No. 24-7204

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Atef Bandary,

Plaintiff-Appellant,

v.

Delta Airlines, Inc.,

Defendant-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Central District of California
Civil Action No. 17-CV-1065, Judge Dale S. Fischer

OPENING BRIEF FOR PLAINTIFF-APPELLANT ATEF BANDARY

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Introduction

In May 2015, during a three-and-a-half-hour flight from Atlanta to Salt Lake City, Atef Bandary walked down the aisle to speak to his partner sitting a few rows away, used the restroom, and requested food from a Delta flight attendant with which to take his medicine. In a series of escalating responses to this mundane conduct, flight attendants aggressively confronted Bandary, handcuffed him so tightly that his wrists bled, and humiliated him by leaving him exposed to other passengers after his pants fell to the floor, causing Bandary lasting physical and emotional injuries.

Bandary suffers from HIV, diverticulitis, and an enlarged prostate—requiring regular use of the restroom and daily doses of medication taken with food. So, early in the flight, Bandary asked a flight attendant for a snack with which to take his medication. The flight attendant refused. Dismayed, Bandary requested help from a second flight attendant, who apologized for her colleague's conduct and immediately provided him complimentary food and beverages. Bandary then took a photograph of the flight attendant who had denied him food, intending to file a consumer complaint with Delta.

After lead flight attendant Joy Rodemoyer heard about this incident, she confronted Bandary while he was waiting to use the restroom and demanded that he return to his seat. Bandary pleaded with Rodemoyer to allow him to use the restroom first. Unmoved by Bandary's visible

distress, Rodemoyer escalated the situation by summoning other flight attendants and a law-enforcement officer. With their help, she restrained Bandary in plastic handcuffs behind his back, causing injuries to his wrists and arms.

Rodemoyer then forced Bandary to sit with his arms restrained behind him for the remainder of the flight, causing permanent injuries to his neck and shoulders too. Beyond these physical injuries, the incident left Bandary with lasting emotional distress, anxiety, and depression, exacerbating his preexisting Post-Traumatic Stress Disorder (PTSD) and requiring ongoing professional treatment.

Bandary sued Delta under the Montreal Convention to recover for these injuries. After a four-day trial, a jury awarded Bandary $7.2 million. Finding this verdict excessive, the district court ordered a new trial. The court then granted summary judgment to Delta, holding that the airline is immune from suit under the Aviation and Transportation Security Act (ATSA), which shields airlines and their employees for their disclosures of suspicious behavior to law enforcement.

That holding was wrong for multiple reasons. To begin with, ATSA immunizes airline employees only for "disclosure[s]" they make to law-enforcement officials—not for airline conduct following those disclosures—so it has nothing to say about Bandary's injuries, which resulted from Delta's actions separate from any disclosure. Second, even if ATSA immunity extends to airline conduct beyond an initial disclosure,

a jury could find that Rodemoyer's complaint about Bandary's innocuous behavior does not qualify, under ATSA, as a disclosure of a "suspicious transaction" related to "aircraft or passenger safety." Third, even if we assume (counterfactually) that Bandary's behavior was suspicious or safety-related under ATSA, a jury could find that his injuries resulted from decisions made solely by Delta, so his claims are not barred.

The district court's errors extended beyond its misapplication of ATSA immunity to a basic misunderstanding of the Montreal Convention. Under Article 17(1), Bandary may recover for emotional injuries arising out of any accident in which he also suffered bodily injury, regardless of whether the emotional injuries were caused by a bodily injury. The causation requirement demanded by the district court is at odds both with the Montreal Convention's text and its passenger-friendly objectives. So, even if one accepts Delta's extravagant argument that it is immune for all physical injuries Bandary sustained after law-enforcement involvement, Bandary may still recover for the emotional injuries suffered prior to that point.

Finally, even if (1) Delta is immune for all actions after law enforcement intervened and (2) damages for emotional injuries are recoverable under the Montreal Convention only when caused by bodily injuries, a jury could find that Bandary sustained a bodily injury that caused him emotional injuries before law enforcement arrived on the scene. Thus, even if the Court were to embrace all of Delta's legal

propositions, each of which Bandary maintains is incorrect, Bandary may still recover.

Statement of Jurisdiction

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1332(a)(1). On November 1, 2024, the district court entered summary judgment in favor of Delta, disposing of all of Bandary's claims. Bandary filed a notice of appeal on November 22, 2024. This Court has jurisdiction under 28 U.S.C. § 1291.

Issues Presented

The first three issues set out below—issues I.A, B, and C—concern whether the district court erred in holding Delta immune under the Aviation and Transportation Security Act, or ATSA. They are presented in what Bandary views as the most logical order. If this Court rules for Bandary on any of them, it need not reach the other two.

Issues II and III concern the Montreal Convention.

I.A. Whether the district erred in holding that ATSA immunity applies to Delta's conduct beyond its "disclosure" to law enforcement.

B. Whether a reasonable jury could find that a flight attendant's report about Bandary's mundane behavior was not a "disclosure" of a "suspicious transaction" related to "a threat to aircraft or passenger safety" sufficient to trigger ATSA immunity.

C. Even if ATSA immunity applies to Delta's conduct after its disclosure, whether a reasonable jury could find that Delta took injury-producing actions independently of law enforcement and therefore is not entitled to ATSA immunity.

II. Whether Bandary can recover under Article 17(1) of the Montreal Convention for emotional injuries that occurred in the same "accident" as his bodily injuries regardless of whether they were caused by his bodily injuries.

III. Whether a reasonable jury could find that Bandary suffered injuries compensable under the Montreal Convention prior to law-enforcement involvement.

Statute and Treaty Involved

The principal statute and treaty involved in this appeal are set out in the Addendum to this brief.

Statement of the Case

I. Factual background

A. Delta's refusal to provide Bandary with food on Flight 1105

On May 29, 2015, Plaintiff-Appellant Atef Bandary flew home from Buenos Aires, Argentina, to Palm Springs, California, with his late partner, Gary Effertz. 2-ER-152. The second leg of Bandary's trip (Delta

Flight 1105), at issue here, went from Atlanta, Georgia, to Salt Lake City, Utah. 2-ER-152.

Bandary has several medical conditions, including HIV, diverticulitis, arthritis, osteoporosis, and an enlarged prostate. 2-ER-156, 167, 184; 3-ER-345. He also suffers from vision loss in one eye. 2-ER-181. To treat his HIV, Bandary must take medication with food at the same time every day. 3-ER-334. Accordingly, shortly after the airline's meal service began, Bandary approached Delta flight attendant Tammy Faucher to request food with which to take his medication. 2-ER-161. She refused, telling him he needed to wait his turn. 2-ER-161.

Desperately needing to take his medicine, Bandary sought help from a second flight attendant, Lucy Cook. 2-ER-162. She apologized for the poor customer service and provided him with crackers, water, and complimentary wine, allowing Bandary to take his medication. 2-ER-162. After that, when Cook passed him during the flight, "he would smile and wave every time he saw her." 2-ER-121; 3-ER-413.

By Delta's own account, Bandary stretched his legs, spoke with his partner, who was seated several rows ahead of him, and used the bathroom several times. 3-ER-551. At some point, while waiting in line for the bathroom, Bandary took a picture of Faucher and another flight attendant because he planned to file a customer-service complaint with Delta. 2-ER-164-66.

