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

REPLY BRIEF FOR PLAINTIFF-APPELLANT ATEF BANDARY

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Table of Contents

Table of Authorities

Cases **Page(s)**

Treaty

Statutes and Regulations

Other Authorities

Introduction

Most of Delta's arguments invite the same rejoinder: Read the text. Its positions cannot be squared with the words of the Aviation and Transportation Security Act (ATSA) or the Montreal Convention.

To begin with, Delta fails to engage with the textual limit on ATSA immunity: Airlines and their employees are shielded only for their *disclosures*. Ignoring that word, Delta argues that ATSA immunizes all tortious actions following a report to law enforcement. But even its purpose-based arguments cannot justify Delta's sweeping view, under which airline employees could, post-disclosure, beat passengers to death with impunity. Again glossing over the text, Delta reads out ATSA's requirement that airline employees are immunized for reports of only *suspicious* behavior by arguing that courts may not review whether a passenger's actions were, in fact, suspicious.

Delta misreads the Convention's text as well. It argues that the Convention's authorization of recovery for damages sustained "in case of" bodily injury permits recovery for emotional injuries only when *caused* by a bodily injury. But "in case of" refers to a conditional, not a causal, relationship. So, the Convention allows recovery for emotional injuries caused by an accident that also results in a bodily injury.

For these and other reasons described below and in our opening brief, this Court should reverse the district court's grant of summary judgment to Delta and remand for trial.

Argument

I. Delta is not immune under ATSA.

ATSA Section 44941(a) does not immunize Delta for three reasons. One, ATSA immunity extends to disclosures alone, not to conduct. Two, no "suspicious transaction" occurred, so the statute does not apply. And three, even if ATSA immunizes conduct as well as disclosures, Delta can be held liable because its injury-producing conduct was not directed by law enforcement.

A. ATSA immunizes airlines for their disclosures, not for post-disclosure conduct.

1. Under ATSA, airlines that voluntarily disclose "suspicious transaction[s]" to law enforcement are not civilly liable "for such disclosure[s]." 49 U.S.C. § 44941(a). "Disclosure" means "the action or fact of disclosing or revealing new or secret information." *Disclosure*, Oxford Eng. Dictionary (2d ed. 1989). So, ATSA protects airlines and their employees from liability only for sharing information, not for their subsequent conduct.

Delta emphasizes that ATSA immunizes airlines under "*any law or regulation*" for "any kind" of liability. Delta Br. 21-22. True, but irrelevant because Delta focuses on the wrong words. Under ATSA, airlines enjoy immunity under any statute or regulation—but only for *what they disclose*.

As our opening brief explains (at 21-22), Section 44941(b)'s exceptions to ATSA immunity confirm that the statute applies only to disclosures. Under those exceptions, airlines do not enjoy immunity for false disclosures made knowingly or with reckless disregard for their truth. *See Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 246-47 (2014) (holding that Section 44941(b) adopts the actual-malice standard from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). That standard makes sense only as applied to speech; conduct cannot be false. Delta does not disagree. *See* Delta Br. 26 n.2.

Nevertheless, Delta argues that subsection (a)'s immunity sweeps far beyond the scope of subsection (b)'s exceptions, asserting that ATSA immunizes airlines for all post-disclosure conduct even though its exceptions apply to speech alone. But Congress does not usually draft a statutory provision and its exceptions with such stark subject-matter incongruence. Instead, "[e]xceptions to a rule tend to restrict the breadth of that rule." *Int'l Bhd. of Teamsters Loc. 947 v. NLRB*, 66 F.4th 1294, 1316 (11th Cir. 2023); *see CS 321 E. 2nd Invs., LLC v. United States*, 178 Fed. Cl. 471, 492 (Fed. Cl. 2025) ("[T]he exception to the rule is informative of the rule's substance.").

And Delta provides no reason why Congress would want to hold accountable certain disfavored speech-tortfeasors—false and reckless speakers—but immunize all other "bad actors." *Air Wis.*, 571 U.S. at 249; *see* Delta Br. 26 n.2. If ATSA immunized airline employees for their

conduct, then Congress surely would have excluded not just those who make false statements but intentional tortfeasors too. Otherwise, ATSA would authorize a suit against a flight attendant who makes a false statement while shielding another flight attendant who tortiously beats a passenger to death post-disclosure. That cannot be right.

2. Congress's purpose confirms Section 44941's ordinary meaning. Section 44941(a) aims to "encourag[e] airline employees to report suspicious activities." *Air Wis.*, 571 U.S. at 249 (quoting ATSA § 125, Pub. L. No. 107-71, 115 Stat. 631 (2001)). Congress created ATSA "[t]o ensure that the TSA would be informed of potential threats." *Air Wis.*, 571 U.S. at 241. "[O]nce a report is made," the parties agree that "*law enforcement* officers … determine and execute a response." Delta Br. 23 (emphasis added) (quoting *Baez v. JetBlue Airways Corp.*, 793 F.3d 269, 275 (2d Cir. 2015)). Congress did not intend airline employees to do anything more than provide information to those trained to respond to it, and with good reason. Airline employees may lack the experience to restrain passengers without causing harm, as evidenced here by Rodemoyer's grossly negligent handcuffing of Bandary. *See* 2-ER-245-46; *see also* 2-ER-122 (Cook had never placed handcuffs on a person outside of training).[1]

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[1] The Department of Homeland Security's national campaign on the subject confirms the point. DHS says: "If you see something, say something," not "If you see something, *do* something." *If You See Something, Say Something*, DHS, https://www.dhs.gov/see-something-say-something (emphasis added) (last visited Feb. 27, 2026).

