No. 12-315

In the Supreme Court of the United States

AIR WISCONSIN AIRLINES CORPORATION, PETITIONER

v.

WILLIAM L. HOEPER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597, provides a broad grant of immunity from suit for an air carrier that "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." 49 U.S.C. 44941(a). Such immunity does not apply only to reports 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 questions presented are:

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

2. Whether the First Amendment requires a reviewing court in a defamation case implicating ATSA to decide de novo whether the plaintiff proved the statements at issue were false.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the first question presented.

STATEMENT

1. a. In response to the 1988 bombing of a 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 whether to report bomb

threats to federal authorities. *Report of the President's Commission on Aviation Security and Terrorism* 49 (1990). The Commission recommended that such discretion be eliminated and that "immediate reporting of all threats to FAA, airport and public safety authorities" by carriers be required, so that public safety authorities, not carriers, would exercise "the responsibility for deciding whether and how searches should be conducted." *Ibid.*

In response to the Commission report, Congress enacted the Aviation Security Improvement Act of 1990 (1990 Act). See Pub. L. No. 101-604, 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 new legal obligation on air carriers to report threats. See § 109(a), 104 Stat. 3078 (49 U.S.C. 44905(a)). That provision states that, pursuant to federal guidelines, "an air carrier, airport operator, ticket agent, or individual employed by such an entity, receiving information * * * of a threat to civil aviation, shall promptly provide such information" to federal authorities. *Ibid.* Civil penalties may be imposed for violations of the threat reporting obligation. 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) 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);

see ATSA, Pub. L. No. 107-71, 115 Stat. 597. In enacting 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.

Conference Report 53. Congress also concluded that "the terrorist hijacking and crashes of passenger aircraft on September 11, 2001 * * * required a fundamental change in the way [the federal government] approaches the task of ensuring the safety and security of the civil air transportation system." *Ibid.*

Through ATSA, Congress made "security functions at United States airports * * * a Federal government responsibility." Conference Report 54. To that end, the legislation established the Transportation Security Administration (TSA). ATSA § 101(a), 115 Stat. 597.[1] Congress directed TSA to, among other things, "be responsible for day-to-day Federal security screening operations for passenger air transportation"; "receive, assess, and distribute intelligence information related to transportation security"; "assess threats to transportation"; and "develop policies, strategies, and plans for dealing with threats to transportation security." ATSA § 101(a), 115 Stat. 597-598.

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[1] TSA was originally part of the Department of Transportation. See ATSA § 101(a), 115 Stat. 597. In 2002, Congress transferred TSA to the newly created Department of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, § 403(2), 116 Stat. 2178.

ATSA also included a provision intended to "encourage[e] airline employees to report suspicious activities" by providing them "immunity" for such reports. § 125, 115 Stat. 631 (capitalization altered). That measure provides that

> [a]ny 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). Congress carved out a narrow exception to such immunity for "any disclosure made with actual knowledge that the disclosure was false, inaccurate, or misleading" or for "any disclosure made with reckless disregard as to the truth or falsity of that disclosure." 49 U.S.C. 44941(b). These provisions together were intended to "exempt[] airline employees from liability for disclosing suspicious activities in response to a 'reasonably believed' threat." Conference Report 74. As explained by Senator Leahy, who sponsored this provision as an amendment on the Senate floor, it was designed to encourage information disclosure while "not protect[ing] bad actors." 147 Cong. Rec. 19,172 (2001).

c. In 2007, Congress enacted a similar provision that provides immunity to members of the public for their "reports of suspected terrorist activity or suspicious

behavior" and similarly excepts only a "report that the person knew to be false or [that] was made with reckless disregard for the truth at the time that person made that report." 6 U.S.C. 1104(a) (Supp. V 2013); see Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1206, 121 Stat. 388. 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" but that, absent immunity, "lawsuits filed against members of the public who reported what they reasonably considered to be suspicious activity to appropriate personnel" created a "potential chilling effect." H.R. Conf. Rep. No. 259, 110th Cong., 1st Sess. 328-329 (2007).