B. Delta's escalation

About 45 minutes before landing, Cook mentioned in passing to the lead flight attendant, Joy Rodemoyer, that Bandary was displeased with Delta's customer service and had taken a photograph of flight attendants. 2-ER-229-30. Although Cook assured Rodemoyer that she had "handled" the situation, Rodemoyer insisted on approaching Bandary to "see if there was something specific that was upsetting him other than his complaint of poor service." 2-ER-213, 235; 3-ER-477. Rodemoyer later claimed that Cook also reported that passengers were complaining about Bandary's conduct, but Cook herself testified to the contrary that "no one had complained" to her about Bandary. 3-ER-453, 494.

Before approaching Bandary, Rodemoyer asked the pilots to check Bandary's background with Delta operations on the ground. 2-ER-211-12. The captain responded that there was no noteworthy information about his background or history. 2-ER-212-13. Rodemoyer herself did not think he was a terrorist and had no reason to believe he was on a no-fly list. 3-ER-454.

After learning that Bandary's background was no cause for concern, Rodemoyer nevertheless confronted Bandary, who was waiting to use the restroom. 2-ER-166. She asked for his name and confirmed his identity but did not ask him about his customer-service concerns, the excuse she later provided for approaching him. 2-ER-166; 2-ER-213. Instead, she demanded that Bandary "come with [her]." 2-ER-166. Bandary

responded that he had diarrhea and needed to use the bathroom first, but Rodemoyer refused his request. 2-ER-166-67. Bandary again pleaded that he urgently needed to use the restroom and began to call out to his partner, Effertz, for help, but Rodemoyer remained unmoved. 3-ER-365; 2-ER-167-68.

At that point, Rodemoyer—and several other flight attendants, including Cook, who had been observing the conversation—advanced on Bandary, who is a small person, standing just five feet seven inches and weighing only 125 pounds. 2-ER-160, 168-69. The group cornered him, causing him to fall and land on his rear. 2-ER-168-69. The flight attendants left Bandary on the floor for "several minutes" before helping him to his feet. 2-ER-169.

Despite Cook's initial friendliness, she then stepped in and attempted to restrain Bandary with plastic handcuffs known as "tuff cuffs." 3-ER-416, 487, 498. She became frustrated, screaming at Bandary to allow her to place the cuffs on him. 3-ER-498, 514. She later testified that she planned to place them on him "no matter what." 3-ER-498. Delta maintains that Bandary contacted Cook's hand while resisting these efforts, though Bandary testified that he did not. 2-ER-223; 3-ER-369. Leaving Bandary and Cook in the rear galley, Rodemoyer sought assistance from Special Agent Nicholas Vahe, an officer with the Treasury Inspector General for Tax Administration who happened to be on board as a passenger. 2-ER-239-40; 3-ER-440-41. Vahe accompanied

Rodemoyer to where she had left Bandary at the back of the plane. 2-ER-242.

Rodemoyer sent Cook to first class and took charge, placing the tuff cuffs on Bandary's wrists while Vahe held his arms. 3-ER-491. Rodemoyer zipped the cuffs so tightly that they caused Bandary immediate pain and physical injury, such that he was "screaming that [the cuffs] were too tight." 2-ER-171-72, 246. Bandary suffered cuts and scrapes on his wrists and lower arms as a result. 1-ER-7; 2-ER-102; 3-ER-376-77. Eventually realizing the cuffs were too tight, either Rodemoyer or Vahe cut them off and cuffed Bandary's hands behind his back with a looser set of cuffs. 2-ER-249.

After Bandary was cuffed the second time, Rodemoyer decided not to return Bandary to his seat until "the last possible minute" prior to landing. 2-ER-249; 3-ER-446. While waiting, Bandary's pants fell down to his ankles. 2-ER-172. Bandary was not wearing underwear, 3-ER-347-48, so he experienced an "embarrassing" and "humiliating" exposure in front of the other passengers. 3-ER-372. Although Bandary and Effertz pleaded for someone to help pull Bandary's pants up, at first, no one did. 3-ER-372; 2-ER-101. After several minutes, Rodemoyer and Effertz together pulled Bandary's pants up. 2-ER-172; 3-ER-448, 519.

Shortly thereafter, as a result of Rodemoyer's refusal to let him use the restroom and his pressing diarrhea, Bandary defecated down his leg.

3-ER-372; 2-ER-185. The flight attendants did nothing to address these unsanitary conditions. *See* 3-ER-380.

As the plane approached Salt Lake City for landing, Rodemoyer moved Bandary back to his seat. Sitting with his hands cuffed behind his back led to neck pain that has persisted for years. 3-ER-373-74, 381. After landing, law-enforcement officials escorted Bandary off the plane. 2-ER-173, 132. He was taken in an ambulance to an emergency room, where he was evaluated psychologically. 3-ER-374; 2-ER-132. After he was discharged, Delta refused to book him on another flight, so Bandary rented a car and drove with Effertz from Salt Lake City back to his home in Palm Springs. 3-ER-380, 601.

C. The aftermath

The in-flight incident imposed a severe physical and emotional toll on Bandary. The handcuffing caused Bandary pain—worsened by his arthritis and osteoporosis—and bleeding wrists requiring bandages. 2-ER-166, 171-72, 174-75. Bandary also suffered neck and shoulder pain, 2-ER-102, 172-73, 176, 182, resulting from his hands being cuffed behind his back while he was seated during the approach and landing. 3-ER-373-74.

Bandary also suffered lasting emotional injuries, requiring treatment at the Inland Psychiatric Medical Group for anxiety, depression and PTSD. 3-ER-384, 386-87, 427; 2-ER-29.

The handcuffing and fall re-triggered Bandary's preexisting PTSD, stemming from living with the risk of persecution in his native Egypt and experiencing torture and intimidation by law enforcement in Kuwait. 3-ER-422-23, 426, 528; 2-ER-29. In Egypt, he suffered from "ongoing concern, living as a gay man in a country where he could easily be killed for being gay and [] could legally … be imprisoned for being gay." 3-ER-422-23, 340-41. Later, while working in Kuwait, Bandary was "tortured" and involved in a confrontation where "Iraqi soldiers were threatening [him] with weapons, wanted bribes, searched his car, [and] took what they wanted." 2-ER-29.

Bandary was able to escape the horrors he had experienced in Egypt and Kuwait, seeking asylum in the United States in 1992 and eventually moving here in the late 1990s. 3-ER-342. But Delta's violent treatment of him exacerbated the effects of his traumatic past, causing him "tremendous fear" and "hypervigilance." 2-ER-29.

After the flight, in July 2015, Bandary was indicted for allegedly interfering with a flight crew in violation of 49 U.S.C. Section 46504. Indictment at 1-2, *United States v. Bandary*, No. 15-cr-414 (D. Utah July 15, 2015), 3-ER-590-91. He spent more than $100,000 to defend himself. 2-ER-283. A jury acquitted him in March 2017. 3-ER-591.

II. Procedural history

Bandary sued Delta in the Central District of California in 2017. 3-ER-596-609. As relevant here, the operative complaint alleged common-law malicious prosecution and bodily and emotional injury under the Montreal Convention, which authorizes recovery against airlines for injuries arising out of an "accident" on an aircraft. 3-ER-582-95. In December 2018, Delta moved for summary judgment, asserting immunity from all claims under the Aviation and Transportation Security Act (ATSA), 49 U.S.C. § 44941(a), which shields airlines and their employees from liability for disclosures of suspicious behavior. 3-ER-577-80. Delta also argued that the in-flight incident did not qualify as an "accident" as required to bring a claim under the Montreal Convention. 3-ER-575-77.

