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 Supreme Court Of Colorado

BRIEF OF *AMICUS CURIAE* FIRST AMENDMENT COALITION IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

The First Amendment Coalition is a nonprofit organization (incorporated under California's nonprofit law and tax exempt under Section 501(c)(3) of the Internal Revenue Code) that is dedicated to freedom of expression, resisting censorship of all kinds, and to promotion of the "people's right to know" about their government so that they may hold it accountable. The Coalition is supported mainly by grants from foundations and individuals, but receives some of its funding from for-profit news media, law firms organized as corporations, and other for-profit companies.

SUMMARY OF ARGUMENT

Congress, in providing exceptions to immunity from state-law claims in the Aviation and Transportation Safety Act (ATSA), 49 U.S.C. § 44941(b), incorporated the constitutional actual malice standard articulated by this Court in the defamation case of *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). The constitutional actual malice standard – *i.e.*, knowledge that a statement is false or reckless

[1] The parties have consented to the filing of *amicus curiae* briefs in support of either party, and their consents were filed with the Clerk on July 31 and August 7, 2013. This brief was not written in whole or in part by counsel for any party, and no persons other than *Amicus* have made any monetary contribution to the preparation or submission of this brief.

disregard for its truth or falsity – is used in many contexts beyond just defamation, including false light invasion of privacy, product disparagement and intentional infliction of emotional distress.

This Court and lower courts have consistently interpreted the application and phrasing of the constitutional actual malice standard to require an attendant showing of falsity. In case after case, in context after context, there can be no actual malice without falsity. This consistent and unbroken treatment compels the conclusion that the ATSA immunity should not be denied without a determination that the air carrier's disclosure was materially false.

The falsity component of the actual malice standard is constitutionally required. Thus, even if Congress intended the ATSA's statutory immunity to exclude falsity as a component of the actual malice standard, the ATSA cannot be interpreted in that way and still be consistent with the First Amendment.

ARGUMENT

I. THE EXCEPTIONS TO THE ATSA IMMUNITY INCORPORATE THE CONSTITUTIONAL ACTUAL MALICE STANDARD, WHICH REQUIRES FALSITY

The constitutional actual malice standard, famously enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964), and refined and expanded in subsequent decisions over half a century, serves to

protect truthful speech on issues of public interest. It does so by forbidding liability in certain defamation and other civil cases predicated on harm from speech, unless the speech is false and made with knowledge of its falsity or reckless disregard of its truth or falsity.[2]

Congress, in enacting the ATSA, incorporated the actual malice standard wholecloth into exceptions to the ATSA's immunity for reports of security risks. There is no basis for the view, implicit in the decision of the Colorado Supreme Court, that Congress selectively incorporated only part of the actual malice test and intended to permit liability for reports of security risks that are substantially true.

That Congress could have intended such a radical change to the actual malice test is more than just improbable; it is absurd. For one thing, the actual malice standard is incoherent if it does not also require falsity. It makes no sense to impose liability for knowledge of a report's falsity, or reckless disregard of its falsity, if a statement is substantially true.

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[2] Actual malice is defined in *New York Times* as "knowledge" that a statement is false or "reckless disregard of whether it was false or not." *Id.* Congress clearly modeled the exceptions to the immunity from liability in the ATSA after the *New York Times* – or constitutional – actual malice standard. 49 U.S.C. § 44941(b) (exempting from its immunity provision individuals who relay potential threats to authorities with either "actual knowledge that the disclosure was false, inaccurate, or misleading" or with "reckless disregard as to the truth or falsity of that disclosure").

Moreover, Congress surely would have known that excluding a falsity requirement from the exceptions to statutory immunity would raise a serious constitutional issue.

II. FALSITY IS AN ESSENTIAL ELEMENT WHERE THE CONSTITUTIONAL ACTUAL MALICE STANDARD APPLIES

Falsity is an essential element of the constitutional actual malice standard. This is true not only in the defamation context, but in many other areas of the law as well, as shown below.

The indispensability of the falsity requirement reflects the fundamental truth-fostering purpose of the actual malice standard. So important to democracy is truthful speech about public issues (or public officials and public figures) that the First Amendment demands protection for some untruthful expression in order to avoid chilling truthful expression. *New York Times*, 376 U.S. at 272. The actual malice requirement thus constitutionalizes the requirement of falsity in order to limit speech in a manner consistent with the First Amendment.

A. Defamation

This Court repeatedly has made clear that falsity is an essential element where actual malice applies to defamation claims. In *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), this Court held that a public official suing for defamation must prove actual malice, and

must additionally "establish[ ] that the utterance was false." A public figure plaintiff also "must show the falsity of the statements at issue" as well as actual malice "in order to prevail in a suit for defamation." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986) (hereinafter "*Hepps*"); *see also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 513 (1991) (holding in a public figure defamation case that "[t]his inquiry [into the evidence concerning actual malice] . . . requires us to consider the concept of falsity; for we cannot discuss the standards for knowledge or reckless disregard without some understanding of the acts required for liability"); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (hereinafter "*Falwell*") (reaffirming the "constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability") (emphasis in original).

