No. 10-_____

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 N. NAZMI, M. MAGDY H. RASIKH, AND HEBA NAZMI

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Article 10 of the Tokyo Convention of 1963 affords immunity from civil suits to the aircraft captain and the airline regarding actions taken on international flights whenever the captain acts in compliance with the Convention. Articles 6 and 8 of the Convention authorize the captain to take reasonable measures when the captain has "reasonable grounds to believe" that a passenger has committed or is about to commit any act that may, or does, jeopardize safety, good order, or discipline on his aircraft. The question presented is:

Whether the Tokyo Convention requires deference to be given to the aircraft captain's decision, based on reports received from the cabin crew, to take action in response to passenger conduct that may jeopardize the safety of the aircraft or of persons or property therein or good order and discipline on board.

PARTIES TO THE PROCEEDING

The parties are as stated in the caption.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Alaska Air Group, Inc. holds all of the shares of petitioner Alaska Airlines, Inc. No publicly-traded company owns more than 10% of Alaska Air Group, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

PETITION FOR A WRIT OF CERTIORARI

Alaska Airlines, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit (App., *infra*, 1a-71a) is reported at 621 F.3d 858 (9th Cir. 2010). The opinions of the district court (App., *infra*, 72a-80a, 81a-95a) are not reported, but one of the opinions is available at 2006 U.S. Dist. LEXIS 45488 (D. Nev. June 15, 2006).

JURISDICTION

The Ninth Circuit issued its opinion on July 30, 2010. Petitions for rehearing en banc were denied on October 26, 2010. App., *infra*, 96a.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

The relevant treaty provisions are set forth in the appendix to this petition at App., *infra*, 97a-111a. The text of 49 U.S.C. § 44902 is set forth in the appendix to this petition at App., *infra*, 112a.

INTRODUCTION

This case presents an important question of treaty interpretation that will affect the ability of tens of thousands of aircraft captains across the

country to maintain safety and security on board international flights.

The Tokyo Convention of 1963, signed and ratified at a time of increased hijackings and passenger disturbances, significantly enhanced an aircraft captain's authority to take action against potential threats on board international flights. *See* Convention on Offences and Certain Other Acts Committed on Board Aircraft, *opened for signature* Sept. 14, 1963, 20 U.S.T. 2941 (1969). Specifically, the Tokyo Convention affords immunity to the captain and the airline whenever the captain's action was based on "reasonable grounds to believe" that a passenger has committed, or is about to commit, any act that may, or does, jeopardize safety, good order, or discipline on board the aircraft. App., *infra*, 97a, 100a-101a, 102a, 103a [Art. 1(1(b)), 6, 8, 10].

A divided Ninth Circuit panel, rejecting the views of the United States as amicus curiae, applied a non-deferential, negligence-based standard in determining whether the captain had "reasonable grounds to believe" that he should act. In this case, based on reports of a disturbance on board the aircraft from the cabin crew, the captain diverted a flight to the nearest airport and disembarked respondents. 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 Ninth Circuit's ruling effectively nullifies the immunity provided by the Tokyo Convention. If left standing, it will undermine the Convention's aim of promoting security by encouraging a captain to act swiftly and decisively, without fear of civil liability. As the United States warned the court of appeals, a non-deferential "searching review of decisions made by the captain w[ill] hinder the central goal of the broad immunity conferred by the Tokyo Convention—to encourage captains to take decisive action, often under chaotic circumstances, to preserve the safety of the plane and its passengers without fear of having those actions second-guessed in the relative calm of a courtroom." App., *infra*, 126a-127a.

In addition to contravening the purpose of the Tokyo Convention, the ruling below cannot be reconciled with the decisions of two other federal courts of appeals interpreting the domestic counterpart to the Convention. Section 44902(b) of Title 49 grants air carriers the right to "refuse to transport a passenger * * * the carrier decides is, or might be, inimical to safety." In stark contrast to the decision below, the First and Second Circuits, as well as a multitude of district courts across the country, review an aircraft captain's actions under Section 44902(b) using a deferential "arbitrary and capricious" standard.

In adopting a non-deferential standard under the Tokyo Convention, the Ninth Circuit's ruling adversely affects not only flight operations and training at petitioner Alaska Airlines, but at every airline operating either domestic or international flights throughout

the United States. This Court should grant review and reverse that ruling.

STATEMENT

A. The Treaty

The Tokyo Convention—formally known as the Convention on Offences and Certain Other Acts Committed on Board Aircraft—is a multilateral treaty that has been ratified by the United States and 184 other nations. It governs the authority and legal liability of aircraft captains and crew members for actions taken on board aircrafts engaged in international aviation to prevent actions that jeopardize the safety of the aircraft or good order and discipline. App., *infra*, 97a, 99a-100a. [Art. 1(2), 5].

1. The treaty's "major purpose" is to "promote the safety of civil aviation." S. Exec. Rep. No. 90-3, at 7 (1969) (statement of Deputy Legal Adviser, Department of State). The Convention was developed at a time of increasing passenger incidents threatening international air travel safety, including a rise in violent hijackings. *See* Gerald F. Fitzgerald, *The Development of International Rules Concerning Offences and Certain Other Acts on Board Aircraft*, 1 Can. Y.B. Int'l L. 230, 240-241 & n.24, 244 n.29 (1963).

One hindrance to addressing such incidents was uncertainty about the authority of the aircraft captain. As President Johnson explained to the Senate, a treaty governing international aviation was required because "aircraft in international air transportation

may traverse sovereign airspace at great speeds, and in some cases travel between national borders in a matter of a few minutes." S. Exec. Doc. No. 90-L, at III (1968). The authority of the aircraft captain could thus vary from moment to moment, depending on where the aircraft was, creating a risk that "an American pilot might find himself the subject of a criminal or civil proceeding for action which he had taken in attempting to prevent the commission of an offense on board his aircraft." *Id.* at VI.

By contrast, the Convention "provides for an element of certainty in the powers and authority of the aircraft commander." *Id*. at III. 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." *Id*. at 9 (statement of the federal Interagency Group on International Aviation).

2. The Convention grants the captain broad authority over persons on board the aircraft. The captain is authorized to take "reasonable measures including restraint" of a person when the captain "has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft" acts which, "whether or not they are [criminal] 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." App., *infra*, 100a, 97a [Art. 6(1), 1(1(b))].

Likewise, the Convention authorizes a captain to disembark any passenger "who he has reasonable

grounds to believe has committed, or is about to commit" an act that jeopardizes the safety of the aircraft or persons therein or that jeopardizes good order or discipline. App., *infra*, 102a [Art. 8(1)]. When the captain does so, he must "report to the authorities * * * the fact of, and the reasons for, such disembarkation." App., *infra*, 102a [Art. 8(2)].

Further, the captain may "deliver to competent authorities" any passenger who the captain has "reasonable grounds to believe has committed on board the aircraft an act which, in his opinion, is a serious offense according to the penal law of the State of registration of the aircraft." App., *infra*, 102a [Art. 9(1)].

To encourage compliance with terms of the Convention, the Convention grants the captain, his employer, and his crew complete immunity to civil and criminal liability. "[N]either the aircraft commander, any other member of the crew, any passenger, [nor] the owner or operator of the aircraft * * * shall be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken." App., *infra*, 103a [Art. 10].

B. Factual Background

Because summary judgment was entered for petitioner, the description below credits all the facts in the record that favor respondents and with all justifiable inferences drawn in their favor. *See Groh v. Ramirez*, 540 U.S. 551, 552 (2004). Petitioner does not concede the truth of this description.

Captain Swanigan was the captain of an international flight operated by petitioner that took off from Vancouver, British Columbia, and was bound for Las Vegas, Nevada. App., *infra*, 4a. The Captain had 26 years of piloting experience and was petitioner's former Chief Pilot. App., *infra*, 37a n.2 (Otero, J., dissenting).

About one hour into the flight, the Captain received a call on the aircraft interphone from a flight attendant. The flight attendant reported that she was having trouble with some first-class passengers and requested that security meet the airplane in Las Vegas. (Respondents were nine of the twelve first-class passengers and were traveling together as a group.) The Captain asked whether there was "anything urgent I need to know?" to which the flight attendant responded that she believed she had the situation under control. Following the conversation, Captain Swanigan initiated cockpit lockdown procedures and turned on the "fasten seatbelt" sign. App., *infra*, 39a (Otero, J., dissenting), 93a.

Several minutes later, the Captain received a second phone call from a flight attendant, stating she had "lost control" of the first-class cabin. To the Captain, it sounded like the flight attendant was crying. At this time, the Captain heard "a bunch of yelling and screaming" coming through the interphone. The Captain confirmed with the First Officer that he too heard yelling and screaming. The Captain had

"never heard anything like that in [his] entire career."[1] The Captain "felt that there was a possibility that [his] airplane and [his] crew were in jeopardy." The Captain decided to put the airplane on the ground as soon as possible, at the nearest suitable airport: Reno, Nevada. App., *infra*, 9a, 39a-40a, 64a (Otero, J., dissenting), 93a-94a.

After the aircraft landed in Reno, the Captain and the flight attendant met at the top of the jetway to discuss what had happened on board. She reported to the Captain that there were six first-class passengers who were causing a disturbance during the flight, including congregating near the cockpit door, refusing to follow flight attendant instructions, and yelling at the flight attendant. She also told him that, after several verbal warnings, she gave the passengers a written warning and they "exploded" at that point. The flight attendant also reported to the Captain that the passengers told her that "[Y]ou

[1] The panel majority believed that there was a material dispute of fact as to whether there was screaming in the background, because some of the passengers claimed that they stopped yelling before the flight attendant called the Captain. App., *infra*, 22a-23a. The dissent and the district court both concluded that respondents had not proffered material evidence on that point, App., *infra*, 40a n.6 (Otero, J., dissenting), 94a, and the evidence relied on by the panel majority is not dispositive. App., *infra*, 7a n.5 (respondent "attempted to make herself heard over the flight attendant's yelling"); App., *infra*, 8a n.5 ("the three members of my party involved at all were simply attempting to respond to the flight attendant"). This disagreement is not material to the issues presented.

Americans [are] so paranoid and all of these safety and security regulations [are] stupid." App., *infra*, 10a, 41a-42a (Otero, J., dissenting), 93a.

Based on this report, Captain Swanigan asked law enforcement to remove the passengers and to press charges against them. Captain Swanigan had the flight attendant return to the first-class cabin to identify the offending passengers, all of whom deplaned. App., *infra*, 10a, 42a (Otero, J., dissenting).

Law enforcement decided not to arrest any of the respondents, who then continued to Las Vegas on a different airline. In Las Vegas, respondents were questioned by the Federal Bureau of Investigation, apparently in response to petitioner's report to the Joint Terrorism Task Force. App., *infra*, 10a-11a.

C. Proceedings Below

1. Respondents sued petitioner in federal court, claiming that petitioner had violated its obligation under the Warsaw Convention—formally known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, T.S. No. 876 (1934)—which creates a cause of action against an airline for "damage occasioned by delay in the transportation by air of passengers" on international flights and preempts state tort law. *See Olympic Airways v.*

Husain, 540 U.S. 644, 649 & n.5 (2004).[2] Petitioner moved for summary judgment on the Warsaw Convention claim, contending that the Tokyo Convention provided it immunity to respondents' claim.

The district court granted summary judgment for petitioner. App., *infra*, 81a-95a. The court explained that when a captain acts in accordance with the Tokyo Convention, neither he nor the owner or operator of the aircraft may be held liable. App., *infra*, 91a-92a. The court determined that the captain had complied with the Tokyo Convention because "[r]easonable minds, given even a cursory examination of all the facts and circumstances of this matter, could not differ in concluding that the Captain had reasonable grounds for his decision." App., *infra*, 95a.

2. On appeal, and after oral argument, the court of appeals *sua sponte* invited the United States to submit an amicus brief setting forth its views as to the correct application of the Tokyo Convention and

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[2] Respondents also brought supplemental state-law claims for defamation and intentional infliction of emotional distress. The district court dismissed all of respondents' state law claims as preempted by the Warsaw Convention. App., *infra*, 72a-80a. The district court subsequently denied respondents' motion to file supplemental pleadings alleging seven new state causes of action. App., *infra*, 83a-89a. The court of appeals affirmed in part and reversed in part the dismissal of the state law claims, App., *infra*, 29a-32a, 69a-70a, and affirmed the district court's order refusing to permit the filing of supplemental pleadings, App., *infra*, 32a-35a, 70a. Those rulings are not at issue in this petition.

the Warsaw Convention. App., *infra*, 46a n.9. The United States subsequently filed a brief urging that the Tokyo Convention requires a highly deferential review of an aircraft captain's actions. The government took no position on whether summary judgment under the Tokyo Convention was appropriate on the instant record. App., *infra*, 114a-142a.

3. As relevant here, a divided court of appeals reversed the ruling that the Tokyo Convention entitled petitioner to summary judgment. App., *infra*, 1a-71a.

Focusing on the phrase "reasonable grounds to believe," the panel majority held that the Tokyo Convention adopts a "reasonableness" standard as that term is used in American law, not a standard that is deferential to the captain. App., *infra*, 14a. The court concluded that "[r]easonableness is a well-established and easily-understood standard, one that American courts are accustomed to applying in a wide variety of situations involving the behavior of individuals." App., *infra*, 18a. In so doing, the panel majority acknowledged that the First Circuit had "adopted an 'arbitrary or capricious' standard for judging the behavior of airline crews" under the analogous statute for domestic air travel, 49 U.S.C. § 44902(b). App., *infra*, 18a (quoting *Cerquiera v. American Airlines, Inc.*, 520 F.3d 1, 12 (1st Cir.), cert. denied, 129 S. Ct. 111 (2008)). But the panel majority "decline[d] to follow *Cerquiera*." App., *infra*, 19a.

Applying its interpretation of "reasonable grounds to believe," the Ninth Circuit held that summary judgment was not appropriate. The panel majority hypothesized that a jury could conclude that a "reasonable captain" should have "tried to find *something* about what was going on in the cabin" after the flight attendant reported she had "lost control of the first class cabin," and before making the decision to divert to Reno. App., *infra*, 22a. The panel majority also reasoned that a jury could conclude that, once the aircraft was on the ground, Captain Swanigan should have interviewed respondents before turning them over to the police. App., *infra*, 24a-27a. Finally, the panel majority surmised that a jury could conclude that the Captain's refusal to allow respondents to reboard the flight after the police decided not to arrest them was not reasonable. App., *infra*, 27a-28a.

The panel majority acknowledged that a captain "must be able to act decisively in an emergency and, in doing so, rely on communications from his crew." App., *infra*, 28a. But the majority held that a jury could conclude that "there was no emergency" here. App., *infra*, 28a.

4. Judge Otero dissented from the panel majority's failure to give the captain's decision deference. In his view, the Tokyo Convention requires that Captain Swanigan's behavior be reviewed under "a more deferential arbitrary and capricious standard" and not a "reasonableness standard." App., *infra*, 38a.

As the dissenting judge observed, the Convention does not define "reasonable grounds to believe" and "reasonable measures." App., *infra*, 45a. And the meaning of these terms is not "clear on their face." App., *infra*, 45a. Judge Otero explained that, although the term "'reasonable' is familiar in American law," the "relevant text in the instant case comes from a multilateral agreement among nations with significant differences in both procedural and substantive law." App., *infra*, 45a-46a. Given the context in which these terms are used and the Convention's "broad" provision of immunity, he concluded that petitioner and the United States were correct that "considerable deference should be owed" the captain. App., *infra*, 47a.

The dissenting judge further noted that the history of the negotiation and drafting of the Tokyo Convention supports a deferential standard. App., *infra*, 49a. In particular, he emphasized that the United States' delegate understood the Convention's "reasonable grounds" language as calling for an arbitrary-and-capricious standard: "In other words, the aircraft commander could not act arbitrarily or capriciously." App., *infra*, 50a (quoting U.S. delegate; emphasis omitted). Judge Otero noted that, in the majority's discussion of this same statement, "my colleagues curiously omit the last sentence." App., *infra*, 51a.

The dissenting judge further observed that his view of the Tokyo Convention was more consistent with federal decisions interpreting the analogous statute for domestic air travel. App., *infra*, 55a-58a.

Finally, Judge Otero reasoned that an "arbitrary and capricious" standard "meets the principal goal of promoting air safety as well as the goal of protecting the rights of passengers to be free from unwarranted discrimination. A negligence standard, on the other hand, will result in hesitation by the pilot in circumstances where he should have acted [and] second-guessing by the courts * * * ." App., *infra*, 61a-62a.

The dissenting judge concluded that Captain Swanigan's diversion of the flight to Reno was neither arbitrary nor capricious, and was thus in compliance with the Tokyo Convention. App., *infra*, 62a-67a. "Captain Swanigan made the split-second decision that landing the aircraft was necessary under the circumstances, aware that any hesitation would soon make it impracticable to make an emergency landing in Reno. There was no affirmative obligation imposed by the Tokyo Convention on Captain Swanigan to conduct a personal investigation * * * ." App., *infra*, 65a; *see also* App., *infra*, 71a.

Judge Otero concurred with the majority that Captain Swanigan's decision to remove respondents from the aircraft after landing and delivering them to the authorities posed a triable issue of fact. But he would have held that the Captain's actions should be examined on remand under an "arbitrary or capricious standard, not a reasonableness standard" as adopted by the majority. App., *infra*, 68a.

REASONS FOR GRANTING THE PETITION

REVIEW IS NECESSARY BECAUSE THE NINTH CIRCUIT'S READING OF THE TOKYO CONVENTION, WHICH IS CONTRARY TO THE UNITED STATES' UNDERSTANDING OF THIS TREATY, THREATENS AVIATION SECURITY

A. The Ninth Circuit's Misinterpretation Of The International Treaty Governing Airline Security Will Deter Aircraft Captains From Taking Swift Action To Address Actual Or Potential Security Threats

This case presents a question of fundamental importance: whether an aircraft captain's decision to act to preserve safety, good order, and discipline on board an international flight is entitled to any deference. The Ninth Circuit's interpretation of the Tokyo Convention will affect not only flight operations and training at petitioner Alaska Airlines, but at every airline operating both domestic and international flights throughout the United States.

1. The decision below will defeat the principal purpose of the Tokyo Convention and chill aircraft captains from making critical security decisions

If allowed to stand, the panel majority's decision will frustrate the Convention's purpose of promoting safety in international aviation and deter captains from making critical, necessary security decisions.

a. "The principal purpose of the Tokyo Convention is to promote aviation safety * * *." S. Rep.

No. 91-1083, at 2 (1970); *see also* S. Exec. Rep. No. 90-3, at 7 (1969) (statement of Deputy Legal Adviser, Department of State) (Convention's "major purpose" is to "promote safety of civil aviation"); Robert P. Boyle & Roy Pulsifer, *The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, 30 J. Air L. & Com. 305, 321 (1964) (the "dominant" theme of the Convention is the "enhancement of safety").

The Convention sought to achieve this purpose in two ways. First, the Convention eliminated a patchwork of national laws by granting a broad, uniform authority to all aircraft captains. This grant of authority "provides for an element of certainty in the powers and authority of the aircraft commander." S. Exec. Doc. No. 90-L, at III (1968) (President Johnson). As the Air Transport Association explained to the Senate in urging ratification, the Convention "affords a useful base of recognition of the authority of the aircraft commander to deal with offenders on board the aircraft." S. Exec. Rep. No. 90-3, at 33 (1969).

Second, to ensure that aircraft captains were not deterred from using the authority granted by the Convention, Article 10 of the Convention grants immunity from civil and criminal proceedings for acts performed in accordance with the Convention. This provision "grant[s] the aircraft commander and crew protection from legal action brought against them because of [conduct] which might otherwise subject them to legal liability or criminal prosecution." *Id*. at 2.

The captain would thus be able to act "without fear of subsequent retaliation through civil suit or otherwise." *Id*. at 10 (statement of Air Line Pilots Association).

The immunity was intended to have "a definite practical value to both the airline operators and their crews." S. Exec. Doc. No. 90-L, at 3 (statement of federal Interagency Group on International Aviation). Instead of being subject to "variations of local law," the Convention "establishe[d] a uniform test by which the actions of the commander will be judged." *Id*. at 9; *see also* S. Rep. No. 91-1083, at 2 (convention "establishes a uniform international standard for judging the actions of the commander").

The President, Secretary of State, and Senate all concluded that this immunity provision would itself "significantly contribute to maintaining the safety of flight in international aviation." S. Exec. Doc. No. 90-L, at IV (President Johnson); *see id*. at VI (Secretary of State); S. Rep. No. 91-1083, at 2 (Senate). The Senate, building on the President's observation, explained that "[t]his immunity should enhance the proper attitudes and actions necessary" by the aircraft captain and crew. S. Rep. No. 91-1083, at 2; *see also* S. Exec. Doc. No. 90-L, at IV (immunity "will create attitudes and actions").

b. These same purposes are reflected in the Convention's drafting history and the views of leading commentators. As the treaty drafters understood, without the Convention's immunity provision, the

captain "might have to hesitate and might, perhaps, do nothing in circumstances in which he should have acted." Int'l Civil Aviation Org. [ICAO], *International Conference on Air Law, Tokyo, Aug.-Sept. 1963*, *Minutes,* at 223, ICAO Doc. 8565-LC/152-1 (1966) (Senegal); *see also* Fitzgerald, *supra*, 1 Can. Y.B. Int'l L. at 247 (immunity provision included because "[t]he aircraft commander, crew members and others would be reluctant to act against persons prejudicing safety, good order and discipline, if, by so acting, they were to expose themselves to legal proceedings brought in respect of their actions"). The chief of the United States' delegation explained that "the Convention provides the aircraft commander with the necessary authority [to act] * * * without fear of subsequent retaliation through civil suit or otherwise." Boyle, *supra*, at 329.

The immunity granted by the Convention is all the more important in the post-9/11 environment. In the fall of 2001, the International Civil Aviation Organization noted an "increase [in] the number and gravity of reported incidents involving unruly or disruptive passengers on board civil aircraft" and recognized the "inherent risks" such incidents pose to "the safety of the aircraft and the passengers and crew on board these aircraft." ICAO, *Adoption of National Legislation on Certain Offences Committed on Board Civil Aircraft (Unruly/Disruptive Passengers*), Assemb. Res. A33-4 (2001).

c. The Ninth Circuit's decision eviscerates the primary purpose of the Convention. Under the panel

majority's ruling, a captain's decision is effectively afforded no deference. Instead, his decision will be second-guessed in the relative calm of the courtroom, by lay jurors, with facts learned in hindsight. As the dissenting judge recognized, "the unintended but probable consequence" of the panel majority's misinterpretation of the Tokyo Convention "is risk to passenger and crew safety—an affront to the principal purpose of the Tokyo Convention." App., *infra*, 37a.

Further, if, as held by the court below, an aircraft captain must conduct an independent investigation during the flight before acting, the captain cannot make prompt decisions when confronted with potential safety or security threats. Moreover, the conduct of the "investigation" required by the Ninth Circuit will, during a potential emergency situation, necessarily take the captain away from the primary responsibility of actually flying the aircraft. Hesitation and indecision, when prompt action is necessary, may lead to inaction or delay that endangers flight safety. That result contravenes the principal purpose of the Tokyo Convention, whose drafters "crafted a standard that takes into account the demanding and time-sensitive nature of an aircraft commander's decision." App., *infra*, 59a.

