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

REPLY BRIEF OF PETITIONER

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November 25, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—continued

REPLY BRIEF

Not even Hoeper attempts to defend the Colorado Supreme Court's decision. Instead, he pretends the court issued a different decision, one that did not reach the question presented, and he asserts Air Wisconsin forfeited its arguments by failing to raise them below. His approach is misdirected for three reasons.

First, the Colorado Supreme Court most certainly did address the question presented, holding: "In our determination of immunity under the ATSA, we need not, and therefore do not, decide whether the statements were true or false. Rather, we conclude that Air Wisconsin made the statements with reckless disregard as to their truth or falsity." Pet. App. 17a n.6. The court did so in the face of a dissent, which argued that "Air Wisconsin was entitled to immunity under [ATSA] because the statements it made to the TSA were substantially true," and that the majority erred by holding that "whether the statements were true is not part of the ATSA immunity analysis." *Id.* at 28a, 29a n.2. No one suggested the court was instead declining to address the issue on forfeiture grounds.

Second, Air Wisconsin clearly preserved its arguments. In its opening brief below, it argued that ATSA "incorporate[s] the *New York Times* actual malice standard," App. 13a; that this standard requires proof "that the allegedly defamatory statement was materially false," *id.* at 30a; and that none of the airline's statements was materially false, *id.* After Hoeper disagreed, Hoeper Colo. S. Ct. Br. 43–44, 49, Air Wisconsin addressed the issues again in reply, AWAC Colo. S. Ct. Reply 17–20, 44. Thus, the question presented was both pressed and passed upon, either of which is sufficient to defeat waiver. *E.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

Third, Hoeper's argument is procedurally improper. In granting certiorari, this Court "necessarily considered and rejected" the threshold objections to considering the question presented that Hoeper raised in his brief in opposition. *Id.* at 40. And any such objections that Hoeper attempts to raise for the first time now are waived. Sup. Ct. R. 15.2. Either way, Hoeper's arguments are unavailing.

On the merits, Hoeper agrees that the decision below cannot stand. He does not dispute that ATSA incorporates the *New York Times* actual malice standard or that this standard requires proof of material falsity. (He disputed these points below, but no longer.) Nor does he dispute here that a call should have been made to TSA. Br. 50. Perhaps most importantly, he does not seek to defend the Colorado Supreme Court's hairsplitting distinctions between Air Wisconsin's statement and the court's sanitized script.

Instead, for the first time in this litigation, he offers his own alternative script of what Air Wisconsin should have read to TSA almost a decade ago. In so doing, he only underscores why Air Wisconsin is entitled to immunity. By no means is his script—drafted by a multitude of lawyers, years after the fact—any improvement upon what Air Wisconsin said, which accurately conveyed the gist of the potential security concern: Hoeper "might potentially have a gun and might potentially be in a frame of mind to use it." U.S. Br. 31. Indeed, it is worse. Hoeper argues that Air Wisconsin should have downplayed any risk and reported (falsely) that it had "no reason" to believe he posed any possible threat. The Court should reject that misguided view, which is antithetical to passenger safety, and hold that Air Wisconsin is entitled to ATSA immunity.

I. ATSA IMMUNITY MAY NOT BE DENIED WITHOUT A DETERMINATION THAT THE AIR CARRIER'S DISCLOSURE WAS MATERIALLY FALSE.

A. Hoeper Does Not Dispute That ATSA Immunity Is Lost Only If The Airline's Disclosure Was Materially False.

1. Despite writing a 60-page brief, Hoeper confines his discussion of the question presented to a single sentence in the text and a cryptic footnote. Br. 30 & n.12. In the single sentence, Hoeper "agree[s]" that the Colorado Supreme Court was "likely wrong" if it held that the truth of an airline's disclosure is irrelevant to ATSA immunity. *Id.* at 30. In the footnote, he muses about what Congress could "reasonably" have done or "might have thought"—but not what it actually did or what ATSA in fact requires. *Id.* at 30–31 n.12. Accordingly, Hoeper has waived any argument that ATSA permits liability for substantially true disclosures.

