No. 12-315

IN THE

Supreme Court of the United States

AIR WISCONSIN AIRLINES CORPORATION,

Petitioner,

v.

WILLIAM L. HOEPER,

Respondent.

On a Writ of Certiorari
to the Colorado Supreme Court

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Aviation and Transportation Security Act (ATSA) withholds immunity from defendants who make disclosures in bad faith if the disclosure turns out to be true.

2. Whether the Colorado Supreme Court erred in reviewing the material truth of petitioner's report in the context of its review of the sufficiency of the evidence to support the elements of respondent's state law defamation claim, rather than under ATSA, when petitioner never raised material truth as a basis for ATSA immunity.

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BRIEF FOR THE RESPONDENT

Respondent respectfully requests that this Court affirm the judgment of the Colorado Supreme Court.

STATEMENT OF THE CASE

I. Introduction

After a 20-year exemplary career as a pilot, respondent William Hoeper came into conflict with individuals responsible for managing a portion of petitioner's fleet to which respondent transferred after the company stopped flying the aircraft he had previously flown for the company. The group undertook to wash Hoeper out of the company by unfairly manipulating a series of training and testing sessions in flight simulators. Hoeper eventually had enough and walked out of his final training session to seek the assistance of his union counsel.

While the incident was unusual, and resulted in a brief, heated exchange between Hoeper and the individual operating the simulator, both quickly cooled off. Hoeper's supervisor, Pat Doyle, after being briefed on the incident, booked Hoeper on a flight home. No one involved in the incident believed that Hoeper was a threat to anyone after he left the session, nor did anyone tell Doyle that he was. Nonetheless, four hours later Doyle called the Transportation Security Administration (TSA) to report that Hoeper, who was about to board the flight Doyle had booked for him, had been terminated from employment, was mentally unstable, and may be armed. TSA responded to Doyle's call as a "hijacking in progress." Hoeper was removed by armed law enforcement officers and detained until TSA

determined that Doyle's report was untrue, and Hoeper constituted no threat.

A jury later found, and the trial court and two courts of appeals confirmed, that Doyle's statements to TSA were false and made with actual malice.

II. Factual Background

1. Hoeper's Background. Hoeper was a 20-year commercial pilot, FAA-certified to fly six different aircraft. JA 364. Prior to joining Air Wisconsin (AWAC), he served as a sheriff's deputy and as a pilot abroad, where he was entrusted to transport dignitaries for the U.S. Embassy in Bahrain. Tr. 1215-16, 1234-36. After joining AWAC in 1998, he piloted several aircraft, including the CL-65, and was promoted in 2002 to management positions, including lead ground instructor for CL-65 pilots. JA 364-70; Tr. 1246, 1254-60. By all accounts, Hoeper was an exceptional instructor.[1]

Given his law enforcement background, AWAC charged Hoeper with training its flight attendants in self-defense and, in 2003, asked him to join the Federal Flight Deck Officer (FFDO) program. JA 198; Tr. 1264. The program trains pilots to carry firearms and protect passengers while on duty piloting planes. To qualify, candidates must pass an

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[1] *See, e.g.*, Tr. 389-90 (Schuerman) (agreeing that Hoeper gave "one of the best ground schools that [he'd] ever participated in"); JA 372 (Hoeper's supervisor, Michael Bauer, writing in a performance review that Hoeper received "good reviews from all [of] his students" and "has an excellent attitude and enthusiastically accomplishes whatever is asked of him").

extensive psychological and professional evaluation. In February of 2004 – just ten months prior to the incident at issue in this case – Hoeper passed a government-administered psychological exam and received his FFDO credentials. JA 197-201.

2. Hoeper's Conflict With AWAC's BAe-146 Group. Hoeper had a positive five-year tenure at AWAC, receiving "satisfactory" and "superior" ratings on every employee review along with several commendation letters. *See, e.g.*, JA 371-74, 378-84; Ex. 1108 at 67-70 (Bauer Depo.).

Nonetheless, in late 2003, Hoeper came into conflict with certain AWAC officials involved in managing the company's fleet of BAe-146 aircraft. Witnesses at trial described the BAe-146 group as a "good old boys" club. *See, e.g.*, Ex. 1106 at 32 (Koehn Depo.); JA 525 (Schuttloffel Depo.). The group included BAe-146 Fleet Manager Patrick Doyle, who reported to Scott Orozco, AWAC's Chief Pilot. Doyle, in turn, supervised Craig Christensen, the lead ground school instructor for the BAe-146 – who had trained both Doyle and Orozco on the BAe-146 – and a close friend of Doyle's. JA 488; Tr. 673. Christensen also was friends with BAe-146 instructor pilots Mark Schuerman and Todd Hanneman, both of whom conducted the training and testing of new BAe-146 pilots.[2]

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[2] The close friendships among Christensen, Doyle, Schuerman, and Hanneman were well established at trial. *See, e.g.*, Tr. 387 (Schuerman); Tr. 673, 737 (Doyle); JA 496, 507 (Christensen Depo.).

A former AWAC captain, John Schuttloffel, testified that "it's very evident [at] Air Wisconsin, if you weren't in the good old boys club or you weren't liked or you rocked the boat or however you want to put it, your days are numbered." JA 525.

The group's dislike for Hoeper apparently began when Christensen discovered that Hoeper had changed some of the training materials Christensen had developed.[3] Christensen complained to Hoeper's supervisor at the time, Michael Bauer, but Bauer told Christensen that he supported Hoeper's changes. JA 505-06, 562-63. The incident permanently soured the relationship between Christensen and Hoeper. *See id.* 64 (Christensen conveyed to Doyle his "personal dislike for Mr. Hoeper").

The district court would later characterize Christensen's actions as instigating a "hatred conspiracy to get rid of Bill Hoeper." JA 260. After being rebuffed by Hoeper's then-supervisor, Christensen brought his complaints to Doyle. *Id.* 497, 506. Shortly thereafter, Hoeper was removed from his management position as lead ground instructor in Denver and sent back to pilot the CL-65. *Id.* 182. When Hoeper asked for an explanation, his supervisor simply explained that he could "no longer protect" him. *Id.* 184.

3. Hoeper's Transition To The BAe-146. As luck would have it, in mid-2004, AWAC stopped flying the CL-65 out of Denver, leading Hoeper to

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[3] *See* Tr. 699 (Doyle) (explaining that Christensen "was very upset" about the changes to his materials).

transition to the only remaining aircraft based in his home town: the BAe-146. Tr. 1287. To obtain the necessary certifications to fly the aircraft, Hoeper would have to pass a series of written and oral examinations, followed by training and test rides in a simulator, administered by Christensen's friends Doyle, Schuerman, and Hanneman.

Numerous witnesses testified at trial that given the power that instructors have over testing, "any pilot can be failed on any given day." Ex. 1106 at 33 (Koehn Depo.). "[Y]ou overload him, get him in a solo flying position, and you can fail him." JA 250 (aviation expert Captain Hulse). Christensen, for example, admitted that an instructor could "fail any airman at any time he would like." Ex. 1103 at 72.

A former AWAC instructor testified that members of the BAe-146 group would use that power to fail qualified pilots who had gotten crosswise with the good old boys club. He explained that he personally was "directed to fail" otherwise qualified pilots by various management officials, including Doyle and Doyle's boss, Scott Orozco. JA 534-37.

By the time of Hoeper's training and testing, Christensen's dislike for Hoeper was shared by others in the BAe-146 group. A pilot testified, for example, that he overheard a conversation in late 2003 or early 2004 between Christensen and Hanneman in which it was "apparent that they disliked" Hoeper. JA 517. Among other things, Hanneman remarked about Hoeper that "we should have fired him" earlier. *Id.* 516-17. And when Hoeper eventually was fired, after the events giving rise to this litigation, Schuerman was heard to say, "[t]hat asshole finally got his." *Id.* 528.

