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 FOR AIRLINES FOR AMERICA, REGIONAL AIRLINE ASSOCIATION, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Airlines for America, the Regional Airline Association, and the Chamber of Commerce of the United States of America respectfully submit this brief as *amici curiae*.

Airlines for America (A4A), formerly known as Air Transport Association of America, Inc., is the only trade organization of the principal U.S. airlines.

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have given their consent to this filing in letters that have been lodged with the Clerk.

A4A's members and affiliates transport more than 90 percent of U.S. airline passenger and cargo traffic. A4A's fundamental purpose is to foster a business and regulatory environment that ensures safe and secure air transportation, while allowing U.S. airlines to flourish and stimulate economic growth locally, nationally, and internationally.

The Regional Airline Association (RAA) represents North American regional airlines and the manufacturers of products and services supporting the regional airline industry before Congress, the Department of Transportation, the Federal Aviation Administration, and other federal agencies. The Regional Airline Association has 27 member airlines and 280 associate members.

The Chamber of Commerce of the United States of America is the world's largest business federation, representing more than 300,000 direct members and an underlying membership of more than three million businesses and trade and professional organizations of every size, sector, and geographic region. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts, including this Court.

A4A and RAA, joined by the Chamber, submit this brief to provide insight into the real-world impact of the decision below on airlines and their customers. *Amici* share the common goal of fostering a civil air-transportation network that is efficient, cost-effective, and—above all—safe for the American traveling public. But airlines cannot carry out their role as an integral part of the multi-layered air-transportation security system if they must fear that

every statement to the authorities carries with it the possibility of a seven-figure defamation award. The Court should clarify that only the most extreme cases of false reports can hurdle the high bar set by the Aviation and Transportation Security Act's (ATSA) statutory immunity for airlines' security-related reports.

SUMMARY OF ARGUMENT

1. Airline reports of suspicious activity and potential threats are an integral component of the civil air security system established by Congress in ATSA and implemented by the Transportation Security Administration (TSA) in its regulations. Airlines are required to report potential threats on pain of civil penalty, and in ATSA, Congress enabled a robust threat-reporting system by immunizing airlines' security-related reports. The decision below will chill or delay airlines' reports, with negative consequences for airlines and the traveling public.

a. The key message sent by the decision below is that airlines cannot simply report what they fear about potential security threats. Airlines must also investigate those threats, lest a court later conclude that an airline was too quick to call the authorities about an incident that turned out to be nothing. But that "investigate first, report later" approach is contrary to what Congress intended when it enacted ATSA. Under ATSA, although airlines play a critical role in detecting security threats, Congress intended *TSA* to be primarily responsible for assessing reported threats and determining what action to take. Respondent's argument that Petitioner should have done more to confirm its suspicions before reporting to TSA—and can be liable in tort for failing to do

so—is precisely the opposite of what Congress intended.

b. The incentives created by the Colorado Supreme Court's decision are obvious: An airline should delay a report until after it conducts a thorough investigation, delicately phrase the report—lest the report contain what a court later determines is a "misleading" characterization—or perhaps not report at all. The potential hazards to passenger safety from these incentives are clear. But there are additional harms, as well. Airlines risk delaying flights and snarling the entire air-transportation network if they keep planes from taking off while their employees conduct a first-level review of a potential threat. In addition, airlines will incur additional costs from litigating cases brought by disgruntled passengers who believe themselves wronged by an airline's report. Those are delays and expenses airlines and their customers can ill afford.

2. The Colorado Supreme Court's decision contravenes Congress's intent in another way as well. The Colorado high court dismissed concerns that its decision would chill airlines' reports by reasoning that airlines could always report exactly what they knew about a threat and nothing more. Pet. App. 21a. But that assurance does little to address the concerns that drove Congress to enact ATSA.

For one, the Colorado Supreme Court's decision renders ATSA immunity largely meaningless. Under the common law and the Constitution, literally true statements are protected. Congress need not have bothered with ATSA if that was all it intended. For another, the Colorado court's focus on the precise facts an airline knows—while forcing an airline to

investigate and strip its reporting of any impressions and subjectivity—ignores what this Court has consistently held: that interpretations of ambiguous facts are entitled to significant protection when the interpretation concerns subject-matter covered by the *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) standard. Finally, the Colorado Supreme Court's granular focus on the precise observations made by Petitioner's employees fails to give airlines the "breathing space" Congress intended in adopting the *New York Times* test for ATSA immunity.

