

IN THE  
**Supreme Court of the United States**

AIR WISCONSIN AIRLINES CORPORATION,  
*Petitioner,*

v.

WILLIAM L. HOEPER,  
*Respondent.*

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On Petition For A Writ of Certiorari  
To The Colorado Supreme Court

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**BRIEF AMICUS CURIAE OF THE REPORTERS  
COMMITTEE FOR FREEDOM OF THE PRESS  
IN SUPPORT OF PETITIONER**

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**STATEMENT OF INTEREST<sup>1</sup>**

The Reporters Committee for Freedom of the Press (“the Reporters Committee” or “*amicus*”) is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. The Reporters Committee is an unincorporated association of reporters and editors with no parent corporation and no stock.

As advocates for the rights of the news media and others who seek to provide information to the public about important issues that affect them, *amicus* has a strong interest in ensuring that the First Amendment guarantee of a free press is protected to the fullest extent. Appellate court scrutiny of issues of actual malice and falsity in defamation cases ensures a strong buffer zone of First Amendment protections for speech on matters of public concern. The extent of such appellate review necessarily implicates journalists, who are often targets of such defamation claims.

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no party’s counsel authored this brief in whole or in part; no party or party’s counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than the *amicus curiae*, their members or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Further, the parties were notified ten days prior to the due date of this brief of the intention to file. Written consent of all parties to the filing of the brief has been filed with the Clerk of the Court.



## SUMMARY OF ARGUMENT

*Amicus curiae* urges the Court to accept review of this case in order to clarify for lower courts that the principle of independent appellate review of actual malice in defamation cases should apply with equal force to the question of falsity.

This Court has consistently made clear the constitutional significance of speech about issues of public concern. *Amicus* believe this Court's long-standing jurisprudence strongly supports establishing equivalent standards of appellate review for both the falsity and fault requirements of defamation law. Exacting evidentiary standards in these areas are critical to the First Amendment interests sought to be protected by independent appellate review. Since both elements are interrelated in defamation law – particularly as it applies to public officials and public figures – both issues should be subject to equivalent standards of appellate review.

The interests protected by independent review of the actual malice standard are no less implicated by findings of falsity. That is, a jury verdict against the great weight of the evidence as to the falsity requirement, left unexamined by a court, comprises a forbidden intrusion on protected speech in the same way as a failure to review the whole record for clear and convincing evidence of actual malice. Given the importance of the particular circumstances of this case and the constitutional protections at stake, this Court should accept review.

## ARGUMENT

### **I. The Court has repeatedly found that speech on matters of public concern lies at the heart of the First Amendment.**

This Court has consistently made clear the constitutional significance of speech about issues of public concern. As recently as 2010, in *Snyder v. Phelps*, this Court stated that such speech “occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection.” 131 S.Ct. 1207, 1215 (2010) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotations omitted)). That principle is also reflected in this Court’s body of work on defamation law. In *Dun & Bradstreet v. Greenmoss Builders, Inc.*, for instance, this Court noted that public speech remains “at the heart of the First Amendment’s protection.” 472 U.S. 749, 759 (1985) (quoting *First National Bank of Boston v. Belotti*, 435 U.S. 765 (1978)). As such, it is entitled to the full constitutional protection granted by the First Amendment.

The actions at the center of this dispute involve statements made by employees of Air Wisconsin Airlines to the federal agency tasked with maintaining the safety and security of the nation’s passenger and freight transportation. The employee statements informing Transportation Security Administration (“TSA”) officials of their observations of Mr. Hoepfer’s actions and relating their concerns about his mental state are precisely the type of speech entitled to First Amendment protection. Further, the Aviation and Transportation Security Act (“ATSA”) immunity provision under review was designed and passed by Congress within weeks of

the September 11, 2001 terrorist attacks to encourage airlines and their employees to report suspicious activities to the proper authorities. 49 U.S.C. § 44941. Such speech involving security threats with the potential to disrupt and derail the nation’s airline transportation system certainly involves matters of interest to the public. As such, the statements by Air Wisconsin’s employees trigger the enhanced constitutional protections afforded by the First Amendment.

