion that resolves the narrow question of summary judgment in this case, and sends the matter back for trial. No new duty was created.

Petitioner also mischaracterizes the court of appeals' opinion, claiming that it "essentially provides no independent defense for captains and airlines to a passenger's claim under the Warsaw Convention." Pet. 20.

This is hyperbole. The Tokyo Convention provides the same defense it has always provided, a complete defense for actions taken in accordance with its provisions. These provisions expressly require that captains have a reasonable basis for actions against passengers, including

ejecting them and turning them over to police for serious offenses. In this case, based on the totality of evidence, including the testimony of the captain himself about his professed ignorance, and the expert testimony of Captain Mark Swint that the captain here was guilty of serious professional negligence, there are factual issues that can't be resolved on summary judgment. Contrary to petitioner's hyperbole, the appellate court's decision doesn't eliminate the Tokyo Convention defense – it holds that, *in this case*, it hasn't been established as a matter of law.

III. There is no conflict in the courts regarding the proper interpretation of the Tokyo Convention, and the alleged "threat to aviation security" is unfounded.

The Tokyo Convention has been in force since 1969. Only three courts, including the court of appeals here, have considered it in reported decisions. There is no conflict in the courts regarding the Convention's proper interpretation.

First, in *Levy v. American Airlines*, 1993 U.S. Dist. LEXIS 7842, 1993 WL 205857 (S.D.N.Y. 1993), *aff'd*, 22 F.3d 1092 (2d Cir. 1994), Judge Freeh found that the Tokyo Convention barred a claim against the airline by a disruptive passenger because:

> "[a]s the undisputed facts indicate, Levy was clearly jeopardizing good order and discipline on board the aircraft, if not the safety of the aircraft and its passengers. Accordingly, it was reasonable for the captain and crew to

> request the assistance of a doctor and to allow the agents to restrain Levy."

Id. at *19, n. 8.

Judge Freeh clearly based his decision, not on the question whether the captain's actions could be characterized as "arbitrary and capricious," but on whether the undisputed facts and circumstances showed reasonable grounds for the captain's judgment. In that case, on undisputed facts, they did.

The second case is *Zikry v. Air Canada*, Civil File No. 1716/05 A (Magistrates Court of Haifa 2006). Petitioner's amici IATA and ATA both relied on *Zikry* in their briefs in the court of appeals, and appended translated copies.

In *Zikry*, a passenger who was suspected of smoking on an Air Canada flight from Israel to Canada, detained by police upon arriving in Canada, and refused carriage by the airline on a subsequent flight, brought an action against the carrier for defamation. The airline asserted the provisions under local Israeli law that gave effect to the Tokyo Convention. In a prior decision, the court had ruled that factual clarification and presentation of evidence was necessary; in this decision, the court entered judgment for the airline. In addressing the appropriate standard for immunity of the carrier, the *Zikry* court stated:

> From the language of these two sections [corresponding to Tokyo Convention, Article 6(1) and (2)] it transpires, that in order to enjoy the immunity there must be an examination whether there were reasonable grounds to

> believe that an act has been committed which jeopardizes the safety of the flight and its passengers, or an act has been committed which under the captain's discretion constitutes an offense under the law existing in the State of registry of the aircraft and whether the steps taken were reasonable.

Zikry, ¶ 8. The Israeli court adhered to and applied this standard. Tellingly, *Zikry* did not apply the "arbitrary or capricious" standard that petitioner and its amici have insisted the Tokyo Convention mandates. *Zikry* does not even mention the terms "arbitrary," "capricious," or "deference."

Moreover, the *Zikry* court did not resolve the question as a matter of law – the court found that "whether reasonable grounds the suspicion that the Plaintiff had committed an offense on board the aircraft, as well as the question of the reasonableness of the steps taken against him, require factual clarifications and presentation of evidence," *Zikry*, ¶ 5, and went on to resolve several factual disputes as to the reasonableness of the airline's conduct. *Zikry*, at ¶ 16.1 ("I prefer the version of the steward"), ¶ 16.3 ("Here, again, I prefer Defendant's version . . . .")

Thus, the two previous courts to apply the Tokyo Convention have not read into the "reasonableness" standards of the Tokyo Convention anything like the deference that petitioner claims is mandated. These decisions are consistent with the court of appeals' opinion in this case. See Pet. App 17a, 20a (analyzing *Zikry*).

