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 AMICUS CURIAE OF DRI - THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI — the Voice of the Defense Bar ("DRI") is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Consistent with this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. To that end, DRI regularly files *amicus curiae* briefs in cases that raise issues of concern to its members. This is just such a case. Indeed, DRI filed an amicus brief at the certiorari stage in this case, urging that this Court grant review.

Constitutional and statutory immunities pose important issues for the proper functioning of the civil justice system. Where both constitutional protections and express legislative directives preclude civil liability, there is no warrant for judicial override. The particular context of this case, which directly implicates national security matters, makes the need for this Court to reverse the judgment of the Colorado Supreme Court all the more compelling.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part, and no person or entity, other than the *amicus curiae,* its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

Proper definition of the scope of constitutional and statutory immunities is a matter of continuing importance to DRI and its members. The issue has great practical significance not only for litigation and the judicial system, but also for counseling and conducting business in industries subject to the relevant immunity. With respect to the context of this case, the invocation of immunity under the Aviation Transportation and Security Act ("ATSA"), Pub. L. 107-71, 115 Stat. 597 (2001) (codified in various parts of 49 U.S.C.), is of paramount importance to DRI members, to the aviation industry and to the public generally.

The decision below sows uncertainty in circumstances where Congress correctly sought to encourage reporting of suspicious activities. Such uncertainty will, at a minimum, impede prompt reporting of potential threats to the federal officials best able to assess threats. At worst, the decision below will affirmatively discourage airlines from reporting to the Transportation Security Administration ("TSA") suspicious behavior that raises security concerns. Given the catastrophic ramifications of inattention to threats against airline safety, there is a manifest need for clear, correct judicial standards implementing the statutory imperative to report to TSA.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Aviation and Transportation Security Act ("ATSA" or the "Act"), Pub. L. 107-71, 115 Stat. 597 (2001) (codified in various parts of 49 U.S.C.), was one of numerous efforts undertaken by the United States government to strengthen national security in the wake of the September 11, 2001 terrorist attacks. Among other things, the Act created the Transportation Security Administration ("TSA"), a new federal agency responsible for overseeing and ensuring security in all modes of transportation, including civil air transportation security. TSA assumed responsibility for passenger and property screening, policies and strategies for dealing with security threats to transportation, and management of security information, including the notification to airport and airline security officers of individuals known to pose a risk or threat to airline safety. 49 U.S.C. §114(d)(1), (e), (f) & (h).

Congress previously had recognized the importance of information sharing by airlines, requiring airlines and their employees – who are often the first to receive information on potential security threats – to report promptly to federal officials any information concerning "a threat to civil aviation." 49 U.S.C. §44905(a). To further encourage prompt reporting, ATSA granted immunity to airlines and their employees from civil liability for disclosure of possible security threats. *Id.* at §44941(a). While the statute denies immunity for knowingly false disclosures or those made recklessly without regard to their truthfulness (49

U.S.C. §44941(b)), this exception is limited to rare and unusual circumstances – not those cases where airlines report in good faith about a legitimate safety concern.

Air Wisconsin "clearly had an obligation to report the incident" and responded "precisely as [TSA] would have wanted them to." *See* JA 341, 342 (testimony of former TSA Chief Support Systems Operator responsible for informing airlines about TSA's reporting policy). In short, Air Wisconsin properly followed federal reporting requirements and advised TSA of its concerns about the air travel of a soon-to-be-terminated pilot employee who, after already failing several proficiency tests on an aircraft he was learning to fly, exhibited irrational behavior and directed angry outbursts at his instructor while training for his fourth proficiency test. Significantly, the pilot was a Federal Flight Deck Officer ("FFDO"), which means he was authorized to carry a TSA-issued firearm. Air Wisconsin communicated to the TSA that the pilot was about to travel and had been terminated that day, that there were concerns about his mental stability and that, as an FFDO, he might be armed.

The pilot sued Air Wisconsin for defamation and was awarded a jury verdict of $1.4 million. In a contentious 4-3 decision, the Colorado Supreme Court affirmed the judgment. The majority opinion concluded that Air Wisconsin was not entitled to ATSA immunity because the airline should have used more precise wording in reporting the potential threat. The Colorado Supreme Court further held

that its finding of reckless reporting did not require a determination of the truthfulness of the report.