Construing ATSA as written would not discourage airline employees "from complying with law enforcement directives," Delta Br. 24. Delta has supplied nothing—beyond its hyperbole—to indicate that airline employees will refuse to assist law enforcement unless they are provided immunity for all intentional torts committed while doing so. And it provides nothing suggesting that flight attendants regularly disobeyed law-enforcement orders prior to ATSA's passage, which was shortly after 9/11, *see* ATSA, Pub. L. No. 107-71, 115 Stat. 597 (2001).

Delta also suggests that, without immunity, airlines will be held vicariously liable for law-enforcement conduct following a disclosure. *See* Delta Br. 24. That position has no support—and Delta points to none—or relevance to the circumstances here: Bandary seeks to hold Delta accountable for its conduct, not law enforcement's.

3. Caselaw interpreting Section 44941 is sparse, perhaps because its words are so clear. The three decisions cited in our opening brief (at 22-23) are faithful to the statute's text and thus hold that immunity applies to disclosures alone. *See Bayaa v. United Airlines, Inc.*, 249 F. Supp. 2d 1198, 1205 (C.D. Cal. 2002); *Dasrath v. Cont'l Airlines, Inc.*, 228 F. Supp. 2d 531, 538 (D.N.J. 2002); *Shqeirat v. U.S. Airways Grp., Inc.*, 515 F. Supp. 2d 984, 1000 (D. Minn. 2007).

Delta's attacks on these decisions come up empty. *See* Delta Br. 25. Delta emphasizes that these cases pre-date the Supreme Court's decision in *Air Wisconsin*, without providing any reason why that decision matters

here. *Air Wisconsin* concerned Section 44941(b)'s exceptions and has nothing to do with whether Section 44941(a) immunizes airlines for tortious conduct following disclosures. *Air Wis.*, 571 U.S. at 249; *see* 49 U.S.C. § 44941(b). And contrary to Delta's argument, whether the airline-employee conduct in *Bayaa*, *Dasrath*, and *Shqeirat* was directed by law enforcement is irrelevant. Each decision held that ATSA does not immunize *any* airline conduct, no matter who directed it. *See Bayaa*, 249 F. Supp. 2d at 1205; *Dasrath*, 228 F. Supp. 2d at 538; *Shqeirat*, 515 F. Supp. 2d at 1000. Delta also maintains that these holdings are really dicta. But we rely on these decisions because they are persuasive, not because they are binding.[2]

The decisions on which Delta relies, on the other hand, fail to honor ATSA's text. As our opening brief explains (at 24-25), although those decisions hold that ATSA immunizes airline conduct flowing from disclosures of suspicious behavior, they do not engage at all with the

[2] Regardless, in each case, a holding that Section 44941(a) immunizes disclosures alone was necessary to the result. *See Bayaa*, 249 F. Supp. 2d at 1205 (denying ATSA immunity to airline for removing plaintiff from flight because ATSA does not apply to "actions taken pursuant [to the disclosure]"); *Dasrath*, 228 F. Supp. 2d at 538 (denying immunity to airline for removing plaintiffs from flight because ATSA "provides shelter not to actions taken on the basis of disclosures but rather to the disclosures themselves"); *Shqeirat*, 515 F. Supp. 2d at 1000 (denying defendant's motion to dismiss plaintiff's false-arrest claim on the basis of immunity because the airline's conduct fell "outside [ATSA's] protection").

statute's text. *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 n.4 (5th Cir. 2023).

Delta cites *Ilczyszyn v. Southwest Airlines Co.*, 295 Cal. Rptr. 3d 533 (Cal. Ct. App. 2022), which is wrong for much the same reason: It dishonors ATSA's text. *Ilczyszyn* interpreted ATSA broadly because "denying immunity to the conduct that flows from the disclosure[] would defeat the purpose of the immunity and render it essentially meaningless." *Id.* at 553. But "even the most formidable argument concerning the statute's purposes [cannot] overcome the clarity [found] in the statute's text." *Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012). And *Ilczyszyn*'s purposivist reasoning was wrong on its own terms. ATSA as written is hardly meaningless; it encourages *reporting* of suspicious behavior.

Finally, Delta's reliance on *Coronado v. BankAtlantic Bancorp, Inc.*, 222 F.3d 1315 (11th Cir. 2000), Delta Br. 22, fails: that case is about a financial-disclosure statute, not ATSA, and, in any event, did not suggest that the similarly worded immunity provision at issue shielded banks for conduct beyond their financial *disclosures*. *See Coronado*, 222 F.3d at 1321-22.

B. No "suspicious transaction" occurred, so ATSA does not apply.

Delta is not immune for a second, independent reason: A reasonable jury could find that Bandary's actions did not qualify as a "suspicious transaction" triggering ATSA immunity. Indeed, a jury earlier found just that. *See* 2-ER-308 (instructing jury to decide whether "Delta made a voluntary disclosure of any suspicious transaction"); 2-ER-302 (verdict finding that Delta did *not* disclose a suspicious transaction by contacting Vahe).

