No. 97-475

In the Supreme Court of the United States

OCTOBER TERM, 1998

EL AL ISRAEL AIRLINES, LTD., PETITIONER

v.

TSUI YUAN TSENG

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

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

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The Solicitor General respectfully moves for leave to file the attached supplemental brief on behalf of the United States as amicus curiae.

This case involves the interpretation of Article 24 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air (1929), 49 Stat. 3000 (49 U.S.C. 40105 note), also known as the Warsaw Convention. In response to this Court's invitation, we filed a brief at the petition stage on behalf of the United States as amicus curiae, in which we argued that the Court should grant certiorari. After certiorari was granted, we filed a brief on the merits, and the Court has granted our motion to participate in the oral argument. We noted in our brief at the merits stage

(and in our earlier letter to the Clerk of July 1, 1998) that the Senate Foreign Relations Committee had recently reported Montreal Protocol No. 4—which, among other things, amends the text of Article 24 of the Warsaw Convention—to the full Senate for its consideration. We explained (U.S. Br. 26-29) that ratification of Montreal Protocol No. 4 by the United States could affect the Court's consideration of this case, and we promised to keep the Court informed of further developments (*id.* at 29).

On September 28, 1998, the full Senate gave its advice and consent to ratification of Montreal Protocol No. 4. Because the Court invited the Solicitor General to file a brief before it decided whether to grant review in this case, we respectfully move for leave to file the attached supplemental brief, which explains the significance of the Protocol for this Court's continued consideration of the case.

SETH P. WAXMAN
Solicitor General

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SUPPLEMENTAL BRIEF FOR
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In our letter of July 1, 1998, we informed the Court that the Senate Foreign Relations Committee had favorably reported Montreal Protocol No. 4 to the full Senate and that, if ratified by the United States, the Protocol could affect how this Court might choose to dispose of this case. Subsequently, in our amicus brief on the merits (at 29), we promised to keep the Court informed of further developments.

On September 28, 1998, the full Senate voted to give its advice and consent to ratification of the Protocol. See 144 Cong. Rec. S11,059-02 (daily ed.). Upon the signing of the instrument of ratification by the President and the deposit of that instrument with the Government of Poland, the United States will have ratified the Protocol, and the Protocol will "come into

force" in the United States 90 days later. Montreal Protocol No. 4, Art. XVIII. The Department of State informs us that the instrument of ratification has been sent to the White House for the President's signature. Because oral argument is scheduled for November 10, 1998, we are filing this supplemental brief now to apprise the Court of the significance that ratification of the Protocol by the United States would have for this case. We will inform the Court immediately upon completion of the ratification process.

1. As we explain in our amicus brief on the merits (at 10-12, 26-28), Montreal Protocol No. 4 makes a highly relevant amendment to the exclusivity provision of the Warsaw Convention. In its original form, Article 24 of the Convention provides that, "[i]n the cases covered by article 17," "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention[.]" This case turns on the meaning of that provision and, in particular, on the disputed meaning of the phrase "[i]n the cases covered by article 17." See U.S. Br. 20-28. Montreal Protocol No. 4 removes that language and amends Article 24 to read: "*In the carriage of passengers and baggage*, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention[.]" Art. VIII (emphasis added). As the Senate Foreign Relations Committee explained in its report recommending that the Senate give its advice and consent to the Protocol, the amended language "declares that *all* damage actions arising out of international air carriage governed by the Convention are subject to the conditions and limits of liability set out in the Convention." S. Exec. Rep. No. 20, 105th Cong., 2d Sess. 14 (1998) (Senate Report) (emphasis added). Put another way, a

passenger seeking damages for *any* form of personal injury arising from "international air carriage governed by the Convention," as amended by the Protocol, must meet the conditions for liability set forth in Article 17, which itself remains unchanged.

If this case had arisen under the Convention as amended by Montreal Protocol No. 4, the amended language would leave no doubt that the Convention bars respondent's state-law claim for damages, which (in two different respects) does not satisfy Article 17's conditions for liability. See U.S. Br. 18-19, 26-28. Indeed, respondent addresses the significance of the Protocol principally by arguing that it lacks retroactive application to her case and that "[t]here would * * * have been no reason to adopt the changes effected by the Protocol if all personal injury causes * * * had been covered originally in the eyes of the international signatories." Resp. Br. 38 (italics omitted); see also Resp. Br. 37 ("Some five years had passed from the time [of the incident at issue here] before a sufficient number of Convention signatories agreed to make it—and Article 17—the exclusive basis upon which a passenger could recover for personal injuries, without making exclusiveness retroactive to willful tort cases which had already accrued."). Ratification of Montreal Protocol No. 4 by the United States would thus raise the question whether this case, which arises under the original language of the Convention, still presents an issue of recurring prospective significance.