The district court granted summary judgment to Delta on the malicious-prosecution claim, reasoning that there was no evidence of the required improper purpose. 3-ER-544-45. That claim is not pursued here. Accordingly, the court did not decide whether Delta was immune from that claim under ATSA. As for Bandary's Montreal Convention claim, the court denied summary judgment, concluding that the altercation qualified as an "accident" under the Convention. 3-ER-544. The court also held that ATSA immunity did not bar Bandary's Montreal Convention claim, reasoning that immunity applies "only to disclosures regarding illegal acts or suspicious behavior." 3-ER-544 n.4.

In a pretrial order resolving the parties' motions in limine, the court determined that, under the Montreal Convention, a plaintiff may not recover for emotional injuries unless they are caused by a bodily injury, expressly rejecting *Doe v. Etihad Airways, P.J.S.C.*, 870 F.3d 406 (6th Cir. 2017). 1-ER-10-11. There, the Sixth Circuit held that the Montreal Convention does not impose a causal requirement but rather permits recovery of damages for emotional injuries when they arise from an accident resulting in a bodily injury regardless of whether one causes the other. 1-ER-10-11; *see Doe*, 870 F.3d at 417. The causal standard applied during Bandary's trial, and the jury was instructed to assign damages for his "emotional distress that was caused by a bodily injury." 2-ER-142.

After a four-day trial, a jury determined that (1) Delta was not entitled to immunity under ATSA, (2) Delta caused Bandary to sustain bodily injury, and (3) Bandary suffered emotional distress caused by that bodily injury. 2-ER-141-42. The jury awarded Bandary $2.5 million for his bodily injuries and $6 million for his emotional injuries. 2-ER-142. The jury also determined that Bandary's negligence caused fifteen percent of his injuries. 2-ER-143. The court later reduced the verdict to account for that finding and entered a $7.2 million judgment for Bandary. 2-ER-288, 300.

Delta then moved for a new trial on damages or, alternatively, remittitur, claiming the jury award was excessive. 2-ER-295-97. The court vacated the judgment, giving Delta more relief than it had asked

for by granting a new trial on liability. 2-ER-285-94. The court reasoned that both the $2.5 million award for his bodily injuries and the $6 million award for his emotional injuries were excessive. And because, according to the district court, damages depended on the jury's finding of liability, including the percentage of responsibility allocated to Bandary, a new trial was warranted. 2-ER-292-93.

Delta then moved for summary judgment a second time, again contending that it was immunized from liability under ATSA, which shields airlines and their employees who report suspicious transactions to law enforcement from liability for those disclosures. 49 U.S.C. § 44941(a); *see* 2-ER-255, 261. This time, the district court granted the motion, maintaining that no evidence indicated that Rodemoyer contacted Special Agent Vahe for "any reason other than to report activity that she suspected violated laws related to passenger safety." 1-ER-5. For that reason, ATSA immunity applied to "whatever law enforcement might do with those reports," so Bandary could not recover for any injuries sustained after Vahe "took command of the situation." 1-ER-6. Because, according to the district court, "any potential bodily injury occurred after Vahe arrived on the scene in the back of the aircraft," Bandary could not recover for any of his injuries, dooming his Montreal Convention claim. 1-ER-6-7.

Summary of Argument

I.A. The district court erred in granting Delta immunity under ATSA Section 44941(a). ATSA's text immunizes only *disclosures* made by airlines or their employees to law enforcement of suspicious behavior related to passenger safety. ATSA makes no mention of shielding airline *conduct* beyond the disclosure itself. That is, Section 44941(a) pertains to speech, not conduct.

This conclusion is confirmed by the design of the statute, which governs only reporting and imports standards used in defending common-law defamation claims. The few cases that have expanded immunity to shield certain subsequent conduct beyond disclosures cannot be reconciled with ATSA's text. Delta's conduct—injuring Bandary through handcuffing and other tortious actions—thus falls outside of ATSA immunity.

B. Delta is not immune for a second, independent reason. ATSA applies only when an airline discloses to law enforcement a "suspicious transaction" relating to aircraft or passenger safety. Here, a genuine dispute exists as to whether Bandary's conduct satisfied this threshold requirement. No objectively reasonable airline employee could view Bandary's mundane behavior of walking down the aisle, using the restroom, and complaining about customer service as a safety threat. And even if Delta need only demonstrate a *subjective* belief that Bandary was

suspicious and posed a threat to safety, a genuine dispute remains as to whether Delta in fact perceived him that way.

C. Even if this Court finds that ATSA immunity extends to some conduct flowing from disclosures, Delta is not immune here because its employees, not law enforcement, caused Bandary's injuries. Even courts that have (mistakenly) expanded ATSA immunity to shield conduct following protected disclosures nonetheless preclude immunity for decisions made by the airline. *E.g., Abdallah v. Mesa Air Grp., Inc.*, 83 F.4th 1006, 1012-13 (5th Cir. 2023). Delta is liable for Bandary's injuries under that standard because its employees alone made the decision to restrain and handcuff him, or a jury could so find.

If this Court holds that Delta is not immune for any of these reasons, it could simply stop there and remand. But it should nonetheless clarify for the district court the connection required under the Montreal Convention between bodily and emotional injuries (discussed below in Section II at 35-44), which would allow Bandary to recover at trial for all his emotional injuries.

II. Assuming (incorrectly) that Delta is immune for all of Bandary's injuries following law-enforcement involvement, Bandary may nevertheless recover for the emotional injuries he suffered before that point. The district court held that he could not because, in its view, a plaintiff may recover for emotional injuries under the Montreal Convention only when they are caused by a bodily injury. But the correct

standard allows recovery for any emotional injuries that *accompany* a bodily injury. *Doe v. Etihad Airways, P.J.S.C.*, 870 F.3d 406 (6th Cir. 2017). The causal standard embraced by the district court is flatly at odds with the Montreal Convention's text and runs headlong into its purpose. Because Bandary suffered emotional injuries before law-enforcement involvement that accompanied his subsequent bodily injuries, he is entitled to recover for them.

III. Assuming (counterfactually) that Delta is immune for its actions following law-enforcement involvement and that the Montreal Convention permits recovery only for emotional harm caused by a bodily injury, Bandary may still recover. A reasonable jury could find that Bandary sustained a physical injury during a fall before Delta contacted law enforcement, which in turn caused him emotional harm. At a minimum, trial is warranted to determine whether Delta is liable for these pre-immunity injuries.

Standard of Review

The district court's grant of summary judgment is reviewed de novo. *See SEC v. Barry*, 146 F.4th 1242, 1251 (9th Cir. 2025). When reviewing a grant of summary judgment, courts must "view all facts and draw all reasonable inferences in the light most favorable to the non-moving party." *Alexander v. Nguyen*, 78 F.4th 1140, 1144 (9th Cir. 2023); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Argument

It is worth taking a moment to explain at the outset how the issues in this appeal—and the sections of this brief—relate to each other. Bandary sued Delta under the Montreal Convention, which allows passengers to recover damages for bodily and emotional injuries suffered during in-flight accidents. After vacating a jury verdict in Bandary's favor, the district court granted summary judgment to Delta on the ground that the airline is immune under the Aviation and Transportation Security Act (ATSA), which, under some circumstances, shields airlines and their employees for their disclosures of suspicious transactions to law enforcement.

Section I explains why, for three independent reasons, the district court erred in holding Delta immune under ATSA for the injuries it inflicted on Bandary. If this Court agrees with any of them, it should reverse and remand for a trial on Bandary's Montreal Convention claim. And to provide crucial guidance to the district court, this Court should also proceed to Section II and clarify that the Montreal Convention authorizes recovery for all emotional injuries arising out of an incident in which a plaintiff also suffered physical injury.