Since its landmark decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court has carved out the contours of such protections in defamation cases, continually working to balance the competing First Amendment interests of free speech with the state’s interests in protecting the reputation of its citizens. In fact, the drafters of the ATSA tracked the actual malice language from *Sullivan* in crafting the exceptions to the statute’s immunity provision.<sup>2</sup> While *Sullivan* concerned speech involving public officials, this Court extended the actual malice fault protections to public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

Further, this Court’s precedents in nullifying the common-law presumption of falsity by shifting the evidentiary burden to plaintiffs and enacting a

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<sup>2</sup> Compare 49 U.S.C. § 44941 (exempting from its immunity provision individuals who relay potential threats to authorities with either “actual knowledge that the disclosure was false, inaccurate, or misleading” or with “reckless disregard as to the truth or falsity of that disclosure.”), with *Sullivan*, 376 U.S. at 280 (defining actual malice in defamation as “knowledge [the speech at issue] was false or with reckless disregard of whether it was false or not”).

test for truth that immunizes some literally false statements from liability demonstrates that trial court judges must be closely involved in evaluating the proof required to establish falsity. In *Philadelphia Newspapers v. Hepps*, this Court held that to recover damages, both public and private-figure plaintiffs must prove the falsity of allegedly defamatory speech relating to matters of public concern. 475 U.S. 767, 777 (1986). In articulating this rule, the Court “recognize[d] that requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so.” *Id.* at 778. Nonetheless, the opinion made clear this result was necessary “[t]o ensure that true speech on matters of public concern is not deterred.” *Id.* at 776.

In *Masson v. New Yorker Magazine, Inc.*, this Court found that “[m]inor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified. ... ” 501 U.S. 496, 517 (1991) (citations and quotations omitted). “Put another way, the statement is not considered false unless it ‘would have a different effect on the mind of the reader from that which the pleaded truth would have produced.’” *Id.* (quoting Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* 138 (1980)).

By not only shifting the burden to plaintiffs to prove falsity, but also recognizing a “substantial truth” test, the Court essentially created in falsity a mixed issue of law and fact that requires judges to thoroughly scrutinize the record to ensure these institutional standards are satisfied.

**II. Because falsity and actual malice are closely tied together in defamation law, both issues should be subject to the same standard of independent appellate review.**

*Sullivan* was significant not only because it recognized constitutional protections for speech by establishing an “actual malice” fault standard in defamation law, but also because the Court took the additional step of making clear the importance of independently reviewing the evidence in lower court records “to assure ... that the judgment does not constitute a forbidden intrusion on the field of free expression.” 376 U.S. at 285. The Court explained its “duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied.” *Id.* This Court on numerous occasions has applied independent appellate review to cases raising First Amendment issues, examining the entire record to ensure there is no intrusion on constitutionally protected speech. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933-34 (1982); *St. Amant v. Thompson*, 390 U.S. 727, 732-733 (1968). Most significantly in *Bose*, this Court relied on such precedent to find that appellate courts were obligated to independently review the record concerning actual malice in defamation cases. 466 U.S. at 514.

The complementary First Amendment rules governing falsity and actual malice are critical to the constitutional interests sought to be protected

by independent appellate review. Since both elements are interrelated in defamation law – particularly as it applies to public officials and public figures – both issues should be subject to equivalent standards of appellate review. In fact, this Court in *Masson* suggests the need for independent review of falsity as a threshold to independent review of actual malice: “This inquiry [into the evidence concerning actual malice] ... requires us to consider the concept of falsity; for we cannot discuss the standards for knowledge or reckless disregard without some understanding of the acts required for liability.” 501 U.S. at 513.

The ties that bind falsity and actual malice can be seen in the equivalent treatment the two issues receive from courts tasked with setting the proper burden of proof at trial. Many lower courts addressing the issue require proof of falsity to be shown by the same clear and convincing standard established by *Sullivan* for the element of actual malice. See, e.g., *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371, 373 (6th Cir. 1981); *Buckley v. Littell*, 539 F.2d 882, 889-90 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Firestone v. Time, Inc.*, 460 F.2d 712, 722-23 (5th Cir. 1972), *cert. denied*, 409 U.S. 875 (1972); see also Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 3.4 (Westlaw 2012) (listing more state cases). Courts have noted the logical symmetry in applying equivalent burdens of proof to both issues. See *Robertson v. McCloskey*, 666 F.Supp. 241, 248 (D.D.C. 1987) (“[A] clear and convincing standard of proof for falsity would resolve doubts in favor of speech when the truth of a statement is difficult to ascertain conclusively. In-

deed, as a practical matter, public-figure plaintiffs already bear such a burden ...”). Because of these close connections between falsity and actual malice, both elements should be subject to the same standard of independent appellate review.

