No. 12 - 315

In the

Supreme Court of the United States

AIR WISCONSIN AIRLINES CORPORATION,

Petitioner,

v.

WILLIAM L. HOEPER,

Respondent.

On Writ of Certiorari to the Colorado Supreme Court

BRIEF OF AMICUS CURIAE U.S. REPRESENTATIVE JOHN L. MICA IN SUPPORT OF PETITIONER

JON M. DEVORE*
DOUGLAS S. FULLER
CARISSA D. SIEBENECK
BIRCH, HORTON, BITTNER, & CHEROT, P.C.
1155 Connecticut Ave., NW, Suite 1200
Washington, D.C. 20036
Tel: 202.659.5800
Email: jdevore@dc.bhb.com

Counsel for Amicus Curiae
U.S. Representative John L. Mica
September 4, 2013 ** Counsel of Record*

QUESTION PRESENTED

May ATSA immunity be denied without a determination that the air carrier's disclosure was materially false?

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INTEREST OF CONGRESSMAN MICA AS AMICUS CURIAE[1]

Congressman John Mica submits this Brief of Amicus Curiae as one of the principal authors of the Aviation and Transportation Security Act (ATSA), which created the Transportation Security Administration (TSA) and is the central piece of legislation at issue in this case. Congressman Mica represents the Seventh District of Florida; he is currently serving his eleventh term in the U. S. House of Representatives. He was also the Chairman of the House Transportation and Infrastructure Committee, which has jurisdiction over aviation security matters in the U.S. House of Representatives, and which considered and passed the ATSA.[2]

Since before the events of September 11, 2001, Congressman Mica has been in a position of leadership on Congressional matters related to aviation and aviation security. From January 2001 through January 2007, he served as Chairman of the

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[1] The parties have consented to the filing of this brief. On July 31, 2013, Counsel for the Respondent submitted a blanket consent letter to the Clerk of the Court. The letter provides Respondent's consent to the filing of amicus briefs in support of any party or in support of no party in this matter. Counsel for the Petitioner filed a blanket consent letter on August 7, 2013. Pursuant to Rule 37.6, Amicus Curiae states that no counsel for a party authored this brief in whole or in part. No person or entity other than amicus and his counsel made a monetary contribution to the preparation or submission of the brief.

[2] ATSA, Pub. L. No. 107-71, 115 Stat. 597 (2001).

Aviation Subcommittee of the House Transportation and Infrastructure Committee. From January 2007 through January 2011, he was the Ranking Republican Member on the House Transportation and Infrastructure Committee. From January 2011 to January 2013, Congressman Mica served as Chairman of the House Transportation and Infrastructure Committee. He remains a senior member of the Committee. These positions gave Chairman Mica a leadership role in the Congressional debate over the nation's response to the terrorist attacks on September 11, 2001, aviation security generally, and the passage of the ATSA, which is at issue in this case.

As a result of the terrorist attacks on September 11, 2001, in which aircrafts were hijacked and nearly 3,000 innocent civilians were murdered, Congress decided that the swift flow of potential threat information to the government was of critical importance. Congressman Mica and other members of Congress recognized that those on the front lines of the aviation industry were uniquely positioned to share information about potential threats that was vital to protecting the country from another attack. They also realized that often it was airlines, airports, and other regulated entities that were in the best position to file suspicious incident reports, because they interacted most directly with air travelers.

To ensure aviation security, Congress decided it was vital that TSA gain immediate access to reports of suspicious and possibly threatening activities. Immediate access to this information would allow

TSA to assess whether the threat was real or not, and would provide the opportunity to delay, intercept, mitigate or avert a potential threat. While TSA took over some aspects of aviation security directly, Congress sought to make airlines and airports partners in securing the aviation domain.

The Federal legislation enacted by Chairman Mica and his colleagues provided a variety of incentives to encourage information-sharing from the aviation industry. Under federal statutes that were amended by the ATSA, aviation industry personnel are **required** to report promptly to TSA information regarding any and all potential threats. 49 U.S.C. § 44905(a). Congress was also aware that concerns of aviation industry personnel regarding potential litigation could cause unnecessary delays—delays that could mean the difference between success or failure in stopping a deadly attack. Thus, to ensure protection from civil liability, and thus incentivize timely reporting, the ATSA also contains two provisions providing immunity to regulated entities that make reports of suspicious activities and to individuals that thwart criminal violence or air piracy (§§ 125 and 144, respectively). Pub. L. No. 107-71, 115 Stat. 597 (2001).