2. Nothing in Hoeper's footnote supports a ruling that ATSA permits liability for substantially true reports. Hoeper does not dispute that Congress modeled ATSA immunity on the First Amendment standard adopted in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), or that the *New York Times* standard permits liability only when the defendant's statement was materially false. AWAC Br. 22–23. Nor does he identify anything in ATSA suggesting Congress intended to depart from the settled meaning of the *New York Times* rule. *Id.* at 23–24. And he does not respond to Air Wisconsin's arguments based on ATSA's text, structure, and close relationship to the immunity Congress provided to members of the public who report suspicious behavior. *Id.* at 24–26. Instead, Hoeper offers two reasons why Congress "might"

have chosen not to protect all substantially true disclosures, even though Congress "likely" did no such thing. Neither reason has merit.

First, Hoeper suggests Congress "could have quite reasonably chosen to deny" ATSA immunity to all reckless speakers because "the vast majority of reckless statements will not turn out to be true" and will lead law enforcement on "wild goose chases." Br. 30 n.12 (internal quotation marks, alteration, and emphasis omitted). But Congress addressed that concern by denying immunity for *false* statements that are made with reckless disregard for the truth, and by imposing criminal liability for false reports. See 18 U.S.C. § 1001(a)(2); *id.* § 1038; Hoeper offers no reason why these provisions are inadequate deterrents of false reports, or why Congress would have permitted liability for *true* statements in an effort to deter false ones. Because most reckless statements will be false, protecting all substantially true disclosures will not encourage airlines to make reckless reports. On the other hand, permitting liability for substantially true statements would chill airlines from reporting threat information that is vital to TSA's ability to protect the public, especially because improper motive is so easy to allege but hard to disprove. AWAC Br. 26–27; U.S. Br. 21–23.

Second, Hoeper suggests that because the common law of defamation and the First Amendment require material falsity, there was no reason to provide that redundant protection in ATSA. Br. 30 n.12. But as the United States explained—with no response from Hoeper—ATSA protects against liability on any cause of action, not just defamation, U.S. Br. 26, and this Court has not addressed whether threat reports qualify as statements on matters of public concern for First Amendment purposes, see Pet. App. 22a (noting

but not resolving the question); Hoeper Colo. S. Ct. Br. 61–71 (arguing that the First Amendment does not apply here). ATSA assures that airlines are immune regardless of whether the First Amendment applies. In addition, there are other open questions regarding the First Amendment, such as whether it requires independent court review of falsity. See AWAC Cert. Pet. 29–35. Thus, ATSA is far from redundant.

B. The Question Presented Was Both Pressed and Passed Upon Below.

1. Having effectively confessed error on the merits, Hoeper presents only one argument for affirmance—that the question presented was not pressed or passed upon below. Br. 30–37. This argument is flawed. In his opposition to certiorari, Hoeper similarly asserted that Air Wisconsin failed to press the issue below. Opp. 23–24, 27–28; see also Supp. Br. 1, 4. This Court "necessarily considered and rejected that contention" when it granted review. *Williams*, 504 U.S. at 40; accord *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 530–31 (2002); *Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 8 (1991).

As for whether the question presented was passed upon, Hoeper argued in his opposition to certiorari that the Colorado Supreme Court "did not directly address the question." Opp. 23. He never squarely contended that the question presented was not passed upon, not even in his supplemental brief filed after Air Wisconsin addressed the issue in its reply. Reply 5.[1] But no matter: To the extent Hoeper pre-

[1] If Hoeper believed the Colorado Supreme Court declined to address the question presented because it deemed the issue forfeited, as he now contends, Br. 31, then surely he would have

served his "passed upon" argument, then it too was "necessarily considered and rejected" when the Court granted certiorari. *Williams*, 504 U.S. at 40. And to the extent he did not make the argument in his brief in opposition, it is waived. See Sup. Ct. R. 15.2; *Nev. Comm'n on Ethics* v. *Carrigan*, 131 S. Ct. 2343, 2351 (2011).