2. Respondent was a pilot for petitioner from 1998 to 2004. Pet. App. 46a. He was approved by the Department of Homeland Security (DHS) as a federal flight deck officer (FFDO), so TSA had issued him a firearm as part of the federal program authorizing 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.'" *Id.* at 3a (quoting 49 U.S.C. 44921(a)).

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" it. *Id.* at 4a. Respondent "knew that he would likely lose his job if he failed this fourth test." *Ibid.*

During the fourth and final test at a training facility in Virginia, respondent "became angry with the test

administrators because he believed that [they] were deliberately sabotaging his testing." Pet. App. 4a. Mark Schuerman, one of the administrators, later testified that respondent "ended the test abruptly, raised his voice at Schuerman, and used profanity." *Ibid.* Schuerman also testified that respondent's "outburst startled him and that [Schuerman] feared for his physical safety during the confrontation." *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, Schuerman reported Hoeper's conduct to Patrick Doyle, a manager for petitioner stationed in Wisconsin. Pet. App. 5a. In particular, Schuerman told Doyle that respondent "blew up at [Schuerman]," that respondent "was 'very angry with [Schuerman],'" and that Schuerman "was 'uncomfortable' remaining at the simulator with [respondent]." *Id.* at 5a, 47a.

Doyle told another employee to book respondent on a 1:30 flight from Virginia to respondent's home in Denver, and told one of the employees involved in respondent's failed test to drive respondent to the airport. Pet. App. 47a. Respondent was unable to make the 1:30 flight, so petitioner booked him on a later one. *Id.* at 48a.

In the meantime, Doyle met with Scott Orozco, petitioner's chief pilot; Kevin LaWare, a vice president for petitioner to whom Doyle reported; and Robert Frisch, the assistant chief pilot. Pet. App. 48a. They discussed

> Doyle's conversation with Schuerman; [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; [that] at Denver International Airport [where respondent embarked on his flight to Virginia], he could have boarded without checking his weapon; whether any means existed to determine the whereabouts of his weapon; [an episode in which] one other Air Wisconsin pilot 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, LaWare decided that petitioner should contact TSA about respondent. *Id.* at 50a.

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

After Doyle's call to TSA, respondent's flight, which had been taxiing, was called back to the gate. Pet. App. 51a. TSA officers removed respondent from the plane and questioned him. *Id.* at 51a-52a. He was then released and took a flight to Denver later that day. *Id.* at 52a.

3. a. In 2005, respondent filed suit in Colorado state court against petitioner and several of its employees for defamation, intentional infliction of emotional distress,

and false imprisonment. Pet. App. 7a, 110a-115a.[2] Petitioner moved for summary judgment, arguing that it was immune from liability for its report to TSA under ATSA's immunity provision, 49 U.S.C. 44941. 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." Pet. App. 7a. The trial court subsequently denied petitioner's motion for directed verdict based on the ATSA immunity provision. *Id.* at 102a-103a.

The trial court instructed the jury on ATSA immunity and stated that it could not find for respondent on his defamation claim if it determined that petitioner was immune. Pet. App. 8a. The jury found in favor of respondent on the defamation claim. *Ibid.* In particular, it determined that Doyle made the statements quoted above, see p. 7, *supra*, found by clear and convincing evidence that they were defamatory, and concluded that petitioner made them "knowing that they were false, or so recklessly as to amount to a willful disregard for the truth." Pet. App. 8a.

The jury awarded respondent $849,625 in compensatory damages and $391,875 in punitive damages. Pet. App. 111a.[3]

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[2] The jury ruled for petitioner on the false imprisonment claim and could not reach a verdict on the claim for intentional infliction of emotional distress. Pet. 13-14 & n.2. Accordingly, only the defamation claim is at issue here.

[3] At trial, 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.

b. After the Colorado Court of Appeals affirmed, Pet. App. 44a-87a, the Colorado Supreme Court accepted discretionary review and also affirmed, *id.* at 1a-43a.

