No. 02-1348

In the Supreme Court of the United States

OLYMPIC AIRWAYS, PETITIONER

v.

RUBINA HUSAIN, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ABID M. HANSON, DECEASED, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether an airline's unreasonable refusal to assist a passenger who becomes ill during an international flight, in violation of industry standards and the airline's own policies, constitutes an "accident" within the meaning of Article 17 of the Warsaw Convention.

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INTEREST OF THE UNITED STATES

As a party to the Warsaw Convention, the United States has a substantial interest in the manner in which the Convention is interpreted by the courts of this Country. The United States also has a substantial interest in the achievement of a sensible balance between protecting U.S. citizens who travel by air outside this Country, including assuring compensation for those who are killed or injured in doing so, and protecting U.S. air carriers from undue and excessive liability. The United States has participated as amicus curiae in other cases in this Court concerning the Warsaw Convention, including *El Al Israel Airlines, Ltd.* v. *Tseng*, 525 U.S. 155 (1999); *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989); and *Air France* v. *Saks*, 470 U.S. 392 (1985).

STATEMENT

1. a. The Convention for the Unification of Certain Rules Relating to International Transportation by Air (Oct. 12, 1929), 49 Stat. 3000, popularly known as the Warsaw Convention, prescribes a comprehensive set of legal principles to govern "all international transportation of persons, baggage or goods performed by aircraft" with respect to carriers' liability to passengers, shippers, and consignees. Art. 1(1).[1] See generally Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967). The Convention was designed to "foster uniformity in the law of international air travel," *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 230 (1996), and "to accommodate or balance the interests of passengers seeking recovery for personal injuries, and the interests of air carriers seeking to limit potential liability," *El Al Israel Airlines, Ltd.* v. *Tseng*, 525 U.S. 155, 170 (1999).

To protect passengers' interests, for example, Article 17 allows a passenger to make out a prima facie case of liability for personal injuries without having to prove that the airline was at fault, as long as the passenger can prove that his injury was caused by an "accident." Article 20 allows the airline to avoid liability by proving that it took "all necessary measures to avoid the damage or that it was impossible for [the airline] to take such measures." The combined effect of Article 17 and Article 20 is to shift the burden of proof with respect to fault from the passenger to the airline. See Lowenfeld & Mendelsohn, *supra*, 80 Harv. L. Rev. at 499-500.

To protect the airline industry's interests, Article 22(1) limits the amount that can be recovered under Article 17 in the event of a death or bodily injury. That limit was set at

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[1] All references to Articles of the Warsaw Convention refer to the reproduction of the Convention that follows the note at 49 U.S.C. 40105.

125,000 French francs, equivalent in 1929 to approximately $8300, a "low amount even by 1929 standards." *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 546 (1991); see Lowenfeld & Mendelsohn, *supra*, 80 Harv. L. Rev. at 499 & n.10. Under Article 25(1), however, that limit ceases to apply if the damage is caused by the "willful misconduct" of the airline or its agent, acting within the scope of his employment.[2] In addition, Article 21 enables an airline to avoid or reduce its liability "[i]f the carrier proves that the damage was caused by or contributed to by the negligence of the injured person."

To prevent airlines from circumventing Article 17 by requiring passengers, as a condition of receiving transportation, to waive their right to bring suit for personal injury, Article 23 nullifies "[a]ny provision tending to relieve the carrier of liability."[3] Article 24, in turn, prevents passengers from seeking to circumvent the limitations in the Warsaw Convention (and in particular its limitation on damages) by bringing suit under domestic law outside the terms of the Convention. Article 24 thus gives preemptive effect to Article 17 as well as Article 18, which concerns loss of or

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[2] Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (1975) contains language that amends Article 25's protection of passengers by replacing the words "willful misconduct" with the words "done with intent to cause damage or recklessly and with knowledge that damage would probably result," as long as the airline's employee or agent was acting "within the scope of his employment." S. Exec. Rep. No. 105-20 at 29 (1998). The United States Senate gave its advice and consent to ratification of the Protocol in 1998, and it entered into force for the United States on March 4, 1999. See *Tseng*, 525 U.S. at 174 n.14. Because the facts giving rise to this case took place in 1997, Montreal Protocol No. 4 does not apply here.

[3] When the Warsaw Convention was drafted, airlines in some countries made their services contingent upon a passenger's contractual waiver of the right to bring suit for personal injury, and such waivers were often enforceable in court. See *Tseng*, 525 U.S. at 170.

damage to baggage and cargo, and Article 19, which concerns delay. See *Tseng*, 525 U.S. at 168-169.

Over the years, airlines have entered into various agreements, with the support and approval of the United States Government, to waive significant aspects of the liability limitations imposed by the Warsaw Convention. See *Floyd*, 499 U.S. at 549.[4]

b. On July 31, 2003, the United States Senate gave its advice and consent to ratification of the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on May 28, 1999. 149 Cong. Rec. S10,870 (daily ed. July 31, 2003). That new Convention modernizes, and is intended ultimately to replace, the Warsaw Convention and its related protocols. Among the significant provisions in the new Convention are the removal of all caps on liability for passengers' death or bodily injury, the creation of strict liability for recoveries up to 100,000 Special Drawing Rights (approximately $139,000) with liability subject to certain defenses above that amount (Art. 21), and the establishment of an additional basis for jurisdiction in the courts of the principal and permanent residence of the passenger under certain conditions (Art. 33).[5] In many

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[4] In the most recent such agreement, concluded in 1996, several dozen major airlines agreed to waive any limit on compensatory liability for claims arising under, and satisfying the liability conditions of, Article 17. Those airlines further agreed to waive the defense of non-negligence under Article 20 (and thereby effectively agreed to strict liability) for such claims in an amount up to 100,000 Special Drawing Rights, which, at the current exchange rate, equals approximately $139,000. See International Air Transport Association: Agreement Relating to Liability Limitations of the Warsaw Convention, Order 97-1-2 (Dep't Transp. Jan. 8, 1997), available in 1997 WL 4834.

