No. 12-315

IN THE

Supreme Court of the United States

AIR WISCONSIN AIRLINES CORPORATION,
Petitioner,

—v.—

WILLIAM L. HOEPER,
Respondent.

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

BRIEF OF *AMICUS CURIAE* INTERNATIONAL AIR TRANSPORT ASSOCIATION IN SUPPORT OF PETITIONER

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International Air Transport Association ("IATA") respectfully submits this brief as *Amicus Curiae* in support of the Petition of Air Wisconsin Airlines Corporation ("Air Wisconsin") for a Writ of Certiorari seeking review of the decision of the Colorado Supreme Court.[1] The opinion of the Colorado Supreme Court is reproduced in the Appendix to the Petition ("Pet. App.") at 1a-43a.

INTEREST OF *AMICUS CURIAE* IATA

IATA is a nongovernmental international organization founded in 1945 by air carriers engaged in international air services. Today, IATA consists of 240 Member airlines from 126 countries representing 84% of the world's total air traffic. The general purpose, objective and aim of IATA is to promote safe, regular and economical air transport, to foster air commerce, to provide the means for collaboration among the air transport enterprises engaged in international air transportation service, and to cooperate with the International Civil Aviation Organization ("ICAO")[2] and other

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[1] Pursuant to Sup. Ct. R. 37.2, IATA certifies that counsel of record for all parties received notice at least 10 days prior to the due date of this Brief of IATA's intention to file it, and the parties have executed a Stipulation on file with the Clerk's office consenting to the filing of this brief. Pursuant to Sup. Ct. R. 37.6, IATA states that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from IATA, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief.

[2] ICAO, established by the Convention on International Civil Aviation, 61 Stat. 1180, 15 U.N.T.S. 6605 (Dec. 7, 1944) ("Chicago Convention"), is a specialized agency of the United

international organizations in the development of aviation law and policy. Safety is IATA's number one priority.

Since 1945, IATA has worked closely with the executive and legislative branches of various governments, including the United States, and intergovernmental organizations, such as ICAO, to achieve and maintain uniformity in the development, implementation and interpretation of numerous domestic and international air law treaties and agreements, especially in the areas of aviation safety and security. IATA holds the status of permanent observer in the ICAO Air Navigation Commission and the Air Transport Committee, has participated in every significant international air law meeting and diplomatic conference, and has contributed substantially to the development of treaties and agreements relating to the liability of air carriers and aviation security, including the Tokyo[3], Hague[4] and Montreal[5]

Nations and is headquartered in Montreal, Canada. In addition to providing a forum for its 189 Contracting States to develop and adopt international air law conventions, ICAO sets international standards and regulations necessary for the safety, health, security, efficiency and regularity of air transport.

[3] Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 (1969).

[4] Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, *reprinted in* 1974 U.S.C.C.A.N. 3975.

[5] Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999, ICAO Doc. No. 9740 (entered into force Nov. 4, 2003), *reprinted in* S. Treaty Doc. 106-45, 1999 WL 33292734.

Conventions, which are the first international Conventions to address counter-measures to hijacking and sabotage.

Most recently, IATA has played a key role in the drafting of 2010 Beijing Convention and Protocol, which are intended to improve aviation security,[6] and ICAO's current review and possible amendment to the Tokyo Convention based on numerous concerns, including over the interpretation by courts of the treaty's immunity provisions.

IATA and its Members have a direct and substantial interest in the critical aviation and security issues before the Court. For more than seven decades, commercial aviation has been a specific focus of terrorist attacks, and the tragic events of September 11, 2001 shifted the attention not just of the United States, but the world, toward the serious problem of aerial terrorism.

The Aviation and Transportation Security Act ("ATSA"), 49 U.S.C. § 44941, "recognizes that the war on terrorism is, in large part, a war of information." 147 Cong. Rec. S12247-05, at S12249

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[6] In recognition of the evolving risks and under the auspices of ICAO, two counterterrorism treaties devoted to improving aviation security were adopted in Beijing, China in September 2010, which stress the States Parties' concerns over the "new types of threats against civil aviation requir[ing] new concerted efforts and policies of cooperation on the part of the States." *See* Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, *opened for signature* Sept. 10, 2010, ICAO Doc. 9960 (2011) (not yet in force); Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* Sept. 10, 2010, ICAO Doc. 9959 (2011) (not yet in force). These treaties were strongly supported and signed by the U.S., but have not yet been ratified.

