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 *AMICUS CURIAE* INTERNATIONAL AIR TRANSPORT ASSOCIATION IN SUPPORT OF PETITIONER

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The International Air Transport Association ("IATA") respectfully submits this brief as *Amicus Curiae* in support of Petitioner Air Wisconsin Airlines Corporation ("Air Wisconsin"), which is seeking reversal of the decision of the Colorado Supreme Court.[1] The opinion of the Colorado Supreme Court is reproduced in the Appendix to the Petition ("Pet. App.") at 1a-43a.

INTEREST OF *AMICUS CURIAE* IATA

IATA is a nongovernmental international organization founded in 1945 by air carriers engaged in international air services. Today, IATA consists of 240 Member airlines from 118 countries representing 84% of the world's total air traffic. The general purpose, objective and aim of IATA is to promote safe, regular and economical air transport, to foster air commerce, to provide the means for collaboration among the air transport enterprises engaged in international air transportation service, and to cooperate with the International Civil Aviation Organization ("ICAO")[2] and other international organizations in

[1] Pursuant to Sup. Ct. R. 37.3, IATA certifies that it received written consent of all parties to file this brief. Both Petitioner and Respondent filed Blanket Consents to the filing of *Amicus* Briefs in Support of Either Party or of Neither Party. Pursuant to Sup. Ct. R. 37.6, IATA states that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from IATA, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief.

[2] ICAO, established by the Convention on International Civil Aviation, 61 Stat. 1180, 15 U.N.T.S. 6605 (Dec. 7, 1944) ("Chicago Convention"), is a specialized agency of the United Nations and is headquartered in

the development of aviation law and policy. Safety is IATA's number one priority.

Since 1945, IATA has worked closely with the executive and legislative branches of various governments, including the United States, and intergovernmental organizations, such as ICAO, to achieve and maintain uniformity in the development, implementation and interpretation of numerous domestic and international air law treaties and agreements, especially in the areas of aviation safety and security. IATA holds the status of permanent observer in ICAO's Air Navigation Commission and the Air Transport Committee, participates in all significant international air law meetings and diplomatic conferences, and has contributed substantially to the development of treaties and agreements relating to the liability of air carriers and aviation security, including the Tokyo[3], Hague[4] and Montreal[5] Conventions, which are the first international Conventions to address counter-measures to hijacking and sabotage.

Montreal, Canada. In addition to providing a forum for its 191 Contracting States to develop and adopt international air law conventions, ICAO sets international standards and regulations necessary for the safety, health, security, efficiency and regularity of air transport.

[3] Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 (1969).

[4] Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, *reprinted in* 1974 U.S.C.C.A.N. 3975.

[5] Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999, ICAO Doc. No. 9740 (entered into force Nov. 4, 2003), *reprinted in* S. Treaty Doc. 106-45, 1999 WL 33292734.

Most recently, IATA has played a key role in the drafting of the 2010 Beijing Convention and Protocol, which are intended to improve aviation security,[6] and is an active participant in ICAO's current review and possible amendment of the Tokyo Convention based, *inter alia*, on concerns about the interpretation by courts of the treaty's immunity provisions.

IATA and its Members have a direct and substantial interest in the critical aviation and security issues before the Court. For more than seven decades, commercial aviation has been a specific target of terrorist activity, and the attack of September 11, 2001 heightened the attention not just of the United States, but the world, toward the serious problem of aerial terrorism.

The threat to aviation is not unique to the United States, as is evidenced by the aforementioned international conventions devoted to increasing the safety and security of aviation. Moreover, the international nature of air transportation makes a threat to the interests of the United States relevant to the rest of the world.

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[6] In recognition of the evolving risks and under the auspices of ICAO, two counterterrorism treaties devoted to improving aviation security were adopted in Beijing, China in September 2010, which stress the States Parties' concerns over the "new types of threats against civil aviation requir[ing] new concerted efforts and policies of cooperation on the part of the States." *See* Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, *opened for signature* Sept. 10, 2010, ICAO Doc. 9960 (2011) (not yet in force); Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* Sept. 10, 2010, ICAO Doc. 9959 (2011) (not yet in force). These treaties were strongly supported and signed by the U.S., but have not yet been ratified.