[5] The Warsaw Convention provides that an action may be brought "before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination." Art. 28(1).

respects, the new Convention closely follows the language of the Warsaw Convention, as amended by subsequent protocols. The text of Article 17(1), which concerns liability for death or bodily injury, is not significantly different from the text of Article 17 of the Warsaw Convention, and was not intended to constitute a change in substance with respect to the meaning of the term "accident."[6]

The new Montreal Convention will enter into force 60 days after 30 countries deposit instruments of ratification, acceptance, approval, or accession. Art. 53(6). The United States has not yet deposited its instrument of ratification, although 29 other countries have done so. The deposit of the United States' instrument of ratification will result in the Convention's entering into force for the United States 60 days thereafter. The new Convention will apply to all round-trip international travel beginning and ending in the United States or beginning and ending in the territory of another party, as well as to one-way travel between the parties to that Convention.

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[6] Article 17(1) of the 1999 Montreal Convention reads:

> 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.

The Article-by-Article Analysis of the Convention in the President's submission of the 1999 Montreal Convention to the Senate stated with respect to Article 17(1):

> Paragraph 1 provides for carrier liability for death or bodily injury of a passenger caused by an accident on board the aircraft or in the course of embarking or disembarking. The carrier's limited defenses to liability are provided for elsewhere in the Convention (i.e., Article 21, below). It is expected that this provision will be construed consistently with the precedent developed under the Warsaw Convention and its related instruments.

S. Treaty Doc. No. 106-45, 106th Cong., 2d Sess., at 9 (2000).

2. In late 1997, Dr. Abid Hanson, a 52-year old physician, and his wife, Rubina Husain, traveled with their children and another family from San Francisco to Athens and Cairo for a vacation. Dr. Hanson, who suffered from asthma and was sensitive to tobacco smoke, was not aware before embarking on the trip that the airline, petitioner Olympic Airways, permitted passengers to smoke cigarettes on international flights. At the airport, therefore, Dr. Hanson requested seats for himself and his family in the non-smoking section of the aircraft. The family was seated away from the smoking section on their flights from New York to Athens and from Athens to Cairo, and Dr. Hanson experienced no problems breathing on either flight. Pet. App. 36a.

Dr. Hanson and his family arrived early at the Cairo airport for their return flights to ensure that they would be seated in the non-smoking section. After receiving the family's seat assignments, Ms. Husain showed the check-in agent a letter signed by Dr. Hanson's brother, also a physician, explaining that Dr. Hanson had a history of asthma, and asked the agent to see that the family was seated in the non-smoking section of the plane. Pet. App. 36a-37a.

Dr. Hanson began experiencing breathing difficulties during a layover in the Athens airport, where he was directed to wait in a room where many people were smoking. When the family boarded their flight from Athens to San Francisco, they discovered that they had been assigned seats toward the rear of the airplane cabin, three rows in front of the economy-class smoking section. Pet. App. 37a.

When the family reached their seats, Ms. Husain advised an Olympic Airways flight attendant, Maria Leptourgou, that Dr. Hanson could not sit in a smoking area, and said, "You have to move him." Pet. App. 38a. The flight attendant paid little attention to Ms. Husain's request and told her to "have a seat." *Ibid.* After the plane was fully boarded but before takeoff, Ms. Husain again asked Ms. Leptourgou

to move Dr. Hanson, explaining that he was "allergic to smoke." *Ibid.* Although Ms. Husain was "adamant" about her request, Ms. Leptourgou replied that she could not assign Dr. Hanson to a different seat because the plane was "totally full" and she was too busy at the moment to assist them. *Ibid.*

Shortly after takeoff, the captain turned off the "no smoking" signs. At that point, passengers in the smoking section began smoking, and passengers from other rows stood in the aisles behind Dr. Hanson, smoking and socializing. As a result, Dr. Hanson was surrounded by ambient smoke. When the smoke began to bother Dr. Hanson, Ms. Husain spoke with Ms. Leptourgou a third time, stating, "You have to move my husband from here." Pet. App. 39a. Ms. Leptourgou curtly refused, again stating that the plane was full. *Ibid.* Ms. Leptourgou told Ms. Husain that Dr. Hanson could switch seats with another passenger, but that Ms. Husain herself would have to ask other passengers to do so, without the aid of the flight crew. Ms. Husain, becoming more desperate and adamant, told Ms. Leptourgou that Dr. Hanson "*had* to move," even if the only available seat was in the cockpit or in first-class, but Ms. Leptourgou refused to provide any assistance. *Id.* at 40a.

Unknown to Dr. Hanson and his party, there were 11 empty passenger seats on the aircraft, some of which were in the non-smoking economy class. Pet. Br. 5-6. In addition, there were 28 "non-revenue" passengers on the flight, 15 of whom were seated in economy class rows 15 through 36, much farther from the smoking section, which began in row 51, than were Dr. Hanson and his family, who were seated in row 48. Pet. App. 37a, 40a.

Smoking increased after the meal service. Dr. Hanson asked Ms. Husain for a new inhaler, since his had become empty and the smoke was bothering him, and moved toward the front of the plane to breathe fresher air. He then

gestured to Ms. Husain to get the epinephrine that he carried in an emergency kit that Ms. Husain had stored in a carry-on bag. Ms. Husain administered a shot of epinephrine to Dr. Hanson and ran to the rear of the cabin to awaken Dr. Umesh Sabharwal, an allergy specialist, with whom Dr. Hanson and his family had been traveling. Pet. App. 41a.

Dr. Sabharwal observed that Dr. Hanson was in respiratory distress. Dr. Sabharwal gave Dr. Hanson another shot of epinephrine and began to administer CPR. Dr. Sabharwal and Ms. Husain also administered oxygen to Dr. Hanson, but Dr. Sabharwal eventually concluded that oxygen was not useful because Dr. Hanson could not breathe spontaneously. Other passengers also attempted to help Dr. Hanson, but he died shortly thereafter. Pet. App. 42a-43a.

