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

REPLY BRIEF OF PETITIONER

DONALD CHANCE MARK, JR.
FAFINSKI MARK & JOHNSON, P.A.
Flagship Corporate Center
775 Prairie Center Drive
Suite 400
Eden Prairie, MN 55344
(952) 995-9500

PETER D. KEISLER*
JONATHAN F. COHN
ERIC D. MCARTHUR
SIDLEY AUSTIN LLP
1501 K Street N.W.
Washington, DC 20005
(202) 736-8000
pkeisler@sidley.com

DAVID H. YUN
JAUDON & AVERY LLP
600 Grant Street
Suite 505
Denver, CO 80203
(303) 832-1122

Counsel for Petitioner

* Counsel of Record

November 27, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

RULE

INTRODUCTION

The Colorado Supreme Court recognized that "the events at the training may have warranted a report to TSA," Pet. App. 18a, and that Air Wisconsin "would likely be immune" if it had only used slightly different words, *id.* at 21a. The court nonetheless denied immunity and affirmed a $1.4 million defamation verdict without deciding whether Air Wisconsin's statements—which barely differed from the court's suggested script—were true. In so doing, the court misinterpreted the ATSA, joined the wrong side of a circuit split on the First Amendment, and set a precedent that will send a chill throughout the airline industry, deterring airlines from promptly reporting potential security concerns and thereby undermining the scheme Congress adopted in the wake of 9/11 to protect the public from threats to aviation security.

Attempting to distract from these clear legal errors, Hoeper defends a decision that no court actually wrote. He contends the Colorado Supreme Court decided that Air Wisconsin's statements were false even though the court expressly (and erroneously) held it "need not, and therefore d[id] not decide" that issue. Pet. App. 17a n.6. And he devotes most of his response to reciting purported facts that were not the basis for the court's decision, were hotly contested at trial, and are irrelevant to the questions presented, which turn solely on the proper interpretation of the ATSA and the First Amendment.[1]

---

[1] For instance, Hoeper asserts that Air Wisconsin's report to TSA was the product of a "personal dispute" between Hoeper and Doyle undeserving of any report to TSA, Br. 1, but that assertion was vigorously disputed below, and the Colorado Supreme Court did not accept it. The court made no suggestion that the incident was simply an escalated personal dispute and,

Nor is there merit to Hoeper's assertions of waiver. The questions presented were pressed and passed upon below and are cleanly presented for review. The time to review these issues is now—before the damage is done and airlines refrain from making timely threat reports to TSA. The Court should grant certiorari and reverse the decision below.

I. THE DECISION BELOW ERRONEOUSLY ALLOWS AIRLINES TO BE HELD LIABLE FOR TRUTHFULLY REPORTING POTENTIAL SECURITY THREATS.

In concluding that Air Wisconsin was not entitled to immunity under the ATSA, the Colorado Supreme Court expressly declined to decide whether the statements at issue were true. Pet. App. 17a n.6 ("In our determination of immunity under the ATSA, we need not, and therefore do not, decide whether the statements were true or false."). By deeming the truth of the report irrelevant to ATSA immunity, the court necessarily held that an airline may be held liable for reporting a potential security threat to TSA, *even if the airline's report is true*. That decision is wrong and warrants this Court's immediate review.

1. Hoeper does not even attempt to defend the Colorado Supreme Court's interpretation of the ATSA. And for good reason—the court's interpretation is indefensible. As Justice Eid explained in her dissent, an airline that reports a potential security threat is immune from liability unless it is shown *both* that the airline's report was false *and* that the false report was made knowingly or with reckless disregard for the truth. Pet. App. 29a–30a n.2.

---

indeed, ultimately agreed that a report may have been warranted, if not required.

Neither the majority opinion below nor Hoeper ventures any reason why Congress would possibly have permitted liability for truthful reports. Settled principles of statutory interpretation confirm that Congress did no such thing. All agree that Congress modeled the ATSA's immunity provision on the First Amendment defamation standard this Court adopted in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). And when Congress borrows a common-law standard, this Court presumes that Congress "knows and adopts the cluster of ideas" associated with it. *FAA* v. *Cooper*, 132 S.Ct. 1441, 1449 (2012) (internal quotation marks omitted).