Thus, IATA, an organization of a majority of the world's airlines, many of which operate within, to and from the United States, has a substantial interest in the interpretation of any law aimed at promoting the reporting by carriers of suspicious activities of passengers.

More specifically, IATA has a strong interest in ensuring that the rules governing the conduct of airline employees in these circumstances clearly favor reporting suspicious activities even when doubt exists. Airline employees should not have to guess whether they will face civil liability if they do report apparently suspicious activity.

The Colorado Supreme Court's affirmance of liability against Air Wisconsin for reporting a suspicious and potentially dangerous passenger is based on a narrow and erroneous application of the Aviation and Transportation Security Act's ("ATSA") immunity provision, 49 U.S.C. § 44941. The decision below will inevitably have a chilling effect on the reporting by airlines of suspicious activities in direct contravention of the ATSA's primary purpose of promoting safety, and the TSA's policy directive of "when in doubt, report." At the same time, it would subject airlines that follow the TSA's policy directive to potential liability for following the TSA's instructions to report suspicious activities.

It is important to air carriers around the world that the Court make clear that 49 U.S.C. § 44941 requires a finding of material falsity, in addition to actual knowledge of or reckless disregard as to that falsity, before immunity may be denied. In setting forth this standard, it is equally important that the Court clarify that a finding of

material falsity should not be based on a hair-splitting analysis aimed at finding small imperfections with a statement, but must be based on a reasonable evaluation of the report in light of the text, purpose and intent of the ATSA, an understanding that reports must be made quickly, and recognition that reports should be made even when the airline has doubts as to whether a potential threat is legitimate.

In light of the foregoing, IATA has a substantial interest on behalf of its Members in ensuring the proper application of 49 U.S.C. § 44941, in a manner that will fulfill the primary goal of the ATSA–encouraging the disclosure of possible threats–and protect its Members and the traveling public.

SUMMARY OF ARGUMENT

The Court should reverse the Colorado Supreme Court's decision below affirming the judgment against Air Wisconsin. The immunity standard set forth in 49 U.S.C. § 44941 incorporates the "actual malice" standard adopted by the Court in *New York Times v. Sullivan*, which here would require a finding that Air Wisconsin's report was materially false, and that it made its report with actual knowledge of the report's falsity or a reckless disregard as to the report's truth or falsity. Thus, immunity cannot be denied pursuant to 49 U.S.C. § 44941 without a finding, *inter alia*, of material falsity, which the plaintiff has the burden to prove by clear and convincing evidence.

Other elements of the decision magnified this error. For example, instead of limiting its analysis to the facts as known to Air Wisconsin at

the time of the possible threat, the Majority implied that Air Wisconsin had a duty to investigate before reporting. The Majority also second-guessed Air Wisconsin's report from the perspective of hindsight while ignoring the real-life circumstances in which the report was made. The decision below thus directly contravenes the "when in doubt, report" directive, and the changes mandated by the ATSA, which established that the TSA, not an air carrier, is responsible for making threat assessments related to passenger and aviation security. *See* H.R. Conf. Rep. No. 296, 107th Cong., 1st Sess., at 53-54 (2001), *reprinted in* 2002 U.S.C.C.A.N. 589, 590-91. Thus, with the enactment of the ATSA, air carriers report suspicious transactions to the TSA, which then determines the gravity of the threat and the appropriate response.

The Majority's decision will have a chilling effect on the reporting of *possible* suspicious activity. At a minimum, the decision increases the risk that airline employees will spend substantial time discussing or investigating potentially suspicious activity with superiors and/or company lawyers before making a report, thereby costing time when an immediate action may be necessary. At worst, the court's decision will result in individuals deciding not to report at all. Either way, the decision, by frustrating the very purpose of the ATSA, will have an adverse impact on aviation safety and security.