U.S. Senator Patrick Leahy, another important contributor to the ATSA, sponsored the amendment that added an immunity clause to the Act. He went on the record stating that the amendment's purpose was to "improve aircraft and passenger safety by encouraging airlines and airline employees to report suspicious activities to the proper authorities." 147

Cong. Rec. S10432, S10439-40 (Oct. 10, 2001). Senator Leahy described the purpose of the exceptions to the immunity clause:

> "This civil immunity would not apply to any disclosure made with actual knowledge that the disclosure was false, inaccurate or misleading or any disclosure made with reckless disregard as to its truth or falsity. In other words, this amendment **would not protect bad actors**."

Id. at S10440 (emphasis added). In other words, good faith actors should be protected by the provision, while the exceptions ensure that bad actors are not. *See also*, *Hansen v. Delta Airlines*, No. 02 C 7651, 2004 WL 524686, at *8-*10 (N.D. Ill. Mar. 17, 2004) (summarizing the opposing arguments as to whether an airline employee was acting in good faith as one factor in the court's consideration as to whether the air carrier immunity provision of 49 U.S.C. § 44902(b) applied in deciding a motion to dismiss).

In approving the immunity clause, Congress' intent was to encourage swift reporting by airlines and their employees of suspicious activity allowing TSA to ascertain the level and validity of the potential threat as well as time to thwart any actual threat.

It is the strong belief of the Amicus Curiae that the verdict in *Air Wisconsin Airlines Corp. v. Hoeper,*

No. 09SC1050, 2012 WL 907764 (Colo. Mar. 19, 2012), undercuts the application of the legal immunities provided in ATSA and frustrates both the general purpose of the ATSA and Congressional intent in passing the Act. As Congressman Mica noted four years ago in his letter to TSA Administrator Kip Hawley, "I am concerned that this verdict could interfere with TSA's ability to obtain immediate reports of suspicious incidents and cost precious time needed to investigate and respond to potential terrorist acts." Letter from John L. Mica, Ranking Republican Member, U.S. House of Representatives, Committee on Transportation and Infrastructure, to Kip Hawley, Administrator, Transportation Security Administration (Jul. 25, 2008). It would be impractical and potentially catastrophic "if TSA had to wait while regulated parties asked their attorneys to review suspicious incident reports before submitting them to the TSA. Such a delay in reporting could make the difference between life and death for the traveling public." *Id.*

It is for this reason that Congress included broad immunity provisions to enable these entities to report information regarding suspicious activities quickly, allowing TSA, not the airline, to assess the validity of, investigate, and respond to the threat.

To encourage swift reporting of information for TSA investigations, Congress intended this immunity to apply to instances when the reporting entity did not know for certain whether the threat was in fact real, as long as the report was made in good faith.

Because Congressman Mica has singularly valuable insight into how ATSA came about, how and why its provisions were drafted, and what the Act was designed to accomplish for the newly created TSA, members of the aviation industry, and the traveling public, his views will be of particular assistance in the Court's consideration of the issue of whether Congress intended the Act to provide immunity for regulated entities in situations such as that at issue in *Hoeper*, where an air carrier's disclosure was made in good faith and true in all material respects.

SUMMARY OF THE ARGUMENT

The purposes of the ATSA will be undermined unless the Supreme Court (1) holds that ATSA immunity may not be denied without a determination that the air carrier's disclosure was materially false, and (2) reverses the Colorado Supreme Court decision to find that Air Wisconsin's actions are in fact covered by the immunity clause of the ATSA. By contrast, if courts were permitted to deny ATSA immunity without determining whether the air carrier's disclosure was materially false, this interpretation would lead to an absurd and dangerous result that directly contradicts the purpose of the Immunity Clause, the purpose of the statute as a whole, and Congress' intent in passing the statute. In addition, such an interpretation would have a significant chilling effect on the aviation industry's willingness to report information regarding potential threats and suspicious activities as quickly as possible. As result, critical

information-sharing may be delayed or withheld entirely for fear of civil liability. This chilling effect would defeat one of the principal goals of the ATSA and post-9/11 legislation generally: timely information-sharing. Such an interpretation is not reasonable in light of the presence of the Immunity Clause, the ATASA as a whole, and legislative history and intent.

For long-held and non-controversial reasons, courts generally avoid statutory interpretations that lead to absurd results. *See, e.g., United States v. Granderson*, 511 U.S. 39, 47 n.5 (1994) (dismissing an interpretation said to lead to an absurd result); *Public Citizen v. Department of Justice*, 491 U.S. 440, 454 (1989) ("[w]here the literal reading of a statutory term would compel 'an odd result,' . . . we must search for other evidence of congressional intent to lend the term its proper scope").

