No. 12-315

In the Supreme Court of the United States

AIR WISCONSIN AIRLINES CORPORATION, PETITIONER

v.

WILLIAM L. HOEPER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597, confers immunity from civil liability on an air carrier that "makes a voluntary disclosure" to law-enforcement and public-safety officials "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." 49 U.S.C. 44941(a). Such immunity does not apply to a disclosure 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 question presented is:

Whether ATSA immunity may be denied without a determination that the air carrier's disclosure was materially false.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

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INTEREST OF THE UNITED STATES

This case concerns the scope of federal statutory immunity for air carriers when they report information about possible aviation-security threats to government authorities. See 49 U.S.C. 44941. Federal law affirmatively requires air carriers to report such information in certain circumstances, see 49 U.S.C. 44905(a), and, in addition, voluntary reports are critically important to the various federal agencies charged with monitoring and maintaining air safety, see, *e.g.*, 49 U.S.C. 114(f) (Transportation Security Administration); 49 U.S.C. 40101(d)(1) (Federal Aviation Administration). The United States accordingly has a substantial interest in the effectiveness of immunity for air carriers that make such reports. In addition, the Court's interpretation of the immunity statute in this case could affect the application of a similarly worded immunity statute that pro-

tects members of the public who report suspicious transportation-related behavior to authorized officials. See 6 U.S.C. 1104(a). At the Court's invitation, the United States filed an amicus brief at the petition stage of this case.

STATEMENT

1. a. In response to the 1988 bombing of a commercial passenger flight over Lockerbie, Scotland, President George H. W. Bush appointed a Commission on Aviation Security and Terrorism (Commission) to "conduct a comprehensive study and appraisal of practices and policy options with respect to preventing terrorist acts involving aviation." Exec. Order No. 12,686, § 2(a), 3 C.F.R. 233 (1990). The Commission found, among other things, that the Federal Aviation Administration (FAA) had "vested too much discretion" in air carriers about whether to report bomb threats to federal authorities. *Report of the President's Commission on Aviation Security and Terrorism* 49 (1990). The Commission recommended eliminating such discretion and requiring carriers to "immediate[ly] report[] * * * all threats to FAA, airport and public safety authorities," so that public-safety officials, not carriers, would exercise "the responsibility for deciding whether and how searches should be conducted." *Ibid.*

In response to the Commission's report, Congress enacted the Aviation Security Improvement Act of 1990 (1990 Act). See Pub. L. No. 101-604, § 2(2), 104 Stat. 3066. In that statute, Congress found that "the safety and security of passengers of United States air carriers against terrorist threats should be given the highest priority by the United States Government" and that the government "should ensure that enhanced security measures are fully implemented by both United States and

foreign air carriers." §§ 2(1) and (5), 104 Stat. 3066, 3067.

Among other things, the 1990 Act imposed a legal obligation on air carriers to report threats. See § 109(a), 104 Stat. 3078. The current version of that provision, 49 U.S.C. 44905(a), requires that "[u]nder guidelines the Secretary of Transportation prescribes, an air carrier, airport operator, ticket agent, or individual employed by an air carrier, airport operator, or ticket agent, receiving information (except a communication directed by the United States Government) about a threat to civil aviation shall provide the information promptly to the Secretary." Violations of that requirement may result in civil penalties. 49 U.S.C. 46301(a)(1)(A).

b. Following the attacks of September 11, 2001, Congress enacted the Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597, to again "address the security of the nation's transportation system." H.R. Conf. Rep. No. 296, 107th Cong., 1st Sess. 54 (2001) (Conference Report). In enacting the ATSA, Congress "recognize[d] 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." *Id.* at 53. Congress also concluded that "the terrorist hijacking and crashes of passenger aircraft on September 11, 2001 * * * required a fundamental change in the way it approaches the task of ensuring the safety and security of the civil air transportation system." *Ibid.*

Through the ATSA, Congress made "security functions at United States airports * * * a Federal gov-

ernment responsibility." Conference Report 54. The legislation established the Transportation Security Administration (TSA) and directed the TSA to, among other things, "receive, assess, and distribute intelligence information related to transportation security"; "assess threats to transportation"; "develop policies, strategies, and plans for dealing with threats to transportation security"; and "on a day-to-day basis, manage and provide operational guidance to the field security resources of the [TSA], including [the] Federal Security Managers" who are stationed at every airport in the United States. ATSA § 101(a), 115 Stat. 597-598; see 49 U.S.C. 44933.

The ATSA also included a section on "Encouraging Airline Employees To Report Suspicious Activities." § 125, 115 Stat. 631 (capitalization altered). That section added to Title 49 a provision entitled "Immunity for reporting suspicious activities," which states:

> Any air carrier * * * or any employee of an air carrier * * * who makes a voluntary disclosure 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 shall not be civilly liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, for such disclosure.

49 U.S.C. 44941(a).[1] Congress carved out a narrow exception to that immunity for "any disclosure made with actual knowledge that the disclosure was false, inaccurate, or misleading" or "any disclosure made with reckless disregard as to the truth or falsity of that disclosure." 49 U.S.C. 44941(b).

The Conference Report described the immunity provision as "[e]ncourag[ing] and exempt[ing] airline employees from liability for disclosing suspicious activities in response to a 'reasonably believed' threat." Conference Report 74. Senator Leahy, who sponsored the provision as an amendment on the Senate floor, similarly explained that the provision was designed to "improve aircraft and passenger safety by encouraging airlines and airline employees to report suspicious activities to the proper authorities," while "not protect[ing] bad actors." 147 Cong. Rec. 19,172 (2001); see S. 1447, 107th Cong. § 121 (2001).

c. In 2007, Congress conferred similar immunity on members of the public. See Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No.

