No. 12-315

IN THE

Supreme Court of the United States

AIR WISCONSIN AIRLINES CORPORATION,
Petitioner,

v.

WILLIAM L. HOEPER,
Respondent.

On Writ of Certiorari to the Colorado Supreme Court

BRIEF OF PETITIONER

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QUESTION PRESENTED

Federal law requires airlines to report to the Transportation Security Administration (TSA) any and all potential security threats to civil aviation. 49 U.S.C. § 44905(a). To encourage such reports, the Aviation and Transportation Security Act (ATSA) provides airlines with a broad grant of immunity, shielding them from all civil liability, including liability for state-law defamation, for disclosing potential threats to aircraft or passenger safety. *Id.* § 44941(a). The only exception to this immunity is for disclosures made "with actual knowledge that the disclosure was false, inaccurate, or misleading" or "with reckless disregard as to the truth or falsity of that disclosure." *Id.* § 44941(b).

In the decision below, the Colorado Supreme Court upheld a $1.4 million defamation verdict against an airline that reported a potential security concern regarding one of its pilots to TSA. In denying the airline ATSA immunity, the court refused to decide whether the airline's report was true or false, thus holding that an airline may be found liable for disclosing a potential security threat to TSA when that disclosure is true in all material respects.

The question presented is:

Whether ATSA immunity may be denied without a determination that the air carrier's disclosure was materially false.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were petitioner Air Wisconsin Airlines Corporation and respondent William L. Hoeper.

RULE 29.6 STATEMENT

Air Wisconsin Airlines Corporation is a subsidiary of AWAC Aviation, Inc., which is a subsidiary of Harbor Diversified, Inc. No publicly held companies hold any of Air Wisconsin's stock.

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INTRODUCTION

In the wake of the September 11, 2001 terrorist attacks, Congress enacted the Aviation and Transportation Security Act (ATSA) to overhaul and improve the security of the nation's aviation system. Among other changes, ATSA transferred responsibility for assessing and investigating security threats from airlines to the newly created Transportation Security Administration (TSA). Even before 9/11, Congress recognized that airlines and their employees are uniquely positioned to acquire some of the most useful threat information. Accordingly, air carriers have long been required to promptly report relevant threat information to federal authorities.

To ensure that the threat of civil liability would not deter airlines from complying with their reporting obligation, ATSA granted airlines that report suspicious transactions a broad immunity from any civil liability arising from the report. 49 U.S.C. § 44941(a). Borrowing the First Amendment "actual malice" standard adopted in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), the statute strips immunity only for disclosures made "with actual knowledge that the disclosure was false, inaccurate, or misleading" or "with reckless disregard as to the truth or falsity of that disclosure." 49 U.S.C. § 44941(b). As the provision's sponsor explained, these exceptions were intended to apply only to "bad actors." 147 Cong. Rec. S10432, S10440 (daily ed. Oct. 10, 2001).

Despite all this, the Colorado Supreme Court held that an airline may be found civilly liable for reporting true information concerning a potential security threat, and sustained a $1.4 million defamation verdict against an airline that did exactly what Congress

would have wanted it to do. Petitioner Air Wisconsin reported its concerns about the mental state of a pilot who was about to board an airplane at Dulles Airport and who knew that he was about to be terminated after failing three proficiency checks and abandoning the fourth. Just hours earlier, the pilot had blown up at his instructors and was acting aggressively, yelling and cursing at them. Moreover, the pilot had been issued a firearm that he was permitted to carry onboard an airplane as a federal law enforcement officer, and the airline could not confirm whether he had the gun with him. The airline also was aware of previous incidents in which disgruntled airline employees had boarded aircraft with the intent to crash them—one successfully, killing everyone onboard. After carefully discussing these and other factors with three of his subordinates, a senior Air Wisconsin executive decided that the best and safest course was to follow Congress's direction and report what they knew to TSA.

The Colorado Supreme Court, however, denied Air Wisconsin the immunity to which it was entitled, even though the court recognized that "the events at the training may have warranted a report to TSA," Pet. App. 18a, and even though Air Wisconsin's report was true in all material respects. Remarkably, the court held that it "need not, and therefore d[id] not, decide whether [Air Wisconsin's] statements were true or false." *Id.* at 17a n.6. Instead, the court picked apart Air Wisconsin's report phrase-by-phrase and concluded that the airline had "overstated" events by, for example, saying it was "'concerned about [the pilot's] mental stability'" instead of saying that "he had acted irrationally at the training three hours earlier and 'blew up' at test administrators." *Id.* at 18a–21a, 25a. The difference between the two

is indiscernible, and yet, for the court, such purported overstatements (even if substantially true) manifested a reckless disregard for the report's truth or falsity and thus deprived Air Wisconsin of ATSA immunity.

The Colorado Supreme Court's decision is erroneous and should be reversed. Under ATSA, as under the *New York Times* standard on which the exceptions to ATSA immunity are modeled, truth is an absolute defense. Accordingly, ATSA immunity may not be denied absent a determination that the airline's disclosure was materially false. The Colorado Supreme Court's contrary ruling violates settled principles of statutory interpretation and is profoundly at odds with the vitally important policy underlying ATSA immunity—that the threat of liability must not deter airlines from promptly reporting potential security threats to TSA. Unless reversed, the decision below will send the intolerable message to airlines that they report security concerns to TSA at their peril, exposing themselves to potentially millions of dollars of liability, even if their report, like Air Wisconsin's, is substantially true. Because ATSA precludes liability for true reports, and because Air Wisconsin's report was true in all material respects, the decision below cannot stand.

OPINIONS BELOW

The Colorado Supreme Court's opinion is not yet published (2012 WL 907764) and is reproduced at Pet. App. 1a–43a. The Colorado Supreme Court's unpublished order denying rehearing is reproduced at Pet. App. 117a. The Colorado Court of Appeals' decision is reported at 232 P.3d 230 and reproduced at Pet. App. 44a–87a. The trial court's opinions are unpublished and reproduced at Pet. App. 88a–109a.

JURISDICTION

The Colorado Supreme Court filed its decision on March 19, 2012, and denied Air Wisconsin's petition for rehearing on April 23, 2012. Justice Sotomayor extended the time for filing a certiorari petition until September 12, 2012, and Air Wisconsin timely filed its petition on September 11, 2012. This Court has jurisdiction under 28 U.S.C. § 1257. See *First English Evangelical Lutheran Church* v. *Cnty. of L.A.*, 482 U.S. 304, 310 n.2 (1987).

STATUTORY PROVISIONS INVOLVED

Section 125 of ATSA, Pub. L. No. 107-71, 115 Stat. 597 (2001), provides, in relevant part:

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

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

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

49 U.S.C. § 44941.

STATEMENT OF THE CASE

A. Statutory Background.

The September 11 terrorist attacks prompted Congress to make "a fundamental change in the way it approach[ed] the task of ensuring the safety and security of the civil air transportation system." H.R. Rep. No. 107-296, at 53 (2001) (Conf. Rep.). Recognizing that "the safety and security of the civil air transportation system is critical to the security of the United States and its national defense," as well as to "the basic freedom of America to move in intrastate, interstate and international transportation," Congress enacted ATSA to ensure that never again could civilian aircraft be converted into "guided bombs for strikes against the United States." *Id.*

Central to this new approach was Congress's determination that "security functions at United States airports should become a Federal government responsibility." *Id.* at 54. Accordingly, ATSA "'broadly expand[ed] the government's control over, and active role in, aviation security.'" *Conyers* v. *Rossides*, 558 F.3d 137, 139 (2d Cir. 2009) (alteration in original), *cert denied*, 133 S. Ct. 329 (2012). To oversee this expanded federal role, Congress created TSA, a new agency charged with responsibility for all "civil aviation security" matters. 49 U.S.C. § 114(d)(1).