Accordingly, Hoeper's argument that the question presented was not pressed or passed upon below need not detain the Court. The time for parties to raise potential barriers to considering the question presented, and the time for the Court to consider them, is at the certiorari stage. To revisit these issues "at this late stage," and decline to address the merits "after briefing, argument, and full consideration of the issue by all the Justices of this Court," would be "improvident indeed." *Williams*, 504 U.S. at 40.

2. In any event, the question presented was both passed upon and pressed below, either one of which is sufficient.

a. The Colorado Supreme Court expressly held: "In our determination of immunity under the ATSA, we need not, and therefore do not, decide whether the statements were true or false." Pet. App. 17a n.6. The court determined that "Air Wisconsin is not immune under the ATSA" based solely on its conclusion that "Air Wisconsin made the statements with reckless disregard as to their truth or falsity." *Id.* And, although the court concluded that ATSA immunity should be reviewed *de novo*, "giv[ing] no weight to the jury's finding of any fact," *id.* at 16a n.5, it held that "the jury was entitled to determine … whether the statements were false," *id.* at 17a n.6. The court's

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argued that the decision rested on an adequate and independent state ground precluding this Court's review, cf. *id.* at 36 n.15.

analysis cannot reasonably be read as anything other than a holding that the truth of an airline's disclosure is irrelevant to ATSA immunity.

That is particularly true given that the entire basis of the dissent was that "Air Wisconsin was entitled to immunity under [ATSA] because the statements it made to the TSA were substantially true." Pet. App. 28a. The dissent directly disputed "[t]he majority['s] conclu[sion] that whether the statements were true is not part of the ATSA immunity analysis" and that ATSA immunity is therefore "lost when a statement is made recklessly even though it may be true." *Id.* at 29a–30a n.2 (citing footnote 6 of the majority opinion). The dissent explained that the majority misconstrued ATSA by failing to recognize that Congress incorporated the falsity element of the *New York Times* standard, *id.* at 30a n.2, and that the majority thus "ma[de] a significant procedural error in deferring to the jury verdict in this case to conclude the statements were false," *id.* at 40a.

The majority, in turn, never disputed the dissent's characterization of the court's holding or suggested that the issue had been forfeited. Surely, if the dissent's characterization was inaccurate, and the majority was simply declining to address truth or falsity on waiver grounds, it would have said so.

b. Even if the lower court had not addressed the question presented, the issue would still be before this Court because Air Wisconsin raised it below. Air Wisconsin plainly argued that *none* of its statements was materially false. App. 30a ("Hoeper cannot establish material falsity"). As to "terminated today" and "may be armed," Air Wisconsin argued that the statements were "substantially true" and "not materially false." *Id.* at 36a–38a. And as to "mental stability," Air Wisconsin argued that the statements were

not materially false, *id.* at 30a, because they were protected opinions based on a rational interpretation of ambiguous circumstances, *id.* at 20a–22a, 34a–36a, and would be understood as "descriptions of Hoeper's unusual behavior rather than an actual diagnosis or factual representation of Hoeper's mental condition," AWAC Colo. S. Ct. Reply 56. By definition, a protected opinion cannot be materially false. See *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 19–20 (1990).

Hoeper's only objection, therefore, is that Air Wisconsin purportedly advanced these arguments only in the context of the defamation verdict and not as a basis for ATSA immunity, but that too is wrong. Air Wisconsin specifically argued that ATSA "incorporate[s] the *New York Times* actual malice standard," App. 13a, *and* that this standard requires proof "that the allegedly defamatory statement was materially false," *id.* at 30a; see also *id.* at 29a ("the issue of material falsity is frequently intertwined with the issue of actual malice"). As Air Wisconsin explained, "even intentionally false statements do not meet the actual malice test when the falsity is not material." *Id.* at 29a–30a (citing *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991)).