AWAC officials, including Doyle, later acknowledged that if Hanneman and Schuerman harbored such ill-will for Hoeper, they never should have been involved in his qualification to transfer to the BAe-146. JA 53-54, 322-23. Yet, that is exactly what happened. Each of Hoeper's failed simulator tests was administered by either Doyle or Hanneman. And in all but one of the failed simulator tests, a second member of the "good old boys" served as co-pilot. *Id.* 385-88.

Under AWAC policy, Hoeper had three chances to pass the simulator test. JA 54. Doyle failed him on his first two attempts. *Id.* 385-86. Experts who examined the records of Hoeper's training and testing (including data from the simulator sessions themselves) testified that the training and testing "was biased and unfair." Tr. 1931. The former instructor who had himself been directed to wash out disfavored pilots testified that Hoeper's treatment was "consistent with [the] targeting [of] airmen that [he] had seen in the past." JA 540.

Unlike the other tests, the third test was administered by a visiting FAA official. JA 387-88. Hoeper passed. The FAA official granted Hoeper his type rating for the BAe-146, indicating the FAA's recognition that Hoeper has demonstrated "complete mastery of the aircraft." Tr. 675, 1942. But Hoeper also needed certification that he had completed his "proficiency check," an additional test based on requirements specific to the air carrier. *Id.* 1339. Multiple witnesses at trial testified that type rating

and proficiency check tests are always conducted during the same simulator session, whether the test is conducted by an AWAC or FAA official.[4] Schuerman told Hoeper he would have to ask Doyle about the proficiency check. But Doyle refused to provide Hoeper the certification, later claiming that the FAA official told him that there was not enough time to complete the proficiency check. *Id.* 1340-41. If that were true, that fact would have been documented by the FAA official on the testing forms; but there was no such record of that alleged problem. *Id.* 684. Moreover, Hoeper testified, *id.* 1342, and expert testimony confirmed, that "Hoeper performed the required maneuvers" and "used his simulator time efficiently," *id.* 1947; *see also* JA 417-19 (simulator copilot testifying that Hoeper "performed well on the check ride").

AWAC set up a repeat of the third check ride, to be conducted by Hanneman with Schuerman as Hoeper's co-pilot, which Hoeper failed. Tr. 1345-48.

4. The December 8 Simulator Incident. After failing Hoeper three times, AWAC agreed to allow Hoeper another training and testing, but only after requiring Hoeper to sign a "last chance" letter intended to remove him from the protection of the union collective bargaining agreement. JA 424-26, 448-49. Schuerman administered the training for the simulator test. When Hoeper arrived for the test that morning, the simulator was not working properly –

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[4] *See, e.g.*, Ex. 1103 at 66 (Christensen Depo.); Ex. 1105 at 48 (Schuttloffel Depo.); Ex. 1106 at 54 (Koehn Depo.).

the co-pilot's navigation instrumentation was not operating and, during the test, both the captain's and the co-pilot's flight management computers locked up. Tr. 1365-1367. Schuerman nonetheless insisted on continuing the test. Then, during a maneuver involving the already unusual circumstance of two of the four engines rendered inoperable, Schuerman caused the simulator to unrealistically report the sudden loss of thousands of pounds of fuel, leading the remaining engines to "flame out." JA 203. An aviation expert testified at trial that Schuerman's actions constituted an "abuse of [his] authority" and were "absolutely unfair." *Id.* 259.

At this point, Hoeper became, in Schuerman's own words, "[j]ustifiably" frustrated. JA 20. When Schuerman began yelling at him for having run out of fuel, Hoeper took his headset off and tossed it onto the dashboard. *Id.* 203-04. He slid his seat back, cursed, and said, "[y]ou are railroading the situation and it's not realistic." *Id.* 204. Schuerman responded that he could "throw some of this stuff out." *Id.* But Hoeper had had enough – he told Schuerman he was "going to go call ALPA legal" – a reference to his union's attorneys – and left the simulator. *Id.* 204-05. The incident lasted only a few seconds. *Id.* 205.

Although Schuerman was "startled by the seat being thrown back," he "quickly realized it wasn't a threatening situation." JA 14-15. In fact, Schuerman later testified that he did not believe that Hoeper "posed a threat in any way to anybody else." *Id.* 30. Schuerman, trained in assessing aviation threat levels, deemed Hoeper "perfectly safe to get on an airplane and fly back to Denver from the training exercise." Tr. 377-78; JA 31. While both he and

Hoeper used elevated voices, neither made any threatening comments. JA 204, 218. In fact, Schuerman was "shocked" when he later learned that AWAC contacted TSA regarding Hoeper. *Id.* 34-35.

Nor did Schuerman believe Hoeper was "engaging in irrational behavior." JA 31. "I understood why [Hoeper] was upset," Schuerman testified. *Id.* 17. Doyle's boss, Orozco, also testified that stopping and calling the union was "completely within [Hoeper's] rights" if in fact training was being conducted unfairly. *Id.* 476.

Indeed, neither Schuerman nor Hoeper believed the incident would lead to Hoeper's termination, much less a call to law enforcement. In fact, Schuerman testified that he "figured we were going to have to schedule another [training] session the following day." JA 18. And Doyle testified that he did not know whether Hoeper would continue to be trained. Tr. 1029.

It was in this frame of mind that Schuerman called Doyle around noon to inform him of the aborted training. JA 25. In his deposition, Schuerman testified that he told Doyle only that "[Hoeper's] very angry at me." *Id.* 24.[5] He did *not* state that Hoeper was a threat to himself or anyone else. *Id.* 29-30. He did not tell Doyle that Hoeper was unstable. *Id.* 30. And he said nothing to indicate that Hoeper should be prevented from

[5] At trial, Schuerman went further and claimed that he told Doyle that Hoeper had "blown up" at him. JA 23. But he was impeached by his prior deposition testimony, which had not included that more inflammatory phrase.

boarding an aircraft. *Id.* "He was just angry at me," Schuerman testified. *Id.* "It doesn't mean he's going to go do anything stupid elsewhere. I never felt that he was going to go do something stupid." *Id.*[6]

The call with Doyle was brief and Doyle did not ask any follow-up questions. JA 25. Doyle later claimed that he left the conversation believing Hoeper might commandeer an aircraft and fly it into AWAC's headquarters or use his FFDO weapon to shoot innocent people. *Id.* 75-76, 89. If this were true, Doyle was required to immediately notify TSA. *See* Petr. Br. 7 (explaining that TSA protocols "require that an aircraft operator . . . *immediately* report to TSA all threat information") (quoting U.S. Colo. S. Ct. Br. 6) (emphasis added); *see also* Tr. 2524. Instead, Doyle booked Hoeper on a United Airlines flight from Dulles to Denver and ordered an AWAC employee to drive Hoeper, unsupervised, back to his hotel. JA 76-77. When Doyle learned that traffic prevented Hoeper from making his flight, he had him booked on yet a second United Airlines flight. *Id.* 80.

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[6] After Schuerman spoke to Doyle, Schuerman saw Hoeper in the parking lot outside the training center as both were walking to their cars. Hoeper "announced" to Schuerman and Hanneman that they were "the two most unprofessional instructors that [Hoeper has] ever had to deal with." JA 206-07. While Schuerman may have viewed Hoeper's conduct as inappropriate, he did not see the need to have any further contact with AWAC officials before Hoeper boarded his flight. Nor did the event alter Schuerman's conclusion, stated in his trial testimony, that nothing about the entire course of events gave him any reason to think that Hoeper was unstable or a potential danger to airline security. *Id.* 30.

Indeed, for the next two and a half hours Doyle took none of the steps one would expect of someone with a genuine airline safety concern. He did not call Hoeper or anyone who interacted with him to inquire into Hoeper's mental stability or to ask whether he had his weapon with him. JA 73-74. When he called another employee to ask him to give Hoeper a ride to the airport, he did not warn the employee that Hoeper might be unstable or violent. *Id.* 77. Nor did Doyle warn United Airlines that he had just booked a mentally unstable pilot who might be armed onto one of the airline's flights, despite protocol that would have required him to report any such suspicion to the airline. Tr. 972, 978.[7]

And although he saw his supervisor, Orozco, shortly after the telephone call with Schuerman, he did not tell him about the incident and made no "intimation to Captain Orozco that [he] had any fear of Mr. Hoeper." JA 81. Doyle would later claim that Orozco was "in a rush" to get to lunch or a meeting. *Id.* In fact, Doyle did not mention the issue to anyone else until nearly two and a half hours later when Orozco returned from lunch. *Id.* 73-74, 81.