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[1] Because the TSA was originally part of the Department of Transportation, ATSA § 101(a), 115 Stat. 597, the reference in Section 44941(a) to that Department included the TSA. In 2002, Congress transferred the TSA to the newly created Department of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, Tit. IV, Subtit. A, § 403(2), 116 Stat. 2178. That reorganization did not affect Section 44941(a)'s coverage of air-carrier disclosures to the TSA, because Congress provided that "[w]ith respect to any function transferred by or under this Act * * * and exercised on or after the effective date of this Act, reference in any other Federal law to any department * * * the functions of which are so transferred shall be deemed to refer to the Secretary, other official, or component of the Department [of Homeland Security] to which such function is so transferred." § 1517, 116 Stat. 2311.

110-53, Tit. X, § 1206, 121 Stat. 388. Under 6 U.S.C. 1104(a), members of the public are immunized from civil liability for reports of suspected terrorist activity or suspicious behavior, with the exception of "any report that the person knew to be false or was made with reckless disregard for the truth at the time that person made that report." In enacting that provision, Congress recognized that "the general public often provides critical assistance to law enforcement in its efforts to disrupt terrorist activity against the homeland." H.R. Conf. Rep. No. 259, 110th Cong., 1st Sess. 328-329 (2007). Congress also recognized that, in the absence of immunity, "lawsuits filed against members of the public who reported what they reasonably considered to be suspicious activity to appropriate personnel" would create a "potential chilling effect." *Ibid.*

2. Respondent is a pilot who was employed by petitioner, a regional airline, from 1998 to 2004. Pet. App. 46a, 52a. Under a federal program authorizing the TSA "to deputize volunteer pilots as federal law enforcement officers 'to defend the flight decks of aircraft . . . against acts of criminal violence or air piracy,'" respondent had been approved as a federal flight deck officer (FFDO). *Id.* at 3a (quoting 49 U.S.C. 44921(a)). An FFDO is authorized "to carry a firearm while engaged in providing air transportation," 49 U.S.C. 44921(f)(1), and the TSA had issued a firearm to respondent, Pet. App. 3a.

In 2004, petitioner stopped using the type of aircraft respondent had piloted and therefore required him to pass a test establishing his ability to fly a new type of plane. Pet. App. 3a-4a. Respondent failed the required test three times, and petitioner provided him "one last opportunity to pass." *Id.* at 4a. Respondent "knew that

he would likely lose his job if he failed this fourth test." *Ibid.*

During a mandatory training session at a facility in Virginia, which respondent needed to complete successfully in order to continue towards his certification, respondent "became angry with the test administrators because he believed that [they] were deliberately sabotaging his testing." Pet. App. 4a; see *id.* at 46a-47a. One administrator later testified that respondent "ended the test abruptly, raised his voice at [the administrator], and used profanity." *Id.* at 4a. The administrator also testified that respondent's "outburst startled him and that [the administrator] feared for his physical safety during the confrontation," although not after it ended. *Id.* at 4a-5a. As the Colorado Court of Appeals explained, "[f]or an experienced pilot, such behavior was unusual." *Id.* at 47a.

After respondent left the training facility, the administrator reported respondent's conduct to Patrick Doyle, a manager stationed in Wisconsin. Pet. App. 5a; see *id.* at 4a, 47a. In particular, the administrator told Doyle that respondent "blew up at [the administrator]," that respondent "was 'very angry' with [the administrator]," and that the administrator "was 'uncomfortable' remaining at the simulator with [respondent]." *Id.* at 5a, 47a. Doyle told another employee to book respondent on a 1:30 p.m. flight home to Denver, and told one of the employees involved in respondent's training to drive respondent to Dulles International Airport. *Id.* at 47a. Respondent was unable to make the 1:30 flight, so he was booked on a later one. *Id.* at 48a.

In the meantime, Doyle met with several of petitioner's other employees: the assistant chief pilot, the chief pilot, and a vice president to whom Doyle reported.

Pet. App. 48a. They discussed "Doyle's conversation with [the administrator]"; respondent's "prior displays of anger in training sessions"; respondent's "expectation of being terminated based on the failed training"; the fact that "as a Federal Flight Deck Officer, [respondent] could carry a weapon aboard a commercial aircraft"; the possibility that at Denver International Airport, where respondent embarked on his flight to Virginia, "he could have boarded without checking his weapon"; the question "whether any means existed to determine the whereabouts of [respondent's] weapon"; an episode in which another of petitioner's pilots "had brought an FFDO weapon to simulator training in violation of FFDO procedures"; and "two incidents that had occurred before the FFDO program involving disgruntled employees of other airlines who had boarded aircraft with firearms and had caused incidents leading to deaths and injuries." *Id.* at 48a-49a (footnote omitted). At the end of the meeting, the vice president "decided that TSA should be contacted." *Id.* at 50a.

Doyle made the call to the TSA. Pet. App. 6a. A jury later found that he made two relevant statements during that call. *Ibid.* The first statement was: "[Respondent] was an FFDO who may be armed. He was traveling from [Dulles to Denver] later that day and we were concerned about his mental stability and the whereabouts of his firearm." *Ibid.* The second statement was: "Unstable pilot in FFDO program was terminated today." *Ibid.*

After Doyle's call to the TSA, respondent's flight, which had been taxiing before takeoff from Dulles, was called back to the gate. Pet. App. 51a. TSA officers removed respondent from the plane, and they searched

and questioned him. *Id.* at 6a, 51a-52a. He was then released and took a later flight to Denver. *Id.* at 52a.