Foremost among TSA's new responsibilities was to "receive, assess, and distribute intelligence information related to transportation security." *Id.* § 114(f)(1). Previously, airlines were largely responsible for security issues such as assessing and investigating suspicious incidents. Pet. App. 38a. Convinced that this uncoordinated approach had contributed to the failure to prevent the 9/11 terrorist attacks, Congress designated TSA to oversee airline security and required that the agency, rather than airlines, "assess threats to transportation." 49 U.S.C. § 114(f)(2); see JA 326–41 (former TSA official describing the "policy shift after 9-11" under which TSA "no longer wanted the airlines making the threat assessments").

At the same time, Congress recognized that TSA would need to lean heavily on the airlines for help. "'Air carriers are perhaps the most obvious source of useful threat information for TSA.'" Pet. App. 54a. Because TSA cannot properly perform its threat assessment functions without the information provided by air carriers, Congress expected airlines and their employees to be the eyes and ears of TSA. Congress therefore recognized that it was essential to adopt measures "encouraging airline employees to report suspicious activities." ATSA § 125, 115 Stat. at 631 (capitalization omitted).

In so doing, Congress built on previous legislation requiring that airlines and their employees who "receiv[e] information … about a threat to civil aviation shall provide the information promptly to" federal officials. 49 U.S.C. § 44905(a).[1] Failure to report

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[1] Originally, airlines were required to report security threats to the Department of Transportation. That responsibility was assumed by TSA, which has since been transferred to the Department of Homeland Security. *See* 6 U.S.C. § 203(2).

such a threat subjects the airline to civil penalties. *Id.* § 46301(a)(1)(A). TSA initiated "at least 16" such civil penalty cases between 2003 and 2006 alone. U.S. Colo. S. Ct. Br. 12 n.6. TSA has reiterated the same message in its Aircraft Operation Standard Security Program protocols. *Id.* at 6. Its procedures "require that an aircraft operator … immediately report to TSA all threat information that *might* affect the security of air transportation." *Id.* (emphasis added). The policy has been aptly dubbed "'when in doubt, report.'" Pet. App. 38a; see JA 123–24, 150–51, 332.

To ensure that the threat of liability would not deter airlines from reporting security concerns, ATSA granted air carriers and their employees immunity for reporting suspicious activities. Specifically, ATSA provides that any air carrier or employee of an air carrier "who makes a voluntary disclosure of any suspicious transaction relevant to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism" to TSA or other law enforcement officials "shall not be civilly liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, for such disclosure." 49 U.S.C. § 44941(a).

Congress also appreciated that TSA has no use for knowingly false information. It thus exempted from immunity any disclosure made "with actual knowledge that the disclosure was false, inaccurate, or misleading" or "with reckless disregard as to the truth or falsity of that disclosure." *Id.* § 44941(b). This exception, which tracks the demanding First Amendment "actual malice" standard this Court adopted in *New York Times* v. *Sullivan*, was intended to be narrow. As the United States explained below, an airline faced with a potential security threat will

usually have "imperfect information" and "limited time and ability to investigate," U.S. Colo. S. Ct. Br. 2, and thus only in "highly unusual situation[s]" should immunity fail to attach, *id.* at 8.

B. Factual Background.

This case arises from a $1.4 million defamation judgment against Air Wisconsin, whose employees reported true information concerning a potential security threat to TSA.

1. Respondent William Hoeper was employed as a pilot for Air Wisconsin from 1998 to 2004. Pet. App. 46a. He also was a federal flight deck officer (FFDO), which meant that TSA had issued him a firearm "to defend the flight decks of aircraft … against acts of criminal violence or air piracy." 49 U.S.C. § 44921(a); Pet. App. 3a. As an FFDO, Hoeper was authorized to carry a gun in the cockpit. JA 236–37, 293–94.

By late 2004, Air Wisconsin no longer flew the type of aircraft that Hoeper had previously piloted out of his home base in Colorado. Pet. App. 3a–4a. Air Wisconsin gave Hoeper the option either to move or commute to a different location or to upgrade to a different type of aircraft. JA 219–20. Hoeper did not want to move or commute, so he chose to begin training to pilot the British Aerospace 146, or BAe-146. JA 219. Ultimate approval, however, required that he pass a proficiency check. Pet. App. 3a–4a.

Hoeper took the simulated flight test three times but failed each time. Pet. App. 4a, 46a. Following his third failure, Air Wisconsin could have terminated Hoeper pursuant to a collective bargaining agreement, but Hoeper requested and received a fourth opportunity pursuant to a "last chance agreement." *Id.* at 46a; JA 54–55, 62, 65, 174–76, 193–97, 221–25, 424–27. As its title suggests, this agreement meant

that Hoeper would be terminated unless he passed. Pet. App. 4a, 33a–34a; JA 287, 294–95, 460.

2. In early December 2004, Hoeper flew from Denver to Northern Virginia for mandatory training as part of his final proficiency check. Pet. App. 4a, 46a–47a. Before he could take the test, he had to complete this training and receive a recommendation from an Air Wisconsin instructor, without which he would be terminated. *Id.*; JA 179, 297–98, 307.

On the final day of training, Hoeper was paired with instructor Mark Schuerman. Pet. App. 4a, 47a. The simulator training did not go well. Approximately 90 minutes into it, Hoeper ran the simulator out of fuel, flamed out the engines, and nearly crashed. *Id.* at 32a; JA 41, 226–27. When Schuerman froze the simulator to prevent it from crashing, Hoeper slid his seat back and threw his headset. Pet. App. 32a; JA 12, 46, 204, 228, 304, 429. Angrily raising his voice, he exclaimed "this is a bunch of shit," accused Schuerman of "railroading the situation," and claimed "it's not realistic." Pet. App. 32a; JA 204, 228–29. Hoeper stopped the session, dramatically announcing "you win, I'm calling [union] legal." Pet. App. 32a; JA 12, 46–48. Schuerman thought Hoeper was going to strike him. Pet. App. 32a; JA 14, 22. Another instructor who was present "could see why [Schuerman] may have [felt threatened]." JA 49, 400.