Meanwhile, Hoeper arrived at the airport from the hotel. He delayed going through security until he could speak with his union counsel, who advised him to call Orozco to ensure he would not be terminated for leaving the training. JA 209-10, 445. He finally was able to reach Orozco at 2:30 PM with the union's

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[7] Had he done so, United Airlines easily could have placed a hold on Hoeper's ticket, preventing him from boarding the plane. JA 141 (United operations director Clevenger).

legal department on the other line. *Id.* 209-10. When Orozco gave Hoeper authorization to go home, Hoeper proceeded through security. *Id.* 210. Orozco did not come away from the call thinking Hoeper was unstable or a threat to anybody. *Id.* 444-45, 462.

5. The Meeting Prior To Doyle's Call To TSA. At some point later, after speaking with Hoeper and the union lawyer, Orozco met with Doyle for fifteen to twenty minutes to discuss a number of matters, including Orozco's disappointment "that Bill had elected to end his training." JA 458, 467. At that point, Doyle brought Orozco up to speed on his earlier phone call with Schuerman. *Id.* 458. Kevin LaWare, Vice President of Flight Operations, testified that he "happened to walk in on the conversation," *id.* 262, and at some point later, Bob Frisch, an AWAC management official, also joined after walking by and "overhearing a conversation." *Id.* 546. Although the group could have called the various individuals involved, they elected not to. *Id.* 262-63.

In the end, LaWare decided "to make a call to the TSA" solely to inform them of "the status," and assigned that task to Doyle. JA 282. LaWare testified, however, that he did not anticipate that Doyle would tell TSA that Hoeper was "mentally unstable" or "may be armed." *Id.* 271-72. In fact, no one at the meeting believed Hoeper was mentally unstable or intended to convey that impression to TSA. *Id.* 93 (Doyle); *id.* 271-72 (LaWare); *id.* 462 (Orozco); *id.* 556 (Frisch). Likewise, no one actually believed that there was a significant chance that Hoeper had his weapon with him. Frisch, who was an FFDO himself, had explained to the group that

FFDO protocols would have prohibited Hoeper from having brought his weapon from Denver to training. *Id.* 542-44; Ex. 1107 at 68, 74-76, 138 (Frisch Depo.). No one had any reason to believe that Hoeper had ever violated FFDO protocols in the past, or that he had done so on this current trip. Accordingly, Orozco explained at trial, although the group discussed the whereabouts of Hoeper's weapon, it was "more of a question than a concern." JA 460. Orozco would not have wanted Doyle to tell TSA that Hoeper "may be armed." *Id.* 468.

Therefore, when asked whether anyone at the meeting "express[ed] any type of concern . . . that Mr. Hoeper was a threat and should be pulled off of a commercial flight," Frisch responded, "[o]h no, not at all." JA 550. In fact, Frisch could recall no information presented at the meeting indicating Hoeper was a threat to an airplane. Ex. 1107 at 125 (Frisch Depo).

6. Doyle's Call To TSA. What Doyle told TSA differed dramatically from what had been discussed at the meeting and what his superiors wanted him to convey. A jury would later find that he made two statements:

> (1) [Hoeper] was an FFDO who may be armed. He was traveling from IAD-DEN later that day and we were concerned about his mental stability and the whereabouts of his firearm.
>
> (2) Unstable pilot in FFDO program was terminated today.

Pet. App. 111a.

At trial, Doyle denied telling TSA that Hoeper was mentally unstable or that AWAC was concerned about his stability. JA 92-93. In fact, Doyle asserted that he consciously avoided referring to Hoeper's "mental stability," because he knew if he did so, there was potential "to cause Mr. Hoeper undue harm." *Id.* 95. But that claim was plainly contradicted by his and TSA's notes of the call. *Id.* 92, 109.

7. TSA's Response. Given the gravity of the situation conveyed by Doyle's statements, TSA immediately executed a "hijack response." Tr. 867. The pilot announced an "unknown situation," and the airplane started traveling back towards the gate, followed by the flashing lights of emergency vehicles and a snowplow to block in the airplane. *Id.* 1393-94. "The anxiety going through the cabin was very, very high." *Id.* 1394. Hoeper testified to being "ready to spring into action in case something happened." *Id.* 1395. However, he would soon find out *he* was the unknown situation. As the flight attendants moved to block the flight deck door, a man in a suit and two armed police officers boarded the plane and pulled him off of the flight. *Id.* 1395-97. As soon as they exited the airplane, Hoeper was questioned about the whereabouts of his firearm (which was locked in a secure location in his home, JA 211-12, as required by FFDO protocols), while his luggage was emptied onto the jet bridge for all to see. Tr. 1398-1400.

Eventually, TSA realized Hoeper posed no threat and allowed him to re-board the flight if he wished. Embarrassed, however, Hoeper opted to take a later flight home. Tr. 1401-02.

8. Doyle's Coverup. Doyle spent the entire evening on the phone with TSA, FBI, and CIA

discussing "how something like this could be prevented." JA 154.

Doyle then began to create notes. In addition to detailing the events of December 8, 2004, he alleged for the first time that during an earlier training on October 14, 2004, Hoeper had acted in a threatening manner and that Doyle had feared for his "own physical harm." JA 386. At some point later, Doyle altered the notes to add that he also feared for "the safety of others." *Id.* 157. But at trial Doyle admitted that, although he had taken contemporaneous notes of the October 14 training, those notes contain no mention of the alleged threatening incident. *Id.* 155. Orozco testified that if the training had gone as Doyle later alleged, it should have been documented and would have disqualified Hoeper from further training as a pilot. *Id.* 435-37, 450-51. Yet, Orozco testified, Doyle had never reported anything of the sort. *Id.* 437-38. Indeed, if Doyle had reported the incident, Orozco would have taken immediate action, including possibly calling the police. *Id.* 438. Instead, AWAC continued training Hoeper. *Id.* 98.

Finally, Doyle admitted that he had testified falsely under oath about the October 14 incident in an arbitration proceeding.[8] JA 101-05. There, he testified that he drove Hoeper to the airport following the incident and had no further contact with him. *Id.* 101-02. But that testimony was false. Although he

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[8] Hoeper and AWAC were previously involved in arbitration under his union contract. JA 101.

would later claim that Hoeper's alleged threatening behavior was so "traumatic" that he would never "forget it," *id.* 99, Doyle admitted at trial that he actually took Hoeper to the hotel where they were both staying, and that Hoeper later joined Doyle and another AWAC employee for food and drinks at a nearby restaurant, *id.* 104.

9. The Aftermath. The incident effectively ended Hoeper's career as a commercial pilot. John Schuttloffel, a former Air Wisconsin pilot, testified that over 850 pilots heard about Hoeper being pulled off his flight. JA 525. Schuttloffel explained that pilots are members of a "pretty tight group," and a lot of the newer pilots assumed Hoeper went off "the deep end." *Id.*; Ex. 1105 at 45 (Schuttloffel Depo.). Obtaining any job in the industry after such an incident, Schuttleoffel testified, would be almost impossible. Ex. 1105 at 68-69. "I think a lot of people can see through the type ride and the [proficiency check] thing, but when you throw a gun into the mix and being pulled off of an airplane and basically treating the guy like he is a threat or something, I mean, that right there – I think that's what is hurting him the most." *Id.* As an aviation expert put it, Hoeper was effectively "blackballed" and his career "is shot." Tr. 1968.