2. The decision misinterprets the Tokyo Convention as offering essentially no defense for captains and airlines sued under the Warsaw Convention

a. The Ninth Circuit effectively read the Tokyo Convention as creating a standard coextensive with a negligence standard. That is, it interpreted the Convention's language authorizing an aircraft captain to act when he has "reasonable grounds to believe" a passenger has or will engage in proscribed conduct as requiring that the captain be "reasonable." That reading essentially provides no independent defense for captains and airlines to a passenger's claim under the Warsaw Convention. At the time the Tokyo Convention was drafted and ratified, the Warsaw Convention already contained a lack-of-negligence defense to its strict liability regime. *See Olympic Airways v. Husain*, 540 U.S. 644, 649 n.5 (2004).

Moreover, that reading deprives captains of the certainty that the Tokyo Convention intended to establish. In so doing, it renders a virtual nullity what the Senate described as a "significant step in the development of international aviation law." S. Exec. Rep. No. 90-3, at 3 (1969). And it does so in a way that essentially precludes resolution by summary judgment, thus causing captains and airlines to experience the burdens of full-blown trial litigation.

b. A "negligence"-type standard also runs contrary to the language of the Tokyo Convention, which uses words of breadth and discretion to describe the

captain's authority. For example, the Convention does not limit the aircraft captain's authority to passenger actions that jeopardize safety. Instead, it empowers the captain to address passenger actions "which, whether or not they are [criminal] offences, *may* or do jeopardize the safety of the aircraft." App., *infra*, 97a [Art. 1(1(b))] (emphasis added). The Convention allows the captain to act when he reasonably believes "that a person has committed, *or is about to commit*, on board the aircraft" such actions. App., *infra*, 100a [Art. 6(1)] (emphasis added). Thus, on its face, the Convention gives a captain discretion to act upon limited information regarding nascent threats, rather than requiring the captain to wait for an "emergency" to materialize. *Cf.* App., *infra*, 28a. A passenger need not actually commit an act—let alone an act which definitively endangers safety (or good order and discipline) on board—before the captain can take reasonable measures to avoid a potential problem.

Further, while the Convention grants the aircraft captain broad authority, the captain is not expected to serve as a detective and to engage in an on-board investigation while flying the aircraft. To the contrary, once the aircraft doors open, *see* App., *infra*, 99a-100a [Art. 5(2)], the Convention contemplates that the captain will involve the competent authorities to investigate the disturbance. App., *infra*, 100a, 102a-103a [Art. 6(1(c)), 9] (captain may deliver problem passenger to "competent authorities"); App., *infra*, at 102a [Art. 8(2)] (captain "shall report" to the

authorities "the facts of, and the reasons for," the passenger disembarkation). The Convention contemplates that the ultimate decision whether to arrest or to detain a passenger shall be made by the local authorities on the ground, without the risks attendant in air travel. *Id*. at 105a [Art. 13(4)] (contracting nation taking custody of delivered passenger "shall immediately make a preliminary enquiry into the facts").

c. The panel majority's reading of the "reasonable grounds to believe" language in the Tokyo Convention is directly contrary to the intent of the Convention's drafters. The drafters recognized the need to confer "extraordinary powers" on the captain because of the unique risks involved in air travel and the "special position" in which the captain is placed. ICAO, *Minutes* at 166 (United States). As the United States' chief delegate explained: "The doors [are] closed and he [does] not have the local police force immediately available. Hence, if a passenger endangered the life or safety of another passenger or threatened the safety of the aircraft, the aircraft commander and his crew should be authorized to take whatever immediate action [i]s necessary." *Ibid*.

Further, the Convention's drafters repeatedly rejected proposals to impose limits on the captain's authority. For example, the drafters rejected a proposal that the captain should have "serious grounds" rather than "reasonable grounds" before taking action. *Id*. at 155. They similarly declined to adopt a standard that would require "some concrete external

facts" to support a reasonable belief, reasoning that such a standard would be too "strict and rigid." *Id*. at 178-179 (Netherlands).

d. The only other court to address the Tokyo Convention rejected the "negligence-esque standard" adopted by the panel majority. App., *infra*, 53a (Otero, J., dissenting). In *Zikry v. Air Canada*, Civil File No. 1716/05 A (2006), the Israeli Magistrates Court of Haifa recognized that the Tokyo Convention confers "extensive and wide authority" upon the captain. It further concluded that "facts are not to be examined by hindsight, but at the time of the actual event." The Israeli court also emphasized that the captain could have a "reasonable fear," "even if *post factum* it was a false apprehension."

The substantial deference given by the Israeli court to the captain's decision to disembark the passenger in that case (who was suspected of smoking in the lavatory) stands in stark contrast to the lack of deference given by the Ninth Circuit to the captain's decision to disembark the passengers here (who reportedly had caused the flight attendant to lose control of the first-class cabin). The Ninth Circuit's departure from the reasoning and result of the Israeli court underscores the need for this Court's review.

B. The Ninth Circuit's Interpretation Of The Tokyo Convention Is Contrary To The Views Of The United States, Which Should Have Been Accorded Great Weight

"It is well settled that the Executive Branch's interpretation of a treaty is entitled to great weight." *Abbott v. Abbott*, 130 S. Ct. 1983, 1993 (2010) (internal quotation marks and citation omitted)). The Ninth Circuit *sua sponte* requested the United States to submit an amicus curiae brief regarding the proper interpretation of the Convention. App., *infra*, 46a n.9. The United States obliged (App., *infra*, 114a-142a), only to have the panel majority ignore its views. Although the majority panel did not mention the United States' views when it addressed the Tokyo Convention, its opinion rejects in full the United States' interpretation.

1. The United States urged that "review of actions taken by a captain pursuant to the Tokyo Convention must be *highly deferential*" in light of the "breadth of discretion afforded the aircraft captain and the purpose of the Convention's grant of immunity." App., *infra*, 122a (emphasis added); *see also* App., *infra*, 121a, 125a (advocating "expansive" and "broad discretion").

The United States explained the practical need for the captain to be given "wide discretion." "Threats to airplane security require captains and crew members to act without hesitation where potential problems arise, and to err on the side of caution by

eliminating possible threats before they have an opportunity to materialize." *Id*. at 128a. That practical need applies while the aircraft is on the ground as well. "Although decisions made on the ground may present less risk of immediate physical danger, the complicated and coordinated nature of airline flight schedules nonetheless makes prompt action necessary." App., *infra*, 128a.

2. The panel majority also rejected the United States' view that, under the Convention, the aircraft captain does not have a duty to conduct an "independent investigation" before diverting the flight. The United States explained that "FAA regulations make it difficult, if not impossible, for a captain to personally investigate potential disturbances in the passenger cabin." App*., infra,* 131a. That is because the "cockpit doors [must] be closed and locked at all times the aircraft is operating" and "crew members in the cockpit must remain in their seats with seatbelts fastened except in limited circumstances." App., *infra*, 131a. Indeed, "[i]n the event of a disturbance, pilots are to remain in the closed cockpit, and cannot leave the cabin to assist crew members." App., *infra*, 131a. The United States thus concluded that the "pilot *must* therefore be able to rely on the reports of the cabin crew, and keep his attention focused on flying the plane." App., *infra*, 131a (emphasis added).

Moreover, the panel majority disregarded the United States' view that the contemporaneous understanding of the phrase "reasonable grounds to believe" in certain federal statutes confirmed that the

Convention's similar language required a deferential standard. For example, the United States pointed to a federal statute authorizing warrantless arrests when there were "reasonable grounds to believe" a violation of federal narcotics laws had occurred or was occurring. This Court held that, under that "reasonable grounds" standard, information from a reliable informant was sufficient. App., *infra*, 130a (citing *Draper v. United States*, 358 U.S. 307, 310 (1959)). Indeed, the United States asserted that a "significantly more deferential" standard should apply to review of a captain's decision under the Tokyo Convention. App., *infra*, 130a.

3. The United States warned that "engaging in searching review of decisions made by the captain would hinder the central goal of the broad immunity conferred by the Tokyo Convention—to encourage captains to take decisive action, often under chaotic circumstances, to preserve the safety of the plane and its passengers without fear of having those actions second-guessed in the relative calm of a courtroom." App., *infra*, 126a-127a.

Far from giving the United States' views their requisite "great weight," the panel majority ignored them. The Ninth Circuit's adoption of a contrary standard warrants this Court's review.

C. The Ninth Circuit's Decision Conflicts With Interpretations By Other Federal Courts Of The Domestic Counterpart To The Tokyo Convention

While the Tokyo Convention governs the captain's authority on international flights, Section 44902(b) of Title 49 governs domestic flights in the United States. Section 44902(b) grants air carriers the right to "refuse to transport a passenger * * * the carrier decides is, or might be, inimical to safety." In applying that analogous domestic provision, the First and Second Circuits, as well as a legion of district courts, apply a deferential standard akin to what the United States advocated in its amicus brief. The Ninth Circuit's decision failing to apply a deferential standard under the Tokyo Convention cannot be squared with those decisions.

1. Like the Tokyo Convention, Section 44902(b) was enacted in the 1960s, in the era of increased hijackings of passenger planes. *See Williams v. Trans World Airlines*, 509 F.2d 942, 946 (2d Cir. 1975).[3] Section 44902(b) was enacted "in furtherance of the first priority of safety in air traffic." *Cerquiera v. American Airlines, Inc.*, 520 F.3d 1, 12 (1st Cir.) (citing 49 U.S.C. § 40101(a)(1)), cert. denied, 129 S. Ct. 111 (2008).

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[3] Section 44902 was first enacted two years before the United States' signing of the Tokyo Convention. *See* Pub. L. No. 87-197, § 4, 75 Stat. 466 (1961).

Federal courts have long held that Section 44902(b) bars civil liability against the airline as long as the decision to refuse transport is not "arbitrary or capricious." *Cerquiera*, 520 F.3d at 14; *Williams*, 509 F.2d at 948; *Hammond v. Northwest Airlines*, No. 09-12331, 2010 WL 2836899, at *4 (E.D. Mich. July 19, 2010); *Al-Watan v. American Airlines, Inc.*, 658 F. Supp. 2d 816, 822 (E.D. Mich. 2009); *Dasrath v. Continental Airlines, Inc.*, 467 F. Supp. 2d 431, 443-444 (D.N.J. 2006); *Ruta v. Delta Airlines, Inc.*, 322 F. Supp. 2d 391, 397 (S.D.N.Y. 2004); *Al-Qudhai'een v. America West Airlines, Inc.*, 267 F. Supp. 2d 841, 846 (S.D. Ohio 2003); *Christel v. AMR Corp.*, 222 F. Supp. 2d 335, 340-341 (E.D.N.Y. 2002); *Zervigon v. Piedmont Aviation, Inc.*, 558 F. Supp. 1305, 1306 & n.7 (S.D.N.Y. 1983).

The Ninth Circuit agreed that the case law interpreting Section 44902(b) was a useful analogy in interpreting the Tokyo Convention, but expressly declined to follow *Cerquiera* and its deferential "arbitrary and capricious" standard. App., *infra*, 19a.[4]

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[4] Before the decision in this case, other courts had understood the Ninth Circuit's decision in *Cordero v. Cia Mexicana De Aviacion, S.A.,* 681 F.2d 669, 672 (9th Cir. 1982), as adopting an arbitrary and capricious standard. *See, e.g.*, *Cerquiera*, 520 F.3d at 14; *Al-Watan*, 658 F. Supp. 2d at 824; *Zervigon*, 558 F. Supp. at 1306 & n.7.

Indeed, that is the most natural reading of *Cordero*. In *Cordero*, the Ninth Circuit explicitly approved the application of an "arbitrary and capricious" standard, 681 F.2d at 671 n.2, and explained that the statute only permits litigation regarding

(Continued on following page)

2. In adopting a deferential standard rejected by the Ninth Circuit here, the First Circuit in *Cerquiera* explained that Section 44902(b)'s plain language vests "very broad" discretion over the air carrier's decision to refuse transport. 520 F.3d at 12. The First Circuit noted that the statute provides that the air carrier "may" refuse transport and does not require the carrier to decide that the passenger "is" inimical to safety—that the passenger "might be" inimical to safety is sufficient grounds for refusal. *Ibid*.

The First Circuit reasoned that, under the deferential arbitrary and capricious standard, review of the captain's decision must be "restricted to what information was actually known at the time of the decision. The test is not what the Captain reasonably *should* have known." *Id*. at 14-15. Moreover, because decisions to refuse transport "must be made in an expedient manner, and it is the Captain who bears the ultimate responsibility of ensuring the safety of the aircraft, there is no obligation on the part of the

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refusal to transport a passenger to proceed if the pilot's beliefs were "unreasonably or irrationally formed." *Id*. at 671. *Cordero* recognized that "air carriers often must make decisions within moments of take-off and with less than perfect knowledge," and that the "reasonableness of the carrier's opinion, therefore, is to be tested on the information available to the airline at the moment a decision is required." *Id*. at 672. As *Cordero* reasoned, "[t]here is correspondingly no duty to conduct an in-depth investigation into a ticket-holder's potentially dangerous proclivities." *Ibid*.

Captain * * * to make a thorough inquiry into the information received, the sources of that information, or to engage in an investigation." *Id*. at 15 (citing *Cordero*, 681 F.2d at 672). Rather, "[t]he Captain (or other decisionmaker) is entitled to accept at face value the representations made to him by other air carrier employees." *Ibid*. (citing *Cordero*, 681 F.2d at 672 and *Williams*, 509 F.2d at 948).

In *Williams*, the Second Circuit had earlier explained the need for a deferential standard of review under the predecessor to Section 44902(b). The court reasoned that this statute "expressly leaves the ascertainment of the necessity for denying passage to * * * 'the opinion of the air carrier * * * .'" *Williams*, 509 F.2d at 948. Moreover, in drafting Section 44902(b), "Congress was certainly aware that decisions under [the statute] would in many instances probably have to be made within minutes of the plane's scheduled take-off time, and that the carrier's formulation of opinion would have to rest on something less than absolute certainty." *Ibid*. Thus, the test of whether the airline properly exercised its power under the statute "rests upon the facts and circumstances of the case as known to the airline at the time it formed its opinion and made its decision and whether or not the opinion and decision were rational and reasonable and not capricious or arbitrary in the light of those facts and circumstances. They are not to be tested by other facts later disclosed by hindsight." *Ibid*.

3. Numerous district courts likewise have applied a deferential "arbitrary and capricious" standard to decisions made under Section 44902(b). Those courts have reasoned that that level of deference is necessary to avoid deterring captains from taking steps appropriate to protect aircraft safety.

For example, in *Zervigon*, the district court reasoned that "[t]he fact that the safety and well being of many lives are dependent upon his judgment necessarily means that the captain is vested with *wide discretion*" under the statute. 558 F. Supp. at 1306 (emphasis added). The court cautioned that a captain's inaction may "subject[ ] the flight and passengers to grave danger"—thus, a captain should not have to "tempt fate" so that the prospect of a hijacking or other disturbance becomes a reality. *Id*. at 1307-1308.

In *Al-Qudhai'een*, likewise, the court held that it need only assess what was known to the captain at the time, and need "not to look beyond the flight attendant's representations." 267 F. Supp. 2d at 847 n.4. The court explained that a captain is entitled to rely upon a flight attendants' representations; even if the flight attendant made "exaggerated or even false representations to the Captain, the Captain did not have an obligation to leave the cockpit and investigate the truthfulness" of the flight attendant's statements. *Ibid*. (quoting *Christel*, 222 F. Supp. 2d at 340); *see also Ruta*, 322 F. Supp. 2d at 397 (same). In contrast, the decision below criticizes, rather than

respects, the captain's reliance on his flight attendant's reports.

These conflicting interpretations of the Tokyo Convention and Section 44902(b) are detrimental to the aviation industry. It is crucial for airlines and aircraft captains to be able to rely on a uniform federal and international standard that will be used to judge their actions in response to potential threats to aircraft and persons on board. A captain should not have less discretion to act to confront a safety-of-flight issue in the air between California and Nevada, or between British Columbia and Nevada, than on a flight between New York and Washington D.C. And a captain's ability to rely on his crewmembers should not depend on his place of departure or destination. Yet, if the decision below is left standing, that will be the inevitable and untoward result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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,

Plaintiffs-Appellants,

v.

ALASKA AIRLINES, INC.,

Defendant-Appellee.

No. 06-16457

D.C. No. CV-04-01304-RCJ

OPINION

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Argued and Submitted
April 18, 2008 – San Francisco, California
Submission Vacated April 23, 2008
Resubmitted July 30, 2010

Filed July 30, 2010

Before: Alex Kozinski, Chief Judge, N. Randy Smith, Circuit Judge and S. James Otero, District Judge.*

Opinion by Chief Judge Kozinski;
Partial Concurrence and
Partial Dissent by Judge Otero

COUNSEL

Gilbert Gaynor (argued), Santa Barbara, California, John F. McHugh, New York, New York, and Allen Lichtenstein, Las Vegas, Nevada, for the plaintiffs-appellants.

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Jonathan A. Cohen and James W. Johnson, Air Line Pilots Association, International, Herndon, Virginia, for amicus curiae Air Line Pilots Association, International.

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* The Honorable S. James Otero, United States District Judge for the Central District of California, sitting by designation.

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OPINION

KOZINSKI, Chief Judge:

We consider when airlines may be held liable to passengers on international flights whom they force to disembark before the voyage is completed.

Facts

These are the facts as plaintiffs allege them: On September 29, 2003, a group of Egyptian businessmen, their wives and a Brazilian fiancée, boarded

Alaska Airlines Flight 694 in Vancouver, British Columbia. Their journey had started a few days earlier in Cairo and they were headed for a convention on energy-related products and services in Las Vegas. The Egyptians were interested in becoming distributors of natural gas equipment manufactured by a Texas company and, to that end, had scheduled a meeting with officials of that company who were attending the convention.

The nine plaintiffs took up all but three of the first class seats on Flight 694. A tenth passenger was Kimberlie Shealy, an American; she sat next to plaintiff Magdy Rasikh, whom she described as "[a]n Egyptian gentleman" with whom she "was having a pleasant conversation." Shealy Declaration at ¶¶ 2, 5. According to Shealy, who provides the only independent account of the incident, the flight attendants treated the Egyptians badly. It started "[e]arly in the flight" when Shealy "heard some comment by the young man in row one [plaintiff Amre Ginena] about coach passengers using the first class bathroom to a young blonde flight attendant [apparently Dalee Callaway]. She said something in response but I could see by her face that she did not like the question. I was surprised by her obvious reaction. . . ." *Id.* at ¶ 4.

About an hour into the flight, Reda Ginena, who was in the front row with his wife and son, stood up to stretch. Shortly thereafter, a second flight attendant, Lee Anne Maykuth, asked him to sit because standing was not permitted right outside the cockpit.

Ginena, who was in his 60s, explained that he needed to stretch periodically because back and circulation problems made protracted sitting extremely painful. Maykuth said he could stand at the rear of the first class cabin, near the partition between first class and coach.

Ginena moved to that location, but soon after the third flight attendant, Robin Duus, came up from coach and ordered Ginena to sit down, using what Shealy described as "an unpleasant loud voice."[1] Shealy Declaration at ¶ 6. According to Shealy, "[i]t was obvious from body language that [Duus] . . . was not in a good mood from the beginning of the flight." *Id.* at ¶ 5. "[S]he had been glaring at [the Egyptian] group every time she passed through the first class cabin. She wasn't looking at me like that." *Id.* at ¶ 6. Duus claims that at the beginning of the flight Reda Ginena made "a put down to [my] intelligence and my roll [sic] as an authority figure" by asking a scientific question. Duus refused to answer Ginena's question because it "wasn't really pertinent to anything. It was just an interruption." Duus might also have been upset because, immediately before the flight, the airline had given her a Notice of Discipline or Discharge.

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[1] As Ginena describes it: "Suddenly another flight attendant was speaking to me and very harshly told me to sit down immediately. She said that I had been asked to sit by her colleague and I had ignored her. I replied that her colleague had indeed told me that I could stand at that location. She again ordered me to sit down in a loud firm voice." Ginena Declaration at ¶ 11.

After Duus asked him to sit, Ginena immediately took his seat but Duus continued to hector him: "She wanted to reiterate the fact that he was not supposed to be in the aisle."[2] Shealy Declaration at ¶ 7. Ginena responded, "I am sitting down," and Duus "then gave them a piece of paper and insisted that they fill it out. The older gentleman [Ginena] looked shocked." *Id.* The form in question was a Customer Inflight Disturbance Report; it was designed to be filled out by flight crew, not passengers.[3] Ginena's son asked what the form was. According to Ginena, "[Duus] yelled at [my son] to 'zip it up, end of discussion'. . . ." Ginena Declaration at ¶ 13.

Ginena the elder eventually figured out that the form was actually supposed to be filled out by Duus, and tried to tell her so.[4] In response, Duus "went

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[2] Ginena recalls: "As I walked she was behind me and was still talking at me. I do not remember what she was saying but her tone was nasty." Ginena Declaration at ¶ 11.

[3] Alaska Airlines's Flight Attendant Manual calls for notification of the captain and his concurrence before a written notification may be given to a passenger. The flight attendants on Flight 694 did not do this, handing out the forms on their own. The manual also explains that only the bottom part of the form, which consists of a pre-printed notice, is to be given to the passengers. The top portion – the one with all the blanks for names, times, witnesses, etc. – is to be retained by the flight attendant and filled out by the crew. There is nothing in the manual or elsewhere that requires passengers to fill out anything.

[4] This is Ginena's account:

> By that time I had reviewed the form. It had no place for a passenger's statement or signature. It is to be filled out by the flight attendant and the captain, not

(Continued on following page)

ballistic and began pacing between the first row and the galley and yelling. She was completely irrational, [Ginena] and his son could not get a word in." Shealy Declaration at ¶ 7. Shealy also reports that, "[e]ven at the height of the argument the people in row one were respectful to the flight attendant to the extent that they could be under the circumstances."[5] *Id.* at

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> by a passenger. I told [Duus] that I was not to fill out or sign that form. At that she began to yell at me. She told me that I was in violation of federal law and would go to jail. She became absolutely irrational and I simply could not follow what she was saying. She was literally screaming at me. My wife then told her that she could not talk to passengers that way and that we could not understand what she was trying to tell us when she was screaming. The flight attendant screamed at my wife pointing her finger at her telling her "I will show you what I can do to you" or words to that effect. The flight attendant walked to the galley and immediately came back and presented my wife with the same form, shouting that she also fill it out and sign it, adding that she will see to it that we all go to jail. She then walked a few feet to the bulkhead by the exit door and picked up a phone which was there. She literally screamed into the phone that she had lost control of the first class cabin and that the aircraft had to be landed immediately.

Ginena Declaration at ¶ 14.

[5] Plaintiffs fully corroborate this observation. Ginena explained:

> At all times while the flight attendant was yelling no one else was yelling or speaking as loud. Indeed, only my wife even attempted to make herself heard over the flight attendant's yelling but she gave up quickly. I gave up when she began to yell as it was clear to me that she was irrational and that effective

(Continued on following page)

¶ 15. She "saw no sign that any person in the first class section was drunk, nor did [she] observe any misconduct of any kind" on the part of the passengers. *Id.* at ¶ 3. According to Shealy, the Egyptian passengers "were being accused of something that they clearly did not understand and were being humiliated before the entire aircraft as the flight attendant [Duus] was yelling at the top of her lungs." *Id.* at ¶ 8.