3. a. Respondent subsequently filed suit in Colorado state court. Pet. App. 7a. He sought, among other things, damages from petitioner on the theory that its statements to the TSA amounted to defamation under Virginia law. *Ibid.* Petitioner moved for summary judgment, arguing that it was immune from liability for its report to the TSA under the ATSA's immunity provision, 49 U.S.C. 44941. Pet. App. 7a. The trial court denied that motion "because it determined that the jury was entitled to resolve disputed issues of fact that controlled the determination of immunity." *Ibid.* The trial court also denied petitioner's later motion for a directed verdict based on the ATSA immunity provision. *Ibid.*; see *id.* at 102a-103a.

The trial court submitted the issue of ATSA immunity to the jury as part of the instructions on the defamation claim. Pet. App. 8a; Jury Instr. No. 11. It instructed the jury that immunity would not apply if respondent proved that petitioner "made the disclosure with actual knowledge that the disclosure was false, inaccurate or misleading" or "made the disclosure with reckless disregard as to its truth or falsity." Jury Instr. No. 11. The instructions explained that "a person acts recklessly when he consciously disregards a substantial and unjustifiable risk that a result will probably occur or that a circumstance probably exists." Jury Instr. No. 7. The jury instructions did not state that the ATSA immunity provision protects materially true statements. The jury found in favor of respondent on the defamation claim, and awarded respondent a total of $1,241,500 in presumed and punitive damages. Pet. App. 45a, 111a; Jury Instr. Nos. 12-13.

4. a. After the Colorado Court of Appeals affirmed, Pet. App. 44a-87a, the Supreme Court of Colorado granted discretionary review and also affirmed, *id.* at 1a-43a.[2] The state supreme court determined that the issue of ATSA immunity was a question of law for the court, not a question of fact for the jury. *Id.* at 9a, 11a-15a. But it concluded that petitioner was not entitled to ATSA immunity in this case. *Id.* at 9a, 15a-21a.

The state supreme court recognized that the scope of the exception to ATSA immunity, 49 U.S.C. 44941(b), is informed by decisions of this Court applying a similarly worded exception to the First Amendment's protection for certain types of speech. Pet. App. 17a. In its view, those decisions allowed a defamation suit to proceed so long as the speaker "entertained serious doubts as to the truth" of a statement or had "high degree of awareness of [it]s probable falsity." *Ibid.* (citation omitted). But the court explained that "[i]n our determination of immunity under the ATSA, we need not, and therefore do not, decide whether [petitioner's] statements were true or false." *Id.* at 17a n.6.

Applying its test to the facts of this case, the state supreme court acknowledged that "the events at the training may have warranted a report to TSA," but reasoned that Doyle "overstated" the events that had occurred "to such a degree that they were made with

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[2] The Colorado Court of Appeals, in addition to affirming the judgment on the defamation claim, "remanded for further proceedings on [repondent's] outrageous conduct claim." Pet. App. 87a. Respondent has not disputed that the judgment of the Supreme Court of Colorado on the defamation claim is "final" for purposes of this Court's review, 28 U.S.C. 1257(a), and the Court has deemed the finality of one claim to be unaffected by the nonfinality of others, see *American Export Lines, Inc.* v. *Alvez*, 446 U.S. 274, 279 n.7 (1980); see also Eugene Gressman et al., *Supreme Court Practice* 164 (9th ed. 2007).

reckless disregard of their truth or falsity." Pet. App. 18a. Specifically, the court was of the view that Doyle "could not form an opinion as to whether [respondent] was mentally unstable at the time that Doyle contacted TSA." *Ibid.* The court further believed that Doyle's statement that respondent had been terminated was knowingly false because, although respondent knew he "likely would be terminated, no termination had yet occurred." *Ibid.* The court also concluded that Doyle's statement suggesting that respondent might be armed was reckless because it "implie[d], for example, that Doyle knew that someone had seen [respondent] with his weapon or that [respondent] had told someone he had his weapon." *Id.* at 18a-19a. Finally, the court reasoned that "the overall implication of Doyle's statements"—namely, "that he believed that [respondent] was so unstable that he might pose a threat to the crew and passengers of the airplane on which he was scheduled to fly"—was a matter on which "at a minimum, Doyle entertained serious doubts." *Id.* at 19a-20a.

The state supreme court expressed the view that its decision would "not chill airlines from reporting to the TSA what they actually know about potential security threats." Pet. App. 21a. As support for that view, the court stated that petitioner "would likely be immune under the ATSA" if Doyle had worded his report differently, namely, by stating that respondent "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." *Ibid.* In the court's view, however, "Doyle's statements in this case * * * went well beyond these facts." *Ibid.*

b. Three justices dissented in part and concurred in part. Pet. App. 28a-43a. They concluded that a deter-

mination of truth or falsity is part of the ATSA-immunity analysis. *Id.* at 29a n.2; see *id.* at 40a-42a. And they further concluded that, under any potential standard of review, the trial court had erred in denying ATSA immunity, because petitioner's statements to the TSA were "true in substance." *Id.* at 30a; see *id.* at 42a & n.7.

The dissenters noted the majority's statement that petitioner likely would have enjoyed immunity if Doyle had worded his report to the TSA differently. Pet. App. 34a. In the dissenters' view, the majority's preferred script "elevat[ed] form over substance" and "dr[ew] hair-splitting distinctions that make no difference to the analysis." *Id.* at 34a-35a. The dissenters reasoned that it "would have made no difference, for example, had the airline reported, as the majority would have it, that [respondent] 'knew he would be terminated soon,' instead of describing him as terminated," because "the only thing left with regard to [respondent's] termination was the formal notification—and everyone, including [respondent], knew that was coming." *Ibid.* "Similarly," the dissenters continued, "there is no difference of any consequence between stating '[respondent] had acted irrationally at the training three hours earlier and blew up at the test administrators,' as the majority would have it, and stating 'concerns' about his 'mental stability,'" because respondent's "'irrational' behavior is precisely what caused the airline to have concerns about his mental stability." *Id.* at 35a. "Finally," the dissenters concluded, "the majority's approved statement that [respondent] 'was an FFDO pilot' contains the very implication that [petitioner] expressed to the TSA—namely that, as an FFDO pilot, [respondent] 'may be armed.'" *Ibid.*

The dissenters also expressed concern that "the majority's reasoning threaten[ed] to eviscerate ATSA immunity and undermine the federal system for reporting possible threats to airline safety to the TSA." Pet. App. 37a. "The federal reporting system," the dissenters explained, "rests on the assumption that airlines should report possible threats to airline safety to the TSA even when the report is based on tentative information and evolving circumstances." *Ibid.* They criticized the majority for giving airlines reason to fear "a hefty defamation verdict" for making such reports. *Id.* at 38a.