A strongly-worded dissent criticized the majority's holding, identifying several key reasons for reversal by this Court. First, the majority opinion failed to follow the well-established standards articulated in *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80 (1964), which require the plaintiff to prove that the alleged defamatory statement is false. *See* Pet. App. 29a (citing *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 773-75 (1986)). As noted by the dissent, the majority opinion misinterpreted the *New York Times* standard by holding "that ATSA immunity is lost when a statement is made recklessly even though it may be true." Pet. App. 30a n.2. Second, the dissent observed that the majority's recitation of "what would have been, in its view, the proper wording of the report to the TSA" draws nothing more than "hair-splitting distinctions that make no difference to the analysis." Pet. App. 34a. Third, the dissent recognized the ultimate truth that "[a]t bottom, the majority's reasoning threatens to eviscerate ATSA immunity and undermine the federal system for reporting possible threats to airline safety to the TSA." Pet. App. 37a.

This Court granted certiorari on the question whether ATSA immunity may be denied without a determination that the air carrier's disclosure was materially false. The indisputable answer is "no." Reversal is also mandated because Air Wisconsin's report was *not* "materially false." In fact, the report was substantially true, and thus entitled Air

Wisconsin to immunity. Moreover, unless this Court reverses, the judgment below will negatively impact the effective administration of TSA's post-September 11 role as assessor and investigator of possible security threats. And, as a practical matter, the judgment below will derail TSA's considered policy of "when in doubt, report." Pet. App. 38a. In an area where national security imperatives and First Amendment protections converge to encourage the free flow of information, the judgment below creates an unwarranted roadblock that this Court should remove.

ARGUMENT

I. ATSA's Language, Purpose and Security Objectives Mandate Reversal and Recognition of Statutory Immunity.

The ATSA's text, purpose, and legislative history reflect the overwhelming need and support for prompt reporting of potential security threats by airlines and their employees. To achieve that essential objective, security threats must be reported without delay or fear of retribution. Throughout the legislative history of the Act, Congress emphasized security-related intelligence and the need to provide law enforcement authorities with "greater tools" to combat very real security threats. 147 Cong. Rec. S10407, S10408 (daily ed. Oct. 10, 2001) (statement of Sen. Craig). The holding of the Colorado Supreme Court obstructs ATSA's safety goals and, if left standing, will jeopardize airline security and have a chilling effect on future reporting.

A. Federal Law Directs Airlines to Report Suspicious Activity Immediately.

Airlines and their employees must promptly report to TSA any information concerning "a threat to civil aviation." 49 U.S.C. §44905(a). Failure to report exposes an airline to civil penalties. *Id.* at §46301(a)(1)(A). Similarly, TSA's Aircraft Operation Standard Security Program directs that airlines "immediately report to TSA *all* threat information that *might* affect the security of air transportation." Brief of the United States as Amicus Curiae in Support of Neither Party ("U.S. Amicus Br."), *Air Wisconsin Airlines Corp. v. Hoeper*, No. 09SC105, 2010 WL 4205326 at *6 (Colo. Sept. 27, 2010) (emphasis added). This broad reporting policy, popularly termed "when in doubt, report," fosters greater reporting to and investigation by TSA. *See* JA 329-32 (explaining policy and TSA's goal of greater reporting by airlines but with TSA conducting the threat assessment).

ATSA's statutory language granting immunity for safety reports is controlling and instructive. Specifically, the Act encourages reporting by airlines and their employees by protecting them from civil liability for "voluntary disclosure of *any* suspicious transaction relevant to a *possible* violation of law or regulation, *relating to* air piracy, *a threat* to aircraft or passenger safety, or terrorism … to *any* 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." 49 U.S.C. §44941(a) (emphasis

added). The statute exempts from immunity only those 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).