Perhaps recognizing disputes of fact exist on this question, Delta suggests that courts should not "second-guess[]" whether a suspicious transaction occurred. *See* Delta Br. 17. But without some judicially enforceable standard, the statutory term "suspicious transaction" would have no meaning. *See* Opening Br. 26-27. Airlines could report people for impermissible reasons or for no reason at all. *See* 2-ER-80 (Delta passenger explaining that the "physical attributes of a terrorist" are "[d]arker skin, dark hair"). And airlines sometimes get it wrong. In *Abdallah v. Mesa Air Group, Inc.*, for instance, the flight attendant and captain reported purportedly suspicious passengers to ground security, who concluded, to the contrary, that no safety risk existed. 83 F.4th 1006, 1010 (5th Cir. 2023). Thus, as our opening brief explains (at 26-27), ATSA applies only when a passenger's conduct causes airline employees to suspect a safety threat.

Under either an objective or subjective standard, a jury could find Bandary's conduct unthreatening. Prior to Rodemoyer's disclosure, Bandary used the restroom multiple times, walked around, expressed dissatisfaction with Delta's customer service, and took a photo of flight attendants about whom he intended to complain. *See* 2-ER-159, 164-66, 211; Opening Br. 27-29.[3] That behavior is mundane, not suspicious. At the least, each action "could equally be seen as nonsuspicious," just as the "hand wave, refusing to leave one's assigned seat, boarding late, sleeping, and using the restroom" were in *Abdallah*, 83 F.4th at 1018.

Delta resists this conclusion with hotly disputed facts, arguing that "Bandary yelled, flailed, took off his shirt, screamed hostile comments, and backed [Rodemoyer] into a wall" prior to Rodemoyer's disclosure to law enforcement. Delta Br. 27. The record reflects otherwise. Bandary testified that he didn't "raise [his] voice at all" prior to the handcuffing. 2-ER-177. He pleaded to use the restroom simply because he couldn't stop his diarrhea. 2-ER-167. He testified that he did not "move [his] arms around," take off his shirt, or make hostile comments. FER-4, 6-7, 11. Finally, far from cornering Rodemoyer, a jury could find it was

[3] Bandary took a photo of flight attendants Falten and Faucher, intending to lodge a complaint against them after landing. *See* 2-ER-164-66. Whether or not these were the same flight attendants who denied Bandary food, *see* Delta Br. 7 n.1, our point stands: Bandary took the photo to support his planned complaint, not for a suspicious reason.

Rodemoyer who forced Bandary backward by "coming towards" him. 2-ER-168.

Delta's reliance on passenger complaints likewise gets it nowhere. Delta cites passenger reactions to events that occurred after Rodemoyer's disclosure to Vahe. *See, e.g.*, Delta Br. 27 (describing passengers' expressions of fear); FER-14-15, 16-17 (clarifying when they occurred). But Rodemoyer could not possibly have based her disclosure to Vahe on things that happened *after* she spoke to him. And whether any passengers complained prior to that disclosure is disputed. *Compare* Delta Br. 27; 3-ER-453, *with* 3-ER-494 (Cook testifying that "no one had complained to me").

Finally, Bandary's statement that other passengers "were afraid of [him] and … thought [he] was a terrorist," 2-ER-192, cannot bear the weight Delta assigns it. Bandary's testimony reflects his understanding of bias against Middle Eastern people. It does not admit any conduct justifying those unwarranted fears. *See* 2-ER-191-92.

C. Delta's conduct was not directed by law enforcement.

Delta is not entitled to ATSA immunity for another reason: Its injury-producing conduct was not directed by law enforcement, as required to obtain immunity under *Baez v. JetBlue Airways Corp.*, 793 F.3d 269, 276-77 (2d Cir. 2015), and *Abdallah v. Mesa Air Grp., Inc.*, 83 F.4th 1006, 1012-13 (5th Cir. 2015); *see* Opening Br. 32-34. Delta relies primarily on

Vahe's testimony to establish he directed the handcuffing. *See* Delta Br. 28-30. But other portions of his testimony, along with additional record evidence, indicate that Vahe did not direct Delta's actions, or at least a reasonable jury could so conclude.

True, Vahe made several sweeping statements regarding his purported authority. *See, e.g.*, 2-SER-195. But other portions of Vahe's testimony call that characterization into question. When asked if he intervened after reaching the back of the plane, Vahe said, "I was just surveying the scene." 2-SER-190. He "didn't know exactly what was going on," "what led up to this," or "why [Bandary] needed to put the flex-cuffs on." 2-SER-190-91.[4]

The decision to use cuffs on Bandary—causing many of his injuries, *see infra* at 26—confirms Vahe's lack of authority. That choice was made by Delta, not Vahe. Vahe acknowledges as much. *See* 2-SER-207; *see also* 3-ER-460 (Rodemoyer testifying that she "made the decision" to restrain Bandary); 3-ER-498 (Cook testifying that she intended to put cuffs on Bandary no matter what). And though Vahe offered to use his own metal handcuffs to restrain Bandary, *see* 2-SER-197, Rodemoyer insisted on using flex-cuffs per Delta policy, *see* 2-ER-96. Presumably, if Vahe had been directing Delta's conduct, he would not have deferred to Delta on

[4] Delta asserts that our opening brief's citations to Vahe's testimony confirm he was in control. *See* Delta Br. 28-30 (citing 2-ER-171-72, 246). But as we explain, Vahe's testimony is both internally inconsistent and disputed by other evidence.

the choice of handcuffs. Plus, both Vahe and Rodemoyer testified that *Rodemoyer* handcuffed Bandary. *See* 2-ER-245-46; 3-ER-462. All told, Delta's blithe assertion that Rodemoyer applied the cuffs *at Vahe's direction* is, charitably put, subject to serious doubt.