In light of the substantial importance of the issues at dispute, and the gravity of the mistakes of the courts below, it is essential that the Court not only reverse the Colorado Supreme Court's

holding that the ATSA's immunity provision does not require a determination of whether a report is true or false, but that the Court also apply to the facts at hand the proper standard—*i.e.*, one requiring a finding of material falsity in addition to a reckless disregard as to truth or falsity. This will ensure that the constitutional principles incorporated into the ATSA's immunity provision are properly observed, and that Air Wisconsin's immunity from suit is upheld.

ARGUMENT

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

In enacting the ATSA, Congress recognized "that the war on terrorism is, in large part, a war of information." 147 Cong. Rec. S12247-05, at S12249 (daily ed. Nov. 30, 2001) (statement of Sen. Brownback). Congress further recognized "that the safety and security of the civil air transportation system is critical to the security of the United States and its national defense, and that a safe and secure United States civil air transportation system is essential to the basic freedom of America to move in intrastate, interstate and international transportation," and that "the terrorist hijacking and crashes of passenger aircraft on September 11, 2001, which converted civil aircraft into guided bombs for strikes against the United States, required a fundamental change in the way it approaches the task of ensuring the

safety and security of the civil air transportation system." H.R. Conf. Rep. No. 296, at 53, *reprinted in* 2002 U.S.C.C.A.N. at 590. These Congressional statements are not limited to the United States but apply to the aviation community and travelling public worldwide.

The ATSA's purpose is to promote prompt reporting, even where there is some doubt as to the existence of a potential threat. It is essential, therefore, that the statute be interpreted uniformly to provide airlines with immunity, except where the disclosure in question was materially false *and* made with "actual knowledge that the disclosure was false, inaccurate, or misleading," or "reckless disregard as to the truth or falsity of that disclosure." 49 U.S.C. § 44941. This will effectuate the TSA's "when in doubt, report" directive.

A. Relevant Principles of Statutory Construction

Three principles of statutory construction are relevant to a proper interpretation of the ATSA's immunity provision set forth at 49 U.S.C. § 44941.

First, the Court must "'give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question.'" *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 298 (2010) (*quoting United States v. Bornstein*, 423 U.S. 303, 310 (1976); *see also Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1330 (2011) (interpretation of a statute depends upon a reading of the whole statutory text, with consideration to the purpose

and context of the statute, and any precedents or authorities that inform the analysis); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (interpretation of a word or phrase depends upon a reading of the entire statutory text, and consideration of the purpose and context of the statute). The text of a statute may not be divorced from its context. *See Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2530 (2013); *see also Dolan*, 546 U.S. at 486. Accordingly, when interpreting the ATSA, the Court must look at the text of the provision together with the purpose of the ATSA and context in which the immunity provision was drafted.

Second, where Congress incorporates common law terms into a statute, it is presumed that it also intends to incorporate the well-settled meaning of those terms.

> "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed."

Sekhar v. United States, 133 S. Ct. 2720, 2724 (2013) (*quoting Morissette v. United States*, 342 U.S. 246, 263 (1952)). Thus, Congress' decision to pattern the exception to immunity under 49 U.S.C. § 44941 after the "actual malice" standard set forth in *New York Times v. Sullivan*, 376 U.S. 254 (1964) evinces an intent to incorporate the case law defining and applying that term.

Third, federal statutes generally are assumed, absent a clear indication of the contrary, to have uniform nationwide application, meaning that their application is not dependent on state law. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43-44 (1989); *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 119-20 (1983).

Accordingly, the Court should set forth a clear, uniform standard for applying the ATSA's immunity provision—a standard that requires a finding of material falsity to deny immunity, and which can be applied consistently by courts throughout the United States, foreclosing courts from implementing the type of hair-splitting analysis utilized by the Majority below.

B. Immunity Under the ATSA Cannot Be Overcome Where There Is No Determination of Material Falsity

The Majority correctly determined that the question of immunity under the ATSA is a question of law to be determined by the trial court. *See* Pet. App. at 15a. The Majority then erroneously held that "[i]n our determination of immunity under the ATSA, we need not, and therefore do not, decide whether the statements were true or false. Rather, we conclude that Air Wisconsin made the statements with reckless disregard as to their truth or falsity." *Id*. at 17a n. 6. The Majority's conclusion that Air Wisconsin could be denied immunity even where its statements were true is contrary to the text, purpose and context of the ATSA, which require a finding of material falsity, in addition to knowledge of that falsity or a

reckless disregard as to truth or falsity, to overcome the presumption of immunity.