> communication was impossible. My son also said nothing to Ms. Duus after telling me not to sign anything immediately after receiving his own copy of the customer disturbance form.

Ginena Declaration at ¶ 16. Same for M. Samir Mansour:

> Sometime later I awoke to shouting. It turned out to be a flight attendant who was on a phone standing by the door of the galley ahead of the first class section. She was telling someone on the other end of the phone line to land the aircraft as she had lost control of the first class cabin. I could see the entire first class cabin as I was in row three of the three-row section. Everyone was sitting and no one but the flight attendant was speaking.

Mansour Declaration at ¶ 6. And Magdy Rasikh:

> As my seat-mate, a young lady from Las Vegas who was unknown to me prior to that flight, says in her declaration, the three members of my party involved at all were simply attempting to respond to the flight attendant who, according to Ms. Shealy, was "going ballistic" and was acting in a completely irrational manner. I am unfamiliar with the term "going ballistic," but the flight attendant was yelling and irrational.

Rasikh Declaration at ¶ 12.

Mrs. Ginena then told Duus that she couldn't treat passengers this way, to which Duus responded "I will show you what I can do to you" and thrust another form into her hands. Ginena Declaration at ¶ 14. Soon afterwards, according to 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," and soon thereafter the plane started "a quick descent." Shealy Declaration at ¶¶ 9-10.

When Duus called the cockpit, she announced that she had "lost control of the first-class cabin." Swanigan Deposition at 96.[6] Captain Michel Swanigan and First Officer James Roberts asked no questions; neither looked through the cockpit window to see what was going on in the cabin. Instead, Swanigan immediately diverted the plane to Reno, where local police and TSA officials were waiting at the gate. The Reno-Tahoe Airport police then came onto the aircraft and the passengers were disembarked.

Plaintiffs, Swanigan and the flight attendants gave written statements to the police. Plaintiffs protested their innocence but the crew wanted to have plaintiffs arrested. Captain Swanigan was

[6] There is a dispute as to which flight attendant called the cockpit, with the passengers (including Shealy) saying it was Duus, and the airline crew insisting it was Callaway.

adamant that plaintiffs be taken to jail: "I said [to Flight Attendant Callaway], I want them off the airplane. I want them arrested. . . . One of [the police officers] said, If you want to press charges, you are going to have to file a report. I said, No problem; I'll do it." Swanigan Deposition at 116-20.[7]

Nevertheless, the police and TSA quickly cleared plaintiffs to continue flying. They then asked Swanigan to let them reboard Flight 694 to its destination but Swanigan declined, giving as the reason that "his flight attendant would not allow it." Rasikh Declaration at ¶ 15. So, with the help of TSA and local police, plaintiffs booked seats on America West. They were allowed to board this flight even though Alaska contacted America West and urged that plaintiffs be denied passage.

After Flight 694 took off, leaving plaintiffs behind, a flight attendant announced to the remaining passengers that plaintiffs had interfered with the flight crew and were responsible for the diversion. Following the incident, Alaska issued this statement: "I know many of us feel that we were let down because these people were not arrested and also puzzled and dismayed by the ability these same passengers had as they proceeded to another airline, bought

[7] The police report confirms this: "SWANIGAN stated that he wanted the involved passengers deplaned and charged with Interfering with a flight crew." Reno/Tahoe Airport Police Report.

tickets and flew to their original destination. Just in case you are wondering, we did inform the other airline of these people and the incident. One has to question if the system really works." Alaska Airlines Chief Pilot's Newsletter, Oct. 2, 2003. Alaska also reported all nine plaintiffs to the Joint Terrorism Task Force.

Plaintiffs suffered serious consequences. Because they had to take a later flight, they missed their scheduled meeting with the manufacturer of natural gas equipment that they had hoped to distribute in Egypt. The meeting was rescheduled but, on the afternoon of the meeting, plaintiffs were collared by the FBI (responding, apparently, to Alaska's Joint Terrorism Task Force report). Plaintiffs were marched under guard through the public areas of their hotel and questioned at length; they were interrogated about their Muslim faith, mosque affiliations, employment histories and the incident on Alaska Airlines. *See* Ginena Declaration at ¶ 34. Mug shots were taken before plaintiffs were released. *See* Mansour Declaration at ¶ 17. As a consequence, they were two hours late for the rescheduled meeting with the Texas manufacturer, and the hoped-for deal was never consummated. *See* Rasikh Declaration at ¶¶ 29-31. Word of the incident made its way back to Egypt, where a U.S. State Department official mentioned it to one of the plaintiffs. *Id.* at ¶ 32.

Proceedings Below

Plaintiffs sued Alaska Airlines alleging 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.

The district court eventually granted Alaska's motion to dismiss plaintiffs' state-law claims as preempted by the Warsaw Convention. Plaintiffs sought leave to file a supplemental complaint under Fed. R. Civ. P. 15(d), alleging seven new defamation claims based on evidence they obtained during discovery. At about the same time, Alaska filed for summary judgment on plaintiffs' Warsaw Convention claim.

The district court denied plaintiffs leave to file a supplemental complaint, holding both that the motion was improperly brought under Rule 15(d) and that the statute of limitations on their new defamation claims had expired. The district court also granted Alaska's motion for summary judgment on the Warsaw Convention claim on the ground that the airline was entitled to immunity under 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 ("Tokyo Convention").

Analysis

I. Original Complaint

A. Warsaw and Tokyo Conventions

In the absence of statute, common carriers such as airlines have the duty "to secure the utmost care and diligence in the performance of their duties," which means "in regard to passengers, . . . the highest degree of carefulness and diligence." *Liverpool & G.W. Steam Co. v. Phenix Ins. Co.,* 129 U.S. 397, 440 (1889); *see also Andrews v. United Airlines, Inc.,* 24 F.3d 39, 40 (9th Cir. 1994) (explaining that under California law, airlines are "responsible for any, even the slightest, negligence and [are] required to do all that human care, vigilance, and foresight reasonably can do under all the circumstances" (quotation omitted)). When it comes to ejecting passengers from flights, that duty has been modified by federal law. In the case of domestic flights, 49 U.S.C. § 44902(b) grants air carriers immunity if they act reasonably in excluding passengers from a flight. *See Newman v. Am. Airlines, Inc.,* 176 F.3d 1128 (9th Cir. 1999); *Cordero v. Cia Mexicana De Aviacion, S.A.,* 681 F.2d 669 (9th Cir. 1982).

As to international flights, the common law rule is abrogated by treaty. Any claim by a passenger based on an airline's conduct during flight, or during the process of boarding or leaving an airplane (embarkation or disembarkation), is limited to three kinds of damages: for bodily injury, for mishandled luggage and for delay; and the maximum amount

awarded may not exceed $75,000. *See, e.g., Day v. Trans World Airlines, Inc.,* 528 F.2d 31, 32-33 (2d Cir. 1975) (explaining the Warsaw Convention's basic provisions). Liability is further limited when a passenger's claim results from actions taken by the pilot or crew to preserve order and safety on board. The Tokyo Convention authorizes pilots to deplane passengers, deliver passengers to law enforcement and forcibly restrain passengers during flight; the airline is immune from any liability if the pilot has "reasonable grounds" to support his actions. As far as we're aware, this is the first case in the United States, and the second reported opinion anywhere, to interpret the Tokyo Convention, the first being the *Zikry* case from Israel, which we discuss at length below. *See* pp. 10972-73, 10975 *infra.*

1. Standard of Care. Alaska and its supporting amici, the Air Transport Association of America and the International Air Transport Association, argue that the airline should not be held liable for its treatment of passengers under the Tokyo Convention unless Captain Swanigan acted in an arbitrary and capricious manner. But the treaty and its drafting history say nothing about "arbitrary and capricious." The standard the treaty adopts is reasonableness. Article 8 of the Tokyo Convention empowers the captain to disembark anyone "who[m] he has reasonable grounds to believe has committed" an act which "jeopardize[s] good order and discipline on board." Article 9 empowers a captain to turn passengers over to the police if he has "reasonable grounds to believe"

that they have committed a "serious offence according to the penal law of the State of registration of the aircraft."

"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). 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).

"Because a treaty ratified by the United States is an agreement among sovereign powers, we have also considered as aids to its interpretation the negotiation and drafting history of the treaty. . . ." *Medellin,* 552 U.S. at 507 (quotation omitted). Here, the drafting history is 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. Our delegate went on to explain that:

> 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.

Delegates from other nations expressed similar sentiments. The Dutch delegate, for example, said "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). 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.

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 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.

When interpreting international agreements, we must also consult "the postratification understanding of signatory nations." *Medellin,* 552 U.S. at 507 (quotation omitted). The only other reported case interpreting the Tokyo Convention, the Israeli decision of *Zikry v. Air Canada,* Civil File No. 1716/05 A (Magistrates Court of Haifa 2006), also required aircrews to act reasonably as a condition for Tokyo immunity. In *Zikry,* the court held that the key questions were "whether reasonable grounds [existed to support] 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." *Id.* § 5.

Finally, our interpretation is consistent with our cases applying the analogous statute for 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." *Cordero,* our first opinion interpreting section 44902(b)'s predecessor, held that airlines must act reasonably. Highly pertinent to our case, *Cordero* held that airlines don't have immunity when they bar passengers from boarding on the basis of "unreasonably or irrationally formed" beliefs. 681 F.2d at 671. That interpretation was reaffirmed seventeen years later by *Newman,* which also held that "the decision to refuse passage cannot be unreasonable or irrational." 176 F.3d at 1131 (citing *Cordero,* 681 F.2d at 671).

Reasonableness is a well-established and easily-understood standard, one that American courts are accustomed to applying in a wide variety of situations involving the behavior of individuals. "Arbitrary and capricious," by contrast, 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.

We are aware that the First Circuit in *Cerqueira v. American Airlines, Inc.,* 520 F.3d 1 (1st Cir. 2008),

adopted an "arbitrary or capricious" standard for judging the behavior of airline crews who bar passengers from flying on domestic flights. We decline to follow *Cerqueira.* To begin with, the court's discussion of the issue is entirely dicta because the passengers there were excluded from the flight by the police not the airline: "During his conversations with the sky marshals service, systems operations control, and the chief pilot on duty, a state police officer approached [the pilot] and told [him], point blank, 'These three gentlemen are not traveling with you today. It's out of your hands.'" *Id.* at 8 (quotation omitted). It is thus unclear why the First Circuit thought it necessary to expound at length on this issue. Moreover, as explained above, *Cordero* adopts a reasonableness standard and remits the issue to the jury. *Cerqueira* thus departs from *Cordero,* even as it purports to follow it. We are bound by *Cordero* and the language of the Tokyo Convention, not *Cerqueira,* 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.

2. Summary Judgment. We recently explained that "summary judgment is generally an inappropriate way to decide questions of reasonableness because the jury's unique competence in applying the reasonable man standard is thought ordinarily to preclude summary judgment." *Gorman v. Wolpoff & Abramson, LLP,* 584 F.3d 1147, 1157 (9th Cir. 2009) (quotation omitted). We apply this

principle in many areas of law. For example, it is generally inappropriate to grant summary judgment on the reasonableness of police conduct, *see, e.g., Howell v. Polk,* 532 F.3d 1025, 1027 (9th Cir. 2008) (per curiam) ("[W]e frequently entrust juries with the task of determining the reasonableness of police conduct."), or when applying state tort law, *see, e.g., Wallis v. Spencer,* 202 F.3d 1126, 1144 (9th Cir. 2000) ("[W]hether there was reasonable cause for the removal of Lauren and Jessie from their home is a question of fact for the jury; so . . . the City is not entitled to summary judgment. . . .").

Zikry, the Israeli case, applies this general principle to the Tokyo Convention. The *Zikry* court held that reasonableness had to be determined as a matter of fact, not law. Like Alaska here, Air Canada there sought dismissal of the complaint based on Tokyo Convention immunity, but the court "rejected the application and held that the question whether reasonable grounds to the suspicion [sic] 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[d] factual clarifications and presentation of evidence." *Zikry* § 5 (reciting its earlier order dated September 27, 2005).

Cordero and *Newman* are also crystal clear that reasonableness is a jury question. *Cordero* held that "it is peculiarly within the province of the trier of fact to determine whether the defendant's conduct was reasonable." 681 F.2d at 672. Judgment as a matter of law was inappropriate, we held, because there was

"ample evidence in the trial record from which the jury might have concluded that [the captain] acted unreasonably in excluding Cordero without even the most cursory inquiry into the complaint against him." *Id.* *Newman* is no different. There the district court granted summary judgment in favor of the airline but we reversed, relying on *Cordero* to hold that reasonableness must be resolved at trial. *Newman,* 176 F.3d at 1132.

As in *Zikry, Cordero* and *Newman,* viewing the evidence in the light most favorable to the plaintiffs, 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. To begin with, plaintiffs presented evidence that Swanigan didn't have reasonable grounds for diverting the plane to Reno. He made the decision to divert after one of the flight attendants called the cockpit and reported that "she had lost control of the first class cabin." Mansour Declaration at ¶ 6; *see also* Swanigan Deposition at 96 ("[She said] I've lost control of the first-class cabin."). Swanigan 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[8] explained, is a "thick acrylic window" that "is

[8] Captain Mark Swint has been flying for United Airlines for over two decades. He has 35 years of experience in the airline industry, including as an Interview Captain and Line Check

(Continued on following page)

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.[9] 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.

Swanigan claims that he and the co-pilot heard shouting in the background when he spoke with the flight attendant, which confirmed that there was chaos in the cabin. Swanigan Deposition at 97. But this claim is contested by plaintiffs and Shealy who

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Airman for United Airlines. He was the subject of a United training video that focused on his handling of a real in-flight emergency that arose during one of his flights. Swint Declaration at ¶ 13.

[9] Amicus the International Air Line Pilots Association attempts to explain in its brief that it was impractical or impossible for either the pilot or co-pilot to look through the cockpit window. But these facts are not in the record and plaintiffs have not had the opportunity to challenge them. Captain Swint also explains in his declaration that "[i]t is a simple matter to stand up, turn around taking no more than one step and look through the port. The entire process takes less than 5 seconds." Swint Declaration at ¶ 48. There is thus at least a dispute as to how a reasonable captain would have responded in the circumstances.

report that the passengers had fallen silent by the time the flight attendant called the cockpit. *See* Shealy Declaration at ¶ 9 ("All discussion and loud voices stopped. [Duus] went and got a phone. . . ."); Mansour Declaration at ¶ 6 ("Everyone was sitting and no one but the flight attendant was speaking."); Ginena Declaration at ¶ 16 ("At all times while the flight attendant was yelling no one else was yelling or speaking as loud."). As expert witness Captain Swint said in his declaration, "it is difficult to understand how Captain Swanigan could have allowed this event to escalate to the level that it did without ever asking anything about it. . . . Actions taken in haste and without an understanding of the pertinent facts are unreasonable and in some cases even dangerous." Swint Declaration at ¶¶ 46, 55.[10] A jury

[10] Captain Swint also faults Captain Swanigan and the Alaska flight crew for failing to adhere to the principles of Crew Resource Management (CRM). 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.

could reasonably accept this conclusion after hearing all the evidence.

Even if the jury were to find that Captain Swanigan had reasonable grounds to divert the plane to Reno, it could well conclude that he did not act reasonably once the plane was on the ground. At the time Swanigan landed the plane he had no direct information about what had happened in the cabin. He ordered the plaintiffs deplaned and arrested based on his understanding at that time. Jurors could reasonably find that Captain Swanigan should have listened to plaintiffs' side of the story before forcing them off the plane and turning them over to the police. The plane was on the ground; the cabin was secure; the door to the jetway was open; the police were nearby. The captain could have taken a few minutes to find out for himself why he had been required to divert the plane and make an emergency landing. To assume that the fault lay with the passengers rather than the crew, without making the least inquiry, may not have been reasonable. *See Cordero,* 681 F.2d at 672.

Indeed, a captain's failure to investigate a flight attendant's adverse report about a passenger is precisely what *Cordero* held was unreasonable. 681 F.2d at 672. The jury there found that the pilot acted unreasonably, but the district court granted judgment notwithstanding the verdict to the airline. *Id.* at 671. We reversed, holding: "There is ample evidence in the trial record from which the jury might have concluded that [the captain] acted unreasonably in

excluding Cordero without even the most cursory inquiry into the complaint against him." *Id.* at 672. We see no reason to depart from that sensible holding.

Moreover, while *Cordero* involved only disembarkation, Swanigan went further by delivering plaintiffs to the police, which requires even stronger support than merely removing a passenger from the plane. Tokyo Convention Article 8 permits "[t]he aircraft commander" to "disembark . . . any person who he has reasonable grounds to believe has committed, or is about to commit, on board the aircraft . . . act[s]" 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." (Emphasis added.) Tokyo Convention Article 9, by contrast, only permits the flight commander 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* according to the penal law of the State of registration of the aircraft." (Emphasis added.)[11]

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[11] *See also Minutes* at 184 ("[I]t was necessary to draw a distinction between . . . disembarkation . . . and . . . delivery. . . . In the latter case there was a presumption that the individual was not free to go where he wished. He could not be delivered to authorities unless he was under some form of restraint. This was not necessarily true in the case of disembarkation . . . [where] the individual was not, at that time, under any form of restraint.").

According to Alaska, Captain Swanigan believed plaintiffs' conduct violated 49 U.S.C. § 46504 (interference with flight crew members and attendants). But the statute is violated only if the interference is accomplished "by assaulting or intimidating a flight crew member or flight attendant." Viewing plaintiffs' version of the facts, they did absolutely nothing that anyone could reasonably believe was criminal. None of the passengers made threats or got physical with the flight attendants. Even the story told by the flight crew at the time of the incident does not disclose any action on plaintiffs' part that could amount to a crime.[12]

In his police report, Captain Swanigan described the situation as follows: "Was advised by cabin crew that passengers were congregating near the Flight Deck Door and they would not stop doing it when ordered. She said things were getting out of hand." Swanigan Police Report. Simple disobedience or sluggish compliance with directions is not the same as "assaulting" or "intimidating" a flight attendant. And "things were getting out of hand," does not suggest criminal conduct. A flight commander is

[12] Long after the incident, in a deposition, one of the flight attendants claimed that both of the passengers to receive Customer Inflight Disturbance Report forms tore or wadded them up and threw them at her. Callaway Deposition at 140-44. That report is not only contradicted by Shealy and the plaintiffs, but by the form itself which one of the plaintiffs produced intact.

required to know a good deal more before turning passengers over to the police.

As an officer charged with enforcing the statute as to passengers aboard his aircraft, Captain Swanigan had to familiarize himself with its terms. *See, e.g., United States v. Song Ja Cha,* 597 F.3d 995, 1005 (9th Cir. 2010) ("The Guam police department's failure to know the governing law was reckless behavior; the police officers were a far stretch from *Leon*'s 'reasonably well trained officer.'" (quoting *United States v. Leon,* 468 U.S. 897, 923 (1984)). 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. Indeed, the jury could simply accept the expert testimony of Captain Swint that Swanigan "had no reason or evidence to believe that all nine passengers were equally culpable of whatever offence he assumed had been committed. . . . It is my opinion, that it was impossible for Captain Swanigan to have had reasonable grounds to believe, due to his lack of inquiry and willingness to provide leadership in this event, that any offence was being or about to be committed by any passenger." Swint Declaration at ¶¶ 65, 67.

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. Further, when some of the plaintiffs asked Swanigan to let them re-board the airplane, he refused on the grounds that "his flight attendant would not allow it." Rasikh Declaration at ¶ 15. Based on this evidence, 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 was designed to placate a flight attendant who had taken a dislike to certain passengers, perhaps because of their nationality or ethnicity. *See Cerqueira,* 520 F.3d at 24 (Lipez, J., dissenting from the denial of rehearing en banc) ("The SOC manager made a separate decision as to whether the passenger could be rebooked on a flight. . . . In doing so, he may have relied – perhaps unwittingly – on information tainted by a flight attendant's racial animus.")

Finally, Alaska and its supporting amici urge us to affirm the district court on the ground that the captain (or aircraft commander, as he is referred to in the Tokyo Convention) must have very broad discretion in acting to preserve the safety of the plane and its passengers, and must be able to rely on uncorroborated information he received from members of his crew in making command decisions. We certainly agree that the captain must be able to act decisively in an emergency and, in doing so, rely on communications from his crew. A jury may reasonably conclude that there was no emergency here. None of the

passengers had made any threats, brandished a weapon or touched a flight attendant. Nor had any of the flight crew informed the captain that any of the passengers had done anything to endanger the plane. Even assuming the truth of everything that Captain Swanigan and his crew now say happened, a jury could conclude that the captain acted unreasonably in diverting the plane to Reno, forcing plaintiffs to disembark, turning them over to the authorities and then refusing to let them re-board the flight after the police had cleared them. We therefore reverse the district court's grant of summary judgment to Alaska Airlines under the Tokyo Convention and remand for these issues to be resolved at trial.

B. Defamation

1. After the plane landed, Captain Swanigan and members of the crew gave formal statements about the incident to the Reno Police and TSA officials. Plaintiffs claim that these reports were knowingly or recklessly false and filed defamation claims based on them. The district court dismissed those claims pursuant to Warsaw Convention Article 17, which preempts local law remedies for claims if based on conduct that occurs "on board the aircraft or in the course of any of the operations of embarking or disembarking." *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng,* 525 U.S. 155, 172 (1999) (quotation and citation omitted). Plaintiffs claim that the Warsaw Convention does not apply because they had left the

plane and thus any actions by the airline fell outside the Convention's protective umbrella.

In determining whether the accident causing a passenger's injuries "took place . . . in the course of any of the operations of . . . disembarking," we conduct an "assessment of the total circumstances surrounding a passenger's injuries. . . ." *Maugnie v. Compagnie Nationale Air France,* 549 F.2d 1256, 1257, 1262 (9th Cir. 1977). "[T]he Convention drafters did not draw a clear line" for when disembarkation ends, so we have always rejected an "inflexible rule." *Id.* at 1262. We have also explained that "[w]hether a passenger is embarking or disembarking is a question of federal law to be decided on the facts of each case." *Schmidkunz v. Scandinavian Airlines Sys.,* 628 F.2d 1205, 1207 (9th Cir. 1980).

In this case, the statements were made in the gate area immediately adjacent to the boarding ramp, shortly after the plane landed. They were made for the sole purpose of transferring custody of plaintiffs from Alaska Airlines to the Reno Police, as authorized by the Tokyo Convention. The Tokyo Convention, moreover, requires flight commanders to provide an explanation to local authorities when they turn over passengers to them. Tokyo Convention Arts. 8(2) & 9(3). It is thus fair to say that the pilot's statements to the police were part of the disembarkation process. Considering "the total circumstances surrounding [plaintiffs'] injuries, viewed against the background of the intended meaning of Article 17," *Maugnie,* 549 F.2d at 1262, we conclude that the crew's report to

the police was covered by the Warsaw Convention. Our conclusion is in accord with *Zikry,* the only other reported opinion that analyzes the relationship between the Tokyo and Warsaw Conventions. As the *Zikry* judge explained, "it is obvious that all the events are connected to the flight. The [Warsaw] Convention applies also to embarkation and disembarkation and all the activities following that were links in one chain." *Zikry* § 19. We therefore affirm the district court's dismissal of plaintiffs' defamation claims based on the statements made in the terminal.