After the outburst, Schuerman left the simulator to call Air Wisconsin's BAe-146 fleet manager, Patrick Doyle, who was at company headquarters in Wisconsin. Pet. App. 5a; JA 23. Schuerman was "very upset" and relayed that Hoeper had "blown up" and was "angry" and "yelling." Pet. App. 5a; JA 23–24, 72–73, 160. Doyle told Schuerman to leave. Pet. App. 47a; JA 23–24, 73. Around the same time, another Air Wisconsin pilot saw Hoeper in the lobby behaving ag-

gressively, talking in a raised voice, and using profanity. Pet. App. 33a; JA 310–12. As Schuerman exited the building, Hoeper followed him into the parking lot, screaming at him. Pet. App. 33a; JA 26–27, 206–07. Multiple witnesses testified that they had never seen or heard of a professional pilot acting in that manner. JA 178, 288, 296, 306, 311–12.

3. After receiving Schuerman's call, Doyle described the situation to his boss, Air Wisconsin's Managing Director of Flight Operations, Scott Orozco. Pet. App. 48a; JA 51. Orozco, however, was just leaving for a meeting and was unable to discuss the matter immediately. JA 74–75. Orozco instructed Doyle to wait until he returned. JA 74, 77, 79–81. Meanwhile, Orozco briefly spoke on the phone with Hoeper, who was "not exactly calm." Pet. App. 33a; JA 81, 462.

When Orozco and Doyle reconvened later that afternoon, they were joined by Orozco's boss, Air Wisconsin Vice President of Operations Kevin LaWare, and later by Assistant Chief Pilot Robert Frisch, who also was an FFDO. Pet. App. 48a; JA 51, 84–85, 165–66, 289. Over the course of a detailed conversation, the group spoke about Hoeper's latest outburst, his previous blow-ups during his BAe-146 training, and his imminent termination. Pet. App. 48a–49a; JA 181–82, 268–70, 276–83, 453–64, 546–47, 549–51.

The group also weighed the fact that Hoeper was an FFDO. JA 166, 299–301, 459–60. Although they knew that FFDO protocols did not permit Hoeper to bring his firearm to training, they could not confirm whether Hoeper had his gun with him. JA 77–79, 166, 171, 180–81, 279. The group knew, moreover, that Hoeper had departed from the Denver airport where FFDOs could bypass security without logging their weapons and that FFDOs had, on occasion, attended training sessions with their firearms in viola-

tion of protocol. JA 77–78, 166–68, 290–93, 299–300. They contacted Air Wisconsin's director of flight operations at Dulles, but he was unable to confirm whether Hoeper had his gun or whether he had used his FFDO credentials to bypass security. JA 464–65.

The group also discussed two well-known incidents in which disgruntled airline employees had boarded aircraft with the intent to do harm. Pet. App. 31a; JA 168–69, 280–81, 301–02. In one tragic instance, a terminated airline employee had boarded an aircraft with a gun and shot the pilots, causing the airplane to crash, killing all 42 passengers. JA 89–90, 121–29. In another instance, a pilot facing termination had boarded an aircraft with a weapon intending to crash it into company headquarters and seriously injured several crew members before he was disabled. *Id.*

The group consulted Air Wisconsin's TSA-ordered Aircraft Operator Standard Security Program (AOSSP). JA 162–63, 165; 49 C.F.R. § 1544.101. As noted, TSA had developed a policy known as "when in doubt, report" requiring airlines to report suspicious activities that might pose a threat to airline security, and to leave the assessment of the threat information to TSA. JA 124, 149–50, 326–41. As the group was "discussing what [their] obligations were and referring to the AOSSP," they felt they should "at least notify TSA to see if they had any concerns." JA 463; see JA 162, 269–70, 461–62.

Based upon these discussions, LaWare, the senior executive among the group who reported directly to the CEO, concluded that Air Wisconsin should report its concerns to TSA. Pet. App. 31a, 50a; JA 51, 266, 282–83, 463. Fearing the potential consequences of not reporting—in violation of the "when in doubt, report" mandate—LaWare decided it was better to be

"safe than sorry." JA 87, 90, 284–85, 466. At trial, LaWare explained his decision:

> I said, Look, we've got an employee whose termination is impending. All right. And he—he knows it. All right. Because we're outside the bounds of the contract. It was a last chance situation. We've got an employee who you're telling me has displayed anger and emotion on one or more occasions to the point of intimidating individuals. We can't confirm whether he has or does not have his weapon with him because of the security difference in Denver versus Dulles.
>
> And we talked about the history where there have been occasions where people who were going to be disciplined or who had been disciplined or lost their jobs had acted in a very bad manner and caused a lot of harm and/or death. I said, Guys, look, I—I think you just need—I think we need to make a call to the TSA and say here's—here's the status and let them know, you know, that. And it was not—it was not debated any—any further than that.

JA 282.

4. Doyle was chosen to make the call to TSA. Pet. App. 6a; JA 89, 169–70, 282–83. His notes state: "TSA was notified that William Hoeper, a disgruntled company employee (an FFDO who may be armed), was traveling from IAD-DEN later that day," and that Air Wisconsin was "concerned about the whereabouts of his firearm, and his mental stability at that time." Pet. App. 6a; JA 393.

A TSA email with the subject "Unstable pilot in FFDO program was terminated today" also summarizes, in considerable detail, Doyle's "cal[l] to advise of an Air Wisconsin pilot in FFDO program who was

terminated today." Pet. App. 62a; JA 414. It states that Hoeper "has been very upset and angry with Air Wisconsin simulator technicians and other personnel[,] has been displaying unstable tendencies and deflecting responsibility to others for failures recently[, and] has just failed his fourth (4th) proficiency check since October to become a Captain." JA 414. With respect to Hoeper's weapon, the email notes that "[redacted] is attempting to notify the proper authorities about the termination to ensure [the] weapon is secured" and "does not believe [Hoeper] is in possession of a firearm at this time." *Id.*[2]

As confirmed by TSA's former Chief Support Systems Operator, who was responsible for informing airlines about the "when in doubt, report" policy, Air Wisconsin was not supposed to investigate the situation itself, should have reported it, and thus responded "precisely as [TSA] would have wanted them to." JA 324–25, 337, 341–42.[3]

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[2] TSA's Washington Dulles Daily Operations Report describes the report similarly. Its subject line is "Suspicious FFDO on UA-921 IAD to DEN" and references a "[p]ilot participating in the FFDO program [who] may have had his right to carry a firearm terminated." JA 404. It continues: "[H]e was attending flight simulator training … and had failed the training on three previous occasions which is grounds for termination.… He was given an additional chance and walked out of the training session today which will almost certainly result in termination of his employment …." JA 404–05.

[3] The United States also indicated that Hoeper's conduct "could have raised concerns about his future behavior in connection with an upcoming flight," that "[i]nformation about such a pilot clearly relates to 'a threat to aircraft or passenger safety,'" and that "Air Wisconsin might very well have been subject to regulatory action for failing to report any sincerely-held concerns regarding plaintiff." U.S. Colo. S. Ct. Br. 9, 11–12.

5. Following Air Wisconsin's report, Hoeper's flight from Dulles to Denver was returned to the gate, where he was removed from the aircraft and searched. Pet. App. 51a–52a; JA 232–34. A TSA official questioned him about his firearm and, upon learning that it was at his house in Denver, arranged to have it picked up there. JA 211–13. Hoeper was then released and returned home on the next flight that evening. JA 211–15, 234–35, 239. The following day he received formal notification of the termination that both he and the other Air Wisconsin personnel had understood would be the consequence of his failure in the training. JA 178, 182, 216, 287, 460.

