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 *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND FIFTEEN NEWS MEDIA ORGANIZATIONS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici, described in Appendix A, are The Reporters Committee for Freedom of the Press and fifteen of the nation's leading news organizations – Advance Publications, Inc., the American Society of News Editors, The Association of American Publishers, Courthouse News Service, the Digital Media Law Project, Hearst Corporation, the Media Law Resource Center, The National Press Club, the National Press Photographers Association, National Public Radio, Inc., the Newspaper Association of America, the Online News Association, the Radio Television Digital News Association, the Society of Professional Journalists, and The Washington Post.

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, *amici* have 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 protection for speech on matters of public concern. The efficacy of such independent appellate review necessarily implicates journalists, who are often targets of defamation claims.

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[1] Both parties have consented to this *amici curiae* brief and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

Amici accordingly write to make clear that more is at stake here than the proper interpretation of a statute that immunizes airlines for communications that facilitate the critical function of reporting potential security threats. That statute, the Aviation and Transportation Security Act ("ATSA"), denies immunity only where communications are made with "actual knowledge that [they were] false, inaccurate, or misleading" or with "reckless disregard as to [ ] truth or falsity." 49 U.S.C. § 44941(b). This language plainly embodies the constitutional "actual malice" standard that this Court adopted in *New York Times v. Sullivan* to ensure necessary "breathing space" for speech on matters of public concern. 376 U.S. 254 (1964); *see also Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967). As a consequence, that statutory immunity must be interpreted and applied broadly, or else important constitutional values will be compromised.

In this case, the Colorado Supreme Court impermissibly removed falsity from the actual malice equation. It denied ATSA immunity by finding that the airline employees acted with actual malice, while expressly declining to determine whether the statements at issue were materially false as a matter of law. The court then went on to sustain a seven-figure defamation verdict for substantially true statements, based on conduct that cannot constitute actual malice under this Court's precedents. *Amici* are gravely concerned that such a ruling, if allowed to stand, will erode the actual malice standard's strong protections that this Court consistently has reaffirmed over decades of jurisprudence, and on

which *amici* rely in their day-to-day profession as journalists and publishers.

INTRODUCTION

In August of 1735, Philadelphia lawyer Andrew Hamilton stood before a jury of New Yorkers on behalf of his client, a printer named John Peter Zenger. Zenger stood accused of seditious libel for printing a newspaper that criticized the governor of the colony of New York. At the time, truth was no defense to libel; to the contrary, a common maxim held that "the greater the truth, the greater the libel." Nevertheless, Hamilton argued that his client was not guilty of libel and offered to prove the truth of the statements as his defense. The judge refused to allow evidence of truth or falsity, but Hamilton appealed directly to the jury. He argued eloquently that the right to complain against government is a natural right, and restraints upon that right "can only extend to what is false." He urged the jury to acquit his client because they knew Zenger's speech to be true, despite the judge's instruction that truth was no defense. The jury deliberated for a brief period and returned with a verdict of not guilty.[2]

Although the Zenger trial created no legal precedent, there can be little doubt that it is one of the precursors to the protections for freedom of the press and speech that the founders deemed important enough to include in the First Amendment to their

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[2] *See* Ralph L. Crosman, *The Legal and Journalistic Significance of the Trial of John Peter Zenger*, 10 Rocky Mtn. L. Rev. 258 (1937-1938).

newly-enacted Constitution. As members of the First Congress debated the proposed Bill of Rights half a century later, one of the Constitution's principal drafters called the Zenger trial "the germ of American freedom, the morning star of that liberty which subsequently revolutionized America."[3]

Today, the defense of truth and the sanctity of these constitutional standards are threatened by the Colorado Supreme Court's decision. That court's application of the ATSA "actual malice" immunity exception flouts this Court's resolve that the *Sullivan* rule "absolutely prohibits … punishment for true statements," *Garrison v. Louisiana*, 379 U.S. 64, 78 (1964), and, in particular, the tenets that plaintiffs must prove substantial falsity, and that substantially true statements are not actionable. The specter that a defamation plaintiff might prevail and then avoid independent appellate review of whether the statements at issue were proven substantially false will chill speech that this Court sought to protect in *Sullivan* and its progeny.

The Court repeatedly has made clear that speech about matters of public concern is of paramount constitutional significance and thus receives the full constitutional protection granted by the First

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[3] Douglas O. Linder, *The Trial of John Peter Zenger and the Birth of Press Freedom,* in Historians on America: Decisions That Made A Difference (U.S. Dep't of State) (2007), *available at* http://iipdigital.usembassy.gov/st/english/publication/2008/04/20080422131918eaifas0.6481439.html; *see also Sullivan*, 376 U.S. at 274-75 (recognizing founders' intent to reject Britain's libel laws in favor of system that would protect the right to truthfully criticize government).