(daily ed. Nov. 30, 2001) (statement of Sen. Brownback). The threat to aviation is not unique to the United States, as is evidenced by the numerous international security conventions devoted to prompting and improving aviation. Thus, IATA, an organization of a majority of the world's airlines, many of which operate within, to and from the United States, has a substantial interest in the interpretation of a provision aimed at promoting the reporting by carriers to the TSA of suspicious activities of passengers, and protecting carriers from liability when they do.

The Colorado Supreme Court's affirmance of liability against Air Wisconsin for reporting a suspicious and potentially dangerous passenger is based on a narrow and erroneous application of 49 U.S.C. § 44941, and will inevitably have a chilling effect on the reporting of suspicious transactions by airline employees in direct contravention of the ATSA's purpose of promoting safety and the TSA's policy of "when in doubt, report". At the same time, it subjects airlines who follow the TSA's policy to potential liability for following the TSA's instructions.

Because it is just the second decision to apply 49 U.S.C. § 44941 to an airline's report of suspicious activity, and the first to apply it to a developed factual record,[7] the decision below will be looked

[7] While several district court decisions have referenced 49 U.S.C. § 44941, only one actually applied it to determine whether the airline was entitled to immunity, and that was at the motion to dismiss stage, where there was no developed factual record. *See Hansen v. Delta Airlines*, No. 02 C 5761, 2004 WL 524686, at *7-8 (N.D. Ill. Mar. 17, 2004)*; see also Hill v. U.S. Airways, Inc.*, No. 08-14969, 2009 WL 4250702, at *4 (E.D. Mich. Nov. 25, 2009) (declining to address immunity issue);

to by air carriers and courts throughout the United States to determine the standard to be used in applying this provision and will likely have a chilling effect on the airlines. Thus, the Court should review the Majority's Decision at this time, without waiting for further percolation of this critical safety issue, in order to avoid the misapplication of the ATSA's immunity provision, and to encourage and ensure the continued prompt disclosure of "any suspicious transaction related to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism. . ." as intended by Congress and as dictated by common sense.

Accordingly, IATA has a substantial interest on behalf of its Members to ensure the proper application of 49 U.S.C. § 44941, which will protect its Members and the traveling public by promoting the exchange of essential security information.

SUMMARY OF REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted because the Colorado Supreme Court interpreted 49 U.S.C. § 44941 in a manner that is inconsistent with its language and Supreme Court precedent, contradicts TSA policy, and will have significant adverse safety and security ramifications beyond the facts

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Shqeirat v. U.S. Airways Group, Inc., 515 F. Supp. 2d 984, 1000 (D. Minn. 2007) (same); *Dasrath v. Continental Airlines*, 228 F. Supp. 2d 531, 538 (D. N.J. 2002) (holding that 49 U.S.C. § 44941 did not apply); *Bayaa v. United Airlines, Inc.*, 249 F. Supp. 2d 1198, 1205 (C.D. Cal. 2002) (same).

of this case. Specifically, the Colorado Supreme Court incorrectly:

- concluded that it was not relevant to the immunity analysis whether the statements at issue were true or false;
- implied a duty to investigate before reporting rather than limiting its analysis to the facts known to Air Wisconsin at the time of the report of a "possible" threat;
- second-guessed Air Wisconsin's report from the perspective of hindsight, ignoring the context in which the report was made; and
- conducted a "hair-splitting" analysis of Air Wisconsin's statements through which it found fault with the statements as they compared to an ideal script drafted by the court, thereby finding falsity where it was not present.

The Majority's decision will have a chilling effect on the reporting of "possible" suspicious activity. At a minimum, the decision increases the risk that airline employees will spend substantial time discussing or investigating potentially suspicious activity with superiors and/or company lawyers before making a report, thereby costing time when an immediate action may be necessary. At worst, the court's decision will result in individuals deciding not to report at all. Either way, the decision will have an adverse impact on the safety of aviation which is anathema to the very purpose of ATSA.

The importance of safety in aviation cannot be overstated, and was expressly recognized by Congress when drafting the ATSA:

> The conferees recognize that the safety and security of the civil air transportation system is critical to the security of the United States and its national defense, and that a safe and secure United States civil air transportation system is essential to basic freedom of America to move in intrastate, interstate and international transportation.

