

## News Release

For Immediate Release

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### **DRI – The Voice of the Defense Bar Files Amicus Brief Supporting Petitioner in U.S. Supreme Court in *Air Wisconsin Airlines Corp. v. Hoeper***

**CHICAGO – (September 5, 2013)**—DRI’s Center for Law and Public Policy has filed an amicus brief with the U.S. Supreme Court supporting the petitioner in *Air Wisconsin Airlines Corp. v. Hoeper*.

The case raises fundamental questions under the First Amendment and a critical national security statute, the Aviation and Transportation Security Act (ATSA).

In the wake of the September 11, 2001, terrorist attacks, Congress enacted ATSA to overhaul and improve the safety and security of the nation’s aviation system. Among other changes, the Act transferred responsibility for assessing and investigating security threats from airlines to the federal government. At the same time, however, Congress recognized that airlines and their employees are uniquely positioned to acquire some of the most useful threat information. Accordingly, air carriers are encouraged and required to report relevant threat information promptly to TSA.

To help ensure disclosure of all relevant threat information, Congress provided airlines and their employees with broad immunity from suit. Borrowing considerably from language in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the statute strips immunity only for statements 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.”

Despite all of this, the Colorado Supreme Court upheld a \$1.4 million defamation verdict against an airline that did exactly what Congress would have wanted it to do. The plaintiff was a pilot for Air Wisconsin, and was also a federal flight deck officer, meaning that he was allowed to carry a TSA-issued firearm. He had failed three aircraft proficiency tests, and knew a fourth failure would result in his termination. In a training session in preparation for the fourth test, the plaintiff became very angry and accused the test administrator of “railroading the situation.” After consultation among the leadership of Air Wisconsin’s Flight Operations, the airline reported to TSA that the plaintiff had been terminated from his job, there was concern about his mental stability, and that he might be armed.

In a 4–3 decision, the Colorado Supreme Court held that Air Wisconsin was not entitled to immunity and further held that the First Amendment did not protect Air Wisconsin from a defamation judgment. The Colorado Supreme Court did not independently assess whether Air Wisconsin’s statements were true.

The Supreme Court granted review on the following question: Can ATSA immunity may be denied without a determination that the air carrier’s disclosure was materially false?

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In its amicus brief on the merits, DRI argues that ATSA's language and purpose require that Air Wisconsin's immunity should be upheld and that the judgment of the Colorado Supreme Court should be reversed.

In its brief, DRI maintains that the judgment is incompatible not only with the views of Congress in passing ATSA, but also with the views expressed by the government in its amicus briefs to the Colorado Supreme Court and this Court in support of certiorari.

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

[W]ithholding immunity in the circumstances presented in this case would thwart ATSA's statutory objective to encourage employees on the front lines to report aviation security concerns promptly....

The Colorado Supreme Court relied instead on "hair-splitting distinctions" between the wording of Air Wisconsin's report and the slightly different language that the majority held would qualify for immunity....

It does not take a crystal ball to perceive the impact of this case on future decision-making: nine years after the 2004 incident, Air Wisconsin is still embroiled in litigation over "hair-splitting" distinctions in its report to TSA and still faces a defamation judgment of \$1.4 million.

The case is on the Supreme Court docket for the October 2013 Term. The date for oral argument has not yet been scheduled. A decision is expected by the end of the upcoming Term.

DRI brief authors Jerrold J. Ganzfried of Holland & Knight, Washington, D.C., and Judith R. Nemsick of Holland & Knight, New York City, are available for interview or for expert comment through DRI's Communications Office.

For the full text of the amicus brief, [click here](#).

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