C. Proceedings Below.

1. Hoeper brought suit claiming that he had been defamed by Air Wisconsin's report to TSA.[4] Air Wisconsin moved for summary judgment, arguing that the claim was barred by ATSA's immunity provision, but the trial court denied the motion and submitted the case to the jury. Pet. App. 7a. At the close of Hoeper's evidence, Air Wisconsin moved for a directed verdict based on ATSA immunity. *Id.* The trial court denied the motion, concluding that ATSA immunity was a jury question. *Id.* at 101a.

The jury returned a verdict for Hoeper. Pet. App. 110a–12a. It found that Air Wisconsin made two defamatory statements: (1) "Plaintiff was an FFDO who may be armed. He was traveling from IAD-DEN later that day and we were concerned about his mental stability and the whereabouts of his firearm"; and (2) "Unstable pilot in FFDO program was terminated

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[4] Hoeper also brought claims for false imprisonment and intentional infliction of emotional distress. The jury found for Air Wisconsin on the false imprisonment claim and hung on the emotional distress claim. Pet. App. 113a–16a.

today." *Id.* at 111a. The jury awarded $849,625 in compensatory damages and $391,875 in punitive damages. *Id.* After reducing the punitive damages to $350,000 and awarding costs, the trial court entered final judgment on Hoeper's defamation claim in the amount of $1,421,748.09. *Id.* at 28a n.1; JA 598.

2. The Colorado Court of Appeals affirmed. Pet. App. 44a–87a. It held that Air Wisconsin was not entitled to immunity under ATSA because, under Colorado law, ATSA immunity was a question of fact for the jury. *Id.* at 53a–61a. Reaching the merits, the court limited its independent review of the record to the fault, or state of mind, aspect of actual malice. *Id.* at 63a–64a, 78a–85a. As to falsity, the court deferred to the jury's determination, concluding that the jury rationally could have found that Air Wisconsin's report to TSA falsely "connoted that this FFDO was so unstable as to threaten the safety of the aircraft he was boarding." *Id.* at 76a–78a.

3. A sharply divided Colorado Supreme Court affirmed, four votes to three. Pet. App. 1a–43a. The majority began by holding, contrary to the Colorado Court of Appeals' conclusion, that ATSA immunity is a question for the court to decide before trial. *Id.* at 9a–15a. The court also acknowledged "the importance to our national security of the threat disclosure encouraged by the ATSA and the unique position of air carriers to obtain information about those threats." *Id.* at 14a. And the court even conceded that "Congress intended to confer upon air carriers the greatest possible degree of protection by enacting the immunity provision," *id.*, and that the events here "may have warranted a report to TSA," *id.* at 18a.

Nevertheless, the majority found that the lower courts' errors were "harmless because Air Wisconsin is not entitled to immunity under the ATSA." Pet.

App. 15a–21a. In denying Air Wisconsin ATSA immunity, the majority expressly declined to decide whether Air Wisconsin's report was true or false, holding instead that falsity is irrelevant to the immunity question and, thus, that an airline may be held liable for reporting a potential threat to TSA, even if its report is true. *Id.* at 17a n.6. ("In our determination of immunity under the ATSA, we need not, and therefore do not, decide whether the statements were true or false.").

The majority then found that Air Wisconsin was not entitled to ATSA immunity because its "statements overstated th[e] events to such a degree that they were made with reckless disregard for their truth or falsity." Pet. App. 18a. Parsing the statements one-by-one, the court found that Doyle had deviated too far from what the majority viewed as an ideal script for the report. *Id.* at 18a–21a. According to the court, the following distinctions represented the difference between immunity and liability:

What Air Wisconsin Said	*What Air Wisconsin Needed To Say To Obtain ATSA Immunity*
"[Hoeper] was terminated today"	"[Hoeper] knew he would be terminated soon"
"[Hoeper] was an FFDO who may be armed"	"[Hoeper] was an FFDO pilot"
"[W]e were concerned about his mental stability"	"[Hoeper] had acted irrationally at the training three hours earlier and 'blew up' at the test administrators"

Id. at 6a, 21a.

After denying immunity, the court addressed the merits of the defamation claim and determined, "[f]or the same reasons," that Air Wisconsin had acted with actual malice under *New York Times*. Pet. App. 23a. The court deferred to the jury's finding on falsity, and concluded that sufficient evidence supported "the jury's determination that Hoeper was not mentally unstable," even though "Hoeper lost his temper and 'blew up' at one test administrator." *Id*. at 26a–27a.

4. Justice Eid, joined by two justices, dissented in part and concurred in part. Pet. App. 28a–43a. The dissent agreed with the majority that the question of ATSA immunity should have been decided by the court before trial, but vigorously disagreed with the conclusion that this error was harmless. *Id*. at 28a. On the contrary, the dissent concluded, "Air Wisconsin was entitled to immunity under [ATSA] because the statements it made to the TSA were substantially true." *Id*. at 28a. In holding that "whether the statements were true is not part of the ATSA immunity analysis," the dissent explained, the majority "misinterpret[ed] the *New York Times* standard." *Id*. at 29a–30a n.2. Because this Court has long held that the *New York Times* standard "requires the plaintiff to show falsity of the statement," the dissent concluded that "when Congress incorporated the standard into the exception to ATSA immunity, it incorporated the falsity component as well." *Id*. at 30a n.2.

The dissent, like the majority, understood that the "federal reporting system rests on the assumption that airlines should report possible threats to airline safety to the TSA even when the report is based on tentative information and evolving circumstances." Pet. App. 37a. But, unlike the majority, the dissent also recognized that this scheme protected Air Wisconsin's statements. Under TSA's "when in doubt, re-

port" policy, the airline properly and accurately relayed that it was concerned that one of its pilots, who was facing imminent termination and was authorized to carry a firearm, was acting erratically and was possibly armed. *Id.* at 30a–40a. The majority's focus on "hair-splitting distinctions," by contrast, would "expos[e] [airlines] to a defamation judgment whenever [a] possible threat turned out to be a false alarm" and would "tur[n] the TSA's 'when in doubt, report' policy on its head." *Id.* at 34a–38a.

Finally, the dissent expressed apprehension about the potential consequences of the majority's decision. The end result and the analytic approach used to reach it, the dissent feared, "threate[n] to eviscerate ATSA immunity and undermine the federal system for reporting possible threats to airline safety to the TSA." Pet. App. 37a.

SUMMARY OF ARGUMENT

I. The court below erred in holding that ATSA immunity may be denied without a determination that the air carrier's disclosure was materially false.

A. ATSA absolutely protects true threat reports. Congress modeled the exceptions to ATSA immunity on the *New York Times* "actual malice" standard, and although that standard speaks in terms of the defendant's mental state, it has long been held to require a showing that the defendant's statement was false. Because there is no indication that Congress intended to depart from this settled interpretation when it enacted ATSA, the exceptions to ATSA immunity likewise require proof of falsity.