H.R. Rep. No. 107-296, at 53, 2002 U.S.C.C.A.N. 589, 590 (Conf. Rep.) (2001). As Amicus United States noted in its submission below, "[a]ir transportation security depends in significant part on the ability of the [TSA] to obtain intelligence; TSA must be made aware of any and all potential threats in order to expeditiously take necessary protective actions. Air Carriers are perhaps the most obvious source of useful threat information for TSA." *See* Pet. App. at 54a; *see also* Pet. App. at 14a.

The question presented herein is significant and critical, and requires immediate review by the Court, as waiting for the issue to percolate or for Circuit Courts of Appeal to address the error of the Majority Opinion could have serious safety consequences. Accordingly, it is imperative that the Court grant certiorari now to correct the errors below.

ARGUMENT

REVIEW AT THIS TIME IS REQUIRED AS THE MAJORITY'S APPLICATION OF 49 U.S.C. § 44941 WILL HAVE A CHILLING EFFECT ON REPORTING OF SUSPICIOUS ACTIVITIES WHICH WILL JEOPARDIZE AVIATION SAFETY

"There is an old Roman canon, XII, salus pupuli lex esto, 'the safety of the people is the supreme law.'" *See* 147 Cong. Rec. S11974-02, at S11975 (daily ed. Nov. 16, 2001) (statement of Sen. Hollings). Even before the events of 9/11, the Court recognized an "observable national and international hijacking crisis," and that "the Government ha[s] a compelling interest in preventing [this] otherwise pervasive societal problem. . . ." *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n. 3 (1989). As the Court recently stated "[e]veryone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order." *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010).

The ATSA was drafted in the days after 9/11 with the purpose of making it safe for Americans to fly again. *See* H.R. Rep. No. 107-296, at 53-54, 2002 U.S.C.C.A.N. at 590. It is incongruous that one of the ATSA's provisions should be interpreted in a way that will erode the very safety it was meant to promote.

Yet this is exactly what will happen if the decision below is permitted to stand. The chilling effect that will result from the decision below is intolerable, and the decision should be reviewed

immediately to ensure that the immunity provision set forth in 49 U.S.C. § 44941 is applied in a proper manner.

A. The Colorado Supreme Court Incorrectly Applied The Immunity Provision Of 49 U.S.C. § 44941 In A Manner Contrary To Its Terms And Intent

The Majority decision below incorrectly held that the ATSA's immunity provision does not require the Court to determine the truth or falsity of the statements in question. The Majority then compounded its mistake by implicitly casting blame for Air Wisconsin's failure to investigate further before reporting, analyzing Air Wisconsin's statements from the perspective of hindsight and applying an impossible standard in which it compared the language used by Air Wisconsin to a script the Majority prepared after months of deliberation. The Majority's misapplication of the relevant standard requires immediate review.

1. The ATSA's Immunity Provision Requires that the Plaintiff Prove Falsity

The ATSA provides immunity to carriers and their employees who voluntarily disclose to the TSA any "suspicious transaction relevant to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism. . ." unless the disclosure is made with knowledge that it is false, inaccurate or misleading, or with reckless disregard of its truth or falsity. 49 U.S.C. § 44941. The language of the

immunity provision mirrors in large part the standard for "actual malice" set forth in *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

Although the Majority relied upon the actual malice standard set forth in *Sullivan* and its progeny, they inexplicably concluded that they need not "decide whether [Air Wisconsin's] statements were true or false". *See* Pet. App. at 17A n. 6. This is contrary to Supreme Court case law, pursuant to which recovery under the actual malice standard requires that the plaintiff satisfy his burden of showing falsity, as well as fault. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-76 (1986). It also flies in the face of logic, which dictates that a carrier encouraged to report all suspicious activities, even where it has doubt as to the legitimacy of the threat, cannot be found liable for a report that is determined to have been correct and truthful.

To subject a carrier to liability for a report without determining that the report was false would be contrary to the very purpose of the ATSA to promote the unhindered and immediate flow of information to the TSA. Accordingly, as the Petitioner states in its Petition, it would be absurd to interpret the immunity provision not to apply in any situation where the report actually turned out to be correct. *See* Pet., at 23-25.