That principle controls here because, when Congress enacted the ATSA in 2001, it had long been settled that "the *New York Times* rule … absolutely prohibits punishment of truthful" statements. *Garrison* v. *Louisiana*, 379 U.S. 64, 78 (1964); accord *id.* at 74 ("Truth may not be the subject of either civil or criminal sanctions"). Thus, as this Court has long held, the *New York Times* rule requires proof "*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); accord *Phila. Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 775 (1986) (*New York Times* rule requires plaintiffs to "show the falsity of the statements at issue"); *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 490 (1975) ("the defense of truth is constitutionally required"). As Justice Powell observed, "the defense of truth" is "implicit in the Court's articulation of a standard of recovery that rests on knowing or reckless disregard of the truth." *Cox*, 420 U.S. at 498–99 (concurring).

By confining the ATSA immunity inquiry solely to the issue of fault, the decision below ignores half of the analysis and thereby eliminates a critical protec-

tion Congress provided for airlines that report potential security threats to TSA. Because the ATSA precludes liability for truthful reports, regardless of fault, the Colorado Supreme Court plainly erred in denying immunity without deciding whether Air Wisconsin's statements were true.

2. All but conceding that the decision below misconstrued the ATSA, Hoeper offers three reasons why, in his view, this Court should permit that error to stand. None has merit.

First, Hoeper contends that review should be denied because no other appellate court has addressed the standard for ATSA immunity. Br. 23. In this context, however, the paucity of caselaw is a reason to *grant* review, not to deny it. As amicus International Air Transport Association explains, because the caselaw interpreting the ATSA's immunity provision is sparse, the decision below "will be looked 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." IATA Br. 4–5.

Thus, unless this Court intervenes, the decision below will stand as a warning to airlines that they report potential security concerns to TSA at their peril—exposing themselves to millions of dollars in damages, even if their report is true. At a minimum, airlines will have to think twice before making a report that has not been carefully vetted by their lawyers, causing unacceptable delay in a context where time is of the essence. This sort of chilling effect is precisely what Congress sought to prevent when it enacted the ATSA and promised airlines immunity for their cooperation in identifying potential security threats. See Mica Amicus Br. 20–24 (expressing "'concer[n] that this verdict could interfere with

TSA's ability to ... investigate and respond to potential terrorist acts'"). The issue is simply too important, and the stakes too high, to postpone review until after the damage is done.

Second, Hoeper argues that Air Wisconsin "did not clearly raise" the question whether a court may deny immunity without finding the report was false. Br. 23. This Court's "traditional rule," however, "precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992). "[T]his rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Id.* The court below directly addressed the question, expressly holding that it "need not, and therefore [did] not, decide whether the statements were true." Pet. App. 17a n.6. The court did so in the face of a dissent arguing that the court erred in "conclud[ing] that whether the statements were true is not part of the ATSA immunity analysis to be determined by the court." *Id.* at 29a–30a n.2. All seven judges on the court reached and squarely resolved the issue.

Moreover, Air Wisconsin pressed the issue below by arguing that "ATSA immunity presents a question of law for the Court," and that the ATSA "incorporate[s] the *New York Times* actual malice standard." AWAC Colo. S. Ct. Br. 21, 24; see also Br. 23 (recognizing that Air Wisconsin preserved "the overall question of ATSA immunity"). As discussed above, the *New York Times* standard requires proof that the statements at issue were false. Thus, by urging the court to decide ATSA immunity using the *New York Times* standard, Air Wisconsin preserved the issue. If Air Wisconsin was not more explicit, it was only because, until the Colorado Supreme Court issued its decision, no one

had suggested that immunity could be denied by looking at only half of the equation.[2]

Third, Hoeper argues that the question presented is not outcome-determinative because "[t]he Colorado Supreme Court effectively undertook independent review of falsity." Br. 24. But this ignores the court's express determination that it "d[id] not decide whether the statements were true or false." Pet. App. 17a n.6. Hoeper attributes to the court a holding it disclaimed making.