II. Under the Montreal Convention, Bandary may recover for all his physical and emotional injuries.

A. Bandary's injuries were "caused" by an "accident."

Under Article 17(1) of the Montreal Convention, an airline is liable for a passenger's injuries "upon condition only that the accident which caused the death or injury took place on board the aircraft." 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. 106-45 (entered into force Nov. 4, 2003). The Montreal Convention's use of the term "accident" does not reflect its colloquial meaning. Instead, it is "an unexpected or unusual event or happening that is external to the passenger." *Phifer v. Icelandair*, 652 F.3d 1222, 1223 (9th Cir. 2011) (quoting *Air France v. Saks*, 470 U.S. 392, 405 (1985)). That definition is "flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." *Saks*, 470 U.S. at 405. When "there is contradictory evidence," as here, "it is for the trier of fact to decide whether an 'accident' … caused the passenger's injury." *Id.*; *see Prescod v. AMR, Inc.*, 383 F.3d 861, 869 (9th Cir. 2004).

Delta argues that Bandary's bodily and emotional injuries were not caused by an Article 17(1) "accident." Delta Br. 18. But, as the district court held, "[a]ny injuries that [Bandary] may have incurred were not due to events that take place in the normal course of air travel." 3-ER-544. Bandary may recover because Delta's actions were unusual and unexpected, and these actions—not Bandary—caused his injuries.

1. Delta's unexpected and unusual actions constitute a Montreal Convention "accident."

A reasonable jury could find that Rodemoyer's pulling Bandary out of the bathroom line, and everything that followed, was "unusual" or "unexpected." *Phifer*, 652 F.3d at 1223. The unusual-or-unexpected test "judg[es events] from the perspective of a reasonable passenger with ordinary experience in commercial air travel." *Moore v. Brit. Airways PLC*, 32 F.4th 110, 117 (1st Cir. 2022). As part of that inquiry, the trier of fact may consider whether a flight crew "violated industry standards." *Rodriguez v. Ansett Austl. Ltd.*, 383 F.3d 914, 918 (9th Cir. 2004).

A jury could find it was unusual and unexpected for Rodemoyer to refuse Bandary bathroom access despite his desperate pleas to relieve his "absolutely disabling" diarrhea. 2-ER-89. The seatbelt sign was off, no other passengers were removed from the bathroom line, and Bandary offered to go with Rodemoyer (although she would not disclose where she planned to take him) after using the bathroom because he was afraid he

would soil himself. *See* 2-ER-159, 166-67, 100. Then he *did* soil himself. *See* 2-ER-185; 3-ER-372.

Forcing a passenger to defecate on himself departs from industry standards supplied by Federal Aviation Administration regulations. *See Phifer*, 652 F.3d at 1224 (noting that FAA requirements may be relevant to "accident" analysis). The Airline Passengers with Disabilities Bill of Rights recognizes the "right of passengers with disabilities to be treated with dignity and respect." 49 U.S.C. § 41728(b)(1).[5] That includes airline personnel not "unduly delaying requests for access to a restroom such that the individual soils himself." 14 C.F.R. § 382.3 (2025). True, airlines must occasionally restrict bathroom access. Delta Br. 41. But that restriction still results in an "accident" when, as here, it is "carried out in a way … that [is] not expected, usual, normal, or routine." *Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 143 (2d Cir. 1998).

Moreover, Bandary's request to use the bathroom "could easily have been satisfied without interference with the airplane's normal operation," making Rodemoyer's refusal even more unexpected. *See Husain v. Olympic Airways*, 316 F.3d 829, 837 (9th Cir. 2002). That refusal is analogous to a flight attendant's rejection of a passenger's requests to move from the aircraft's smoking section that constituted an accident in

[5] Delta displays this Bill of Rights on its website. *See United States - Airline Passengers with Disabilities Bill of Rights*, https://www.delta.com/us/en/legal/notices/us-disability-bill-of-rights (last visited Feb. 27, 2026).

Husain. *See id.* at 840. Rodemoyer's denial of a "reasonable alternative[]" to a "known, serious risk," *id.* at 837—not only of humiliation and emotional harm, but also the risk to Bandary and other passengers of feces in the aisles—indicates that an accident occurred, or at least a reasonable jury could so find.[6]

And several *other* events were also "unusual" or "unexpected." After Rodemoyer blocked Bandary's bathroom access, his "only resistance was to argue." 2-ER-101. A jury could conclude—as the district court did here—that it was unusual and unexpected for the crew to surround Bandary, "knock[ing] [him] down twice." 2-ER-101. The same goes for handcuffing him tightly and bloodying his wrists, 2-ER-171-72; "manhandl[ing]" him, 2-ER-176; and holding him in place with his pants down, forcing him to soil himself, 3-ER-372. These escalations are, to understate things, "unusual" and "unexpected."