ARGUMENT

I. THE DECISION BELOW THREATENS TO CHILL OR DELAY AIRLINES' REPORTS OF SUSPICIOUS ACTIVITY, WITH NEGATIVE CONSEQUENCES FOR AIRLINES AND THE TRAVELING PUBLIC.

Respondent's position—adopted by the Colorado Supreme Court below—is clear enough: Airlines should not report potential security concerns to the authorities unless and until they have undertaken a sufficient investigation to confirm those suspicions. Br. in Opp. 7-9 (detailing Petitioner's supposed failure to investigate its suspicions about Respondent's mental state and whether he was armed); Pet. App. 5a (noting that Petitioner's employees "never sought nor received any additional information" about Respondent's conduct during his failed simulator test and "never sought nor received any information" about whether Respondent had his weapon). But Respondent's investigate first, report later rule is contrary to the integral—but secondary—role airlines play in identifying threats to air security. Moreover, Respondent's rule, if adopted by this Court, will lead to delayed reports by airlines or no reports at all. And those delayed or discarded re-

ports will inevitably lead to increased risk to passengers, increased delay for airlines and air travelers, and increased costs for an industry and public already ill-equipped to bear them.

A. ATSA And TSA's Regulations Contemplate An Integral, But Secondary, Role For Airlines In Identifying And Reporting Threats To Civil Aviation.

1. Civil aviation security in the United States presents a unique challenge to both the government and airlines. On the one hand, the symbolic importance of American airlines and the destructive potential of American airplanes make them appealing targets for terrorists, warranting the maximum possible security. P.S. Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 Colum. J. Transnat'l L. 649, 651 (2003). On the other hand, American aviation is an indispensable engine of the U.S. economy. American airlines carried 720.5 million passengers in 2010[2], generated $1.3 *trillion* in economic output, and made up 5.2 percent of the gross domestic product.[3] Air transportation therefore must be open, accessible, and efficient, allowing passengers and cargo to reach their final destinations with minimal delay.

This tension between security and openness is the core dilemma facing American aviation security. As the Transportation Research Board has aptly put it,

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[2] Airlines for America, *2011 Economic Report* 3 (2012), *available at* http://www.airlines.org/Documents/economicreports/2011.pdf.

[3] Federal Aviation Administration, *The Economic Impact of Civil Aviation on the U.S. Economy* 21 tbl.2 (Aug. 2011), a*vailable at* http://www.airlines.org/Documents/2011-AJG-025-economic_impact_report_2010_ca25[1].pdf.

"[t]he nation's vast air * * * transportation systems are marvels of innovation and productivity, but they are designed to be accessible, and their very function is to concentrate passenger and freight flows in ways that can create many vulnerabilities." Transportation Research Board, *Deterrence, Protection, and Preparation: The New Transportation Security Imperative* 1 (2002).[4] And because of this need for openness, the traditional "guards, guns, and gates" approach to security is simply not feasible. *Id.*

TSA instead has developed a "layered" approach to security that relies on 21 integrated checks, ranging from intelligence reports to checkpoint screening to hardened cockpit doors. Government Accountability Office, *Aviation Security: Status of Transportation and Security Inspector Workforce* 15-16 (Feb. 6, 2009) (detailing the layers making up American air transportation security).[5] Airlines are an integral part of TSA's layered approach. For good reason: Airlines and their employees are constantly interacting with passengers, are familiar with their facilities and aircraft, and are attuned to discrepancies in secure areas that might go unnoticed by others. And as TSA moves to more "risk-based" approaches to security—focusing screening efforts on more high-risk passengers based on reports and intelligence—airlines' observations will become even more essential. *See Eleven Years After 9/11 Can TSA Evolve To Meet The Next Terrorist Threat?: Hearing Before the Subcomm. on Transportation Security of the H. Comm. on Homeland Security*, 112th Cong. 42-43 (2012) (statement of John W. Halinski, Deputy

[4] *Available at* http://onlinepubs.trb.org/onlinepubs/sr/sr270.pdf.