**A. The *Bose* Court’s rationale for independent appellate review of actual malice logically extends to appellate review of falsity.**

In *Bose*, this Court recognized two competing legal principles: deference to trial courts on findings of fact, and review of facts to protect constitutional principles. In ultimately recognizing a requirement for independent appellate review in actual malice cases, the Court noted that “the content of the [actual malice] rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication.” *Id.* at 501-02. This characteristic, coupled with the traditionally broad role given “to the judge in applying [actual malice] to specific factual situations” and the “constitutional values protected by the rule,” *id.*, led the Court to conclude it was its duty not just to pronounce rules, but “in proper cases review the evidence to make certain that those principles have been constitutionally applied.” *Id.* at 508 (quoting *Sullivan*, 376 U.S. at 285). Therefore, “whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact.” *Id.* at 511.

Essential to maintaining the freedom of speech and the press is the creation of “breathing space” for false speech to assure that truthful speech is not discouraged. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). Requiring public officials and figures to prove by clear and convincing evidence on independent appellate review that a publisher acted with actual malice is one means by which this breathing space is carved out. Such clarification by the courts is particularly important in cases that implicate speech rights, for “[u]ncertainty as to the scope of the constitutional protection can only dissuade protected speech — the more elusive the standard, the less protection it affords.” *Harte-Hanks Commc’ns v. Connaughton*, 491 U.S. 657, 686 (1989).

This unique interest protected by independent review of the actual malice standard is no less implicated by findings about other constitutional issues, namely falsity. That is, a jury verdict against the great weight of the evidence as to the falsity requirement, left unexamined by a court, comprises a forbidden intrusion on protected speech in the same way as a failure to review the whole record for clear and convincing evidence of actual malice. *Locricchio v. Evening News Ass’n*, 476 N.W.2d 112, 125 (Mich. 1991).

Failure to recognize independent review for falsity to ensure constitutional protections were properly applied threatens to not only weaken speech on public concern but leave lower courts grasping at how to ultimately apply the “substantial truth” test prescribed by this Court. This case



demonstrates what happens when a reviewing court declines to follow *Sullivan's* call to “review the evidence to make certain that those principles [elaborated by this Court] have been constitutionally applied.” 376 U.S. at 285. The facts are not in dispute, yet the majority and dissenting opinions of the Colorado Supreme Court reach polar opposite conclusions as to whether the statements made by Air Wisconsin Airlines employees satisfied the falsity element by essentially deferring to the trial court. *Air Wisconsin Airlines Corp. v. William L. Hoeper*, 2012 WL 90764 (Colo. 2012).

The constitutional rule of “substantial truth” requires not deference to the jury on falsity but independent appellate review in order to ensure that no judgment is affirmed in absence of a substantive falsehood. *See Masson*, 501 U.S. at 517. As this Court makes clear in *Bose*, “[w]hen the standard governing the decision of a particular case is provided by the Constitution, this Court’s role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance.” 466 U.S. at 503.

**B. Lower courts are increasingly extending independent appellate review in defamation cases to issues beyond actual malice.**

The existing law reveals that the majority of lower courts are increasingly extending the mandate of *de novo* review under *Bose* to elements of defamation beyond actual malice.

The law in more than 20 of the states, terri-

tories and the District of Columbia has addressed, either directly or indirectly, the issue of whether courts considering defamation appeals must review for themselves evidence of constitutional issues other than actual malice.<sup>3</sup> Of these jurisdictions, only four – Kentucky, Maine, Texas and Virginia – have held that appellate courts’ independent review is limited to the issue of actual malice. Rather, the