2. Plaintiffs further allege that after Flight 694 took off from Reno to complete the trip to Las Vegas, a member of the crew made an in-flight announcement blaming plaintiffs for causing the diversion. Plaintiffs filed an additional defamation claim for this statement. Like the other defamation claims, the district court dismissed this claim on the pleadings as preempted by the Warsaw Convention.

In supplemental briefing, both the United States and Egypt urge us to reverse this dismissal. Their views deserve serious consideration. *See, e.g., El Al Israel Airlines, Ltd.,* 525 U.S. at 168 (interpreting the Warsaw Convention and explaining that "[r]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty"); *Zicherman v. Korean Air Lines Co.,* 516 U.S. 217, 226 (1996) ("Because a treaty ratified by the United States is . . . an agreement among sovereign powers, we have traditionally considered as aids to its

interpretation . . . the postratification understanding of the contracting parties.").

Quoting from Articles 1(1) and 17, the United States in its amicus brief argues that "[t]he Warsaw Convention by its terms applies only to injuries suffered during the 'international carriage of persons.' Such carriage ends when 'the operations of . . . disembarking' have completed." Egypt agrees, quoting from Article 17 and explaining that the key question is "whether *the passengers* were still involved 'in the course of any of the operations of . . . disembarking.' "

Both the United States and Egypt argue that the Warsaw Convention's preemptive effect exists only so long as the plaintiff is still on the airplane, embarking onto the plane or disembarking from the plane. Nothing in the Convention suggests that it extends to lawsuits filed by former passengers for things that happen on planes long after they've disembarked. We therefore reverse the district court's dismissal of plaintiffs' defamation claim for the post-disembarkation, in-flight announcement.

II. Supplemental Complaint

Plaintiffs sought to add seven new defamation claims based on statements Alaska's employees made to America West Airlines, to the Joint Terrorism Task Force and in internal newsletters. Alaska stated in internal newsletters that plaintiffs had been "argumentative and abusive," should have been "arrested" and shouldn't have been permitted to "proceed[ ] to

another airline, [buy] tickets and fl[y] to their original destination." Alaska Airlines Chief Pilot's Newsletter, Oct. 2, 2003. The newsletters also recounted how Alaska "inform[ed] the other airline of these people and the incident." *Id.* Additionally, Alaska filed a formal report with the Joint Terrorism Task Force in which it reported the entire Egyptian party for causing a "disturbance" in which the captain heard "lots of loud talking, bordering on yelling." Alaska JTTF Report. Plaintiffs attempted to add defamation claims for these statements by filing a supplemental complaint pursuant to Fed. R. Civ. P. 15(d), rather than by amending their complaint using Fed. R. Civ. P. 15(a). Plaintiffs acknowledge that the acts of defamation underlying these claims occurred between September 29, 2003 and October 3, 2003, and that their original complaint was filed on September 17, 2004. Plaintiffs claim, however, that they did not have the information until it was supplied by defendants in discovery, which itself was late.

Rule 15(d) provides a mechanism for parties to file additional causes of action based on facts that didn't exist when the original complaint was filed. *See, e.g., Cabrera v. City of Huntington Park,* 159 F.3d 374, 382 (9th Cir. 1998) (per curiam). Plaintiffs, however, seek to add defamation claims arising from conduct which happened nearly a year *before* they filed their first complaint. These claims could not, therefore, be brought as supplemental pleadings under Rule 15(d). *See, e.g., id.*; *U.S. for Use of Atkins v. Reiten,* 313 F.2d 673, 674 (9th Cir. 1963) ("Since

the additional allegations in appellant's 'amended complaint' related to events which had 'happened since the date of the pleading sought to be supplemented,' Rule 15(d), Federal Rules of Civil Procedure, was applicable."); William W. Schwarzer et al., *California Practice Guide: Federal Civil Procedure Before Trial* § 8:1377 (The Rutter Group 2009) ("A pleading may be 'supplemented' where the pleader desires to set forth allegations concerning matters which have taken place *since* the original pleading was filed.").

The only available mechanism for adding these claims was an amended complaint pursuant to Rule 15(a). But, despite ample warning from the district court, which explained at length that plaintiffs' claims were not properly brought as supplemental pleadings, plaintiffs insist that these defamation claims were properly filed under Rule 15(d). Their brief presents the issue as simply: "Did the district court improperly deny leave to file a supplemental complaint alleging defamation claims accruing after the original complaint was filed . . . ?" The answer is clearly "no" for the reasons explained above. Because plaintiffs don't make a Rule 15(a) argument, we say nothing on that score. *See, e.g., Seven Words LLC v. Network Solutions,* 260 F.3d 1089, 1097 (9th Cir. 2001) ("[It is a] longstanding rule that we do not consider arguments not raised in the briefs.").

Because we affirm the district court's denial of the motion as improperly brought under Rule 15(d), we needn't reach the question of whether Nevada's discovery rule tolled the statute of limitations. We

leave the question of whether plaintiffs may now file a Rule 15(a) motion for leave to amend their complaint for the district judge to decide in the first instance.[13]

* * *

We are mindful of the claims of Alaska Airlines and its supporting amici that flight commanders must be given wide latitude in making decisions to preserve safety and orderly conduct aboard an aircraft in flight. But passengers also have a legitimate interest in being treated fairly and with dignity; they are, after all, captives of the airline for the duration of the flight, and may be stranded far from home if not allowed to continue on the flight they have paid for. Moreover, air crews have both de facto and de jure law enforcement authority when the plane is in the air.

These concerns are particularly acute in international flights where passengers may be stranded not only far from home, but confronting police in a foreign country. The Tokyo Convention negotiators worried about this possibility and deliberately chose not to

[13] We do note that under Nevada law, the question of whether plaintiffs were diligent and the delay was caused by Alaska – thereby tolling the statute of limitations – is a factual one that is sufficiently contested in this case that it must be decided by a jury. *See, e.g., Nev. Power Co. v. Monsanto Co.,* 955 F.2d 1304, 1307 (9th Cir. 1992) ("[Diligence] may be decided as a matter of law only when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct.").

give flight crews unfettered discretion to deplane passengers and turn them over to authorities; rather, they insisted that flight crews act reasonably in doing so. Treating foreign passengers fairly when they are mistreated by our airlines will make it more likely that Americans traveling abroad will be treated fairly by foreign airlines and the foreign authorities where they land.

The record contains substantial evidence that would support a jury's finding that Captain Swanigan and his crew acted unreasonably toward the plaintiffs. We reverse the grant of summary judgment on plaintiffs' delay claims and remand them for trial along with their defamation claim for the in-flight announcement after the plane took off from Reno. We affirm the dismissal of plaintiffs' defamation claims for the statements made on the ground and the district court's denial of plaintiffs' motion to supplement their complaint.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

OTERO, District Judge, dissenting in part and concurring in part:

The facts of this case revolve around an unfortunate in-flight incident that occurred September 29, 2003, on board an international flight from Vancouver, British Columbia, to Las Vegas, Nevada

resulting in the diversion of the aircraft and removal of Plaintiffs.[1]

Depending on whose perspective of the events one adopts, Captain Swanigan, Alaska's vice president of flight operations, is either a dedicated, experienced pilot who believed that an in-flight emergency required him to immediately land his aircraft, or a simpleton in charge of a cockpit crew that failed to follow airline procedures and who was buffaloed by two vindictive flight attendants into needlessly diverting the flight and forcing passengers off the plane.[2] I take the former view.

More importantly, the unintended but probable consequence of the standard my colleagues adopt for judging the in-flight conduct of a pilot under the Tokyo Convention is risk to passenger and crew safety – an affront to the principal purpose of the Tokyo Convention.[3] The majority misinterprets the standard and examines facts in hindsight that were

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[1] The incident occurred just two years after the September 11, 2001 hijackings and attacks on New York and Washington, D.C.

[2] Captain Swanigan has been an Alaska pilot since 1980. In 1993, he was promoted to Chief Pilot, a position in which he managed the entire pilot group at Alaska. In 1995, he was promoted to Vice President of Flight Operations, in charge of a $400 million budget and all pilots, training, flight simulation, and flight control.

[3] 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) [hereinafter Tokyo Convention].

unknown to the captain at the time of the event, concluding that Captain Swanigan may have acted unreasonably. I respectfully dissent from the adoption of a reasonableness standard in favor of a more deferential arbitrary or capricious standard.

I. *Facts*

It is imperative to recite the facts from the perspective of Captain Swanigan.[4] While the majority correctly states that evidence must be viewed in the light most favorable to the plaintiffs in a motion for summary judgment, using the correct standard for judging the pilot's decision requires us to restrict the analysis to the information that the pilot knew at the moment a decision was required. Walk with me for a minute and consider the incident from the perspective of Captain Swanigan.[5]

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[4] There is no material dispute of facts as to the information that was before Captain Swanigan.

[5] Indeed, the majority's recounting of the facts includes many pieces of information that are irrelevant for the purposes of judging the captain's decision. Not only does the majority include such tidbits as whether the passengers' conversations with one another were pleasant or not – something the captain could not possibly have known or factored into his decision – but my colleagues also rely heavily on the testimony of Kimberlie Shealy, whom they believe provides "the only independent account." Majority Op. at 10963. But Ms. Shealy has a dog in this fight; she was a fellow first class passenger inconvenienced because her flight was diverted. Life experience suggests that a passenger whose plans were significantly altered due to an unscheduled landing might not view the airline in a completely

(Continued on following page)

A. *The Diversion of the Aircraft*

About one hour into the flight, approximately 65 miles south of Reno, Nevada, Captain Swanigan received a call on the aircraft interphone from flight attendant Ms. Calloway. Ms. Calloway told him, "I've got some passengers giving me a bit of a problem here in first class. I'd like to have security meet the airplane when we get in." Captain Swanigan responded, "Is there anything urgent, anything we need to know?" Ms. Calloway said, "No, I think I've got it under control." Following the conversation, Captain Swanigan put the aircraft into "lockdown mode" and turned on the "fasten seat belt" sign.

Minutes later, Captain Swanigan received a second call from Ms. Calloway. According to Captain Swanigan:

> She came across distraught; almost sounded like she was crying, to me, and said, Mike, I've lost control of the first-class cabin. And when I heard that, also I heard a bunch of yelling and screaming coming through the interphone. . . . I've been [with] the airline 26 years; I've never heard anything like that in my entire career.

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objective light. *See Cordero v. Cia Mexicana De Aviacion, S.A.,* 681 F.2d 669 (1982). In any event, at the time he acted, Captain Swanigan had no information regarding Ms. Shealy's account and could not exit the cockpit to inquire further. *See* FAA Crew Training Manual, Common Strategy for Hijack, app. II at 21. In the event of a disturbance, pilots are to remain in the closed cockpit, and cannot leave the cabin to assist crew members.

Captain Swanigan confirmed with First Officer Roberts that he was indeed hearing the yelling and screaming in the background. Upon confirmation, Captain Swanigan told Ms. Calloway "we're landing the airplane now."[6]

At the time of this decision, the aircraft was approximately 100 miles past Reno and 200 miles from Las Vegas, with a difference in flight time of approximately 25 minutes. As Alaska Flight 694 was traveling at approximately 500 miles per hour, this means that Captain Swanigan only had a few moments to make a decision as to whether to divert the plane to Reno or commit to continuing all the way to Las Vegas. Captain Swanigan contacted air traffic control to report the passenger disturbance and to request permission to make a forced emergency landing at the nearest suitable airport. He received permission and landed the aircraft in Reno.

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[6] Plaintiffs and Shealy claim it was Ms. Duus and not Ms. Calloway who called Captain Swanigan. However, they do not dispute that he was told by a flight attendant that there had been a loss of control in the first class cabin. Plaintiffs additionally claim that Captain Swanigan lied about hearing screaming during the phone call. However, according to Plaintiff Reda Ginena, the flight attendant "literally screamed into the phone that she had lost control of the first class cabin. . . ." Thus, there is no dispute that Captain Swanigan heard screaming.

B. *The Removal of Plaintiffs from the Aircraft*

Upon landing, the aircraft was met at the gate by officers from the Reno-Tahoe Airport Police Department. Captain Swanigan requested that Ms. Calloway assist the officers in securing the first class cabin, and then meet him at the top of the jetway to discuss what had happened on board.

During his meeting with Ms. Calloway, Captain Swanigan learned the following:

- There were six passengers involved.
- They began causing problems during departure operations by distracting Ms. Calloway during safety briefings and continuing to use their cell phones after being asked to turn them off.
- While in flight, they congregated near the cockpit door, forward galley, and the forward lavatory. When told that these actions were prohibited, they responded: "[Y]ou Americans [are] so paranoid and all of these safety and security regulations [are] stupid."
- They refused to leave the restricted area in the front of the airplane.
- After several verbal warnings, Ms. Calloway gave them a written warning and they "exploded" at that point.

- The fact that there were six people in a "hostile mood" became "very intimidating" to the flight attendant crew.

Based on these representations, Captain Swanigan believed that the offending passengers had interfered with his flight crew in violation of federal law.

Captain Swanigan asked the officers to remove the offending passengers from the aircraft and press charges. Captain Swanigan had Ms. Calloway return to the first class cabin to identify the offending passengers. After Plaintiffs were identified, the record indicates that three of the Plaintiffs were asked to exit and then escorted off the aircraft (the other Plaintiffs had already voluntarily deplaned).[7]

Upon reaching the terminal end of the jetway, Plaintiffs were led to an adjacent gate area where additional law enforcement officials were stationed. Captain Swanigan, Ms. Calloway, and one of the remaining two flight attendants, joined Plaintiffs. The parties produced written statements recounting their respective versions of the incident. The officers

[7] Although Plaintiffs contest this point and argue that all Plaintiffs were delivered, Judge Jones clarified any ambiguity in the record at oral argument by specifically asking Plaintiffs' counsel who extracted them and whether they left willfully. In response, Plaintiffs' counsel unequivocally admitted that the Reno-Tahoe airport police asked three Plaintiffs to leave and that those three "were removed from the aircraft but all the [sic] nine people who were traveling with them left simultaneously. . . . They willfully chose to leave." Appellee's Supplemental Excerpts of R. 8:17-25, 9:2-7.

ultimately determined that no crime had occurred and informed Captain Swanigan that Plaintiffs would not be arrested. The Plaintiffs who were escorted off the aircraft were refused carriage, and with the assistance of the officers, were boarded on a flight to Las Vegas on a different airline.

Captain Swanigan and his flight crew returned to the aircraft and resumed the flight to Las Vegas. According to Plaintiffs, once back in the air, "one of [Alaska's] flight attendants made an announcement to all passengers that the flight had been diverted and delayed due to a disturbance created by the plaintiffs."

II. *Standard of Care*

A. *Under the Tokyo Convention, the Aircraft Commander's Actions Are Judged Under a Deferential Reasonableness Standard: Her Actions Are Protected Unless They Are Arbitrary or Capricious.*

The majority correctly states that the "interpretation of a treaty, like the interpretation of a statute, begins with its text. . . ." *Medellin v. Texas,* 128 S. Ct. 1346, 1357 (2008) (internal quotation marks and citations omitted). But because "a treaty ratified by the United States is an agreement among sovereign powers, we have also considered as aids to its interpretation the negotiation and drafting history of the treaty as well as the postratification understanding of

signatory nations." *Id.* at 1357 (internal quotation marks and citations omitted); *see also Air France v. Saks,* 470 U.S. 392, 396 (1985) ("'[T]reaties are construed more liberally than private agreements, and to ascertain their meaning [courts] may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.'") (quoting *Choctaw Nation of Indians v. United States,* 318 U.S. 423, 431-32 (1943)). Accordingly, courts look to extrinsic sources to aid in the interpretation of a treaty even with a relatively low level of ambiguity.

The existence of analogous United States law also may be relevant to the analysis. *Cf. In re Extradition of Smyth,* 72 F.3d 1433, 1441 (9th Cir. 1996) (Reinhardt, J., joined by Pregerson, Noonan & O'Scannlain, JJ., dissenting) ("The panel's interpretation of the Treaty is also inconsistent with the interpretation given the analogous United States law governing asylum and withholding of deportation. . . ."); *Delchi Carrier SpA v. Rotorex Corp.,* 71 F.3d 1024, 1028 (2d Cir. 1995) ("Caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code ("UCC") may also inform a court where the language of the relevant [United Nations Convention on Contracts for the International Sale of Goods] provisions tracks that of the UCC.").

Application of these principles leads me to conclude that the Tokyo Convention affords considerable

deference to the in-flight actions of the aircraft commander. In short, such actions are permitted unless arbitrary or capricious.

1. *Although the Text of the Tokyo Convention Is Unclear as to the Degree of Deference Owed the Aircraft Commander, the Context in Which the Words Are Used Supports a Deferential Standard.*

Interpretation of the Tokyo Convention standard turns on the meaning of the terms "reasonable grounds to believe" and "reasonable measures . . . which are necessary." The majority correctly states that the text of the treaty uses the words "reasonable grounds" and not "arbitrary and capricious." Majority Op. at 10970. However, it is not clear that in using the phrase "reasonable grounds," the drafters intended the aircraft commander's actions to be judged by a reasonableness standard as that standard has been interpreted and applied by American courts. These terms are not defined in the treaty, and the majority incorrectly asserts that the terms are clear on their face. Majority Op. at 10971. While I acknowledge that the term "reasonable" is familiar in American law, I emphasize that the relevant text in the instant case comes from a multilateral agreement among nations with significant differences in both procedural and

substantive law.[8] Examining the context in which the words are used to gain a sense of what the drafters intended to accomplish is a prudent step for courts to take. It would be an oversight on our part to assume that the phrase "reasonable grounds" in the Tokyo Convention should be construed to mean the American reasonableness standard.

Alaska and the United States argue that these terms impose a standard of deferential reasonableness, while the majority agrees with Plaintiffs in holding that they impose a standard that sounds in negligence.[9] Given the facial ambiguity of these terms, *see Yusupov v. Attorney General,* 518 F.3d 185, 200 (3d Cir. 2008) (describing the phrase "reasonable

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[8] Under the auspices of the International Civil Aviation Organization ("ICAO"), a specialized agency of the United Nations, the representatives of 61 governments participated in the drafting and enactment of the Tokyo Convention. *See* Robert P. Boyle & Roy Pulsifer, *The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft,* 30 J. Air L. & Comm. 305, 305 (1964). The Tokyo Convention was signed on September 14, 1963, by 16 of the states represented, including the United States and Canada, and was entered into force on December 4, 1969. Dep't of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2007,* 24 (2007). There are currently 185 parties to the Tokyo Convention, including the United States and Canada. *Id.*

[9] In our order dated April 23, 2008, we invited the United States to set forth its views as to the proper application of the Tokyo Convention. The Airline Pilots Association, International and the Air Transport Association of America, Inc. had previously filed *amicus curiae* briefs in support of a deferential standard.

grounds to believe" as "ambiguous"); *Williams Natural Gas Co. v. F.E.R.C.,* 943 F.2d 1320, 1331 (D.C. Cir. 1991) (stating that the words "reasonable" and "necessary" "are among the broadest in the congressional lexicon of delegation"), the dispute cannot be resolved solely by reference to the text of the standard. However, the context in which these terms are used does support the deferential standard urged by Alaska and the United States.[10] Specifically, the "[p]owers of the aircraft commander" are broadly defined under the Tokyo Convention in a manner that suggests considerable deference should be owed the aircraft commander in her exercise of those powers.

First, deference is given to the aircraft commander as to whether to take action at all. Articles 6, 8, and 9 of the Tokyo Convention state that the aircraft commander "may" take action, not that he must take action. Only when action is taken do certain affirmative obligations attach.

Second, action is permitted under a broad set of circumstances. *See* Tokyo Convention, *supra* note 1, art. 1. The aircraft commander need not wait for a passenger to commit a dangerous or disorderly act; it

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[10] *See* Brief for the United States of America as Amicus Curiae at 9, *Eid v. Alaska Airlines, Inc.,* No. 06-16457 (9th Cir. July 22, 2008) ("Given the breadth of discretion afforded the aircraft captain and the purpose of the Convention's grant of immunity, review of actions taken by a captain pursuant to the Tokyo Convention must be highly deferential.").

is enough if the aircraft commander believes that the passenger "is about to commit" such an act. *Id.* at art. 6. Nor need the aircraft commander determine whether a passenger's act will in fact imperil the aircraft, or even affect safety per se; it is enough that the act "may" jeopardize the safety of the aircraft or will jeopardize "good order and discipline on board." *Id.* at art. 1.

Third, the aircraft commander is authorized to decide what action to take with regard to a disruptive passenger. Provided such action is necessary to protect the safety of the aircraft or persons or property therein, to maintain good order and discipline on board, or to facilitate delivery or disembarkation of a passenger, the aircraft commander is entitled to take *any* "reasonable measure [ ]" under the circumstances.

Lastly, where the aircraft commander acts in accordance with the Tokyo Convention, neither he, nor any other member of his crew, nor the airline, may be held responsible in "any proceeding." Such broad immunity allows the aircraft commander to act without hesitation to guard passenger safety, and without concern of being second-guessed if she does – a strong indication that a commander's judgments are entitled to deference absent a showing of arbitrary or capricious behavior.

In light of the deference given the aircraft commander as to whether, when, and how to act, as well as the accompanying grant of blanket immunity,

consistency suggests that the terms "reasonable grounds to believe" and "reasonable measures . . . which are necessary" should be interpreted broadly in favor of a deferential standard.

2. *The Negotiation and Drafting History of the Tokyo Convention Supports an Arbitrary or Capricious Standard.*

An evaluation of the negotiation and drafting history of the Tokyo Convention – another vital step to take in order to apply the treaty properly – supports a finding that the drafters intended for the aircraft commander's actions to be judged by a deferential reasonableness standard.

With respect to the requirement that the aircraft commander's belief be based on "reasonable grounds," the drafters opposed any efforts to impose a more severe test. Their comments suggest that by "reasonable," the Tokyo Convention drafters meant to protect the actions of the aircraft commander so long as they are neither arbitrary nor capricious.[11]

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[11] This is especially true when considering that the Tokyo Convention was developed at a time when there was a discernable increase in passenger incidents that threatened the safety of international air travel, including violent hijacking. *See* Gerald F. Fitzgerald, *The Development of International Rules Concerning Offences and Certain Other Acts on Board Aircraft,* 1 CAN. Y.B. INT'L L. 230, 240-41 (1963).

For instance, the parties rejected a proposal by the Swiss delegate to substitute the term "serious grounds" for the term "reasonable grounds." The United States delegate explained why the "less severe" reasonable standard was preferred:

> 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. 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. *In other words, the aircraft commander could not act arbitrarily or capriciously.*

International Civil Aviation Organization, *Minutes, International Conference on Air Law, Tokyo, Aug.-Sept. 1963,* Doc. 8565-LC.152-1, at 155 [hereinafter *Minutes*] (emphasis added).

The majority cites the same statement to support its position that the standard should be reasonableness. Majority Op. at 10971. But the panel's use of the American delegate's statement is misplaced for three reasons.