The Act plainly immunizes airline employees for reports of *any* possible security threats, including border-line cases, and identifies a variety of agencies and authorities to which the reports should be directed. ATSA's directive is consistent with TSA protocols and the Department of Homeland Security's daily message in connection with travel on public transportation: "If you see something, say something."[2]

The message could not be more clear and simple — it is far better to report, even if based on uncertain information and developing events**.** Indeed, the obvious goal is to encourage over-reporting by the airlines, which are on the front lines, so that TSA can assess the reports and determine the appropriate response. There can be no doubt that Air Wisconsin's report of an unstable pilot employee was (1) required by federal law, and (2) consistent with the Act's objective to encourage reports of *any* suspicious activity.

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[2] *See* Department of Homeland Security, "If You See Something, Say Something" campaign website, *available at* http://www.dhs.gov/if-you-see-something-say-something%E2%84%A2-campaign.

B. Congress Intended the ATSA Immunity Clause to Encourage "Good Faith" Reports of Possible Security Threats.

In enacting ATSA, Congress expressly recognized the vital role that information sharing with government authorities plays in assuring aviation security. The Conference Committee Report observed that "the effectiveness of existing security measures is currently impaired because of the inaccessibility of, or the failure to share information among, data bases maintained by different Federal and international agencies for criminal behavior or pertinent intelligence information." H.R. Rep. No. 107-296, at 53-54, *reprinted in* 2002 U.S.C.C.A.N. 589, 590. Additionally, the Conference Report recognized that security measures must be undertaken that will enhance communications among airport security personnel about potential threats. *Id.* at 593-94.

Congress included an express immunity provision to protect employees from civil liability for the voluntary disclosure of a possible safety threat. As explained by Senator Leahy, a sponsor of the legislation granting immunity, the law is intended to "improve aircraft and passenger safety by encouraging airlines and airline employees to report suspicious activities to the proper authorities." 147 Cong. Rec. S10432, S10440 (daily ed. Oct. 10, 2001). The statute also requires greater sharing of aviation security risk information among federal agencies and airport or airline security officers. In discussing this demand for greater flow of information, Senator

Leahy quoted from a Wall Street Journal article, which stated that "one of the most glaring loopholes in aviation security" is "a lack of clear-cut procedures to circulate timely information about threats to airlines and airports." *Id*.

The Act's exception to the broad grant of immunity for reporting security threats is narrowly limited to knowingly false, inaccurate or misleading statements or disclosures made with reckless disregard as to the falsity of the disclosure. Senator Leahy explained that this exception is targeted at "bad actors" – not airlines that make good faith reports concerning legitimate safety concerns. *Id*. at S10439-40. Indeed, even the majority opinion of the Colorado Supreme Court recognized that Air Wisconsin had a sufficient reason to report to TSA under the circumstances, but – without any judicial assessment whether the report was materially false – the court held that the airline was reckless because it "overstated" the facts regarding the security threat.

The judgment below is incompatible not only with the views of Congress in passing ATSA, but also with the views expressed by the government in its amicus briefs to the Colorado Supreme Court and this Court in support of certiorari. Significantly, the government urged the Colorado Supreme Court to "keep in mind the significant national security interests that the (ATSA) protects" and to "'exercise its discretion in a way that protects the substance of the ... immunity defense'" by recognizing that an air carrier would lack immunity because of intentional or reckless acts "[o]nly in the highly unusual

situation." U.S. Amicus Brief, 2010 WL 4205326, at *8-9 (*quoting Crawford-El v. Britton*, 523 U.S. 574, 597 (1998)). And, in this Court, the government repeated its concerns about the decision's impact on airline safety, stating that the "Colorado court's analysis may chill other air carriers from timely providing the government with critical information about threats to aviation security." U.S. Amicus Brief in Support of Air Wisconsin's Petition for Certiorari, No. 12-315 at 11 (May 17, 2013).

II. The Judgment of the Colorado Supreme Court Contradicts Congressional Intent, Misapplies the Legal Standards for Analyzing ATSA Immunity, and Merits Reversal.