Amendment. The long-standing protection for such speech is seen throughout this Court's defamation jurisprudence. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, for instance, the 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. Bellotti*, 435 U.S. 765, 776 (1978)). As recently as 2011, in *Snyder v. Phelps*, this Court reiterated 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 (2011).

At the center of this dispute are statements made by employees of petitioner Air Wisconsin Airlines to the federal agency tasked with maintaining the safety and security of the nation's passenger and freight transportation. When Congress enacted the ATSA, it intentionally gave statements such as these – relaying to Transportation Security Administration ("TSA") officials observations about respondent Hoeper's actions and expressing concerns about his mental state – the enhanced constitutional protections of the First Amendment's "actual malice" standard. Thus, Congress made clear that speakers such as Air Wisconsin may not be held liable unless their statements are both false *and* made with knowledge of their falsity or reckless disregard of truth or falsity.

To assess whether these statements fall outside the ATSA's immunity, this Court must engage in the same constitutional analysis of fault that it would undertake in any other case involving a question of actual malice. Because a finding of actual malice

necessarily depends on finding substantial falsity under established First Amendment principles, ATSA immunity cannot be denied without the same finding of falsity here. Any other result threatens to dissolve the "'starch' in [the] constitutional standards" of this Court's defamation jurisprudence. *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004).

SUMMARY OF ARGUMENT

In the decision below, the Colorado Supreme Court allowed a $1.4 million defamation verdict to stand where airline employees reported to the TSA their concerns about a disgruntled employee who had an irrational outburst at a training session, knew that his termination was imminent, was authorized to carry a weapon on an aircraft, and was about to board a commercial flight. The ATSA expressly protects such reports unless made with constitutional actual malice as defined in *Sullivan*, and the Colorado Supreme Court agreed that a report to the TSA may have been warranted in these circumstances. Nevertheless, the court denied immunity under the ATSA, and went on to sustain a seven-figure defamation verdict for substantially true statements made under circumstances that cannot support a finding of actual malice.

In determining that the airline's statements were made with "actual knowledge of falsity" or "reckless disregard as to truth or falsity" so as to deny ATSA immunity, the court expressly declined to make a finding as to whether the statements were, in fact, materially false. It then offered an alternate script

for the airline's report to the TSA that, in the court's view, would have qualified for ATSA immunity.

The court's "approved" script underscores why this case should have been disposed of long ago: the statements by the airline's employees were substantially true, and their choice of specific words to describe a fluid, ambiguous situation cannot support a finding of actual malice. Nonetheless, at every turn in this case, the lower courts have abdicated their responsibility to undertake an independent review of the evidence that purports to show that the statements were made with "actual malice" – a necessary component of which is that the statements were materially false.

As this Court has recognized, consistency in enforcing the actual malice standard is important because "[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, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989). Were other courts to follow the lead of the Colorado Supreme Court by upholding crippling defamation verdicts for substantially true speech, the crucial "breathing space" for speech on matters of public concern that allows *amici* to function would dissipate, casting a chill over speech at the heart of the First Amendment. The Court should hold that, by incorporating the *Sullivan* test for actual malice, the ATSA requires a court to find substantial falsity as a matter of law in order to deny immunity, and it should reverse the Colorado Supreme Court's decision as antithetical to the First Amendment.

ARGUMENT

I. THE ATSA INCORPORATES THE STRONG PROTECTIONS FOR SUBSTANTIALLY TRUE SPEECH OF THE FIRST AMENDMENT'S "ACTUAL MALICE" STANDARD

A. The ATSA Must Be Construed to Incorporate the "Actual Malice" Standard

Since its landmark decision in *New York Times v. Sullivan*, 376 U.S. 254, this Court steadfastly has maintained that, unless speech on a matter of public concern is provably and materially false, it is not actionable. In the interest of providing "breathing space" for such speech, the Court's jurisprudence places on plaintiffs the burden to prove that speech is substantially – not just literally – false, and further, to show that it was made with "actual malice," an exactingly high degree of fault.