[5] *Available at* http://www.gao.gov/new.items/d09123r.pdf.

Administrator, Transportation Security Administration, Department of Homeland Security).

Recognizing that airlines enjoy a unique expertise, both ATSA and regulations promulgated by TSA require that airlines be on the lookout for and report any threats to air security. Under ATSA, airlines are required to train all crew members "to prepare [them] for potential threat conditions," including training on "[r]ecognizing suspicious activities and determining the seriousness of any occurrence." 49 U.S.C. § 44918(a)(1), (2)(A). In addition, airlines must "promptly" report any "information * * * about a threat to civil aviation" to TSA. *Id.* § 44905(a).

TSA's regulations are even more detailed. Their cornerstone is that an airline must have a TSA-approved "Aircraft Operator Standard Security Program" that contains the airline's standard operating procedures on topics such as reporting threats to TSA and training employees on security protocols. 49 C.F.R. § 1544.103. To implement the security program, an airline must have a corporate-level Aircraft Operator Security Coordinator or alternate who is available 24-hours a day to serve as the airline's primary security contact with TSA. *Id.* § 1544.215(a). And when it comes to reporting a threat to air security, an airline must immediately notify TSA of the threat and follow up with additional information as it becomes available. U.S. Colo. Br. 6. An airline's failure to comply with ATSA, TSA's regulations, or its security program can subject the airline to a civil penalty of up to $25,000. 49 C.F.R. § 1503.401(c)(2).

2. Despite airlines' important and integral role in protecting their aircraft and passengers, they still

only play a *secondary* role in air transportation security. ATSA's core reform was to make "security functions at United States airports * * * a Federal government responsibility." H.R. Conf. Rep. No. 296, 107th Cong., 1st Sess. 54 (2001). To that end, Congress directed TSA to "receive, assess, and distribute intelligence information related to transportation security," "assess threats to transportation," and "serve as the primary liaison for transportation security to the intelligence and law enforcement communities." 42 U.S.C. § 114(f)(1)-(2), (5). Congress, in short, recognized that airlines are indispensable in detecting and relaying information related to security threats, but assigned TSA the job of assessing and acting on those threats.

That was no casual shift in air-security policy. Before ATSA, airports and airlines themselves carried out TSA's functions under regulation and supervision from the Federal Aviation Administration. K.C. Krause, *Putting the Transportation Security Administration in Historical Context*, 68 J. Air L. & Com. 233, 235 (2003) ("Pre-September 11, the then-existing regulatory scheme placed the responsibility of formulating and implementing security strategy principally upon the airlines and airport operators * * *."). With ATSA, there is now "hands-on, full-time federal control over aviation security." *Id.* And with that hands-on, full-time, federal control, the security role played by airlines and their employees changed. *See id.*

3. All this underscores why Respondent's proposed rule is unworkable. To insist that an airline should have better investigated before reporting fundamentally miscomprehends the roles of airlines and TSA. Under ATSA, it is *TSA's* responsibility to investigate

and assess security threats, not airlines'. That is, Congress intended for TSA, not freelancing airline employees, to decide which reports merit further investigation. Respondent's rule to the contrary would return American air carriers to a September 10 regulatory regime ATSA explicitly rejected.

B. The Colorado Supreme Court's Rule Will Chill Or Delay Security-Related Reports By Airlines, With Potentially Significant Consequences.

1. Air carriers are required by their security plans to promptly report suspicious activity and potential threats. U.S. Colo. Br. 6. As a result, airlines make thousands of reports to TSA; to give just one example, one A4A member reported over 1,700 potential security threats to TSA over the last five years—a rate of close to one per day. And TSA relies on those reports as an integral part of its layered approach to security. *Supra* 7-8.