Hoeper disputed both points, Hoeper Colo. S. Ct. Br. 43–44, 49, and Air Wisconsin replied, AWAC Colo. S. Ct. Reply 17–20, 44. Further, Air Wisconsin argued that a "statement is not considered false unless it would have a different effect on the mind of the reader from what the pleaded truth would have produced," App. 30a (citing *Masson*, 501 U.S. at 517) (internal quotation marks omitted), and that the court must review material falsity *de novo*, *id.* at 28a. That is sufficient to preserve the argument that ATSA

immunity may not be denied absent a finding by the court that the disclosure was materially false.[2]

Finally, there is no merit to Hoeper's suggestion that Air Wisconsin waived the issue by failing to argue for "an ATSA-specific test for materiality." Br. 34, 37. Consistent with *Masson*, Air Wisconsin argued that materiality must be assessed based on the statement's "effect on the listener," App. 37a, and that here the relevant "listener" was "TSA," AWAC Colo. S. Ct. Reply 48 (arguing that the ATSA inquiry focuses on the "context in which the statement was made and how TSA would have understood the statement"); see also Hoeper Colo. S. Ct. Br. 49 (recognizing that materiality turns on whether the "pleaded truth" would have had a "different effect on the mind of the recipient, TSA"). This is not an ATSA-unique test for materiality. It is simply an application of the *New York Times* materiality standard in a particular context. See also *Masson* 501 U.S. at 512–13 (addressing material falsity of quotations in the context of the work in which they appear).

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[2] Further, as Hoeper concedes, whether the issue was adequately preserved in the Colorado courts "is ultimately a question of state law," Br. 40, "which this Court does not sit to review," *Volt Info. Scis., Inc.* v. *Bd. of Trs.*, 489 U.S. 468, 474 (1989); see also *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 667 (1991) ("It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided."). And Hoeper never suggested to the Colorado Supreme Court that these arguments had not been preserved in the lower courts, thereby waiving any state-law objection in that regard. Regardless, any such objection would have been meritless because Air Wisconsin argued in both the trial court and the court of appeals that it was immune under ATSA and that its statements were not materially false. DV Motion 6; AWAC Colo. Ct. App. Br. 20–34.

II. THIS COURT SHOULD REJECT THE COLORADO SUPREME COURT'S HAIR-SPLITTING DISTINCTIONS AND APPLY THE MATERIAL FALSITY STANDARD ITSELF.

1. Because the Colorado Supreme Court erred in holding that ATSA immunity may be denied without a determination that the disclosure was materially false, the decision below must be set aside. Hoeper concedes that if the Court rejects his forfeiture argument, it would be "appropriate" to vacate and remand. Br. 39.

Hoeper also appears to agree that the Colorado Supreme Court's hairsplitting distinctions are meritless. See *id.* (the Court need "not endors[e] the Colorado Supreme Court's suggestion that there is a material difference between what Doyle said and what that court proposed he could have said"). Any difference between that court's preferred script and Air Wisconsin's statement is immaterial as a matter of law.

2. There is, however, no need for a remand. The correct result in this case is clear: Air Wisconsin is entitled to ATSA immunity because its disclosure was not materially false. See *infra*, Part III; *Forsyth Cnty.* v. *Nationalist Movement*, 505 U.S. 123, 135 n.12 (1992).

In addition, a remand is unnecessary because the Colorado Supreme Court has already "considered in detail the facts of this case," *Holland* v. *Florida*, 130 S. Ct. 2549, 2565 (2010), recognized that "the events at the training may have warranted a report to TSA," Pet. App. 18a, and made clear that Air Wisconsin could have truthfully reported the facts set forth in the court's script, *id.* at 21a. There are no more facts for the lower court to review. All that remains is the

question whether the difference between Air Wisconsin's words and the lower court's preferred script is material as a matter of law. There is no need to remand that legal question.