Congress was aware of these strong protections when it adopted *Sullivan*'s actual malice rule for the exceptions to the ATSA's grant of immunity.[4] As a matter of statutory construction, it is presumed that the legislature intended to incorporate the well-established meaning of the borrowed standard, and

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[4] *Compare* 49 U.S.C. § 44941 (exempting from immunity individuals who relay potential threats to authorities with either "actual knowledge 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 [that the speech at issue] was false or [] reckless disregard of whether it was false or not").

"adopt[ed] the cluster of ideas" associated with it. *FAA v. Cooper*, 132 S. Ct. 1441, 1449 (2012); *see also Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989) ("When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts.").

The ATSA does not contain any indication that Congress meant to deviate from the judicially established understanding of the *Sullivan* standard that it borrowed. As a result, it must be presumed that Congress imported the First Amendment's well-developed protections for speech on matters of public concern – requiring material falsity and a high level of fault – and applied them specifically to speech about potential airline safety threats.

This is not simply a matter of sound statutory construction. The doctrine of constitutional avoidance requires the ATSA to be construed to provide at least the same level of protection for speech as constitutional defamation law under the First Amendment. Such construction avoids a statutory interpretation that raises "grave" constitutional questions. *Jones v. United States*, 529 U.S. 848, 857 (2000) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other … such questions are avoided, our duty is to adopt the latter.") (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). *See also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,*

485 U.S. 568, 575 (1988); *United States v. CIO*, 335 U.S. 106, 120-22 (1948) (construing federal expenditure provision as not prohibiting labor union endorsement of candidate in its weekly periodical, noting that "the gravest doubt would arise … as to [the law's] constitutionality" under the First Amendment, if it were construed to suppress the publication); *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (a statute must be construed "to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score").

Courts must "construe [a] statute to avoid such problems unless [it] is plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575. In fact, "every reasonable construction must be resorted to" rather than one that renders a statute unconstitutional. *Id.* (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). *See generally Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983).

Here, allowing defamation liability for substantially true statements on matters of public concern, on grounds that the ATSA's immunity provision provides exceptions that allow such exposure, creates serious constitutional tensions. Especially given that Congress sought to incorporate this Court's constitutional protections noted above, an interpretation recognizing as much is imperative. Those protections include determining falsity at the appropriate time, and with the proper level of proof, to ensure that liability is not imposed for substantially true statements.

Any holding that the ATSA can expose airline employees to defamation liability for substantially true statements would run afoul of long-standing First Amendment jurisprudence. To avoid such a reading, this Court must construe the ATSA as incorporating no less protection than the protection that is constitutionally provided in *Sullivan* and its progeny.

B. The First Amendment's Protections Provide Necessary "Breathing Space" for Speech on Matters of Public Concern

In *Sullivan*, this Court held that public officials may not recover damages for defamation without showing "actual malice," which requires plaintiffs to prove a statement was made with "knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 280.

Actual malice is a deliberately demanding standard. In the media context, this Court has held that even "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" will not suffice to establish actual malice. *Harte-Hanks Commc'ns*, 491 U.S. at 663-64; *see also Newton v. NBC*, 930 F.2d 662, 669 (9th Cir. 1990) (even "extreme departure from accepted professional standards … will not suffice to establish actual malice"). By protecting even erroneous statements made without the requisite level of fault, this high bar guards against self-censorship and provides the necessary "breathing

space" to protect speech on matters of public concern. *Sullivan*, 376 U.S. at 272.

Without such protection, the *Sullivan* Court reasoned, would-be critics on topics of public concern would censor their speech beyond even what the law requires, "tend[ing] to make only statements which steer far wider of the unlawful zone." Such self-censorship "dampens the vigor and limits the variety of public debate," and is therefore "inconsistent with the First and Fourteenth Amendments." *Id.* at 279.

Other precedents enhance the constitutional protection for such speech. In *Philadelphia Newspapers, Inc. 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 – rejecting the common-law presumption of falsity in defamation cases, and shifting the burden of proof to plaintiffs. 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 that this result was necessary "[t]o ensure that true speech on matters of public concern is not deterred." *Id.* at 776.

These precedents counteract the chilling effect that would otherwise attend the imposition of liability for a false statement, and they accordingly encourage free debate on matters of public concern without the need for constant self-censorship. In order to provide this necessary "breathing space," the *Sullivan* standard requires defamation plaintiffs to "prove *both*

that the statement was false and that the statement was made with the requisite level of culpability." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

The ATSA immunity provision clearly was intended to create "breathing space" for reports on matters of undeniable public concern. Congress drafted and passed it 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 cause loss of life and grievous injury, and to disrupt and derail the nation's travel system, unquestionably involves matters of vital public interest.