3. Ms. Husain, on behalf of herself and Dr. Hanson's estate, and the couple's children, all of whom are respondents here, filed this wrongful death suit in California state court under Article 17 of the Warsaw Convention. The case was removed to federal court, which, after a bench trial, held petitioner liable for Dr. Hanson's death.[7]

The district court held that the repeated refusal of petitioner's flight attendant to assign Dr. Hanson to another seat was an "accident" within the meaning of Article 17 of the Warsaw Convention. Pet. App. 51a-52a. The court applied the definition of that term articulated in *Air France* v. *Saks*, 470 U.S. 392, 405 (1985): "an unexpected or unusual event or happening that is external to the passenger." The court reasoned that the flight attendant's conduct was external to Dr. Hanson and, because it was in "blatant disregard of industry standards and airline policies," was not expected or usual. Pet. App. 51a-52a, 58a. The court noted that "the recognized standard of care for flight attendants during

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[7] The flight attendant, Ms. Leptourgou, did not testify at trial. Pet. App. 38a.

international air travel demands that a flight attendant make efforts to accommodate a passenger who indicates that he or she needs to be moved for medical reasons." *Id.* at 52a. The court further noted that petitioner's own policies likewise require flight attendants to attempt to move passengers who become ill during flights, if doing so could alleviate their condition. *Ibid.*

In addition, the district court held that the flight attendant's refusal to reseat Dr. Hanson caused his death, Pet. App. 59a-60a; that the flight attendant engaged in "willful misconduct," *id.* at 65a-71a, thereby removing the limits on compensatory damages under the Warsaw Convention; that Dr. Hanson was contributorily negligent in not attempting to switch seats independently, *id.* at 74a-75a; and that his negligence contributed to his death at a rate of 50%, *id.* at 78a. The court consequently reduced respondents' recovery by half. *Id.* at 79a-80a.

The district court awarded respondents $700,000 in pecuniary damages and another $700,000 in non-pecuniary damages. Pet. App. 31a, 80a

4. The Ninth Circuit affirmed. Pet. App. 1a-21a.

The court of appeals, reviewing the district court's "accident" determination under the "clearly erroneous" standard because it was "inextricably intertwined with the facts," held that "the district court's findings and conclusions are well-grounded in the record." Pet. App. 15a, 21a. Applying the *Saks* definition, the court agreed that the flight attendant's refusal to reseat Dr. Hanson "was clearly external to Dr. Hanson, and it was unexpected and unusual in light of industry standards, Olympic policy, and the simple nature of Dr. Hanson's requested accommodation." *Id.* at 14a. The court of appeals further concluded that an airline's failure to act, as well as its affirmative acts, may constitute an "accident": "The failure to act in the face of a known, serious risk satisfies the meaning of 'accident' within Article 17," the

court explained, "so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane." *Ibid.*

The court of appeals also affirmed the district court's determinations that the "accident" caused Dr. Hanson's death, Pet. App. 15a-17a, and that the flight attendant's actions and inactions amounted to "willful misconduct," *id.* at 20a-21a.

SUMMARY OF ARGUMENT

The Warsaw Convention imposes liability on an airline for a passenger's death or bodily injury caused by an "accident" that occurred in connection with an international flight. In *Air France* v. *Saks*, 470 U.S. 392 (1985), this Court explained that the term "accident" in the Convention refers to "an unexpected or unusual event or happening that is external to the passenger," and not to "the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." *Id.* at 405-406. Accordingly, the court concluded that a passenger's hearing loss "caused by normal operation of the aircraft's pressurization system," *id*, at 395, was not an "accident" under the Convention, *id.* at 407.

When a passenger becomes ill during an international flight, the airline's response to the illness may amount to "an unexpected or unusual event," and thus satisfy the definition of "accident," applied with the "flexib[ility]" that *Saks* requires. 470 U.S. at 405. The inquiry turns on whether or not airline personnel's response to the medical crisis is objectively reasonable in the circumstances, as measured against industry standards, individual airline policies and practices, and general standards of care. If airline personnel's conduct is unreasonable under that analysis, the passenger's resulting death or bodily injury is not, as in *Saks*, a "reaction to the usual, normal, and expected operation of the aircraft," *id.* at 405-406, but instead is the result of something aberrational

in the aircraft's operation. Both action and inaction by airline personnel in the face of a medical crisis may constitute an "accident": an airline employee's refusal to assist an ill passenger, as occurred here, is not meaningfully distinguishable from an affirmative act.

The understanding that an "accident" may consist of an airline's "unexpected or unusual" response to a medical crisis is fully consistent with the Convention's text and structure, and it advances the Convention's purpose of balancing the interests of air passengers and air carriers. See *El Al Israel Airlines, Ltd.* v. *Tseng*, 525 U.S. 155, 170 (1999). Common carriers have traditionally been understood to have a duty to come to the aid of passengers who suffer illness or injury while in transit. A passenger thus has every reason to expect that airline personnel will respond reasonably to a medical crisis that occurs during flight. If they do not, and thereby aggravate a passenger's condition, the airline may fairly be held accountable for that "accident."

Here, the district court properly analyzed whether the flight attendant's repeated refusal to reseat an asthmatic passenger amounted to an "accident" under the Convention. The district court considered whether the flight attendant's conduct was "unexpected or unusual" in view of the industry standard of care, petitioner's own policies, and what would reasonably have been expected from airline personnel in the circumstances. See Pet. App. 53a-55a. Having concluded that the flight attendant acted in "blatant disregard of industry standards and airline policies," *id.* at 58a, the district court correctly concluded that her conduct was an "accident" that could give rise to liability under the Convention.

ARGUMENT

AN AIRLINE'S UNREASONABLE REFUSAL TO COME TO THE AID OF AN ILL PASSENGER IS AN "ACCIDENT" THAT CAN GIVE RISE TO LIABILITY UNDER THE WARSAW CONVENTION

If airline personnel refuse to render reasonable assistance to a passenger who becomes ill on an international flight, an "accident" has occurred within the meaning of Article 17 of the Warsaw Convention. Any resulting bodily injury or death of the passenger is actionable under the Convention. That conclusion satisfies the definition of an Article 17 "accident" that this Court articulated in *Air France* v. *Saks*, 470 U.S. 392 (1985), is consistent with the text and structure of the Convention, and serves the Convention's purpose of balancing the interests of passengers and air carriers. That conclusion also accords with the United States' interpretation of the Convention, to which "[r]espect is ordinarily due." *El Al Israel Airlines, Ltd.* v. *Tseng*, 525 U.S. 155, 168 (1999); *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982). Accordingly, the courts below correctly held that the refusal of petitioner's flight attendant to respond to repeated requests to reseat an asthmatic passenger away from the smoking section of the aircraft was an "accident" under Article 17.

