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

BRIEF OF DRI - THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* 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 23,000 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.

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's review all the more compelling.

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[1] Letters of consent have been filed with the Court. Counsel of record received notice of DRI's intent to file this *amicus* brief at least 10 days prior to the due date. 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, 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 judicial standards implementing the statutory imperative to report to TSA. Given the decision below and the existing conflict of authority on key constitutional standards, the essential clarity can come only from this Court.

INTRODUCTION

Following September 11, 2001, the United States government's efforts to strengthen national security included additional protection for our borders, air space and homeland. The government enacted extensive legislation and expended enormous sums to address terrorism and security threats at home and abroad. Among the most critical legislation was the Aviation and Transportation Security Act ("ATSA"), Pub. L. 107-71, 115 Stat. 597 (2001) (codified in various parts of 49 U.S.C.), which created the Transportation Security Administration ("TSA"), a new federal agency responsible for overseeing and ensuring civil air transportation security.

To assist TSA in achieving its safety objectives, ATSA mandates that airlines and their employees promptly report to TSA any information concerning "a threat to civil aviation." 49 U.S.C. §44905(a). Failure to report exposes the airline to civil penalties. *Id.* at §46301(a)(1)(A). Similarly, the TSA's Aircraft Operation Standard Security Program directs airlines to "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).

The statutory language is both controlling and instructive. Significantly, the Act encourages reporting by airlines and their employees 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). Airlines and their employees are immunized from civil liability "to any person … for such disclosure." *Id.*

Immunity is not granted, however, for disclosures made "with actual knowledge that the disclosure was false, inaccurate or misleading" or "with reckless disregard as to the truth or falsity of that disclosure." 49 U.S.C. §44941(b). The exception to immunity is expressly targeted at "bad actors,"[2] not airline employees who report legitimate safety concerns. The Act's broadly-worded immunity is designed to encourage airlines and their employees to report suspicious activity without fear of punishment or burdensome litigation even in the event that information reported in good faith turns out to be false.

The dissenting opinion in the Colorado Supreme Court explains precisely why the majority is incorrect. Equally as important for present purposes, the dissenting opinion explains precisely

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[2] 147 Cong. Rec. S10432, S10439-40 (daily ed. Oct. 10, 2001) (statement of Sen. Leahy).

why this Court's review is essential. First, "the majority misinterprets 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. Rather, as the dissent discerns, "the standards articulated in *New York Times v. Sullivan,* 376 U.S. 254 (1964), includ[e] the requirement that the plaintiff must prove that a statement is false." Pet. App. 29a (citing *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 773-75 (1986)). Second, the dissent perceives 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 recognizes 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.

In short, unless this Court grants review and reverses, the judgment below will directly hamper 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.

REASONS FOR GRANTING THE PETITION

The Majority Opinion of the Colorado Supreme Court Creates a Harmful Precedent Curtailing ATSA Immunity

A. The Decision Below Erroneously Disregarded the Truthfulness of Air Wisconsin's Report

Air Wisconsin reported to TSA its concerns about the air travel of an about-to-be terminated pilot and Federal Flight Deck Officer who was authorized to carry a TSA-issued firearm, and who directed angry outbursts against airline employees upon failing multiple proficiency checks. Pet. App. 32a-33a. Consider whether, in these circumstances, another court could conclude that a decision by Air Wisconsin *not* to report to TSA would have been irresponsible.

The "hair-splitting distinctions" (noted by the dissent) between what Air Wisconsin reported and what the majority found sufficient for immunity creates significant obstacles to achieving ATSA's critical objectives. Pet. App. 34a. Indeed, the government's *amicus* brief to the Colorado Supreme Court likewise emphasized the key pragmatic point that airlines must often make reports based on "imperfect information" and with "limited time and ability to investigate." U.S. Amicus Br., 2010 WL 4205326 at *2. While TSA has no interest in receiving *knowingly* false information, there is profound concern that defamation cases and awards

will chill the reporting of possible security threats to the TSA. *Id*. at *3.

Bear in mind that the majority opinion of the Colorado Supreme Court does not say that Air Wisconsin should have remained silent. That is, at bottom, recognition that Air Wisconsin had sufficient basis for concern and sufficient reason for reporting its concern to TSA. Rather, the majority denies immunity based on a preference for Air Wisconsin to have used slightly different words to express legitimate concern about respondent's behavior. But the vital statutory purpose is not served by such Monday-morning quarterbacking. To require that airline employees use specific words and "fool-proof" language in reporting to TSA will result in extensive internal vetting processes by risk management departments and in-house counsel. Even more compelling for present purposes is the risk that such internal review will subordinate the critical security objective to avoidance of liability from just the sort of litigation the judgment below rewards. At the very least, a requirement to dot the "i's" and cross the "t's" before communicating with TSA will delay reporting, further impeding ATSA's goals. Our national security does not have the luxury of waiting for re-writes and edits when a person whose observed actions arouse security-related concerns is heading to the airport to board a flight.[3]

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[3] Under First Amendment precedent and Virginia law, the law applicable to this case, speech that is "substantially true" will not support a defamation claim, and a plaintiff may not prove falsity based on slight inaccuracies of expression. *Jordan v. Kollman*, 612 S.E.2d 203, 207 (Va. 2005).