There is no conflict regarding the proper judicial interpretation of the Tokyo Convention. The rules

have long been clear – reasonableness under the Tokyo Convention has meant reasonableness under accepted legal standards, not "not arbitrary or capricious," as petitioner insists.

Any international airline general counsel who advised her client that reasonableness under the Tokyo Convention meant something different than the straightforward meaning of that term given to it by *Levy*, *Zikry* and now *Eid* – who advised that a captain on international flights could, under the Tokyo Convention, take action that would be unreasonable, as long as it was not arbitrary and capricious -- would have been guilty of professional incompetence. No competently-advised airline would have operated on any different basis at any time since the inception of the Tokyo Convention in 1963. There has been, for more than forty years, no reason to suppose that the Tokyo Convention's drafters, when they chose the legal term, "reasonable," actually meant "perhaps unreasonable, but not arbitrary and capricious."[2]

Yet operating under the rule of reasonableness under the Tokyo Convention, in line with *Levy* and *Zikry*, has not threatened international aviation security in any way.

Petitioner claims that the appellate court's reading of the Tokyo Convention "threatens aviation security" because it "deter[s] captains from making critical, necessary security decisions." Pet. 15. But the court did nothing more than straightforwardly apply the treaty language, and if the standard of reasonableness set forth

2. Indeed, the very paucity of cases – only three in more than forty years – itself suggests that the Tokyo Convention, as written, has provided clear and necessary guidance, and has worked well.

in the Tokyo Convention posed a "threat to aviation security," the sky would have fallen long ago.

Petitioner urges the Court to look to the analogous federal statute governing domestic air travel, 49 U.S.C. § 44902(b), which provides that "an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." The Ninth Circuit did so, and observed that in *Cordero v. Cia Mexicana De Aviacion, S.A.*, 681 F.2d 669 (9th Cir. 1982), the court, interpreting section 44902(b)'s predecessor, adopted a reasonableness standard and determined a jury trial was warranted. *Accord, Newman v. Am. Airlines, Inc.*, 176 F.3d 1128, 1131 (9th Cir. 1999).

Accordingly, since the decision in *Cordero* in 1982, in the Ninth Circuit the analogous rule for domestic air travel has been the rule of reasonableness – the same general rule the court of appeals applied here.

Yet in the nearly three decades since *Cordero* was decided in 1982, the rule of reasonableness has not caused a crisis for aviation security regarding domestic flights.

The sky has not fallen due to the application of a reasonableness standard under either the Tokyo Convention or 49 U.S.C. § 44902(b), and it will not fall as a result of the court of appeal's decision in this case.

As explained in the expert declaration of Captain Mark A. Swint, a distinguished United Airlines international captain with over three decades of experience, the actions of the Alaska Airlines captain in this case represent an

extreme departure from professional standards in the airline industry, including violations of Crew Resource Management (CRM) principles, training in which is mandated by the FAA. ER 0257-0259; *see* 14 C.F.R. §§ 121.404, 121.427(b)(4), 121.417(b)(3)(v).

The law should not be made to fit, and excuse, such professional incompetence.

IV. The appellate court's straightforward reading of the Tokyo Convention accords with the intent of the treaty drafters, including the United States.

In addition to the plain language of the Tokyo Convention, the court of appeals also considered the drafting history of the Convention, and found that it was

> entirely consistent with the treaty's plain language. The American delegate to the Tokyo Convention wanted reasonableness to be the standard because it is a familiar term for American judges and juries. When another delegate moved to replace the phrase "reasonable grounds" with "serious grounds," our delegate objected: "At least in the United States legal system, the phrase 'serious grounds' had no significant legal meaning, while, on the other hand, the phrase 'reasonable grounds' had a substantial legal significance." *International Conference on Air Law,* Vol. 1 ("Minutes"), Doc 8565-LC.152-1 (1966) at 155.

Pet. App. 15a. Thus, the United States Delegate to the Tokyo Convention stated:

> Within the general concept of United States law, the phrase "reasonable grounds" would give the impression that *the aircraft commander would be required to have a substantial basis for his belief, that he could not act on the basis of facts which were inadequate to support his belief* to the effect that a person had committed or was about to commit the kind of act under consideration.

Id., quoted at Pet. App. 16a. The court of appeals recognized that "[d]elegates from other nations expressed similar sentiments," citing the Dutch delegate, who stated:

> "there had always been an attempt to keep in sight two objectives: Firstly, the safety of civil aviation, and, secondly, the guarantees for individual freedom. For that reason the word 'reasonable' had been introduced."