[6] The potential consequences here are well known and serious. *See, e.g.*, *Flight Cancelled After Passenger Has 'Biohazard' Diarrhea and Vomiting*, WKRC (Aug. 15, 2025), https://local12.com/news/nation-world/flight-cancelled-biohazard-diarrhea-vomiting-vomit-sick-illness-ill-sickness-united-airplane-plane-bathroom-evacuated-evacuate-portugal-attendant-staff-employees-workers-extreme-passenger-passengers-deplane; Maureen O'Hare & David Williams, *Delta Flight Forced to Turn Around Because of Diarrhea Incident*, CNN (Sept. 6, 2023), https://www.cnn.com/travel/delta-flight-diarrhea-biohazard.

2. Bandary did not cause the accident.

Delta next argues Bandary's "disruptive behavior" caused the unusual and unexpected events just described, Delta Br. 32, rendering them not accidents because they were not "external to [Bandary]." *Saks*, 470 U.S. at 405. But Delta's argument relies entirely on disputed facts, so the issue must go to a jury.

As previously explained, *supra* at 8-10; Opening Br. 1, the facts reveal only mundane behavior—nothing that would justify Delta's escalations. Just before Rodemoyer pulled Bandary out of line, Cook told her not to intervene because Bandary was "okay" and Cook "ha[d] it handled," 2-ER-235. A jury could thus find that Bandary was neither disruptive nor a cause of the bathroom-line incident or what followed.

In response, Delta again relies entirely on disputed facts, asserting that Bandary hit Cook "so hard that she sought medical treatment." Delta Br. 32. But Delta's own witnesses tell a different story. Flight attendant Carol Falten reported she did not see him assault anyone. 2-ER-124. Agent Vahe told Salt Lake police he saw Bandary "swing at" an attendant, "but not hit her." 2-ER-134. Passenger Krista Palmer similarly did not see Bandary strike anyone. *See* FER-19. And contrary to Delta's assertion that Cook required "medical treatment" for her hand, Delta Br. 32, Rodemoyer told the FBI that Cook sought medical attention not for a hand injury, but out of "concern about getting HIV or hepatitis" from Bandary. 2-ER-118-19. Given these disputes of fact, Delta's citation

to *Cush v. BWI Int'l Airways, Ltd.*, 175 F. Supp. 2d 483 (E.D.N.Y. 2001), doesn't work. *See* Delta Br. 32. Unlike here, the plaintiff in *Cush* did not dispute that he engaged in the behavior found to be disruptive (refusing to disembark from the plane). *Cush*, 175 F. Supp. 2d at 488-89.

Delta next argues that some of Bandary's harms are attributable to his "internal reactions," which are not accidents. Delta Br. 40-41. But *Saks* excludes only a passenger's "internal reaction[s] to the *usual, normal, and expected* operation of the aircraft" from the scope of an "accident." 470 U.S. at 406 (emphasis added). Even if Bandary's reactions could be categorized as disruptive—which, as just explained, is disputed—they would be understandable responses to Delta's unexpected and inappropriate actions. *See supra* at 13-15.

And even if Bandary contributed to his injuries, the Montreal Convention employs comparative negligence, which allocates recovery in proportion to fault. *See* Montreal Convention, art. 20 ("[T]he carrier shall be wholly or partly exonerated from its liability to the claimant *to the extent that* such negligence … caused or contributed to the damage." (emphasis added)); *see also* 1 Comparative Negligence Manual, § 17.14: Montreal Convention, (3d ed.). Thus, Bandary may have been contributorily negligent and still suffered a Montreal Convention "accident." In any event, as a jury already found, Delta—not Bandary—was the primary cause of his injuries. *See* 2-ER-303-04, 309.

3. The accident caused Bandary's injuries.

As required for recovery under the Montreal Convention, the "unusual" and "unexpected" events just described caused Bandary's injuries. A reasonable jury could easily conclude that Delta's actions were "a link in the causal chain that resulted in [his injuries]." *Baillie v. MedAire, Inc.*, 764 Fed. App'x 597, 599 (9th Cir. 2019); *see Olympic Airways v. Husain*, 540 U.S. 644, 646 (2004); *see also Armstrong v. Hawaiian Airlines, Inc.*, 416 F. Supp. 3d 1030, 1048-49 (D. Haw. 2019) (denying summary judgment where a reasonable jury could find that wheelchair attendant's refusal to help disabled passenger retrieve bags caused passenger's arm injury).

Delta concedes that some of Bandary's injuries were caused by an accident: the handcuffing. *See* Delta Br. 40 ("[T]he 'accident' that *caused* Bandary's cut wrists was the application of flex-cuffs to his wrists."). But a jury could also reasonably conclude that *any* of the other events described—converging on him until he fell, manhandling him, and making him soil himself—were "happenings that [each] contributed to" Bandary's injuries. *Husain*, 540 U.S. at 654; *see id.* at 653 ("[T]he reality [is] that there are often multiple interrelated factual events that combine to cause any given injury."); *cf. Bostock v. Clayton Cnty.*, 590 U.S. 644, 656 (2020) ("[T]he traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged [action].").