The Colorado Supreme Court concluded that the issue of ATSA immunity should have been decided by the court, not submitted to the jury. Pet. App. 9a. The court determined, however, that the error was harmless because, in its view, petitioner was not entitled to immunity. *Ibid.*; see *id.* at 15a. In undertaking that inquiry, the court ruled that it need not—and it therefore did not—determine whether Doyle's statements to TSA were actually true or false, but only whether the statements were made with reckless disregard as to their truth or falsity. *Id.* at 16a-17a & n.6.

The court acknowledged that "the events at the training may have warranted a report to TSA," but concluded that Doyle "overstated" the events that had occurred "to such a degree that they were made with 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 determined 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 determined 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.

The 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 proposition, the court stated that petitioner "would likely be immune under the ATSA" if Doyle had worded his report differently, *i.e.*, by stating that respondent "was an Air Wisconsin employee, that he knew he would be terminated soon, that he had acted irrationally at the training three hours earlier and 'blew up' at test administrators and that he was an FFDO pilot." *Ibid.* In the court's view, however, "Doyle's statements in this case * * * went well beyond these facts." *Ibid.*

"For the same reasons," the court determined that there was clear and convincing evidence of actual malice, as required under the First Amendment to support punitive damages in a defamation suit brought by a private plaintiff. Pet. App. 22a-23a. The court further held that there was sufficient evidence to support the jury's finding that Doyle's statements were false. *Id.* at 26a-27a.

Three justices dissented in part and concurred in part. Pet. App. 28a-43a. They would have held that petitioner was entitled to ATSA immunity because the statements made were substantially true. *Id.* at 29a. They also disagreed with the majority that the determination of truth or falsity was not a part of the ATSA immunity analysis. *Id.* at 29a n.2.

The dissenters noted the majority's statement that petitioner likely would have enjoyed immunity if it had worded its report to TSA differently. Pet. App. 34a. In the dissenters' view, however, the majority's preferred script "dr[ew] hair-splitting distinctions that make no difference to the analysis," *ibid.*, and "the majority's reasoning threatens to eviscerate ATSA immunity and

undermine the federal system for reporting possible threats to airline safety to the TSA." *Id.* at 37a.

DISCUSSION

The Colorado Supreme Court erred by rejecting ATSA immunity without first determining whether petitioner's disclosure to the TSA was false. Moreover, a proper falsity analysis under ATSA should include a materiality component, under which the court asks whether a fully accurate statement would have had a qualitatively different impact on the law enforcement recipient than the possibly-exaggerated or technically incorrect statement that was actually made. Applying that standard, the jury verdict in this case should not stand. The Colorado court's analysis may chill other air carriers from timely providing the government with critical information about threats to aviation security. This Court's review on the first question presented is warranted.

The Court should decline review of petitioner's second question presented, involving the First Amendment standard of review of falsity in a defamation case. This case should be resolved through proper application of the ATSA statutory immunity provision. This Court has repeatedly declined to grant review of the First Amendment question posed by petitioner, and this case is a poor vehicle for resolving it because it arises in an atypical context involving information provided confidentially to a government agency, a non-media defendant, and a specialized statutory scheme of immunity.

A. The Colorado Supreme Court Erred In Applying ATSA Immunity, And This Court's Review Is Warranted

1. ATSA bars suit against air carriers and their 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).

The text of the exemption in Section 44941(b) tracks this Court's longstanding articulation of the First Amendment "actual malice" standard, *i.e.*, the rule that bars a defamation plaintiff who is a public figure from recovering "unless he proves * * * that the defendant published the defamatory statement * * * with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280 (1964)).

Although the actual malice standard, like the standard in Section 44941(b), is articulated in terms of the speaker's mental state, it necessarily requires that the statement at issue be false. The First Amendment would bar a defamation judgment based on a true statement, even if it were uttered with reckless disregard for the truth. This rule is illustrated by this Court's analysis in *Masson*, in which the Court considered whether "the evidence suffice[d] to show that [the speakers] acted with the requisite knowledge of falsity or reckless disregard as to truth or falsity." 501 U.S. at 513. The Court explained that "[t]his inquiry in turn require[d] [it] to consider the concept of falsity" itself, for the Court could not "discuss the standards for knowledge or reckless disregard without some understanding of *the acts required for liability*," *i.e.*, whether the state-

ments in question were false. *Ibid.* (emphasis added); see *ibid.* (referring to "the requisite falsity"). Likewise, in *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767 (1986), the Court explained that although most of its "opinions to date ha[d] chiefly treated the necessary showings of fault rather than of falsity," the *New York Times* rule also required a finding of falsity before liability could be imposed. *Id.* at 775; see Cert. Reply Br. 3 (citing additional authorities).