If the Colorado Supreme Court's decision is allowed to stand, however, airlines will necessarily delay their reports to TSA or not report at all. Indeed, that is the intended effect of the damages verdict the court below affirmed. Respondent's $1.4 million damages award included $350,000 in punitive damages, Pet App. 28a & n.1, and—as this Court has recognized—one of the chief purposes of punitive damages is to "deter[]" a practice's "repetition." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 568 (1996). Airlines and their advisors have certainly gotten the message. One commentator summed up the Colorado Supreme Court's holding as "if you see something, say something (but you might get sued for something)." M. McGrory & K. Calhoun, *If You See Something, Say Something (But You Might Get*

Sued For Something), DRI—Voice of the Defense Bar, Skywritings: The Newsletter of the Aviation Law Committee (June 29, 2012) (capitalization altered).[6]

The choice facing airlines in the wake of the Colorado Supreme Court's decision is particularly stark. If an airline does not report an incident that TSA determines should have been reported, it faces a maximum civil penalty of $25,000. 49 C.F.R. § 1503.401(c)(2). But if an airline reports an incident that a court later determines with the benefit of hindsight should *not* have been reported, then the airline could get hit with a seven-figure judgment. Faced with these lopsided risks—particularly because an unreported incident that ultimately turns out to be nothing is unlikely to be noticed by TSA—airlines will have an incentive at the margins to err on the side of *not* reporting. And that is precisely the incentive that ATSA's grant of immunity was supposed to eliminate. *See* ATSA § 125, 115 Stat. 631 ("Encouraging Airline Employees To Report Suspicious Activities").

And when airlines *do* report, they will have to think long and hard about how to carefully parse their words. Under the Colorado Supreme Court's decision, the difference between a report that an employee "was terminated today" and a report that an employee "would be terminated soon" can be $1.4 million. *Cf.* Pet. App. 21a. The natural response, then, will be to require employees to consult management and in-house counsel—perhaps even outside counsel—before making a report. After all,

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[6] *Available at* http://www.salawus.com/PubsEvents/pubs/McGrory_Calhoun_SkywritingsVol13Issue1.pdf.

those airline employees on the front lines of aviation security—gate agents, flight attendants, and baggage handlers, to name a few—may not necessarily " 'speak with the discrimination of an Oxford don' " as the Colorado Supreme Court would have airlines do. *Cf. Davis* v. *United States*, 512 U.S. 452, 459 (1994) (citation omitted). And even if the investigation and consultation that the decision below contemplates can be done quickly, that may be too long. In situations where minutes can count, an airline's report to the authorities should not be delayed.

2. The security risk to passengers posed by airlines not reporting—or delaying their reports of—potential threats is obvious. *See* U.S. Cert. Br. 17-20; IATA Cert. Br. 18-21; DRI Cert. Br. 9-10. But delayed reports can have significant negative effects for airlines and air travelers even where a potential security threat turns out to be nothing.

a. For one, an airline delaying a report to TSA while it investigates a potential threat may delay a flight's departure. An airline is unlikely to dispatch a plane when a security threat may be on board. That delay comes with a price tag. J. Ferguson *et al.*, *Estimating Domestic U.S. Airline Cost of Delay Based on European Model* tbl.10.[7] Indeed, in just a single month flights were delayed by over 8 million minutes and racked up over $63 million in delay-related costs at 12 airports. *Id.* Over the course of a year, one FAA-sponsored study estimated system-wide delays to cost $8.3 billion for airlines and $16.7 billion for passengers. M. Ball *et al.*, *Total Delay Impact Study: A Comprehensive Assessment of the*

[7] *Available at* http://catsr.ite.gmu.edu/pubs/Delay_Cost_Model_US_Ferguson.pdf.

Costs and Impacts of Flight Delay in the United States vii (Nov. 2010).[8] And the same study concluded that the indirect effects of air transportation delays reduced the overall U.S. gross domestic product by $4 billion as a result of decreased demand and productivity. *Id.* at 14 tbl.2-4.

To be sure, a report to the authorities may trigger delays of its own, as it did here. Br. in Opp. 1. But TSA and law enforcement are able to quickly assess and resolve reported threats in appropriate circumstances. *See*, *e.g.*, K. McConnell, *Airport Threat Leads To Delay*, The Lawton Constitution, 2013 WLNR 18018449, Jul. 23, 2013 (bomb threat resolved in 30 minutes); *Crime Watch*, The Baltimore Sun, 2006 WLNR 17686979, Oct. 12, 2006 (e-mailed threats resolved without any delays). And even where delays are longer, it is far better for them to result from trained professionals actively searching for threats and not lay airline employees consulting with counsel.