Likewise, in *Hepps*, this Court, ruling in the context of a private figure suing for defamation on speech that was a matter of public concern, applied the actual malice test and imposed "a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." 475 U.S. at 775-76; *see also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 n. 6 (1990) ("[p]rior to *Hepps*, of course, where public-official or public-figure plaintiffs were involved, the *New York Times* rule already required a showing of falsity before

liability could result"); *Herbert v. Lando*, 441 U.S. 153, 176 (1979) ("[i]n every or almost every case, the plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability on the part of the publisher"). And, in a libel case in the context of a labor dispute, this Court held that "[b]efore the test of reckless or knowing falsity" – *i.e.*, actual malice – "can be met, there must be a false statement of fact." *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 284 (1974).

B. False Light Invasion Of Privacy

In *Time, Inc. v. Hill*, 385 U.S. 374, 386-87 (1967), a false light case stemming from a magazine article, this Court held that the First Amendment requires invasion of privacy claims arising from publications concerning matters of public interest be supplemented with proof of both "material and substantial falsification" and actual malice. Lower courts have followed suit. *See*, *e.g.*, *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1082 (9th Cir. 2002) (holding that plaintiff in an invasion of privacy case must prove, *inter alia*, that statements concerning plaintiff were "actually false or created a false impression" and that the defendant "acted with constitutional malice").

C. Product Disparagement

In *Bose Corp. v. Consumers Union*, 466 U.S. 485, 513-14 (1984), this Court applied the *New York Times*

actual malice rule to a product disparagement claim. Two holdings stand out. First, this Court held that actual malice requires more than "mere proof of falsity." *Id.* at 511. In other words, it is assumed that falsity must be proved before actual malice. Second, the Court reaffirmed that the actual malice rule was intended to "eliminate the risk of undue self-censorship and the suppression of truthful material." *Id.* at 513. This further reinforces that *both* falsity and actual malice must be shown.

D. Intentional Infliction Of Emotional Distress

Falsity also is an essential element of claims for intentional infliction of emotional distress where actual malice applies. In *Falwell*, this Court "conclude[d] that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as" ad parodies "without showing in addition that the publication contains a *false* statement of fact which was made with 'actual malice[.]'" *Falwell*, 485 U.S. at 56 (emphasis added). Even before the *Falwell* decision, courts consistently ruled that claims for intentional infliction of emotional distress were subject to the same constitutional strictures – including actual malice – as defamation claims. *See*, *e.g.*, *Hutchinson v. Proxmire*, 579 F.2d 1027, 1036 (7th Cir. 1978) (holding that claim for intentional infliction of emotional distress was barred by the actual malice doctrine), *rev'd on other grounds*, 443 U.S. 111 (1979);

Reader's Digest Ass'n v. Superior Ct., 37 Cal. 3d 244, 265 (1986) (same).

E. Other Contexts In Lower Courts

The language from the *New York Times* actual malice doctrine appears in a variety of other contexts in lower court decisions. In those contexts, which clearly invoke First Amendment principles, falsity consistently accompanies constitutional actual malice.

1. Right Of Publicity/Misappropriation Of Likeness/Lanham Act

In *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1187 (9th Cir. 2001), the court held that actor Dustin Hoffman was required to show that the defendant magazine acted with actual malice and made "false statements of fact" in order to prevail on his state right of publicity and federal Lanham Act claims. Citing *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667, 109 S. Ct. 2678 (1989), the court reasoned that "full First Amendment protection," including the requirements of falsity and actual malice, applied because Hoffman was seeking to "recover damages from noncommercial speech." *Hoffman*, 255 F.3d at 1186. The First Amendment barred Hoffman's claims because he could not show actual malice or any false statements or implications of fact. *See id.* at 1188-89; *accord Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994) (holding plaintiff's claim for misappropriation of name and

likeness/invasion of privacy was barred by the First Amendment because he could not show defendant acted with actual malice or presented plaintiff in a false manner).