SUMMARY OF ARGUMENT

The Supreme Court of Colorado erred in concluding that the ATSA leaves air carriers exposed to civil liability when they report materially true information about potential air-security threats to the proper authorities. The only exception to an air carrier's blanket immunity for threat-related reports, 49 U.S.C. 44941(a), is when the carrier makes the report 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 wording of that exception mirrors the wording of this Court's "actual malice" standard under the First Amendment, which immunizes certain speech from defamation liability unless the speech was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280 (1964). The Court has interpreted the actual-malice standard to protect speech that contains "[m]inor inaccuracies," so long as it does not "differ materially in meaning" from the truth. *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 521 (1991).

The ATSA's immunity provision incorporates a similar protection. Congress crafted the provision's text against the backdrop of this Court's actual-malice decisions, and the linguistic congruence between the statutory and constitutional standards was presumably intentional. The immunity provision is designed to "encourag[e] airline employees to report suspicious activities." ATSA § 125, 115 Stat. 631 (capitalization altered). Incorporation of the actual-malice standard, including its material-falsity requirement, furthers that design in two ways. First, by repurposing a preexisting legal framework, Congress reduced the possibility that air-carrier threat reports would be chilled based on an insufficiently broad scope of protection or uncertainties as to how the ATSA's immunity provision would be applied in practice. Second, the actual-malice standard has itself evolved to solve precisely the same problem Congress faced in the ATSA: how to give breathing room to useful speech (here, reports of information concerning potential threats to aviation safety) while preserving the possibility of suits in extreme circumstances.

In the specialized context of ATSA immunity, the material falsity of an air carrier's communication should be evaluated from the perspective of the presumed recipient of the communication, namely, a reasonable air-safety official. The inquiry thus turns on whether any inaccuracies in the air carrier's communication changed "the substance" or "the gist" of the potential threat to air safety that the communication conveyed. *Masson*, 501 U.S. at 517 (citation omitted). In addition, because the ATSA immunizes reports relating to possible (as opposed to certain) threats, and because threat reporting often occurs in rapidly changing circumstances and without complete information, the scope of immunity

must afford air carriers the broad leeway "that is necessary when relying on ambiguous sources" by providing "protection for rational interpretation" of shifting events. *Id.* at 519.

Application of that standard to the facts described in the Supreme Court of Colorado's decision would lead to the conclusion that petitioner is immune to liability for its call to the TSA. Petitioner's choice of language in its communication with the TSA did not exceed a rational interpretation of the circumstances. The gist of the potential threat petitioner identified—that respondent might have a firearm and might be in a frame of mind to use it—does not differ from the gist of the suspicious activity relevant to a potential threat that would have been conveyed by a communication that the state supreme court would have considered to be entirely accurate. Because the Supreme Court of Colorado nevertheless denied immunity on the erroneous premise that the ATSA does not require an inquiry into material falsity, its decision should be vacated and the case remanded for further proceedings not inconsistent with a proper application of the ATSA.

ARGUMENT

THE SUPREME COURT OF COLORADO ERRED IN CONCLUDING THAT ATSA IMMUNITY MAY BE DENIED WITHOUT A DETERMINATION THAT THE AIR CARRIER'S STATEMENTS WERE MATERIALLY FALSE

A. A Determination Of Material Falsity Is A Prerequisite To The Denial Of ATSA Immunity

The ATSA forecloses civil liability for air carriers or air-carrier employees who disclose to law-enforcement and public-safety officials "any suspicious transaction relevant to a possible violation of law or regulation,

relating to * * * a threat to aircraft or passenger safety." 49 U.S.C. 44941(a). Congress excepted from this otherwise-blanket immunity only those 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). That narrow exception does not permit the imposition of liability on air carriers for materially true reports of information about potential threats to air safety.

1. The text of the exception to ATSA immunity tracks this Court's longstanding articulation of the "actual malice" standard under the First Amendment. In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), this Court held that the First Amendment immunizes certain speech (namely, speech about a public official's execution of his duties) from liability in a defamation suit unless the plaintiff "proves that the statement was made with 'actual malice.'" *Id.* at 279-280. The Court explained that a statement is made "with 'actual malice'" if it is made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280; see *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 596, 510-511 (1991) (clarifying that "the term actual malice" is "a shorthand to describe First Amendment protections for speech injurious to reputation" and "should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will").

Although the actual-malice standard, like the effectively identical standard codified in the ATSA's immunity provision, is articulated in terms of the speaker's intent, one of its elements is that the statement at issue be materially false. As this Court's decision in *Masson* v. *New Yorker Magazine*, *supra*, makes clear, the actu-

al-malice standard would bar a defamation judgment based on a statement that was not materially false, even if the statement was inaccurate in some particulars and the speaker believed or suspected the statement to be inaccurate. In *Masson*, the Court addressed a suit in which the plaintiff alleged that an author and her publishers had defamed him by "us[ing] quotation marks to attribute to him comments he had not made." 501 U.S. at 499. Applying the actual-malice standard, the Court considered whether "the evidence suffice[d] to show that [the defendants] acted with the requisite knowledge of falsity or reckless disregard as to truth or falsity." *Id.* at 513. Consistent with previous decisions, the Court explained that "[t]his inquiry in turn requires us to consider the concept of falsity" itself, reasoning that it could not "discuss the standards for knowledge or reckless disregard without some understanding of the acts required for liability," namely, "the requisite falsity." *Ibid.* (emphasis added); see, *e.g.*, *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 775 (1986) ("[A]s one might expect given the language of the Court in *New York Times*, * * * , a public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation.").