Moreover, the relevant facts in this case are undisputed and few in number. Although Hoeper spills much ink discussing the alleged "hatred conspiracy" to "wash him out" of the company, which was hotly disputed at trial, none of that is relevant to the truth or falsity of Air Wisconsin's disclosure, which turns on the undisputed events of December 8, 2004.[3] There is no dispute that (1) Hoeper had an angry outburst during his training that morning; (2) LaWare and the other executives with whom he met were concerned about Hoeper's frame of mind given his outburst, his impending termination, and past incidents in which disgruntled pilots had committed retaliatory acts of violence, killing passengers and crew;

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[3] In recounting the alleged "hatred conspiracy"—the evidence for which the trial court called "pretty thin," JA 260—Hoeper fails to mention that Air Wisconsin repeatedly gave him the option, which he repeatedly declined, to continue flying the aircraft he had previously flown. JA 66–67; Tr. 1545–52. And it gave him a *fourth* chance to pass the test when it could have fired him after his third failure, JA 54, 62, spending more than $50,000 on his training, Tr. 2668–70. Even Hoeper agreed that Air Wisconsin was "very, very wonderful" to him. JA 222; Ex. CC. Moreover, Hoeper admitted at the arbitration that his first and second failures were his own fault, that Doyle and Hanneman were not "out to get" him, and that Schuerman was "tough, but fair." JA 231; Tr. 1302, 1530–35, 1539–40, 1543, 1576–77. Regardless, the alleged "hatred conspiracy" has nothing to do with the call to TSA, which was ordered by LaWare, who not even Hoeper alleges was part of the "conspiracy." Finally, even if there were a "hatred conspiracy," that would only have exacerbated Hoeper's motive to retaliate and provided an *additional* reason to be concerned about his state of mind after he failed his last chance.

(3) Hoeper was an FFDO; and (4) Air Wisconsin could not be certain whether Hoeper had his gun. Based on these undisputed facts, Air Wisconsin's report was not materially false as a matter of law.

Finally, applying the material falsity standard would provide much-needed guidance regarding the scope of ATSA immunity, reducing the risk that potential liability will chill reporting. In the analogous context of the First Amendment, this Court has often painstakingly reviewed the record to determine whether the *New York Times* standard was met, emphasizing that "this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984). Thus, for example, after clarifying the standards for determining when a quotation is materially false for purposes of the actual malice inquiry, the Court in *Masson* "appl[ied] those principles to the case before [it]," assessing each of the quotations at issue. 501 U.S. at 520–25. Given the vital importance of ATSA immunity in ensuring that airlines are not chilled from reporting potential security threats, this Court's role in marking out the limits of the material falsity standard is no less important here.

III. AIR WISCONSIN'S DISCLOSURE WAS NOT MATERIALLY FALSE AS A MATTER OF LAW.

All parties agree that a disclosure is not materially false for purposes of ATSA immunity unless a "more accurate statement would have conveyed a qualitatively different meaning" to a reasonable security officer. U.S. Br. 24; Br. 41. Applying that standard, under any standard of review, Air Wisconsin is entitled

to ATSA immunity because its disclosure was not materially false as a matter of law.[4]

1. **"Mental stability."** Hoeper does not dispute that Air Wisconsin was concerned about his state of mind because of his angry outburst and impending termination. Nor could he—the record is undisputed that the four executives who met to discuss Hoeper's situation (of whom only Doyle was part of the alleged "hatred conspiracy") were concerned by his aggressive behavior because they knew that disgruntled pilots had previously killed innocent passengers. JA 87, 89, 168–69, 280–82, 301–02, 466. Whether they thought Hoeper was likely to commit acts of violence or "'should be pulled off a commercial flight,'" Br. 56–57, is irrelevant. They were concerned about his mental state given the events that morning; and as between informing TSA of their concern and remaining silent, they chose to call TSA because they thought it better to be "safe than sorry." JA 89–90, 168.