2. Air Carriers Do Not Have a Duty to Investigate

Having found that it did not have to determine whether Air Wisconsin's statements were true or false, the Majority compounded its error by faulting "Air Wisconsin for failing to investigate the

matter sufficiently". Pet. App. at 38a-39a; *see also* Pet. App., at 5a, 18a. The imposition of a duty to investigate is contrary to the text and purpose of the ATSA. As the Dissent correctly noted:

> Prior to the events giving rise to this case, the TSA issued a security directive (footnote omitted) requiring all airlines to report suspicious activities to the TSA. This directive was part of a fundamental shift in airline security in the wake of 9/11. Prior to 9/11, the airlines were responsible for assessing and investigating possible threats to airline security. **After 9/11, the TSA assumed responsibility for such assessment and investigation. According to the TSA official who testified at trial, "we [the TSA] wanted to know about suspicious incidents" from the airlines, but "we did not want to have the carriers . . . . doing the investigation, the assessment of . . . potential security matters that came to their attention." The post–9/11 policy was known as "when in doubt, report."**

See Pet. App., at 37a (emphasis added). Thus, the duty to investigate lies with the TSA, not air carriers.

Neither do the Court's decisions applying the actual malice standard upon which the Majority relies support the Majority's imposition of a duty to investigate. *See Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) ("failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard"); *St. Amant v. Thompson*, 390 U.S. 727, 730-32 (1968)

("These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.").

Finally, the Majority's imposition of a duty to investigate is contrary to the accepted interpretation of 49 U.S.C. § 44902(b), a similar provision which grants the carrier authority to remove a passenger deemed inimical to safety pursuant to 49 U.S.C. § 44902(b). *See, e.g., Cerqueira v. American Airlines, Inc.*, 520 F.3d 1, 15 (1st Cir. 2008) (there is no obligation on the part of the Captain to engage in an investigation); *Cordero v. CIA Mexicana de Aviacion, S.A.*, 681 F.2d 669, 672 (9th Cir. 1982) (the reasonableness of the carrier's opinion is to be tested on the information available at the moment a decision is required, and there is no duty to conduct an in-depth investigation); *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975) (same).[8]

Airlines often have to act quickly based on limited facts to ensure that reporting is completed in

[8] In interpreting a similar immunity provision contained in the Tokyo Convention, the Ninth Circuit recently found that the Tokyo Convention imposes a duty to investigate when taking action with regard to unruly passengers. *See Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 870-71 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2874 (2011). This decision factored into the establishment of a sub-committee by ICAO to explore the amendment of the Tokyo Convention. *See* ICAO, LC/SC-MOT Report, Special Sub-Committee of the Legal Committee for the Modernization of the Tokyo Convention Including the Issue of Unruly Passengers (2012).

time to take action. By inserting an investigation requirement where none exists, the Majority's holding will delay the reporting of information while investigations are performed, which ultimately could have tragic results.

3. Carriers' Reports to the TSA Should Not Be Viewed in Hindsight

As the Dissent below noted, the Majority ignored the context in which Doyle's report was made, and second-guessed his choice of language from the perspective of hindsight. *See* Pet. App. 39a-40a ("It is easy for an appellate court to write a script for what Air Wisconsin should have said to the TSA after having had the benefit of hours of trial testimony and ample time for appellate review and reflection. But this is exactly the sort of approach that the U.S. Supreme Court has rejected."). In so doing, the Majority focused on the fact that Hoeper ultimately did not pose a threat. *See* Pet. App. at 20a, 27a, 39a. This type of approach has been rejected in a number of different contexts, and must be rejected here.

For example, in *Ryburn v. Huff*, 132 S. Ct. 987 (2012), the plaintiffs brought an action under 42 U.S.C. § 1983 arising out of the defendant police officers' alleged violation of the plaintiffs' Fourth Amendment rights by entering their home without a warrant. *Id.* at 989. On appeal, the Ninth Circuit held that the officers had no reason to fear for their safety, or the safety of anyone else, and therefore did not have a right to enter the premises and were not entitled to qualified immunity. *Id.* at 991.