First, my colleagues curiously omit the last sentence. This is significant – the sentence cuts against the majority's notion that the arbitrary or capricious standard should be cabined to the actions of government agencies or judicial officers and also directly rebuts the majority's claim that the drafting history "say[s] nothing about 'arbitrary and capricious.'" Majority Op. at 10970. Clearly, the standard was considered to be one that applied to individual aircraft commanders. Second, not even the American delegate described "reasonable grounds" as referring to some sort of objective, "reasonable person" point of view that is so familiar to American torts scholars. Instead, the delegate simply stated that an aircraft commander "could not act on the basis of facts which were inadequate to support *his* belief." Minutes, *supra* (emphasis added). Ultimately, the standard was intended to leave room for a commander to freely make the best judgment possible, without having to conform to an amorphous "reasonableness" standard. Finally, the majority uses an American delegate's statement as affirmation that other nations had all agreed to abide by the American reasonableness standard. But the fact that "reasonableness" is a familiar term in American jurisprudence should not preclude us from examining the intent of the other parties if we are to faithfully execute the true meaning of the treaty. If anything, the American delegate's statement illustrates the very reason why closely examining the treaty's drafting history is critical – certain terms have different meanings for the different nations represented.

Examining the drafting history from a holistic point of view, then, demonstrates that the progression of the drafting went from a restrictive standard to a deferential one. The parties rejected a proposal by the Argentinian delegate to add words "which would indicate that the reasonable belief of the aircraft commander must be founded on some concrete external facts." *Id.* at 179. The Dutch delegate stated that such a requirement would impose too "strict and rigid" a standard. *Id.* at 178.

Similarly, as to the requirement that the "measures" taken by the aircraft commander be "reasonable" and "necessary," the parties appear to have rejected a simple negligence standard in favor of an arbitrary or capricious standard. The parties rejected a proposal to delete the word "necessary" because, as explained by the Greek delegate, "the word 'necessary' gave a guarantee that the aircraft commander *would not exercise his powers in an arbitrary way*." *Id.* at 174 (emphasis added). The parties also opposed a French proposal to withhold immunity "if it were proved that [the aircraft commander] had been at fault." *Id.* at 219. According to the delegate from the Federal Republic of Germany, the word "reasonable" sufficiently established that the aircraft commander did not enjoy unlimited immunity. Immunity would be withheld only "[i]f the aircraft commander did something without reasonable grounds, *if he intentionally abused his powers or if he was guilty of serious negligence*. . . ." *Id.* at 227

(emphasis added). In light of similar opposition, the French delegate withdrew his proposal.

To be sure, the drafting history is not, as the majority writes, "entirely consistent" with a reasonableness standard. A thorough and careful examination of the drafting history indicates that the standard should be deferential to the commander.

3. *The Majority's Examination of* Zikry *Is Incomplete.*

As the majority indicates, the Israeli case *Zikry v. Air Canada* appears to be the only published decision interpreting the Tokyo Convention's reasonableness standard. *See* Majority Op. at 10972-73. The majority also correctly points out that the court in *Zikry* held that the key questions were whether the captain had "reasonable grounds to believe that an act had been committed which jeopardize[d] the safety of the flight and its passengers" and whether "the steps taken were reasonable." *See* Majority Op. at 10973; *Zikry v. Air Canada,* Civil File No. 1716/05 A (Magistrate Court of Haifa 2006). But the majority again misses the point: the word "reasonable" does not necessarily carry the same meaning across all legal systems. Accordingly, we must do more than a cursory search for the word "reasonable" in foreign opinions to properly interpret the Tokyo Convention.

In fact, *Zikry* itself contains language that indicates something other than the negligence-esque standard that my colleagues adopt. According to the

court in *Zikry,* the proper standard conferred "extensive and wide authority" upon the captain. *Id.* The court also emphasized that "facts are not to be examined by hindsight [as the majority has done here], but at the time of the actual event." *Id.* Such an interpretation is consistent with the arbitrary or capricious standard that the Tokyo Convention establishes, and actually sounds much like the language that this court used in the *Cordero* and *Newman* cases to adopt a deferential reasonableness standard. *See Newman v. American Airlines, Inc.,* 176 F.3d 1128, 1131 (1999); *Cordero,* 681 F.2d at 672.

Finally, it is worth recapping the material facts from *Zikry*, for they help illustrate the degree of deference the pilot should receive in her decisions. The plaintiff in *Zikry* was suspected of smoking a cigarette in a lavatory on a flight from Israel to Canada, detained by police upon arriving in Canada, and refused carriage by the airline on a subsequent leg of the flight. Finding that immunity was warranted, the court dismissed the action. *See Zikry,* Civil File No. 1716/05 A. A passenger who is smoking on a flight, while posing an annoyance to other passengers, can hardly be deemed an emergency situation. Yet the court in *Zikry* applied a deferential standard, isolating the facts to what the pilot knew at the time of the event and granting "extensive and wide authority" upon the pilot in his decision to refuse carriage to the passenger. In the instant matter, Captain Swanigan faced a much more dire situation than a passenger smoking a cigarette – he received word

from a flight attendant that she had lost control of the cabin. Relying on his judgment and experience and knowing that he had limited opportunity to act, he landed the aircraft in response to what he legitimately perceived to be a grave threat. Presumably, if the Tokyo Convention grants deference to a pilot who bases his decision on a passenger smoking a cigarette, it also grants deference to a pilot who bases his decision on belief that the crew lost control of the cabin.

4. *49 U.S.C. § 44902(b) Supports an Arbitrary or Capricious Standard.*

The majority correctly recognizes 49 U.S.C. § 44902(b) as the analogous statute for domestic air travel. But my colleagues interpret it to impose a reasonableness standard, when courts' prior interpretations of the statute indicate otherwise. Under 49 U.S.C. § 44902(b), "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." Like the Tokyo Convention, this statute authorizes airlines to deny passage to air travelers under certain circumstances. Although § 44902(b) does not contain the phrase "reasonable grounds" like the Tokyo Convention, courts have read into the statute a deferential reasonableness standard akin to that under the Tokyo Convention: the exercise of power under § 44902(b) is proper where the aircraft commander's belief that a passenger is or might be inimical to safety is reasonable,

and where the action taken based upon that belief is reasonable. These same courts have interpreted "reasonableness" to refer to actions that are neither arbitrary nor capricious; that is, deference is inherent in this context. Based on the similarity of the § 44902(b) and Tokyo Convention standards, as well as the similarity of circumstances to which these standards apply, the case law interpreting § 44902(b)'s reasonableness requirement is particularly relevant to the instant analysis.

The first articulation of § 44902(b)'s deferential reasonableness standard was set out by the Second Circuit in *Williams v. Trans World Airlines,* 509 F.2d 942 (2d Cir. 1975):

> The test of whether or not the airline properly exercised its power . . . to refuse passage to an applicant or ticket-holder rests upon the facts and circumstances of the case as known to the airline at the time it formed its opinion and made its decision and whether or not the opinion and decision were rational and reasonable and not capricious or arbitrary in the light of those facts and circumstances. They are not to be tested by other facts later disclosed by hindsight.

Id. at 948. The court emphasized that a deferential standard requiring "less than absolute certainty" was necessary because decisions would need to be made in a compressed time frame and in light of the potential risks of inaction. *See id.* at 946, 948. Accordingly, the air carrier need not make a "thorough inquiry" before

proceeding under the statute. *Id.* at 948. A compressed time frame, of course, is precisely what Captain Swanigan was facing.

This court adopted the *Williams* test in *Cordero* when it held that "the district court properly instructed the jury in the precise language of the *Williams* test." The majority recognizes that *Cordero* "held that airlines don't have immunity when they bar passengers from boarding on the basis of 'unreasonably or irrationally formed' beliefs." Majority Op. at 10973 (citing *Cordero,* 681 F.2d at 671). It is not clear, however, why the majority believes that this establishes a reasonableness standard. There is a subtle but important difference between examining an aircraft commander's decisions under a reasonableness standard and permitting a commander's actions unless *un*reasonable. The language in *Cordero* establishes the latter, which aligns with the arbitrary or capricious standard as I have articulated above. The majority's citation of *Newman* is also puzzling for the same reason. My colleagues believe that this court further supported a reasonableness standard in *Newman* when we held that "the decision to refuse passage *cannot be unreasonable or irrational.*" *Id.* (emphasis added). Again, this language supports an arbitrary or capricious standard, not a reasonableness standard.

The *Williams* test was adopted most recently by the First Circuit in *Cerqueira v. American Airlines, Inc.,* 520 F.3d 1 (2008). The court clarified that "[t]he arbitrariness or capriciousness standard here is not

the same as reasonableness under a negligence standard." *Id.* at 14 n.17. Rather, an arbitrary or capricious standard appears to create a presumption of reasonableness. *Id.* at 14. According to the court:

> Some courts have described an air carrier's reliance on § 44902(b) as a defense in the nature of an immunity. . . . In our view, § 44902(b) does not merely create a defense: the statute is an affirmative grant of permission to the air carrier. Congress specifically authorized permissive refusals by air carriers; Congress did not say § 44902 was merely creating a defense. It is the plaintiff who carries the burden to show that § 44902(b) is inapplicable.

Id. The court, like other courts that have adopted the *Williams* test, stated that broad discretion is warranted because safety is the "first priority" in air traffic, as confirmed by the legislative history behind § 44902(b), and decisions implicating safety concerns "have to be made very quickly and based on limited information." *Id.* at 12, 14.

Ensuring safety in air commerce is similarly the primary objective of the Tokyo Convention. *See* S. Rep. No. 91-1083, 1970 U.S.C.C.A.N. at 3997 ("The principal purpose of the Tokyo Convention is to promote aviation safety. . . ."); Brief for the United States of America as Amicus Curiae at 2, *Eid,* No. 06-16457 (9th Cir. July 22, 2008) ("The 'principal purpose' of the Tokyo Convention was 'the enhancement of safety' aboard aircraft."). The drafters of the Tokyo

Convention believed that giving immunity for "reasonable actions" would "enhance the proper attitudes and actions necessary to significantly contribute to safety of flight in international aviation." *Id.* at 3997-98. The drafters, like the courts that have interpreted § 44902(b), crafted a standard that takes into account the demanding and time-sensitive nature of an aircraft commander's decisions. *See* Minutes, *supra,* at 223 ("While [the aircraft commander] would be comparable to the captain of a ship, he would have to deal with situations that might be more urgent. . . . The Conference should give some guidance to the aircraft commander who was given powers in the general interest. If nothing were included in the Convention on the point under discussion, the aircraft commander might have to hesitate and might, perhaps, do nothing in circumstances in which he should have acted.").[12]

At the same time, the drafters were certainly mindful of the rights of passengers to be free from unwarranted discrimination, and the majority correctly points this out. But safety of civil aviation was the principal objective of the Tokyo Convention. *See* Minutes, *supra,* at 156 ("[T]here has 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

[12] This point is particularly true where the aircraft is actually in flight, a circumstance faced by Captain Swanigan and specifically addressed under the Tokyo Convention.

'reasonable' had been introduced.") (emphasis added). The majority again cites to the same statement – this one made by the Dutch delegate – but comes to an odd conclusion, implying that the two objectives at all times and under all circumstances are to be weighed equally. Majority Op. at 10972. It is entirely possible for two objectives to exist but have one take precedence over the other; indeed, the language itself suggests this. No statement in the drafting history indicates that these two goals are equal in importance, although we must assume they are intertwined. There is no mention of "twin" or "dual" aims, only that of having two goals. An arbitrary or capricious standard, which grants deference to the aircraft commander to allow her to firmly and confidently make decisions concerning the safety of passengers but denies her immunity when those decisions are irrational and infringe on individuals' rights, comports more closely with the intent of the Tokyo Convention.

It is important to state that deeming individual freedoms an important but secondary goal of the Tokyo Convention does not mean they are in danger of being violated anytime an aircraft takes flight. In describing the arbitrary or capricious standard, this court stated:

> The reasonableness of the carrier's opinion, therefore, is to be tested on the information available to the airline at the moment a decision is required. There is correspondingly no duty to conduct an indepth investigation into

> a ticket-holder's potentially dangerous proclivities. We believe this facet of the test provides a reasonable balance between safety concerns and the right of a ticket-holder to be free from unwarranted discrimination.

Cordero, 681 F.2d at 672. An arbitrary or capricious standard, while broad, thus has clear limits. Individuals' freedom will not be compromised in the pursuit of safety, as the majority seems to suggest.

In light of these shared objectives and considerations, the adoption of an arbitrary or capricious standard governing actions under § 44902(b) strongly supports the adoption of a like standard governing actions under the Tokyo Convention.

5. *The Tokyo Convention Establishes an Arbitrary or Capricious Standard for Judging the Actions of the Aircraft Commander.*

In light of the foregoing, I believe an arbitrary or capricious standard is proper for judging the actions of an aircraft commander under the Tokyo Convention akin to that articulated in the § 44902(b) line of cases. An aircraft commander's actions are protected under the Tokyo Convention when the belief warranting the taking of action is neither arbitrary nor capricious and when the action taken on the basis of said belief is neither arbitrary nor capricious. Such a standard meets the principal goal of promoting air safety as well as the goal of protecting the rights of

passengers to be free from unwarranted discrimination. A negligence standard, on the other hand, will result in hesitation by the pilot in circumstances where he should have acted, second-guessing by courts, and the discovery of arguments which had escaped the attention of the aircraft commander. *See* Minutes, *supra,* at 223.

B. *The Diversion of the Aircraft Was Neither Arbitrary Nor Capricious.*

Captain Swanigan's decision to divert the aircraft is analyzed under Article 6.[13] According to Alaska, Captain Swanigan had reasonable grounds to believe that Plaintiffs had committed or were about to commit acts jeopardizing safety, good order, and discipline on board, and that diversion of the flight

[13] The making of a forced landing is an action explicitly contemplated by the Tokyo Convention. (*See, e.g.,* Tokyo Convention, *supra* note 2, art. 5(2) ("In the case of a forced landing. . . .").) However, it is unclear whether this act should be analyzed under Article 6 or under Articles 8 or 9. Neither Article 8 nor 9 speaks to whether the aircraft commander may make a forced landing in order to effectuate a disembarkation or a delivery. Even if the authority to disembark or deliver includes the authority to make a forced landing, it is unclear as to whether the aircraft commander may make a forced landing prior to making the decision to disembark or deliver. Here, it appears that Captain Swanigan did not make such a decision until the aircraft landed and he conferred with Ms. Calloway. Article 6 speaks more generally to the taking of reasonable measures that are necessary under the circumstances. Thus, Article 6 seems to be the better fit for analyzing Captain Swanigan's decision to divert the aircraft.

was a reasonable and necessary measure under the circumstances. Plaintiffs argue – and the majority agrees – that Captain Swanigan's diversion may have been unreasonable because he acted without adequate inquiry into the nature of the first class disturbance, specifically: (1) when Ms. Calloway called Captain Swanigan to notify him that she was having a problem with some first class passengers and to request that security meet the aircraft in Las Vegas, Captain Swanigan agreed to call security without ascertaining the true state of events in the first class cabin; (2) when Ms. Calloway called a second time to say that she had lost control of the first class cabin, Captain Swanigan did not seek any explanation regarding the situation; and (3) at no time did Captain Swanigan look through the viewing port in the cockpit door to observe the first class cabin.[14]

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[14] So what if under these circumstances Captain Swanigan did not look through the viewing port? Had he done so, was he to disregard Ms. Calloway's frantic call and assume all was well if he saw no commotion? As mentioned, regulations prevent him from exiting the cockpit. What would the majority require him to do next – conduct interviews of the crew and passengers via the interphone and peephole? Moreover, the Airline Pilots Association, International explained in its appellate *amicus* brief that looking out the port window requires one of the pilots to unfasten his safety belt, get out of the seat, and go to the cockpit door, while the other pilot must put on an oxygen mask and take command of the aircraft. Brief for the Airline Pilots Association, International as Amicus Curiae Supporting Appellee at 8, *Eid v. Alaska Airlines, Inc.,* No. 06-16457 (9th Cir. Jan. 18, 2007). While this statement is not part of the trial record, we are not precluded from relying on

(Continued on following page)

But if Captain Swanigan's belief and action are to be judged on the basis of the information actually known to him at the time he formed his belief and took action – which is what would be required if we were to properly abide by an arbitrary or capricious standard and what the courts did in *Cordero, Newman,* and *Zikry* – the relevant inquiry focuses on the second phone call. It was during that call when Captain Swanigan "felt that there was a possibility that my airplane and my crew were in jeopardy" and decided to land the airplane.[15] What Captain Swanigan arguably would have known had he made further inquiries during the first call is irrelevant to the analysis. The court need only determine the facts that were before Captain Swanigan at the time he formed his belief and took action, and whether, on the basis of those facts, a reasonable fact finder could conclude that his belief or action was arbitrary or capricious. The district court correctly answered this question in the negative.

At the time Captain Swanigan received the second phone call, he was already of the belief that some first class passengers had given his flight crew

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our common sense understanding of commercial aircraft in flight and the duties of pilots. Finally, while the Federal Aviation Administration requires windows on all cockpit doors, there is no FAA regulation requiring pilots to use them when the pilot has to act quickly and believes that failure to do so will jeopardize the lives of passengers and crew.

[15] Indeed, the first phone call ended with Ms. Calloway assuring Captain Swanigan, "I think I've got it under control."

some problems.[16] Ms. Calloway "came across very distraught; almost sounded like she was crying . . . and said, Mike, I've lost control of the first-class cabin." Captain Swanigan heard "a bunch of yelling and screaming" unlike anything he had ever heard in his 26 years with the airline. He confirmed with his first officer that the noise he was hearing was real, not imaginary. At that time, the difference in flight time between Reno and Las Vegas was approximately 25 minutes.

Based on these facts, Captain Swanigan believed that the passengers referenced in the first phone call – here, Plaintiffs – had committed or were about to commit acts jeopardizing safety, good order, and discipline on board. Captain Swanigan made the split-second decision that landing the aircraft was necessary under the circumstances, aware that any hesitation would soon make it impracticable to make an emergency landing in Reno. There was no affirmative obligation imposed by the Tokyo Convention on Captain Swanigan to conduct a personal investigation given the facts before him, whether in the form of additional questioning of Ms. Calloway or looking

[16] According to Captain Swanigan, "based on the information I got, it initially sounded like a minor disturbance. . . ." Whether this belief alone warrants calling security to the gate in Las Vegas is not a question before the court. Captain Swanigan's belief, based on the representations of Ms. Calloway, that some first class passengers had caused some problems, is but one factor in his calculus of the situation in the first class cabin at the time of the second phone call.

through the window in the cockpit door. That the facts may not have been as Captain Swanigan believed them to be is immaterial, as hindsight and second-guessing have no place in the analysis.

For these reasons, Captain Swanigan's diversion of the aircraft was neither arbitrary nor capricious, and is protected under the Tokyo Convention as a matter of law.

The majority, on the other hand, concludes that the captain's decision to divert the plane must be presented before a jury. The panel cites *Cordero* to illustrate that this court has held that reasonableness should always be an issue for the trier of fact, thus making summary judgment improper. *See* Majority Op. at 10974-75. The majority correctly states this well-established legal principle. Of course, summary judgment may be precluded in this case only if reasonableness is indeed the proper standard by which to judge the commander's actions. I contend that it is not. Further, I find the panel's reliance on *Cordero* deficient because in that case, this court explicitly adopted the deferential standard from *Williams. See Cordero,* 681 F.2d 669 at 672. While the majority is correct to point out that the matter in *Cordero* went before a jury when this court overruled the district court's judgment notwithstanding the verdict, there was "ample evidence in the trial record from which the jury might have concluded that [the airline] acted unreasonably." *Id.* The record in the instant matter is entirely different from the one in *Cordero.* More importantly, we must remember that "unreasonably"

in this context refers to a finding of unreasonableness *under the deferential standard established in* Williams. In other words, even after restricting the analysis to the "facts and circumstances . . . as known to the airline at the time it formed its opinion and made its decision" and granting the captain the right to make a decision without conducting an "investigation into a ticket-holder's potentially dangerous proclivities," this court held that the captain in *Cordero* may have acted unreasonably. *Id.* It is not hard to see why. In *Cordero,* the plaintiff was accused of verbal misconduct while the plane was still on the ground. After the captain for Mexicana Airlines bizarrely announced that he would be making an unscheduled stop to pick up more passengers, several passengers on board the aircraft became upset. The plaintiff was accused of insulting the captain and crew and was subsequently not allowed to reboard. *See id.* Time was not as pressing – and the consequence of inaction not as significant – as it was for Captain Swanigan. Captain Swanigan faced a dramatically different situation. Here, the plane was mid-flight and the captain believed he needed to take action immediately. He received a call from a flight attendant unlike any other in his 26 years of flight experience. When examining the facts and circumstances as Captain Swanigan knew them at the time he needed to make his decision, I submit that no reasonable jury could find that he acted either arbitrarily or capriciously, as set by the Tokyo Convention.

C. *The Removal of Plaintiffs from the Aircraft Is a Triable Issue of Fact.*

I concur with the majority that Captain Swanigan's decision to remove Plaintiffs from the aircraft is a triable issue; however, I iterate that faithfully following the Tokyo Convention as well as this circuit's precedent would still require the commander's actions to be examined under an arbitrary or capricious standard, not a reasonableness standard. As I have articulated above, *Cordero* and *Newman* both adopt a deferential standard that restricts the analysis of the decision to the facts and circumstances known to the airline at the time the decision was made. *See Cordero,* 681 F.2d 669 at 672; *Newman,* 176 F.3d 1128 at 1131.

Cordero, as explained above, involved a passenger who allegedly became angry and insulted the captain because after takeoff, the captain announced he would be making an unscheduled stop. The man was subsequently denied carriage onto the last leg of that trip. The plaintiff in *Newman,* a blind woman suffering from a heart condition, claimed she was denied entry onto a plane due to the airline's discriminating against her for suffering from observable disabilities. The commanders in both *Cordero* and *Newman* made decisions to keep the plaintiffs off their flights, and the decisions in both cases were made at a time when the planes were on the ground. The facts of those cases align more closely with the disembarkation of the passengers in the instant case; it is for that reason that I concur with the majority on

this particular issue. But the instant case also includes facts that were not before the courts in the aforementioned cases, namely, that the plane was in the air and the crew had reported that the cabin was out of control, requiring the pilot to make an emergency landing. If safety is the primary concern – and the drafting history of the Tokyo Convention makes clear that it is – then deferring to the pilot when the plane is in flight would naturally lead to a very different result than deferring to the pilot when the plane is on the ground. For that reason, I maintain that: (1) the proper standard, even when sending the issue of disembarkation before a jury, is the deferential standard previously adopted by this court; and (2) while the issue that went before the jury in *Cordero* and *Newman* is akin to the disembarkation issue in the instant case, it is separate and distinct from the issue of diversion.

III. *Defamation*

I concur with the majority in its holding that an assessment of the total circumstances surrounding the filing of the criminal complaint supports a finding that the allegedly defamatory statements made by Captain Swanigan and his flight crew were made in the course of the operations of disembarking Plaintiffs and are thus covered by the Warsaw Convention.

I also concur with the majority in its reversal of the district court's dismissal of Plaintiffs' defamation claim for the post-disembarkation, in-flight

announcement. Nothing in the Tokyo Convention suggests it extends to lawsuits filed by former passengers for harm that allegedly occurred after the plane disembarked.

IV. *Plaintiffs' Motion to File a Supplemental Complaint*

I concur with the majority in affirming the district court's denial of Plaintiffs' motion to file a supplemental complaint as improperly brought under Rule 15(d).

Also, I agree that whether Plaintiffs were diligent and can now file a Rule 15(a) motion for leave to amend their complaint is a question for the district court judge.