III. Proceedings Below

Hoeper brought claims for defamation, false imprisonment, and outrageous conduct in Colorado state court. Among other defenses, petitioner asserted immunity under the Aviation and Transportation Security Act (ATSA). After a lengthy trial, the jury found that the statements Doyle made

to TSA were false and made with knowledge of, or reckless disregard for, their falsity. Those findings were affirmed by the Colorado Court of Appeals and the Colorado Supreme Court.

1. Colorado District Court. Hoeper sued petitioner and several individual defendants, including Doyle. The individual defendants were dismissed after AWAC assumed their liability. Accordingly, the jury was instructed that even if AWAC itself had not acted unlawfully, it should be found liable if any of the individual defendants, including Doyle, would have been liable individually. JA 572-74.

During an extensive three-week trial, the jury heard live testimony from numerous witnesses, including Doyle and Hoeper, allowing the jury to assess the credibility of both sides. The jury also heard from the individuals present in the simulator during the December 8 training incident, each of whom testified that while Hoeper was briefly angry about his treatment, they did not believe he was mentally unstable or posed any risk to airline security. JA 30-31 (Schuerman), 399-400 (Scharf). Finally, the jury heard from several expert witnesses. Among them was Captain Robert Hulse, who testified that his review of Hoeper's training indicated that the testing was "absolutely unfair," *id.* 259, and Quinten Johnson, former head of Federal Aviation Administration security and former TSA Federal Security Director, who testified that in his view, Hoeper's reaction to his unfair training on December 8 did not even warrant a call to TSA. *Id.* 356.

The parties agreed to an ATSA immunity instruction that largely tracked the language of the

statute. JA 582. Petitioner did not ask the court to instruct the jury that it was entitled to immunity if Doyle's statements were reckless but materially true. Nor did petitioner ask the court to tell the jury that even if the statement were false, the untruth was immaterial unless "TSA would not have reacted differently to a strictly accurate report." Petr. Br. 29. In fact, petitioner did not request a materiality instruction at all.

After deliberations, the jury rejected petitioner's claim of ATSA immunity and ruled in favor of Hoeper on the defamation claim.[9] The jury found, among other things, that contrary to Doyle's denials, he in fact told TSA that Hoeper was mentally unstable and that AWAC was concerned about his mental stability. Pet. App. 111a. And the jury further found Doyle's statements to TSA were false. *See* JA 579-80; Pet. App. 110a. Finally, the jury found Doyle made the false statements "knowing that they were false, or so recklessly as to amount to a willful disregard for the truth." Pet. App. 111a.

2. Colorado Court of Appeals. The Colorado Court of Appeals affirmed.

The court first held that the question of ATSA immunity is, as a matter of Colorado law, a question for the jury. Pet. App. 57a (citation omitted). Nonetheless, the court conducted a *de novo* review of "actual malice" and found "clear and convincing

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[9] The jury ruled AWAC's favor on false imprisonment, but hung on the outrageous conduct claim, which is awaiting retrial. Pet. App. 113a-116a.

evidence" that "Doyle acted with actual malice in communicating to TSA." *Id.* 85a.

The court identified "[t]hree aspects of Doyle's conduct on December 8 and thereafter" that were particularly telling. Pet. App. 82a. First, the court pointed to Doyle's actions on the day of the incident, including: asking another AWAC employee to drive Hoeper to the airport, having Hoeper booked on a return flight to Denver, postponing his conversation with Orozco, and waiting over three hours to contact TSA. *Id.* 83a. Second, the court considered Doyle's creation of notes the day following the TSA call documenting incidents which he "had not previously mentioned to anyone at Air Wisconsin." *Id*. The court noted that the timing of those notes "strongly suggests that [Doyle] attempted to bolster the grounds for the threat connotation of the TSA call by exaggerating the events of October 14." *Id.* 84a. Third, the court noted that Doyle denied he informed TSA of his concerns about Hoeper's mental instability, but noted that "testimony was contradicted by TSA's records of the call." *Id.* 84a.

Thus, although the court "agree[d] with amicus United States that" immunity should be withheld "'[o]nly in the highly unusual situation in which an air carrier has acted with knowing falsity or reckless disregard of the truth or falsity of its statements,'" it concluded that "[o]n the particular evidence presented, this is just such an unusual case." Pet. App. 84a-85a (first alteration in original).

3. The Colorado Supreme Court. The Colorado Supreme Court granted certiorari and also affirmed. Pet. App. 3a.

a. Before the Colorado Supreme Court, petitioner argued that the court of appeals erred in relying on Colorado law to hold that ATSA immunity was an issue for the jury. App. 7a.[10] And it argued that the evidence was insufficient to show that Doyle made his statements to TSA "with reckless disregard of their truth or falsity." *Id.* 18a. Petitioner did not, however, argue that it should have been afforded ATSA immunity because Doyle's statements were materially true.

Appearing again as amicus, the Government emphasized the importance to airline security of proper application of the ATSA immunity provision. The Government did not assert that the court of appeals' denial of that immunity was, in itself, any cause for concern. Instead, it argued that the Government's security interests would be satisfied if the Colorado Supreme Court, "as the court of appeals did," made "clear that immunity has been denied to defendant Air Wisconsin because the evidence in the record establishes that the carrier made defamatory statements knowing they were false, or so recklessly as to amount to a willful disregard for the truth of the statements." U.S. Co. S. Ct. Br. 3-4. Thus, because the Government did not view the resolution of the factual disputes in this case as important to airline security, it did "not urge either affirmance or reversal of the judgment below." *Id.* 1.

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[10] Petitioner's Colorado Supreme Court Brief is included as an Appendix to this brief.

b. The Colorado Supreme Court affirmed. It first determined that the trial court "erred in this case by submitting the immunity question to the jury," because in its view the distribution of authority between judge and jury was governed by federal law and because it viewed federal law as requiring that "the trial court must decide immunity under the ATSA as a matter of law before trial." Pet. App. 15a. Nonetheless, the court concluded that the error was harmless because a *de novo* review of the evidence revealed that "Air Wisconsin [was] not entitled to immunity under the ATSA." *Id.*

The court first affirmed that Doyle's statements "were made with reckless disregard as to their truth or falsity." Pet. App. 16a-17a. The court found that Doyle made his statement regarding Hoeper's mental instability "with a high degree of awareness of its probable falsity." *Id.* 18a. Among other things, the court noted, "Doyle admitted at trial that, based on the information he had when he contacted TSA, he could not determine if Hoeper was mentally unstable." *Id.* In addition, "the evidence establishe[d] that Doyle's statement that Hoeper had been terminated that day was false and that Doyle knew it to be false." *Id.* Finally, finding "no indication in the record that Doyle believed an FFDO pilot would be more likely than any other passenger to sneak a firearm through security," the court concluded that Doyle's statement that Hoeper may be armed was "made with reckless disregard of its truth or falsity." *Id.* 19a.

The court further concluded that the "overall implication of Doyle's statements is that he believed that Hoeper was so unstable that he might pose a

threat to the crew and passengers of the airplane on which he was scheduled to fly back to Denver." Pet. App. 19a. Yet, "Doyle's actions belie the claim that he believed Hoeper to be mentally unstable." *Id.* The court pointed out that when Doyle "first heard about the confrontation . . . he booked Hoeper on the flight back to Denver and had another employee drive Hoeper to the airport." *Id.* 19a-20a. But if "Doyle truly believed Hoeper posed a threat to employees of Air Wisconsin, he would not have directed an employee to drive Hoeper to the airport" and if he believed Hoeper "posed a threat to the crew and passengers of the flight, he could have instructed Hoeper to return to his hotel room for the evening and booked him a flight only when his mental state improved." *Id.* 20a.

The court acknowledged that "important policy considerations underlie the grant of immunity contained in the ATSA" and concluded that its analysis "does not chill airlines from reporting to the TSA what they actually know about potential security threats and leaving the assessment of each potential threat to TSA officials." Pet. App. 21a. The court emphasized that it was not holding a call should not have been made, and noted in passing that petitioner "would *likely* 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." *Id.* (emphasis added).