Id. at 156 (Netherlands Delegate), quoted at Pet. App. 16a. "The negotiators spent considerable time striking a balance between the need of flight commanders to maintain order and the legitimate expectation of passengers that they be treated fairly and with dignity." *Id.*

The drafting history actually *refutes* the claim that the delegates intended the Tokyo Convention's defense to liability to be broadly construed. Indeed, the United States Delegate made quite clear the position of the United States that

> *his [American] Delegation did not wish to give too broad an immunity* . . . . The Legal

> Committee had never intended that unrestricted immunity be granted and he had considered when this provision was being drafted that the immunity from civil action would be extended to the pilot, the crew members and the company only when action had been taken in accordance with the provisions of the Convention. That was why the words "reasonable' and "necessary"', the objective tests and the subjective tests by which these actions were to be measured had been so carefully put in the Convention.

Minutes: International Conference on Air Law, Tokyo, August-September 1963, ICAO Doc 8565/LC.152-1, *Volume I, Minutes* (hereafter, *Tokyo Minutes*) at 227 (emphasis added).

The United States took the position that the reasonableness defense required that captains "strictly" adhere to the Convention's requirements. In debate on a proposal to delete the word "strictly" from a draft, the Delegate stated:

> Mr. Boyle (United States of America) recalled that, in connection with the original Canadian proposal (Doc. No. 51), his Delegation had pointed out that *it had only wanted protection given to the persons concerned when they had acted in accordance with the terms and conditions of the Convention.* The persons concerned were entitled to protection *only when they had acted strictly in accordance with its terms and limitations.*

Tokyo Minutes at 317 (emphasis added). The word "strictly" was removed only because the drafters considered it redundant.[3]

The court of appeals also found instructive the President's transmittal message to the Senate concerning the Tokyo Convention, and the Senate Report itself:

> President Johnson's message transmitting the Tokyo Convention to the Senate for ratification and the Senate Report recommending ratification *strike the same balance by recognizing that air crews must act reasonably in exercising their authority to deplane passengers.* In his message to the Senate, President Johnson wrote that the Convention "provides that *only those persons whom the aircraft commander has reasonable grounds to believe have committed, on board his aircraft, an act which is a serious offence can be 'delivered' [to the police*]." Message from the President of the United States, transmitting *The Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Signed at*

3. France "was opposed to the introduction of the word 'strictly' on the ground that it was unnecessary." *Tokyo Minutes* at 317. Similarly, Italy was "opposed to the use of the word 'strictly' because there was no other way in which to observe the law." *Tokyo Minutes* at 318. The opposition to the word "strictly" prevailed. *Tokyo Minutes* at 324. In fact, the United States saw no contradiction between its understanding of the draft, and its agreement to the proposal to delete the word strictly, because it voted along with France and Italy to eliminate the word "strictly." *Id.*

> *Tokyo on September 14, 1963,* S. Exec. Rep. 90-L at 8 (Sept. 25, 1968). The Senate Report recommending ratification explains that "*if their actions are reasonable and comply with the Convention*, each aircraft crew member and passenger, the aircraft owner or operator, and the person for whom the flight is made, all would have legal immunity." S. Rep. No. 91-1083 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 3996, 3997.

Pet. App. 16a-17a (emphases added).

The court of appeals' straightforward reading of the Tokyo Convention is amply supported by the drafting history of the Convention, and the history of its domestic ratification.

V. A supposed conflict in the federal courts on the proper interpretation of the domestic counterpart to the Tokyo Convention provides no basis for certiorari in this case.

Petitioner finally contends that this Court should grant certiorari because the court of appeals' decision "conflicts with interpretations by other federal courts of the domestic counterpart to the Tokyo Convention." Pet. 27. The first obvious flaw in this argument is that domestic law and an international treaty are not synonymous. The standard for one need not comprise the standard for another. Thus, there can be no conflict of circuits based on interpretations of a law inapplicable to the instant case.

As shown above, under *Cordero,* 681 F.2d 669 the standard applied under the domestic statute, 49 U.S.C. § 44902(b), is generally similar to the reasonableness standard the Tokyo Convention establishes. Pet. App. 13a, 18a. Petitioner contends there is a conflict, principally relying on *Cerquiera v. American Airlines, Inc.* 520 F.3d 1 (1st Cir. 2008), which endorses an "arbitrary or capricious" standard under federal law.