The Court held that the actual-malice standard cannot be satisfied by mere "technical falsity," but instead requires "a *material* change in the meaning conveyed by the statement." *Masson*, 501 U.S. at 514, 517 (emphasis added); see *id.* at 521 ("We must determine whether the [reported quotations] differ materially in meaning from [the plaintiff's original statements]."). The Court explained that the "definition of actual malice relies upon [the] historical understanding" of the "common law of libel," under which "[m]inor inaccuracies do not amount

to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'" *Id.* at 516-517 (quoting *Heuer* v. *Kee*, 59 P.2d 1063, 1064 (Cal. Ct. App. 1936)). "Put another way," the Court continued, "the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Id.* at 517 (quoting Robert D. Sack, *Libel, Slander and Related Problems* 138 (1st ed. 1980)). The Court made clear that these requirements are not simply "a discrete body of jurisprudence directed to" the "special case of inaccurate quotations" presented in *Masson* itself, but instead constitute part of the actual-malice standard in every case to which that standard applies. *Id.* at 516; see *ibid.* ("[W]e reject any special test of falsity for quotations.").

Indeed, outside the context of fabricated quotations, this Court has applied the actual-malice standard in a manner that allows speakers "the interpretive license that is necessary when relying on ambiguous sources." *Masson*, 501 U.S. at 519. In *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984), for example, the Court held that the actual-malice standard precluded liability for a magazine's description of certain loudspeakers as creating the impression that a sound source moved "about the room," when the loudspeakers would more accurately have been described as creating the impression that the sound source moved "along the wall." *Id.* at 511; see *id.* at 511-514. The Court reasoned that "the language chosen was 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive challenges for the writer." *Id.* at 512 (quoting *Time, Inc.* v. *Pape*, 401 U.S. 279, 290 (1971)). Although the decision in *Bose Corp.* did not itself frame the analysis as a question

of material falsity, *id.* at 511, the Court's discussion of material falsity in *Masson* summarized *Bose Corp.* as "refus[ing] to permit recovery for choice of language which, though perhaps reflecting a misconception, represented 'the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies.'" *Id.* at 519 (quoting *Bose Corp.*, 466 U.S. at 513).

2. The linguistic congruence between the First Amendment actual-malice standard and the statutory exception to ATSA immunity demonstrates Congress's intent to incorporate (and adapt as necessary) the basic framework of the actual-malice standard, including its material-falsity requirement, into the ATSA. *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989). This Court "normally assume[s] that, when Congress enacts statutes, it is aware of relevant judicial precedent." *Ryan* v. *Gonzales*, 133 S. Ct. 696, 703 (2013) (citation omitted). And "'it is a cardinal rule of statutory construction' that, when Congress employs a term of art, '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.'" *FAA* v. *Cooper*, 132 S. Ct. 1441, 1449 (2012) (quoting *Molzof* v. *United States*, 502 U.S. 301, 307 (1992)) (internal quotation marks and citation omitted).

That rule should have special force in the context of an immunity provision like the ATSA's, which relies on predictability in the application of its expansive protection to accomplish its goals. Congress designed the ATSA's immunity provision to "encourag[e] airline employees to report suspicious activities." § 125, 115 Stat. 631 (capitalization altered); see 147 Cong. Rec. 19,172 (2001) (Sen. Leahy) (explaining that the immunity provi-

sion would "improve aircraft and passenger safety by encouraging airlines and airline employees to report suspicious activities to the authorities"). Adapting a preexisting immunity standard, which afforded broad protection and came with a preexisting body of decisional law to define its scope and application, served that purpose far better than would creating a novel or ambiguous standard, the meaning of which would be uncertain and require elaboration over time. As the Court has recognized in the First Amendment context, "[u]ncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords." *Harte-Hanks Comm'ns, Inc.* v. *Connaughton*, 491 U.S. 657, 686 (1989). The same is true of statutory immunities.

3. The actual-malice standard was a natural choice as a model for ATSA immunity. This Court has analogized the protections of the actual-malice standard to an official privilege that curtails "the threat of damages suits [that] would otherwise 'inhibit the fearless, vigorous, and effective administration of policies of government and dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.'" *New York Times*, 376 U.S. at 282 (quoting *Barr* v. *Matteo*, 360 U.S. 564, 571 (1959) (plurality opinion)). In enacting the ATSA and related statutes, Congress recognized that air carriers and their employees are uniquely situated to play a critical role in the official governmental program for ensuring safety in air travel and that they accordingly need the protection of an official-type immunity. The statutory scheme enlists air carriers as the eyes and ears of aviation security, requiring them to make certain threat-related reports. See 49 U.S.C. 44905(a). And it treats every link in the air-

security chain, from members of the public and air carriers (and their employees) who report suspicious activity, to the officials who act on such reports, as deserving a comparable degree of immunity. See 6 U.S.C. 1104(a) (members of the public); 6 U.S.C. 1104(b) (officials); 49 U.S.C. 44941 (air carriers and employees).[3]

The actual-malice standard "carve[s] out an area of 'breathing space' so that protected speech is not discouraged." *Harte-Hanks Comm'ns*, 491 U.S. at 686 (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)). The "protected speech" for which Congress wanted to assure full "breathing space" in the ATSA context is the reporting to the proper authorities of information about suspicious activities relevant to possible aviation threats. See Conference Report 74 (explaining that the immunity provision "encourages and ex-