B. The Montreal Convention permits recovery for emotional injuries if the same accident caused bodily injuries.

To recover for emotional injuries under Article 17(1), a plaintiff must show that the same accident caused both bodily and emotional injuries. *See* Opening Br. 36-41. Without bodily injury, emotional injuries are not recoverable. *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 552-53 (1991). But a plaintiff can recover for emotional injuries that *accompany* a bodily injury. *Doe v. Etihad Airways, P.J.S.C.*, 870 F.3d 406, 433-34 (6th Cir. 2017). Those emotional injuries need not be *caused* by a bodily injury, however. *Id.*

1. The Montreal Convention permits recovery for emotional injuries.

Even under the most restrictive standard adopted by courts, recovery for emotional injuries is permitted in some circumstances under the Montreal Convention. *See, e.g.*, *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 400 (2d Cir. 2004). Flouting this precedent, Delta maintains for the first time on appeal, *see* Mot. in Limine to Exclude Evidence of Emotional Distress, ECF 167, at 1; Delta Trial Br., ECF 202, at 5-6, that Convention delegates intended to exclude recovery for emotional injuries altogether. Delta Br. 36. But neither the Convention's text nor its purpose supports that result.

Article 17(1) provides for recovery of "damage sustained in case of death or bodily injury." Montreal Convention, art. 17(1). The term

"damage sustained" is generally understood—albeit outside the Montreal Convention context—to include emotional damages. *See, e.g.*, *Broadus v. O.K. Indus., Inc.*, 238 F.3d 990, 992 (8th Cir. 2001); *Allstate Ins. Co. v. Tozer*, 392 F.3d 950, 953 (7th Cir. 2004). And death or bodily injury are simply "conditions" that must be satisfied to trigger Article 17(1) liability, not an exhaustive list of all injuries for which recovery is authorized. *See Floyd*, 499 U.S. at 535-36.

The Convention's drafting history confirms this point. When the Convention was under consideration, existing precedent permitted the "recovery of mental injury in certain situations." Letter of Submittal, S. Treaty Doc. 106-45, 1999 WL 33292734, at *7 (2000). U.S. jurisdictions authorized recovery for at least some emotional injuries. *See, e.g.*, *In re Aircrash Disaster Near Roselawn*, 954 F. Supp. 175, 179 (N.D. Ill. 1997); *In re Air Crash at Little Rock Ark.*, 291 F.3d 503, 510 (8th Cir. 2002). Accordingly, the Convention delegates excluded emotional injuries in Article 17(1) to allow that precedent to "continue to develop in the future," Letter of Submittal, 1999 WL 33292734, at *7, not to bar recovery for emotional injuries.

Moreover, courts that have considered the question hold that recovery for some emotional injuries is required to protect passenger rights. The Eighth Circuit reasoned that "physical injuries will not be fully compensated if we do not allow recovery for this aspect of the harm." *In re Air Crash at Little Rock Ark.*, 291 F.3d at 510. Other courts have

likewise rejected a rule prohibiting recovery for any emotional injuries as "too restrictive of passengers' rights." *Id.* at 509 (discussing *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 665 (N.D. Cal. 1994)).

2. The Montreal Convention does not require a causal relationship between bodily and emotional injuries.

The Convention's text and purpose establish that plaintiffs may recover for all emotional injuries caused by the underlying accident, not only those caused by bodily injuries. *See* Opening Br. 36-42; *Doe*, 870 F.3d at 413-14.

a. Text. The Montreal Convention's text does not impose a causal requirement linking bodily and emotional injuries. As our opening brief explains (at 36-38), "in case of" does not mean "caused by." It means "in the event or contingency that" or "if it should prove or happen that." *In case*, Oxford Eng. Dictionary (2d ed. 1989). Delta provides no contrary dictionary definition—because there isn't one. Instead, Delta analogizes to a hypothetical insurance policy that provides "coverage for damages in case of fire." Delta Br. 46. But that conflates two concepts that Article 17(1) keeps separate: the cause (the accident) and the necessary result (the bodily injury). In Delta's example, fire is both the only possible cause and the necessary effect. By contrast, in Article 17(1), a *different* cause is assigned: the accident—and plaintiffs may recover for all damages it inflicts. As the Supreme Court has observed, the "text of Article 17 refers

to an accident *which caused* the passenger's injury." *Air France v. Saks*, 470 U.S. 392, 398 (1985).

Common parlance confirms that understanding. "In case of" typically signifies a conditional, rather than causal, relationship. That is, "[t]o say *in case of X, do Y* is to say 'if X happens, then do Y.'" *Doe*, 870 F.3d at 413. A sign reading "In case of fire, break glass," for example, does not mean that the fire causes the glass to break.

b. Warsaw Convention precedent. Our opening brief observes (at 40) that the Montreal Convention's "vast improvement" of "passenger rights," Letter of Transmittal, S. Treaty Doc. 106-45, 1999 WL 33292734, at *2 (2000), justifies a less restrictive reading of "in case of" than how one might read that term in the Warsaw Convention. Delta resists this conclusion, emphasizing that the Montreal Convention sought only an "equitable balance" between passengers and airlines. Delta Br. 49 (citation omitted). Maybe yes, maybe no. But measured against the carrier-protective prior Warsaw regime, even an equitable balance signified "increased economic protection for the international air traveler." Letter of Submittal, S. Treaty Doc. 106-45, 1999 WL 33292734, at *10 (2000).