There is no reason why airlines and their passengers should shoulder the additional burden that Respondent's investigation requirement would impose. In the analogous context of airlines' statutory power to deny potentially disruptive passengers carriage, courts have recognized that Congress "did not contemplate that [a] flight would have to be held up or cancelled until certainty was achieved." *Williams* v. *Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975); *accord Cerqueira* v. *Am. Airlines, Inc.*, 520 F.3d 1, 14 (1st Cir. 2008); *Al-Watan* v. *Am. Airlines, Inc.*, 658 F. Supp. 2d 816, 825 (E.D. Mich.

[8] *Available at* http://www.nextor.org/pubs/TDI_Report_Final_11_03_10.pdf.

2009). The same holds true here. Air carriers should not have to delay or cancel flights so they can undertake a first-level investigation.

The potential for widespread flight delays occasioned by deferred threat reports is more than imaginary. As they are required to be, *supra* 8, airlines are in constant contact with TSA regarding potential hazards. Extrapolated across the entire industry, the delay likely occasioned by Respondent's investigate first, report later rule could have significant ripple effects on passengers throughout the country. *See*, *e.g.*, J.A. Rome *et al.*, *Ripple Delay and its Mitigation* 2 (concluding that an early flight being delayed by one minute can lead to later flights being delayed by 13 minutes)[9]; A. Halsey III & L. Lazo, *Flights Are Delayed At Major East Coast Airports As Sequester-Related Furloughs Begin*, Wash. Post, Apr. 22, 2013 (noting that "[w]hen New York's three mega-airports fall behind schedule, that often has a ripple effect as far as the West Coast").

b. Beyond the expense and inconvenience caused by delays, the decision below may expose air carriers to a new wave of expenses from threat-reporting litigation and their associated judgments. As the United States observed below, ATSA immunity should protect carriers not just from tort judgments, but also the expense and distraction of litigation based on protected reports. U.S. Colo. Br. 7. But under the Colorado Supreme Court's cramped view of ATSA immunity, carriers will now be subjected to prolonged discovery regarding what their employees knew, when they knew it, and what steps they took

[9] *Available at* http://web.ornl.gov/~jar/AirTraffic/Resequencing.doc.

to confirm or dispel their suspicions before reporting to TSA. And if the trial below is any model—and it likely will be, IATA Cert. Br. 4-5—airlines will need to engage a cadre of security experts to opine on whether a particular report to TSA was called for at the time it was made.

Such a regime may be a boon to plaintiffs' lawyers and those seeking lucrative expert-witness retentions, but it will impose yet another cost on airlines and their passengers. Indeed, passengers already directly pay up to $10 per round-trip ticket to fund TSA's aviation security operations, 49 C.F.R. § 1510.5(a), and may pay in the future as much as $20 or $30 per ticket under currently pending proposals, Airlines for America, Press Release, *A4A Says Senate-Passed Budget Hikes TSA Passenger Tax, Adds Insult to Injury for Airlines and Customers* (Mar. 23, 2013).[10] And passengers pay even more indirectly, as air carriers are assessed for part of the difference between TSA's actual aviation security costs and the amount collected directly from passengers. *See Southwest Airlines Co.* v. *TSA*, 554 F.3d 1065, 1068 (D.C. Cir. 2009). The Colorado Supreme Court's decision, however, will impose another, hidden assessment on passengers: they will now have to fund their airlines' defense when the subject of a security report elects to sue.

Airlines and their passengers are ill-equipped to shoulder these additional regulatory and litigation costs. Airlines are barely beginning to recover from some of their worst economic performances in histo-

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[10] *Available at* http://www.airlines.org/Pages/A4A-Says-Senate-Passed-Budget-Hikes-TSA-Passenger-Tax,-Adds-Insult-to-Injury-for-Airlines-and-Customers.aspx.

ry, eking out a slight 2 percent profit margin in the first half of 2013 while at the same time pouring over $1 billion a month into upgrades and improvements. Airlines For America, Press Release, *U.S. Airlines Achieve 2 Percent Net Profit Margin in First Half of 2013* (Aug. 22, 2013).[11] And passengers already pay approximately 20 percent of their ticket prices towards taxes and fees—equal to $61.49 on a typical $300 round-trip ticket. Airlines for America, Cost Breakdown of an Airline Ticket (last visited Aug. 24, 2013).[12] This Court should not impose an additional strain on airlines' already precarious financial situation—particularly when airlines' security reports are both federally required and made in the interest of passenger safety.