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[3] In other contexts, some courts of appeals have held that "[w]hen private parties are under a mandatory duty to supply information" to the government that is "necessary to execute governmental functions," "they are entitled to the government's official immunity." *Slotten* v. *Hoffman*, 999 F.2d 333, 335 (8th Cir. 1993); see *Becker* v. *Philco Corp.*, 372 F.2d 771, 776 (4th Cir.) ("[A]n action for libel will not lie in the circumstances against a private party fulfilling its governmentally imposed duty to inform."), cert. denied, 389 U.S. 979 (1967); see also *In re Quarles*, 158 U.S. 532, 535-536 (1895); 3 Restatement (Second) of Torts § 592A, at 257-258 (1977). Petitioner has not argued that it is entitled to absolute immunity for its report to the TSA. Accordingly, this case does not present any question regarding the possible application of absolute immunity in this context. This Court thus need not decide whether the category of "voluntary disclosure[s]" covered by 49 U.S.C. 44941(a) is broader than the disclosures made mandatory by 49 U.S.C. 44905(a); whether the disclosure in this case was required under Section 44905(a); or whether Congress superseded any applicable common-law doctrines of immunity when it enacted Section 44941's specialized immunity provision.

empts airline employees from liability for disclosing suspicious activities in response to a 'reasonably believed' threat"). Experience with multiple terrorist incidents had taught Congress that the best way to maintain air safety is to centralize responsibility for airport security in the TSA, which would "receive, assess, and distribute intelligence information." ATSA § 101(a), 115 Stat. 597; see Conference Report 54. For the TSA to be effective in that role, an air carrier must feel safe providing the TSA with information, even in marginal cases where the carrier has some doubts about the information's significance. Because the TSA has access to greater resources and an ability to connect the dots of information from different sources, it is able to recognize threats that an individual air carrier would not.

One particularly important way in which the actual-malice standard carves out breathing space is by curtailing the "self-censorship" that would result from a regime in which even true statements might expose the speaker to liability. *New York Times*, 376 U.S. at 279. That goal would have been critically important to Congress in enacting the ATSA, which affords immunity to carriers and their employees who must often make quick decisions in fluid circumstances based on incomplete information. Especially in this setting, Congress surely had no sound reason to deter threat-related reports that are materially true. To allow for liability based simply on somewhat imprecise or careless language, on exaggerations that may be due to apprehension or misperception, or on technical inaccuracies would chill air carriers' willingness to convey possible threat information that is uncertain, not fully investigated, or perhaps not susceptible to precise description. See IATA Cert. Amicus Br. 4-5. At the very least, the potential for liability

when a report is not completely accurate in every particular could lead carriers to "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." *Id.* at 6. Even then, the most carefully worded threat report could nevertheless prove vulnerable in litigation if, as in this case, the actual text of the carrier's statement is not introduced into evidence, but must instead be reconstructed from disputed secondary notes or recollections. See, *e.g.*, Pet. App. 6a (noting factual dispute about what petitioner told the TSA in this case).[4]

4. In the specialized context of ATSA immunity, the actual-malice standard's inquiry into material falsity properly focuses on materiality from the perspective of the aviation-security and law-enforcement personnel who receive the threat reports that the ATSA protects. As discussed above, in applying the actual-malice standard to allegedly libelous statements in a media publication, the material falsity of a statement turns on whether a "reasonable reader" would view the statement differently from how he would view the truth. *Masson*, 501 U.S. at 513. The analogue to a "reasonable" person reading a media publication, in the context of an ATSA-

[4] Interpreting the ATSA not to protect materially true statements could also have a chilling effect on threat reports from members of the public, who enjoy a statutory immunity similar to ATSA immunity. See 6 U.S.C. 1104(a). A member of the public, who has no affirmative duty to make threat reports and is unlikely to have access to investigative and legal resources that might help avoid potential liability, is even more likely than an air carrier to respond to a narrowing of immunity by forgoing a threat report altogether.

protected report, is a "reasonable" official receiving the report.

An analysis of whether a particular statement "would have a different effect on the mind" of such an official "from that which the * * * truth would have produced," *Masson*, 501 U.S. at 517 (citation omitted), requires an understanding of what matters to an official tasked with protecting air security. When an air carrier reports a person's suspicious activity, a reasonable official's assessment of that report does not turn on how the report portrays that person as a general matter. Rather, the reasonable official focuses on the nature of the possible threat to aviation safety that the person may pose, which is what informs the official's response to the report. See, *e.g.*, ATSA § 101(a), 115 Stat. 597 (requiring the TSA to, *inter alia*, "assess threats to transportation"); cf. *Kungys* v. *United States*, 485 U.S. 759, 770 (1988) (describing a material misrepresentation as one that "'has a natural tendency to influence, or was capable of influencing, the decision of' the decisionmaking body to which it was addressed").

To the extent that components of a statement about a possible security threat are not technically true, or are exaggerated, the question should be whether a more accurate statement would have conveyed a qualitatively different meaning to a reasonable security official considering a possible threat to aviation safety. The inquiry should focus on the overall substance of the information disclosed in light of the likely high-pressure circumstances of its conveyance, rather than on a granular, sentence-by-sentence parsing of how the report was worded. So long as the report accurately conveys "the substance" or "the gist" of the potential threat, any "[m]inor inaccuracies" would "not amount to falsity."

Masson, 501 U.S. at 517 (internal quotation marks omitted).