A. An Airline Employee's Response To A Medical Crisis Can Constitute An "Accident" Within The Meaning Of Article 17 Of The Warsaw Convention

1. Article 17 of the Warsaw Convention, the article that establishes an airline's prima facie liability for a passenger's death or bodily injury, provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if *the acci-*

> *dent* which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Art. 17 (emphasis added). The governing French text of Article 17 similarly refers to damage caused by "l'accident." 49 Stat. 3005. Recovery is available under the Convention, therefore, only if a passenger's death or bodily injury results from an "accident" that occurred in connection with the flight.

In *Saks*, this Court held that a passenger's "loss of hearing proximately caused by normal operation of the aircraft's pressurization system" was not an "accident" within the meaning of Article 17. 470 U.S. at 395, 407. The Court noted that the Warsaw Convention nowhere defines the term "accident," the context in which the term is used is not "illuminating," and "the records of [the Convention's] negotiation offer no precise definition of 'accident.'" *Id.* at 399, 403. The Court nonetheless was able to discern the term's meaning from the text, structure, and history of the Convention and from the parties' subsequent conduct. See *id.* at 398-405.

The Court concluded that an "accident" of the sort that can give rise to liability under the Warsaw Convention is "an unexpected or unusual event or happening that is external to the passenger." 470 U.S. at 405. In contrast, the Court observed that, "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply." *Id.* at 406. The Court made clear that the definition of "accident" in Article 17 "should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." *Id.* at 405.

Consistent with the definition of "accident" articulated in *Saks*, passengers may seek recovery under the Warsaw Convention for death or bodily injury resulting from airplane crashes, see, *e.g.*, *In re Air Crash at Little Rock, Ark.*, 291 F.3d 503 (8th Cir. 2002); terrorist attacks, see, *e.g.*, *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 37 F.3d 804 (2d Cir. 1994), cert. denied, 513 U.S. 1126 (1995); and other flight-related occurrences, see, *e.g.*, *Magan* v. *Lufthansa German Airlines*, No. 02-7172, 2003 WL 21912258 (2d Cir. Aug. 12, 2003) (turbulence); *Gezzi* v. *British Airways PLC*, 991 F.2d 603, 604-605 (9th Cir. 1993) (water on stairway to aircraft); *Diaz Lugo* v. *American Airlines, Inc.*, 686 F. Supp. 373, 375 (D.P.R. 1988) (spill of hot liquid). Such events are "unexpected or unusual" in the operation of an aircraft and are "external to the passenger." *Saks*, 470 U.S. at 405.

Under that definition, however, passengers cannot recover for death or bodily injury resulting from heart attacks, strokes, or similar medical events that occur on an aircraft but are unrelated to its operation. See, *e.g.*, *Rajcooar* v. *Air India Ltd.*, 89 F. Supp. 2d 324, 328 (E.D.N.Y. 2000); *Northern Trust Co.* v. *American Airlines, Inc.*, 491 N.E.2d 417, 422 (Ill. App. Ct. 1986). Nor may passengers recover for death or bodily injury caused by the routine operation of an aircraft, such as hearing loss resulting from a normal change in pressurization, as in *Saks*, or deep-vein thrombosis resulting from tight seating arrangements, see *e.g.*, *Scherer* v. *Pan Am. World Airways, Inc.*, 387 N.Y.S.2d 580, 581 (N.Y. App. Div. 1976). As a general matter, such injuries are the result of "the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." *Saks*, 470 U.S. at 406.

2. A different situation is presented when, as here, a passenger seeks to recover not for death or bodily injury resulting from his medical condition alone, but for death or bodily injury resulting from an airline's response to his

medical condition. In appropriate circumstances, the airline's response, including a refusal to respond, satisfies the definition of an "accident" under the Warsaw Convention, applied with the "flexib[ility]" that *Saks* requires, 470 U.S. at 405.

Airline personnel's acts, or refusals to act, in a medical crisis necessarily are events "external to the passenger." *Saks*, 470 U.S. at 405. A flight attendant's response to a passenger's illness, like a pilot's response to severe weather or an equipment malfunction, is part of the "operation of the aircraft." *Id.* at 406. And, if that response deviates from what would be "usual, normal, and expected" in the circumstances, *ibid.*, the Warsaw Convention's requirement of an "accident" is satisfied. See, *e.g.*, *Fishman* v. *Delta Air Lines, Inc.*, 132 F.3d 138, 141 (2d Cir. 1998) (when a flight attendant treated a passenger's earache by applying a scalding compress, the passenger could seek recovery under the Warsaw Convention for the resulting burns to her neck and shoulder, because "the scalding by a flight attendant [was] an unexpected, unusual event that was external to [the passenger]"); *Fulop* v. *Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 664-665 (S.D.N.Y. 2001) (when a passenger suffered a heart attack, the flight crew's failure to make an unscheduled landing, in alleged violation of its own policies, may be sufficiently unexpected or unusual to be an accident); see also pp. 26-27, *infra* (citing similar cases).