Even if this Court determines Delta is immune for its actions after law-enforcement involvement, Section II explains why Bandary has a path to recovery anyway. The district court incorrectly concluded that, under the Montreal Convention, damages for emotional injuries are

recoverable only when the emotional injuries are *caused by* physical injuries. To the contrary, damages for emotional injuries are recoverable so long as they *accompany* physical injuries—that is, they both must arise from the same Montreal Convention "accident." Thus, Bandary may recover for emotional injuries sustained before Delta enlisted law enforcement. Remand would therefore be required for a trial on Bandary's pre-immunity emotional injuries.

Section III explains that even if this Court concludes that (1) Delta is immune for all injuries following law-enforcement involvement and (2) the Montreal Convention requires a causal connection between bodily and emotional injuries, a reasonable jury could determine that Bandary suffered a bodily injury from a fall, and resulting emotional harm, before law-enforcement involvement. Thus, at the very least, a trial is necessary to determine Delta's liability for Bandary's pre-immunity fall and resulting emotional harm.

I. The district court erred in holding that Delta is immune.

ATSA provides that an airline or airline employee "who makes a voluntary disclosure of any suspicious transaction relevant to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism … to any … local law enforcement officer, or any airport or airline security officer shall not be civilly liable … for such disclosure." 49 U.S.C. § 44941(a). Contrary to the district

court's conclusion, Section 44941(a) does not shield Delta from liability for three independent reasons. First, Section 44941(a) immunizes only "disclosure"—not the conduct that occurs after it. Second, a reasonable jury could find that Bandary's conduct did not constitute a "suspicious transaction" related to "a threat to aircraft or passenger safety," so Delta's report to law enforcement is not immunized by Section 44941(a). Third, a reasonable jury could find that Delta was solely responsible for Bandary's injuries independent of law enforcement. For each reason, Delta is not immune from suit for causing Bandary's injuries.

A. ATSA applies only to disclosures of a suspicious transaction, not to the conduct that occurs after those disclosures.

Section 44941(a) immunizes airlines and their employees only for "disclosure" of suspicious transactions to law enforcement. Accordingly, the district court erred when it applied ATSA immunity to the actions flight attendants took to restrain Bandary after reporting his conduct to Vahe. Under ATSA, an airline employee who discloses a suspicious transaction "shall not be civilly liable … for *such disclosure*." 49 U.S.C. § 44941(a) (emphasis added). By its terms, then, the statute immunizes only the disclosure itself. It does not sweep in an airline's conduct following a disclosure. The Court should stop there and reverse the district court's immunity holding based on ATSA's plain text.

But there's more. Section 44941's exceptions confirm what its ordinary, unadorned words say: that it applies to disclosures alone—or put differently, to speech, not to conduct. *See* 49 U.S.C. § 44941(b). ATSA immunity does not apply to "*disclosures* made with actual knowledge that the *disclosure* was false, inaccurate, or misleading" or made with "reckless disregard as to the truth or falsity of that *disclosure*." *Id.* (emphasis added). The disclosures referenced in the exceptions are, of course, the same disclosures covered by the statute in the first place if for no other reason than that "[a] word or phrase is presumed to bear the same meaning throughout a text." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 170 (Thomson/West 2012). And the concepts of truth and falsity make sense only as applied to "disclosure," not to conduct. Fluent speakers of English don't talk about false or untrue conduct. Put differently, a jury apparently found the flight attendants' conduct here to be wrongful, but it would be spectacularly odd to refer to that conduct as false or untrue.

The Supreme Court has understood ATSA to be focused on speech alone, holding that ATSA's exceptions are "patterned … after the actual malice standard of *New York Times Co. v. Sullivan*," *Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 238 (2014), which applies to defamation suits challenging a defendant's *speech* about matters of public concern, not *conduct* causing physical or emotional injuries. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). That understanding is

underscored by the context in which ATSA immunity litigation typically arises: as a defense to speech-based torts like defamation. *See, e.g.*, *Air Wis.*, 571 U.S. at 246-47 (interpreting ATSA immunity through defamation jurisprudence); *Columbare v. Southwest Airlines Co.*, 2023 WL 406439, at *1-3 (N.D. Tex. Jan. 10, 2023) (ATSA immunity invoked against defamation claim); *Kreith v. Am. Airlines, Inc.*, 2021 WL 780716, at *4 (N.D. Ill. Mar. 1, 2021) (same); *DelVecchia v. Frontier Airlines, Inc.*, 2021 WL 1214778, at *3-4 (D. Nev. Mar. 30, 2021) (same). Unlike the plaintiffs in these cases, who challenged airline speech as defamatory, Bandary takes no issue with what Rodemoyer said to Vahe. Rather, Delta's physical and emotional abuse are the grounds for his claim.

This conception of ATSA immunity accords with the statute's aim. ATSA "give[s] air carriers the breathing space to report potential threats to security officials without fear of civil liability for a few inaptly chosen words." *Air Wis.*, 571 U.S. at 257 (internal quotations omitted). Under our interpretation, airline employees may continue to report threats freely and avoid suit for those reports in most circumstances; they simply may face liability, as they would in the absence of the statute, if they commit ordinary personal-injury torts.

Other courts have applied Section 44941(a)'s plain meaning, understanding that the statute's immunity protection extends only to disclosures. In *Shqeirat v. U.S. Airways Group, Inc.*, 515 F. Supp. 2d 984 (D. Minn. 2007), for example, the airline asserted Section 44941

immunity from claims arising out of its report of suspicious behavior to the Metropolitan Airports Commission and its subsequent arrest of the plaintiffs in concert with the Commission. *Id.* at 1000. The court recognized that the "text of the statute protect[ed] [the airline's] disclosure of information to" the Commission but held that the subsequent arrest fell "outside the protection of 49 U.S.C. § 44941(a)," even though the arrest would not have occurred absent the disclosure. *Id.* Other courts have likewise held that the statute applies to disclosures alone. *See Bayaa v. United Airlines*, 249 F. Supp. 2d 1198, 1205 (C.D. Cal. 2002) ("49 U.S.C. § 44941 … specifically applies to the disclosure of suspicious activities, not the actions taken pursuant thereto."); *Dasrath v. Continental Airlines, Inc.*, 228 F. Supp. 2d 531, 538 (D.N.J. 2002) ("By its terms [Section 44941] provides shelter not to actions taken on the basis of disclosures but rather to the disclosures themselves.").

The district court here came to the same conclusion when it initially considered the question. Delta argued in its first motion for summary judgment that Bandary's malicious-prosecution claim was barred by Section 44941(a). The court dismissed that claim for lack of improper motive. 3-ER-545. But in responding to Delta's "suggest[ion] that § 44941(a) applies to all of [Bandary's] claims," the court observed that "the text of [Section 44941(a)] indicates that it applies only to disclosures regarding illegal acts or suspicious behavior." 3-ER-544 n.4.

We acknowledge that two circuits have held that ATSA immunity extends to some airline conduct beyond disclosure. *See Baez v. JetBlue Airways Corp.*, 793 F.3d 269, 276-77 (2d Cir. 2015); *Abdallah v. Mesa Air Grp., Inc.*, 83 F.4th 1006, 1012-13 (5th Cir. 2023). Those decisions, however, do not address Section 44941's text, let alone seek to reconcile their holdings with it.