Alternatively, the district judge may deem Plaintiffs as having waived their Rule 15(a) arguments by not addressing the applicability of Rule 15(a) in their opening or reply briefs despite being given notice by the district court and Alaska that the motion fell under that rule. *See Greenwood v. FAA,* 28 F.3d 971, 977 (9th Cir. 1994) (noting that the Ninth Circuit "review[s] only issues which are argued specifically and distinctly in a party's opening brief.").

CONCLUSION

For the aforementioned reasons, I respectfully DISSENT from the majority's adoption of a reasonableness standard in favor of a deferential arbitrary or

capricious standard to judge the captain's flight decisions. Under the arbitrary or capricious standard, I submit that Captain Swanigan had no duty to conduct a thorough investigation prior to his decision to divert the plane, and could rely on the distress call he received from Ms. Calloway. I CONCUR with the majority in affirming the district court's dismissal of Plaintiffs' defamation claims based on the statements made in the terminal, and CONCUR with the reversal of the district court's dismissal of Plaintiffs' defamation claim for the post-disembarkation, in-flight announcement. I CONCUR with the majority in affirming the district court's denial of Plaintiffs' Motion for Leave to File a Supplemental Complaint.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

REDA A. GINENA, *et al.*,
Plaintiffs,
vs.
ALASKA AIRLINES,
Defendant.

CV-S-04-1304-RCJ-(LRL)

ORDER

(Filed Jan. 5, 2005)

This matter coming before the Court on Defendant's Motion to Dismiss (#3), Defendant's Request for Judicial Notice (#12), and Plaintiffs' Motion to Strike Defendant's Reply (#13). The Court has considered the motions, the pleadings on file, and oral argument on behalf of all parties. IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (#3) is *granted with leave to amend*. Plaintiffs shall have fifteen days from the date of this order to amend their complaint. IT IS ALSO HEREBY ORDERED that Defendant's Request for Judicial Notice (#12) and Plaintiff's Motion to Strike Defendant's Reply (#13) are *denied*.

BACKGROUND

On September 29, 2003, Plaintiffs boarded an international flight operated by Defendant Alaska Airlines. The flight originated in Vancouver, British Columbia, bound for Las Vegas, Nevada. All Plaintiffs

were flying together and seated in the first-class section of the aircraft. Due to an unspecified in-air incident, the flight crew judged Plaintiffs a security risk and diverted the flight to Reno, Nevada.

Upon landing in Reno, Plaintiffs were ordered to leave the aircraft by the flight crew. While at the gate, Plaintiffs and the flight crew made statements to the police regarding the in-air incident. Following these statements, the flight crew reboarded the aircraft and the flight resumed to Las Vegas, leaving Plaintiffs in Reno. While in the air between Reno and Las Vegas, the flight crew announced to the remaining passengers the reason for the delay and diversion to Reno.

After speaking with the police, Plaintiffs were escorted to another area of the Reno airport, where they caught a later flight to Las Vegas that was operated by a different airline.

As a result of this incident and the attendant consequences, Plaintiffs filed a complaint with the Court on September 17, 2004, alleging (1) damage due to delay under the Warsaw Convention, Article 19, (2) defamation due to the filing of a false criminal report, (3) defamation in the form of slander, (4) intentional infliction of emotional distress, and (5) invasion of privacy/false light.

Defendant filed the instant motion to dismiss on October 27, 2004, contending that the Warsaw Convention provides Plaintiffs' exclusive remedy for

liability, and that Plaintiffs' state law claims are thus preempted.

In opposition, Plaintiffs contend that the events giving rise to Plaintiffs' second through fifth causes of action occurred after Plaintiffs had disembarked from the aircraft, and thus do not fall under the Warsaw Convention. In the alternative, Plaintiffs seek leave to amend their complaint to include the allegation that they had disembarked from the aircraft at the time of the alleged tortious acts by Defendant's employees.

In response, Defendant argues that Plaintiffs should not be allowed to escape the strictures of the Warsaw Convention because they had to be escorted from the plane by police due to a security risk. Defendant contends that this did not constitute "disembarking" for purposes of Article 17 of the Warsaw Convention, and the totality of the circumstances requires that the claims be preempted. Defendant also requests that the Court take judicial notice of Defendant's "International Contract of Carriage" that was purportedly in effect at the time of the disputed incident.

Plaintiff filed an additional motion to strike Defendant's reply, asserting that the reply was due on Friday, November 26, 2004, and that it was not actually filed until Monday, November 29, 2004.

DISCUSSION

I. Preemption under Article 17 of the Warsaw Convention

Plaintiffs were traveling on an international flight, potentially bringing the events in question under the purview of the Warsaw Convention. The core issue is whether Plaintiffs' state-law claims are preempted by Article 17 of the Warsaw Convention.

Article 17 of the Warsaw Convention reads (in English):

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or *in the course of any of the operations of embarking or disembarking*.

Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 535 (1991) (emphasis added). If Plaintiffs' claims fall under Article 17, then Plaintiffs' state-law causes of action are preempted by the Warsaw Convention. *El Al Israel Airlines v. Tseng*, 525 U.S. 155, 176 (1999) (holding that "the Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law when her claim does not satisfy the conditions for liability under the Convention."). Additionally, Plaintiffs cannot sustain a cause of action under Article 17, as they were not physically injured in the incident. *Eastern*

Airlines, Inc., 499 U.S. at 552 ("We conclude that an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury.").

The critical question is whether the events allegedly causing injury in this case took place "in the course of any of the operations of embarking or disembarking." In making this determination, the Ninth Circuit advocates "an approach which requires an assessment of the total circumstances surrounding a passenger's injuries, viewed against the background of the intended meaning of Article 17." *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256, 1262 (1977). The location of the passenger and the degree to which the airline continues to exercise control over the passenger are factors relevant to this inquiry. *Id*.

The present action is particularly subject to an analysis that considers the words "operations of disembarking." Although the physical location of Plaintiffs at the time of the alleged injuries is critical to the analysis, this factor must be viewed in the context of the entire incident. *See id*. For example, an explosion aboard an airplane that injures a passenger standing at the gate waiting to board an international flight would most likely fall under Article 17, thus preempting local law. However, if a passenger standing at the gate was instead injured by debris falling from the terminal ceiling, a cause of action would survive outside of the Warsaw Convention. The operative question is whether the injury is rightly ascribed to

the consequences of operating the aircraft, or whether fault is better assigned to the passenger's presence in the particular terminal or other coterminous area. *See id*. (rejecting Article 17 preemption when the passenger had slipped and fallen in a corridor after leaving the airline gate).

The actions and circumstances of Defendant's flight crew are also relevant to the analysis. If the pilot and flight crew are removed from duty and have relinquished control of the aircraft at the time of the alleged injuries, then this weighs against Article 17 preemption. If, however, members of a flight crew simply exit an aircraft long enough to eject certain passengers and explain the situation to the police, and then resume service on the same flight, then the crew's actions are better considered as "operations of disembarking."

The pleadings clearly indicate that Plaintiffs were no longer aboard the aircraft at the time of the alleged injuries. However Plaintiffs had not been removed to a separate police facility or other security area of the airport while the flight crew made statements to the police, but instead remained at the gate. In addition, the pilot and flight crew were not removed from duty in Reno. Instead, certain members of the crew exited the airplane with Plaintiffs, made statements to police, and then resumed their duty and finished the operation of the flight into Las Vegas.

As a result, the statements made by Defendant's employees to police did not fall outside of the operation of the international flight to Las Vegas, or more specifically, outside of the "operations of embarking or disembarking." Therefore, Plaintiff's second, fourth, and fifth causes of action are preempted by Article 17 of the Warsaw Convention.

Plaintiff's third cause of action for defamation is also preempted. Although Plaintiffs were not physically present at the time of the alleged defamatory statements, such statements occurred during the completion of the ticketed international route. Had the statements occurred on a later route after the completion of the flight to Las Vegas, the Warsaw Convention would not apply. However, if a passenger causes the diversion of a scheduled international flight, and the crew later explains the reason for the diversion to the remaining passengers during completion of the originally scheduled route, the Warsaw Convention still applies. Therefore, Plaintiff's third cause of action is also preempted by Article 17.

II. Judicial Notice of Carriage Contract

"A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). In support of its motion to dismiss, Defendant asks that

the Court take judicial notice of a copy of Alaska Airlines' "International Contract of Carriage" that Defendant attaches to its request.

This purported carriage contract is certainly not generally known within the territorial jurisdiction of this Court, nor can it be readily and accurately determined by undeniable sources that this was the contract in place at the time of the incidents in question. Therefore, the Court declines to take judicial notice of the offered carriage contract.

III. Plaintiff's Motion to Strike Defendant's Reply

According to Plaintiff's calculations, Defendant's reply was due on Friday, November 26, 2004 – the day following Thanksgiving. Given that the Court was on holiday that day, Defendant's reply was timely when filed the following Monday.

CONCLUSION

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (#3) is *granted with leave to amend*. Plaintiffs shall have fifteen days from the date of this order to amend their complaint to allege facts consistent with the Court's analysis of this motion. IT IS ALSO HEREBY ORDERED that Defendant's Request for Judicial Notice (#12) and Plaintiffs' Motion to Strike Defendant's Reply (#13) are *denied*.

DATED this 5 day of January, 2005.

/s/ Robert C. Jones
ROBERT C. JONES
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

AZZA EID, AMRE R. GINENA, NAHID I. GINENA, REDA A. GINENA, SABRINA KOBERT, M. AMIR MANSOUR, HEBA NAMZI, NAMZI M. NAMZI, and M. MAGDY H. RASIKH, Plaintiffs, vs. ALASKA AIRLINES, INC., Defendant.	2:04-CV-01304-RCJ-(LRL) **ORDER**

This matter coming before the Court on Plaintiffs' Motion for Leave to File and Serve Supplemental Complaint (#56) filed on December 1, 2005, and Defendant's Motion for Summary Judgment (#58) filed December 2, 2005. The Court has considered the Motions, the pleadings on file, and oral arguments on behalf of the parties. IT IS HEREBY ORDERED that Plaintiffs' Motion for Leave to File and Serve Supplemental Complaint (#56) is *denied,* and Defendant's Motion for Summary Judgment (#58) is *granted.*

FACTS

On September 29, 2003, all nine Plaintiffs boarded an international flight in Vancouver, British Columbia,

bound for Las Vegas. All nine passengers were flying together and seated in the first-class section of the aircraft. Due to an in-air incident involving the Plaintiffs, the flight was diverted to Reno, Nevada. Upon landing in Reno, all nine Plaintiffs were ordered to leave the aircraft by employees of Defendant.

As a result of this incident and subsequent events, Plaintiffs filed a Complaint with the Court on September 17, 2004, alleging five causes of action: (1) damage due to delay under the Warsaw Convention, Article 19, (2) defamation due to the filing of a false criminal report, (3) defamation in the form of slander, (4) intentional infliction of emotional distress, and (5) invasion of privacy/false light.

On January 5, 2005, the Court held that the Warsaw Convention preempted Plaintiffs' state law claims, and granted Defendant Alaska Airlines' Motion to Dismiss Plaintiffs' second, third, fourth, and fifth causes of action, with leave to amend.

Plaintiffs filed an Amended Complaint (#22) on January 20, 2005. On May 16, 2005, the Court granted Defendant's Motion to Dismiss the Amended Complaint (#22) maintaining that Plaintiffs' second, third, fourth, and fifth claims for relief were still preempted by the Warsaw Convention.

Plaintiffs' instant Motion seeks leave to file a supplemental complaint alleging seven new causes of action (claims 6-12), all for defamation, and allegedly arising since Plaintiffs' Amended Complaint was filed. All of the new proposed causes of action arise from

publications or republication of alleged defamatory statements made by Defendants regarding Plaintiffs' involvement in the in-air incident.

Defendants' instant Motion for Summary Judgment (#58) was filed one day after Plaintiffs' Motion for Leave to File Supplemental Pleadings (#56). Defendant seeks summary judgment for Plaintiffs' remaining Warsaw Convention Claim under the terms of the Tokyo Convention. Defendants allege that any action taken by an in-command pilot or captain to preserve the good order and discipline on board an aircraft is precluded from liability.

Plaintiffs, in opposition contend that the Captain's actions do not meet the Tokyo Convention's reasonableness requirement, or at least create a question of material fact as to reasonableness that does not overcome the summary judgment standard.

DISCUSSION

Defendants argue that Plaintiffs' Motion for Leave to File Supplemental Pleadings (#56) should be dismissed for several reasons. First, because all of the newly alleged defamatory statements occurred well before the date of Plaintiffs' Amended Complaint, and because the statute of limitations on the newly alleged defamation claims has expired; second, because Plaintiffs have no current pleadings for defamation before the Court that they can supplement; and third, because the additional causes of action are futile. In opposition, Plaintiffs contend that Defendants

purposefully suppressed material evidence, which under the discovery rule, defers the accrual of Plaintiffs' causes of action for defamation.

I. Supplemental Pleadings

Both parties to this litigation stipulated that any motions to amend the pleadings must be filed by October 11, 2005. Under Rule 16(b), a scheduling order "shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge." Defendants contend that Plaintiffs, upon realizing that the date to file amended pleadings had expired, disingenuously fashioned their instant Motion as one to supplement their complaint under Rule 15(d) rather than to amend their complaint under Rule 15(a).

Additionally, Defendants attack Plaintiffs' attempt to supplement prior pleadings because the original complaint no longer contains a cause of action for defamation, thereby rendering Rule 15(d) inapplicable. As stated above, this Court granted Defendant's Motion to Dismiss Plaintiffs' second, third, fourth, and fifth causes of action, after having previously granted Plaintiffs leave to amend. Defendants contend therefore, that proposed supplemental pleadings introduce new claims, which are not allowable under Fed. R. Civ. P. 15(d).

A. Statements Made Prior to Filing of Amended Complaint

Fed. R. Civ. P. 15(d) gives a court discretion to allow a party to serve supplemental pleadings to set forth "transactions . . . occurrences, or events which have happened since the date of the pleading sought to be supplemented." Rule 15(d) states:

> Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.

Though permitting supplemental pleadings is "favored," *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988), Rule 15(d) permits the filing of a supplemental pleading only if the pleading introduces a cause of action not alleged in the original complaint and not in existence when the original complaint was filed. *Cabrera v. City of Huntington Park*, 159 F.3d 374 (9th Cir. 1998) (quoting *Planned Parenthood v. Neely*, 130 F.3d 400, 402 (9th Cir. 1997). Furthermore, Rule 15(d) may not be used to introduce a "separate, distinct and new cause of action." *Planned Parenthood*, 130 F.3d at 402 (citing 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure: Civil 2D § 1509 (1990) (noting that leave to file a supplemental pleading will be denied where "the supplemental pleading could be the subject of a separate action")).

In *Cabrera*, Plaintiffs' supplemental claim was for malicious prosecution, obviously accruing after his original complaint was filed. 159 F.3d at 382. Here however, Plaintiffs' supplemental claims allege defamatory statements occurred prior to the date of the Supplemental Complaint.

The statute of limitations for defamation in Nevada is two years and begins to run on publication. *See* N.R.S. 11.190(4)(c). Here, the alleged defamatory statements were made between September 29, and October 3, 2003. (Pl.'s Mot. for Leave to File Supplemental Pleadings.) Plaintiffs' original Complaint was filed on September 17, 2005, and their Amended Complaint was filed on January 1, 2005. Clearly, any causes of action for defamation in regard to these statements were in existence when both the original and amended complaints were filed. Therefore, Rule 15(d) precludes Plaintiffs' defamation claims.

B. New Defamation Claims

As stated above, on May 16, 2005, this Court dismissed Plaintiffs' amended defamation claims because said claims were preempted by the Warsaw Convention. Therefore, Plaintiffs' only remaining claim is for damages for delay under Article 19 of the Warsaw Convention. Plaintiffs' immediate attempt to supplement their Complaint with seven new defamation causes of action seeks to introduce separate, distinct, and new causes of action, which the Court is

precluded from allowing under *Planned Parenthood*. 130 F.3d at 402.

C. Discovery Rule & Statute of Limitations

Plaintiffs argue that the accrual of their proposed defamation claims is deferred by application of the discovery rule. As stated above, the statute of limitations for defamation in Nevada is two years and begins to run on publication. N.R.S. 11.190(4)(c). An exception to the general statute of limitations rule however is the "discovery rule," under which "the statutory period of limitations is tolled until the injured party discovers or reasonably should have discovered facts supporting a cause of action." *Peterson v. Bruen*, 792 P.2d 18, 20 (Nev. 1990); *see also, Cusano v. Klein*, 264 F.3d 936, 949 (9th Cir. 2001). Application of the discovery rule requires that plaintiffs exercise reasonable diligence to discover facts regarding the cause of action. *Siragusa v. Brown*, 971 P.2d 801, 807 (Nev. 1998) ("Plaintiffs may not close their eyes to means of information reasonably accessible to them and must in good faith apply their attention to those particulars within their reach.").

The Ninth Circuit has held that the application of the discovery rule is a task best suited for a jury, and may be decided as a matter of law only when uncontroverted evidence irrefutably demonstrates the plaintiff discovered or should have discovered the fraudulent conduct. *See Nevada Power Co. v. Monsanto Co.*, 955 F.2d 1304, 1307-1308 (9th Cir. 1992). In

Flowers v. Carville, 292 F. Supp. 2d 1225, 1234 (D. Nev. 2003), this Court held that the discovery rule applied in determining the accrual of a claim for conspiracy to defame. The Court in *Flowers* denied summary judgment on certain conspiracy to defame counts because "the evidence does not irrefutably prove when [plaintiff] knew or should have known she had a cause of action that met the actual malice standard against these Defendants." *Id.*

Here, the pleadings irrefutably demonstrate that Plaintiffs should have, and would have, discovered the evidence leading to its supplemental claims had it exercised reasonable diligence at discovery. Plaintiffs were on notice at the time of the incident – two years prior to their filing of supplemental claims – that Alaska Airlines had reported the Plaintiffs' behavior on flight 694 to law enforcement. Plaintiffs could have requested Alaska Airlines' opinions and internal statements regarding Plaintiffs or flight 694 at any time following the incident. Instead, Plaintiffs waited until the eleventh hour under the defamation statute of limitations to demand the documents at issue.

Further evidence of Plaintiffs' lack of diligence in the discovery process includes Plaintiffs' delay in participating in a Rule 26 conference. When Plaintiffs propounded discovery on August 18, 2005, Defendants requested a protective order because certain requested documents contained what they held to be sensitive, confidential, and proprietary information. Defendants sent Plaintiffs a proposed stipulated

protective order, yet Plaintiffs waited over a month to review and sign said order.

Plaintiffs reasonably should have discovered the statements made by Alaska Airlines before the two year statute of limitations. Plaintiffs' late hour request evinces their failure to exercise reasonable diligence in seeking discovery. Therefore, it is neither reasonable nor required that this Court apply the discovery rule to Plaintiffs' supplemental pleadings.

D. Futility

Defendant contends that should the Court construe Plaintiffs' Motion as a Motion to Amend rather than a Motion for Supplemental Pleadings, the Court should deny the Motion. Pursuant to the parties' stipulation that all motions to amend the pleadings must be made by October 15, 2005, and due to the expiration of the statute of limitations for defamation discussed above, the Court denies any attempt to amend the pleadings or to construe the immediate Motion as a motion to amend at this time.

II. Summary Judgment

Defendant seeks that the Court grant summary judgment for Plaintiffs' remaining Warsaw Convention Claim under the terms of the Tokyo Convention. Defendants allege that any action taken by an in-command pilot or captain to preserve the good order

and discipline on board an aircraft is precluded from liability.

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). The moving party is entitled to summary judgment as a matter of law where, viewing the evidence and the inferences arising therefrom in favor of the nonmovant, there are no genuine issues of material fact in dispute. Fed. R. Civ. P. 56(c); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). Where reasonable minds could differ on the material facts at issue, summary judgment is not appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995).

The moving party bears the burden of informing the court of the basis for its motion, together with evidence demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the party opposing the motion may not rest upon the mere allegations or denials of his pleadings but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby., Inc.*, 477 U.S. 242, 248 (1986).

In evaluating the appropriateness of summary judgment, three steps are necessary: (1) determining whether a fact is material; (2) determining whether there is a genuine issue for the trier of fact, as

determined by the documents submitted to the court; and (3) considering that evidence in light of the appropriate standard of proof. *Anderson*, 477 U.S. at 248. As to materiality, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes which are irrelevant or unnecessary will not be considered. *Id*. Where there is a complete failure of proof concerning an essential element of the nonmoving party's case, all other facts are rendered immaterial, and the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. Summary judgment is not a disfavored procedural shortcut, but an integral part of the federal rules as a whole. *Id.*

A. Tokyo Convention

The Tokyo Convention of 1963 is a federal treaty that addresses a pilot's broad authority to maintain aircraft and passenger safety. *Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, 20 U.S.T. 2941 ("Tokyo Convention" or "Convention"). The purpose of the Convention was in part to encourage countries to punish both crimes and certain non-criminal acts committed aboard an aircraft. *United States v. Georgescu*, 723 F. Supp. 912, 915 (E.D.N.Y. 1989).

When a pilot acts in accordance with the Convention, "neither the aircraft commander, or any other member of the crew, any passenger, [nor] the owner

or operator of the aircraft . . . shall be held responsible *in any proceeding* on account of the treatment undergone by the person against whom the actions were taken." Tokyo Convention, Art. 10 (emphasis added).

The Convention applies both to penal offenses and to "acts which, whether or not they are offences, may or do jeopardize . . . good order and discipline on board." Tokyo Convention, Art 1 ¶ 1(b). It entrusts the safety of the aircraft to the reasonable judgment of the pilot-in-command, stating:

> 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, an offence or act contemplated in Article 1, paragraph 1, (acts which whether or not they are offences, may or do jeopardize the safety of the aircraft or . . . good order and discipline on board) impose upon such person reasonable measures including restraint which are necessary: (a) to protect the safety of the aircraft, or of the persons or property therein, (b) to maintain good order and discipline on board; or (c) to enable him to deliver such persons to competent authorities or to disembark him in accordance with the provisions of this Chapter.

Tokyo Convention, Art. 6 ¶ 1 (Including the ability to disembark passengers under Art. 8).

Defendant proffers evidence that the Captain's decision to disembark the Plaintiffs was reasonable

given the circumstances surrounding his decision. The Captain's written statement to officials at the Reno-Tahoe airport states that he "was advised by cabin crew that passengers were congregated near the flight deck door and they would not stop doing it when ordered. She said things were getting out of hand. I decided to land the jet at the nearest airport. We requested police intervention." (Pl.'s Opp. at 4.) In his post-flight report to the airline, the Captain repeated the basic charges he had made to the Reno-Tahoe airport police.

The Captain's account states that he received a call from the first flight attendant advising that she was having trouble with some first class passengers and that she was requesting that law enforcement meet the plane when it landed in Las Vegas. In his deposition, the Captain added that at the time of the first call he asked "is there anything urgent I need to know?" to which the flight attendant replied, "No I think I've got it under control." (Pl.'s Opp. at 5.)

The Captain also testified that he received a second phone call in which he described the flight attendant as "in hysteria" and stated "it sounded like she was crying." The flight attendant reported to the Captain that she had "lost control" of the first class cabin. (Def.'s Mot. for Summ. J. Ex. A 96:1-23, deposition Ex. 16, p.2.) At this point, the Captain heard "a bunch of yelling and screaming" coming through the interphone. (*Id.* at 96:15-16, 24-25.) Having "never heard anything like that in [his 26 year] career," (*Id.* at 96:25-97:1), the Captain decided

to put the airplane on the ground as soon as possible, and disembarked to Reno.