To ensure that decision-makers would not hesitate to relay information that Congress deemed critical to the safety of U.S. transportation systems, the ATSA's immunity provision provided a necessary assurance that such information could be reported without fear of inviting a crippling defamation judgment. Accordingly, the ATSA must be construed to conform to the constitutional standard of "actual malice" in order to breach its grant of immunity. *Sullivan*, 376 U.S. at 272.

II. ATSA IMMUNITY CANNOT BE DENIED FOR SUBSTANTIALLY TRUE SPEECH

A. Substantial Falsity Is a Necessary Component of the *Sullivan* Standard

The drafters of the ATSA conclusively resolved the question of fault for a statement otherwise falling

within the law's purview – unless it breaches the high constitutional bar of actual malice, it cannot form the basis of *any* suit, including defamation. As the lower court noted, the ATSA specifically incorporates the actual malice test from *Sullivan* as the determining standard for immunity. *See* Pet. App. 61a (language of ATSA immunity provision "tracks the definition of 'actual malice' required for defamation actions to pass constitutional muster").

In order to deny ATSA immunity, a court must make findings necessary to establish constitutional malice: (1) that the statement was false, and (2) that it was made with knowledge of or reckless disregard for that falsity. This Court repeatedly has made clear that the first finding – falsity – is a necessary element of the *Sullivan* standard. *See, e.g.*, *Hustler Magazine*, 485 U.S. at 52 (*Sullivan* rule requires plaintiffs to "prove *both* that the statement was false and that the statement was made with the requisite level of culpability"); *Philadelphia Newspapers*, 475 U.S. at 775 (*Sullivan* rule requires plaintiffs to "show the falsity of the statements at issue"); *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 514 (1991) (recognizing that plaintiffs must "prove[] falsity for purposes of the actual malice inquiry").

As this Court explained in *Masson*, the *Sullivan* standard "requires [the Court] to consider the concept of falsity" because it is impossible to "discuss the standards for knowledge or reckless disregard without some understanding of the acts required for liability." 501 U.S. at 513. The Court engaged in a careful analysis of its own precedents and the common law to determine what defamation plaintiffs

must prove to establish that a statement is false. It concluded that the common law "overlooks minor inaccuracies and concentrates upon substantial truth." *Id.* at 516. Noting that "of course, the burden is upon petitioner to prove falsity," the Court held that a statement is false only if it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Id.* at 517 (citation omitted). The Court then emphasized that "*[o]ur definition of actual malice relies upon this historical understanding*." *Id.* (emphasis added).

To establish actual malice, the showing of falsity must meet constitutional standards. Under First Amendment precedent, "substantially true" statements cannot form the basis for a defamation claim, and slight inaccuracies of expression are not enough to prove falsity. A substantially true statement cannot be made with knowledge of falsity or reckless disregard for truth, *see id.* at 513, and therefore cannot cause the speaker to lose ATSA immunity.

As the dissent below correctly noted, the ATSA immunity exception "encompasses the standards articulated in *New York Times v. Sullivan … including the requirement that the plaintiff prove that a statement is false*." Pet. App. 29a (emphasis added). Because ATSA immunity must be decided by the court as a matter of law before the case is submitted to the jury – as the Colorado Supreme Court unanimously agreed – the trial court was required to make its finding of substantial falsity during this pre-trial stage. The Colorado Supreme Court compounded that error by expressly declining to consider whether

the statements at issue were true or false as part of its determination as to immunity. Pet. App. 17a n.6.

Without the common-sense approach of substantial truth, every factual inaccuracy – no matter how minor – could lead to defamation liability, even though statements that are not substantially false cannot unlawfully harm a plaintiff's reputation. *E.g.*, *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1228 (7th Cir. 1993) (reputation is "the only interest that the law of defamation protects"). The substantial truth doctrine thus helps isolate actionable falsehoods from inconsequential inaccuracies. *See Bustos v. A&E Television Networks*, 646 F.3d 762, 765 (10th Cir. 2011) (substantial truth helps courts "screen against trivial claims"). In this way, the "rule making substantial truth a complete defense and the constitutional limitations on defamation suits coincide." *Haynes*, 8 F.3d at 1228.

In keeping with this doctrine, courts repeatedly have refused to engage in the type of hair-splitting and textual parsing that the Colorado Supreme Court undertook in this case. For example, in *Jewell v. NYP Holdings, Inc.*, the court found defendant's description of the plaintiff as the "main" and "prime" suspect was substantially true, where the plaintiff was only "a suspect" who was "investigated by the FBI." 23 F. Supp. 2d 348, 367 (S.D.N.Y. 1998).