The statute's text and structure further confirm that the exceptions to ATSA immunity apply only to false disclosures. Subsection (b)(1), which requires

"actual knowledge" of falsity, necessarily requires that the defendant's disclosure actually be false, and there is no reason to suppose that in expanding the mens rea requirement to include recklessness in subsection (b)(2), Congress dispensed with subsection (b)(1)'s falsity requirement. Moreover, in a closely related statute that provides immunity for members of the public who report security threats, Congress expressly made clear that the exception for knowingly false or reckless reports applies only to "[f]alse reports." These provisions are *in pari materia* and should be interpreted harmoniously.

Permitting liability for true reports would undermine ATSA's purpose of encouraging airlines to promptly report security threats to TSA. True reports enable TSA to perform its critical threat assessment function, regardless of the airline's state of mind. And a rule permitting airlines to be held liable for reporting true information concerning a potential security threat would send a chill throughout the airline industry, deterring airlines from reporting suspicious incidents and thereby undermining the scheme Congress adopted in the wake of 9/11 to protect the public from threats to aviation security.

B. The ATSA exceptions apply only if the airline's disclosure was *materially* false. This Court has held that the *New York Times* standard requires material falsity, and by borrowing that standard in the ATSA exceptions, Congress is presumed to have incorporated the materiality requirement as well. Accordingly, minor or technical inaccuracies do not deprive an airline of immunity. Rather, an airline loses immunity only if its disclosure deviates from the truth to such a degree as to cause the listener, TSA, to react to the threat report in a materially different way. A contrary rule permitting liability for inconsequential

inaccuracies would not give airlines the "breathing space" they need to feel free to share threat information promptly with TSA even in the face of evolving or ambiguous circumstances.

II. The judgment below must be reversed because Air Wisconsin's disclosure to TSA was substantially true. No material difference exists between any of Air Wisconsin's statements and the slightly more sanitized script the Colorado Supreme Court preferred. It simply makes no sense to deny immunity because Air Wisconsin said Hoeper was "terminated today" instead of that he "knew he would be terminated soon," or because it said he was an "FFDO pilot who may be armed" instead of that he was an "FFDO pilot," who, by definition, may be armed. The gist of Air Wisconsin's report—that Hoeper, an FFDO who may have been armed, was about to board an aircraft, and Air Wisconsin was concerned about his mental state given his recent outburst, aggressive behavior, and loss of his job—was undeniably true.

The court's imputation of "implications" that went well beyond Air Wisconin's actual statements was improper and cannot be squared with Congress's post-9/11 determination that any implications about whether a genuine threat exists are for TSA to draw. Moreover, the court's conclusion that Air Wisconsin did not actually believe Hoeper posed a potential threat rests on a distorted view of the record and improperly second-guesses Air Wisconsin's actions based on 20/20 hindsight. Immunity exists precisely for borderline cases in which airlines confronted with uncertain and ambiguous situations err on the side of reporting, as TSA has directed them to do. In reporting the situation to TSA, Air Wisconsin did exactly what it was supposed to do. The court below erred in

denying Air Wisconsin immunity, and its judgment should be reversed.

ARGUMENT

I. ATSA IMMUNITY MAY NOT BE DENIED WITHOUT A DETERMINATION THAT THE AIR CARRIER'S DISCLOSURE WAS MATERIALLY FALSE.

In denying Air Wisconsin ATSA immunity, the Colorado Supreme Court held that the truth or falsity of Air Wisconsin's report was irrelevant to the immunity analysis and therefore refused to "decide whether the statements were true or false." Pet. App. 17a n.6.[5] The necessary implication of that holding is that an airline may be denied ATSA immunity and subjected to defamation liability for reporting true information concerning a potential security threat to TSA. See *id.* at 30 n.2 (Eid, J., dissenting) ("the majority believes that ATSA immunity is lost when a statement is made recklessly even though it may be true"). That holding is manifestly erroneous: Under ATSA, as under the *New York Times* standard it codifies, substantial truth is an absolute defense. Accordingly, an airline cannot be held liable for reporting a potential security threat to TSA absent a determination that its report was materially false.

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[5] In its analysis of reckless disregard, the court identified purported overstatements and took issue with imputed implications before offering its own script that, it said, Air Wisconsin should have used to qualify for immunity. Pet. App. 18–21. However, the court expressly declined to address whether Air Wisconsin's report was substantially true. *Id.* at 17a n.6.

A. Under ATSA, Truth Is A Complete Defense To Liability.

Under ATSA, an airline "shall not be civilly liable to any person" for making "a voluntary disclosure of any suspicious transaction relevant to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism." 49 U.S.C. § 44941(a). The only exceptions to this otherwise blanket grant of immunity are for disclosures made "with actual knowledge that the disclosure was false, inaccurate, or misleading" or "with reckless disregard as to the truth or falsity of that disclosure." *Id.* § 44941(b). Under settled principles of statutory interpretation, these exceptions do not apply if the airline's report was true.

1. In enacting the exceptions to ATSA immunity, Congress borrowed the First Amendment "actual malice" standard this Court articulated in *New York Times Co.* v. *Sullivan*. Compare *id.* (requiring actual knowledge of falsity or reckless disregard), with *N.Y. Times*, 376 U.S. at 279–80 (adopting "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false"). Incorporating the *New York Times* standard into ATSA was a logical choice because defamation claims are the most obvious potential source of liability for airlines that report security threats to TSA. And, just as First Amendment freedoms require "'breathing space'" to survive, *N.Y. Times*, 376 U.S. at 271–72, Congress understood that the free flow of information from airlines to TSA requires a broad rule of immunity with only limited exceptions for "bad actors," 147 Cong. Rec. at S10440.

This Court, in turn, has long held that the "the *New York Times* rule … absolutely prohibits punishment of truthful" statements. *Garrison* v. *Louisiana*, 379 U.S. 64, 78 (1964). Indeed, less than a year after announcing the *New York Times* standard, this Court held that, under that standard, "[t]ruth may not be the subject of either civil or criminal sanctions." *Id.* at 74. In the years since, this Court has repeatedly affirmed that the *New York Times* rule requires proof "*both* that the statement was false and that the statement was made with the requisite level of culpability." *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 52 (1988); accord *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 514 (1991) (recognizing that plaintiffs must "prov[e] falsity for purposes of the actual malice inquiry"); *Phila. Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 775 (1986) (holding that the *New York Times* rule requires plaintiffs to "show the falsity of the statements at issue"); *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 490 (1975) ("the defense of truth is constitutionally required"); *Greenbelt Coop. Publ'g Ass'n* v. *Bresler*, 398 U.S. 6, 10 (1970) (the *New York Times* standard is met "only if [the plaintiff] establishes that the utterance was false") (internal quotation marks omitted). As the Court explained in *Masson*, the *New York Times* standard "requires" consideration of "the concept of falsity" because it is impossible to "discuss the standards for knowledge or reckless disregard without some understanding of the acts required for liability." 501 U.S. at 513.

Because Congress modeled the exceptions to ATSA immunity on the *New York Times* standard, and because when Congress enacted ATSA in 2001 it had long been settled that the *New York Times* standard requires proof of falsity, it is presumed that the ATSA exceptions likewise require proof of falsity. It is a

"cardinal rule of statutory construction" that when Congress adopts a common-law standard, it presumptively "knows and adopts the cluster of ideas" associated with it. *FAA* v. *Cooper*, 132 S. Ct. 1441, 1449 (2012) (internal quotation marks omitted). "In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). In other words, where, as here, "Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981).