A. Air Wisconsin's Report Is Consistent With the Act's Language and Objectives.

After a meeting at which Air Wisconsin Flight Operations leadership discussed respondent's behavior and prior aviation incidents involving violent outbursts by terminated employees (JA 84-85, 87-90, 165-69, 280-81),[3] the airline followed

[3] Those two incidents involved (1) a 1994 incident where a FedEx employee facing possible discharge for lying about his flight experience, boarded a flight in the jump seat and intended to kill the crew and crash the plane into company headquarters to collect on a life insurance policy (*see United States v. Calloway*, 116 F.3d 1129 (6th Cir. 1997) (affirming flight engineer's conviction for aircraft piracy following his attack on flight crew)); and (2) a 1987 incident on Pacific Southwest Airlines, where a terminated US Airways employee

federal directives and safety protocols to report concerns about activity that might threaten aircraft safety. In this case, there is no dispute that Hoeper (1) would be terminated; (2) exhibited irrational and angry behavior during and after the training session; and (3) was a licensed FFDO who had departed from an airport where he could bypass security without logging his TSA-issued weapon.

Is there any responsible way that Air Wisconsin could have decided not to inform TSA? Failure to report this potential security threat would have been a mistake and, had something occurred on Hoeper's flight, there could have been catastrophic ramifications. Indeed, the majority opinion of the Colorado Supreme Court does not say that Air Wisconsin should have remained silent, patently recognizing that Air Wisconsin had sufficient basis for concern and sufficient reason for reporting its concern to TSA.

The large number of passengers arriving at airports with guns in carry-on bags poses a serious test for TSA's security-gate interception measures. In 2012, travelers attempted to carry more than 1,500 firearms through U.S. airports and on board airplanes, with the majority of the weapons loaded. And the numbers have only increased, raising

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boarded the flight, shot his supervisor and the pilots and crashed the plane, killing all on board. *See* Eric Malnic, *Report Confirms That Gunman Caused 1987 Crash of PSA Jet*, Los Angeles Times (Jan. 6, 1989) *available at* http://articles.latimes.com/1989-01-06/news/mn-280_1_ntsb-report.

further security concerns. In the first half of 2013, TSA confiscated almost 900 firearms from passengers, a 30% increase over the same period last year.[4] In a single week in May 2013, TSA confiscated a record-breaking total of 65 firearms, 54 of them loaded and 19 with bullets in the chamber ready to be fired.[5]

Given this reality, withholding immunity in the circumstances presented in this case would thwart ATSA's statutory objective to encourage employees on the front lines to report aviation security concerns promptly. While the airlines are required to report such security concerns, it is *TSA* that is tasked with the assessment and investigation of the risk. Indeed, at trial, TSA's former Chief Support Systems Operator, who was responsible for advising airlines on TSA's "when in doubt, report" policy, testified that Air Wisconsin *was not* supposed to investigate the situation and, in fact, responded "precisely as [TSA] would have wanted them to." JA 329-330, 341-42.

Disregarding the real-world dangers that TSA faces, the Colorado Supreme Court relied instead on "hair-splitting distinctions" between the wording of

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[4] *See* Joan Lowy, *TSA: More Fliers Arriving at Checkpoints with Guns*, USA Today (July 5, 2013), *available at* http://www.usatoday.com/story/todayinthesky/2013/07/03/more-air-passengers-show-up-with-guns/2485619/.

[5] *See TSA Week in Review: Record 65 Firearms Discovered in Carry-on Bags (54 Loaded)*, The TSA Blog (May 24, 2013), *available at* http://blog.tsa.gov/2013/05/tsa-week-in-review-record-65-firearms.html.

Air Wisconsin's report and the slightly different language that the majority held would qualify for immunity. Such distinctions in wording (*e.g.,* that the pilot was soon-to-be terminated, not "terminated") are without a difference in this context and create significant obstacles to achieving ATSA's critical objectives. Pet. App. 34a. Indeed, the government's *amicus* brief in the Colorado Supreme Court emphasized the key pragmatic point that airlines must make reports based on "imperfect information" and with "limited time and ability to investigate." U.S. Amicus Br., 2010 WL 4205326 at *2.