2. On balance, we agree with petitioner that it would be appropriate for this Court to decide this case on the merits notwithstanding ratification of the Protocol. But we disagree with petitioner, at least in part, about why that is so. Petitioner urges the Court to "resolve the issue of exclusivity" presented here because of concern

that, even under the Protocol's amendment of the exclusivity provision in Article 24, future passengers who are injured in the course of international air travel, but who cannot satisfy the liability conditions of Article 17, may still try to bring personal injury claims under local law. Reply Br. 18-19. The Protocol, however, squarely forecloses such claims. Under Article 24, as amended, the Convention's liability conditions would apply to "any action for damages, however founded," arising from "the carriage of passengers and baggage" in international air transportation governed by the Convention. Montreal Protocol No. 4, Art. VIII. Just as important, even if there were some room for dispute about the meaning of that language, this Court does not ordinarily decide issues arising under an obsolescent provision in order to cast light on distinct issues arising under a new and differently worded provision. The "issue of exclusivity" that petitioner urges the Court to resolve under the original language of the Convention is not necessarily identical to the "issue of exclusivity" that would be presented in cases arising under the Convention as amended by the Protocol, even though in our view the *result* should be the same under both. See Senate Report 14 (confirming that, in relevant respects, the Protocol "continues the existing rules of the Warsaw Convention for the carriage of baggage and passengers").

We nonetheless suggest that the Court decide this case on the merits for a separate reason, to which petitioner also adverts in its opening brief (at 39 n.40): Even after ratification of the Protocol by the United States, the courts of this country could still be presented with new cases in which the original exclusivity provision of the Warsaw Convention is applicable.

In suits for damages, the Protocol's amendments to the Convention apply "provided that the places of departure and destination * * * are situated either in the territories of two Parties to th[e] Protocol or within the territory of a single Party to th[e] Protocol with an agreed stopping place in the territory of another State." Montreal Protocol No. 4, Art. XIV. If either the place of departure or the place of destination lies within a State that has ratified only the original Convention and not the Protocol, the original terms of the Convention would continue to govern. See generally *In re Korean Air Lines Disaster of Sept. 1, 1983*, 664 F. Supp. 1463, 1469 (D.D.C. 1985), aff'd on other grounds, 829 F.2d 1171 (D.C. Cir. 1987), aff'd *sub nom. Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989); see also Montreal Protocol No. 4, Art. XX(3).

The Department of State informs us that at least 30 countries have already ratified the Protocol, and the Department anticipates that other countries are likely to do so within the next few years. Over time, therefore, the number of cases presenting the precise exclusivity question at issue here will probably diminish. Moreover, even if no additional countries were to ratify the Protocol, ratification by the United States would itself ensure that the terms of the Protocol will govern many if not most disputes in this country arising within the scope of the Convention. That is so because "the places of departure and destination" for round trips—a very common form of international air travel for passengers—are generally considered the same place for purposes of this treaty regime. Thus, if a passenger buys a round-trip ticket from country X to country Y and back, Montreal Protocol No. 4 will likely govern personal-injury suits arising from that trip so long as country X has ratified the Protocol, whether or not

country Y has done so. See, *e.g.*, *Alexander* v. *Pan American World Airways, Inc.*, 757 F.2d 362, 363 (D.C. Cir. 1985); *Petrire* v. *Spantax, S.A.*, 756 F.2d 263, 265 (2d Cir.), cert. denied, 474 U.S. 846 (1985); see also *Swaminathan* v. *Swiss Air Transport Co.*, 962 F.2d 387, 389 (5th Cir. 1992).

There may nonetheless be a range of circumstances, especially in the near term, in which United States courts would need to resolve claims under the original terms of the Warsaw Convention, even if those claims accrued after ratification of the Protocol by the United States.* One such circumstance would be where an injured passenger had purchased a one-way ticket and either the place of departure or the place of destination was within a country that had ratified the Convention but not Montreal Protocol No. 4. Another circumstance would be where the injured passenger had purchased a round-trip ticket *from* such a country *to* the United States and back. Cf. Warsaw Convention, Art. 28(1) (jurisdictional provision). Such a passenger would generally be subject to the original terms of the Warsaw Convention, even though another passenger in the same airplane would be subject to the terms of the Protocol if he or she purchased tickets for a round trip that began and ended in the United States. Resolution of this case in petitioner's favor would eliminate an anomaly posed by the Second Circuit's decision, under which the Convention would set forth exclusive conditions for liability as to the latter passenger but not as to the former.

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* As noted in our amicus brief on the merits (at 10 n.5), the Hague Protocol of 1955, which was ratified by a number of foreign states several decades ago (and is now incorporated by Montreal Protocol No. 4), does not itself amend Article 24.

In sum, a decision by the Court on the merits would have some precedential significance, even after ratification of Montreal Protocol No. 4 by the United States. Because the case has now been fully briefed, we believe that it would be appropriate for the Court to give the case plenary consideration despite ratification of the Protocol. In the alternative, the Court may wish to vacate the judgment of the court of appeals and remand the case to that court for further consideration in light of such ratification if it occurs while this case is still pending.

Respectfully submitted.

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Solicitor General

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