No. 12-315

IN THE

Supreme Court of the United States

AIR WISCONSIN AIRLINES CORPORATION,

Petitioner,

v.

WILLIAM L. HOEPER,

Respondent.

On Petition for a Writ of Certiorari
to the Colorado Supreme Court

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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SUPPLEMENTAL BRIEF FOR THE RESPONDENT

The Solicitor General suggests this Court grant certiorari, limited to the first Question Presented by the petition, which asks "Whether a court can deny ATSA immunity without deciding whether the airline's report was true." The decision whether to follow that recommendation turns on the Court's judgment about the balance between two considerations.

On the one hand, the case meets none of the Court's certiorari criteria: there is no circuit conflict; the answer to the Question Presented has no practical significance because the Constitution and defamation law independently protect truthful reports; the United States' argument that the court failed to consider whether petitioner's false statements were material *from the perspective of TSA* is waived because it was never raised by respondent or the Government as *amicus* below, and is not encompassed within the Question Presented; and the case implicates numerous factual disputes between the parties.

On the other hand, the United States is concerned that the Colorado Supreme Court's ruling has the potential to cause some harm to airline safety.

The balance between those considerations weighs decisively in favor of denying certiorari because there is no credible argument that the ruling below in fact threatens airline safety. The most that the United States is willing to say is that there is a "risk" that an airline might read the ruling below and perceive a risk in reporting a threat. U.S. Br. 17. But even that meager claim is overstated. The Government notably does not represent that it has seen any evidence at all

of such an effect in the years since the three lower courts in this case ruled in respondent's favor. That is no surprise, for regardless of how one reads the lower court's footnote regarding the treatment of truth under the ATSA, the opinion makes absolutely clear that true statements will never be the basis of liability, as falsity is already independently an element of every defamation claim under state law and the First Amendment. That surely is one reason why the Question Presented apparently has *never* before arisen in any case in any part of the country in the entire ten-year history of the statute.

Thus, the prospect of suits against airlines for reckless but true statements cannot have more than a trivial effect on airlines' decision making. But even if the ATSA provision had independent significance, the ruling below would still present no substantial cause for concern. The United States filed an *amicus* brief below proposing a legal rule that it represented would obviate any security concerns; the Colorado Supreme Court then adopted *precisely* that rule. BIO 34. The United States now says it has additional concerns about the way in which the lower court applied that rule to the facts of this case (as it sees them, though the jury disagreed). But even if those concerns had merit (and they do not), future cases will have different facts. And there is no reason to think that other courts will rely on the decision in this case to decide whether the statements before them are materially false. In any event, airlines in those cases will be free to point out the Government's expressed disagreement with the result in this case, which surely will be given serious consideration. At the same time, air carriers will be free to raise in defense the additional arguments that the Government identifies

(U.S. Br. 16-17 n.5), but which petitioner chose to waive in this case.

By contrast, there is a cost to the Court in intervening in this case beyond merely the investment of its valuable time. Because certiorari is granted rarely, orders granting review that depart substantially from the Court's certiorari criteria draw significant attention and sow real confusion. They signal to litigants and the bar a willingness to seriously consider a near-limitless array of petitions. By adhering to those well-known and long-respected criteria, the Court facilitates the management of its own docket.

1. The Solicitor General argues that certiorari is warranted because the "Colorado Supreme Court erred by rejecting ATSA immunity without first determining whether petitioner's disclosure to the TSA was false." U.S. Br. 11. But the Government then immediately acknowledges that any error in the interpretation of ATSA's immunity provision is harmless in this and every other case because wholly apart from the statute the "First Amendment would bar a defamation judgment based on a true statement, even if it were uttered with reckless disregard for the truth." *Id.* 12; *see also* Pet. App. 26a (falsity is a required element of every defamation claim). Accordingly, the alleged error had no effect even in this particular case because the court did, in fact, determine whether AWAC's statements were false in the course of deciding whether respondent had proven knowing or reckless disregard for the truth, Pet. App. 18a-20a, and in resolving AWAC's claim that certain of its statements were "substantially true," *id.* 26a.

The Government claims that this "separate discussion" of falsity "does not serve as an adequate substitute for the examination of falsity required by the ATSA immunity provision." U.S. Br. 13. But its point is not that the court failed to consider falsity. Rather, the Government says the court failed to ask in addition whether the false statement was "material" from the "perspective of . . . aviation security or law enforcement personnel." *Id.* 14. So not even the Government disputes that the Colorado Supreme Court conducted the legal inquiry into falsity that the Question Presented requests.

In any event, petitioner waived the argument that the United States identifies as critical: that materiality must be considered from the perspective of TSA.[1] The United States also never mentioned it in its *amicus* brief below. The Colorado courts would be free to consider that question in a later case. And in this Court, it is not remotely encompassed within the Question Presented, as it is not mentioned in the question itself or the body of the petition.