Plaintiffs contend that given the account of what happened on board flight 694 by flight attendants and other witnesses, the Captain's decision to disembark the plane was not reasonable or necessary. Essentially, Plaintiffs argument, according to said statements, is that though an altercation ensued between some, or one, of the Plaintiffs and a flight attendant – in which one of the Plaintiffs was afoot near the plane's galley and front deck door – upon being asked to sit, all Plaintiffs comported with the flight attendants orders and returned to their seats.

Plaintiff proffers testimony by the flight's first officer that had the Captain peered through the cabin portal window and seen all passengers had taken their seats as directed, and were just arguing, that a "less direct" response than diverting the aircraft would have been appropriate.

B. Application

The critical inquiry here is whether the Captain had reasonable grounds to believe that a person on board the aircraft had committed "an act which may jeopardize the safety of the aircraft . . . or good order and discipline on board." Tokyo Convention, Art. 1, 6. What the flight attendant or First Officer would have done, the relationship a pilot had with his crew, queries regarding what the Captain *could have done* in the situation – such as calling the flight attendant

one more time, or getting up and peering through the portal door – are not relevant to the question at hand.

Given the circumstances in the cockpit as described, it is more than obvious both subjectively and objectively, that the Captain had reasonable grounds to disembark to the nearest available airport. Reasonable minds, given even a cursory examination of all of the facts and circumstances of this matter could not differ in concluding that the Captain had reasonable grounds for his decision. Therefore, no genuine issue of material fact exists. Defendant Airline and its employees are precluded from liability under Article 10 of the Tokyo Convention, and Defendant's Motion for Summary Judgment (#58) in regards to the Warsaw Convention claim is granted.

III. CONCLUSION

Therefore, IT IS HEREBY ORDERED that Plaintiffs' Motion for Leave to File Supplemental Pleadings (#56) is *denied*. IT IS ALSO ORDERED that Defendants' Motion for Summary Judgment (#58) is *granted*.

DATED: June 15, 2006.

/s/ R. Jones
ROBERT C. JONES
UNITED STATES
DISTRICT JUDGE

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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,

Plaintiffs-Appellants,

v.

ALASKA AIRLINES, INC.,

Defendant-Appellee.

No. 06-16457

D.C. No. CV-04-01304-RCJ

ORDER

(Filed Oct. 26, 2010)

Before: **KOZINSKI**, Chief Judge, **N.R. SMITH**, Circuit Judge and **OTERO**, District Judge.*

The petitions for rehearing and rehearing en banc are denied. *See* Fed. R. App. P. 35, 40. Judge Otero would grant appellee's petition.

* The Honorable S. James Otero, United States District Judge for the Central District of California, sitting by designation.

APPENDIX E

Convention on Offences and Certain Other Acts Committed on Board Aircraft, chap. III, Sept. 14, 1963, 704 U.N.T.S. 219, 20 U.S.T. 2941 (entered into force in the United States Dec. 4, 1969)

THE STATES Parties to this Convention
HAVE AGREED as follows:

Chapter I – Scope of the Convention

Article 1

1. This Convention shall apply in respect of:

   a) offences against penal law;

   b) 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.

2. Except as provided in Chapter III, this Convention shall apply in respect of offences committed or acts done by a person on board any aircraft registered in a Contracting State, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State.

3. For the purposes of this Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.

4. This Convention shall not apply to aircraft used in military, customs or police services.

Article 2

Without prejudice to the provisions of Article 4 and except when the safety of the aircraft or of persons or property on board so requires, no provision of this Convention shall be interpreted as authorizing or requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination.

Chapter II – Jurisdiction

Article 3

1. The State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.

2. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 4

A Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases:

a) the offence has effect on the territory of such State;

b) the offence has been committed by or against a national or permanent resident of such State;

c) the offence is against the security of such State;

d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State;

e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement.

Chapter III – Powers of the aircraft commander

Article 5

1. The provisions of this Chapter shall not apply to offences and acts committed or about to be committed by a person on board an aircraft in flight in the airspace of the State of registration or over the high seas or any other area outside the territory of any State unless the last point of take-off or the next point of intended landing is situated in a State other than that of registration, or the aircraft subsequently flies in the airspace of a State other than that of registration with such person still on board.

2. Notwithstanding the provisions of Article 1, paragraph 3, an aircraft shall for the purposes of this

Chapter, be considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the provisions of this Chapter shall continue to apply with respect to offences and acts committed on board until competent authorities of a State take over the responsibility for the aircraft and for the persons and property on board.

Article 6

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, an 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.

2. The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member or passenger may

also take reasonable preventive measures without such authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein.

Article 7

1. Measures of restraint imposed upon a person in accordance with Article 6 shall not be continued beyond any point at which the aircraft lands unless:

a) such point is in the territory of a non-Contracting State and its authorities refuse to permit disembarkation of that person or those measures have been imposed in accordance with Article 6, paragraph 1 c) in order to enable his delivery to competent authorities;

b) the aircraft makes a forced landing and the aircraft commander is unable to deliver that person to competent authorities; or

c) that person agrees to onward carriage under restraint.

2. The aircraft commander shall as soon as practicable, and if possible before landing in the territory of a State with a person on board who has been placed under restraint in accordance with the provisions of Article 6, notify the authorities of such State of the fact that a person on board is under restraint and of the reasons for such restraint.

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).

2. The aircraft commander shall report to the authorities of the State in which he disembarks any person pursuant to this Article, the fact of, and the reasons for, such disembarkation.

Article 9

1. The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands 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 according to the penal law of the State of registration of the aircraft.

2. The aircraft commander shall as soon as practicable and if possible before landing in the territory of a Contracting State with a person on board whom the aircraft commander intends to deliver in accordance with the preceding paragraph, notify the authorities of such State of his intention to deliver such person and the reasons therefor.

3. The aircraft commander shall furnish the authorities to whom any suspected offender is delivered in accordance with the provisions of this Article with evidence and information which, under the law of the State of registration of the aircraft, are lawfully in his possession.

Article 10

For actions taken in accordance with this Convention, neither the aircraft commander, any other member of the crew, any passenger, the owner or operator of the aircraft, nor the person on whose behalf the flight was performed shall be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken.

Chapter IV – Unlawful Seizure of Aircraft

Article 11

1. When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.

2. In the cases contemplated in the preceding paragraph, the Contracting State in which the aircraft

lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession.

Chapter V – Powers and Duties of States

Article 12

Any Contracting State shall allow the commander of an aircraft registered in another Contracting State to disembark any person pursuant to Article 8, paragraph 1.

Article 13

1. Any Contracting State shall take delivery of any person whom the aircraft commander delivers pursuant to Article 9, paragraph 1.

2. Upon being satisfied that the circumstances so warrant, any Contracting State shall take custody or other measures to ensure the presence of any person suspected of an act contemplated in Article 11, paragraph 1 and of any person of whom it has taken delivery. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted.

3. Any person in custody pursuant to the previous paragraph shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.

4. Any Contracting State, to which a person is delivered pursuant to Article 9, paragraph 1, or in whose territory an aircraft lands following the commission of an act contemplated in Article 11, paragraph 1, shall immediately make a preliminary enquiry into the facts.

5. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the State of registration of the aircraft and the State of nationality of the detained person and, if it considers it advisable, any other interested State of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 4 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 14

1. When any person has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1, or has disembarked after committing an act contemplated in Article 11, paragraph 1, and when such person cannot or does not desire to continue his journey and the State of landing refuses to admit him, that State may,

if the person in question is not a national or permanent resident of that State, return him to the territory of the State of which he is a national or permanent resident or to the territory of the State in which he began his journey by air.

2. Neither disembarkation, nor delivery, nor the taking of custody or other measures contemplated in Article 13, paragraph 2, nor return of the person concerned, shall be considered as admission to the territory of the Contracting State concerned for the purpose of its law relating to entry or admission of persons and nothing in this Convention shall affect the law of a Contracting State relating to the expulsion of persons from its territory.

Article 15

1. Without prejudice to Article 14, any person who has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1, or has disembarked after committing an act contemplated in Article 11, paragraph 1, and who desires to continue his journey shall be at liberty as soon as practicable to proceed to any destination of his choice unless his presence is required by the law of the State of landing for the purpose of extradition or criminal proceedings.

2. Without prejudice to its law as to entry and admission to, and extradition and expulsion from its territory, a Contracting State in whose territory a person has been disembarked in accordance with

Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1 or has disembarked and is suspected of having committed an act contemplated in Article 11, paragraph 1, shall accord to such person treatment which is no less favourable for his protection and security than that accorded to nationals of such Contracting State in like circumstances.

Chapter VI – Other Provisions

Article 16

1. Offences committed on aircraft registered in a Contracting State shall be treated, for the purpose of extradition, as if they had been committed not only in the place in which they have occurred but also in the territory of the State of registration of the aircraft.

2. Without prejudice to the provisions of the preceding paragraph, nothing in this Convention shall be deemed to create an obligation to grant extradition.

Article 17

In taking any measures for investigation or arrest or otherwise exercising jurisdiction in connection with any offence committed on board an aircraft the Contracting States shall pay due regard to the safety and other interests of air navigation and shall so act as to avoid unnecessary delay of the aircraft, passengers, crew or cargo.

Article 18

If Contracting States establish joint air transport operating organizations or international operating agencies, which operate aircraft not registered in any one State those States shall, according to the circumstances of the case, designate the State among them which, for the purposes of this Convention, shall be considered as the State of registration and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all States Parties to this Convention.

Chapter VII – Final Clauses

Article 19

Until the date on which this Convention comes into force in accordance with the provisions of Article 21, it shall remain open for signature on behalf of any State which at that date is a Member of the United Nations or of any of the Specialized Agencies.

Article 20

1. This Convention shall be subject to ratification by the signatory States in accordance with their constitutional procedures.

2. The instruments of ratification shall be deposited with the International Civil Aviation Organization.

Article 21

1. As soon as twelve of the signatory States have deposited their instruments of ratification of this Convention, it shall come into force between them on the ninetieth day after the date of the deposit of the twelfth instrument of ratification. It shall come into force for each State ratifying thereafter on the ninetieth day after the deposit of its instrument of ratification.

2. As soon as this Convention comes into force, it shall be registered with the Secretary-General of the United Nations by the International Civil Aviation Organization.

Article 22

1. This Convention shall, after it has come into force, be open for accession by any State Member of the United Nations or of any of the Specialized Agencies.

2. The accession of a State shall be effected by the deposit of an instrument of accession with the International Civil Aviation Organization and shall take effect on the ninetieth day after the date of such deposit.

Article 23

1. Any Contracting State may denounce this Convention by notification addressed to the International Civil Aviation Organization.

2. Denunciation shall take effect six months after the date of receipt by the International Civil Aviation Organization of the notification of denunciation.

Article 24

1. Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Contracting States shall not be bound by the preceding paragraph with respect to any Contracting State having made such a reservation.

3. Any Contracting State having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the International Civil Aviation Organization.

Article 25

Except as provided in Article 24 no reservation may be made to this Convention.

Article 26

The International Civil Aviation Organization shall give notice to all States Members of the United Nations or of any of the Specialized Agencies:

a) of any signature of this Convention and the date thereof;

b) of the deposit of any instrument of ratification or accession and the date thereof;

c) of the date on which this Convention comes into force in accordance with Article 21, paragraph 1;

d) of the receipt of any notification of denunciation and the date thereof; and

e) of the receipt of any declaration or notification made under Article 24 and the date thereof.

APPENDIX F

Title 49, United States Code

Section 44902. Refusal to transport passengers and property

(a) MANDATORY REFUSAL. – The Under Secretary of Transportation for Security shall prescribe regulations requiring an air carrier, intrastate air carrier, or foreign air carrier to refuse to transport –

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

(2) property of a passenger who does not consent to a search of the property establishing whether the property unlawfully contains a dangerous weapon, explosive, or other destructive substance.

(b) PERMISSIVE REFUSAL. – Subject to regulations of the Under Secretary, an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety.

(c) AGREEING TO CONSENT TO SEARCH. – An agreement to carry passengers or property in air transportation or intrastate air transportation by an air carrier, intrastate air carrier, or foreign air carrier is deemed to include an agreement that the passenger or property will not be carried if consent to search the

passenger or property for a purpose referred to in this section is not given.

APPENDIX G

No. 06-16457

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AZZA EID, ET AL.,
Plaintiffs-Appellants,
v.
ALASKA AIRLINES, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEVADA
HONORABLE ROBERT C. JONES
(CASE NO. CV-S-04-1304-RCJ-LRL)

BRIEF FOR THE UNITED STATES OF AMERICA
AS AMICUS CURIAE

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* * *

The United States respectfully submits this brief in response to the orders of this Court dated April 23, 2008, and May 12, 2008, inviting the United States to set forth its views as to the proper application of the Tokyo Convention and the Warsaw Convention.

STATEMENT

I. The Tokyo and Warsaw Conventions.

A. The Tokyo and Warsaw Conventions limit the liability of airlines for incidents occurring during international travel. *See* Convention on Offences and Certain Other Acts Committed on Board Aircraft, chap. III, Sept. 14, 1963, 704 U.N.T.S. 219, 20 U.S.T. 2941 (entered into force in the United States Dec. 4, 1969) (Tokyo Convention); Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (entered into force in the United States in 1934) (Warsaw Convention), *reprinted in* 49 U.S.C. § 40105 note.

1. The "principal purpose" of the Tokyo Convention was "the enhancement of safety" aboard aircraft. Robert P. Boyle & Roy Pulsifer, The Tokyo Convention on Offenses and Certain Other Acts Committed On Board Aircraft, 30 J. Air. L. & Com. 305, 321 (1964). The Convention was developed at a time when there was a discernable increase in passenger incidents that threatened the safety of international air travel, including violent hijacking. *See* Gerald F. FitzGerald,

The Development of International Rules Concerning Offenses and Certain Other Acts on Board Aircraft, 1 Can. Y.B. Intl L. 230, 240-41 & n.24, 244 n.29 (1963). In response to these threats, the parties to the treaty sought to supply the "aircraft commander" (*i.e.*, the captain of the flight) and the flight crew with the legal authority to "take necessary measures in respect of acts on board endangering the safety of flight and for the preservation of order in the ever increasing community on board." *Id*. at 232-33.

The Tokyo Convention thus grants the captain and crew of a flight broad powers to act to preserve the safety of the aircraft and its passengers. The captain is permitted to take certain actions when he or she has "reasonable grounds to believe" a person has committed, or is about to commit, an "offence[ ] against penal law" or an act which "may or do[es] jeopardize the safety of the aircraft or of persons or property therein or which jeoparize[s] good order and discipline on board." *See* Tokyo Convention, arts. 1(1), 5-9.

The captain may impose "reasonable measures including restraint" on people who threaten safety, good order, or discipline on board the aircraft. *Id*. art. 6(1). The captain is permitted to enlist the assistance of crew members and other passengers to restrain unruly or dangerous people. *Id*. art. 6(2). Crew members and passengers themselves are authorized to "take reasonable preventive measures" without authorization from the captain when they have "reasonable grounds to believe that such action is immediately

necessary to protect the safety of the aircraft, or of persons or property therein." *Ibid*.

Once the plane is on the ground, the captain may "disembark" a passenger who he has "reasonable grounds to believe has committed, or is about to commit," an act that threatens good order or discipline, and he is required to "report to the [local] authorities * * * the fact of, and the reasons for, such disembarkation." *Id*. art. 8(1)-(2). A captain may take the further measure of delivering to "competent authorities" in the country where an aircraft lands any person who the captain has "reasonable grounds to believe has committed on board the aircraft an act which, in [the captain's] opinion, is a serious offence according to the penal law of the State of registration of the aircraft." *Id*. art. 9(1); *see also id*., art. 9(2) ("The aircraft commander shall as soon as practicable * * * notify the authorities of such State of his intention to deliver such person and the reasons therefor.").

To encourage the exercise of these powers, the Convention immunizes the captain, crew, passengers, and air carrier against any legal liability based on "the treatment undergone by the person against whom the actions were taken" so long as the actions were "taken in accordance with [the] Convention." Tokyo Convention, art 10; FitzGerald, *supra*, 1 Can. Y.B. Int'l L. at 247 (noting that absent such immunity "[t]he aircraft commander, crew members and others would be reluctant to act against persons prejudicing safety, good order and discipline").

2. The Warsaw Convention applies to "all international transportation of persons, luggage or goods performed by aircraft." Warsaw Convention, art. 1(1)[1] At the core of the treaty is a series of provisions governing the nature and scope of a carrier's liability for harms occurring in the course of international air travel. One of those provisions makes air carriers "liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods." *Id*. art. 19. Another renders a carrier liable for "bodily injury suffered by a passenger" if an "accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." *Id*. art. 17. Liability is subject to the carrier's assertion of certain defenses. *Id*. arts. 20, 21.

As the Supreme Court has explained, the Warsaw Convention displaces all local-law remedies for personal injury arising during international air travel. *El Al Israel Airlines* v. *Tsui Yuan Tseng*, 525 U.S. 155, 168-69, 176 (1999); Warsaw Convention art. 24 ("cases covered by" the liability provisions may

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[1] Because the incident in question here occurred on September 29, 2003 (Appellants' Br. at 6; Appellee's Br. at 4), the treaty known as the Montreal Convention, which supersedes the Warsaw Convention, does not apply to this case. *See* Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999 (entered into force on Nov. 4, 2003), *reprinted in* S. Treaty Doc. No. 106-45, 1999 WL 33292734 (2000); *see also Ehrlich* v. *American Airlines, Inc.*, 360 F.3d 366, 372 (2d Cir. 2004) (describing history of Montreal Convention).

"only be brought subject to the conditions and limits set out in this Convention"). However, "[t]he Convention's preemptive effect only on local law extends no further than the Convention's own substantive scope." *Tsui Yuan Tseng*, 525 U.S. at 172 (quoting Brief of the United States as Amicus Curiae 16). The Warsaw Convention applies only when an injury was suffered "on board [an] aircraft or in the course of any of the operations of embarking or disembarking." *Id*. at 171-72 (quoting Warsaw Convention art. 17). An air carrier "is indisputably subject to liability under local law for injuries arising outside of that scope." *Id*. at 172.

II. Facts and Procedural History

A. Plaintiffs are five Egyptian businessmen, the Egyptian wives of three, and the Brazilian fiancee of a fourth; all but one state that they are Muslims of Arab origin. Appellants' Br. at 6; Compl. ¶¶ 5-13. They were traveling as a single group in the first-class cabin of an Alaska Airlines flight from Vancouver, British Columbia to Las Vegas. Compl. ¶¶ 16-17. Though the particular facts are disputed, there is apparently no dispute that some of the plaintiffs were involved in an incident with a flight attendant while the plane was airborne. As a result, the flight attendant informed the captain of the flight by interphone that she had "lost control" of the first class cabin. Appellants' Br. at 7; Appellee's Br. at 5. The pilot stated testified [sic] that the flight attendant sounded hysterical during this call, and that he also

heard shouting in the background over the interphone. *See* Appellants' Br. at 8-9; Appellee's Br. at 5. Plaintiffs allege that they had never caused any disturbance, that they had complied with all crew instructions, and that the flight attendant who made the call to the cockpit was behaving in a "completely irrational" manner. Appellants' Br. at 6-7, 10.

The captain diverted the flight to the Reno-Tahoe Airport, and radioed ahead to ask that the flight be met by police. After speaking with the flight attendant in the airport terminal, the captain asked that plaintiffs be removed from the flight. *See* Appellants' Br. 44; Appellee's Br. 25, 34. At the gate, the police took statements from the captain, the flight crew, and plaintiffs. At that time, the captain also asked the police to arrest plaintiffs and charge them with interfering with the flight crew, a federal felony. Appellants' Br. at 10-11; Appellee's Br. at 25. After being further interviewed by police, plaintiffs were allowed to board a flight with a different airline to Las Vegas. No charges were ever filed. Appellants' Br. at 11.

According to plaintiffs, after the Alaska Airlines flight resumed its trip to Las Vegas without plaintiffs, "a flight attendant falsely announced that the plane had been diverted due to misconduct by the plaintiffs." Appellants' Br. at 11.

B. Plaintiffs filed this suit against Alaska Airlines, alleging five causes of action. The first is a claim for damages due to delay under Article 19 of the Warsaw Convention. The other four are state-law

claims for defamation, intentional infliction of emotional distress, and invasion of privacy/false light, based on two sets of statements made by Alaska Airlines employees: (a) the statements by the captain and other flight crew to police; and (b) the flight attendant's statements to the remaining passengers after the flight resumed. Plaintiffs allege that the flight crew's actions were based on discriminatory animus.

The district court dismissed plaintiffs' state-law claims on the pleadings, holding that those claims were preempted by the Warsaw Convention. *See* 1/5/05 Order. After discovery, the district court granted Alaska Airlines' motion for summary judgment on plaintiffs' remaining claim, for delay under the Warsaw Convention, holding that the Tokyo Convention rendered Alaska Airlines immune from that claim. *See* 6/15/06 Order. The court concluded that "it is more than obvious both subjectively and objectively, that the Captain had reasonable grounds" for diverting the plane and disembarking plaintiffs. *Id*. at 12.

SUMMARY OF ARGUMENT

I. The Tokyo Convention vests pilots and other flight crew with expansive discretion to take action in response to potential threats to safety, order, and discipline affecting the plane or its passengers. The Convention expressly authorizes the captain to restrain passengers and disembark them from the flight when there are "reasonable grounds to believe" an act

affecting the safety, good order, or discipline aboard the aircraft has occurred or is about to occur.

The Convention's drafters were concerned that the prospect of civil or criminal liability would make the flight crew reluctant to exercise the full authority given to them by the Convention. The Convention accordingly provides the flight crew and the air carrier with broad immunity from liability for disembarkation and other actions taken under the treaty. Given the breadth of discretion afforded the aircraft captain and the purpose of the Convention's grant of immunity, review of actions taken by a captain pursuant to the Tokyo Convention must be highly deferential.

The United States takes no position on whether, if the deferential standard mandated by the Tokyo Convention is applied to the summary-judgment record here, the judgment against plaintiffs should be affirmed. Plaintiffs are clearly incorrect, however, in insisting that they are entitled to reversal on the ground that the captain had to conduct an independent investigation prior to diverting the flight, and could not rely on the information received from his crew. That argument is without basis in either the terms or the purpose of the treaty. Even when a plane is on the ground, requiring an independent investigation by the captain as a condition of compliance with the treaty would be impractical, and the Tokyo Convention contemplates that local authorities will conduct a detailed investigation.

II. Plaintiffs' state-law claims were premised on two sets of allegedly defamatory statements by Alaska Airlines employees: (1) reports made by the captain and members of the flight crew to police immediately after the plane landed and the plaintiffs had deplaned, and (2) statements made by a flight attendant to remaining passengers after the flight resumed without plaintiffs.

A. Plaintiff's claims based on the reports to police are barred by the Tokyo Convention to the extent that those reports were made in accordance with the Convention. The Convention requires the captain to report to authorities the reasons for the disembarkation or delivery of a passenger. If the captain had "reasonable grounds to believe" that the plaintiffs had committed or were about to commit an act that would adversely affect the safety, good order, or discipline aboard the aircraft, then the Tokyo Convention immunizes the air carrier based on the required reports.