True, "courts have routinely relied upon Warsaw Convention precedent where the equivalent provision in the Montreal Convention is substantively the same." *Narayanan v. Brit. Airways*, 747 F.3d 1125, 1127 n.2 (9th Cir. 2014). But "in case of" and "en cas de" (the Warsaw

Convention's equivalent phrase) are substantively distinct; though the French term in the Warsaw Convention may have implied causation, the English term in the Montreal Convention does not. *See* Opening Br. 39 (citing *Doe*, 870 F.3d at 426).

And even if Delta is correct that the Montreal Convention imported existing Warsaw Convention precedent, that does not support Delta's interpretation of Article 17(1). First, the case on which Delta principally relies, *Ehrlich v. American Airlines, Inc.*, 360 F.3d 366 (2d. Cir. 2004), was decided after the Montreal Convention was drafted. *See* Montreal Convention (2000). So, the drafters could not have intended to adopt *Ehrlich*'s holding that only emotional injuries caused by bodily injuries are recoverable.

In any event, *Ehrlich* and its progeny are wrong. The Second Circuit did not draw its causation requirement from the Warsaw Convention's text, acknowledging that "en cas de" "often means 'circumstance'" and does not "conclusively impose a causation requirement." *Ehrlich*, 360 F.3d at 378. *Ehrlich* nevertheless drew a causation requirement from, among other sources, purpose, French legal materials, sister signatories' judicial decisions, and drafting history. *Id.* at 378-91. But none of those materials may override the text. *See Doe*, 870 F.3d at 416 (observing that *Ehrlich* "interpolated a causal component into the Warsaw Convention that was not required by the text … expressly to serve the Warsaw Convention's purpose"). *Ehrlich* impermissibly "alter[s], amend[s], or

add[s] to" the treaty, so this Court should not follow it. *Id.* (citation omitted).

c. Administrability. Bandary's standard is neither nebulous nor novel. *Contra* Delta Br. 45. Instead, our standard supplies two limiting principles. First, recoverable emotional injuries must be caused by the accident that caused the bodily injuries. *Doe,* 870 F.3d at 434. So, a passenger insulted at the beginning of the flight and later struck by luggage could not recover for emotional harm flowing from the insults because those insults are not a "link in the chain" causing the bodily injury. *Olympic Airways v. Husain*, 540 U.S. 644, 653 (2004). Second, a plaintiff may not recover at all without establishing a bodily injury under Article 17(1). *Floyd*, 499 U.S. at 552-53; *cf. Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 546-47 (1994) (describing the physical-impact test, under which a plaintiff asserting negligent infliction of emotional distress must show a "contemporaneous[] … physical impact").

It is Delta's standard, not the Sixth Circuit's in *Doe*, that is unworkable. It is often nearly impossible to disentangle whether a plaintiff's bodily injury or the broader accident caused his emotional injuries, especially when the accident and bodily injury occur simultaneously. *See Doe*, 870 F.3d at 428. A plaintiff who survives a plane crash with broken limbs cannot usually determine whether her PTSD is attributable to her injury or to her fear of the crash. *See id.* (noting the

anomaly of not permitting a plaintiff to recover for "harm result[ing] from the *realization* of an imminent crash-landing").

And even if our standard occasionally permits recovery for emotional injuries accompanying relatively minor bodily injuries, some measure of over-inclusiveness is preferable to Delta's drastic under-inclusiveness—excluding, for instance, all emotional injuries suffered by the plaintiff in the crash just described. Recovery for emotional injuries when a plaintiff suffers only a minor bodily injury is simply a "side effect of Article 17's focus on physical injury as a threshold requirement for liability." *In re Aircraft Disaster Near Roselawn*, 954 F. Supp. at 179. Delta's rule would instead require "Montreal Convention plaintiffs to prove causation in a way that burdens the injured passenger far more than the text requires." *Doe*, 870 F.3d at 428.[7]

Bandary's emotional injuries were caused by the same accident that caused his physical injuries. *See Husain*, 540 U.S. at 652. Damages for those injuries are therefore recoverable under the Montreal Convention.

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[7] Delta also maintains that *Doe*'s causation ruling was dicta. We use *Doe* for its persuasive, not binding, effect. In any event, *Doe* held that the airline was "liable for damages arising from [the plaintiff's anguish] regardless of whether [it] was directly caused by the physical hole in Doe's finger or by the fact that Doe was pricked by a needle." *Doe*, 870 F.3d at 434. That ruling was necessary to the result. Without it, Doe's fear of "possible exposure to hepatitis, tetanus, and HIV" would have been excluded from recovery as not caused by the puncture wound. *Id.* at 410.

C. Even under Delta's standard, Bandary may recover for some emotional injuries caused by his bodily injuries.

Assuming (counterfactually) that a plaintiff may be compensated only for mental injuries caused by his physical injuries, Delta Br. 36, Bandary suffered compensable emotional injuries. Under this standard, emotional injuries "must proximately flow from physical injuries caused by the accident." *In re Air Crash at Little Rock Ark.*, 291 F.3d 503, 510 (8th Cir. 2002).