The ATSA provides immunity to carriers and their employees who voluntarily disclose to the TSA 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…" unless the disclosure is made with actual knowledge that it is false, inaccurate or misleading, or with reckless disregard as to its truth or falsity. 49 U.S.C. § 44941. This immunity provision largely mirrors the standard for "actual malice" set forth in *New York Times*, 376 U.S. at 279-80 (finding that a statement is made with actual malice where it is made "with knowledge that it was false or with reckless disregard of whether it was false or not"), which therefore provides the framework for analysis of the immunity provision—*i.e.*, Air Wisconsin is entitled to immunity unless it is found to have made the statements in question with actual malice. *See Sekhar*, 133 S. Ct. at 2724; *Neder v. United States*, 527 U.S. 1, 23 (1999); *Morissette*, 342 U.S. at 263. Actual malice must be established by clear and convincing evidence. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

The Court has made clear that the actual malice standard cannot be separated from the concept of falsity. *See Masson*, 501 U.S. at 513 (noting that the actual malice inquiry required the Court 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"); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986) (while most

of the Court's "opinions to date have chiefly treated the necessary showings of fault rather than of falsity," the *New York Times* rule also required the plaintiff to make a showing of falsity to prevail in a suit for defamation); *New York Times*, 376 U.S. at 279 (noting insufficiency of defense of truth to properly protect First and Fourteenth Amendment rights in all circumstances as reason why actual malice standard is necessary, thereby highlighting the importance of truth/falsity analysis to application of actual malice standard). In other words, the application of the actual malice standard requires a determination of whether the statement in question was true or false. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (reading *New York Times* as requiring a public official to establish that the utterance was false before recovering for civil defamation).[7]

The ATSA shares the *New York Times* Court's concern with self-censorship—*i.e.*, the failure to report. The purpose of the ATSA is to encourage a carrier to report all suspicious activities, even where it has doubt as to the actual existence of a threat; as the Dissent noted below, the TSA's policy was "when in doubt, report." *See* Pet. App. at 38a. To subject a carrier to liability for a report without determining that the report was false would be contrary to the very purpose of the

[7] *See also* Rodney A. Smolla, *Law of Defamation* § 3:10 (2d ed. 2013) (the Supreme Court implied in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 n. 6 (1990) that the actual malice standard implicitly includes a requirement of falsity); David Elder, *Defamation, A Lawyer's Guide* § 4.3 (2013) (numerous Supreme Court decisions have intimated that the actual malice standard set forth in *New York Times* linked indissolubly the issues of fault and falsity).

ATSA to promote the unhindered and immediate flow of information to the TSA.

It is nonsensical to interpret the immunity provision not to apply in any situation where the report actually turned out to be correct–especially when dealing with potential threats to aviation. *See Bustos v. A & E Television Networks*, 646 F.3d 762, 764 (10th Cir. 2011) (regardless of whether the declarant knew whether a statement was true when published, truth, when discovered, serves as a complete defense).

Furthermore, mere technical falsity of Air Wisconsin's statements is insufficient to satisfy the actual malice inquiry; material falsity is required. *See Masson*, 501 U.S. at 514. Statements are materially false only if they "'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Masson*, 501 U.S. at 517 (*quoting* Robert D. Sack, Libel, Slander, and Related Problems 138 (1980)).[8] Here, the relevant "reader" is the TSA, the sole audience for the statement. *See, e.g., Marier v. Lance, Inc.*, No. 07-4284, 2009 WL 297713, at * 4 (3d Cir. Feb. 9, 2009) (stressing relevance of limited nature of audience to defamation inquiry). As explained by the United States as *Amicus Curiae*:

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[8] *See also* Restatement (Second) of Torts, § 581A, comment f (1977) ("[s]light inaccuracies of expression are immaterial provided that the defamatory charge is true in substance"); Meiring de Villiers, *Substantial Truth in Defamation Law*, 32 Am. J. Trial Advoc. 91, 99 (Summer 2008) ("The substantial truth doctrine states that '[t]ruth will protect the defendant from liability even if the precise literal truth of the defamatory statement cannot be established,' as long as the 'gist' or 'sting' of the statement is true.").