Whether an airline employee's response to a medical crisis is "unexpected or unusual," and thus an "accident," turns on its objective reasonableness "after assessment of all the circumstances." *Saks*, 470 U.S. at 405; see, *e.g.*, *Fulop*, 175 F. Supp. 2d at 670 ("What is unusual or unexpected should be gauged by what objectively is usual or reasonably to be expected under particular circumstances.").[8] The relevant

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[8] A similar approach is applied in insurance law, which generally considers an injury inflicted on an insured by a third person to be "due to

circumstances may include the nature of the assistance required by the passenger; the extent to which the flight crew knew, or should have known, of the passenger's need for assistance; the location, conditions, and remaining duration of the flight when assistance was required (severe and prolonged turbulence, for example, could preclude movement around the aircraft); whether providing the assistance could pose a risk to the other passengers or crew (as might exist, for example, if an unscheduled landing had to be made in a dangerous area); and any recommendations by medical professionals. In many instances, as here, the inquiry may be informed by "industry norms, internal policies and procedures, and general standards of care," *Fulop*, 175 F. Supp. 2d at 665, although the absence of formal standards or policies should not be dispositive.[9]

It still must be established, of course, that the "accident" —that is, the airline's objectively unreasonable action or inaction—caused the passenger's death or bodily injury. That requirement can be satisfied even if the passenger's internal medical condition was the initial link in the chain of events that caused his death or bodily injury. As the Court observed in *Saks*, "[a]ny injury is the product of a chain of causes, and we require only that the passenger be able to prove that some link in the chain was an unusual or

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accident or accidental means where it was neither foreseen, expected, nor anticipated by the insured." Ferdinand S. Tinio, *Accident Insurance: Death or Injury Intentionally Inflicted by Another as Due to Accident to Accidental Means*, 49 A.L.R.3d 673, 678 (1973) (footnotes omitted). In the present context, however, the analysis focuses on what would reasonably have been anticipated in the circumstances, not on what the injured passenger subjectively would have anticipated.

[9] Contrary to the suggestion of amicus Air Transport Association (Br. 14 n.12), therefore, airlines would not be able to avoid liability under the Warsaw Convention simply by declining to adopt standards or policies for addressing medical events that occur during flight.

unexpected event external to the passenger." 470 U.S. at 406. If, therefore, it is established that the passenger's death would not have occurred, or his injury would not have been as severe, but for the flight crew's "unexpected or unusual" response to his medical condition, the death or bodily injury would not have "result[ed] from the passenger's own internal reaction to the *usual, normal, and expected* operation of the aircraft," *ibid.* (emphasis added), but instead from an aberration in the aircraft's operation.

3. The same analysis applies whether the asserted "accident" involves action or inaction on the part of the airline. In the context of international air travel, an airline employee's refusal to assist an ill passenger, as occurred in this case, is not meaningfully distinguishable from an airline employee's affirmative act. Contrary to petitioner's suggestion (Br. 18-21), both are correctly viewed as an "event or happening" within the *Saks* definition of "accident." It would create perverse incentives, moreover, if a flight attendant's coming to the aid of an ill passenger could give rise to liability under the Warsaw Convention, if done negligently or wrongfully, whereas a flight attendant's ignoring increasingly desperate requests to assist the passenger could never do so. See *McDowell* v. *Continental Airlines, Inc.*, 54 F. Supp. 2d 1313, 1320 (S.D. Fla. 1999) (observing that such a distinction would "create[] an incentive to airlines * * * to completely refuse to treat passengers who are in need of medical help").[10]

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[10] See Tory A. Weigand, *Accident, Exclusivity, and Passenger Disturbances Under the Warsaw Convention*, 16 Am. U. Int'l L. Rev. 891, 955 (2001) ("[I]t is certainly consistent with the Warsaw scheme to find, 'after assessment of all the circumstances,' that an 'accident' occurs when a flight crew does not make reasonable efforts to assist stricken passengers. Such action *or inaction*, if contrary to established airline procedures or standards, could be 'unusual and unexpected' in modern air travel.") (emphasis added).

The fallacy of the position that an "accident" under the Warsaw Convention cannot take the form of inaction is demonstrated by a hypothetical situation posited by the court in *McCaskey* v. *Continental Airlines, Inc.*, 159 F. Supp. 2d 562, 574 (S.D. Tex. 2001). Suppose, said the court, that "a passenger inexplicably collapsed and ceased breathing through no initial accident," and "a medical doctor informs the crew that the passenger's life could be saved, but only if the flight landed within one hour." *Ibid.* If, the court continued, "[t]he plane is within thirty minutes of a suitable airport, but the crew blithely elects to continue on a planned cross-country flight," "[t]he notion that this is not an unusual event is staggering." *Ibid.*

More generally, common carriers have traditionally been understood to have a duty to provide reasonable assistance to passengers who become ill or injured, so that a failure to act in those circumstances can give rise to liability. See Restatement (Second) of Torts § 314A(1) (1965) (see p. 23, *infra*). The law imposes liability in other circumstances as well for failure to act when under a duty to do so.[11]

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[11] See, *e.g.*, Restatement (Second) of Torts § 314B (duty to provide aid to injured employee); 15 U.S.C. 1601 *et seq.* (consumer credit disclosure); 42 U.S.C. 1395dd (duty of hospital to treat emergency patients); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 568-570 (1996) (describing the "patchwork of rules" existing under state statutory and case law relating to "disclosure obligations of automobile manufacturers, distributors, and dealers"); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 115-118 (1989) (obligation to disclose information relating to employee benefit plans); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 150-154 (1972) (obligation to disclose material information under securities laws). See also Edward A. Tomlinson, *The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement*, 20 N.Y.L. Sch. J. Int'l & Comp. L. 451, 452 & n. 2 (2000) (observing that "[m]ost civil law countries * * * recognize a general duty to rescue in their criminal codes" and identifying those countries); A.D. Woozley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 Va. L. Rev. 1273, 1273-1274

4. The text and structure of the Warsaw Convention are fully consistent with the conclusion that an "accident" includes an airline's unreasonable response to a medical situation that arises during flight. Petitioner's arguments to the contrary are without merit.

As the Court recognized in *Saks*, the Warsaw Convention does not define an "accident" for purposes of Article 17. 470 U.S. at 399. Nor does the context provide any clear indication of which events causing a passenger's death or injury qualify as an "accident." *Ibid.* It therefore cannot be, as petitioner asserts (Br. 16), that "the express language of Article 17" resolves the question here.

In *Saks*, the Court discerned only two textual "clues to the meaning of 'accident'" in the Warsaw Convention: (i) the distinction between an "accident," the event giving rise to liability for death or bodily injury under Article 17, and an "occurrence," the event giving rise to liability for loss or damage of baggage under Article 18, and (ii) the distinction in Article 17 itself between the "accident" and the "injury." See 470 U.S. at 398-399. Both distinctions are preserved by treating an airline's "unexpected or unusual" response to a medical crisis as an "accident." Such an "accident" is distinct from whatever death or bodily injury it causes. And, *other* causes of death or bodily injury, such as the passenger's own internal response to ordinary aircraft conditions, remain mere "occurrences" outside the coverage of Article 17.