Equally significantly, the statements Hoeper contends were false were not even statements at all, but rather, to use Hoeper's own words, "implications," "connotations," and "interpretations of connotations." For instance, Hoeper contends that "the crux of [Air Wisconsin's] statements" was the "implication" that "Hoeper posed a genuine threat." Br. 26, 29 (defending this "interpretation of the connotations of Doyle's words."). Hoeper also argues that the "central defamatory statement" is the "implication" that Air Wisconsin "'believed that Hoeper was so unstable that he might pose a threat to the crew and passengers of the airplane.'" Br. 22. And he contends that the "implications of Doyle's statement that Hoeper 'may be armed,' were false." Br. 27.

As the dissent recognized, however, it is inappropriate to "tos[s] up … overblown 'implication[s]' just to have something to swat down as false." Pet. App. 36a. The implications, if any, are for TSA to make. Whether Hoeper "posed a genuine threat" was not for

---

[2] Also meritless is Hoeper's contention that Air Wisconsin did not argue the statements were true. The court itself recognized that "Air Wisconsin contends that its statements were substantially true and therefore we must reverse the jury's verdict." Pet. App. 26a; *see* AWAC Colo. S. Ct. Br. 39–52.

Air Wisconsin (or the court) to decide. Requiring airlines to remain silent absent a belief of a "genuine threat" would transform TSA's "when in doubt, report" policy to "when in doubt, stay silent."

Ultimately, even the Colorado Supreme Court recognized that a report was warranted, and may well have been required, holding only that Air Wisconsin got the precise words wrong. But the hairsplitting distinctions made by the court are no basis to deny immunity, especially since the court did not resolve whether Air Wisconsin's actual statements were substantially true—and they plainly were. Pet. 27–28. It simply makes no sense to deny immunity because the airline expressed concerns about the pilot's "mental stability" instead of reporting that he had "acted irrationally" and "'blew up' at the test administrators." Nor should immunity be denied because the airline said the pilot was "terminated today" instead of that he "knew he would be terminated soon," or because the airline said he was an "FFDO who may be armed" instead of that he was an "FFDO pilot," who, by definition, may be armed. *Id.* There is no meaningful difference between Air Wisconsin's words and the court's carefully crafted script, prepared over the course of eleven months in the repose of judicial chambers. See *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (false statement must have a different effect on listener).

By refusing to decide whether Air Wisconsin's statements were true, and denying immunity based on these picayune distinctions, the court effectively gutted ATSA immunity and sent an intolerable message to airlines. The Court should grant review to correct this deeply misguided approach and reassure airlines that when they make truthful reports about

potential security threats to TSA, they will receive the immunity Congress explicitly granted them.

II. THE DECISION BELOW DEEPENS A CIRCUIT SPLIT REGARDING INDEPENDENT REVIEW OF FALSITY.

Even apart from the ATSA immunity issue, review is warranted because the decision below further entrenches a longstanding split as to whether the First Amendment requires courts to independently review the evidence of falsity in defamation cases.

1. Hoeper does not deny a split exists, and indeed acknowledges that at least two circuits and three state supreme courts (now four) have held that the First Amendment does not require independent review of falsity. Br. 31–32. On the other side of the split, three circuits and three state supreme courts have correctly held that courts must independently review falsity along with actual malice. Pet. 31–32.

Hoeper asserts that the latter decisions contain no "meaningful analysis," Br. 31, but he is wrong. Those decisions correctly recognize that independent review applies to each "constitutionally-mandated elemen[t]" of liability, *Veilleux* v. *NBC*, 206 F.3d 92, 108 (1st Cir. 2000), and that falsity, no less than actual malice, is a "constitutional prerequisit[e]" to liability under the *New York Times* rule, *Liberty Lobby, Inc.* v. *Dow Jones & Co.*, 838 F.2d 1287, 1293 (D.C. Cir. 1988); accord *Locricchio* v. *Evening News Ass'n*, 476 N.W.2d 112, 125 (Mich. 1991).