In *Baez*, a passenger frustrated after a gate agent would not let her onto her departing plane asked, "what if there was a bomb in [my] bag," which had been loaded onto the plane without her. 793 F.3d at 272. The gate agent reported Baez's statements to law enforcement. *Id.* After being detained and questioned until TSA verified that her luggage did not contain a bomb, Baez sued the airline and the gate agent for defamation, false arrest, negligence, and intentional infliction of emotional distress. *Id.* at 272-73. The Second Circuit held that the airline was immune under Section 44941(a), reasoning that "the report to law enforcement, as defined by § 44941(a), … led to Baez's detention, interrogation, and arrest." *Id.* at 276. These "adverse consequences to Baez flowed from the decisions made by such law enforcement officers," so the gate agent and airline were "entitled to ATSA immunity." *Id.* at 276-77. The Fifth Circuit, for its part, found the "extension of § 44941(a) [in *Baez*] reasonable, and [] formally adopt[ed] it." *Abdallah*, 83 F.4th at 1012 n.4.

Baez and *Abdallah* thus hold that consequences "flow[ing] from" a report covered by Section 44941 are immunized. *Baez*, 793 F.3d at 276.

But that is not what ATSA says. It immunizes airline carriers and their employees for only "disclosure[s]" of suspicious transactions to law enforcement. 49 U.S.C. § 44941(a). It makes no mention of the separate tortious conduct that may follow those disclosures. At the end of the day, this Court "ha[s] no warrant to ignore clear statutory language on the ground that other courts have done so." *Milner v. Dep't of Navy*, 562 U.S. 562, 576 (2011). It should therefore reverse.

B. A reasonable jury could find that Bandary's conduct did not constitute a "suspicious transaction" relating to "a threat to aircraft or passenger safety."

ATSA grants immunity to airline employees only if they disclose a "suspicious transaction" relating to air piracy, terrorism, or "a threat to aircraft or passenger safety." 49 U.S.C. § 44941(a). No one has suggested that this case involves air piracy or terrorism.

And determining whether Delta disclosed a "suspicious transaction" related to a safety threat is a question for the trier of fact—one to which a jury answered "no" at Bandary's trial. 2-ER-141. The standard by which a safety-related "suspicious transaction" is judged is objective, and a jury could find that a reasonable airline official would not view Bandary's conduct as a threat. But even assuming the standard is subjective, a dispute of fact exists as to whether Delta *did in fact* perceive Bandary's conduct as potentially dangerous.

1. Neither ATSA nor caselaw defines "suspicious transaction" relating to a safety threat, so dictionaries offer a sensible jumping-off point. "Suspicious" means "of questionable character" or, alternatively, something "that is or should be an object of suspicion," where suspicion means "apprehension of guilt or fault on slight grounds or without clear evidence." *Suspicious*, Oxford Eng. Dictionary (2d ed. 1989); *Suspicion*, Oxford Eng. Dictionary (2d ed. 1989). And a "transaction" is "the carrying on or completion of an action or course of action." *Transaction*, Oxford Eng. Dictionary (2d ed. 1989). "Safety" is "exemption from hurt or injury." *Safety*, Oxford Eng. Dictionary (2d ed. 1989). A suspicious transaction relating to a threat to safety, then, signifies an occurrence suggesting "guilt or fault" that threatens "hurt" or "injury" to passengers or the aircraft.

Congress likely intended the statute to apply when a passenger's conduct *objectively* causes a reasonable airline employee to suspect a safety threat. Otherwise, immunity would sweep far too broadly. If a subjective standard governed, airlines could arguably be entitled to immunity for a report so long as they invoked their employees' own idiosyncratic safety-related rationalizations, regardless of whether a reasonable airline employee would view the situation that way. As a general matter, the law favors objective standards because they are "judicially administrable" and "avoid[] the uncertainties and unfair discrepancies that can plague a judicial effort to determine [someone]'s

unusual subjective feelings." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68-69 (2006). And especially in contexts where courts are evaluating judgments made in the fast-moving situations, objective inquiries "promote[] evenhanded, uniform enforcement of the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011). Subjective standards, on the other hand, are difficult to evaluate because "state of mind is easy to allege and hard to disprove." *Nieves v. Bartlett*, 587 U.S. 391, 403 (2019) (citation omitted).

One of ATSA's listed exceptions to immunity—the material-falsity exception—offers further support for an objective standard. *See* 49 U.S.C. § 44941(b). To evaluate if a disclosure is materially false (and thus not immunized), courts ask whether "a reasonable [law-enforcement] officer" would consider "an omitted or misrepresented fact" important "in determining a response to the supposed threat." *Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 252 (2014). This inquiry is an "objective one." *Id.* It is exceedingly unlikely that the statute adopted an objective standard for an exception, but a subjective standard for the provision it modifies.

Bandary's conduct comes nowhere close to qualifying as objectively threatening to passenger or aircraft safety. Prior to Vahe's involvement, the undisputed record establishes only that (a) Bandary used the restroom multiple times (a symptom of his medical diagnoses), (b) visited his partner, who was seated a few rows ahead of him, and (c) expressed his dissatisfaction with the quality of Delta's customer service and took

a picture of the flight attendant about whom he planned to complain. 2-ER-262-65. And the flight attendant who witnessed Bandary taking the photo assured lead flight attendant Rodemoyer that Bandary was "fine" and that the situation was "under control." 3-ER-472, 477, 494; 2-ER-235. On these facts, a flight attendant could not reasonably suspect Bandary of threatening "hurt" or "injury" to other passengers or to the aircraft.

2. But even if a subjective standard applies, under which an airline employee need believe only that suspicious conduct implicates a threat to safety, summary judgment would still be improper. A genuine dispute exists as to whether Delta actually perceived Bandary as posing a safety threat.

To begin with, Cook testified that she "never thought [Bandary] was a security risk," that "[she] wasn't afraid of" him hurting other passengers, 3-ER-501, and that she never thought Bandary was a terrorist, a threat to others, or even acting suspiciously. 3-ER-493. Quite the contrary, she reported positive interactions each time she passed him and that the two had a "bit of a rapport." 3-ER-487.

Likewise, Rodemoyer testified that she never thought that Bandary was a suspicious passenger, 3-ER-457, and that neither she nor anyone else on the flight expressed concern that Bandary was a terrorist. 3-ER-415. Indeed, she acknowledged that she confronted Bandary to better understand his customer-service complaint, not to probe a safety threat. 2-ER-213.

To be sure, Delta maintained that passengers complained about Bandary, and Rodemoyer testified that she was afraid for her safety at some points during their interaction. 2-ER-215-17, 219. But the evidence just recounted—that neither Cook nor Rodemoyer viewed Bandary as suspicious or a terrorist threat—calls both assertions into serious question. Plus, Cook received no passenger complaints, despite Rodemoyer claiming that Cook had reported complaints to her. 3-ER-453, 494. And Bandary testified that *Rodemoyer* was the aggressor during their interaction. 2-ER-168. That view of the facts finds support in Bandary's stature and health status. Recall that Bandary stands at only five feet seven inches, is just 125 pounds, and suffers from osteoporosis, a condition that weakens his bones. 2-ER-160, 167. So, the notion that Bandary was capable of physically threatening a large group of able-bodied people is, charitably put, implausible.

3. The limited caselaw analyzing ATSA immunity reveals how far Bandary's conduct departs from the usual safety-threatening behavior reported by airlines. Though the meaning of a safety-related "suspicious transaction" was not at issue, courts applying ATSA have assumed that threats prompted by weapons, bombs, or other potentially lethal situations form the heartland of the conduct covered by the statute. *See Air Wis.*, 571 U.S. at 253; *Baez*, 793 F.3d at 273-74. No doubt, edge cases may exist, but customer-service complaints and restroom use come nowhere close to the range of air security threats ATSA contemplates.