It is important also to bear in mind that Air Wisconsin's communications to TSA were neither impulsive nor precipitous. Despite the disapproving comments in the majority opinion below, there was no dispute in the record that prior to communicating with TSA several Air Wisconsin employees had a lengthy conversation about whether to report respondent's behavior, and that during their deliberations the Air Wisconsin employees discussed two incidents involving terminated workers from other airlines (which, in one case, had resulted in an aircraft crash). Pet. App. 31a.

Another noteworthy factor pertinent to the certiorari assessment is the description in the government's amicus brief in the Colorado Supreme Court that analogizes immunity under the ATSA to the qualified immunity extended to government officials in tort litigation. ATSA's statutory objective is to facilitate voluntary reporting by airline employees of suspicious activity without fear of incurring costs defending litigation arising from safety-related communications. *See* U.S. Amicus Brief, 2010 WL 4205326 at *7 (*citing Crawford-El v. Britton*, 523 U.S. 574, 590 (1998)). 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." *Id.* at *8-9 (*quoting Crawford-El*, 523

U.S. at 597)). The judgment below is incompatible with the views expressed in the government's amicus brief.

B. Substantially True Statements By Airline Employees Qualify for Immunity and Advance ATSA's Salutary Goals

The majority's decision below is also incompatible with the language, spirit and purpose of ATSA. The United States government recognizes that all eyes and ears must be on alert to combat terrorism and security threats. The Department of Homeland Security reiterates daily, particularly in connection with travel on public transportation: "If you see something, say something." The message could not be more clear and simple — it is better to report, even if based on uncertain information and developing events.

Well-documented and well-known episodes of violent outbursts by terminated employees[4]

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[4] *See, e.g., Minneapolis Shooting Spree Claims Fifth Victim; Suspect ID'd as Fired Employee*, NBC News (September, 28, 2012), *available at* http://usnews.nbcnews.com/_news/2012/09/28/14142424-minneapolis-shooting-spree-claims-fifth-victim-suspect-idd-as-fired-employee?lite; David Ariosto, "*2 Dead, 9 Wounded in Empire State Building Shooting, Police Say*", CNN (Aug. 25, 2012), *available at* http://www.cnn.com/2012/08/24/justice/new-york-empire-state/**;** *Employee kills 8, himself in Connecticut shooting rampage,* Los Angeles Times (August 4, 2010), *available at* http://articles.latimes.com/2010/aug/04/nation/la-na-connecticut-shooting-20100804.

demonstrate an acute need for reporting *any* activity that may raise safety concerns. Such reporting is uniquely essential in air travel where innocent passengers on the flight and thousands of people on the ground could be placed in peril. The risk is enormously high and, unfortunately, it is not hypothetical.[5]

Among the more compelling factors that weigh in favor of review is the fact that this case does not involve an intentional or malicious false report. If immunity is withheld in these circumstances, then the statutory objective is plainly thwarted as employees on the front lines of preserving our safety lack meaningful guidance.

And, if anything, the majority opinion's standard for assessing a reporting carrier's reckless disregard for the truth or falsity of communications with TSA further underscores the powerful reasons for this Court's review. The majority's determination to strip Air Wisconsin of statutory immunity because of "reckless disregard" is expressly *not* dependent on the falsity of the report to TSA. That standard is incompatible with the statute and with settled First Amendment precedent. *Hepps*, 475 U.S. at 773-75 (plaintiff must show falsity of the statement).

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[5] *See, e.g.,* Joe Sharkey, *That Loaded Gun in My Carry-On, Oh I Forgot,* New York Times (September 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.

In any event, under 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. Pet. App. 31a-34a.

First Amendment precedent holds that the "substantially true" standard informs the "reckless disregard" analysis. *Masson v. New York Magazine, Inc.*, 501 U.S. 496, 517 (1991). As this Court held in *New York Times v. Sullivan*, 376 U.S. 274 (1964), a plaintiff must prove that the allegedly defamatory statement was false. But in this case, the Colorado Supreme Court removed the falsity/substantially-true element from the recklessness analysis. In the view of the majority below, 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." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). By its express terms, the majority opinion deems 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 actually and 100% literally true could be stripped of immunity and subject to suit if the defendant fails to meet the newly-concocted standard of "recklessness." That standard does not meet constitutional norms protecting

speech. It surely cannot meet the necessarily higher standard for defeating statutory immunity.[6]

In addition to immunity being compelled by the governing legal standards, it is also compelled by the record. As the dissenting opinion observes, the majority's finding of recklessness based on petitioner's alleged overstatements is "not only contrary to the report itself, but also contrary to federal airline safety protocols, which require the reporting of potential flight risks even when based on tentative information and evolving circumstances." Pet. App. 29a. And, as the petition sets forth in compelling detail, state and federal courts are sharply divided on whether to require an independent appellate review of the record in deciding falsity. This, too, is a question that requires national uniformity and mandates review. The centrality of free speech to our social and government fabric — particularly in the safety context in which this case arises — constitutes an additional compelling reason for this Court's review.