II. THE COLORADO SUPREME COURT'S APPROACH TO ATSA IMMUNITY IS CONTRARY TO CONGRESS'S INTENT IN ADOPTING THE *NEW YORK TIMES* STANDARD.

The Colorado Supreme Court dismissed the potential impact of its decision on airlines by suggesting that Petitioner could have retained its immunity by reporting exactly what it knew and nothing more: that Respondent "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 the test administrations and that he was a[] [Federal Flight Deck Officer] pilot." Pet. App. 21a.

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[11] *Available at* http://www.airlines.org/Pages/U.S.-Airlines-Achieve-2-Percent-Net-Profit-Margin-in-First-Half-of-2013-and-Deliver-Solid-Operational-Performance.aspx.

[12] *Available at* http://www.airlines.org/Documents/comm/TicketBreakDown.pdf.

As Petitioner points out, there is no daylight between the Colorado court's approved script and the statement Petitioner's employee actually made to TSA. Pet'r Br. 29-38. But even if Petitioner's statements were not as precise as they could have been or used the wrong adjective to describe Respondent's conduct, ATSA immunity should still attach. That's because the just-the-facts approach endorsed by the decision below is contrary to Congress's intent in adopting the *New York Times* test for ATSA immunity. This Court should reject it.

1. In one sense, the Colorado Supreme Court was correct: If Petitioner had done nothing more than report *precisely* what its employees observed, Petitioner would not be liable. But Petitioner would not need ATSA's incorporation of the *New York Times* standard to obtain that result. As a matter of both state tort law and constitutional principles, a literally true statement cannot be the basis for defamation liability. *See Garrison* v. *Louisiana*, 379 U.S. 64, 73 (1964) (" 'If upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle that can make him liable, even if he was actuated by express malice.' ") (citation omitted); *Restatement (Second) of Torts* § 581A (1977) ("One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true."); *accord Gomba* v. *McLaughlin*, 504 P.2d 337, 338 (Colo. 1972) ("The right to assert 'the truth thereof' is a constitutional right and * * * an absolute defense to a libel action").

In enacting ATSA and incorporating the *New York Times* standard, then, Congress must have meant to go further than the universally available defense of truth. After all, Congress is presumed to have

intended to do *something* in enacting a statute; a statutory immunity that does not immunize beyond the protections generally available to all defamation defendants is no immunity at all. *See Am. Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 263 (1992) (noting the "canon of statutory construction requiring a change in language to be read, if possible, to have some effect"); *accord Cal. Indep. Sys. Operator Corp.* v. *FERC*, 372 F.3d 395, 401 (D.C. Cir. 2004) ("Traditional principles of statutory construction counsel against reading acts of Congress to be superfluous.").

Indeed, Congress's decision to import the *New York Times* test into ATSA closely mirrors this Court's decision to create the *New York Times* test in the first place. As this Court recognized in *New York Times* itself, a state rule imposing tort liability for defamatory statements about public officials "is not saved by its allowance of the defense of truth." 376 U.S. at 278. That is because even with the defense of truth available, speakers' statements may be unjustly chilled; under a rule that places the burden of proving truth on the speaker "would-be [speakers] * * * may be deterred from voicing their [concerns], even though it is believed to be true and even though it is in fact true, because of doubt of whether it can be proved in court or fear of the expense of having to do so." *Id.* at 279.

In *New York Times* and its progeny, the Court's fear was that even with the defense of truth available, speakers would self-censor criticism of public officials or their views on matters of public concern. *See St. Amant* v. *Thompson*, 390 U.S. 727, 731-732 (1968) ("*New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great

that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies."). In ATSA, Congress's fear was that even with the defense of truth available, airlines would self-censor reports of potential security threats. In both, the bottom line is the same: The Colorado Supreme Court's claimed assurance that there will be no chilling effect because the speaker can always protect itself by speaking the truth, Pet. App. 21a, is not sufficient to protect the important policies that underlie the *New York Times* test.