The Court reversed the Ninth Circuit's decision. Noting that the panel majority's conclusions were made "far removed from the scene and with the opportunity to dissect the elements of the situation," the Court held that the Ninth Circuit's conclusions were flawed for numerous reasons. *Id.* at 991. One of those reasons was that "the panel majority did not heed the District Court's wise admonition that judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Id.* at 991-92. The Court added:

> With the benefit of hindsight and calm deliberation, the panel majority concluded that it was unreasonable for petitioners to fear that violence was imminent. But we have instructed that reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving."

Id. at 992 (citations omitted).

The Court's analysis of the Fourth Amendment is similar to various courts' analyses of 49 U.S.C. § 44902, which, as noted *supra*, grants carriers the right "to refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety". *See Cerqueira*, 520 F.3d at 14-16 (the test of whether or not an airline properly refused passage to a passenger is based on the facts as known

at the time of the decision, and should not be tested by other facts later disclosed by hindsight); *Cordero*, 681 F.2d at 672 (same); *Williams*, 509 F.2d at 948 (same). The courts adopted this test to "reconcile[ ] the primary priority of safety with other important policies, such as § 1981's prohibitions on racial discrimination". *Cerqueira*, 520 F.3d at 14; *see also Al-Watan v. American Airlines, Inc.*, 658 F. Supp. 2d 816, 824 (E.D. Mich. 2009).

As with 49 U.S.C. § 44902, the ATSA's primary concern is safety of aviation, and similar to the circumstances in *Ryburn*, individuals making reports governed by § 44941 often must do so quickly.

Not only did the Majority analyze Doyle's report using the 20/20 vision of hindsight, they did not take into account the context in which Doyle made his statement. The incident in question occurred in December 2004, approximately three years removed from the attacks of September 11, 2001, and Doyle's impressions were colored by his knowledge of prior incidents where disgruntled airline employees had crashed or attempted to crash aircraft, which he discussed with co-employees before making his report to the TSA. *See* Pet. App. at 30a-31a. The incidents to which Doyle was referring likely were the crash of Pacific Southwest Airlines flight 1771 from Los Angeles to San Francisco on December 7, 1987, during which a recently terminated employee murdered the crew and supervisor who had fired him, and caused the aircraft to crash, killing all 43 passengers on board (*see* Kevin Howe, *A Grim Job for Monterey Dentist*, Monterey County Herald, December 7, 2007, at B1), and the attempted

takeover of FedEx Flight 705 on April 7, 1994 by "a suicidal co-worker" who was piloting the aircraft while awaiting a disciplinary hearing likely to end his flying career (*see* Lela Garlington, *Trauma of Flight 705 Bonds Three Survivors – Federal Express Pilots' Lives Never Same after '94 Event*, Memphis Commercial Appeal, August 31, 2007, at A1).

Intentional airplane crashes such as the two mentioned above, and especially those that changed our nation on September 11, 2001, affect everyone. Those who work in aviation and are faced with the task of protecting it are not immune from these effects, and should be given broad discretion. While this does not and should not give airlines *carte blanche* to report without thought, it stresses the need to view reports in context, not hindsight. As aptly noted by the Court of Appeals of New York in the context of the airline's discretion to deny passage to certain persons in under 49 U.S.C. § 44902:

> "[Airline] safety is too important to permit a safety judgment made by the carrier * * * to be second-guessed months later in the calm of the courtroom by a judge or a jury, having no responsibility for the physical safety of anyone, on the basis of words which are inadequate to convey the degree of excitement and tenseness existing at the time the judgment was made."

Adamsons v. American Airlines, Inc., 444 N.E.2d 21, 24-25 (N.Y 1982) (citations omitted).

4. ATSA Immunity Only Requires Substantial Truth

Having previously held that they need not make any determination as to falsity, the Majority nonetheless engages in a micro-analysis of Air Wisconsin's report, applying a heightened standard of exactness not supported by the text or underlying purpose of § 44941.

Under § 44941, a carrier is entitled to immunity unless the plaintiff demonstrates that the report was made with actual knowledge that it was false, inaccurate or misleading, or with reckless disregard of its truth or falsity. If a statement is "substantially" true it is not false.

The Majority drafted its own script of what Air Wisconsin should have reported, and found fault based on inconsequential details and purported overstatements. The Majority found that "Air Wisconsin likely would be immune under the ATSA if Doyle had reported that Hoeper was an Air Wisconsin employee, that he knew he would be terminated soon, that he had acted irrationally at the training three hours earlier and 'blew up' at test administrators, and that he was an FFDO pilot." *See* Pet. App. at 21a. However, as fully set forth in the Petition, Air Wisconsin's statements were substantially true and did not substantively differ from what the Majority held would have been acceptable.