The lower court expressly decided the only materiality argument AWAC ever made, which was that certain of its statements were "substantially true" from anyone's perspective. *See* Pet. App. 26a-27a; AWAC Colo. S. Ct. Br. § IV(C)(5) ("The Statement That Hoeper was Terminated Today was Substantially True"); *id.* 51 (arguing that statement that Hoeper may be armed was "not materially false"). The court explained that respondent's claim "does not rely upon slight inaccuracies," as AWAC alleged. Pet. App. 26a.

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[1] Indeed, AWAC never even asked for a jury instruction on materiality, let alone one setting forth an ATSA-specific rule.

> Rather, the crux of the defamatory statements was that Hoeper was so mentally unstable that he might constitute a threat to aircraft and passenger safety. The record reveals sufficient evidence to support the jury's determination that Hoeper was not mentally unstable. Specifically, the record includes evidence that, although Hoeper lost his temper and "blew up" at one test administrator, Hoeper did not exhibit any other irrational behavior, and no other person who interacted with Hoeper after the confrontation believed Hoeper to be mentally unstable or believed Hoeper to pose a threat to others at the testing center or the airport.

Id. 26a-27a.[2]

Nor has the Government shown that any alleged nuance in the materiality standard would have made a difference in this case. It summarily asserts that had "the Colorado Supreme Court followed" the Government's "approach, it would have set aside the judgment against petitioner." U.S. Br. 15. One might expect, then, that the Solicitor General would point to evidence in the record showing that TSA would have responded the same way in this case if AWAC had told it the truth – *i.e.*, that an FFDO who had gotten upset earlier in the day at an unfair test, and may be fired (although AWAC had not yet decided whether to terminate him), would be boarding a flight that AWAC itself had booked for him hours earlier. But the

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[2] The Government agrees with respondent that the factual disputes about the truth of AWAC's statements were appropriately submitted to the jury rather than decided by a court de novo. *See id.* 15 n.4; BIO 28 n.12.

Government does nothing of the sort. Indeed, even though the Solicitor General makes a point of stating that he consulted with TSA in filing his brief, *id.* 19, the Government does not even *assert* that TSA would have responded in the same way. *See id.* 15-16. Instead, the lawyers in the Solicitor General's office simply make the same generalized claim AWAC made below and the Colorado Supreme Court fully considered and rejected: "there was no material difference between" what AWAC told TSA and the truth. *Id.* 16.

2. The Government's real objection, thus, is simply that it thinks that the courts below erred in finding AWAC's particular statements in the specific case materially false. But the Solicitor General has correctly argued in innumerable briefs to this Court that such case-specific allegations of error do not warrant this Court's review. The only reason the Solicitor General gives for his extraordinary departure from standard practice in this case is the claim that there is a "risk" that the decision in this case "'will be looked to by air carriers and courts throughout the United States to determine the standard to be used in applying' ATSA immunity," U.S. Br. 17 (quoting *amicus* brief), with a resulting "risk" that airlines will feel a "chill" in reporting suspicious activities to TSA, *id.* 18. For several reasons, that speculation provides no basis for certiorari.

First, as already discussed, even if other courts concluded that falsity is not part of the ATSA immunity analysis, that would have no practical effect on carriers' liability or their willingness to report truthful information to TSA. Given the independent requirements of defamation law and the First

Amendment, only the most incompetent airline attorney could read the decision below and come away with the belief that airlines can be held liable for true, but reckless statements.

Importantly, the Government suggests an airline might have an additional common law absolute immunity even for knowingly, materially false statements, U.S. Br. 16-17 n.5, which would obviously render ATSA immunity unnecessary. But AWAC did not make that argument in this case. It would be anomalous for this Court to intervene based on concerns regarding the effect of a single state court ruling, when no other court had considered the issue and when even that state court would be free to consider multiple other arguments against liability in a later case.

Second, there is no basis to believe that the state court's resolution of the fact-intensive materiality question in this particular case will have any effect on future decisions by other courts confronting different factual claims. Precisely because the question is so fact-bound, courts rarely rely on precedent from other, necessarily different, cases to decide whether a particular statement is materially false.

The Solicitor General's purported concern about the broader impact of a single court's treatment of the unusual facts of a specific case is particularly difficult to credit, given that the Government *twice* declined to give any opinion on that question below, even though it was already participating in the case as *amicus*. By the time of its second brief to the Colorado Supreme Court, the Government had in front of it the intermediate appellate court's decision holding exactly what the Solicitor General now says is so harmful –

i.e., that the particular statements in this case were materially false, made with actual malice, and outside the scope of ATSA immunity. *See* Pet. App. 61a, 76a-85a. Yet, in a brief that could be filed only with the approval of the Solicitor General, 28 C.F.R. § 0.20, the Government took "no position on this Court's ultimate resolution of the question whether sufficient evidence exists in the record to support the jury's finding that Air Wisconsin . . . operated outside the scope of [ATSA's] protection." U.S. Colo. S. Ct. Br. 8. To the contrary, the brief told the Colorado Supreme Court that the Government's interest in airline security would be satisfied so long as the court made clear that it was denying immunity because it upheld the finding of actual malice. BIO 34. And that, of course, is exactly what the Colorado Supreme Court did. *See* Pet. App. 21a.