Delta is wrong that "Bandary does not seek to recover for emotional harm stemming from the flex-cuffs." Delta Br. 40. Several of Bandary's emotional harms stem from the cuts and neck and shoulder injuries caused by his handcuffing. When asked whether his physical injuries caused him emotional distress, Bandary testified that his injuries caused him to wake in the middle of the night crying and gave him bad dreams. 2-ER-176. And his PTSD stemming from these physical injuries made him afraid to fly alone. 3-ER-385. Because these emotional injuries "flow from" his handcuff-induced bodily injuries, he can recover for them even under Delta's restrictive, atextual standard. *In re Air Crash at Little Rock Ark.*, 291 F.3d at 510.

III. Bandary suffered compensable physical injuries and emotional injuries prior to Vahe's involvement.

Even if Delta is immune for events following the disclosure to Vahe, Bandary suffered a bodily injury before then. *See* Opening Br. 44-45.

After being surrounded by Delta staff, Bandary fell and hurt his rear. 2-ER-168-69; 3-ER-381. That fall qualified as a bodily injury under both the Montreal Convention's text and state law that would apply in the Convention's absence.

A. Bandary's fall qualifies as a "bodily injury" as used in Article 17(1) because it caused him pain. 3-ER-381; *contra* Delta Br. 30-31. "Bodily injury" is "any damage to a person's physical condition *including pain* or illness." *Bodily Injury*, Merriam Webster Legal Dictionary, https://www.merriam-webster.com/legal/bodily%20injury (last visited Feb. 27, 2026) (emphasis added). Black's Law Dictionary likewise defines "bodily harm" (an identical concept) as including "[p]hysical *pain*." *Bodily Harm*, Black's Law Dictionary (12th ed. 2024) (emphasis added); *see Harm*, Oxford Eng. Dictionary (2d ed. 1989), https://www.oed.com/dictionary/harm_n; *see also* 18 U.S.C. § 1365(h)(3)(B) (criminalizing tampering with consumer products and defining "bodily injury" element to include "physical pain"). Accordingly, Bandary's pain from falling on his rear is a bodily injury, and any disputes concerning its severity must go to a jury. *See Oshana v. Aer Lingus Ltd.*, 2022 WL 138140, at *9 (N.D. Ill. Jan. 12, 2022).

Delta cites *Eastern Airlines, Inc. v. Floyd*, which provides, as one example of a bodily injury, "a change in the structure of an organ." 499 U.S. 530, 541 (1991). But this observation suggests only that such a change is *sufficient* to show a bodily injury, not that it's necessary. Nor

did the Court there have occasion to define the bounds of "bodily injury," holding only that emotional injuries alone are not recoverable under the Warsaw Convention. *Id.* at 553-54.

To define bodily injury, Delta relies principally on *Tharp v. Delta Air Lines, Inc.*, 552 F. Supp. 3d 1091 (D. Or. 2021). But, oddly, none of the cases that *Tharp* relies on address the question here: whether pain constitutes bodily injury. *See id.* at 1099; *Heinemann v. United Cont'l Airlines*, 2011 WL 2144603, at *4 (W.D. Wash. May 31, 2011); *Rosman v. Trans World Airlines, Inc.*, 314 N.E.2d 848, 850 (N.Y. 1974); *Salis v. Ghana Airways*, 780 N.Y.S.2d 627, 629 (N.Y. App. Div. 2004).

B. Beyond the standard definitions of "bodily injury" discussed above, Bandary's pain from his fall also qualifies as a bodily injury under state law that would apply in the Convention's absence. When the Montreal Convention doesn't define a term, courts apply "the law that would govern in [its] absence." *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 229 (1996); *see Ins. Co. of N. Am. v. Fed. Exp. Corp.*, 189 F.3d 914, 920 (9th Cir. 1999) (applying *Zicherman* to other undefined terms such as "wil[l]ful misconduct").

Absent the Montreal Convention, Bandary would have brought state-law tort claims against Delta. Under the choice-of-law provision in

Delta's Contract of Carriage, Georgia law applies.[8] Bandary's fall constitutes a "bodily injury" under Georgia tort law because it caused him "physical pain." *State v. Randle*, 781 S.E.2d 781, 783 (Ga. 2016); *Mize v. State*, 218 S.E.2d 450, 451 (Ga. App. 1975).

Tort claims are ordinarily "decided according to the law of the forum state" rather than governed by contractual choice-of-law provisions. *See Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, 971 F.2d 401, 407 (9th Cir. 1992). Under California law, too, Bandary's fall is a "bodily injury." Although California law provides no definition of "bodily injury" for assault and battery, the state's felony enhancement for defendants who inflict "great bodily injury" confirms our position. Cal. Penal Code § 12022.7. Under this enhancement, some "physical pain … is sufficient for a finding of 'great bodily injury.'" *People v. Washington*, 148 Cal. Rptr. 3d 748, 753 (Cal. App. 4th 2012); *see People v. Cross*, 190 P.3d 706, 712 (Cal. 2008).

In sum, because Bandary's fall resulted in a bodily injury, he can recover for it and any resulting emotional injuries, even assuming (incorrectly) that ATSA provides Delta immunity after Vahe's involvement. *See* Opening Br. 44-45.

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[8] *See Contract of Carriage: International, Rule 26*, Delta Air Lines, Inc., https://www.delta.com/us/en/legal/contract-of-carriage-igr (last visited Feb. 27, 2026).

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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FOR THE NINTH CIRCUIT

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