

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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BRIEF FOR THE UNITED STATES OF AMERICA
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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. Int'l 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 jeopardize[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

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.

(continued...)

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 "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

¹(...continued)
2004) (describing history of Montreal Convention).

[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 fiancée 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 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 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

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).

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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JULY 2008

CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that the foregoing Brief for the United States of America as Amicus Curiae satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7) and Ninth Circuit Rule 32-1. The brief was prepared in Courier New monospaced font, has 10.5 or fewer characters per inch, and contains 6560 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2008, I filed and served the foregoing Brief for the United States of America as Amicus Curiae by causing an original and fifteen copies to be sent to this Court by Federal Express overnight, and by causing two copies to be served upon the each of the following counsel by Federal Express overnight:

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