Finally, airlines and the United States itself can take steps to ensure that if the ATSA immunity question ever again arises, future courts will not be unduly influenced by the decision in this case. Carriers can point to the Government's invitation brief here and the Government can provide the *amicus* assistance it withheld from the Colorado courts, making clear its disagreement with the decision in this case.

3. In any event, the Government's criticism of the lower court's fact-bound materiality determination is misplaced.

The Solicitor General agrees that the courts below appropriately considered the "overall substance of the disclosure," rather than focusing solely on "a granular, sentence-by-sentence parsing of the disclosure." U.S. Br. 15; *contra* Pet. 27-28 & n.10. Inexplicably,

however, in the very next paragraph, the Government then engages in exactly the sentence-by-sentence dissection it just denounced. U.S. Br. 15; *but see* BIO 26-27 & n.11.

When he eventually turns to the overall substance of the call, the Solicitor General does not dispute the lower courts' factual finding that the basic message conveyed by petitioner was that Doyle "believed that [respondent] was so unstable that he might pose a threat to the crew and passengers of the airplane." U.S. Br. 16 (quoting Pet. App. 19a). Nor does he contest the finding that this claim was false, or respondent's showing that Doyle knew that the implication was false at the time he made the call to TSA. *See id.*; BIO 10-14, 25-27.

Moreover, the Government does not deny that Doyle and his supervisor admitted that they knew telling TSA Hoeper was mentally unstable was a *material* lie. Doyle admitted that making such an allegation would cause Hoeper "undue harm." BIO 10. Likewise, Doyle's supervisor acknowledged that the untrue assertion likely would provoke a "raised" or "more dramatic" response from TSA. *Id.*

Tellingly, the Solicitor General also does not dispute the entirely sensible proposition that the true state of respondent's mental stability was material to TSA's response. Instead, he simply asserts that the "purpose of the ATSA immunity provision" is to "encourage air carriers to disclose suspicious occurrences that might be relevant to aviation security" and "allow *TSA* to determine whether the situation is sufficiently serious to merit a response." U.S. Br. 16. The Government thus seems to suggest that almost *no* knowingly false statement can ever be

material (and, therefore, almost no immunity claim can ever be defeated) because TSA will sort out the truth for itself.

But in enacting the ATSA immunity provision, Congress unambiguously rejected that approach. Rather than immunize all statements to TSA, on the theory that it would be better to encourage broad reporting and let TSA determine which reports were true and which were false – which, the Government suggests, was the common law rule, U.S. Br. 16-17 n.5 – Congress withheld immunity for knowingly and recklessly false statements. That surely is because Congress recognized, as the Government told the courts below, that false reports are themselves harmful to airline security. *See* U.S. Colo. S. Ct. Br. 3.

Doyle's knowingly false report was precisely the kind of conduct Congress intended to discourage. This is not a case about an airline whose employees made a good faith mistake in the details of a legitimate report, or who understandably decided to immediately report uncertain information to TSA rather than investigating the facts. It is a case about an employee who booked respondent on a flight; waited for hours until just before the flight was scheduled to depart; only then reported concerns that, if actually believed, should have prevented him from putting respondent on the flight in the first place; and included in the report allegations that he knew to be materially false, believing that the material falsehoods would prompt a heightened security response that would cause respondent "undue harm." He later falsified evidence to cover his tracks and lied to the jury on the witness stand. *See* BIO 10, 12-14. If such conduct does not

deprive the defendant of ATSA immunity, it is hard to imagine anything that will.

4. For the foregoing reasons, nothing in the decision below creates a risk to airline security that warrants discarding the Court's traditional criteria for review.

That said, if the Court remains concerned that although the ruling below does not meet its ordinary certiorari criteria it might nonetheless present some safety concerns if followed more broadly, there is a ready solution: any member of the Court can make that point in an opinion respecting the denial of certiorari. *Cf.*, *e.g.*, *Evans v. Stephens*, 544 U.S. 942 (2005) (Stevens, J., respecting the denial of certiorari); *Huber v. N.J. Dep't of Envtl. Prot.*, 131 S. Ct. 1308 (2011) (Alito, J., joined by Roberts, C.J., and Scalia and Thomas, JJ., respecting the denial of certiorari). Such an opinion could acknowledge the concerns of the United States about the ruling, and make clear that the denial does not amount to an endorsement of the lower court's interpretation of ATSA or resolution of the case on its facts. The opinion could further explain that certiorari was denied because this is the first case in which the Question Presented has arisen, it is doubtful whether the question has broad practical significance, and it seems entirely possible that if it does, other courts in the future will revisit the issue in light of the Government's brief, including the alternative arguments and defenses the Government suggests, which petitioner has not raised in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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