Even if those claims are not barred by the Tokyo Convention, they are nevertheless preempted by the Warsaw Convention. The Warsaw Convention preempts state-law claims for injuries arising "on board an aircraft or in the course of any of the operations of embarking or disembarking" from the aircraft. In determining whether an injury falls within the Warsaw Convention's scope, courts have generally considered several factors, including the timing and location of the injury, the activity of the passenger at the time of injury, and whether the passenger was in the

control of the air carrier. Here, these factors – particularly the close temporal and physical proximity of the allegedly defamatory statements to plaintiffs' actual deplaning – militate in favor of finding the alleged injury to have occurred within the scope of the Warsaw Convention.

B. As to the claims premised on statements made by a flight attendant after the flight resumed without plaintiffs, the district court reached its conclusion without consideration of relevant factors. The district court focused on the fact that the flight crew and aircraft were simply completing their ticketed international route. But the Warsaw Convention requires consideration of whether the statements were made "in the course of any of the operations of * * * disembarking" plaintiffs, including plaintiffs' circumstances at the time the statements were made. Because plaintiffs' state-law claims were dismissed on the pleadings, there is not a sufficiently developed factual record on that issue, and therefore the case should be remanded to the district court for further proceedings as to those claims.

ARGUMENT

I. The Tokyo Convention Immunizes Actions Taken Within a Broad Range of Discretion.

A. The Tokyo Convention renders the captain of a flight and the air carrier immune from suits based on actions authorized by the Convention. Tokyo

Convention, arts. 1, 6-10. The Convention gives the captain authority to disembark a passenger in the territory of "any State in which the aircraft lands," if there are reasonable grounds to believe that person has committed, or is about to commit, an act that may jeopardize the safety, good order, or discipline aboard the aircraft. *Id*. art. 8. The captain may take the further measure of delivering a passenger to competent authorities in a Contracting State if he believes the passenger has committed a "serious offence." *Id*. art. 9.

In reviewing whether the actions of the captain are immunized by the Tokyo Convention, due regard must be given to the broad discretion afforded the captain in determining when to act. The captain is not only permitted to respond to threats to safety, but may take reasonable measures to maintain "good order and discipline on board." *Id*. arts. 1(1)(b), 6(1)(b). The captain's authority extends not simply to acts that in fact jeopardize safety, but to all "acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft * * * or the good order and discipline on board." Tokyo Convention art. 1(1)(b). The captain need not wait until a passenger acts; he may respond with "reasonable measures" even if there are only reasonable grounds to believe a person "is about to commit" those acts. *Id*. art. 6(1) (emphasis added). The broad scope of authority afforded the captain is a strong indication that the treaty signatories intended the captain's exercise of

that authority to be reviewed with great deference, whatever the precise articulation of the standard.

That understanding of the treaty is confirmed by its negotiating history. *See Air France* v. *Saks*, 470 U.S. 392, 400 (1985) ("[C]ourts frequently refer to" the "published and generally available" negotiating history of the Warsaw Convention "to resolve ambiguities in the text"). The parties to the Tokyo Convention rejected an Argentine proposal that would have required the aircraft commander to have an objective basis – "concrete" and "specific external facts" – for his actions in restraining and disembarking a passenger who had not yet committed an actual disorderly act. Minutes, International Convention on Air Law, Tokyo 1963, ICAO Doc. 8565-LC/152-1 ("Tokyo Conference Minutes") at 178-179. Several representatives opposed the proposal because, as one representative said, it conflicted with the Convention's goal "to give powers of judgment to the aircraft commander." *Ibid*. The defeat of the Argentine proposal serves to highlight the broad discretion afforded the aircraft commander: the Convention permits a captain to rely on his reasonable judgment, without searching out "concrete" facts on which to base that judgment.

Moreover, engaging in searching review of decisions made by the captain would hinder the central goal of the broad immunity conferred by the Tokyo Convention – to encourage captains to take decisive action, often under chaotic circumstances, to preserve the safety of the plane and its passengers without fear of having those actions second-guessed in the

relative calm of a courtroom. *See* Tokyo Convention, art. 10; FitzGerald, *supra*, 1 Can. Y.B. In'tl L. at 247. The parties consistently rejected proposals to water down or eliminate the Convention's grant of immunity. The parties rejected a draft of the immunity provision that would have required captains to "strictly" adhere to the treaty terms in order to qualify for the immunity provision. Tokyo Conference Minutes 317-24. The delegate who proposed deletion of the word "strictly" from the draft article stated that if the word were "given a restrictive interpretation, [it] could reduce the protection which [the Convention has] sought to give to the persons concerned." *Id*. at 317. The French delegation proposed eliminating the immunity provision altogether, but that proposal also was rejected. *Id*. at 219, 231. One delegate remarked that absent an explicit immunity provision "the aircraft commander might have to hesitate and might, perhaps, do nothing in circumstances in which he should have acted." *Id*. at 223. The delegate expressed concern that a court would second-guess the decisions of an aircraft commander: "The urgent conditions that might arise on board an aircraft would have to be examined by a court and that might lead to the discovery of arguments which had escaped the attention of the aircraft commander." *Ibid*.

The parties also rejected a proposal to limit immunity to civil proceedings. *See* Tokyo Conference Minutes 232; Boyle & Pulsifer, *supra*, 30 J. Air L. & Com. at 344. The Convention thus grants the immunity from liability in "any proceeding," whether

criminal, administrative, or civil. Tokyo Convention art. 10; *see* Boyle & Pulsifer, *supra*, 30 J. Air L. & Com. at 344. A narrow view of Tokyo Convention immunity would thus expand the ability of countries to subject pilots, crew members, and passengers who respond to threats aboard aircraft to criminal prosecution as well as civil damages.

Affording the captain wide discretion to act in response to perceived threats is eminently sensible in light of the circumstances in which aircraft operate. Threats to airplane security require pilots and crew members to act without hesitation where potential problems arise, and to err on the side of caution by eliminating possible threats before they have an opportunity to materialize. That is also true for actions taken while the plane is on the ground, such as decisions to disembark passengers or deliver them to authorities. Although decisions made on the ground may present less risk of immediate physical danger, the complicated and coordinated nature of airline flight schedules nonetheless makes prompt action necessary. *Cf. Williams* v. *Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975) (noting that decisions to deny carriage under 49 U.S.C. § 44902 "in many instances probably have to be made within minutes of the plane's scheduled take-off time, and that the carrier's formulation of opinion would have to rest on something less than absolute certainty"). Moreover, a plane that is on the ground is eventually going to take off, and a pilot need not wait until a threat unfolds during flight before deciding to disembark a passenger.

B. Plaintiffs urge that immunity under the Tokyo Convention is premised on the captain's undertaking a personal investigation into all available facts, even if, based on the information obtained from other crew members alone, there were plainly "reasonable grounds to believe" that the safety or good order of the flight was jeopardized. *See* Appellant's Br. at 29-39; Reply Br. at 8-13.

Nothing in the Tokyo Convention requires the captain to conduct an independent investigation before taking any of the actions specified in the treaty. That understanding of the Convention is confirmed by the contemporaneous understanding of the phrase "reasonable grounds to believe" as used in certain federal statutes. As the United States representative to the Tokyo Conference explained, "the phrase 'reasonable grounds' had a substantial legal significance" in U.S. law. Tokyo Conference Minutes 155.

For example, a federal statute authorized agents of the Bureau of Narcotics to make warrantless arrests where there were "reasonable grounds to believe" a violation of federal narcotics laws had occurred or was occurring. *See* Narcotics Control Act of 1956, § 104, 70 Stat. 567, 570; *Draper* v. *United States*, 358 U.S. 307, 310 (1959) (quoting this provision). The Supreme Court held that information from a reliable informant could provide "reasonable grounds" under that statute. *See Draper*, 358 U.S. at 313; *see also Butler* v. *United States*, 273 F.2d 436, 441 (9th Cir. 1959) (permitting reliance on a paid informant).

Similarly, by the time of the Tokyo Convention, the Supreme Court had made clear that in determining whether "reasonable grounds" exist under federal arrest statutes, one asks only whether "the facts and circumstances *known to the officer* warrant a prudent man in believing that the offense has been committed." *Henry* v. *United States*, 361 U.S. 98, 102 (1959) (emphasis added).

Although the Supreme Court interpreted "reasonable grounds" in the narcotics arrest statute to be substantially equivalent to "probable cause" under the Fourth Amendment, *Draper*, 358 U.S. at 310 n.3, for the reasons explained in Part I.A, review of a captain's decision under the Tokyo Convention should be significantly more deferential than review of a DEA agent's warrantless arrest. Indeed, the current FBI arrest statute authorizes arrest only where there are "reasonable grounds to believe that the person to be arrested *has committed* or *is committing*" a federal *felony*. 18 U.S.C. § 3052 (emphases added). The Tokyo Convention, by contrast, broadly permits disembarkation where passengers have committed, or are "*about to commit*" any act that would adversely affect the "*safety, good order, or discipline aboard the aircraft*." Tokyo Convention, arts. 1(1)(b), 8(1) (emphases added). Furthermore, in contrast to the arrest statute, which gives DEA agents authority to detain persons, the Tokyo Convention contemplates that the ultimate detention decision will be made by the local authorities. *See id*. art. 13(4) (providing that a contracting state taking custody of a delivered passenger

"shall immediately make a preliminary enquiry into the facts").

Moreover, FAA regulations make it difficult, if not impossible, for a captain to personally investigate potential disturbances in the passenger cabin. The Federal Aviation Administration (FAA) requires that cockpit doors be closed and locked at all times the aircraft is operating. 14 C.F.R. § 121.587. And crew members in the cockpit must remain in their seats with seatbelts fastened except in limited circumstances. 14 C.F.R. § 121.543. In the event of a disturbance, pilots are to remain in the closed cockpit, and cannot leave the cabin to assist crew members. *See* FAA Crew Training Manual, Common Strategy for Hijack, App. II at 21 (reproduced in addendum). The pilot must therefore be able to rely on the reports of the cabin crew, and keep his attention focused on flying the plane. That is true even if, as plaintiffs assert, the pilot had "no regular working relationship with any member of the cabin crew." Appellant's Br. at 21-22.

Even when the plane is on the ground, the Tokyo Convention imposes no obligation on a pilot to undertake a personal investigation. Given the scheduling constraints on the flight crew,[2] it would be impractical

[2] The FAA has complex rules governing flight time limitations and rest requirements for domestic carriers. *See* 14 C.F.R. § 121.470 *et seq*.; *see also Air Transport Ass'n of Am., Inc.* v. *FAA*, 291 F.3d 49 (D.C. Cir. 2002) (addressing these regulations).

to require a flight to be held while the pilot undertakes a thorough investigation. If anything, the Convention contemplates that any investigation will be done by competent authorities who, unlike pilots, are trained to investigate such incidents and sort out competing stories. A captain is permitted to deliver to 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." Tokyo Convention, art. 9(1). This provision was crafted to give a captain the authority to turn a passenger over to competent authorities when in his or her subjective belief, informed by the facts at hand, the acts committed are penal offenses. The provision does *not* require the captain to conclusively determine whether the actions were actually substantive offenses. *See* S. Exec. Rep. No. 90-L (Article-By-Article Analysis) at 8. Article 17, in turn, contemplates that the State parties are responsible for "taking any measures for investigation or arrest" and requires that in doing so the State "shall pay due regard to the safety and other interests of air navigation and shall so act as to avoid unnecessary delay of the aircraft, passengers, crew or cargo." Tokyo Convention art. 17.

A court applying the Tokyo Convention should not simply ask whether the captain's actions were correct with the benefit of hindsight, but must consider whether the information known to the captain at the time supports the exercise of the broad discretion afforded to him or her by the Tokyo Convention. In sum, plaintiffs' contention that the captain should be

required to conduct an independent investigation in order to qualify for immunity under the Tokyo Convention is inconsistent with the text and purpose of the Convention. Accordingly, that argument should be rejected.

C. Plaintiffs do not dispute that a flight attendant made a frantic call to the captain while the plane was in flight, telling him that she had "lost control" of the first class cabin. Appellants' Br. at 7. Nor do they challenge the captain's testimony that he and the first officer both heard shouting in the cabin. *Id*. at 8-9. When viewed against the backdrop of those undisputed facts and the legal standards outlined above, there were plainly reasonable grounds supporting the captain's decision to divert the airplane to Reno. However, plaintiffs' claim of delay under the Warsaw Convention is also premised on the captain's decision to disembark plaintiffs and deliver them to authorities. The government takes no position on whether a dispute of fact exists with respect to the decisions to disembark and deliver. The government accordingly expresses no view as to whether summary judgment against plaintiffs was appropriate on the record here.

II. Plaintiffs' State-Law Tort Claims.

Plaintiffs' claims under state-law are based on two sets of allegedly defamatory statements made by employees of Alaska Airlines. The first statements were made by the captain and other members of the

flight crew to police after the flight was diverted to the Reno-Tahoe Airport and plaintiffs were removed from the flight. The other statements were allegedly made by a flight attendant to the remaining passengers after the Alaska Airlines flight had resumed to Las Vegas without plaintiffs.

As explained below, the immunity provided by the Tokyo Convention extends to the statements made by Alaska Airlines employees to police to the extent they were made in accordance with the Convention. But even if those statements do not qualify for protection under the Tokyo Convention, plaintiffs' state-law claims based on those statements are nonetheless preempted by the Warsaw Convention.

The state-law claims based on the statements made by the flight attendant to the remaining passengers are a different matter. The district court failed to consider relevant factors in determining whether the alleged injuries were suffered within the scope of the Warsaw Convention. In particular, the district court did not consider the circumstances of the plaintiffs in determining whether the injury occurred in the course of "any of the operations of embarking or disembarking." Warsaw Convention art. 17. Given that the claims were dismissed on the pleadings, this Court should remand those state-law claims to the district court for further factual development.

A. Claims Based On Statements Made To Police.

1. The Tokyo Convention requires a flight captain to report the reasons for disembarkation or delivery of a passenger to local authorities. *See* Tokyo Convention, art. 8(2) (requiring the captain to "report to the [local] authorities * * * the fact of, and the reasons for, such disembarkation"); *id*., art. 9(2) ("The aircraft commander shall as soon as practicable and if possible before landing in the territory of a Contracting State with a person on board whom the aircraft commander intends to deliver in accordance with the preceding paragraph, notify the authorities of such State of his intention to deliver such person and the reasons therefor.").

The immunity provided by the Tokyo Convention clearly extends to such reports, to the extent they are made "in accordance with" the terms of the Tokyo Convention. *Id*. art. 10. Thus, if disembarkation and delivery of the plaintiffs were appropriate because the captain had "reasonable grounds" to believe that plaintiffs had committed, or were about to commit, an act that may jeopardize good order or discipline, or serious criminal offense, then the required statements to police following such disembarkation or delivery are immunized.

2. Even if extending Tokyo Convention immunity to the captain and flight crew's statements to police is inappropriate (because the captain's actions were, for whatever reason, not in accordance with the Tokyo

Convention), the Warsaw Convention preempts state-law claims based on those statements. As explained above, the Warsaw Convention displaces all state-law claims based on personal injury (including those for non-physical injury) arising during international air travel. *Tsui Yuan Tseng*, 525 U.S. at 168-69, 176. The preemptive force of the Warsaw Convention, however, extends "'no further than the Convention's own substantive scope.'" *Id*. at 172 (quoting Brief of the United States as Amicus Curiae 16). The Warsaw Convention only extends to injuries suffered "'on board [an] aircraft or in the course of any of the operations of embarking or disembarking,'" and an air carrier "is indisputably subject to liability under local law for injuries arising outside of that scope." *Id*. at 171-72 (quoting Warsaw Convention art. 17).

Here, the events causing injury to plaintiffs are within the scope of the Warsaw Convention, because the events giving rise to plaintiffs' claims took place "in the course of any of the operations of . . . disembarking." Warsaw Convention art. 17. "Whether a passenger is embarking or disembarking is a question of federal law to be decided on the facts of each case." *Schmidkunz* v. *Scandinavian Airlines System*, 628 F.2d 1205, 1207 (9th Cir. 1980). In determining the boundaries within which the Warsaw Convention applies, four factors are generally considered: (1) the location of the passenger relative to the aircraft, (2) the activity in which the passenger was engaged and whether or not it was necessary to the process of disembarkation, (3) the degree to which the

airline was in control of the passenger, and (4) the temporal distance between the injury suffered and the actual act of embarking or disembarking. *See Marotte* v. *American Airlines*, 296 F.3d 1255, 1260 (11th Cir. 2002); *McCarthy* v. *Northwest Airlines, Inc.*, 56 F.3d 313, 316-17 (1st Cir. 1995); *Buonocore* v. *Trans World Airlines, Inc.*, 900 F.2d 8, 10 (2d Cir. 1990). Although this Court has not explicitly adopted this multi-factor test, it has considered these factors in applying the Convention. *Schmidkunz*, 628 F.2d at 1207 (injury occurred outside scope of Warsaw Convention where plaintiff "had left the airplane on which she had arrived in Copenhagen, had walked not closer than approximately 500 yards from the boarding gate to the SAS airliner that she was to take," "was still within the common passenger area of the terminal," "was not imminently preparing to board the plane," and "was not at that time under the direction of SAS personnel"). None of these factors is dispositive, and this Court has considered "the total circumstances" surrounding the injury. *Maugnie* v. *Compagnie Nationale Air France*, 549 F.2d 1256, 1262 (9th Cir. 1977).

Here, those factors indicate that the flight crew's statements to police took place within the scope of the Warsaw Convention. The flight crew's conversation with police took place immediately after plaintiffs were removed from the aircraft and were about events that occurred on the aircraft. *See* 1/6/05 Order 2. At the time, plaintiffs were located with the flight crew and police inside the Reno-Tahoe terminal near

the gate. *Ibid*. Such close temporal and physical proximity to the passengers' actual deplaning (the first and fourth factors above) weighs strongly in favor of finding that the injury took place within the scope of the Warsaw Convention. *See Marotte*, 296 F.3d at 1260 (finding that plaintiffs' location at gate was suggestive of "an extremely close spatial relationship between the [accident] and the aircraft").

By contrast, this Court found an injury to be outside the scope of the Warsaw Convention where the passenger "had deplaned and was heading to the Swiss Air gate to make her connecting flight to Geneva at the time of injury" and was located in a "common passenger corridor of [the airport] which was neither owned nor leased by Air France." *Maugnie*, 549 F.2d at 1262; *see also Buonocore* v. *Trans World Airlines, Inc.*, 900 F.2d 8, 10 (2d Cir. 1990) (injury in a public area "nowhere near the gate" outside scope of Warsaw Convention); *Martinez Hernandez* v. *Air France*, 545 F.2d 279, 282 (1st Cir. 1976) (injury suffered at baggage claim outside scope of Warsaw Convention).

As to whether the activity in which the plaintiffs were engaged was necessary to the process of disembarkation (the second factor above), this Court has indicated that "the disembarking passenger normally has few activities, if any, which the air carrier requires him to perform" as part of the disembarkation process. *Maugnie*, 549 F.2d at 1260 (internal quotation marks omitted). Here, however, plaintiffs were active participants in the discussion involving the flight

crew and the police during disembarkation, *see* 1/5/05 Order 2, and it appears that plaintiffs were required to explain their version of the story before receiving clearance to depart from the police. *See* Appellants' Br. at 52; *cf. Martinez Hernandez*, 545 F.2d at 282 (passengers not disembarking because they were not "engaged in any activity relating to effecting their separation from the aircraft").

The third factor considers the degree of control the airline is exerting over the passenger at the time of the injury. Plaintiffs urge that they were not within the control of the airline when the statements were made because they were placed immediately into the custody of police upon deplaning. The fact that plaintiffs were no longer within the control of the airline at the time of the defamatory statements tends to weigh against Alaska Airlines' position. *See Turturro* v. *Continental Airlines*, 128 F. Supp. 2d 170, 182 (S.D.N.Y. 2001) (holding that "crucial acts took place *after* 'disembarking'" in part because passenger "plaintiff had already been delivered into the hands of the police and a medical team"). As explained above, however, no single factor is dispositive, and this Court considers the "total circumstances surrounding a passenger's injuries." *Maugnie*, 549 F.2d at 1262. Here, the "total circumstances," particularly the physical and temporal proximity and relationship to the act of deplaning, and the direct causal connection between deplaning the passengers and reporting the reasons to authorities, lead to the conclusion that the

flight crew's statements to police were made within the scope of the Warsaw Convention.

B. Claims Based on Statements Made By Cabin Crew After Plane Resumed Flight Without Plaintiffs.

By contrast, plaintiffs' claims based on statements allegedly made to the remaining passengers after the flight continued to Las Vegas without them are arguably outside the scope of the Warsaw Convention. The Warsaw Convention by its terms applies only to injuries suffered during the "international carriage of persons." Warsaw Convention, art. 1(1). Such carriage ends when "the operations of * * * disembarking" have completed. *Id*. art. 17; *Tsui Yuan Tseng*, 525 U.S. at 171-72. As explained above, determining whether the operations of disembarking have completed requires an inquiry into the totality of the circumstances surrounding a passenger's injury, including at least some consideration of the circumstances of the passenger at the time of injury. *See*, *e.g.*, *Marotte*, 296 F.3d at 1260 (considering "the passenger's activity at the time of the accident"; "the passenger's whereabouts at the time of the accident"; "the amount of control [over the passenger] exercised by the carrier at the moment of the injury"; and "the imminence of the passenger's actual boarding of the flight in question").

The district court concluded that the statements made by the flight attendant after the flight resumed were within the scope of the Warsaw Convention

because they "occurred during the completion of the ticketed international route." 1/5/05 Order at 6. Although, as discussed above, "the operations of * * * disembarking" particular passengers may continue even after those passengers have physically left the aircraft – particularly where, as here, those "operations of * * * disembarking" require a diversion from the scheduled route, are initiated by the airline over the passengers' objection, and involve the possibility that the passengers will leave the aircraft in custody – those operations do not automatically last for the entire time until "completion of the ticketed international route." The question whether plaintiffs were still within the Warsaw Convention's "substantive scope," and its "preemptive effect," requires consideration of more than just whether the plane was still in the course of its scheduled international flight." *Tsui Yuan Tseng*, 525 U.S. at 172.

Because plaintiffs' state-law claims were dismissed on the pleadings, there has been insufficient factual development to determine whether the flight attendants allegedly tortious remarks were made "in the course of any of the operations of * * * disembarking" plaintiffs. Plaintiffs were clearly no longer on board the aircraft, but the pleadings do not make clear whether they were still at the gate, were still in discussions with airport or law enforcement authorities, or were at liberty and had moved to a public area of the terminal. Nor do the pleadings make clear how much time had passed between plaintiffs' removal from the aircraft and the statements made aboard the aircraft. These physical and temporal factors should

have been considered as part of the preemption inquiry under the Warsaw Convention. Accordingly, the district court's judgment as to these state-law claims should be vacated and the case remanded for further proceedings.

CONCLUSION

For the foregoing reasons, the district court's judgment of dismissal as to plaintiffs' state-law claims based on statements made by Alaska Airlines employees to police should be affirmed, and the district court's judgment as to the remaining state-law claims should be vacated and the case remanded for further proceedings. The government takes no position on the appropriate disposition of plaintiffs' claim for delay under the Warsaw Convention.

Respectfully submitted,

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