In requiring anything more, the Majority ignored that *Sullivan* and its progeny demand only substantial truth, and overlook minor inaccu-

racies.[9] *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516-17 (1991) (noting that the Court's definition of actual malice relies on the understanding that a "statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced'") (citation omitted)).

B. The Majority's Decision Will Have A Chilling Effect On Reporting, Which In Turn Will Adversely Impact Aviation Safety

The Dissent succinctly explained the chilling effect the Majority's Decision is likely to have:

> It may be tempting to dismiss this case as an outlier. Indeed, the case before us appears to be the first reported case rejecting immunity in the ATSA's ten-year history. But a $1.4 million verdict is not easy to dismiss, nor is the majority's troubling rationale, which I fear may threaten to undermine the federal system for reporting flight risks. The majority recognizes that the entire point of immunity under the ATSA is to "encourage [private air] carriers to take action on issues of public importance, such as avoiding air piracy and other threats to national security, without fear of

[9] Doyle spoke with the TSA for approximately ten minutes when providing his report. As the Dissent noted, Doyle provided the facts underlying his statements to TSA, allowing TSA make its own conclusions regarding Hoeper's mental stability and the potential danger he posed. *See* Pet. App. at 35a. Carriers should not be required to submit a perfect report when the TSA is in a position to garner all pertinent facts at the time a report is provided.

> consequences." Maj. Op. at ¶ 25. Unfortunately, the majority appears to forget this statement in analyzing whether immunity would apply in this instance.

Pet. App. at 43a.

Representative John L. Mica, one of the principal authors of the ATSA, added his concern that the "verdict" against Air Wisconsin "could interfere with TSA's ability to obtain immediate reports of suspicious incidents and cost precious time needed to investigate and respond to potential terrorist acts." Pet. App. at 118a-120a.

The United States, as amicus below, cautioned of the vital importance "that defamation damages awards not chill air carrier reports regarding incidents or behavior that could affect aircraft or passenger safety." *See* U.S. Br., at 3.

Finally, the Court has recognized in other contexts the dangerous chilling effect state rules of law can have on speech. *See Smith v. California*, 361 U.S. 147, 152-53 (1959) (holding that proof of guilty knowledge was indispensible to the conviction of a bookseller for possessing obscene writings for sale, because failing to so require would result in booksellers restricting the books they sell to those they have inspected); *see also Sullivan*, 376 U.S. at 278-79 (noting that a "defense for erroneous statements honestly made is no less essential than was the requirement of proof of guilty knowledge" held indispensible in *Smith*).

The Majority affirmed the verdict against Air Wisconsin despite finding that Air Wisconsin was correct to make a report to the TSA. *See* Pet. App. at 21a. It did so based on a strained analysis of

the facts and erroneous application of the ATSA's immunity provision.

The immunity provision included in § 44941 was added to encourage reporting and as a means of being proactive, not reactive, to aviation security threats. *See* Fred H. Cate, *Government Data Mining: The Need for a Legal Framework*, 43 Harv. C.R.-C.L. L. Rev. 435, 474 (Summer 2008) (noting that the United States' response to threats to aviation security has generally been reactive instead of proactive); Paul Stephen Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 Colum. J. Transnat'l L. 649, 657 (2003) ("the development of aviation policy has long been a reactive, rather than a proactive, process"). While it is likely that most "suspicious transactions" reported by carriers will prove benign, just one failure to report a legitimate threat could have catastrophic consequences. Indeed, even a delay in reporting—while an air carrier attempts to sanitize a proposed report and clear it with legal counsel—could have such consequences.

Because such incidents are infrequent, the cases interpreting these provisions are sparse. However, the effect that the Majority's decision may have on security and safety is immeasurable and profound. The primary premise of the ATSA is to encourage the immediate and free flow of information; the decision of the Court below will have the very opposite result.

It bears repeating: "the safety of the people is the supreme law." 147 Cong. Rec. S11974-02, at S11975. The issues raised in this Petition involve issues of critical importance to the safety of avia-

tion, and, therefore, concern "the safety of the people".

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Dated: October 15, 2012

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