Congress, in enacting the same language in the ATSA immunity provision, is presumed to have incorporated that same rule. See *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 813 (1989). The Colorado Supreme Court therefore erred in stating that in the "determination of immunity under the ATSA, [it] need not * * * decide whether the statements were true or false." Pet. App. 17a n.6. Indeed, in light of the critical purpose of the ATSA provision to encourage reporting of suspicious information that may bear on threats to security in air transportation and national security more broadly, Congress could not have intended to allow liability to attach for disclosures that were substantially true.

2. Although the Colorado Supreme Court disclaimed the need to determine whether petitioner's statements were true for purposes of the ATSA immunity provision, respondent contends (Br. in Opp. 24-28) that the lower court "effectively undertook independent review of falsity" (*id.* at 24) as part of its discussion of actual malice. See Pet. App. 18a-20a. That separate discussion by the Colorado Supreme Court does not serve as an adequate substitute for the examination of falsity required by the ATSA immunity provision.

In the context of the First Amendment actual malice requirement, the Court has explained that examination of whether a statement is false includes a materiality component. See *Masson*, 501 U.S. at 515-518. Because the purpose of a libel action is "to redress injury to the plaintiff's reputation by a statement that is defamatory and false," a statement that is "technical[ly] false," but in a way that is not "material" to the listener, cannot be actionable under the First Amendment. *Id.* at 514, 515-516. In other words, a "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 (internal citation omitted); see *ibid.* ("Our definition of actual malice relies upon this historical understanding.").

In the context of the specialized ATSA immunity provision, this inquiry properly focuses on materiality from the perspective of the recipient of the statement in question, namely aviation security or law enforcement personnel. Cf. *Fedorenko* v. *United States*, 449 U.S. 490, 509 (1981) ("It is * * * clear that the materiality of a false statement in a visa application must be measured in terms of its effect on the applicant's admissibility into this country."). In addition, a proper inquiry into falsity in this specialized context must take into account the inherently uncertain nature of threat reporting and the often fast-moving circumstances in which it occurs, just as Congress did in enacting the ATSA immunity provision. See 49 U.S.C. 44941(a) (providing immunity for disclosures of "*suspicious* transaction[s] *relevant* to a *possible* violation of law") (emphases added); Pet. App. 37a (dissent).

To the extent components of a statement about a possible security threat were not technically true, or were

exaggerated, the question should be whether a more accurate statement would have had a qualitatively different effect on security officials considering a possible threat to aviation security. The inquiry must focus on the overall substance of the disclosure in light of the likely time-sensitive, high-pressure circumstances of its conveyance, rather than involve a granular, sentence-by-sentence parsing of the disclosure.[4]

Had the Colorado Supreme Court followed this approach, it would have set aside the judgment against petitioner. For example, the Colorado Supreme Court stated that "the evidence establishes that Doyle's statement that [respondent] had been terminated that day was false" and said that Doyle instead should have told TSA that respondent "knew he would be terminated soon." Pet. App. 18a, 21a. But the court never suggested that its revised sentence would have produced a materially different impact on TSA and its assessment of respondent's possible state of mind. Likewise, the Colorado court did not assess whether there was a material difference from TSA's security perspective between

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

Doyle's statement that respondent was "mentally unstable" and the court's preferred formulation that respondent "had acted irrationally at the training three hours earlier and 'blew up' at test administrators." *Ibid.* Finally, the Colorado court'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.'" *Id.* at 35a (dissent). Again, there was no material difference between the two statements in the relevant sense.