But as the court of appeals explained, the *Cerquiera* court's discussion of the issue is "entirely dicta because the passengers there were excluded from the flight by the police not the airline." Pet. App. 19a. In any event, this Court's resolution of a conflict between the appellate courts on the interpretation of a federal statute should await a case that squarely presents that conflict. This is not such a case.[4]

As a practical matter, to the extent international law might diverge from the domestic aviation law of any nation, this is routine and not problematic. Airlines are perfectly capable of recognizing when they are flying international routes, not domestic ones, and of advising their captains accordingly that the Tokyo Convention applies, and not local law.

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4. Moreover, 49 U.S.C. § 44902(b) provides that an "air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety," but it does not set forth a standard for judging those decisions, unlike the Tokyo Convention, which expressly uses a "reasonable grounds to believe" standard. Because the Convention itself sets forth a standard, there is no justification to look to standards articulated by courts under a non-specific domestic statute.

Petitioner's suggestion that the Tokyo Convention, an international treaty to which 185 nations are parties, should be interpreted to conform to the domestic law of one nation is particularly ill-advised. If international treaties are interpreted by national courts so as to conform to the substance or effect of analogous domestic law, then treaties such as the Tokyo Convention will potentially have scores of differing interpretations, all with reference to local law. This is profoundly deleterious to the goal of international regulation.[5]

VI. This pre-judgment appeal is a poor candidate for certiorari because even if petitioner were correct as to the Tokyo Convention, reversal of the grant of partial summary judgment would still be required.

This case is a poor candidate for certiorari. It is not an appeal from a final judgment.

The district court granted summary judgment in favor of petitioner on a single claim -- for damages due to delay under Article 19 of the Warsaw Convention. The court of appeals reversed this grant of summary judgment, and remanded the case for trial, and for further proceedings on additional claims for relief. The case is nowhere near a final judgment. It is in a pretrial posture.

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5. "[O]ne of the important aims of the conventions, in so far as international air transport was concerned, was that they created a uniform[] rule." *Tokyo Minutes*, at 227.

Indeed, when ratifying the Tokyo Convention, the Senate found it particularly "significant" that the purpose of article 10's defense is "that it establishes a uniform test by which the actions of the commander will be judged rather than to abandon him to the variations of local law." S. Exec. Rep. 90-L, at 9 (1969).

> We generally await final judgment in the lower courts before exercising our certiorari jurisdiction. See, *e. g.*, *American Construction Co.* v. *Jacksonville, T & K. W. R. Co.*, 148 U.S. 372, 384 (1893); *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) (*per curiam*); see generally R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 4.18, pp. 224-226 (6th ed. 1986).

Virginia Military Institute v. United States, 508 U.S. 946 (1993) (opinion of JUSTICE SCALIA respecting the denial of the petition for writ of certiorari).

Notably, the question presented by the petitioner is not only not case-determinative – *resolution of petitioner's question would not even alter the outcome in this pretrial appeal.*

The thrust of the petition is that the court of appeals erred in determining that "reasonable" under the Tokyo Convention means "reasonable," rather than "not arbitrary and capricious," as petitioner insists.

Although not a single judge of the Ninth Circuit voted for rehearing, this approach did persuade a district judge sitting by designation on the panel. Yet even District Judge Otero concurred in the result, finding that – under the arbitrary and capricious standard advocated by the airline -- "Captain Swanigan's decision to remove [respondents] from the aircraft is a triable issue . . . ." Pet. App. 68a.

Although not mentioned in the court of appeals' opinion, there is even further evidence that the conduct of the captain in this case was not only unreasonable, but was arbitrary and capricious. *See* ER 0268 (declaration of Captain Mark Swint that the captain's actions here were arbitrary and capricious).

Finally, petitioner's Tokyo Convention defense is in any event incomplete. After the captain delivered respondents to police for prosecution, police cleared respondents to continue flying – and the captain refused to let them re-board, thereby causing delay that is actionable under Article 19 of the Warsaw Convention. The Tokyo Convention inarguably offers no defense for the actions of the captain *after* he delivered respondents to police.

Accordingly, this case is not a suitable vehicle for certiorari, not only because (1) it is presented in a pretrial posture long in advance of any final judgment, but also because, (2) even if the legal question raised is resolved in petitioner's favor by this Court, it would not alter the outcome of the appeal – reversal of the grant of partial summary judgment would still be required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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