ATSA does not "otherwise dictat[e]" that Congress intended to depart from the settled interpretation of the *New York Times* rule. *Id.* Nothing in the text, purpose, or history of ATSA suggests that Congress meant to dispense with the falsity requirement and expose airlines to liability for true reports. This "absence of contrary direction" is alone sufficient reason to hold that ATSA absolutely protects true disclosures and reject the Colorado Supreme Court's contrary interpretation. *Morissette*, 342 U.S. at 263.

2. The statute's text and structure further confirm that Congress stripped airlines of immunity only for false disclosures. Subsection (b)(1) of the immunity provision denies immunity for "any disclosure made with actual knowledge that the disclosure was false, inaccurate, or misleading." 49 U.S.C. § 44941(b)(1). This subsection necessarily requires that the airline's disclosure actually be "false, inaccurate, or misleading," because otherwise the airline could not have "actual knowledge" that it was so.

Subsection (b)(2), in turn, is simply a corollary to subsection (b)(1) designed to ensure that airlines cannot evade the exception by avoiding "actual knowledge" of falsity or ignoring obvious red flags. See *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060, 2071 (2011) (a reckless defendant is one who ignores a "substantial and unjustified risk" of wrongdoing); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 84 (1967) (per curiam) (recklessness under *New York Times* requires a "high degree of awareness of probable falsity") (internal quotation marks and omissions omitted). By expanding the statute's mens rea requirement to include recklessness in subsection (b)(2), there is no indication that Congress intended to jettison the falsity requirement inherent in subsection (b)(1) and deny immunity for true disclosures. To the contrary, as Justice Powell observed, "the defense of truth" is "implicit in … a standard of recovery that rests on knowing or reckless disregard of the truth." *Cox*, 420 U.S. at 498–99 (concurring).

3. This interpretation is further confirmed by Congress's treatment of a closely related immunity provision. In 2007, Congress enacted a companion provision to ATSA that grants immunity to members of the public who report "suspected terrorist activity or suspicious behavior." 6 U.S.C. § 1104(a)(1); see Pub. L. No. 110-53, § 1206, 121 Stat. 266, 388 (2007). Like ATSA, this provision denies immunity only for a "report that the person knew to be false or [that] was made with reckless disregard for the truth." 6 U.S.C. § 1104(a)(2). Congress titled the § 1104(a)(2) exception, which uses the same basic language as the ATSA exceptions, "False reports," *id.*, demonstrating that Congress understands this language to require a showing of falsity. Because § 1104(a) and ATSA

"dea[l] with the same subject matter," they are *in pari materia* and "should if possible be interpreted harmoniously." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012); see also, *e.g.*, *United States* v. *Stewart*, 311 U.S. 60, 64–65 (1940) (construing statutes *in pari materia* to resolve "ambiguities and doubts" about meaning of earlier statute).

4. Finally, reading the ATSA exceptions to require proof of falsity better serves the statute's purpose. ATSA immunity is designed to "encourag[e] airline employees to report suspicious activities" by eliminating the speech-inhibiting specter of liability. ATSA § 125, 115 Stat. at 631 (capitalization omitted). Congress wanted airlines to share information freely because it recognized that they are uniquely positioned to gather relevant threat information and that disclosure of this information is essential to TSA's ability to perform its core threat assessment function. Because true information about a potential security threat enables TSA to perform that vital function, regardless of the state of mind of the reporting airline, ATSA is best read to absolutely protect all true disclosures.

Moreover, the "breathing space" that is essential to prevent the threat of liability from chilling reports is best created by the dual protection provided by a rule that allows plaintiffs to recover "only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability." *Hustler*, 485 U.S. at 52. As the United States observed in its brief supporting certiorari, "in light of the critical purpose of the ATSA provision to encourage reporting of suspicious information that may bear on threats to security in air transportation and national security more broadly, Congress could

not have intended to allow liability to attach for disclosures that were substantially true." U.S. Br. 13.

B. ATSA Immunity Is Lost Only If The Airline's Disclosure Was Materially False.

In addition to requiring falsity, the ATSA exceptions require that the airline's disclosure be *materially* false. As a result, inaccuracies in an airline's disclosure do not negate immunity unless they would cause an official considering the threat report to react in a materially different way.

1. Just as this Court has made clear that the *New York Times* rule requires proof of falsity, it also has made clear that only *material* falsity gives rise to liability. In *Masson*, for example, the Court held that "a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times* … unless the alteration results in a material change in the meaning conveyed by the statement." 501 U.S. at 517. "Minor inaccuracies," the Court explained, "do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." *Id.* (internal quotation marks omitted). "Put another way, the statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Id.* (internal quotation marks omitted). Absent contrary indication, Congress is presumed to have incorporated this concept of materiality into ATSA when it borrowed the *New York Times* standard. See *Amax Coal*, 453 U.S. at 329; *Morisette*, 342 U.S. at 263.

2. Nothing in ATSA suggests Congress intended to depart from this Court's understanding of the *New York Times* rule and expose airlines to liability for immaterial inaccuracies in their reports to TSA. Such

an interpretation would frustrate the statute's core purpose of encouraging airlines to report threat information promptly. Because TSA can perform its threat assessment function so long as the information it receives is substantially true, penalizing airlines for slight inaccuracies would serve no rational purpose. If Congress had meant to depart from the *New York Times* rule to no apparent end, surely it would have made that intent clear in the statute's text.

Moreover, Congress understood that airlines facing a potential security threat will rarely have the luxury of perfect information and will often have to act quickly in the face of ambiguous and evolving circumstances. That is why it provided immunity for disclosures of "*suspicious* transaction[s] relevant to a *possible* violation of law." 49 U.S.C. § 44941(a) (emphases added). Indeed, the fact that threat reports, unlike journalistic endeavors of the kind at issue in *Masson*, often arise with little or no time to act and under significant stress is every reason to be more forgiving of inconsequential inaccuracies. See *Cordero* v. *CIA. Mexicana De Aviacion, S.A.*, 512 F. Supp. 205, 206–07 (C.D. Cal. 1981) ("airline safety is too important to permit a safety judgment … to be second-guessed months later in the calm of a courtroom by a judge or jury, having no responsibility for the physical safety of anyone, on the basis of words which are inadequate to convey the degree of excitement and tenseness existing at the time the judgment was made"), *rev'd in part and aff'd in part*, 681 F.2d 669 (9th Cir. 1982).

Requiring perfect accuracy as a condition of immunity, by contrast, would undermine ATSA's purpose by causing airlines to delay reporting until they could confirm that their reports were strictly accurate in every particular. Indeed, under the extreme approach taken by the Colorado Supreme Court, which

found dispositive differences in picayune distinctions such as saying Hoeper was "terminated today" rather than that he faced imminent termination, airlines would not report what they knew to TSA until their statements had been rigorously vetted by their attorneys. It is difficult to imagine a regime more at odds with Congress's goal to promote prompt reporting of threat information in a context in which time is of the essence and delay could cost lives.