The only question, therefore, is whether there is a material difference between expressing a concern about Hoeper's "mental stability" (or calling him "un-

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[4] The Colorado Supreme Court held that, under federal law, ATSA immunity is a question for the court, subject to *de novo* appellate review. Pet. App. 9a–15a. Although that issue is outside the question presented, Hoeper argues that disputed historical facts relevant to immunity are for the jury. Br. 40–41 & n.17. This case, however, does not turn on disputed historical facts, but rather on the ultimate question of materiality. And materiality "is an issue of law, which [the Court] may decide for [itself]." *Kungys* v. *United States*, 485 U.S. 759, 772 (1988). This makes sense because *de novo* review of materiality produces uniformity and predictability, thereby reducing the chilling effect of litigation and promoting air safety. Cf. *Ornelas* v. *United States*, 517 U.S. 690, 697 (1996); *Muehler* v. *Mena*, 544 U.S. 93, 98 n.1 (2005). Regardless, under any standard of review, Air Wisconsin's disclosure was not materially false.

stable") and expressing a concern about his "mental state." There is not, and Hoeper does not even contend there is. The gist of both formulations is that Air Wisconsin was concerned that Hoeper might be in a potentially dangerous frame of mind, and that was true.[5]

Contrary to Hoeper's suggestion, Schuerman's testimony that he thought Hoeper was "'safe to get on an airplane,'" Br. 8–9, 45, does not show otherwise. Schuerman was not at the meeting that led to the call and did not know most of the relevant facts. He did not know, for example, about the last-chance agreement or that Hoeper was an FFDO. JA 35–40. Nor does it matter that Doyle and Orozco stated that the words "mentally unstable" might cause the potential for "undue harm" to Hoeper's reputation or prompt a "more dramatic" response from TSA. JA 474–75. Neither witness was ever asked to assess the difference between "mental state" and "mental stability," and neither had a basis to determine whether any difference between those formulations would have been material to TSA. See *id.* (Orozco "[did not] know how the TSA internally rates their threat levels" or whether the words "mentally unstable" "raise[d] it a notch").[6]

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[5] Hoeper's allegations about the "knowledge and good faith of Doyle," Br. 44, are thus irrelevant. LaWare, not Doyle, made the decision to call TSA based on the group's concerns. And Doyle's words did not materially misstate the group's concerns.

[6] Hoeper's discussion of his previous outburst during the October 14 debriefing session, Br. 49, also is irrelevant. Air Wisconsin did not mention that incident in its call to TSA. Nor was the incident "a complete fabrication." *Id.* Hoeper admitted that during the debriefing he was cursing and "exhibiting [h]is frustration openly" and that Doyle asked him repeatedly to calm himself and sit down. JA 187; Tr. 1542; see JA 97, 386, 437, 481.

Ultimately, Hoeper concedes it was proper for Air Wisconsin to convey its concern about his mental state by saying he was "upset" or "angry." Br. 51, 57. But those sanitized words (which would still probably have had the same effect on TSA as Air Wisconsin's statement) would not have accurately conveyed Air Wisconsin's concern about someone who had behaved in a way that multiple witnesses testified was unheard of for a professional pilot. JA 178, 288, 296, 306, 311–12. And the fact that Doyle—who is, after all, a pilot and not a lawyer trained to parse words—used "mental stability" rather than "mental state" or "frame of mind" to capture that concern cannot be the difference between immunity and liability. As the government has explained, "[t]o 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." U.S. Br. 22.

2. **"An FFDO who may be armed."** Hoeper concedes it was proper to inform TSA that he was an FFDO. Br. 57. That should end the matter because, as Hoeper does not dispute, the only reason to report Hoeper's FFDO status was to alert TSA to the "greater than normal possibility" that he might be armed as compared to a non-FFDO pilot. Br. 55.