Contrary to petitioner's suggestion (Br. 16, 26-27), Article 20(1) does not speak to the question here. Article 20(1) permits an airline to avoid liability under the Convention by proving that it took "all necessary measures to avoid the damage or that it was impossible" to do so. According to petitioner, the Convention's drafters, "[h]aving provided for

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(1983) ("In civil-law countries a statutory requirement to render aid, subject to various conditions, is quite common.").

a defense turning on the absence of negligence," would not have "intended that the initial 'accident' inquiry be resolved by reference to negligence." Br. 27 (quoting *Krys* v. *Lufthansa German Airlines*, 119 F.3d 1515, 1522 (11th Cir. 1997), cert. denied, 522 U.S. 1111 (1998)). As the Court recognized in *Saks*, however, although Article 17 "involves an inquiry into the nature of the event which *caused* the injury," while Article 20(1) involves an inquiry into "the care taken by the airline to avert the injury," "these inquiries may on occasion be similar." 470 U.S. at 407. Although the Article 17 inquiry is quite similar to the Article 20(1) inquiry in a case such as this one, those inquiries diverge in most cases, in which the "accident" consists of something other than the "unexpected or unusual" conduct of the airline's own personnel.[12]

5. Two foreign courts, which follow the *Saks* definition of an "accident" under the Warsaw Convention, have suggested that the definition is satisfied in circumstances such as those here.

In a recent decision of the Court of Appeals of England and Wales, Lord Phillips held that an "accident" could not arise from airlines' failure to minimize, or warn of, the risks of deep-vein thrombosis. *Re Deep Vein Thrombosis & Air*

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[12] Nor does Article 25, which eliminates the monetary limit on liability in cases of "willful misconduct," suggest that the existence of an "accident" cannot be determined by reference to the reasonableness of airline personnel's conduct. Although the "accident" inquiry and the "willful misconduct" inquiry may overlap in some Warsaw Convention cases, "willful misconduct" requires a greater degree of culpability than does unreasonableness and, according to some courts, a showing of the actor's subjective state of mind. See, *e.g.*, *Bayer Corp.* v. *British Airways, PLC*, 210 F.3d 236, 238-240 (4th Cir. 2000). Thus, as the district court recognized here, the flight attendant's refusal to reseat Dr. Hanson could be an "accident" without being "willful misconduct." Compare Pet. App. 50a-60a with *id.* at 65a-71a.

Travel Group Litig., [2003] EWCA Civ 1005 (July 3, 2003) (Transcript: Smith Bernal). Lord Phillips reasoned that an "omission to act" of that sort cannot constitute an accident. Lord Phillips nonetheless viewed the flight attendant's refusal to reseat Dr. Hanson in this case—as well as the airline's refusal to make an emergency landing after a passenger suffered a heart attack in *Fulop*, 175 F. Supp. 2d at 673—as involving conduct that can constitute an accident under the Convention. With respect to this case, Lord Phillips observed that "[t]he refusal of the flight attendant to move Dr. Hanson cannot properly be considered as mere inertia, or a non-event," but instead "was a refusal to provide an alternative seat which formed part of a more complex incident, whereby Dr. Hanson was exposed to smoke in circumstances that can properly be described as unusual and unexpected."

The Supreme Court of Victoria, in an Australian case under the Warsaw Convention also involving deep-vein thrombosis, described the present case as "illustrat[ing] the point that an accident, as *Saks* uses the word, may include action or inaction by airline staff" or the airline itself. *Povey* v. *Civil Aviation Safety Auth.*, 7223 of 2001, No. BC 200207836 (Dec. 20, 2002). The court added that, "[w]here, objectively viewed, an airline would be expected to act in a particular way (or refrain from doing so) having regard to what is usual or expected in air travel at the time of injury, its failure to so act could constitute an accident."[13]

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[13] Although the court in *Povey* declined to dismiss the case before trial, suggesting that a failure to warn of deep-vein thrombosis might be an "accident" under the Warsaw Convention, other Australian courts have held to the contrary without addressing the present case. See, *e.g.*, *Rynne* v. *Lauda-Air Luftfahrt Aktiengelsellschaft*, [2003] QDC 004 (Dist. Ct. Queensland Feb. 7, 2003).

B. Subjecting Airlines To Liability Under The Warsaw Convention For Injuries Caused By Their Unreasonable Response To A Medical Crisis Properly Balances The Interests Of Passengers And Airlines

Allowing passengers to seek recovery for death or bodily injury caused by an airline's "unexpected or unusual" response to a medical crisis accords with the Warsaw Convention's purpose "to accommodate or balance the interests of passengers seeking recovery for personal injuries, and the interests of air carriers seeking to limit potential liability." *Tseng*, 525 U.S. at 170. The interests served by imposing liability on airlines in such circumstances are substantial; the interests served by precluding recovery are not.

The Court has recognized that a flexible application of the "accident" definition ameliorates the harshness to passengers of the Warsaw Convention's exclusivity in affording a remedy for their injuries and prevents airlines from "escap[ing] liability" for their own wrongful conduct. *Tseng*, 525 U.S. at 172; see U.S. Br. 18-19 n.11, *Tseng* (No. 97-475) (observing that "[t]he expansive scope of the term 'accident' is one answer to the * * * concern that carriers not escape liability for their intentional torts") (citation omitted). As *Tseng* implies, such flexibility is especially warranted when, as here, the consequence would be to subject an airline to liability under the Warsaw Convention for injuries caused by its *own* misconduct and that of its agents, not by unrelated third parties or natural forces. Indeed, if the "accident" definition is "flexibl[e]" enough to "encompass torts committed by terrorists or fellow passengers," as the Court noted with seeming approval in *Saks*, the definition surely is flexible enough to encompass the "unexpected or unusual" conduct of an airline's own employees. 470 U.S. at 405; cf. *Tseng*, 525 U.S. at 165 n.9.