The Colorado Supreme Court stated that "the overall implication of Doyle's statements is 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 back to Denver" but that, in its view, "Doyle entertained serious doubts" about that proposition. Pet. App. 19a-20a. The purpose of the ATSA immunity provision, however, is to encourage air carriers to disclose suspicious occurrences that might be relevant to aviation security (including, and perhaps particularly, in border-line cases) and to allow *TSA* to determine whether the situation is sufficiently serious to merit a response. *Id.* at 39a (dissent) ("The majority's concerns fall within the purview of the TSA's investigative authority, not within [petitioner's] responsibility.").[5]

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[5] 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. The Colorado Supreme Court's mistaken interpretation of the ATSA immunity provision merits this Court's review.

a. The Colorado court's application of ATSA does not conflict with any decision of this Court or any other appellate court. See Br. in Opp. 23. Nonetheless, certiorari is warranted because of the possible impact of the lower court's decision on aviation security. As amicus International Air Transport Association (IATA) explains (Br. 4), the Colorado court's decision in this case is the first appellate decision to apply Section 44941 to a fully developed factual record. While that circumstance would ordinarily counsel against review by this Court, there is a risk here that the lower court's path-marking decision "will be looked to by air carriers and courts throughout the United States to determine the standard to be used in applying" ATSA immunity. *Id.* at 4-5.[6]

The Colorado Supreme Court's approach "threatens to undermine the federal system for reporting flight

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3 Restatement (Second) of Torts § 592A, at 257 (1977). Petitioner has not argued that it is entitled to absolute immunity for its report to TSA. Accordingly, this case does not present any question regarding the possible application of absolute immunity in this context. In particular, if the Court granted certiorari in this case, it would not be required to 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 doctrine of absolute immunity when it enacted Section 44941's specialized immunity provision.

[6] As noted above (p. 5, *supra*), Congress has enacted a generally-applicable immunity provision governing reports of suspicious activity by members of the general public. See 6 U.S.C. 1104(a) (Supp. V 2011). Because of that provision's similar wording and purpose, courts construing it may be influenced by the Colorado Supreme Court's interpretation of Section 44941.

risks." Pet. App. 29a (dissent). "Air carriers are perhaps the most obvious source of useful threat information for TSA." *Id.* at 54a. By applying an overly narrow construction of ATSA's immunity provision—indeed one that does not even require the disclosure to have been false, much less materially false to the intended security or law enforcement recipient—the majority's analysis may chill air carriers' willingness to convey possible threat information that is uncertain, not fully investigated, or not susceptible to precise articulation. See IATA Amicus Br. 4-5. "The federal reporting system 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." Pet. App. 37a (dissent). Even if carriers are not dissuaded from making reports entirely, employees may perceive the need 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." IATA Br. 6. The prospect of substantial damages awards (as occurred here) underscores the risk of chill posed by the Colorado Supreme Court's approach.

The errors in the Colorado Supreme Court's interpretation and application of the ATSA immunity provision are sufficiently clear—especially the court's conclusion that it does not require a determination whether the disclosure was true or false—that the Court may wish to consider summary reversal on that issue and a remand of the case to the Colorado Supreme Court. In proceedings on remand, that court could then consider further issues going to materiality and whether the

disclosure was substantially true from the perspective of the recipient, TSA.

b. The United States participated in this case below in only a limited fashion, filing amicus briefs in the Colorado Court of Appeals and Supreme Court emphasizing the importance of ATSA immunity but not taking a position on its application to the facts of this case. This Court has now asked for the government's views on the questions presented in the petition for a writ of certiorari, however, and those questions go beyond the narrow subjects addressed by the United States below.

In analyzing those issues, the Solicitor General, in consultation with TSA and other interested parts of the government, has determined that the Colorado Supreme Court's opinion does raise significant concerns. In particular, although the government in its amicus brief in the Colorado Supreme Court stated (at 6-7) that immunity could be overcome only if the statement was false, that court concluded that it need not decide whether petitioner's statements "were true or false" before finding ATSA immunity inapplicable, Pet. App. 17a n.6.