Courts similarly have rejected defamation claims for imprecisely describing a violation of securities laws as "fraud";[5] for stating that a plaintiff was

[5] *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1112 (6th Cir. 1978).

"suspended" when in fact he was on "administrative leave";[6] for reporting that a publisher "is married and also has a live-in girlfriend," when, in fact, the publisher had been married in the past and had a live-in girlfriend during that time;[7] for calling a plaintiff a "member" of the Aryan Brotherhood when he was merely "affiliated" with them;[8] and for telling a plaintiff's subsequent employer that she had a sexual harassment suit "pending" against the prior employer and had been "terminated," when in fact she had only filed an administrative charge of sexual harassment and was "constructively discharged."[9] In considering substantial truth, courts look to the ordinary meaning a statement conveys to reasonable listeners, rather than confining the analysis to legal or technical definitions. *See, e.g.*, *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 297 (4th Cir. 2008) (in suit based on broadcast about Abu Ghraib prison abuses, concluding that "a reasonable listener would have understood" use of the word "torture" not in its "narrow, legalistic sense, but in a broader sense that encompassed the range of severe abuses … that had been reported in the media and other sources").

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[6] *Miller v. Journal-News*, 620 N.Y.S.2d 500, 501 (2d Dep't 1995).

[7] *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 302 (2d Cir. 1986).

[8] *Bustos v. A&E Television Networks*, 646 F.3d 762 (10th Cir. 2011).

[9] *Chung v. Better Health Plan*, No. 96 Civ. 7310, 1997 WL 379706, at *3 (S.D.N.Y. July 9, 1997).

B. The Colorado Court's Failure to Consider Falsity Falls Short of Constitutional Requirements

This case demonstrates what happens when a reviewing court declines to follow *Sullivan*'s mandate to "review the evidence to make certain that those principles [elaborated by this Court] have been constitutionally applied." 376 U.S. at 285. The wording of Air Wisconsin's report is not currently in dispute, yet the majority and dissenting opinions of the Colorado Supreme Court reached opposite conclusions as to whether the statements made by Air Wisconsin employees satisfied the falsity element. *Compare* Pet. App. 26a *with id.* at 28a-29a. The constitutional rule of "substantial truth" requires independent appellate review in order to ensure that no judgment is affirmed in the absence of a substantive falsehood. *See Masson*, 501 U.S. at 517; *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-11 (1984).

As this Court made 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. The Colorado Supreme Court abdicated its responsibility to police the limits of the constitutional standard when it declined to make falsity part of its immunity determination. It then imported its constitutionally flawed finding of fault into its defamation analysis, finding actual malice in the defamation claim "for the same reasons" that it denied immunity. Pet. App. 23a.

The Colorado Supreme Court's refusal to reach the issue of falsity – which would have required a substantial truth analysis – led to its internally inconsistent decision. In addition, in avoiding a ruling on truth or falsity, the Court made assumptions about the statements at issue that are at odds with well-established defamation and First Amendment jurisprudence.

First, the court improperly conjured various "implications" from Air Wisconsin's statements and then examined those "implications" as though they were part of the statements at issue. For example, the court explained:

> The tenor of the statement therefore suggests much more than FFDO status; the statement implies, for example, that [Air Wisconsin] knew that someone had seen Hoeper with his weapon or that Hoeper had told someone he had his weapon. [Air Wisconsin]'s statement that Hoeper may have been armed was therefore made with reckless disregard of its truth or falsity.

Pet. App. 19a. None of these implications are expressed or adopted by Air Wisconsin. Rather, as discussed below, the context of the statements as a whole directly undercuts these implications. As the dissent notes, "[i]t is as if the majority tosses up the

overblown 'implication' just to have something to swat down as false." Pet. App. 36a.[10]

Second, the court improperly plucked the two statements from their context, and considered them without reference to other relevant communications. In determining whether these statements were true or false – or relatedly, whether they were capable of sustaining the implications that the court read into them – the court should have considered the context of the communication as a whole in order to determine the overall information that was actually relayed to the TSA.[11] Further, the court failed to consider the nature of the audience – namely, the TSA – in analyzing the statements.[12] Here, clarifying

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[10] Courts are traditionally wary of such defamation by implication claims – and with good reason. Implication claims "face a severe constitutional hurdle" because, "by their nature [they] present ambiguous evidence with respect to falsity." *Locricchio v. Evening News Ass'n*, 476 N.W.2d 112, 129 (Mich. 1991). Thus, courts set a high bar for deciding whether a particular implication can reasonably be found in the actual statements – it must be intended or endorsed by the defendant in order to be actionable in actual malice cases. *See*, *e.g.*, *Dodds v. American Broad. Co.*, 145 F.3d 1053, 1063-64 (9th Cir. 1998); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993); *Woods v. Evansville Press Co.*, 791 F.2d 480, 487 (7th Cir. 1986). Without finding that the suggested implications were endorsed or intended by Air Wisconsin, the court erred in considering these implications in the actual malice analysis.