Accordingly, no facts support taking the determination of whether Bandary's conduct falls within the statute from the jury.

In *Air Wisconsin*, a pilot failed a simulation exercise and directed an angry outburst at his flight instructor. 571 U.S. at 242. When he boarded a flight shortly afterward, his airline employer reported to TSA that he was "unstable" and possibly armed, so the airline was "concerned about his mental stability and the whereabouts of his firearm." *Id.* at 244. After being removed from the flight, searched, and questioned by TSA, the pilot sued the airline for defamation. *Id.* In assessing the materiality of allegedly false statements, the Supreme Court reasoned that, confronted with a pilot with access to a firearm who had just lost his job, law enforcement "would have wanted to investigate whether [the pilot] was carrying his gun." *Id.* at 253. Although the Court's analysis concerned whether ATSA's exception for false statements applied, the Court assumed that an unstable and armed passenger qualified as a safety threat for purposes of the statute.

Similarly, in *Baez*, a passenger angry after a gate agent would not let her onto her departing plane referenced the possibility of a bomb in her luggage, which had been loaded onto the plane without her. 793 F.3d at 272. In affirming the district court's grant of immunity to the airline, the Second Circuit reasoned that any minor differences between Baez's actual statement to the gate agent and the airline's subsequent report to law enforcement were immaterial because once a bomb is mentioned in

connection with an unaccompanied checked bag, "a reasonable" law-enforcement officer "would have wanted to investigate." *Id.* at 275, 276-77 (citations omitted). There too, without directly addressing the question, the Second Circuit assumed that a bomb threat qualified as a suspicious transaction.

The transactions in *Air Wisconsin* and *Baez* thus involved objectively serious safety threats—a firearm and a bomb. The same is not true here. Bandary's behavior involved nothing beyond relatively common in-flight activity. Expressing frustration with customer service—even if done vigorously—does not threaten passenger safety. And, unlike in cases where airlines reported concerns to TSA—the agency created to address threats to air safety—here, Delta contacted only Vahe, an off-duty officer with the Treasury Inspector General for Tax Administration who happened to be on-board traveling to a funeral as a civilian. 2-ER-220, 239-40. That no evidence indicates Delta reported Bandary to TSA further suggests that it viewed Bandary as a dissatisfied customer, not a threat to passenger or airline security.

In sum, factual disputes exist as to whether (1) an objectively reasonable airline employee would have suspected Bandary to be a threat to passenger safety or, alternatively, (2) under a subjective standard, whether Delta actually viewed Bandary as a threat. Accordingly, Delta was not entitled to immunity at summary judgment.

C. Delta made all the key decisions leading to Bandary's injuries without law-enforcement involvement, so Delta is not immune.

Even if ATSA immunizes conduct beyond disclosure, and even if Bandary's conduct qualified as a matter of law as suspicious, Bandary may still recover because Delta, not Vahe, made the decisions that caused his injuries. Even the few courts that have imposed ATSA immunity excessively—incorrectly shielding all conduct flowing from the disclosure of a suspicious transaction—agree that conduct occurring solely because of the airline's actions is not immunized. *See Abdallah v. Mesa Air Grp., Inc.*, 83 F.4th 1006, 1012-13 (5th Cir. 2023); *Baez v. JetBlue Airways Corp.*, 793 F.3d 269, 276 (2d Cir. 2015).

In *Baez*, as already discussed, the plaintiff was questioned and detained after referencing a bomb in her bag. 793 F.3d at 272-73. In holding that the airline was immune for its role in Baez's detention, interrogation, and arrest, the court emphasized that "adverse consequences to Baez flowed from the decisions made by such law enforcement officers." *Id.* at 276.

Abdallah made explicit what *Baez* had suggested: ATSA immunity does not extend to adverse consequences attributable only to airlines. There, the airline cancelled a flight because of a flight attendant's purported safety concerns about two Arab-American passengers, even though security officials told the captain there was no basis for concern. *Abdallah*, 83 F.4th at 1009-11. The two passengers brought race-

discrimination claims, and the airline invoked ATSA immunity. *Id.* at 1011-12. The court held that although the airline was immunized for "any impact that 'flowed from the decisions made by [] law enforcement officers'" following a disclosure, the statute did not grant immunity "for things that occurred solely because of the airline's actions." *Id.* at 1012-13. Accordingly, the airline was liable for its decision to cancel the flight and any damages that flowed from that decision, but no more. *Id.*

The district court apparently applied the *Abdallah* standard without citation, reasoning that "implicit in immunity for making reports to law enforcement is immunity from liability for whatever law enforcement might do with those reports." 1-ER-14. The court then emphasized that "once Vahe arrived in the back of the plane, he immediately took command of the situation," "considered himself to be in charge," and "was directing the flight attendants in dealing with Plaintiff." 1-ER-6. Accordingly, the court held that, after Vahe's arrival, Delta was immunized by Section 44941(a). 1-ER-8. But the district court ignored contrary record evidence indicating that Vahe did not direct the others in causing Bandary's injuries.

Actions attributable solely to Delta caused Bandary's cuffing injuries, or at least a reasonable jury could come to that conclusion. Even before Rodemoyer requested Vahe's assistance, Rodemoyer and Cook had decided to restrain Bandary with the tuff cuffs. 3-ER-483. Indeed, Cook began placing the cuffs on Bandary before Rodemoyer contacted Vahe. 3-

ER-487-88. Cook was determined to place the cuffs on Bandary "no matter what." 3-ER-498. And when Vahe arrived on the scene, Cook was screaming at Bandary to allow her to put on the cuffs. 3-ER-498, 514. Rodemoyer herself took responsibility for the decision to cuff Bandary, testifying that she "told Special Agent Vahe that we would need to use the cuffs." 2-ER-224. Evidence also suggests that it was Rodemoyer who ultimately placed the too-tight cuffs on Bandary. 2-ER-245-46 (Vahe testifying that Rodemoyer initially cuffed Bandary).

And that's not all. At points, Vahe's own perception of his role contradicts the district court's conclusion that "[t]he uncontroverted evidence shows that once Vahe arrived in the back of the plane, he immediately took command of the situation." 1-ER-6. Vahe testified that he didn't get involved immediately because he was "surveying the scene." 3-ER-511-12. He disclaimed his involvement in the actual handcuffing, saying "[t]he first time, I believe she [Rodemoyer] … tightened them." 2-ER-246. Accordingly, a jury could conclude that the airline would have cuffed Bandary and injured his wrists, neck, and shoulder regardless of Vahe's involvement. Therefore, ATSA immunity, even as (wrongly) interpreted in *Baez* and *Abdallah*, would not apply to Delta's conduct. This Court should reverse.

II. Bandary may recover under the Montreal Convention for the emotional injuries that accompanied his physical injuries.

Bandary sued Delta under the Montreal Convention, the international treaty governing airline liability for death and injury of passengers. Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) art. 17(1), *opened for signature* May 28, 1999, S. Treaty Doc. No. 106-45 (entered into force Nov. 4, 2003). The district court held (incorrectly) that Delta was immune for all physical injuries following the disclosure to Vahe and that Bandary suffered no physical injuries prior to that disclosure. And because it also held that, under the Montreal Convention, Bandary may recover for emotional injuries only if they are caused by physical injuries, Bandary could not recover for any emotional injuries.