A passenger has every reason to expect that an airline will respond reasonably to a medical crisis that arises during

a flight. As noted above, the law has traditionally viewed common carriers, such as airlines, as standing in a "special relation" to their passengers, which imposes a duty "to protect [passengers] against unreasonable risk of physical harm" and "to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others." Restatement (Second) of Torts § 314A(1); see *id.* cmt. d ("The duty to give aid to one who is ill or injured extends to cases where the illness or injury is due to natural causes, to pure accident, to the acts of third persons, or to the negligence of the plaintiff himself, as where a passenger has injured himself by clumsily bumping his head against a door."); *McDowell*, 54 F. Supp. 2d at 1319 ("It is recognized in most jurisdictions that airlines owe a heightened duty of care to their passengers."); cf. 49 U.S.C. 44701(d)(1)(A) (noting "the duty of an air carrier to provide service with the highest possible degree of safety in the public interest").[14]

Airline passengers, even more so than passengers of other common carriers, are uniquely dependent on the carrier for their health, safety, and comfort while on board. By necessity, when passengers step onto an airplane, they place their well-being in the hands of the airline. Passengers must depend on airline personnel not only to pilot the aircraft to

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[14] The common law duty of carriers to protect passengers who are ill or incapacitated, including those incapacitated as a result of their voluntary intoxication, was well established at the time that the Warsaw Convention was drafted. See, *e.g.*, *Fardette* v. *New York & S. Ry.*, 180 N.Y.S. 179 (N.Y. App. Div. 1920) (question of fact existed on whether railroad was negligent in requiring intoxicated passenger to stand on outdoor platform of car rather than taking a seat inside); *Benson* v. *Tacoma Ry. & Power Co.*, 98 P. 605 (Wash. 1908) (jury could find that railroad was negligent in allowing intoxicated passenger to stand on platform); *Williams* v. *Louisville & N.R. Co.*, 43 So. 576 (Ala. 1907) (railroad could be held liable for negligence of its employees in assisting ill passenger in boarding train).

its destination, but also to maintain the air pressure and temperature of the cabin, to control the behavior of other passengers, and even to supply the very air that they breathe. A passenger, moreover, must remain within the narrow confines of the cabin—perhaps in his own seat—for hours at a time between scheduled landings. (An unscheduled landing, even when feasible, cannot be immediate.) It is thus essential, and reasonably to be expected, that flight attendants and other airline personnel will respond appropriately to medical situations that arise during flight. If they instead respond in an "unexpected or unusual" manner (which may include not responding at all), and thereby cause a passenger's death or bodily injury, the airline may fairly be held accountable for that "accident" under the Warsaw Convention.[15]

The airline industry is unlikely to be burdened significantly by recognizing such incidents to be "accidents." Cases similar to this one, fortunately, are relatively few. It remains available to the airline, moreover, to establish that its conduct was not "unexpected or unusual" in the particular

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[15] A passenger who becomes ill during a flight has particular reason to expect a flight attendant to come to his assistance. The flight attendant's role has traditionally been associated with the protection of passengers' safety and health aboard the aircraft. In fact, when flight attendants were introduced into commercial aviation in the early 1930s (and thus during the period immediately following the entry into force of the Warsaw Convention), many airlines required their flight attendants to be nurses, a practice that continued until the demand for nurses increased during World War II. See, *e.g.*, Johanna Omelia & Michael Waldock, *Come Fly With Us! A Global History of the Airline Hostess* 12-13, 18, 32 (2003); *id.* at 25 (quoting airline's promotional pamphlet referring to its "stewardess-nurses"); Georgia Panter Nielsen, *From Sky Girl to Flight Attendant: Women and the Making of a Union* 10 (noting that original flight attendants wore their nurse uniforms during flights), 24 (1982); United Air Lines, *Flight attendant history: 1926-1933* (visited Aug. 27, 2003) <http://www.ual.com/page/article/0,1360,3211,00.html>.

circumstances or was not a cause of the passenger's injury. Other defenses, such as comparative fault, that may reduce or eliminate the airline's liability may be available as well. And even when an airline is found liable, the payment of compensation would typically be limited to a single passenger's death or bodily injury, in contrast to cases involving crashes and similar events involving the death or bodily injury of many passengers.

Contrary to the suggestion of amicus Air Transport Association (Br. 15), the Warsaw Convention's other purpose, "achiev[ing] uniformity of rules governing claims from international air transportation," *Tseng*, 525 U.S. at 169, is not undermined by the understanding of "accident" urged here. The Court determined in *Saks* that the term "accident," in European as well as American jurisprudence, refers to events that are "fortuitous, unexpected, unusual, or unintended." 470 U.S. at 400. An airline's "unexpected" or "unusual" response to a medical crisis during flight fits comfortably within that definition. Indeed, as noted above (at pp. 20-21), courts in two other countries have indicated that conduct of the sort at issue here can constitute an "accident" under the Convention.

C. The Lower Courts Correctly Held That The Refusal Of Petitioner's Flight Attendant To Render Assistance To Dr. Hanson When Informed Of His Medical Condition Was An "Accident" Under The Warsaw Convention

1. The district court's decision in this case, affirmed by the court of appeals, reflects the correct approach to determining the existence of an "accident" under the Warsaw Convention.

The district court focused on whether the flight attendant's conduct—not Dr. Hanson's asthma and sensitivity to the cabin's ambient cigarette smoke, standing alone—"was

an 'unusual' or 'unexpected' event." Pet. App. 50a. The court then analyzed whether the flight attendant's refusals to reseat Dr. Hanson were indeed "unusual" or "unexpected," considering whether, and to what extent, such conduct deviated from "the accepted industry standard of care," petitioner's own policies, and what Dr. Hanson would reasonably have expected from airline personnel. *Id.* at 53a-55a. In particular, the court relied on "extensive testimony on the standard of care for flight attendants in situations such as this," which "demands that a flight attendant make efforts to accommodate a passenger who indicates that he or she needs to be moved for medical reasons," "even if the flight ha[s] no empty seats in the economy section." *Id.* at 52a. The court also relied on evidence that petitioner's own policy was to "make efforts to move passengers who become ill during flights if moving those passengers will assist in their recovery," including "a passenger [who] must be moved because of smoke-related illness." *Id.* at 53a. Based on all of that evidence, the court could properly conclude that the flight attendant's "failure to respond appropriately to Ms. Husain's requests and her failure to comply with the applicable standards of care were both 'unexpected' and 'unusual,'" and consequently were "actionable under the Warsaw Convention." *Id.* at 58a-59a; see *id.* at 14a (affirming that the flight attendant's conduct was "unexpected and unusual in light of industry standards, Olympic policy," and the reasonableness of the request for assistance).