That Air Wisconsin made this implication express by adding the words "who may be armed" did not make its statement materially false. Contrary to Hoeper's contentions, Air Wisconsin did not convey any assessment of the "degree of likelihood" that Hoeper had his gun, *id.* at 54, let alone suggest there was a "significant chance," *id.* at 12, or "reasonable

chance," *id.* at 57, he was actually armed. Nor did Air Wisconsin state or imply that it had a reason to believe Hoeper was more likely to be armed than any other FFDO—although it did, in fact, have such a reason because Hoeper had departed from the Denver airport where he would not have had to log his gun, JA 166.[7] Like the court below, Hoeper can contend that the words "may be armed" were materially false only by conjuring "overblown 'implication[s]'" that are nowhere to be found in Air Wisconsin's actual statement. Pet. App. 36a (Eid, J., dissenting).

Likewise, there is no basis for Hoeper's assertion that Air Wisconsin "was not genuinely concerned about the location of his weapon." Br. 54. The record is undisputed that the location of Hoeper's gun was a focal point of the group's discussion, JA 166–68, 278–79, 299–300, 461, and that Air Wisconsin even contacted its director of flight operations at Dulles to try to determine whether Hoeper had used his FFDO credentials to bypass security, JA 464–65. Whether or not Hoeper thinks that concern was reasonable, there can be no dispute that Air Wisconsin was sincerely concerned about whether Hoeper had his gun. As was TSA. See *supra*, n.7.

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[7] Hoeper claims it was not "possible to bypass security at Dulles with a gun." Br. 53 n.25. But if that were sufficient to eliminate any concern about whether Hoeper might be armed, there would have been no need for TSA to remove him from the plane. Even after conducting an investigation and doing all the things Hoeper says Air Wisconsin should have done (*e.g.*, calling United Airlines and checking the security logbook), TSA still determined that passenger safety mandated sending someone to the plane to check Hoeper and his bags. JA 406; Tr. 3375; Ex. KK. Obviously, TSA decided it could not rule out the possibility that Hoeper was able to get his gun past security, and Air Wisconsin cannot be faulted for doing the same.

Hoeper's argument is also profoundly at odds with the policy underlying ATSA immunity. If an airline cannot express a concern to TSA about what "may be" the case unless it believes there is a "significant" or "reasonable" chance its concern will prove valid, and if a reviewing court is free to read false assertions of fact into an expression of possibility, reporting of suspicious incidents will inevitably be chilled. The incentive for airlines will be to report their concerns only when the threat appears certain, and only after independently investigating the situation to determine that their concerns will be defensible in court should the threat not materialize. That is the exact opposite of what Congress intended in enacting ATSA.

3. **"Terminated today."** When Air Wisconsin called TSA, Hoeper had just walked out on his last chance to pass the proficiency check on which his continued employment depended. There is no material difference between saying that and saying Hoeper was "terminated today." Either way, a reasonable air safety official would understand that Hoeper was under job-related stress and had a motive to retaliate.

Hoeper argues that Air Wisconsin's statement was materially false, notwithstanding that he was in fact terminated the next day, because Air Wisconsin had not yet formally decided to terminate him when it called TSA. Br. 55. On that point, Hoeper cites, but does not quote, the following testimony from Orozco:

> Q You had [not] made that decision [to terminate Hoeper's employment] at that point in time?
>
> A No. But I mean it's called the last-chance letter for a reason. It's not the chance before the last chance. We've already met the contractual obligation, so Bill had a pretty good idea what the

> outcome was going to be, I believe. But, no, I had not made the decision at that point.

JA 460.

Hoeper also argues that he "believed he was not going to be terminated," Br. 56, but he cites no evidence for that specious claim. Instead, he cites testimony that *Schuerman* believed Hoeper's training would continue. *Id.* at 55. But Schuerman was not involved in decisions about Hoeper's employment and did not even know about the last-chance agreement. JA 38, 306. And although Hoeper notes he called Orozco for permission to go home, Br. 55–56, he fails to mention what Orozco told him on that call—"that his training was over." JA 445. Hoeper "knew exactly what his status was going to be, having stopped that simulator session and walked out on it." JA 287.