Having resolved petitioner's "actual malice" argument, the only ATSA immunity argument it had

raised, the court proceeded no further. In a footnote, it explained that "we need not, and therefore do not, decide whether the statements were true or false." Pet. App. 17a n.6. The court observed, however, that it reviewed "the elements of the defamation claim, including whether the statements were false," later in the opinion. *Id.*

In that portion of the opinion, the court rejected petitioner's arguments that certain portions of its statements were substantially true. It held that Hoeper's claim "does not rely upon 'slight inaccuracies.'" Pet. App. 26a. "[T]he crux of the defamatory statements was that Hoeper was so mentally unstable that he might constitute a threat to aircraft and passenger safety." *Id.* 26a-27a. The court thus found "sufficient evidence to support the jury's determination that Hoeper was not mentally unstable." *Id.* 27a.

SUMMARY OF ARGUMENT

1. The Colorado Supreme Court did not err in affirming the denial of ATSA immunity.

a. The question presented by the petition does not arise in this case because petitioner misconstrues the opinion it has challenged. The only ground for ATSA immunity petitioner pressed below was that its employee did not *know* his statements were false and was not subjectively *reckless* in making them; it never argued that it was entitled to immunity because the statements were materially true. Instead, petitioner raised that distinct argument only in the context of challenging the sufficiency of the evidence to satisfy the elements of state law defamation. The footnote on which the petition is premised simply reflects that the court decided the question of material truth in the only context (defamation) in which it was actually raised.

Even if there were some doubt about what the footnote means, there should be no doubt that petitioner did not argue material truth as a ground for ATSA immunity. As a consequence, whatever this Court decides about the meaning of ATSA's immunity provision, it should ultimately affirm the judgment on the ground that petitioner forfeited any argument that it was entitled to immunity on the ground that Doyle's statements, while reckless, were materially true.

b. In any event, whatever its interpretation of ATSA, the court below ultimately *did* review the material truth of petitioner's statements before affirming the jury's verdict, albeit it in the context of reviewing the sufficiency of the evidence to prove

defamation. To the extent that the court did not apply the ATSA-specific materiality standard the Government or petitioner now advance, that is because no party – or the Government as amicus – proposed such a standard below.

Affirming on the ground that petitioner's argument is forfeited or because the court below ultimately conducted the appropriate inquiry will not lead to the practical concerns raised by the Government. Even in affirming, this Court could make clear that ATSA protects all true statements and that the Court is not endorsing the lower courts' view of the facts of this particular case or conclusion that there was a material difference between what Doyle said and what the Colorado Supreme Court hypothesized he could have truthfully asserted (the subject of much of the worry expressed by the United States and other amici).

2. Even if this Court accepts petitioner's reading of the decision below, and even it if concludes petitioner preserved its present objection, the Court should reject petitioner's request for reversal.

a. This Court should decline to review the facts of this case in the first instance and instead vacate and remand to allow the Colorado courts the opportunity to review the evidence in light of the Court's interpretation of ATSA, as is the Court's ordinary practice. That course is particularly appropriate here, given the length and complexity of the record and the central role considerations of credibility played in the case.

b. If this Court were to review the record it could only come to one conclusion: Doyle's statements to TSA were false, and materially so.

Under ATSA, a false or misleading statement is material if a jury could find that the difference between the statement and the truth could predictably affect a reasonable security officer's assessment of the existence, nature, or extent of any security threat. Here, both the detail of Doyle's individual statements and the overall message those statements conveyed to TSA were materially false.

ARGUMENT

The safety of our nation's air travel depends on security officials receiving timely and *truthful* information from air carriers. While it is no doubt damaging when suspicious activities go unreported, knowingly and recklessly false reports can also cause great harm, diverting attention and resources from true threats and potentially creating dangerous situations in which armed security officers come into unnecessary confrontations with members of the public. Indeed, the Government attests to that danger in its brief to this Court, U.S. Br. 29, and has even prosecuted individuals who filed knowingly false security reports.[11]

Congress balanced these competing interests by providing immunity under the Aviation and Transportation Security Act to those who make good faith reports of what they know about suspicious activities, while withholding it from those who act in bad faith by making knowingly or recklessly false statements to security officials. To secure immunity, individuals reporting suspicions need not conduct an investigation or undertake their own evaluation of the threat. But they do need to truthfully report the facts that they *have* gathered. And if they choose to convey an *assessment* (*e.g.*, that a passenger is mentally unstable) rather than just stating the underlying facts from which officials would make

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[11] *See, e.g.*, *United States v. Williams*, 690 F.3d 1056 (8th Cir. 2012); *United States v. Mendoza*, 244 F.3d 1037 (9th Cir. 2001)

their own judgment, they must at least believe the assessment to be true and have some good faith basis for the assertion. Particularly when time is short, security officials must be able to rely on the good faith of such statements in deciding what action to take, even if they will conduct their own additional investigation and reach their own ultimate conclusions about the possible threat.

Asking air carriers to act in good faith is not too much to ask. Yet in this case, a jury found, the trial court confirmed, and two appellate courts on *de novo* review affirmed that petitioner's employee, Patrick Doyle, did *not* act in good faith when he reported that respondent was a "mentally unstable" former pilot who "may be armed," had been "terminated," and about to board a plane. Critically, petitioner *does not contest* that finding of bad faith here. Instead, it claims that even if Doyle acted in bad faith – knowing, or at least suspecting, that what he said was not true – he and his employer are entitled to immunity because, by happenstance, his reckless report was not actually materially false. But the same jury and courts below also found that Doyle's statements were false and petitioner has never even asserted that the central message of Doyle's overall statement – that Hoeper was so mentally unstable that there was a genuine risk he might harm someone on the plane – was true.

Petitioner seeks fact-bound review of those case-specific findings on the pretense that the Colorado Supreme Court committed a legal error in purportedly construing ATSA to provide no protection for reckless but true statements. That is a misreading of the decision below, which simply

declined to decide whether Doyle's statements were materially true before affirming the denial of ATSA immunity because neither petitioner nor the United States as amicus ever asked it to. And it ignores that the courts below *did* decide whether the evidence supported petitioner's material truth defense in the context (the sufficiency of the evidence to support the elements of respondent's defamation claim) in which it was actually raised. Petitioner's complaint that the court analyzed the right question under the wrong subheading of its opinion is no ground for reversal. If this Court disagrees, it should remand the case to the Colorado Supreme Court or affirm on the ground that in the end, that court was correct in finding Doyle's statements materially false.

I. The Colorado Supreme Court Did Not Err In Denying Petitioner's Claim To ATSA Immunity Without Determining That The Air Carrier's Disclosure Was Materially False.

The question presented by the petition is premised on a misconstruction of the Colorado Supreme Court's decision. *See* BIO 23-24. And petitioner's brief advances an argument for ATSA immunity that was neither pressed nor passed upon below. *See id.* 23-24, 27-28; Resp. Supp. Br. 1, 4-5. For those reasons alone, this Court should affirm.

A. The Colorado Supreme Court Did Not Hold That Material Truth Is Irrelevant To ATSA Immunity, But Rather Declined To Decide A Question Petitioner Failed To Raise On Appeal.