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<sup>3</sup> *Finebaum v. Coulter*, 854 So. 2d 1120 (Ala. 2003); *Dombey v. Phoenix Newspapers, Inc.*, 708 P.2d 742 (Ariz. Ct. App. 1985), *approved in part, vacated in part*, 724 P.2d 562 (Ariz. 1986). *But see Morris v. Warner*, 770 P.2d 359 (Ariz. Ct. App. 1988). *Butler v. Hearst-Argyle Television, Inc.*, 49 S.W.3d 116 (Ark. 2001); *McCoy v. Hearst Corp.*, 727 P.2d 711 (Cal. 1986); *Walker v. Colo. Springs Sun, Inc.*, 538 P.2d 450 (Colo. 1975), *overruled on other grounds, Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982); *Journal-Gazette Co., Inc. v. Bandido’s, Inc.*, 712 N.E.2d 446 (Ind. 1999); *Ky. Kingdom Amusement Co. v. Belo Ky., Inc.*, 179 S.W.3d 785 (Ky. 2005); *Mashburn v. Collin*, 355 So. 2d 879 (La. 1977); *Beal v. Bangor Publ’g Co.*, 714 A.2d 805 (Me. 1998); *Chesapeake Publ’g Corp. v. Williams*, 661 A.2d 1169 (Md. 1995); *Locricchio v. Evening News Ass’n*, 476 N.W.2d 112 (Mich. 1991); *Wellman v. Fox*, 825 P.2d 208 (Nev. 1992); *Howard v. Antilla*, 294 F.3d 244 (1st Cir. 2002) (applying New Hampshire law); *Ward v. Zelikovsky*, 643 A.2d 972 (N.J. 1994); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299 (N.Y. 1977); *Fargo v. Brennan*, 543 N.W.2d 240 (N.D. 1996); *Miskovsky v. Okla. Publ’g Co.*, 654 P.2d 587 (Okla. 1982); *Ertel v. Patriot-News Co.*, 674 A.2d 1038 (Pa. 1996); *Garib Bazain v. Clavell*, 135 D.P.R. 475 (P.R. 1994); *McCann v. Shell Oil Co.*, 551 A.2d 696 (R.I. 1988); *Sparagon v. Native Am. Publishers, Inc.*, 542 N.W.2d 125 (S.D. 1996); *Brown v. Petrolite Corp.*, 965 F.2d 38 (5th Cir. 1992) (applying Texas Law); *O’Connor v. Burningham*, 165 P.3d 1214 (Utah 2007); *The Gazette, Inc. v. Harris*, 325 S.E.2d 713 (Va. 1985); *Havalunch, Inc. v. Mazza*, 294 S.E.2d 70 (W.Va. 1981); *Wiegel v. Capital Times Co.*, 426 N.W.2d 43 (Wis. Ct. App. 1988); *Abromats v. Wood*, 213 P.3d 966 (Wyo. 2009).

majority of these courts either expressly extend the requirement of independent appellate review to the constitutional issues of falsity (Maryland, Michigan, Pennsylvania) or opinion (Louisiana, Nevada, New Jersey, West Virginia) or both (Colorado, New York, Puerto Rico) or do so implicitly by adoption of *Bose*'s broad standard requiring appellate courts to conduct an independent review in cases raising First Amendment issues (Alabama, Arizona, Arkansas, California, Indiana, New Hampshire, North Dakota, Oklahoma, Rhode Island, South Dakota, Utah, Wisconsin, Wyoming).

Federal appellate courts provide similarly strong support for application of the independent appellate review standard beyond the issue of actual malice to other constitutional elements in a defamation case. Of the federal circuits to address the issue, at least two have expressly reviewed falsity determinations under *Bose*. The First Circuit has noted that appellate courts must independently review the evidence on dispositive constitutional issues regardless of whether a court or jury performed the fact-finding function. *Veilleux v. NBC*, 206 F.3d 92, 106 (1st Cir. 2000). The "plaintiff's constitutional burden to show the falsity of each statement" brought with it a duty on the appellate court to "independently verify that this burden was met." *Id.* at 108.

Moreover, the Second Circuit has explained that, "[a]s to our role in reviewing a libel case, the First Amendment requires careful appellate review of the facts found at trial which have constitutional significance." *Buckley*, 539 F.2d at 888. Thus, "[w]hen interpretation of a communication in the

light of the constitutional requirements is involved, our scope of review is to examine in depth the ‘statements in issue’ and the ‘circumstances in which they are made.’” *Id.* (quoting *Sullivan*, 376 U.S. at 285). The Second Circuit would later find that the constitutional duty appellate courts have to conduct such careful appellate review also involves “determining whether plaintiffs have established falsity.” *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 182 (2d Cir. 2000).

Both of these cases represent a clear split with the decision in the Colorado Supreme Court. Given the importance of both the particular circumstances of this case and the broad speech protections at stake, this Court should accept review in order to clarify for lower courts that the principle of independent appellate review of actual malice in defamation cases applies with equal force to the question of falsity.

## CONCLUSION

For the foregoing reasons, this Court should accept review and reverse the decision of the Colorado Supreme Court.

Respectfully submitted,

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