3. Under the *New York Times* rule, an inaccuracy is immaterial unless "it would have a different effect" on the listener than a strictly accurate statement. See *Masson*, 501 U.S. at 517 (internal quotation marks omitted). Accordingly, any inaccuracies in an airline's disclosure are not actionable unless they would have a different effect on TSA. Cf. *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U.S. 662, 673 (2008) ("it must be established that th[e conspirators] agreed that the false record or statement would have a material effect on the Government's decision to pay the false or fraudulent claim"); *Fedorenko* v. *United States*, 449 U.S. 490, 509 (1981) ("[T]he materiality of a false statement in a visa application must be measured in terms of its effect on the applicant's admissibility into this country."). Thus, if the overall "gist" of the airline's disclosure was true, and if TSA would not have reacted differently to a strictly accurate report, the airline is entitled to immunity "irrespective of slight inaccuracy in the details." *Masson*, 501 U.S. at 517 (internal quotation marks omitted).

II. AIR WISCONSIN'S DISCLOSURE TO TSA WAS TRUE IN ALL MATERIAL RESPECTS.

Because substantial truth is an absolute defense under ATSA, the Colorado Supreme Court erred in denying Air Wisconsin immunity without deciding whether its statements to TSA were materially false.

Accordingly, the judgment at a minimum should be vacated. However, to provide guidance on the meaning and application of material falsity under ATSA, the Court should go further. See *id.* at 520 ("We apply these principles to the case before us."). Application of the proper standard to the record in this case can yield only one conclusion: The judgment below must be reversed because Air Wisconsin's disclosure to TSA was substantially true.[6]

1. **"Terminated today."** The jury found that Air Wisconsin stated that Hoeper "was terminated today." Pet. App. 111a. That statement was substantially true. Although Hoeper was not formally terminated until the following day, he had just failed his last chance to pass the proficiency check upon which his continued employment depended and he thus knew that his termination was imminent. *Id.* at 33a (Eid, J., dissenting); JA 178, 182, 216, 287, 294–95, 460. As the dissent below observed, Hoeper "had, in effect, been terminated." Pet. App. 34a.

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[6] The Colorado Supreme Court correctly held that ATSA immunity is a question for the court, not the jury. Pet. App. 11a–15a. That issue is outside the scope of the question presented, however, and in any event is immaterial to the outcome. Regardless of who should have made the decision, and under any standard of review, the judgment must be set aside because no reasonable court or jury could have concluded that Air Wisconsin's disclosure to TSA was materially false. *See id.* at 41a–42a (dissent below explaining that, because ATSA immunity is a question for the court, "it is irrelevant that the jury could have rationally concluded that the statements were false (although I would find that a jury could not have so concluded in this case)"); *Brady* v. *S. Ry.*, 320 U.S. 476, 479 (1943) (sufficiency of the evidence with respect to a federal claim is a federal question subject to this Court's review), *abrogation on other grounds recognized by CSX Transp., Inc.* v. *McBride*, 131 S. Ct. 2630 (2011).

In any event, the difference between saying Hoeper was "terminated today" and saying his termination was imminent is precisely the sort of "[m]inor inaccurac[y]" that does not rise to the level of material falsehood. *Masson*, 501 U.S. at 517. TSA would not have responded any differently had Air Wisconsin used the Colorado Supreme Court's preferred script and stated that Hoeper "knew he would be terminated soon." Pet. App. 21a. Indeed, any suggestion that TSA would have responded differently is belied by the record, which shows that TSA knew Hoeper had not yet been formally terminated. See JA 133 (Dulles security coordinator testifying that "TSA had contacted [the control center] and had told them [Hoeper] was on his way to Denver, *probably to be terminated*") (emphasis added). The gist of Air Wisconsin's statement—that Hoeper was under job-related stress because of events that adversely affected his employment with Air Wisconsin—is the same either way. Any difference between the statements "is, in context, immaterial." *Masson*, 501 U.S. at 524.

2. **"An FFDO who may be armed."** Air Wisconsin also reported that Hoeper was "an FFDO who may be armed" and that it was concerned about "the whereabouts of his firearm." Pet. App. 111a. This statement too was true. It is undisputed that Hoeper was an FFDO, and, as an FFDO, Hoeper might have been armed. Moreover, Air Wisconsin knew that Hoeper had departed from the Denver airport where he could have bypassed security without logging his gun; that FFDOs had previously attended training sessions with their firearms in violation of protocol; and that Air Wisconsin's director of flight operations at Dulles could not confirm whether Hoeper had his gun or had used his FFDO credentials to bypass security. JA 78, 166–68, 290–92, 299–300, 464–65.

The Colorado Supreme Court thought Air Wisconsin should have said only that Hoeper "was an FFDO pilot." Pet. App. 21a. But again, there is no material difference between these statements. In the context of a threat report, TSA undoubtedly would have understood that the only reason to report that Hoeper was an FFDO was to alert TSA to the possibility that he may be armed. Thus, the court's "approved statement that Hoeper 'was an FFDO pilot' contains the very implication that Air Wisconsin expressed to the TSA—namely that, as an FFDO pilot, Hoeper 'may be armed.'" *Id.* at 35a (Eid, J., dissenting).

The Colorado Supreme Court also concluded that "Doyle's statement that Hoeper may have been armed implies the assertion of some fact which led him to conclude that Hoeper was armed." Pet. App. 19a. That is simply wrong. Air Wisconsin did not state that it believed Hoeper was armed or that it was aware of facts indicating that he was armed; nor did its statement imply as much. Rather, Air Wisconsin stated that it was "concerned about … the whereabouts of his firearm," *id.* at 111a, indicating clearly that it did not know whether Hoeper had his gun.

As the dissent recognized, moreover, it is inappropriate to "tos[s] up … overblown 'implication[s]' just to have something to swat down as false." Pet. App. 36a. Any implications are for TSA to make. Nothing prevented TSA from following up to determine whether Air Wisconsin was aware of any additional facts beyond Hoeper's FFDO status indicating he had his gun. In fact, the record reflects that TSA did just that: TSA's email describing Doyle's call states that "[redacted] *does not believe* [Hoeper] is in possession of a firearm at this time." JA 414 (emphasis added).

3. **"Mental stability."** The jury also found that Air Wisconsin said it was "concerned about [Hoeper's]

mental stability." Pet. App. 111a. That statement also was true. Hoeper had just blown up at his instructor to the point that the instructor felt physically threatened. JA 14, 22. Hoeper then seemingly snapped, yelling and cursing loudly in public spaces. JA 26–27, 206–07, 310–12. Given Hoeper's bizarre outburst and aggressive behavior, his impending termination, and Air Wisconsin's knowledge of prior incidents in which disgruntled employees had committed retaliatory acts of violence, Air Wisconsin had every reason to be, and was in fact, concerned about Hoeper's mental state. See Pet. App. 33a (Eid, J., dissenting) ("It is reasonable to conclude from these events that Hoeper was unstable."); cf. *Masson*, 501 U.S. at 519 (a speaker is entitled to make statements reflecting a "rational interpretation" of ambiguous circumstances).