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[6] *A fortiori* the standard for stripping a speaker's statutory immunity must be higher than the First Amendment standard. Otherwise the statute would be wholly redundant of the constitutional protection and, hence, superfluous. Under ordinary principles of statutory construction, therefore, the statutory immunity must provide a greater measure of immunity against claims for protected speech. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant").

C. ATSA Immunity Presents an Important Recurring Issue

Certiorari is also indicated in this case to address the unwarranted restrictions some courts, including the Colorado Supreme Court, have placed on airline immunity under ATSA. *See, e.g., Shqeirat v. US Airways Group*, 515 F. Supp. 2d 984, 1000 (D. Minn. 2007); *Hansen v. Delta Airlines*, No. 02 Civ. 7651, 2004 WL 524686, at *8 (N.D. Ill. Mar. 17, 2004); *Bayaa v. United Airlines*, 249 F. Supp. 2d 1198, 1205 (C.D. Cal. 2002); *Dasrath v. Continental Airlines*, 228 F. Supp. 2d 531, 538 (D.N.J. 2002); *see also Hill v. U.S. Airways, Inc.*, No. 08-14969, 2008 WL 4250702, at *4 (E.D. Mich. Nov. 25, 2009) (raised but not addressed by the court); *Baez v. JetBlue Airways,* No. 09 Civ. 596, 2009 WL 2447990, at *5 n.5 (E.D.N.Y. Aug. 3, 2009) (raised but preliminarily rejected on motion to dismiss).

Instead of the explicit immunity Congress enacted, some courts have read the statute narrowly, often finding factual issues that preclude an early determination of immunity and concluding that certain claims, such as false arrest, fall outside the statute's protection. *See, e.g., Shqeirat*, 515 F. Supp. 2d at 1000 (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); *Hansen*, 2004 WL 524686 at *8 (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*, 249 F. Supp. 2d at 1205 (immunity applies only "to the *disclosure* of suspicious activities, not the actions taken pursuant thereto"); *Dasrath,* 228 F. Supp. 2d at 538 (finding §44941 inapplicable because plaintiffs' claims were not based on reporting of activity, but rather on airline's ultimate decision to remove them from the aircraft).

By curtailing the scope of the statute in various ways, such decisions enable plaintiffs to plead around the immunity Congress deemed necessary. Such decisions subject parties and courts to the burdens of extensive and costly discovery that the Act was designed to preclude. Accordingly, the lower courts would benefit from review and guidance by this Court on the statute's scope and application.

D. The Public Policy Behind ATSA Is Further Reflected in Other Statutes that Protect Decisions Made in the Interest of Safety

The judgment below is also incompatible with established law in related areas where our government has made a policy decision to protect an airline's decision to "refuse to transport a passenger or property that the carrier decides is or may be inimical to safety." 49 U.S.C. §44902. Such a refusal does not give rise to a claim for damages under either federal or state law unless the carrier's decision was arbitrary or capricious. *See, e.g., Cerqueira v. American Airlines*, 520 F.3d 1 (1st Cir.), *cert. denied*, 555 U.S. 821 (2008) (overturning jury

verdict awarding damages on claims for discrimination on the basis that a carrier can refuse to transport a passenger who it decides may be inimical to the safety of the flight).

The law expressly recognizes that airline pilots are under tremendous time constraints and pressures in the moments before takeoff when many of these decisions are made, and a captain is not legally obligated to investigate a situation of concern, nor is he required to leave the cockpit to verify reports by flight attendants or other ground crewmembers and may accept their representations at face value. *See, e.g., Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975) (air carrier is not required to make a thorough inquiry into the intelligence received, its sources or the passenger's personal history); *Al-Qudhai-een v. America West Airlines, Inc.*, 267 F. Supp. 2d 841, 847-48 (S.D. Ohio 2003) (captain may remove passengers from the aircraft act based on circumstances known to him and may rely on information from crew despite any exaggerations or false representations); *Christel v. AMR Corp.*, 222 F. Supp. 2d 335, 340 (E.D.N.Y. 2002) (even if a flight attendant makes exaggerated or false representations, the captain is not required to investigate).

Lessons from the world of experience should not be overlooked in the vitally important context of this case. Airline employees, as frontline witnesses, should not be dissuaded from reporting safety concerns by the need to conform to a scripted

playbook. Nor should courts call retrospective fouls in the face of slight deviations in wording.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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