2. Congress had good reasons for adopting the *New York Times* test for ATSA immunity. For one, the *New York Times* standard allows airlines to report their interpretations of potential security threats without fear of a jury later deeming those interpretations misleading and thus actionable under common-law defamation rules. For another—and relatedly—the *New York Times* test gives airlines the " 'breathing space' " they need to report potential security threats without needing to constantly second-guess whether a jury would later deem the statement "true." In abrogating Petitioner's ATSA immunity, the Colorado Supreme Court ignored both important considerations.

a. Many statements in every-day life occupy an uneasy gray space between "fact" and "opinion." They purport to convey something more than personal sentiment, but are necessarily based on the speaker's interpretation and synthesis of underlying facts. A speeding car may come "tearing" around the corner. A friend who slurs a bit after an evening at the bar may be "drunk." How the speaker describes an event is necessarily based on his or her interpre-

tation of underlying facts, facts that may not be conveyed along with the statement.

Such mixed statements present a unique problem for defamation law, but this Court has erred on the side of protecting them when they involve subject matter protected by the *New York Times* standard. Suppose, for instance, a bartender reports a "drunk" patron to the police, and the patron—a local politician—sues for defamation, arguing that he wasn't drunk at all and the bartender's statement must have been knowingly false. No liability would attach. As this Court has explained, where a speaker's statement is " 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities,' " the statement, even if it "reflect[s] a misconception," is not actionable. *Bose Corp.* v. *Consumers Union of the U.S., Inc.*, 466 U.S. 485, 512-513 (1984) (citation omitted). And that is true even where the speaker is a trained professional—like our hypothetical bartender—and should have known at the time that his description was ill-suited for the situation. *See id.* at 511-513 (professional reviewer's statement that sound system's sound wandered "about the room"—even if an inaccurate description of what the reviewer heard—was not actionable). Such solicitude for technically untrue statements about events that do not " 'speak for themselves' " is needed because they are "the sort of inaccuracy that is commonplace in the forum * * * to which the *New York Times* rule applies." *Id.* (citation omitted). People necessarily disagree about how to interpret or describe the same event.

What is true for bartenders and sound-system reviewers is true for airline employees reporting security threats—and more so. What one gate agent

might deem a "suspicious" unattended package, another might write-off as merely a "forgotten" unattended package. What one flight attendant would describe as an "unruly" passenger, another might consider merely "annoyed." And—as here—what one airline executive might consider an "unstable" pilot, a court later might think was simply "irrational." Pet. App. 21a. In adopting the *New York Times* standard for ATSA immunity, Congress necessarily recognized that these kinds of ambiguities in reports to TSA could be "commonplace." *Bose*, 466 U.S. at 513. But Congress—recognizing the importance of airline reports of security threats—nonetheless decided to err on the side of protecting even poorly chosen descriptions. *See id.* In imposing liability on Petitioner for—at worst—deploying the wrong adjectives to describe its concerns about Respondent's behavior, the Colorado Supreme Court contravened this Court's teachings as incorporated by Congress into ATSA immunity.

b. Finally, Congress's use of the *New York Times* test for immunity indicates Congress's desire to give airlines the " 'breathing space' " they need to make reports to the authorities about potential security threats, even if those reports, in hindsight, turn out to be inaccurate. *See New York Times*, 376 U.S. at 271-272 (citation omitted). As this Court has explained, the *New York Times* test necessarily protects some untruthful defamatory statements. *See Time, Inc.* v. *Hill*, 385 U.S. 374, 388-389 (1967) (" 'Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than in that of the press.' ") (quoting 4 *Elliot's Debates on the Federal Constitution* 571 (1876 ed.)). But even though "some error is inevita-

ble"—and even though that error may visit a reputational harm on some, like Respondent—the stringent showing called for by the *New York Times* test and ATSA is essential "in order to eliminate the risk of undue self-censorship and the suppression of truthful material." *Herbert* v. *Lando*, 441 U.S. 153, 171-172 (1979).

In the end, Congress recognized that there were two potential types of error that could occur when it came to reports of potential threats to civil aviation. On one side, airlines and their employees could report too readily, with the result that innocent passengers may find themselves needlessly investigated. On the other, airlines and their employees could be too reticent to report, with the result that genuine security threats could go unreported for fear of defamation liability. In ATSA, Congress, like this Court in *New York Times*, struck the balance in favor of a robust reporting system. The Colorado Supreme Court's contrary approach upsets that balance and should be rejected.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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