Thus, to avoid an absurd and dangerous result in this case and in future cases construing the ATSA Immunity Clause, the Court should find that ATSA immunity may not be denied without a determination that the air carrier's disclosure was materially false. Truthful reports cannot be made in bad faith, and thus, cannot be exempted from the ATSA Immunity Clause. Furthermore, truthful statements are not actionable grounds for defamation.

As the legislation, immunity clause, and legislative history make clear, the purpose of the ATSA was to strengthen the security of air

transportation in the wake of the attacks on September 11, 2001, by many methods, including by (1) federalizing investigation of suspicious activities regarding potential threats to civil aviation, and (2) encouraging airlines and their employees to report suspicious activities to TSA immediately. To encourage the airlines and employees to disclose potential threat information, Congress inserted the immunity clause to ensure that the reports made in good faith would not subject the reporters to liability. The clause, along with other policies, favors over-reporting instead of under-reporting. Air Wisconsin's actions are covered by the immunity clause and the exceptions do not apply. Allowing this verdict to stand would have a chilling effect on the airline industry's willingness and timeliness in reporting suspicious activities, which would thwart the purposes of the ATSA and endanger national security. The importance of this case cannot be overstated, and Congressman Mica urges the Court to reverse the decision of the Colorado Supreme Court.

The Court should reverse the decision of the Colorado Supreme Court and find that Air Wisconsin's disclosures were not materially false and thus were not exempted from the ATSA Immunity Clause. Air Wisconsin did what they were obligated to do under federal law 49 U.S.C. 44905(a), under TSA's "when in doubt report" guidance, and as responsible citizens: promptly report suspicious activity regarding a potential threat to aviation security. This type of information reporting is

exactly what Congress sought to incentivize and protect with the immunities clause in the ATSA.

ARGUMENT

A. Courts must determine whether an air carrier's disclosure was materially false prior to denying ATSA immunity in order to avoid an absurd result that directly contradicts the purpose of the Immunity Clause, the purpose of the ATSA as a whole, and Congress' intent in passing the ATSA.

The ATSA was the work product of Congressman Mica and other Members of the House of Representatives and the Senate, and was designed to strengthen the security of air transportation in the wake of the terrorist attacks on September 11, 2001. As one of the principal drafters and sponsors of the ATSA, Congressman Mica is an authoritative source regarding the legislative purpose and history of the ATSA.

1. General Purpose of the ATSA.

To interpret and apply the Immunity Clause properly, it is necessary to consider the purpose and context of ATSA as a whole.

> "Statutory construction…is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme —

> because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."

United Savings Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (citations omitted).

The primary objective of statutory construction is to effectuate statutory purpose. *SEC v. Joiner*, 320 U.S. 344, 350-51 (1943) ("However well these rules [of statutory construction] may serve at times to decipher legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.").

The purpose of the ATSA was to strengthen the security of air transportation in the wake of 9/11. The Act employed multiple methods to accomplish this goal, such as creating the Transportation Security Administration, federalizing the investigation of potential threats to civil aviation, and encouraging members of the airline industry to report information regarding potential threats. One of the primary reasons that TSA was created was to have one federal agency in charge of aviation security—an agency that could connect the dots

regarding potential threats to aviation security and that had the authority and means to intercept those potential threats in a timely fashion.

This legislation is vitally important to the security of the traveling public, because it encourages timely reporting of potential threat information. The Immunity Clause at issue in this case (and discussed in subsection (A)(2) below), is a critical affirmative protection that Congress included, not only to make reporting of potential threat information acceptable, but to *encourage* reporting. "Our intent was to encourage self reporting of suspicious transactions by airlines and their employees . . ." Letter from John L. Mica, Ranking Republican Member, U.S. House of Representatives, Committee on Transportation and Infrastructure to Roger Cohen, President, Regional Airline Association (Dec. 5, 2008) (App. to Pet. Cert. 118a).

Legislative Purpose & History. Legislative history is also instructive in interpreting and applying the ATSA's Immunity Clause. The legislative history illustrates that one of the primary goals of the Act was information-sharing to strengthen aviation security.