1. In a footnote, the Colorado Supreme Court stated that it "need not, and therefore d[id] not, decide whether [Doyle's] statements were true or false" before affirming the trial court's denial of immunity. Pet App. 17a n.6. Petitioner contends that the "necessary implication of that holding is that an airline may be denied ATSA immunity and subjected to defamation liability for reporting true information concerning a potential security threat to TSA." Petr. Br. 21. If that were the necessary implication of the court's statement, we would agree that the court was likely wrong.[12]

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[12] That said, by its literal terms, Section 44941(b)(2) establishes a good faith defense, available so long as the defendant does not act with a particular mental state (reckless disregard for the truth), which can occur even if the statement by happenstance turns out to be true. Given Congress's intent that the immunity not shield "bad actors," 147 Cong. Rec. S10,432 (daily ed. Oct. 10, 2001) (statement of Sen. Leahy), and given that the vast majority of reckless statements will *not* turn out to be true (and, therefore, will predictably lead law enforcement on wasteful, sometimes dangerous, "wild-goose chase[s]," U.S. Br. 29), Congress could have quite reasonably chosen to deny the special privilege of ATSA immunity to all reckless speakers. The fact that the words of the provision are seemingly taken from *New York Times v. Sullivan*, 376 U.S. 254 (1964), does not show otherwise. The borrowed language established the "actual malice" requirement as an *additional* requirement beyond the pre-existing state law defamation

But that is almost certainly not what the court meant. As discussed next, neither party briefed the question of whether reckless but true statements are immunized – respondent insisted that the statements were false (as found by the jury) and, as set forth below, petitioner argued only that it was entitled to immunity because Doyle did not act with "actual malice." And as a result, the far more plausible reading of the footnote is that, in affirming the denial of immunity, the court was considering and resolving the only argument petitioner ever raised regarding the ATSA provision – namely that even if Doyle's statements were false, they were not made with knowledge or reckless disregard for the truth. That is why, the court explained, the question of material truth was properly considered by the jury as an element of respondent's defamation claim, and why the court reviewed material truth in that context only. Pet. App. 17a n.6.

2. Throughout the proceedings below, petitioner drew a clear distinction between: (1) "actual malice," which it acknowledged turns on the defendant's state

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element of material falsity. *Id.* at 278 (explaining that the Alabama statute at issue already established truth as a defense). And the fact that the First Amendment (as well as defamation law) already provides an independent truth defense is neither here nor there – Congress might have thought there was no need to provide an additional layer of federal statutory protection for reckless but true statements, or it might have intended the provision to track the broader protections of the First Amendment for true speech.

of mind;[13] and (2) the factual question of material falsity. And petitioner's only objection to the jury's rejection of the ATSA defense was that there was insufficient evidence of actual malice; when petitioner wanted to argue about the truth of Doyle's statements it knew how to do so and made those arguments in separate parts of its briefs addressing the sufficiency of the evidence to support the falsity element of respondent's defamation claims.

Trial Court. Petitioner raised its ATSA defense for the first time in the trial court in its summary judgment motion. There, petitioner argued that it was entitled to immunity because "Plaintiff has failed to establish, and cannot establish, that Defendants acted with reckless disregard as to the truth or falsity of their disclosure." SJ Motion 19. The only claim it made regarding truth was that the defendants' "statement that Plaintiff was a 'training failure' . . . is not actionable *under Virginia law* because . . . it is true." *Id.* 25 (emphasis added). Likewise, in its motion for directed verdict, petitioner simply argued that its "disclosure was not made with actual knowledge that it was false, or with reckless disregard as to its truth or falsity." DV Motion 8.

Court of Appeals. In the court of appeals, petitioner again argued that it was entitled to ATSA immunity because there was no "evidence to suggest

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[13] *See, e.g.*, App. 17a (Recklessness turns on "the subjective beliefs at the time of the publication." (citation omitted)); Petr. Co. App. Br. 39 ("[T]he actual malice inquiry is concerned with only the subjective beliefs at the time of the publication." (citation omitted)).

AWAC recklessly disregarded the truth or falsity of its statements to TSA." Petr. Co. App. Br. 23. It did not argue, for example, that it was entitled to immunity because Doyle's statement that Hoeper was mentally unstable was substantially true. Instead, in a separate section of its brief it argued that certain *other* portions of Doyle's statements were "substantially true"[14] and therefore did "'not support a cause of action for defamation'" under Virginia law. *Id.* 26 (quoting *McCleary v. Kessling*, 29 Va. Cir. 523, 524-25 (1990)). Petitioner specifically recognized the distinction between "actual malice" and falsity, explaining that a "jury's finding that a statement is false is not enough to demonstrate actual malice." *Id.* 36. Instead "the actual malice inquiry is concerned with only the subjective beliefs at the time of the publication." *Id.* 39 (citation omitted).

Colorado Supreme Court. In the Colorado Supreme Court, petitioner's principal argument regarding ATSA immunity was that the court of appeals erred in concluding that immunity was a question to be decided by the jury. *See* App. 10a. Petitioner argued "the trial court should have determined, as a matter of law, whether Hoeper presented clear and convincing evidence that AWAC made its disclosure with *reckless disregard to its truth or falsity*." *Id.* 13a (emphasis added).

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[14] *See* Petr. Co. App. Br. 29 ("The statements that Hoeper was 'a pilot in FFDO program,' 'an FFDO who may be armed,' and AWAC was concerned about 'the whereabouts of his firearm,' were either substantially true or expressions of opinion." (capitalization altered)).

But petitioner again made clear that it understood "actual malice" to turn on the defendant's subjective beliefs, not on the truth of the statements asserted. *See* App. 17a. (recklessness turns on "the subjective beliefs at the time of the publication." (citation omitted)); Petr. Co. S. Ct. Reply Br. 33 (arguing that actual malice was not proven because the evidence did not show that "Doyle seriously entertained doubt about the truth of [the] statements" and because "[t]here is not clear and convincing evidence that Doyle purposely avoided the truth").

Thus, petitioner again did not argue that it was entitled to ATSA immunity because its statements were actually true. Instead, as it had done in the court of appeals, it argued only that certain portions of Doyle's statement were true and therefore could not be the basis of a defamation claim under Virginia law. *See* App. 30a. ("Indeed, true statements do not support a cause of action for defamation." (quoting *Jordan v. Kollman*, 612 S.E.2d 203, 206 (Va. 2005))); *see also id.* 36a ("The statement that Hoeper was terminated today was substantially true." (capitalization altered)); *id.* 38a (Doyle's statements that "Hoeper 'may be armed' and that AWAC was concerned about the whereabouts of his firearm" were "not materially false"). *Compare id.* 34a (arguing only that Doyle's statements regarding Hoeper's mental stability were inactionable statements of opinion). And even in that context, petitioner never argued for an ATSA-specific test for materiality. *Compare id.* 37a *with* Petr. Br. 29.

3. It is thus no surprise that both the Colorado Supreme Court and the Colorado Court of Appeals

addressed the truth of Doyle's statements only in the context of reviewing the sufficiency of the evidence to establish the elements of the defamation claim, not as part of the ATSA immunity analysis. *See* Pet. App. 26a-27a (Colorado Supreme Court); *id.* 76a-78a (Colorado Court of Appeals).

The Colorado Supreme Court's statement that it "need not, and therefore d[id] not, decide whether the statements were true or false" as part of the ATSA analysis, is most plausibly read as simply reflecting that the Court had resolved the only ATSA argument petitioner had raised, leaving the question of material truth to be decided in the context (state law defamation) in which the argument was actually raised. Pet. App. 17a n.6.

B. Petitioner Forfeited Any Argument That It Was Entitled To ATSA Immunity On The Ground Doyle's Statements, While Reckless, Were Materially True.

Even if this Court were uncertain about the proper reading of the Colorado Supreme Court's footnote, there should be no question that petitioner failed to preserve any argument that it was entitled to ATSA immunity because Doyle's statements were materially true. As a consequence, regardless of what the footnote means or whether it is correct, the Court should affirm on the ground that petitioner has forfeited the argument it now makes in this Court.