[11] *See*, *e.g.*, *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005); *Celle v. Filipino Reporter Enters., Inc.*, 209 F.3d 163, 187 (2d Cir. 2000).

[12] *See Remick v. Manfredy*, 238 F.3d 248, 261 (3d Cir. 2001) ("In determining whether a communication is defamatory, the court must view the statement 'in context' with an eye toward

statements nullified the possible effects of any misstatement. For example, the court's "implication" that Air Wisconsin had additional undisclosed knowledge that Hoeper was armed is undercut where, within the same statement, Air Wisconsin indicates it was "concerned about … the whereabouts of [Hoeper's] firearm." Pet. App. 30a.

C. The Statements at Issue Are Entitled to ATSA Immunity Because They Are Substantially True

The Colorado Supreme Court made a fundamental error when it refused to consider whether its proposed script for Air Wisconsin's report to the TSA would have had "a different effect" than what was actually said; in other words, whether the court's tweaks would make a material difference to the TSA. *Masson*, 501 U.S. at 517.

Air Wisconsin told the TSA that Hoeper was "an FFDO who may be armed"; that it was "concerned about [Hoeper's] mental stability and the whereabouts of his firearm"; and that Hoeper had been "terminated today." The majority decried this as an "overstate[ment]," but offered that it would have been acceptable to report that Hoeper was an FFDO pilot; had "acted irrationally" and "blew up" at a training earlier in the day; and "knew he would be terminated soon." As the dissent noted, the majority drew "hair-

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'the effect [it] is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate.'") (citation omitted).

splitting distinctions that make no difference to the [immunity] analysis." Pet. App. 34a.

The "gist" or "sting" of Air Wisconsin's statements was the same as that of the court's preferred report (and arguably the same as *any* report to the TSA)[13]: that the TSA should investigate whether Hoeper might pose a threat to his fellow passengers before allowing him onto the plane. Air Wisconsin's slight variances of phrasing cannot transform these otherwise protected statements into actionable defamation.

The court's wordsmithing is fundamentally at odds with the doctrine of substantial truth. This Court specifically cautions against courts imposing their own interpretations of ambiguous situations as the "truth" in order to determine actual malice. In *Bose*, the Court made clear that "[t]he choice of [inaccurate] language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's *broad protective umbrella."* 466 U.S. at 513 (emphasis added). As the Court noted, to find otherwise would mean that "any individual using a malapropism might be liable, simply because an intelligent speaker would have to know that the term was inaccurate in context, even though he did not realize his folly at the time." *Id.* Thus, the Court held that a reviewer's inaccurate description of a sound system's acoustics as

[13] As the dissent pointed out, *any* report to the TSA of "suspicious" activity – including the court's preferred script – carries the same "implicit suggestion" that the suspicions may be true. Pet. App. 37a.

wandering "about the room" rather than "along the wall" did not constitute actual malice. *See also Time, Inc. v. Pape*, 401 U.S. 279 (1971) (omission of "alleged" in report about government document that "bristled with ambiguities" was not sufficient to create an issue of constitutional malice).

Lower courts have similarly declined to impose liability based on mistaken accounts of ambiguous events. *See, e.g.*, *Newton v. NBC*, 930 F.2d at 681 ("[C]onstitutional malice does not flow from a finding that an 'intelligent speaker' failed to describe the words he used as the finder of fact did."); *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1304 (8th Cir. 1986) ("[T]he First Amendment cautions courts against intruding too closely into questions of editorial judgment, such as the choice of specific words."); *Woodcock v. Journal Publ'g Co.*, 230 Conn. 525, 539 (1994) (description of plaintiff as "urging" rather than "suggesting" a proposal did not constitute actual malice, as the difference between the two phrases "fits easily within the breathing space that gives life to the First Amendment") (citing *Bose*, 466 U.S. 513).