That is wrong: The district court erred in imposing a causation standard. Bandary may recover for emotional injuries that *accompany* his physical injuries, whether or not one caused the other.

Remedying this error is important for two reasons. First, if Delta is not immune from liability for any of Bandary's claims, as we urge above (at 19-34), this Court should clarify that a plaintiff may recover under the Montreal Convention for emotional injuries that accompany physical injuries to guide the district court on remand. Second, even if Delta is immune from liability for injuries Bandary suffered after Vahe's

involvement, he may still recover for his emotional injuries incurred earlier.

A. The Montreal Convention permits recovery for emotional injuries when they accompany bodily injuries.

1. The Montreal Convention does not require a causal relationship between physical and emotional injuries.

The district court's holding that a plaintiff can recover under the Montreal Convention for emotional injuries only when they are caused by physical injuries is at odds with the Convention's text.

Under Convention Article 17(1):

> The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Montreal Convention, art. 17(1). Article 17(1) renders an airline carrier liable for "damage sustained *in case of* death or bodily injury of a passenger" (emphasis added). "In case of" does not mean "caused by" but rather "in the event or contingency that" or "if it should prove or happen that." *In case*, Oxford Eng. Dictionary (2d ed. 1989). The Convention's language demands only that "damage" occurs (be "sustained") when death or bodily injury occurs. Thus, the Convention authorizes recovery

for emotional injuries whenever they *accompany* physical injuries. *See Doe v. Etihad Airways, P.J.S.C.*, 870 F.3d 406, 409 (6th Cir. 2017).

An additional textual clue buttresses this plain-meaning conclusion. Under Article 17(1), airlines are liable only when the accident that "*caused* the death or injury took place on board the aircraft" or during embarking or disembarking (emphasis added). The use of "caused" in Article 17(1) just a few words after the phrase in dispute indicates that the drafters intended "in case of" to mean something different. When interpreting treaties, as with statutes, courts apply the meaningful-variation canon: "[W]here the drafters used two different words it implies that the drafters of the Convention understood the words to mean something different." *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 995 (9th Cir. 2002) (citing *Air France v. Saks*, 470 U.S. 392, 398 (1985)) (cleaned up); *see also Doe*, 870 F.3d at 414 (applying the meaningful-variation canon to Article 17(1) to reach the same conclusion); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 170 (Thomson/West, 2012) ("[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea.").

The only court of appeals to have addressed the issue in depth rejected the causation standard and held that the Montreal Convention authorizes recovery for emotional injuries that accompany bodily injuries in the same accident. *Doe*, 870 F.3d at 433. There, the Sixth Circuit

referred to the Oxford English Dictionary entries discussed above (at 36) and similar contemporaneous Canadian Oxford Dictionary entries to conclude that "the plain meaning of 'in case of' is *conditional*, not *causal*." *Id.* at 413. The court explained that "[t]o say *in case of X, do Y* is to say 'if X happens, then do Y'—none of which means that there is a causal relationship between X and Y." *Id.*

Doe was the first court to conduct a comprehensive textual analysis of Article 17(1), marking a shift in Montreal Convention precedent on the conditional-versus-causal question. Not surprisingly, then, once *Doe* took Article 17(1)'s text seriously, several district courts adopted its straightforward text-based conclusion that Article 17(1) eschews a causation standard. *See Oshana v. Aer Lingus Ltd.*, 2022 WL 138140, at *7 (N.D. Ill. Jan. 12, 2022); *Ariza v. Concesionaria Vuela Compania de Aviacion S.A.P.I. de C.V.*, 2024 WL 4875314, at *2 (N.D. Cal. Sept. 10, 2024) (Chhabria, J.); *Rivera v. Aerovias de Mexico, S.A. de C.V.*, 690 F. Supp. 3d 906, 911 (N.D. Ill. 2023). This Court should do the same.

2. Earlier interpretations of the Warsaw Convention do not impose a causation requirement on the Montreal Convention.

a. Pre-*Doe* decisions restricting recovery for emotional injuries to those caused by bodily injuries stem from analyses of the Warsaw Convention, the Montreal Convention's predecessor. Convention for the Unification of Certain Rules for International Transportation by Air (the

Warsaw Convention), *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (entered into force Oct. 29, 1934). English translations of the Warsaw Convention, which was authenticated only in French, provide that airline carriers "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." *Id.* In *Ehrlich v. American Airlines, Inc.*, 360 F.3d 366 (2d Cir. 2004), the Second Circuit interpreted this provision of the Warsaw Convention to allow recovery for emotional injuries only when they are caused by physical injuries, spawning similar atextual applications in other circuits, as discussed below (at 40-41). *Id.* at 374-75.

Ehrlich's holding should not be imported to the very different Montreal Convention context. For starters, *Ehrlich* reasoned that some dictionary definitions of the Warsaw Convention's operative *French* phrase "*en cas de*" imply a causation requirement. 360 F.3d at 377-78 ("[I]n its legal sense, the word "cas" means, *inter alia*, 'cause.'"). But the Montreal Convention was authenticated in English, so "courts may rely on the Convention's English terms without recourse to any []other language." *Badar v. Swissport USA, Inc.*, 53 F.4th 739, 747 n.4 (2d Cir. 2022). And, as the Sixth Circuit observed, "the range of ambiguity in the English 'in case of' is far, far narrower than the range of ambiguity that *Ehrlich* found in the French 'en cas de.'" *Doe*, 870 F.3d at 426.

Because *Ehrlich* found Article 17 of the Warsaw Convention to be ambiguous, it relied largely on the Warsaw Convention drafters' goal of "foster[ing] the growth of the fledgling commercial aviation industry" by "limiting the liability of air carriers" to support its causation requirement. 360 F.3d at 385 (citations omitted). "[T]he purpose of the Montreal Convention vastly differs from the purpose of the Warsaw Convention," *Doe*, 870 F.3d at 426, however, with the former "favor[ing] passengers rather than airlines," *In re Air Crash at Lexington*, 501 F. Supp. 2d 902, 907 (E.D. Ky. 2007). So, the Montreal Convention should not be interpreted "to serve the purposes of the Warsaw Convention, as *Ehrlich* did." *Doe*, 870 F.3d at 426.

True, two unreported circuit decisions have expressed agreement with *Ehrlich*. *Bassam v. Am. Airlines, Inc.*, 287 F. App'x 309, 317 (5th Cir. 2008); *Jacob v. Korean Air Lines, Co.*, 606 F. App'x 478, 482 (11th Cir. 2015). But neither invoked *Ehrlich* under circumstances where its causation requirement could have affected the outcome. *See Doe*, 870 F.3d at 431. *Bassam* involved emotional injuries alone, so the causation issue could not have made a difference (and, besides, it did not engage with the Montreal Convention's text). 287 F. App'x at 317. And *Jacob* held that no "accident" had occurred in the first place, barring recovery

(and, like *Bassam*, it conducted no textual analysis). 606 F. App'x at 480-82.[1]

b. What's more, even if this Court were inclined to seek some guidance from the Warsaw Convention, that would be no reason to shun the most basic rule of construction: that the "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *In re Stevens*, 15 F.4th 1214, 1217 (9th Cir. 2021) (citation omitted).