Hoeper also asserts that the standard of review "likely made no difference to the outcome" in the cases requiring independent review, Br. 31, but that is

sheer speculation.[3] It also ignores that those decisions are binding precedents in their respective jurisdictions and thus have significance beyond the results in those particular cases. Hoeper's real contention is that the standard of review itself lacks "practical significance," Br. 29, but this Court has obviously rejected that view, emphasizing that the requirement of independent review is "a rule of federal constitutional law" designed to safeguard "precious" First Amendment freedoms. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 510–11 (1984). The division among the lower courts is real, it is significant, and only this Court can resolve it.[4]

2. This case is also an ideal vehicle. Contrary to Hoeper's contention, Air Wisconsin squarely presented the issue below, arguing that "[b]ecause falsity is a constitutional limitation," the "court must scrutinize the record and determine for itself whether there is sufficient evidence of falsity." AWAC Colo. S. Ct. Reply Br. 44. Hoeper took the contrary position, contending the court should not "review the jury's determination of truth or falsity *de novo*." Hoeper Colo. S. Ct. Br. 49. The Colorado Supreme Court then expressly passed upon the issue, "limit[ing] [its] review [of falsity] to whether sufficient evidence supports the jury's determination," Pet. App. 26a, in contrast to its "independent review" of actual malice, *id.* at 23a. And the issue is outcome-determinative because the Colo-

---

[3] Hoeper's assertion that the standard of review is irrelevant here is also inconsistent with his insistence below that the court should *not* review falsity *de novo* but should defer to the jury. Hoeper Colo. S. Ct. Br. 47–50.

[4] No weight should be given to previous denials of certiorari on this issue. Br. 22. The most recent of the cases Hoeper identifies was nearly a decade ago, and the circuit split has grown much deeper since those cases were decided.

rado Supreme Court did not find—and on *de novo* review could not reasonably find—that *any* of Air Wisconsin's actual statements (as opposed to purported "implications" and "connotations" of "interpretations") were materially false, let alone *all* of them as required to sustain the verdict. See AWAC Colo. S. Ct. Br. 52 (new trial required if any of the statements was substantially true).

Nor is there any reason to await a case "involving media defendants." Br. 32. Hoeper does not dispute that the *New York Times* rule applies to this case, so any argument to the contrary is waived. See Sup. Ct. R. 15.2; cf. *Bose*, 466 U.S. at 513 (assuming without deciding that the *New York Times* rule applied). And the question presented—whether a court applying the *New York Times* rule must independently review the evidence of falsity—is a pure question of law, the answer to which does not vary based on the context of the litigation or the identity of the defendant. There is no impediment to this Court's review.

III. THE DECISION BELOW POSES A SIGNIFICANT RISK TO NATIONAL SECURITY.

The decision below is also profoundly at odds with national security policy underlying the ATSA because it will chill airlines from reporting potential security threats. Hoeper's contrary argument fails to come to grips with the lower court's decision or the questions presented. The issue is not whether airlines are subject to liability for "knowingly or recklessly false claims" or "bogus reports," Br. 33–34, but rather whether they can be held liable for *truthful* reports based on a reviewing court's imputation of purportedly reckless "implications" and "connotations." Hoeper cannot explain how denying immunity for truthful reports "*implements* rather than interferes with national security policy." Br. 33.

Hoeper quotes the government's statements that TSA "need[s] to receive prompt and *accurate* reporting of threats," and "has no desire to receive knowingly *false* information, U.S. Br. 2–3 (emphases added), but these statements underscore the lower court's error. By allowing *truthful* reports to be penalized, the decision below does precisely what the government said it is "vitally important" that defamation awards *not* do—"chill air carrier reports regarding incidents or behavior that could affect aircraft or passenger safety." *Id.* at 3. If airlines withhold truthful information about possible security threats for fear of liability, TSA will be handicapped in assessing and responding to threats. At a minimum, given the serious national security concerns, the Court should not allow the decision below to stand without seeking the Solicitor General's views as to whether airlines that truthfully report potential security concerns are immune from liability.

CONCLUSION

The petition should be granted.

Respectfully submitted,

DONALD CHANCE MARK, JR.
FAFINSKI MARK &
JOHNSON, P.A.
Flagship Corporate Center
775 Prairie Center Drive
Suite 400
Eden Prairie, MN 55344
(952) 995-9500

PETER D. KEISLER*
JONATHAN F. COHN
ERIC D. MCARTHUR
SIDLEY AUSTIN LLP
1501 K Street N.W.
Washington, DC 20005
(202) 736-8000
pkeisler@sidley.com

DAVID H. YUN
JAUDON & AVERY LLP
600 Grant Street
Suite 505
Denver, CO 80203
(303) 832-1122

Counsel for Petitioner

November 27, 2012

* Counsel of Record