> In the context of the specialized ATSA immunity provision, this inquiry properly focuses on materiality from the perspective of the recipient of the statement in question, namely aviation security or law enforcement personnel.

US Pet. Br. at 14.

Accordingly, the Majority erred by denying Air Wisconsin immunity without making a determination that Air Wisconsin's disclosure was materially false.[9] As cautioned by *Amicus Curiae* the United States, "an overly narrow construction of the ATSA's immunity provision … may chill air carriers' willingness to convey possible threat information that is uncertain, not fully investigated, or not susceptible to precise articulation." *See* U.S. Pet. Br., at 18; *see also* Mica Pet. Br. at 20-24. While it is likely that most "suspicious transactions" reported by carriers will prove benign, just one failure to report a legitimate threat could have catastrophic consequences. Indeed, even a delay in reporting—while an air carrier attempts to sanitize a proposed report and clear it with legal counsel—could have such consequences.[10]

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[9] Although never expressly ruled upon by this Court, a reasonable reading of the Court's decisions leads to the conclusion that plaintiff had the burden to prove falsity by clear and convincing evidence, even though Air Wisconsin is a non-media defendant. *See Hepps*, 475 U.S. at 775-77; *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 352 (2010); *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 783-84 (1985) (Brennan, J., dissenting); *Pearce v. E.F. Hutton Group, Inc.*, 664 F. Supp. 1490, 1512 (D.D.C. 1987).

C. The Majority Erroneously Imposed a Duty to Investigate

The Majority acknowledged that the events at the training may have warranted a report to the TSA but then faulted "Air Wisconsin for failing to investigate the matter sufficiently" before reporting and ignored the context in which Doyle's report was made. *See* Pet. App. at 38a-40a; *see also* Pet. App. at 5a, 18a.

The imposition of a duty to investigate is contrary to the text and purpose of the ATSA, which remain a focal point of the relevant analysis. As the Dissent correctly noted:

> Prior to the events giving rise to this case, the TSA issued a security directive (footnote omitted) requiring all airlines to report suspicious activities to the TSA. This directive was part of a fundamental shift in airline security in the wake of 9/11. Prior to 9/11, the airlines were responsible for assessing and investigating possible threats to airline security. *After 9/11, the TSA assumed responsibility for such assessment and investigation. According to the TSA official who testified at trial, "we [the TSA] wanted to know about suspicious incidents" from the airlines, but "we did not want to have the carriers .... doing the*

[10] The fear of delays is far greater with foreign carriers, whose employees may be unable to communicate with necessary individuals from their head offices to discuss a potential report due to time differences, and may be hesitant to report all but the clearest cases without the consent of their superiors due to the potential liability.

> *investigation, the assessment of ... potential security matters that came to their attention." The post–9/11 policy was known as "when in doubt, report."*

See Pet. App. at 37a-38a (emphasis added). Thus, the duty to investigate lies with the TSA, not air carriers.

The imposition of a duty to investigate also is not supported by the decisions upon which the Majority relied. *See Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) ("failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard"); *St. Amant v. Thompson*, 390 U.S. 727, 730-32 (1968) ("These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.").

In fact, courts have found that the lack of ability and time to investigate can weigh in favor of forgiving certain inaccuracies that would not be forgiven if more time to investigate was available. *See Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 171 (1979) (Blackmun, J., concurring) (noting that while a reporter trying to meet a deadline may find it impossible to check the accuracy of his sources thoroughly, a historian writing *sub specie aeternitatis* has time for reflection and to investigate the truthfulness of his statements); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 717 (4th Cir. 1991) (noting the necessity of a balance between

the duty to confirm accuracy and the need to deliver news in a timely manner); *Hunt v. Liberty Lobby*, 720 F.2d 631, 643 (11th Cir. 1983) (recognizing that standards of investigation vary with the timeliness of a news item).