And the Warsaw Convention's text does not actually require a causal standard. As just shown (at 40), *Ehrlich* "interpolated a causal component into the Warsaw Convention" not found in the text "expressly to serve the Warsaw Convention's purpose" of protecting the airline industry. *Doe*, 870 F.3d at 416. But "where the text of a treaty is clear, a court has 'no power to insert an amendment' based on consideration of other sources." *Chubb Ins. Co. of Europe S.A. v. Menlo Worldwide Forwarding, Inc.*, 634 F.3d 1023, 1026 (9th Cir. 2011) (quoting *Chan v. Korean Air Lines Co.*, 490 U.S. 122, 134 (1989)).

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[1] Though this Court observed in *Phifer v. Icelandair*, 652 F.3d 1222 (9th Cir. 2011), that "any differences between" Article 17 of the Warsaw and Montreal Conventions "are immaterial," that case concerned the meaning of the term "accident," which is not at issue here. *Id.* at 1223 n.1. As just explained (at 39), the difference between the Warsaw Convention's "*en cas de*" and the Montreal Convention's "in case of" is meaningful because some translations of the French term imply causation, while the English term does not. The same does not appear true of "accident."

In any case, *Ehrlich*'s analysis of the Warsaw Convention is flawed. Even the district court decision that *Ehrlich* purported to follow acknowledged that Article 17's French text "does not state that the damages must be caused by the bodily injury." *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 665 (N.D. Cal. 1994) (cited in *Ehrlich*, 360 F.3d at 376); *see also In re Aircrash Disaster Near Roselawn*, 954 F. Supp. 175, 179 (N.D. Ill. 1997) ("Article 17 does not say that a carrier will only be liable for damage caused by a bodily injury[.]"). This Court should not sully the plain words of the Montreal Convention with an interpretation of the Warsaw Convention that was wrong from the start. Bandary may recover for his emotional injuries because they accompanied a bodily injury, regardless of whether one caused the other.

B. Even if Delta is immune for much of its conduct, Bandary may recover for his emotional injuries that preceded Vahe's involvement.

Even if all of Delta's actions were immunized following its report to Vahe, that would not doom Bandary's recovery for his emotional injuries. As just demonstrated (at 36-42), the Montreal Convention permits recovery for emotional injuries that arise out of an accident involving bodily injury. Dictionaries at the time of the Montreal Convention's drafting define a bodily injury as "physical damage to a person's body." *Injury*, Black's Law Dictionary (7th ed. 1999); *see also Injury*, Oxford English Dictionary (2d ed. 1989) (defining "injury" as "[h]urt or loss

caused to or sustained by a person or thing"). Here, even if Delta is immune for all physical injuries following Vahe's arrival on the scene—a conclusion we urge the Court to reject (at 19-34)—Bandary suffered significant emotional injuries prior to that point, which formed part of the same accident in which he suffered bodily injury.

When Rodemoyer denied Bandary's request to use the bathroom prior to his handcuffing, Bandary "d[id]n't know what [he had] do[ne] wrong"; he felt Rodemoyer was "forceful," "violent," and "angry" toward him and that his "freedom" was "restrict[ed]." 2-ER-167-68. Later, when several flight attendants, including Rodemoyer and Cook, backed Bandary into the plane's galley, he felt "so bad and so sad," as though he was "captured … for something [he] did not do." 2-ER-170-71.

These events also "re-trigger[ed]" Bandary's existing PTSD from traumatic experiences prior to his arrival in the United States. 3-ER-426; 2-ER-29. Forensic psychologist Dr. Martin H. Williams testified to Bandary's encounter with Iraqi soldiers during Iraq's invasion of Kuwait, where the soldiers "threated[ed] Bandary with weapons, wanted bribes, searched his car," and Bandary "[c]ould have easily been killed." 2-ER-29; 3-ER-422-23. Earlier, Bandary had been arrested in Kuwait and "blindfolded" and "tortured." 3-ER-527 (Dr. Martin H. Williams' Psychological Evaluation Report of Bandary). His experience on Delta Flight 1105 was "psychologically similar" to what he endured in Kuwait, exacerbating his emotional injuries. 3-ER-423, 535-36; 2-ER-29.

Because the district court incorrectly held that Bandary could recover for his emotional injuries only if they were caused by his physical injuries, 1-ER-10-11, it overlooked the injuries just discussed. Remand is therefore required, even if immunity applies, so that a jury can determine which of Bandary's emotional injuries occurred prior to law-enforcement involvement and are recoverable under the proper "accompanying" standard. *See Doe*, 870 F.3d at 433; *supra* at 36-42. And even if Delta's recruitment of Vahe did *not* immunize the airline (as we maintain), the standard to recover emotional injury under the Montreal Convention should be clarified so Bandary can seek on remand all the recovery—for both physical and emotional injuries—to which he is entitled.

III. Bandary suffered physical injuries prior to Vahe's involvement and resulting emotional injuries for which he may recover.

Even if Delta is immune for all conduct following the report to Vahe—it is not, as we have shown (at 19-34)—and this Court holds that, under the Montreal Convention, a plaintiff may recover only for emotional injuries caused by physical injuries, Bandary may still recover. He suffered bodily injuries for which Delta may be held liable *before* its disclosure to Vahe. Bandary testified that after Rodemoyer approached him in the back of the plane, Delta staff advanced on him, causing him to fall in the narrow galley. 2-ER-168-69. His "bottom was hurt" by the fall. 3-ER-381.

Because the district court ignored the evidence of Bandary's fall, its determination that "any potential bodily injury occurred after Vahe arrived on the scene in the back of the aircraft," 1-ER-7, is wrong. The jury explicitly found that Bandary sustained bodily injury caused by Delta before Special Agent Vahe arrived at the back of the plane—presumably based on this fall. 2-ER-141, 302. Although the verdict was subsequently vacated, it indicates (accurately) that the record contains evidence from which a jury could find that Bandary was injured prior to Vahe's arrival. 2-ER-141. Thus, even if Bandary cannot recover for his other injuries, reversal of summary judgment is warranted on the issue of whether Bandary sustained a bodily injury before Vahe arrived.

Though not required for Bandary to prevail at this stage, that fall caused him emotional injuries, too, as discussed earlier (at 43). *See* 2-ER-29; 2-ER-168-71. The extent of Bandary's injuries—physical and emotional—will be sorted out on remand. For present purposes, it's enough to recall that a jury found that Bandary deserved more than $7 million, likely recognizing that his physical injuries triggered emotional injuries that continue to haunt him and for which he deserves recovery.

Conclusion

This Court should reverse the district court's grant of summary judgment to Delta and remand for trial.

Respectfully submitted,

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9th Cir. Case Number(s) 24-7204

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I certify that this brief *(select only one)*:

- (•) complies with the word limit of Cir. R. 32-1.
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Signature s/ Natasha R. Khan **Date** 10/16/2025
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Addendum

Addendum Table of Contents

FEDERAL STATUTE

AVIATION AND TRANSPORTATION SECURITY ACT

49 U.S.C. § 44941. Immunity for reporting suspicious activities

(a) In general.— Any air carrier or foreign air carrier or any employee of an air carrier or foreign air carrier who makes a voluntary disclosure of any suspicious transaction relevant to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism, as defined by section 3077 of title 18, United States Code, to any employee or agent of the Department of Transportation, the Department of Homeland Security, the Department of Justice, any Federal, State, or local law enforcement officer, or any airport or airline security officer shall not be civilly liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, for such disclosure.

(b) Application.— Subsection (a) shall not apply to:

(1) any disclosure made with actual knowledge that the disclosure was false, inaccurate, or misleading; or

(2) any disclosure made with reckless disregard as to the truth or falsity of that disclosure.

INTERNATIONAL TREATY

Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention)

Article 17(1)

The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.