In the ATSA Conference Committee Report, Congress highlighted the importance of this legislation, and of information-sharing, to aviation security:

> "The conferees recognize 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. The conferees further note the terrorist hijacking and crashes of passenger aircraft on September 11, 2001, which converted civil aircraft into guided bombs for strikes against the United States, required a fundamental change in the way it approaches the task of ensuring the safety and security of the civil air transportation system. The Conferees expect that security functions at United States airports should become a Federal government responsibility . . . **The Conferees also noted that the effectiveness of existing security measures . . . is currently impaired because of the inaccessibility of, or the failure to share information . . .**"

H.R. Rep. No. 107-296, at 53-54 (2001) (Conf. Rep.), reprinted in 2002 U.S.C.C.A.N. 589, 590 (hereinafter "H.R. Conf. Rep") (emphasis added).

Thus, the legislative history makes clear that one purpose of the ATSA was to remedy this "failure to share information." The Immunity Clause (discussed in more detail below) is critical to effectuating this remedy. This information suggests that the Immunity Clause should be broadly

interpreted and the exceptions should be narrowly applied to ensure that those reporting threat information in good faith are protected from civil liability. Construing the Immunity Clause, as the lower courts have done, in a narrow and impractical way that will encourage delay, reflection, and review prior to disclosure would frustrate this clear Congressional intent. It would be absurd to conclude that Congress intended this result, and, indeed, Chairman Mica assures the Court that they did not.

Courts Avoid Statutory Interpretations with Absurd Results. For long-held and non-controversial reasons, courts generally avoid statutory interpretations that lead to absurd results. *See, e.g., United States v. Granderson*, 511 U.S. at 47 n.5 (dismissing an interpretation said to lead to an absurd result); *Dewsnup v. Timm*, 502 U.S. 410, 427 (1992) (Scalia, J., dissenting) ("[i]f possible, we should avoid construing the statute in a way that produces such absurd results"); *Public Citizen v. U.S. Department of Justice*, 491 U.S. at 454 ("[w]here the literal reading of a statutory term would compel 'an odd result,' . . . we must search for other evidence of congressional intent to lend the term its proper scope"); *U.S. v. Kirby*, 74 U.S. (7 Wall.) 482, 486 (1869) (finding that the prohibition on obstructing mail does not apply to local sheriff's arrest of mail carrier on a murder charge; "[g]eneral terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence").

Types of Threats. In passing the ATSA and creating TSA, Congress was concerned not only with

threats posed by foreign terrorists, but also domestic threats, including those that may be posed by disgruntled pilots. Although the vast majority of aviation employees are conscientious professionals dedicated to the safety and comfort of the traveling public, an unstable aviation employee may pose a unique insider threat due to an insider's skill sets and access to planes, baggage, and passengers. History provides unfortunate examples of disgruntled pilots and other airline industry employees crashing or attempting to crash planes.[3] In some cases, passengers and crew members have been able to prevent disaster, but in others, disgruntled airline employees have killed and seriously injured innocent people.[4] In reporting

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[3] In 1999, Relief First Officer Gameel Al-Batouti crashed EgyptAir Flight 990 into the Atlantic Ocean killing all 217 people on board; possible motives included the fact that Al-Batouti had been recently demoted by an EgyptAir executive who was also on the plane. See Nat'l Transp. Safety Bd., PB2002-910401, Aircraft Accident Brief: EgyptAir Flight 990 (1999), available at http://www.ntsb.gov/doclib/reports/2002/-AAB0201.pdf; Matthew L. Wald, *EgyptAir Pilot Sought Revenge By Crashing, Co-Worker Said*, N.Y. Times, Mar. 16, 2002, at A11.

[4] In 1987, David Burke, a recently fired employee of USAir, crashed Pacific Southwest Airlines (PSA) Flight 1771 killing all 43 people on board, including Burke's former supervisor. *See* Stephen Braun & Ronald J. Ostrow, *Gun-Toting Fired Employee Linked to PSA Plane Crash; Ex-Boss Was Also on Flight*, L.A. Times, Dec. 8, 1987, at 1. In another example in April 1994, Auburn Calloway, a FedEx employee facing possible discharge, boarded a flight as a "jump-seat" passenger; he intended to kill the crew using hammers while in the air and then crash the airplane, hoping the crash would be considered an accident to enable his family to collect on a $250,000 life

potential threats to aviation security, pilots and other employees cannot and must not be ruled out.

2. Consistent with the overall purpose of the ATSA, Congress included an Immunity Clause that protects airline industry reports of suspicious activities to further encourage reporting of potential threat information.

The immunity provision was added to the ATSA to reinforce the overall goals of the Act. The protection from liability offered by this provision was designed to provide further encouragement for reporting timely information regarding potential threats to aviation security.