4. **Overall implication.** Like the Colorado Supreme Court, Hoeper does not dispute that a call should have been made, but contends that Air Wisconsin is not entitled to immunity because its report falsely "impli[ed]" that Hoeper "'might constitute a threat to aircraft and passenger safety,'" when "no one actually believed that he posed a genuine threat." Br. 56. To the extent Hoeper means to suggest no one was concerned about the *possibility* that Hoeper might be a threat, the suggestion is baseless: LaWare and the others with whom he met plainly were concerned about that possibility. JA 89, 182, 276–82, 462, 466. Otherwise there would have been no reason to call TSA, and, as Hoeper concedes, "the question here is not about the decision to make a call." Br. 50.

Hoeper is thus left to contend that Air Wisconsin is not immune because the words it chose supposedly contained false "implications regarding the *degree* of the potential threat." *Id.* at 59. But Air Wisconsin's

disclosure did not contain any assessment of the degree of the potential threat. Nor should it have; threat assessments are for TSA to make. Moreover, an airline's assessment of the degree of the potential threat is precisely that—a subjective assessment of the probability of an uncertain future event, not a statement of fact that could be materially false and the basis for liability. Air Wisconsin's disclosure cannot be deemed materially false simply because, in hindsight, it turned out that Hoeper did not "pos[e] a genuine threat." *Id.* at 56.

According to Hoeper, Air Wisconsin could have retained immunity only by stating that it had "'no reason'" to believe Hoeper "'pose[d] a threat.'" *Id.* at 57. But, unlike Air Wisconsin's disclosure, *that* would have been false. Hoeper's highly unusual outburst and aggressive behavior, together with his impending termination, gave Air Wisconsin a reason to believe he might pose a threat. Nor would it have been correct to say simply that Hoeper "'was angry this morning'" or that he "'may be fired.'" *Id.* Many people become angry without throwing objects or cursing and yelling in public spaces, and Hoeper was almost certain to be fired. The script that Hoeper now proposes for the first time, after years of litigation and with the assistance of multiple lawyers and Supreme Court practitioners, is inaccurate.

To be accurate, Hoeper's proposed script would need to be revised along the following lines:

> This morning, one of our FFDO pilots blew up at his flight instructor during a training session and walked out on his last chance to pass the proficiency check on which his continued employment depended. As a result, he will almost certainly be terminated. He is flying from Dulles to Denver this afternoon, and we are concerned

> about his state of mind given his unusual and aggressive behavior and his impending termination. We don't know whether he has his gun, but we do know that he departed from a Denver airport where FFDOs can bypass security without logging their guns, and pilots have on occasion brought their guns with them to training sessions in violation of FFDO protocol.

Perhaps, if Air Wisconsin had stopped to consult its lawyers before calling TSA, it would have crafted this script or something better. But it would not have made a difference. Air Wisconsin's disclosure, which was made in the press of business without the opportunity to wordsmith, accurately conveyed the essential gist of the potential threat—that Hoeper "might potentially have a gun and might potentially be in a frame of mind to use it." U.S. Br. 31.

More fundamentally, this sort of Monday-morning quarterbacking by lawyers and courts is precisely what Congress sought to avoid in ATSA. As Hoeper recognizes, it "may not be possible to adequately convey (particularly under time pressure) the underlying basis for an airline's belief" that a potential threat exists. Br. 58. Recognizing that reality, and mindful that TSA's ability to protect the public depends critically on the willingness of airlines to promptly report what they know without fear of being sued, Congress permitted liability only in the extreme circumstance in which an airline knowingly or recklessly makes materially false statements. That is not this case. Air Wisconsin did exactly what Congress would have wanted it to do, and its disclosure, both in its particulars and its overall gist, was true in all material respects. Air Wisconsin is entitled to ATSA immunity.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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November 25, 2013

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