1. Petitioner argued at the certiorari stage that even if it did not raise material truth as an ATSA defense, the Colorado Supreme Court nonetheless passed upon the question in footnote 6. Pet. Cert. Reply Br. 5. But as explained above, the statement

does not pass on the question of whether reckless but true statements are protected; it reflects instead that the court was *not* passing on that un-raised question. Moreover, the footnote certainly does not pass on the proper standard for materiality in the ATSA context, an issue petitioner also never raised below.[15]

Nor did petitioner preserve the issue by simply arguing that "'ATSA immunity presents a question of law for the [c]ourt'" and that ATSA "'incorporate[s] the *New York Times* actual malice standard.'" Pet. Cert. Reply Br. 5 (second alteration in original). Arguing that ATSA immunity is a question for the court says nothing about the legal standard the court is to apply. Nor did petitioner's invocation of the "actual malice" test of *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), suffice to preserve the distinct claim that the ATSA provision provides immunity for reckless statements so long as they are materially true under an ATSA-specific definition of materiality. *See* Petr. Br. 29. In fact, in *New York Times* this Court drew a clear distinction between the requirement that a statement be false (which was already required by the Alabama statute under review) and the additional constitutional requirement established in that case that the

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[15] Even if petitioner had clearly raised material truth as a ground for ATSA immunity in the Colorado Supreme Court, that court would have been justified in holding that argument waived because petitioner never raised it at trial or in the court of appeals. Had the court done so, the waiver holding would have constituted an adequate and independent state ground for the decision and precluded review by this Court. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

statement be made with a particular state of mind. 376 U.S. at 278-80. Petitioner's assertion that its references to "actual malice" below encompass *both* that wrongful intent *and* material falsity is thus unpersuasive. It is also belied by the fact that, as just discussed, petitioner's briefs treated actual malice as a *mens rea* issue distinct from the separately briefed question of material truth. To the extent it claimed that any part of Doyle's statement was true, it did so in unambiguous terms in the context of challenging the sufficiency of the evidence to establish the elements of state law defamation. In that context, the reference to "actual malice" hardly sufficed to put the courts below on notice that petitioner was also making an ATSA claim based on material truth.

C. Nevertheless, The Colorado Supreme Court Effectively Applied The Legal Standard Petitioner Advances.

In any event, prior to affirming the jury's verdict, the Colorado Supreme Court effectively applied the legal test petitioner now asks this Court to apply.

Petitioner does not dispute that the Colorado Supreme Court reviewed the sufficiency of the evidence to support the jury's finding that Doyle's statements in this case were false as part of its review of the jury's defamation finding. *See* Petr. Br. 17; Pet. App. 26a-27a. Moreover, the court also recognized that state law requires the defamatory statement be *materially* false. *See* Pet. App. 26a ("Speech that is 'substantially true' will not support a defamation claim, and a plaintiff may not prove falsity based upon '[s]light inaccuracies of

expression.'" (citation omitted) (alteration in original)). Nor does petitioner dispute that the Colorado Supreme Court considered and resolved every substantial truth argument petitioner actually made. *See id.* 26a-27a. Petitioner and the United States may believe that the court reached the wrong conclusion, but they cannot reasonably deny that the court asked the legal question they say ATSA requires.

The United States (but not petitioner) nonetheless does attempt to deny it. The Government objects that the "jury instructions on defamation did not direct the jury to evaluate material falsity under the standards (such as the reasonable-official perspective for materiality) that ATSA requires" and the state supreme court did not "itself apply those standards." U.S. Br. 32. But the Solicitor General ignores that petitioner never requested *any* instruction on materiality, much less the ATSA-specific instruction the Government now advances. And on appeal petitioner simply argued that portions of Doyle's statements were substantially true from *anyone's* perspective. *See* App. 37a. Nor does the Government acknowledge that *it* never suggested its ATSA-specific materiality standard in either of its two briefs to the Colorado courts below. It is not reversible error for a court to fail to apply a standard that no party ever proposed.

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Affirming on any of the above grounds need not give rise to the practical concerns the Government or other amici have expressed about the Colorado Supreme Court's opinion. Even if it affirms on alternative grounds, the Court could still make clear

that ATSA protects all true statements; that it is not passing on the lower courts' application of ATSA to the specific facts of this case; and that it is not endorsing the Colorado Supreme Court's suggestion that there is a material difference between what Doyle said and what that court proposed he could have said to retain immunity.

II. The Court Should Reject Petitioner's Request For A Fact-Based Reversal.

If this Court accepts petitioner's contrary reading of the decision below, and concludes petitioner has preserved its argument, the Court should either vacate and remand the case or affirm on the ground that Doyle's statements to TSA were materially false.

A. This Court Should Decline To Review The Factual Record In This Case.

It is this Court's usual practice to remand a case to the lower courts for application in the first instance of the legal standard announced by the Court's decision. *See, e.g.*, *Holland v. Florida*, 130 S. Ct. 2549, 2565 (2010). That ordinary approach is particularly appropriate here, given the fact-intensive nature of the material falsity inquiry.[16] A remand also would allow the Colorado courts to determine in the first instance whether petitioner

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[16] Moreover, if this Court were to review the facts, it would immediately confront the question on which it denied certiorari: "Whether the First Amendment requires a reviewing court in a defamation case to make an independent examination of the record before affirming that a plaintiff met its burden of proving a statement was false." Pet. i.

preserved the material truth arguments it now makes, which is ultimately a question of state law.

B. Doyle's Statements To TSA Were Materially False.

If the Court were to review the factual record in this case, it could come to only one conclusion: Doyle's report to TSA was materially false in both its detail and in the overall message it conveyed.

1. The Question On Appeal Is Whether A Jury Could Reasonably Find That The Difference Between Doyle's Statements And The Truth Could Predictably Affect A Reasonable Security Officer's Assessment Of The Existence, Nature, Or Extent Of Any Security Threat.

a. When reviewing evidence of falsity, a court must ask whether "a reasonable jury could find a material difference between" what the defendant said and what the truth was, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 522 (1991), giving due deference to the jury's "opportunity to observe the demeanor of the witnesses" and judge their credibility, *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (citation and quotation marks omitted).[17]

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[17] Petitioner asserts in a footnote that because it is akin to qualified immunity, "ATSA immunity is a question for the court, not the jury." Petr. Br. 30 n.6. Petitioner further implies that, as a consequence, this Court should examine the factual record in this case *de novo*. But as the Government points out, even in the qualified immunity context, disputed factual questions are

A statement is materially false if it "results in a material change in the meaning conveyed by the statement." *Masson*, 501 U.S. at 517. Minor inaccuracies are not materially false. *Id.* On the other hand, literally true statements can give a materially misleading impression to the listener, *i.e.*, by omitting pertinent facts or misleadingly combining facts. *See id.* at 515 ("[A]n exact quotation out of context can distort meaning, although the speaker did use each reported word.").

In the context of ATSA immunity, whether a particular statement is materially true should be considered from the perspective of a "reasonable security official considering a possible threat to aviation safety." U.S. Br. 24. The question is whether a "more accurate statement would have *conveyed a qualitatively different meaning*" to a security officer. *Id.* (emphasis added).

Thus, telling TSA that a passenger is "upset and may have a gun" is not materially true when, in fact, the person had a fight with his spouse four hours earlier and owns a pistol which he keeps locked in a gun safe back at his home a thousand miles away. When made in the context of a report to TSA, the claim creates an impression vastly different from the truth, in a way that would undoubtedly alter a security official's assessment of the potential threat.

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still resolved by a jury, subject to ordinary appellate review. U.S. Br. 29 n.6; *see also Scott v. Harris*, 550 U.S. 372, 377 (2007). In any event, petitioner does not press its claim to *de novo* review, but instead argues that it can prevail under any standard. Petr. Br. 30 n.6.

Contrary to petitioner's assertion, Petr. Br. 29, a plaintiff need not prove that law enforcement would have acted differently if it had known the truth (an impossible task given the need to maintain secrecy regarding airline security operations). *See* U.S. Br. 27; *see also Kungys v. United States*, 485 U.S. 759, 771 (1988) ("It has never been the test of materiality that the misrepresentation or concealment would *more likely than not* have produced an erroneous decision, or even that it would *more likely than not* have triggered an investigation." (emphasis in original)).[18] Instead, the question is whether the difference between what was said and what was true was "predictably capable of affecting," *id.*, a reasonable officer's evaluation of the existence, nature, or extent, of any security threat.

b. To resolve whether a statement is materially false, one must compare what was said with what was actually true. In this case, there is no dispute about what Doyle said. The jury found, and petitioner does not contest here, that Doyle told TSA: (1) that "[Hoeper] was an FFDO who may be armed. He was traveling from IAD-DEN later that day and we were concerned about his mental stability and the whereabouts of his firearm"; and (2) that an

[18] In any event, the jury heard from Quinten Johnson, the former head of Federal Aviation Administration security and former TSA Federal Security Director, who testified that although the security response was appropriate based on the information Doyle had provided, Tr. 3486, the actual truth did not even warrant a call to TSA, JA 356-57.