The Colorado Supreme Court faulted Air Wisconsin for using the words "mental stability," concluding that Air Wisconsin instead should have said that Hoeper "had acted irrationally at the training three hours earlier and 'blew up' at test administrators." Pet. App. 21a. Here again, there is no material difference between Air Wisconsin's statement, made in the heat of the moment without the opportunity to wordsmith, and the court's preferred script, which the court had 11 months to craft in the repose of judicial chambers. Both convey the same basic message—that Hoeper was upset and acting aggressively and that Air Wisconsin was concerned about his current state of mind. It is inconceivable that TSA would have responded in a materially different way to a report that Hoeper had "blown up" and was "acting irrationally."

Ultimately, the Colorado Supreme Court erred by attaching talismanic significance to the words "mental stability"—hardly a phrase that has a fixed or definite meaning. The court concluded that, based on the

events at the training, Air Wisconsin "could not form an opinion as to whether Hoeper was mentally unstable." Pet. App. 18a. Likewise, at trial, Hoeper criticized this word choice, extracting concessions from Air Wisconsin's witnesses that they were not qualified to assess anyone's "mental stability." JA 158.

This nitpicking of Air Wisconsin's phraseology has no place under ATSA. Air Wisconsin never purported to have made a clinical psychiatric diagnosis of Hoeper, and TSA would not have understood its statement as such. Rather, TSA undoubtedly understood that Air Wisconsin was concerned about Hoeper's mental state given his angry and aggressive behavior that morning and his impending termination. To the extent there is any discernible difference between the words "mental state" and "mental stability," it is immaterial. In the context of a report to TSA about a disgruntled pilot, both phrases "bear the same substantial meaning." *Masson*, 501 U.S. at 524.

4. **Overall implication.** The Colorado Supreme Court further concluded that the "overall implication" of Air Wisconsin's statement was that it "believed that Hoeper was so unstable that he might pose a threat to the crew and passengers of the airplane on which he was scheduled to fly back to Denver." Pet. App. 19a. According to the majority below, this "implication" was inaccurate because, in the court's view, "Doyle did not believe Hoeper to be so unstable that he might pose such a threat." *Id.* at 20a (emphasis omitted). This analysis is deeply flawed.

First, the court's analysis is at war with the fundamental premise of Congress's post-9/11 approach to aviation security—that TSA, not the airline industry, is responsible for assessing potential security threats. See *supra*, 5–6. Under this new regime, an airline's obligation is to report suspicious activities to TSA,

not to attempt to investigate or assess the likelihood of the threat itself. An airline's job is simply to report suspicious facts, and the mandate is "when in doubt, report." Accordingly, the only "implication" of Air Wisconsin's report was that it thought TSA should be aware of the situation. Determining whether the circumstances warranted a response or further investigation was TSA's responsibility. Whether Hoeper posed a genuine threat was for TSA, not Air Wisconsin (or the Colorado Supreme Court), to decide.

Second, to the extent Air Wisconsin's report implied that it believed a threat might possibly exist and TSA should be aware of it, that "implicit suggestion is present in virtually every report to TSA." Pet. App. 37a (Eid, J., dissenting). Under the Colorado Supreme Court's logic, therefore, Air Wisconsin could not have made *any* report to TSA without creating implications and exposing itself to liability, regardless of what it said. Yet the Colorado Supreme Court itself concluded that "the events at the training may have warranted a report to TSA," *id.* at 18a, and that Air Wisconsin "would likely be immune" if only it had used slightly different words, *id.* at 21a. Likewise, Hoeper's own witnesses agreed that a call should have been made and that TSA should have been made aware of what had happened. JA 137 ("you always want to let the appropriate agency know, but, in this particular case, the carrier should have been advised, as well"); JA 247 (Hoeper's threat expert "ha[d] no problem with the fact that they called TSA").

Third, the Colorado Supreme Court's opinion paints a distorted and inaccurate picture of the circumstances leading to Air Wisconsin's report. According to the court, Doyle must not have believed Hoeper posed a threat because he did not call TSA immediately and instead "booked Hoeper on the flight back

to Denver and had another employee drive Hoeper to the airport." Pet. App. 19a–20a. This at most shows that Doyle did not immediately appreciate the threat, and completely ignores the undisputed fact that the decision to call TSA was made, not by Doyle, but by his boss's boss, LaWare, a vice president of the company. JA 51, 266, 282–83, 462–63. Indeed, reading the majority opinion below, one would think that Doyle was the only Air Wisconsin employee involved. The opinion does not even mention the meeting with LaWare, Orozco, Frisch, and Doyle that culminated in LaWare's decision to call TSA.

The reality is that when these four Air Wisconsin executives met that afternoon, they faced an uncertain situation. It may well be that it was not immediately apparent that Hoeper's outburst needed to be reported to TSA, and that the concern crystallized only as the group discussed the situation and collectively focused their attention on the relevant facts: that Hoeper had blown up and behaved aggressively that morning; that he knew he was facing imminent termination; that he was an FFDO who could carry a gun onboard an aircraft with access to the cockpit; that he could have brought his gun with him to Virginia without logging it in Denver; that he was about to board a flight; that Air Wisconsin's director of flight operations at Dulles could not confirm whether Hoeper had his gun; and that disgruntled airline employees had previously taken down aircraft, killing innocent passengers. Ultimately, LaWare and his colleagues did not know whether Hoeper posed a genuine threat, but they could not be certain he did not, so they did what they had been directed to do if they were in doubt—they reported what they knew to TSA.

Thankfully, the threat they feared did not materialize. As a result, it is easy with the benefit of 20/20 hindsight to second-guess their judgment. But it is precisely for situations like this one that immunity exists. When the duty to report is immediately obvious, or when the threat materializes, no one needs immunity. Congress, however, recognized that there would be borderline cases and that judgments made in uncertain and rapidly evolving situations can be made to appear unreasonable to a court or jury that has the benefit of hindsight and the luxury of time to dissect every decision and parse every word. Cf. *Ryburn* v. *Huff*, 132 S. Ct. 987, 991–92 (2012) (per curiam) (lower court erred in denying qualified immunity based on perspective of "hindsight and calm deliberation"); *Williams* v. *Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975) (an air carrier's decision to refuse to transport passengers who may pose a safety threat is assessed based "upon the facts and circumstances of the case as known to the airline at the time it formed its opinion and made its decision").

Recognizing that perfection is not achievable, Congress chose to err on the side of safety. It accordingly granted broad immunity to airlines that report potential security threats, subject only to narrow exceptions for bad actors who make false reports knowingly or with reckless disregard for the truth. Air Wisconsin is entitled to that immunity because its report to TSA was true in all material respects. That simple fact should have ended this litigation years ago.

Instead, Air Wisconsin now faces a $1.4 million defamation judgment for doing precisely what Congress and TSA would have wanted it to do. To correct the Colorado Supreme Court's erroneous interpretation of ATSA, to grant Air Wisconsin the immunity to which it is entitled, and to ensure that airlines will

continue to assist TSA with its vitally important mission by promptly reporting potential security threats, the Court should reverse the decision below.

CONCLUSION

The decision below should be reversed and remanded for further proceedings not inconsistent with the Court's decision.

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