Several courts have similarly recognized that airline personnel's unreasonable response to a medical crisis can constitute an "accident" under the Warsaw Convention. See *e.g.*, *Fishman*, 132 F.3d at 143; *Gupta* v. *Austrian Airlines*, 211 F. Supp. 2d 1078, 1083-1085 (N.D. Ill. 2002); *Fulop*, 175 F. Supp. 2d at 673; *McCaskey*, 159 F. Supp. 2d at 571; *Turturro* v. *Continental Airlines*, 128 F. Supp. 2d 170, 175 n.1

(S.D.N.Y. 2001); *Kemelman* v. *Delta Air Lines, Inc.*, 740 N.Y.S.2d 434, 435 (N.Y. App. Div. 2002).[16]

2. Other courts, following the lead of the Third and Eleventh Circuits, have declined to find an "accident" when a flight crew's allegedly negligent action or inaction aggravated a passenger's medical condition. See *Abramson* v. *Japan Airlines Co.*, 739 F.2d 130, 132-133 (3d Cir. 1984), cert. denied, 470 U.S. 1059 (1985); *Krys*, 119 F.3d at 1520-1522 (citing additional cases).

In *Abramson*, a case that predated *Saks*, flight attendants refused to provide a place where a passenger who suffered a paraesophageal hiatal hernia attack could lie down and administer a "self-help remedy." Relying on cases involving passengers who suffered hearing loss or other medical consequences as a result of normal flight, see 739 F.2d at 132-133, the Third Circuit stated that, "[i]n the absence of proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an 'accident' within the meaning of Article 17," *id.* at 133. Without expressly addressing whether, or in what circumstances, a flight attendant's response to a medical crisis could be an "abnormal external factor[]," the court held that "the alleged acts and omissions of [the airline] and its employees during the routine flight on which [the plaintiff] was a passenger do not constitute an 'accident.'" *Ibid.*[17]

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[16] Cf. *Langadinos* v. *American Airlines, Inc.*, 199 F.3d 68, 71 (1st Cir. 2000) (flight attendant's continuing to serve alcohol to passenger whose behavior was already "erratic" and "aggressive" was an "accident"); *Schneider* v. *Swiss Air Transport Co. Ltd.*, 686 F. Supp. 15, 17 (D. Me. 1988) (flight attendant's refusal to assist passenger by asking passengers in front of her to raise their seats could be an "accident").

[17] In *Saks*, the Court cited *Abramson* as one of several cases "refus[ing] to extend the term ['accident'] to cover routine travel procedures that produce an injury due to the peculiar internal condition of a

In *Krys*, after a passenger suffered a heart attack, the flight crew failed to make an unscheduled landing, thereby aggravating the damage to the passenger's heart. The Eleventh Circuit reasoned that the external event that could be said to have caused the passenger's aggravated injury was "the continuation of the flight from its scheduled point of departure to its scheduled point of arrival." 119 F.3d at 1521. The court concluded, therefore, that the aggravated injury "arises not from an 'unexpected or unusual happening,' but rather from the 'passenger's own internal reaction to the usual, normal, and expected operation of the aircraft.'" *Ibid.* (quoting *Saks*, 470 U.S. at 405-406). The court acknowledged, however, that "this is a close question," and noted that "it is at least arguable that where injury is caused by crew negligence, the injury arises from 'an unexpected or unusual event or happening external to the plaintiff.'" *Ibid.* (quoting *Saks*, 470 U.S. at 405).

The courts in *Abramson* and *Krys* did not apply the Warsaw Convention's "accident" definition with the flexibility that *Saks* requires. When those cases were decided, the Third and Eleventh Circuits had held, contrary to this Court's subsequent decision in *Tseng*, that the Convention did not preempt other remedies not subject to the Conven-

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passenger." 470 U.S. at 405. The citation of *Abramson* was accompanied by the parenthetical description "sitting in airline seat during normal flight which aggravated hernia not an 'accident.'" *Ibid.* The proposition for which the Court cited *Abramson* is consistent with the United States' position here: that the "accident" requirement is not satisfied when a passenger suffers an illness or injury during, or in reaction to, "the usual, normal, and expected operation of the aircraft." *Id.* at 406. The "accident" requirement may be satisfied, however, when the flight crew *responds* to the illness or injury in a manner that is not "usual, normal, and expected." The Court did not characterize *Abramson* as taking any position on the latter point; indeed, *Abramson* itself recognized that "abnormal external factors" may constitute an "accident." 739 F.3d at 133.

tion's monetary limits on recovery. *Abramson*, 739 F.2d at 134; *Krys*, 119 F.3d at 1522-1530. For that reason, the airline in *Krys* argued that "a negligent response to a passenger's heart-attack symptoms constitutes an 'accident,'" while the plaintiffs argued that "there was no 'accident' within the terms of the Warsaw Convention." 119 F.3d at 1519. Several courts have questioned whether *Abramson* and *Krys* would have applied the "accident" definition in the same manner had they understood that the Convention was the plaintiffs' exclusive remedy. See *Fulop*, 175 F. Supp. 2d at 666; *McCaskey*, 159 F. Supp. 2d at 573; *McDowell*, 54 F. Supp. 2d at 1319-1320.

In sum, as the lower courts recognized in this case, an airline employee's response to a passenger's illness can constitute an "accident" under the Warsaw Convention, if that response is "unexpected or unusual" as measured against industry standards, airline policies and practices, or other indicia of what would be reasonable in the circumstances.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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