To require that airline employees use specific words and "fool-proof" language in reporting to TSA will result in extensive, protracted internal vetting processes by risk management departments and in-house counsel. Such internal review will likely subordinate the critical security objective embodied in the statute to the more self-interested objective of avoiding just the sort of litigation the judgment below rewards. It does not take a crystal ball to perceive the impact of this case on future decisionmaking: nine years after the 2004 incident, Air Wisconsin is still embroiled in litigation over "hair-splitting" distinctions in its report to TSA and still faces a defamation judgment of $1.4 million. Years of litigation and potential seven-figure judgments have consequences.

Our national security cannot afford the luxury of waiting for re-writes and edits to fine-tune an urgent report to TSA when a person whose observed actions arouse security-related concerns is heading

to the airport to board a flight. As Congressman Mica, one of ATSA's principal authors, explained: any delay in reporting to allow an airline's attorneys to review and revise submissions to TSA "could make the difference between life and death for the traveling public." Pet. App. 120a. While TSA has no interest in receiving *knowingly* false information or *materially* false information, it has a profound concern in receiving – immediately – *any and all* potential security-related information.

B. The State Court's Failure to Determine Whether Air Wisconsin's Report Was Materially False Is Contrary to ATSA's Immunity Analysis and Requires Reversal.

The Colorado Supreme Court erroneously held that it was not necessary for a finding of reckless conduct to determine the truthfulness of Air Wisconsin's report to TSA. But, stripping an airline of ATSA immunity without deciding whether the report is materially false (or substantially true) is incompatible with the statute and with settled First Amendment precedent. The test for exemption from ATSA immunity essentially tracks this Court's well-known First Amendment "actual malice" standard, *i.e.,* the rule that precludes a defamation plaintiff who is a public figure from any recovery "unless he proves…that the defendant published the statement …with knowledge that it was false or with reckless disregard of whether it was false or not." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (internal quotes and citations omitted). As this Court held in *New York Times Co. v. Sullivan*, 376

U.S. 254, 279-80 (1964), this standard requires that the plaintiff prove the falsity of the alleged defamatory statement.

In this case, however, the Colorado Supreme Court removed the falsity/substantially-true element from its recklessness analysis. As the majority opinion explained, the judgment in this case rests on the view that the *New York Times* standard means that a court need determine only whether the speaker had a "high degree of awareness of ... probable falsity" or "entertained serious doubts as to the truth of his publication." Pet. App. 17a (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). By its express terms, the majority opinion deemed it unnecessary to decide — as part of the immunity analysis — whether the statements are actually false or substantially true. Under that standard, even a statement that is 100% literally true could be stripped of immunity and subject to liability if the defendant fails to meet the novel standard of "recklessness." That standard does not meet constitutional norms protecting free speech. *See, e.g., Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773-75 (1986) (explaining that *New York Times* rule required plaintiff to show falsity of the statement before liability could be imposed).

In any event, under well-established legal standards, there is only one correct conclusion that can be drawn from a comparison of Air Wisconsin's actual report and the preferred terminology that the majority opinion below agrees would have been immune. That correct conclusion is that Air Wisconsin's report was substantially true (and not

materially false), and therefore no liability can be imposed. Pet. App. 31a-34a.

III. Reversal Is Necessary to Instruct Lower Courts on the Proper Standards for Determining Immunity and to Prevent a Chilling Effect on Security-Related Reports.

A. Courts Require Guidance on Standards for Analyzing ATSA Immunity.

There is no merit to the central proposition on which the Colorado Supreme Court decision rests: that it was unnecessary to determine the falsity of Air Wisconsin's report. The state court's nitpicking analysis and strained reading of the airline's report to TSA is not only counter to the broad immunity intended by Congress, but categorically turns First Amendment precedent on its head. ATSA's immunity clause is designed to encourage – indeed, to require – airline employees to report suspicious activity to law enforcement authorities.