Application of the actual-malice standard in this context should also incorporate significant "protection for rational interpretation" by affording air carriers and their employees—and ultimately the government officials responsible for receiving and assessing information and ensuring security in air travel—the leeway "that is necessary when relying on ambiguous sources." *Masson*, 501 U.S. at 519. Reporting information relating to possible threats is an inherently speculative enterprise, which often occurs in rapidly changing circumstances. Significantly, the ATSA immunity provision does not protect only reports of actual threats, nor does it protect only reports based on any specified degree of certainty. It instead immunizes air carriers who report "*any suspicious* transaction *relevant to* a *possible* violation of law or regulation." 49 U.S.C. 44941(a) (emphasis added). Accordingly, even if an air carrier's "choice of language * * * reflect[s] a misconception" of the events it is reporting, *Masson*, 501 U.S. at 519, the immunity standard should be expansive enough to allow for the "sort of inaccuracy that is commonplace," *ibid.* (internal quotation marks omitted), in the threat-reporting context, where uncertainty, confusion, the resolution of doubt in favor of reporting, and even fear-inspired exaggeration are to be expected.

5. Respondent has not directly disputed that the ATSA immunity provision incorporates a material-falsity requirement. His discussion of that requirement, however, has reflected some misunderstanding of the proper approach.

First, respondent has suggested that an ATSA-required inquiry into falsity is unnecessary as a practi-

cal matter, because "falsity is already independently an element of every defamation claim under state law and the First Amendment." Supp. Br. 2; see *id.* at 3, 6-7; Br. in Opp. 24. That suggestion is mistaken in several respects. To begin with, a defamation claim is not the only sort of claim to which ATSA immunity might apply. The events at issue in this case, for example, led respondent to raise claims of false imprisonment and outrageous conduct as well. See Br. in Opp. 14 n.9. Furthermore, even with respect to defamation claims, the First Amendment's actual-malice standard may not always apply of its own force in cases like this. When the plaintiff is not a public figure, the actual-malice standard applies only to the extent that the plaintiff is attempting to recover presumed or punitive damages for speech on a matter of public concern. See *Hepps*, 475 U.S. at 775; *Gertz*, 418 U.S. at 348-350; see also Pet. App. 22a (noting, but not resolving, dispute about whether petitioner's statements here were on a matter of public concern). ATSA immunity, however, is not so limited.

In any event, the material-falsity inquiry in the ATSA context differs from the requirements of common-law defamation, and represents a specialized and context-specific application of the actual-malice standard that is drawn from First Amendment precedent, but adapted to this setting through its particular focus on materiality from the perspective of a reasonable air-safety official. Say, for example, an air carrier reports that someone assaulted a flight attendant, when in fact the person assaulted a ticket agent. A jury might conclude that this misstatement of criminal activity would be material from the perspective of the average listener. See 1 Rodney A. Smolla, *Law of Defamation* § 5:20, at 5-26.7 (2d ed. 2000) ("An allegation that the plaintiff embezzled

$50 from the First State Bank cannot be proved substantially true with evidence that the plaintiff embezzled $100 from the Second National Bank."); cf. 3 Restatement (Second) of Torts § 571 (1977) (observing that a plaintiff can generally get automatic damages, without particularized proof of harm, when falsely accused of "conduct constituting a criminal offense"). But it would not be material from the perspective of a reasonable air-security official, because the gist of the threat conveyed (a violent passenger) does not depend on the precise victim of the assault. Congress would not have wanted to expose air carriers to liability for such a misstatement.

Second, respondent has suggested (Supp. Br. 5) that application of the material-falsity requirement in cases like this would necessarily require "evidence in the record showing that TSA would have responded the same way" had the air carrier's statements been 100% technically accurate. But the material-falsity test in this context cannot demand a literal determination of precisely what a particular official or federal agency would have done in a counterfactual scenario. The ATSA immunity provision broadly covers reports to a number of different federal, state, or local entities, see 49 U.S.C. 44941(b), indicating that the availability of immunity should not turn on the policies of one particular entity at one particular time. Furthermore, details of the TSA's security procedures are designated as sensitive security information, protected from public disclosure by 49 C.F.R. Pts. 15 and 1520, and ATSA immunity should not be interpreted to require exploration of those procedures in private litigation.[5] The inquiry into ATSA im-

[5] Congress has provided a procedure through which a party to a civil proceeding in federal district court with "substantial need" for

munity should instead apply the ATSA actual-malice standard in a manner that focuses on whether the central import of the air carrier's statements constituted a reasonable interpretation of the facts; whether those statements could reasonably be regarded as reporting "*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," 49 U.S.C. 44941(a); and whether a reasonable official would perceive the air carrier's report as communicating a substantially different character of suspicious activity relevant to a possible threat than a completely accurate report would have.

Third, respondent has suggested (Supp. Br. 9-10) that because the TSA will react to nearly every threat report, regardless of its inaccuracies, by "sort[ing] out the truth for itself," adopting the government's approach to material-falsity would mean that "almost *no* knowingly false statement can ever be material." That criticism is misplaced. As an initial matter, the immunity afforded to encourage carriers and their employees to report suspicious activities was *intended* to be broad,

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certain sensitive security information "in the preparation of the party's case" can sometimes obtain access to such information. Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, § 525(d), 120 Stat. 1382. It is unlikely that Congress intended such information to be routinely disclosed in cases involving the ATSA (which, among other things, may take place in state court and involve presentation of evidence to juries). In this particular case, both petitioner and respondent called former federal employees to testify as expert witnesses concerning petitioner's obligation to report security incidents. See, *e.g.*, Br. in Opp. 9, 34. As the United States informed the Supreme Court of Colorado, that testimony was not authorized and was not necessarily accurate in describing TSA policy. See U.S. Colo. S. Ct. Amicus Br. 10-12.