Senator Patrick Leahy was the sponsor of the amendment to the ATSA (called the Aviation Security Act in the Senate) that contained the immunity clause. He went on the record when the bill was under consideration by the Senate stating that the amendment's purpose was to "improve aircraft and passenger safety by encouraging airlines and airline employees to report suspicious activities to the proper authorities." 147 Cong. Rec. S10432, S10440 (Oct. 10, 2001).

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insurance policy. The attack was thwarted by the crew, although they sustained severe, permanently disabling injuries. *"4 Injured as Crew on Cargo Jet Fights Off Attempted Hijacking*," N.Y. Times, Apr. 8, 1994, at A12. *See also United States v. Calloway*, 116 F.3d 1129, 1131 (6th Cir. 1997), *cert. denied* 522 U.S. 925 (1997).

The ATSA Immunity Provision protects good faith reports. Most importantly for this case, Senator Leahy went on to describe for his Congressional colleagues the purpose of the exceptions to the immunity clause. He noted that "[t]his civil immunity would not apply to any disclosure made with actual knowledge that the disclosure was false, inaccurate or misleading or any disclosure made with reckless disregard as to its truth or falsity. In other words, this amendment would not protect *bad actors*." *Id.* at S10440 (emphasis added). "This testimony suggests that Congress did not intend to shield airlines from civil liability for disclosures made in bad faith." *Hansen*, 2004 WL 524686, at *8, n.9.

Truthful reports cannot be made in bad faith and, thus, cannot be exempted from the immunity provision. Judge Allison H. Eid, who wrote the dissenting opinion and was joined by two other Colorado Supreme Court Justices, emphasized this point in her dissent. *Air Wisconsin Airlines Corp.,* 2012 WL 907764, at *16, n.2 (Eid, J., dissenting). "Hoeper's defamation claim cannot succeed because Air Wisconsin's statements were true and therefore not actionable as defamation." *Id.*, (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774–75 (1986); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). The ATSA incorporates the *New York Times* standard that substantial truth is an absolute defense. *See* Pet. Br. 21-27. *See also, Garrison v. Louisiana*, 379 U.S. 64, 78 (1964) (Under *NY Times* standard, the "truth may not be the subject of either civil or criminal sanctions.").

This immunity provision, like all legislation, should be read in context of other laws and regulations that had a direct bearing on the situation.[5]

The petitioner points to another similar immunity provision of the United States Code, which "grants '[i]mmunity for reports of suspected terrorist activity or suspicious behavior,' 6 U.S.C § 1104(a), and, in language paralleling the ATSA, does not 'apply to 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.' *Id.* § 1104(a)(2)." Pet. Cert. at 24, n.8. The text of the provision provides that it is only aimed at "[f]alse reports," not truthful ones. Congressman Mica agrees with the petitioner's contention that "because the ATSA's immunity provision is substantively identical, it should be read the same way," *id.*, especially in light of Sen. Leahy's description that the provision would not protect "bad actors." 147 Cong. Rec. at S10440. *See also*, *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 738-39 (1989) (Scalia, J., concurring in part and concurring in the judgment) (It is a "rudimentary principle[] of construction that…where text permits, statutes dealing with similar subjects should be interpreted harmoniously.").

Sen. Leahy's contemporaneous remarks were central to the consideration of the amendment, and

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[5] *See Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1990).

he conveyed the gravity of the provision to enable its successful inclusion in the negotiated conference version of the ATSA. His remarks are critical legislative history showing that Congress intended the exceptions to be narrowly construed, denying immunity coverage only to those reports made in bad faith. Congress clearly intended to cover airline and employee reports that were made in good faith and were materially true. What is vital to any threat reporting is that the reporter shares the information that he believes to be true, and that the report is made in a timely fashion. It is up to TSA and other government authorities to investigate the potential threat and determine whether and how to respond to that potential threat.

The statute and TSA protocol also expressly mandate that airlines "promptly" report suspicious activity to TSA and do so even "when in doubt." 49 U.S.C. § 44905(a); *see*, U.S. Br. 2 (stating "air carriers are encouraged and required to promptly report relevant threat information to TSA"). *See also*, U.S. Br. 6 (discussing non-public sensitive security information procedures that "require that an aircraft operator—like Air Wisconsin—immediately report to TSA all threat information that might affect the security of air transportation.") As the U.S. Brief noted, reports are often by their nature based on imperfect information, and the ATSA even shields tentative transmissions of "possible violations" and "threats" from liability, 49 U.S.C. § 44941(a).