To date, however, some courts have read the statute narrowly and restricted its application by finding factual issues that preclude an early determination of immunity and concluding that certain claims, such as false arrest, are unrelated to the act of disclosure and thus fall outside the statute's protection. *See, e.g., Shqeirat v. U.S. Airways Group, Inc.*, 515 F. Supp. 2d 984, 1000 (D. Minn. 2007) (in civil rights case, court held that plaintiffs' false arrest claim fell outside the statute

because plaintiffs' claim was based on airline acting in concert with the police);[6] *Hansen v. Delta Airlines*, No. 02 C 7651, 2004 WL 524686, at *8 (N.D. Ill. Mar. 17, 2004) (court denied dismissal motion, finding questions of fact on whether the disclosure to police was made with knowledge of its falsity or with reckless disregard as to its truth); *Bayaa v. United Airlines, Inc.*, 249 F. Supp. 2d 1198, 1205 (C.D. Cal. 2002) (immunity applies only "to the *disclosure* of suspicious activities, not the actions taken pursuant thereto").

And, although an airline may eventually prevail on summary judgment where the evidence shows that a plaintiff has used an incendiary-type word, such as "terrorist" or "bomb," in an "imaginably threatening way" (*Hansen*, 2004 WL 524686 at *11), this determination would likely follow extensive and costly discovery that the Act was designed to preclude. As explained by the United State government in its amicus brief to the Colorado Supreme Court, "there is a substantial federal interest in providing immunity from liability for air carriers and their employees who report legitimate concerns to TSA, *and in having that immunity determined as early as possible in litigation so defendants are not improperly subjected to the massive burdens of litigation*." U.S. Amicus Br., 2010 WL 4205326 at *3 (emphasis added).

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[6] Summary judgment ultimately was granted to the airline on the ground that it did not act in concert with law enforcement officials in arresting or deplaning the passengers. *Shqeirat v. U.S. Airways Group, Inc.*, 645 F. Supp. 2d 765, 790-93 (D. Minn. 2009).

B. Heightened Security Risks Related To Air Travel Call For Vigilant Reporting And Broad Immunity For Airline Employees.

In the realm of public transportation, particularly air travel, customer and employee reporting are critical sources of threat information.[7] As the headlines and empirical data remind us, the importance of public reporting is not an exercise in the hypothetical.[8] Tragic consequences may result

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[7] *See, e.g.*, GAO Testimony Before the Subcommittee on Oversight, Investigations, and Management, Committee on Homeland Security, H.R., *Aviation Security: TSA Has Made Progress, but Additional Efforts Are Needed to Improve Security*, GAO-11-938T, at 4-6 (Sept. 16, 2011) (identifying intelligence gathering and passengers as sources TSA relies on to deter, detect and disrupt aviation security threats), *available at* http://www.gao.gov/ products/GAO-11-938T; John N. Balog, et al., *TCRP Report 86: Public Transportation Security: Vol. 1, Communication of Threats: A Guide,* at 4, Transportation Research Board (2002) ("[d]irect reports from employees or customers are also key sources of threat information"), *available at* http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_rpt_86-v1.pdf.

[8] *See, e.g.,* Corey Kilgannon & Michael Schmidt, *Vendors Who Called Police Called Heroes*, New York Times (May 2, 2010) (street vendors alerted police to suspicious smoke from SUV parked in Times Square, allowing officials to disarm bomb), *available at* http://www.nytimes.com/ 2010/05/03/nyregion/03vendor.html?_r=0; James McKinley & Sarah Wheaton, *Saudi Student to Be Arraigned in Bomb Plot*, New York Times (Feb. 25, 2011) (chemical company reported suspicious purchases to FBI, resulting in terrorist arrest), *available at* http://www.nytimes.com/2011/02/26/ us/26texas.html; Jana Winter, *Clerk Rings Up N.J. Jihad Jerks*, New York Post (May 13, 2007) (report of suspicious

when suspicions are not shared.[9] In recognition of this reality, Congress provided not only airline employees, but the public as well with immunity for good faith reports involving threats to transportation systems, vehicles or passengers. *See* 6 U.S.C. §1104 ("Any person who, in good faith and based on objectively reasonable suspicion makes…a voluntary report of covered activity to an authorized official shall be immune from civil liability…").

To deny immunity in this case would remove a layer of security from air travel, which is already plagued by unwarranted safety threats that range from unruly passengers who cause in-flight disturbances and flight diversions[10] to passengers

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video resulted in arrest of terrorists), *available at* http://www.nypost.com/p/news/regional/item_0oS2xKmNdVwCzcvzxPuCBL.