In addition, we acknowledge that other aspects of the opinion have brought to the fore problematic aspects of the imposition of liability based on the report to TSA in this case upon which the United States did not focus in its prior filings. In particular, the Colorado Supreme Court concluded that there was a dispositive difference between how Doyle articulated the disclosure to TSA and the court's preferred formulation of that report. Pet. App. 21a. The dissent below properly characterized the distinctions drawn by the majority as "hair-splitting." *Id.* at 34a; see Pet. 18, 27-29 (discussing statements). The majority's conclusion that immunity can be lost because of such differences in turn sheds

light on the need to construe the immunity provision in a manner that gives broad breathing space to those making reports, that is consistent with its purpose of safeguarding the disclosure of seemingly suspicious information that TSA or law enforcement, in their informed judgment, may regard as significant, and that recognizes the critical element of materiality from the perspective of the disclosure's recipient.

B. This Court Should Deny Certiorari On The Question Whether The First Amendment Requires Independent Appellate Review Of The Jury's Factual Findings

1. In *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984), this Court held that the "ultimate fact" of whether the plaintiff proved by clear and convincing evidence that an alleged defamatory statement was made with actual malice in a defamation case is not an ordinary factual finding reviewed only for clear error under Fed. R. Civ. P. 52(a). 466 U.S. at 498 n.15, 499-500. The standard of review for such ultimate facts, the Court explained, "must be faithful to both Rule 52(a) and the rule of independent review applied in *New York Times Co.* v. *Sullivan*," which held that courts in defamation actions must review the record as a whole to ensure that the judgment does not interfere with free expression. *Id.* at 499.

The Court, accepting that Bose was a public figure for *New York Times* purposes, affirmed that in "a case governed by *New York Times Co.* v. *Sullivan*," "[a]ppellate judges * * * must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." *Bose*, 466 U.S. at 514. The Court emphasized, however, that even in such a case, an appellate court's review of the record must give "'due regard' * * * to the trial judge's opportunity to

observe the demeanor of the witnesses," *id.* at 499-500 (quoting Fed. R. Civ. P. 52(a)), and must afford "special deference" to the "trial judge's credibility determinations," *id.* at 500.

In defamation cases brought by non-public figures, however, the Constitution permits plaintiffs to establish liability by a standard of proof lower than actual malice. See *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342-344 (1974). In *Gertz*, the Court, finding "no difficulty in distinguishing among defamation plaintiffs," concluded that private plaintiffs need only show "fault" to recover compensatory damages. *Id.* at 344, 347.

2. Petitioner asks the Court to grant certiorari and hold that *Bose*'s independent review requirement applies to all "constitutional fact[s]," not just actual malice. Pet. 33 (quoting *Bose*, 466 U.S. at 509 n.27). Petitioner further suggests that because falsity is a "prerequisite to finding actual malice," appellate courts must independently review falsity as well as actual malice. *Ibid.* This case presents a poor vehicle for consideration of this question.

This is an atypical defamation action that involves a disclosure (about a non-public figure) that was channeled confidentially to a government agency and that is protected by a specialized immunity provision. The judgment may properly be reversed on that statutory basis alone, without need to consider the First Amendment.

By contrast, the question of *Bose*'s applicability to findings of falsity most often arises in common-law libel actions against media defendants (as is apparent from the amicus participation here of the Reporters Committee for Freedom of the Press). The Court should await such a case in which to decide the question. Cf. *Hepps*,

475 U.S. at 779 n.4 (reserving judgment on whether constitutional limits on defamation actions might differ between media and non-media defendants); see *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 20 n.6 (1990) (same).

This Court has denied a number of certiorari petitions involving the applicability of the *Bose* independent review requirement to findings of falsity in defamation actions. See Br. in Opp. 22 (citing examples).[7] There is no basis for a different result here.

[7] In addition, the Court has recently denied certiorari petitions seeking to extend *Bose* to findings of falsity in fraud cases. See *Pirate Investor LLC* v. *SEC*, 130 S. Ct. 3506 (2010) (No. 09-1176); *Philip Morris USA Inc.* v. *United States*, 130 S. Ct. 3501 (2010) (No. 09-976).

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented. The Court may wish to consider summary reversal of the Colorado Supreme Court's conclusion that ATSA immunity may be denied without determining whether the disclosure at issue was materially false.

Respectfully submitted.

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