The purpose and context of the immunity clause and the ATSA should be considered in applying the immunity provision. Cases involving immunity under the ATSA must, therefore, balance an individual's interest in his reputation against both the aviation industry members' free speech and national security—specifically, the security of the traveling public. These interests and the language of the clause suggest a broad application of immunity and a very narrow application of its exceptions.

Indeed, the Colorado Supreme Court's majority adopted this approach in deciding that the ATSA's Immunity Clause conferred immunity from suit, not merely immunity from damages:

> "Given the importance to our national security of the threat disclosure encouraged by the ATSA and the unique position of air carriers to obtain information about those threats, we must conclude that Congress intended to confer upon air carriers the greatest possible degree of protection by enacting the immunity provision of the ATSA."

Air Wisconsin Airlines Corp., 2012 WL 907764, at *5.

Congress is presumed to have incorporated the materiality requirement. Congressman Mica agrees with United States that the Colorado Supreme Court erred in construing and applying the ATSA Immunity Clause. *See* U.S. Br.

at 11-15.[6] This Court has stated that it is a "cardinal rule of statutory construction" that when Congress adopts a common-law standard it presumptively "knows and adopts the cluster of ideas" associated with it. *FAA v. Cooper*, 132 S. Ct. 1441, 1449 (2012).[7] The text of the exemption in 49 U.S.C. 44941(b) tracks this Court's longstanding articulation of the First Amendment "actual malice" standard. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (citing *New York Times Co.*, 376 U.S. at 280).

"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." Amicus Br. of United States at 12. The *New York Times* rule requires a finding of falsity before liability can be imposed. *Philadelphia Newspapers, Inc.*, 475 U.S.

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[6] See also Yule Kim, Cong. Research Serv., 97-589, Statutory Interpretation: General Principles and Recent Trends (2008) ("CRS Report 97-589") ("when Congress employs legal terms of art, it normally adopts the meanings associated with those terms").

[7] See also, *Midlantic Nat'l Bank v. New Jersey Dep't of Envt'l Protection*, 474 U.S. 494, 501 (1986) (The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."); CRS Report 97-589 at 18 ("a commonly invoked presumption is that Congress does not intend to change judge-made law").

767 (1986). First Amendment protections also apply to those making aviation threat reports to TSA. Thus, falsity must be determined in order to determine whether immunity can constitutionally be denied under the ATSA.

Congress intended to provide broad immunity to encourage reporting of potential threat information. In order to deny that broad immunity, Congress is presumed to have incorporated the rule that a finding of falsity is required before liability can be imposed. Furthermore, as the Court explained in *Masson*, an examination of whether a statement is false includes a materiality component. *Masson*, 501 U.S. at 515-18. The purpose of a libel action is "to redress injury to the plaintiff's reputation by a statement that is defamatory and false," thus, 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 514-16 *cited by* (U.S. Br. at 14). "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." *Masson*, 501 U.S. at 517.

Congressman Mica agrees with the U.S. that:

> "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…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."

U.S. Br. at 14 (citations omitted).

3. Allowing this verdict to stand, including allowing courts to deny ATSA immunity without a determination as to whether the air carrier's disclosure was materially false, would have a dangerous chilling effect on the airline industry's willingness and timeliness in reporting potential threat information. This would undermine the purposes of the immunity provision and entire act as well as unnecessarily weaken U.S. national security.

Congressman Mica became concerned about the potential ramifications of this case several years ago. Upon learning of the case, he sent a letter to TSA Administrator Kip Hawley on July 25, 2008, notifying him of the case and voicing his concern that the case might "put into question the application of the legal immunities provided in the ATSA." Letter from John L. Mica, Ranking Republican Member, U.S. House of Representatives, Comm. on Transp. and Infrastructure to Kip

Hawley, Administrator, TSA (Jul. 25, 2008). Congressman Mica continued that he was "concerned that this verdict could interfere with TSA's ability to [obtain] immediate reports of suspicious incidents and cost precious time needed to investigate and respond to potential terrorist acts." *Id.*

In addition to the concerns expressed by the petitioner regarding the potential chilling effect, see Pet. Cert. at 35-38, the Regional Airline Association filed an amicus brief on behalf of its member airlines emphasizing that upholding the verdict would "have a chilling effect o[n] future reports of suspicious incidents and thereby adversely affect passenger and aviation safety." Amicus Curiae Br. of the Reg'l Airline Ass'n 9, 13-15 (Ct. App. Dec. 19, 2008).

If the lower court ruling were to stand, Airlines would be concerned about being held liable for reporting similar imperfect information. They might wait to consult with attorneys before making reports, wasting valuable time for the government to investigate and act to prevent disaster.