In this case, Air Wisconsin employees faced a series of fluid, fast-moving events, "bristling with ambiguity." They had an irate pilot who had failed his last-chance test to keep his job, knew of his imminent termination, was licensed to carry a weapon on airplanes, and was about to board a civilian aircraft. Air Wisconsin employees internally discussed their concerns about Hoeper's behavior – as well as concerns about past incidents of violence on airplanes by disgruntled employees – and then reported those concerns to the TSA. The court's

agreement that such a report was warranted should have been the end of the inquiry.

Instead, the court allowed Air Wisconsin to be held liable for perhaps imprecise words used in describing this fluid series of events, even though the difference in effect between Air Wisconsin's report and the court's corrected version "is, in context, immaterial." *Masson*, 501 U.S. at 524. Under established First Amendment jurisprudence, this fact pattern simply cannot support a finding of actual malice.[14]

III. THE COLORADO SUPREME COURT'S HOLDING THREATENS TO CHILL SPEECH BY UNDERMINING THE ACTUAL MALICE STANDARD

Consistency in enforcing the actual malice standard is important because "[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*, 491 U.S. at 686. The meaning of "actual malice" "cannot be fully encompassed in one infallible definition"; its limits are "marked out through case-by-case adjudication." *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968). *Amici* are thus concerned by the Colorado Supreme Court's holding, because it suggests that statements may be made with actual malice *even if they are materially true*. Allowing the Colorado Supreme Court's decision to stand would

[14] Moreover, the fact that the court based its reasoning on what it believed Air Wisconsin "should have" said demonstrates that the court misapplied the actual malice standard.

therefore threaten the strong protections for public speech staked out by this Court and others.

The role of a robust press is not just to tell us the facts, but to tell us why those facts are important. The undersigned *amici* operate in situations where information is fluid and constantly changing, and time is of the essence in keeping the public updated with accurate and timely information. Coverage of some of the major stories of the past year has shown the need for a press that makes sense of a sea of information, wading into the facts to tell us where they are leading.

For example, on February 3, 2013, a former officer with the Los Angeles Police Department, Christopher Dorner, began a nine-day rampage, killing four people and injuring three others. During that time, the LAPD maintained a dialogue with the public, through the media, holding a number of press conferences to keep the public informed and to ask for help in finding the fugitive. After witnesses and victims led police to Big Bear, California, Mr. Dorner was killed in a fire that destroyed the house in which he was hiding. As information flew about the manhunt, the media played an active role not only in keeping the public updated, but also by providing context, background and structure to the rapid flow of information.

Another major story unfolded in real time on April 15, 2013, when a bomb exploded at the finish line of the Boston Marathon. Over the next few days, state and federal police left no stone unturned in their search for the bombers. But here, too, they did not do it alone. A mere three days after the bombing, on

April 18, 2013, the FBI released photographs of the suspects, which they had identified using local surveillance cameras. Through the media, they asked the public for help finding the suspects. The next day, after one of the suspects was killed, officials shut down the City of Boston and urged residents to remain inside. The remaining suspect was found and arrested that night. As rumors and reports flew during those 72 hours, people turned to the media to filter and make sense of the rapid developments at hand, and to fill in other pieces of the puzzle through independent investigative reporting.

In both of these cases, the media reported events as they occurred, although many of the facts they received were ambiguous and uncertain. They were free to do so because this Court has insisted that speakers receive the broad protection of the First Amendment whenever they relay substantially true information about issues of public concern. In this environment, "some error is inevitable," and "the difficulties of separating fact from fiction" have convinced this Court from *Sullivan* onward "to limit liability to instances where some degree of culpability is present in order to eliminate the risk of undue self-censorship and the suppression of truthful material." *Herbert v. Lando*, 441 U.S. 153, 171-72 (1979). The actual malice standard and substantial truth doctrine provide the necessary "breathing space" for *amici* to perform their public function. If the Colorado Supreme Court's interpretation of actual malice were to stand, *amici* would be forced to guess what minor linguistic edits a reviewing court might make with the benefits of hindsight and comprehensive testimony – or else risk crushing liability for defamation being

sustained. The risks inherent in such a system would lead to "intolerable self-censorship." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

Moreover, the Colorado Supreme Court's holding, if upheld, would have a wider impact than First Amendment jurisprudence. In addition to providing a baseline protection for speech on matters of public concern, the actual malice standard has been incorporated by courts in many jurisdictions as the test for determining when a common-law conditional privilege is lost.[15] The *Sullivan* standard also is incorporated into numerous other laws, including electoral statutes;[16] trade libel laws;[17] and a law similar to the ATSA providing immunity for reports of suspected

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[15] *See* Hon. Robert D. Sack, Sack on Defamation, § 9:3-2 n.214 (4th ed. 2010) (collecting cases).