[9] *See* U.S. Senate Homeland Security and Governmental Affairs Committee, Chairman Joseph I. Lieberman and Ranking Member Susan M. Collins, *A Ticking Time Bomb: Counterterrorism Lessons from the U.S. Government's Failure to Prevent the Fort Hood Attack*, at 27 (Feb. 2011), *available at* http://hsgac.senate.gov/public/_files/Fort_Hood/FortHoodReport.pdf.

[10] *See* David Goodhue, *Passenger Accused of Attacking Miami-Bound Russian Flight Crew*, Miami Herald (Aug. 9, 2013), *available at* http://www.miamiherald.com/2013/08/09/3552136/passenger-accused-of-attacking.html #; *Unruly Passenger Forces Flight Back to Philly,* Denver Post (August 8, 2013), *available at* http://www.denverpost.com/breakingnews/ci_23820203/unruly-passenger-forces-flight-back-to-philly.

who attempt to travel with loaded weapons.[11] Moreover, as repeated incidents illustrate, the security threat from disgruntled or disturbed employees interfering with flight operations is real.[12] Air Wisconsin, in fact, considered well-known instances of violence by terminated airline employees in deciding whether to report its concerns. *See* Pet. App. 31a; *see also* JA 87-90, 165-69, 280-81.

Beyond these security risks, actual threats of real terrorism pose an ever-lurking danger. ATSA is intended to protect the traveling public from all of these potential harms and to protect the front line employees who are the ones best situated to observe, recognize and report them. Part and parcel of the statutory objective to encourage reporting is the compelling need to avoid legal standards that would chill reporting by the very people most likely to become aware of potential threats.

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[11] *See supra* notes 4, 5; *see also* Philip Messing & Chuck Bennett, *Sources: TSA Screeners Allow Fed Agent with Fake Bomb to Pass Through Security at Newark Airport*,"' New York Post (Mar. 19, 2013), *available at* http://www.nypost.com/p/news/local/newark_tsa_bomb_ boozled_eTIZBp2X7B299 qO5WCWvAK; Joe Sharkey, *That Loaded Gun in My Carry-On, Oh I Forgot,* New York Times (Sept. 29, 2012), *available at* http://www. nytimes.com/2012/09/29/business/tsa-is-finding-more-guns-at-airport-security-checkpoints.html?_r=1& pagewanted=all.

[12] *See supra* note 3 (discussing tragic airline accidents involving disgruntled or terminated employees); *see also* Mike M. Ahlers, *911 Calls Show Passengers' Fear During Flight Attendant's Rant*, CNN (Mar. 14, 2012), *available at* http://www.cnn.com/2012/03/13/travel/flight-attendant-meltdown.

Furthermore, the judgment below is inconsistent with the policies of the airlines themselves.[13] Recognizing that their employees perform their jobs in a uniquely sensitive and potentially dangerous context, airlines expressly encourage "a proactive reporting culture" by pledging that "no disciplinary action will be taken against any employee for reporting a safety or security occurrence…except in cases of willful noncompliance with or intentional disregard of regulations…or when a criminal act has been committed."[14] Encouraging a proactive safety reporting culture is not only good corporate policy, but is also consistent with aviation industry norms, with ATSA's express statutory language, and with our critical national security imperatives.

CONCLUSION

The judgment of the Colorado Supreme Court should be reversed.

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[13] *See, e.g.,* Gary Kelly & Mike Van de Ven, *Southwest Airlines Safety & Security Commitment*, Southwest Safety & Security (Dec. 1, 2012), *available at* http://www.southwest.com/assets/pdfs/corporate-commitments/safety-commitment-pol.pdf; Valerie Walker & Melissa Madden, *AFA Leads the Way in Aviation Safety Action Programs for Flight Attendants* (February 2013) (discussing Onboard Safety Action Program that encourages flight attendants to voluntarily report safety issues and events), *available at* http://www.unitedafa.org/safety/osap/default.aspx.

[14] *See Southwest Airlines Safety & Security Commitment*, *available at* http://www.southwest.com/assets/pdfs/ corporate-commitments/safety-commitment-pol.pdf.

Respectfully submitted.

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