Finally, the Majority's imposition of a duty to investigate is contrary to the accepted interpretation of 49 U.S.C. § 44902(b), a similar provision which grants the carrier authority to refuse to transport a passenger deemed inimical to safety and provides immunity for the carrier's decision unless the decision is arbitrary or capricious. *See, e.g., Cerqueira v. American. Airlines, Inc.*, 520 F.3d 1, 15 (1st Cir. 2008) (there is no obligation on the part of the Captain to engage in an investigation); *Cordero v. CIA Mexicana de Aviacion, S.A.*, 681 F.2d 669, 672 (9th Cir. 1982) (the reasonableness of the carrier's opinion is to be tested on the information available at the moment a decision is required, and there is no duty to conduct an in-depth investigation); *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975) (same).[11]

The ATSA imposes a duty on airlines to report quickly, or even immediately, and leaves the threat investigation and assessment to the

[11] In interpreting a similar immunity provision contained in the Tokyo Convention, the Ninth Circuit found that the Tokyo Convention imposes a duty to investigate when taking action with regard to unruly passengers. *See Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 870-71 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2874 (2011). This decision was one of a number of factors which led ICAO to explore the amendment of the Tokyo Convention. That process will culminate in a Diplomatic Conference to consider a Protocol to revise the Tokyo Convention in early 2014. *See* ICAO Working Paper, A38-WP/49 (ICAO Assembly, 38th Sess., July 11, 2013).

TSA. Airlines often have to act quickly based on limited facts to ensure that reporting is completed in time to take action. By inserting an investigation requirement where none exists, the Majority's holding will dangerously delay the reporting of information while investigations are performed, which ultimately could have tragic results.

II. AIR WISCONSIN IS ENTITLED TO IMMUNITY BECAUSE ITS DISCLOSURE TO THE TSA WAS NOT MATERIALLY FALSE

In reaching its determination that Air Wisconsin is not entitled to immunity for Doyle's report to the TSA, the Majority engaged in a hair-splitting analysis whereby it compared the statements the jury found Doyle to have made to a script of acceptable statements drafted by the Court during its months of deliberation. Air Wisconsin, however, was entitled to immunity because Air Wisconsin's statements were substantially true (*i.e.*, were not materially false) and did not substantively differ from what the Majority held would have been acceptable.[12] *See* Brief of Petitioner at 29-34. As the Dissent noted, Doyle provided the facts underlying his statements to the TSA, allowing the TSA to make its own conclusions regarding the potential danger Hoeper posed. *See* Pet. App. at 35a.

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[12] The Majority found that "Air Wisconsin would likely be immune under the ATSA if Doyle had reported that Hoeper was an Air Wisconsin employee, that he knew he would be terminated soon, that he had acted irrationally at the training three hours earlier and 'blew up' at test administrators, and that he was an FFDO pilot." See Pet. App. at 21a.

Carriers should not be required to submit a perfect report when the TSA has been tasked by Congress to garner the facts and assess the threat.[13] While it is likely that most "suspicious transactions" reported by airlines will prove benign, the fact that the transaction proves benign does not mean that the report was false or reckless. With the constantly evolving risks faced by airlines, just one failure to report a legitimate threat could have catastrophic consequences. Indeed, even a delay in reporting—while an airline attempts to sanitize a proposed report and clear it with legal counsel—could have such consequences.

It is essential that the Court reject the flawed analysis of the court below and reaffirm that the ATSA provides airlines with immunity, except where the disclosure in question was materially false *and* made with "actual knowledge that the disclosure was false, inaccurate, or misleading" or "reckless disregard as to the truth or falsity of that disclosure." 49 U.S.C. § 44941.

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[13] This is especially true for foreign carriers, who are more likely to employ individuals who do not speak English as a first language, thus heightening the danger of minor language glitches that should not be over-analyzed.

CONCLUSION

For the foregoing reasons and those set forth in the Brief of Petitioner, the Court should hold that the ATSA's immunity provision requires a determination of whether the statements in question were materially false, and that Air Wisconsin is entitled to immunity.

Dated: September 5, 2013

Respectfully submitted,

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