[16] *See, e.g.*, Alaska Stat. § 15.13.095 (imposing liability for statements in telephone polls made with actual malice); Cal. Elec. Code § 20010 (prohibiting campaign material with superimposed imagery of candidate, where material is made or distributed with "actual malice"); Minn. Stat. Ann. § 211B.06 (imposing liability for campaign materials made with actual malice); N.C. Gen. Stat. Ann. § 163-274 (creating misdemeanor offense for publication of derogatory reports about candidate with actual malice); N.D. Cent. Code § 16.1-10-04 (imposing liability for campaign materials made with actual malice); Ohio Rev. Code Ann. § 3517.22 (same); Or. Rev. Stat. § 260.352 (imposing liability for publications made with "knowledge or with reckless disregard" that the publication "contains a false statement of material fact" regarding a candidate or political measure).

[17] *See, e.g.*, Idaho Code Ann. § 6-2002 (product disparagement must be made with "actual malice" to be actionable).

terrorist activity.[18] Divorcing the falsity requirement from the constitutional malice standard would impact courts' analyses of these statutes and common-law principles as well.

CONCLUSION

The ATSA immunizes an airline's reports of suspicious activity because Congress wanted to encourage airline employees to give the TSA critical, time-sensitive information and assessments, provided they are not simply figments of the imagination. Here, Air Wisconsin reported to the TSA not only the bare facts, but also why they were important: Air Wisconsin was concerned about a volatile pilot who knew he was returning home to lose his job and was authorized to carry a firearm. Imposing liability on Air Wisconsin for this report is not only at odds with the ATSA – it also flies in the face of this Court's long history of rejecting liability for speech on matters of public concern that is substantially true, but delivered with slight inaccuracies of phrase.

Because the Colorado Supreme Court's interpretation of actual malice is at odds with the weight of precedent – from this Court and lower courts – on these crucial protections, the Court should hold that in order to deny immunity under the ATSA's actual malice standard, a court must make a determination

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[18] 6 U.S.C. § 1104(a)(2) (denying immunity for reports that the person "knew to be false or was made with reckless disregard for the truth at the time that person made that report").

of substantial falsity consistent with First Amendment principles. The Court further should hold that on the facts of this case, such a finding is not possible, because all of Air Wisconsin's statements were substantially true.

For the foregoing reasons, this Court should reverse the Supreme Court of Colorado.

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APPENDIX A

Advance Publications, Inc., directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, daily newspapers in over 20 cities, and weekly business journals in over 40 cities throughout the United States. It also owns many internet sites and has interests in cable systems serving over 2.3 million subscribers.

With some 500 members, the American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and credibility of newspapers.

The Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and nonprofit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary and professional markets, scholarly journals, computer software and electronic products and services. The Association represents an industry whose very

existence depends upon the free exercise of rights guaranteed by the First Amendment.

Courthouse News Service is a California-based legal news service for lawyers and the news media that focuses on court coverage throughout the nation, reporting on matters raised in trial courts and courts of appeal up to and including the U.S. Supreme Court.

The Digital Media Law Project ("DMLP") provides legal assistance, education and resources for individuals and organizations involved in online and citizen media. DMLP is jointly affiliated with Harvard University's Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study and help pioneer its development, and the Center for Citizen Media, an initiative to enhance and expand grassroots media.

Hearst Corporation is one of the nation's largest diversified media companies. Its major interests include the following: ownership of 15 daily and 38 weekly newspapers, including the *Houston Chronicle*, *San Francisco Chronicle* and *Albany (N.Y.) Times Union*; nearly 300 magazines around the world, including *Good Housekeeping*, *Cosmopolitan* and *O, The Oprah Magazine*; 29 television stations, which reach a combined 18% of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E and ESPN; business publishing, including a joint venture interest in Fitch Ratings; and Internet businesses, television production, newspaper features distribution and real estate.

The Media Law Resource Center, Inc. ("MLRC") is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

The National Press Club is a membership organization dedicated to promoting excellence in journalism and protecting the First Amendment guarantees of freedom of speech and of press. Founded in 1908, it is the nation's largest journalism association.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to photojournalism.

National Public Radio, Inc. is an award-winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations that are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and 10 years of archived audio and information.

The Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

The Online News Association ("ONA") is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing

the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

The Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Reporters Committee for Freedom of the Press 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 Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

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