2. Tortious Interference With Contract

In tortious interference cases involving speech, courts routinely hold that plaintiffs must prove both falsity and, where applicable, actual malice. *See*, *e.g.*, *Medical Lab Mgmt. Consultants v. ABC*, 306 F.3d 806, 821 (9th Cir. 2002) ("the First Amendment requires [plaintiff] to demonstrate the falsity of the statements . . . as well as Defendants' fault in broadcasting them, before recovering damages" for tortious interference); *Jefferson County School Dist. v. Moody's Investor's Services, Corp.*, 175 F.3d 848, 857 (10th Cir. 1999) (rejecting intentional interference claims because the publication at issue was protected by the First Amendment and plaintiff failed to show it "contain[ed] a false statement of fact which was made with 'actual malice'"); *accord Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522-23 (4th Cir. 1999) (rejecting tortious interference claims for "defamation-type damages" because "when a public figure plaintiff uses a law to seek damages resulting from speech covered by the First Amendment, the plaintiff must satisfy the proof standard of *New York Times*," *i.e.*, the plaintiff must prove "the publication contains a false statement of fact which was made with 'actual malice'"); *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local*

655, 39 F.3d 191, 196 (8th Cir. 1994) (the constitutional requirements for defamation "must equally be met for a tortious interference claim based on the same conduct or statements"; otherwise "a plaintiff may . . . avoid the protection afforded by the Constitution . . . merely by the use of creative pleading").

3. Campaign Regulations

Several state courts have held that candidates for office may only be reprimanded for their statements about other public officials where the statements are false and made with actual malice. *See*, *e.g.*, *McKimm v. Ohio Elections Comm.*, 89 Ohio St. 3d 139, 147 (2000) (Ohio permits liability "only for those false statements about public officials made with actual malice – that is, either knowing that it was false or acting in reckless disregard of whether it was false or not"); *Service Employees International Union Dist. 1199 v. Ohio Elections Comm.*, 158 Ohio App. 3d 769, 776 (2004) ("[p]olitical speech . . . is subject to First Amendment protection unless clear and convincing evidence shows the statements are false and were made with actual malice"); *Sharkey v. Florida Elections Comm'n*, 90 So.3d 937, 938 (Fla. 2012) (Florida requires proof of falsity and actual malice to reprimand officials for false speech under state campaign regulations); *Snortland v. Crawford*, 306 N.W.2d 614, 621-22 (N.D. 1981) (North Dakota requires proof of

falsity and actual malice to penalize speaker for violating state campaign regulations).[3]

III. CONSTITUTIONAL ACTUAL MALICE REQUIRES A SHOWING OF FALSITY IN THE ATSA CONTEXT

The Colorado Supreme Court concluded that "cases discussing actual malice pursuant to [*New York Times v. Sullivan*] are instructive because the actual malice standard also includes the concept of reckless disregard." *Air Wisconsin Airlines Corp. v. Hoeper*, No. 09SC1050, 2012 Colo. LEXIS 163, at *19 (Colo. Mar. 19, 2012), *reh'g denied, cert. granted in part*, 133 S.Ct. 2824. The cases are more than instructive. The decisions of this Court and lower courts lead to one

[3] Courts have also held that a plaintiff must demonstrate false statements along with actual malice in order to overcome peer review immunity. *See*, *e.g.*, *Ironside v. Simi Valley Hosp.*, 188 F.3d 350, 353-54 (6th Cir. 1999) (defendants entitled to peer review immunity because statements to medical review committee were not false and thus could not have been made with knowledge of falsity); *Benson v. St. Joseph Reg'l Health Ctr.*, 2007 WL 7120757 (S.D. Tex. Mar. 22, 2007) (to overcome immunity, "a plaintiff must show that a peer review participant knew that the allegations against the physician that led to his suspension or non-renewal were false, or acted with reckless disregard for the falsity of those allegations"), *aff'd*, 575 F.3d 542 (5th Cir. 2009); *Feyz v. Mercy Memorial Hosp.*, 475 Mich. 663, 667 (2006) (same); *Hassan v. Mercy American River Hosp.*, 31 Cal. 4th 709, 718 (2003) (qualified privilege may be overcome by showing of malice, which includes "not only deliberate falsehoods but also false statements made without reasonable grounds to believe them true").

inescapable conclusion: there can be no actual malice without falsity.

As explained above, the constitutional actual malice standard is used in a multitude of contexts, and it is consistently accompanied by a required showing of falsity. The same should hold true when the actual malice language is evaluated in the context of the ATSA's exceptions to immunity.

Consistency, predictability and repose require that the jurisprudence surrounding actual malice remain stable in the many contexts in which that standard is used. It would cause uncertainty and inconsistency in the law if the interpretation of actual malice under the ATSA differed from the standard articulated nearly 50 years ago in *New York Times* – a standard that courts consistently have followed in a wide range of contexts ever since.

There is no basis to believe that Congress, in its copy-and-paste use of the actual malice standard into the ATSA, meant to exclude a falsity requirement and allow liability for true speech. If, contrary to precedent and common sense, Congress did intend to divorce falsity from actual malice then the ATSA, to that extent, is unconstitutional.

Falsity is not just an optional aspect of actual malice. This Court's precedents interpreting actual malice make clear that it is an essential constitutional doctrine that gives life to the First Amendment's protection for speech on matters of public interest

that is substantially true. Indeed, that describes precisely what ought to be the outcome in this case.

CONCLUSION

For the foregoing reasons the judgment of the Supreme Court of Colorado should be reversed.

Respectfully submitted,

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