and the exception was *intended* to be narrow, denying immunity only to "bad actors." See p. 5, *supra* (quoting 147 Cong Rec. 19,172 (2001) (Sen. Leahy)). But in addition, under the government's approach, an air carrier would still face liability if, through fabrication or excessive exaggeration, it conveyed a threat with a materially different substance about suspicious activity relevant to a possible threat to air safety than the truth would rationally support. An air carrier that, for example, knowingly or recklessly takes the mere fact of a person's apparent nationality as a license to characterize that person as a member of a terrorist organization could face civil liability for doing so. Congress had no reason to immunize a knowingly or recklessly false report that leads officials on a wild-goose chase. See Conference Report 74; 147 Cong. Rec. 19,172 (2001) (Sen. Leahy). Indeed, such a report could give rise not only to civil, but also to criminal, liability. See 18 U.S.C. 1001(a)(2) (criminalizing, *inter alia*, "willful[]" and "knowing[]" statements "in any matter within the jurisdiction of the executive" that is "materially false"); 18 U.S.C. 1038 (criminalizing "false or misleading" reports of, *inter alia*, potential air piracy or placement of an explosive on an aircraft).

B. This Court Should Vacate The Supreme Court Of Colorado's Decision

1. Applying the proper ATSA standard to the facts as recounted by the Supreme Court of Colorado, petitioner would be entitled to immunity on the ground that its statements to the TSA were not materially false.[6]

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[6] The government agrees with the Supreme Court of Colorado that "'[i]mmunity ordinarily should be decided by the court long before trial' in order to avoid the consequences of forcing officials to stand

The state supreme court appeared to accept that petitioner could truthfully have told the TSA that respondent "knew he would be terminated soon"; that respondent had "acted irrationally at the training three hours earlier and 'blew up' at test administrators"; and that respondent "was an FFDO pilot." Pet. App. 21a. According to the jury's findings, what petitioner did tell the TSA was that respondent was an "[u]nstable pilot in [the] FFDO program [who] was terminated today"; that petitioner was "concerned about [respondent's] mental stability and the whereabouts of his firearm"; and that respondent "was an FFDO who may be armed." *Id.* at 6a, 111a. For purposes of ATSA immunity, those two sets of statements were not materially different.

None of the distinctions between the statements—the technical inaccuracy about the precise date of respondent's imminent termination; the reference to someone who has "acted irrationally" and "'bl[own] up'" as "unstable" or as raising a "concern[] about his "mental stability"; and the potentially unnecessary emphasis on

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trial," Pet. App. 12a (brackets in original) (quoting *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (per curiam)), and that the ultimate question of immunity is a question of law to be decided by the court, see *id.* at 11a. If there are disputed factual questions relating to immunity, however, the government does not believe that this statute or federal law generally requires that they be resolved by the court at a pretrial hearing. Cf. *id.* at 15a. For example, if factual disputes related to an individual's entitlement to qualified immunity for alleged constitutional torts prevent the entry of summary judgment, such issues are resolved at trial. See, *e.g.*, *Scott* v. *Harris*, 550 U.S. 372, 378 (2007); see also *Masson*, 501 U.S. at 513, 521. In this case, under the standard of review suggested in *Masson*, 501 U.S. at 521-525, which Congress presumably intended to incorporate into ATSA's immunity provision, and taking the facts established at trial as the state supreme court viewed them, the inaccuracies in petitioner's statements were immaterial as a matter of law.

the ability of an FFDO to carry a weapon into an airport—exceeds the bounds of a rational interpretation of the facts. The gist of the two reports, with respect to suspicious activity relevant to a possible threat to air safety, is the same: both would inform a reasonable official of suspicious activity suggesting that someone might potentially have a gun and might potentially be in a frame of mind to use it. Congress would not have wanted to deter a report of that nature, and the ATSA immunizes an air carrier's use of the second form of words just as it would have immunized use of the first.

2. The Supreme Court of Colorado erred in concluding (Pet. App. 17a n.6) that ATSA immunity may be denied without an ATSA-specific inquiry into the material falsity of the statements at issue. Contrary to respondent's suggestion (Supp. Br. 3), nothing in the state supreme court's decision provided an adequate substitute for the material-falsity inquiry that the ATSA demands. In his brief in opposition (Br. in Opp. 24-25), respondent contended that the state supreme court "effectively undertook independent review of falsity" in concluding that the record in this case satisfied the First Amendment's version of the actual-malice standard. See Pet. App. 21a-23a. But the court's First Amendment discussion simply incorporated by reference its analysis of ATSA immunity, *id.* at 23a, which expressly disavowed any inquiry into truth or falsity, *id.* at 17a n.6.

Respondent has also pointed out (Supp. Br. 3) that the state supreme court, reviewing the jury's verdict on the state-law defamation claim, rejected contentions that the evidence was sufficient to show only "slight inaccuracies of expression" and that the jury should thus have found petitioner's statements "substantially true." Pet. App. 26a. But sufficiency-of-the-evidence review of

the jury's defamation verdict was not the functional equivalent of an inquiry into material falsity for purposes of ATSA immunity. The jury instructions on defamation did not direct the jury to evaluate material falsity under the standards (such as the reasonable-official perspective for materiality) that ATSA requires. See Jury Instrs. Nos. 8-13. Nor did the state supreme court itself apply those standards when it reviewed the jury's determinations. See Pet. App. 26a-27a.

Instead, the Supreme Court of Colorado's decision rests on the premise that the ATSA permits the imposition of liability on an air carrier even for a threat report that is materially true from the perspective of a reasonable official. See Pet. App. 17a n.6. That premise is legally erroneous. The state supreme court's reliance upon that premise requires that its decision be vacated and the case remanded for further proceedings not inconsistent with the foregoing principles.

CONCLUSION

This Court should vacate the decision of the Supreme Court of Colorado on the defamation claim and remand for further proceedings not inconsistent with the Court's opinion.

Respectfully submitted.

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