> "Imagine if TSA had to wait while regulated parties asked their attorneys to review suspicious incident reports before submitting them to the TSA. Such a delay in reporting could make the difference between life and death for the traveling public."

Letter from John L. Mica, Ranking Republican Member, U.S. House of Representatives, Committee

on Transportation and Infrastructure to Roger Cohen, President, Regional Airline Association (Dec. 5, 2008).

Judge Eid of the Colorado Supreme Court also voiced her concerns about the chilling effect and negative repercussions on national aviation security; she questioned "the majority's troubling rationale, which I fear may threaten to undermine the federal system for reporting flight risks." *Air Wisconsin Airlines Corp.,* 2012 WL 907764, at *16 (Eid, J., dissenting). Eid expressed concerns that the majority's reasoning required too much from airlines to be at liberty to make a suspicious activity report:

> "The majority gives assurances that its 'conclusion does not require [the airline] to be sure that Hoeper actually posed a threat.' Maj. Op. at ¶ 36. But its reasoning belies this assertion, as it repeatedly cites grounds for its decision that are inconsistent with airline safety protocols . . . The majority's concerns fall within the purview of the TSA's investigative authority, not within Air Wisconsin's responsibility."

Id. at *15.

> "According to the TSA official who testified at trial, 'we [the TSA] wanted to know about suspicious incidents' from the airlines, but 'we did not want to have the carriers . . . doing the investigation, the assessment of . . . potential security matters that came to their attention.'"

Id.

Absurd Result. Employing the reasoning of this verdict could lead to an absurd, impractical, and potentially disastrous result: airline industry members with information regarding a potential threat would be required to validate the information, assess the threat, and run its disclosure by the corporate legal department before government investigative authorities are ever notified of a potential threat. This was certainly not the threshold for coverage by the Immunity Clause that was contemplated by Congressman Mica and his fellow Congressional authors of the ATSA. The purpose of this legislation and of the Immunity Clause is to encourage the immediate reporting of potential threats to aviation and national security. In addition, Congress did not intend that immunity would be denied for reports that were truthful in all material respects.

Courts generally avoid statutory interpretations that lead to absurd results. *See, e.g., United States v. Granderson*, 511 U.S. at 47 n.5 (dismissing an interpretation said to lead to an absurd result); *Dewsnup*, 502 U.S. at 427 (Scalia, J., dissenting) ("[i]f possible, we should avoid construing the statute

in a way that produces such absurd results"); *Public Citizen v. U.S. Department of Justice*, 491 U.S. at 454 ("[w]here the literal reading of a statutory term would compel 'an odd result,' . . . we must search for other evidence of congressional intent to lend the term its proper scope"); *U.S. v. Kirby*, 74 U.S. (7 Wall.) at 486 (finding that the prohibition on obstructing mail does not apply to local sheriff's arrest of mail carrier on a murder charge; "[g]eneral terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence").

If courts were permitted to deny ATSA immunity without determining whether the air carrier's disclosure was materially false, this interpretation would lead to an absurd result that directly contradicts the purpose of the Immunity Clause, the purpose of the statute as a whole, and Congress' intent in passing the statute. That statutory interpretation, which would be validated if the verdict in the case is upheld, would have a significant chilling effect on the aviation industry's willingness to quickly report information regarding potential threats and suspicious activities. As result, critical information-sharing may be delayed or withheld entirely for fear of civil liability. This chilling effect would defeat one of the principle goals of the ATSA and post-9/11 legislation generally: information-sharing. By passing the ATSA and creating the TSA, Congress specifically federalized aviation security and investigation of aviation security threats. This case's application of the Immunity Clause will cause the immunity provision

to have the opposite effect: undermining information gathering, thwarting the intent of Congress in passing the ATSA, and therefore, undermining U.S. national security. *See United Savings Ass'n of Texas*, 484 U.S. at 371 (describing what is often referred to as the "whole act rule" where statutory construction is viewed as "a holistic endeavor," and "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme.")

Such an interpretation is not reasonable in light of the presence of the Immunity Clause, the ATSA as a whole, and legislative history and intent.

Thus, to avoid an absurd and dangerous result in this case and in future cases construing the ATSA Immunity Clause, the Court should find that ATSA immunity may not be denied without a determination that the air carrier's disclosure was materially false.

B. Air Wisconsin's Disclosures are covered by the Immunity Clause, and the clause's exceptions do not apply.

Air Wisconsin's actions are one example of reporting actions that must be covered by the immunity clause in order for the ATSA to accomplish its goals of air security, information and intelligence collection, and suspicious activity reporting.

1. Air Wisconsin was obligated to report suspicious activities, including any information regarding potential threats to aviation security.

Air Wisconsin's responsibility was to report any information they had regarding a potential threat to aviation security. Before reporting what it knew to TSA, Air Wisconsin was not required to investigate that threat or determine the threat's truth or falsity.

When in Doubt, Report! As mentioned above, the ATSA immunity provision was included to encourage the aviation industry to report potential threat information. Congress favored over-reporting compared to under-reporting. However, in practice, many potential threats went unreported. "TSA became concerned that air carriers were underreporting threat information . . . As a result of this concern, the TSA informed air carriers . . . that, when in doubt, they should report . . . Finally, in November 2004, the TSA implemented a mandatory security directive that required air carriers to report 'suspicious incidents' to the TSOC [Transportation Security Operations Center]." Regional Airline Ass'n (RAA) Amicus Br. at 11, (citing the trial testimony of Thomas Blank, former TSA Acting Deputy Administrator).

Judge Eid also stated that the "when in doubt, report" policy should be taken into consideration in construing the Immunity Clause. *Air Wisconsin Airlines Corp.,* 2012 WL 907764, at *14 (Eid, J., dissenting). "The majority's reasoning turns the

TSA's 'when in doubt, report' policy on its head; in other words, if there is doubt, a report may lead to a hefty defamation verdict." *Id.*

In addition to being a relevant policy, the "when in doubt, report" policy provides another finger on the scale for the petitioner (and other similarly situated defendants), balancing the interests of Mr. Hoeper's reputation against the U.S. interests in national aviation security the customary free speech rights of Air Wisconsin. "TSA issued a security directive *requiring* all airlines to report suspicious activities to the TSA. This directive was part of a fundamental shift in airline security in the wake of 9/11. Prior to 9/11, the airlines were responsible for assessing and investigating possible threats to airline security. After 9/11, the TSA assumed responsibility for such assessment and investigation." *Id.* (emphasis added).

Unlike most defamation cases, where the only risk is to someone's reputation, here there is a legal impetus to compel reporting. That mandate exists because the risk in aviation security is to the lives of the traveling public. In addition, the information is reported to law enforcement and national security agencies, which are the entities that are authorized to assess and potentially act to thwart threats to national security.

2. Reports made by Air Wisconsin were true, and, thus, they could not have been made in bad faith.

Air Wisconsin's report was true. While the Colorado Supreme Court majority takes issue with minute details of the report (as it was re-reported by TSA internally), there were no materially false or even misleading statements in Air Wisconsin's report.

The material facts reported were that (1) Hoeper failed a test that he knew would result in his immediate termination, (2) he was extremely upset and exhibited irrational behavior, (3) he was a designated Federal Flight Deck Officer, so he may or may not have been armed, and (4) he was headed to the airport to catch a flight. These facts are all true. *See* Pet. Cert. at 13, 27-29.

Whether Hoeper's termination had already happened or was about to happen was not material. He knew he was to be terminated, and blamed the airline, and that made him very upset. *See e.g.*, Pet. Cert. at 12.

The Colorado Supreme Court minority agreed.

> "Because I would find that the statements made by Air Wisconsin were substantially true, I would find that they could not have been made with actual knowledge of, or reckless disregard toward, falsity."

Air Wisconsin Airlines Corp., 2012 WL 907764, at n.8 (Eid, J., dissenting).

CONCLUSION

The Court should reverse the decision of the Colorado Supreme Court and find that (1) the state court erred by denying ATSA immunity without first determining whether the air carrier's disclosure was materially false; (2) Air Wisconsin's disclosures were not materially false; and (3) thus, Air Wisconsin's disclosures are covered by the Immunity Clause and the exceptions to the Immunity Clause did not apply. To find otherwise, would yield a chilling effect on the aviation industry's willingness and timeliness to report potential threats, resulting in an absurd and dangerous result that frustrates the clear intent of Congress.

Respectfully submitted,

JON M. DEVORE*
DOUGLAS S. FULLER
CARISSA D. SIEBENECK
BIRCH, HORTON, BITTNER, & CHEROT, P.C.
1155 Connecticut Ave., NW, Suite 1200
Washington, D.C. 20036
Tel: 202-659-5800
Email: jdevore@dc.bhb.com

Counsel for Amicus Curiae Congressman John Mica

September 4, 2013 * *Counsel of Record*