"[u]nstable pilot in FFDO program was terminated today." Pet. App. 111a.

What was actually true, however, has been a matter of great dispute in this case, a question requiring a three-week trial, expert testimony, and credibility determinations regarding numerous witnesses whose demeanor this Court has had no opportunity to observe. *See* Tr. 563 (trial court acknowledging that the "nature of this case" amounted to "a swearing contest"). Petitioner and the Government attempt to bypass the difficult task of sorting out what actually happened by inviting the Court instead to measure the difference between what Doyle said and what the Colorado Supreme Court stated in passing dicta that AWAC "likely" could have said while retaining ATSA immunity. Petr. Br. 30-34; U.S. Br. 29-31.[19] But that shortcut is unavailable for two reasons.

First, the court's dicta does not accurately reflect the facts as established at trial. For example, the suggestion that AWAC could have truthfully said Hoeper "had acted irrationally," Petr. Br. 16, is not supported by the record; as discussed below, Hoeper reacted entirely rationally to an unfair training session by ending it and seeking his union's assistance. Second, as the Government emphasizes,

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[19] The Government, in particular, makes no pretense of having reviewed the actual trial record, arguing only that for "purposes of ATSA immunity, those two sets of statements" – *i.e.*, what the jury found Doyle said and what the Colorado Supreme Court hypothesized Doyle could have truthfully reported – "were not materially different." U.S. Br. 30.

"[t]he inquiry should focus on the overall substance of the information disclosed" rather than a "granular, sentence-by-sentence parsing of how the report was worded." U.S. Br. 24. And in this case, *both* the individual statements and the overall connotation were materially false and misleading under a fair reading of the record.

c. Finally, it bears remembering that the question here is whether Doyle's statements were materially false, not whether he or anyone else at AWAC had a good faith basis to believe they were true. Although petitioner dwells on the mind-set of LaWare, the AWAC vice president who ordered the call to TSA, the jury and the courts below rightly focused instead on the knowledge and good faith of Doyle, whose personal liability AWAC voluntarily assumed in exchange for Doyle's dismissal from the case. JA 572-74. The jury found, and courts twice affirmed below, that Doyle did not have a good faith basis for asserting that Hoeper was "mentally unstable" or "may be armed," or for the overall message his report conveyed. While petitioner repeatedly attempts to imply that the actual malice finding is wrong, it does not ask this Court to reverse on that ground and did not raise that question in its petition or Question Presented. *See* Pet. i, 22-29. Accordingly, the question here is whether – even though Doyle at least entertained substantial doubts as to the truth of his report – the report, by happenstance, turned out to be materially true.

2. Doyle's Individual Statements Were Materially False And Misleading.

Unstable Pilot/Concerned About Mental Stability. Doyle's statements that Hoeper was an "[u]nstable pilot" and that AWAC was "concerned about his mental stability," Pet. App. 111a, were materially false and misleading.

Assertion That Hoeper Was Actually "Unstable." AWAC has never argued that Hoeper was *actually* unstable. And, in fact, no one who interacted with Hoeper on December 8 testified that he believed Hoeper to be unstable or a threat to airline security. Schuerman, who was trained in making threat assessments as part of AWAC's security program, Tr. 377-78, explained that Hoeper "was angry at me," but that did not "mean he's going to go and do anything stupid elsewhere. I never felt that he was going to go do something stupid. He was just angry at me." JA 30. Schuerman was "shocked" when he later learned that Doyle had reported Hoeper to TSA as a potential security threat. *Id.* 34-35. And Hoeper's co-pilot at the simulator, Scharf, said that on the drive back to the hotel after the training exercise Hoeper "appeared to be at some peace with the situation" and that Scharf "did not feel threatened." *Id.* 400.[20]

Nor was Hoeper acting "irrationally" in ending an unfair training that was setting him up for failure.

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[20] Petitioner says that another pilot "saw Hoeper in the lobby behaving aggressively, talking in a raised voice, and using profanity." Petr. Br. 9-10. But the jury was not required to accept that version of events, given that Hoeper told an entirely different story of his interaction with that pilot. *See* JA 206.

Orozco testified that if the training was in fact being conducted unfairly, it was perfectly reasonable for Hoeper to end it and seek the union's intervention. JA 476.[21] And Schuerman agreed that Hoeper was not engaging in irrational behavior at the training simulator. *Id.* 31. Petitioner's claim that Hoeper's conduct was "bizarre," Petr. Br. 33, depends entirely on the unfounded assumption that Hoeper's difficulty in the simulator was the result of his own failings, rather than an act of deliberate sabotage. But the jury heard ample evidence that Doyle's good old boys had targeted Hoeper for failure and had previously used simulator sessions to wash out qualified but disfavored pilots. JA 540. And Hoeper's experts, who examined the training, including computer records from the simulators, told the jury in no uncertain terms that the testing was in fact unfair. *Id.* 259.

Assertion Of Subjective Concern About Mental Stability. The material falsity of Doyle's claim that Hoeper was "mentally unstable" is sufficient grounds for liability in itself, and that liability is not avoided by Doyle's additional claim that "we were concerned about [Hoeper's] mental stability." Pet. App. 111a. Indeed, even that assertion about AWAC's subjective beliefs was materially false and misleading.

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[21] Because Orozco believed that the testing *was* fair, he described Hoeper's decision to walk out of it, risking termination, to be "irrational." JA 461. But he made clear that even so, he "didn't believe [Hoeper] was mentally unstable" and therefore "[i]t was not [his] intent . . . to convey to TSA that Mr. Hoeper was mentally unstable." *Id.* 462, 467.

Members of AWAC management who met with Doyle before he called TSA categorically testified that they did not believe Hoeper was mentally unstable. Orozco, who had recently spoken with Hoeper and given him permission to fly home, testified that he "didn't believe [Hoeper] was mentally unstable." JA 462. Frisch testified that he did not have any information to conclude that "Mr. Hoeper's mental stability was in question." *Id.* 556. And LaWare testified that he did not contemplate that Doyle would tell TSA that Hoeper was "mentally unstable." *Id.* 272.

LaWare also confirmed that "Doyle never shared his opinion with [LaWare] that he had concerns about Mr. Hoeper's mental stability." Tr. 2612. And Doyle himself admitted that he was not qualified to form an opinion as to whether Hoeper was mentally unstable. JA 158. Doyle's only source of information regarding Hoeper's conduct that day was Schuerman, who did not say that Hoeper was mentally unstable and who simply told Doyle that Hoeper was just angry with him. *Id.* 30.

Moreover, as the Colorado Supreme Court observed, "Doyle's actions belie the claim that he believed Hoeper to be mentally unstable." Pet. App. 19a. After receiving the call, Doyle ran into Orozco but did not mention it, explaining later that Orozco was "in a rush" to go to lunch or a meeting.[22] JA 81.

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[22] Several questions the jury asked Doyle indicate that they did not find credible his testimony that he actually considered Hoeper to be a threat. For example, the jury asked: "[W]hy did your supervisor decide to take lunch first?" and "Considering

While Orozco was out, Doyle booked (and then re-booked) Hoeper onto a flight to Denver. *Id.* 76, 80. The first time Doyle mentioned anything regarding Hoeper's training to Orozco was two and a half hours after he received Schuerman's call, when Orozco had returned from lunch, a full hour after Hoeper's initial flight would have departed Dulles airport. *Id.* 459.

Petitioner tries to argue that Doyle did not recognize the severity of the security issue until the later meeting with management. Petr. Br. 36. But petitioner identifies nothing that came to light in that meeting that Doyle did not already know that could account for the dramatic change from the attitude he displayed earlier in the day.

Allegations Of Past Incidents Of Aggressive Behavior. Nor was there anything in Hoeper's prior employment history that would have supported any alleged concerns about his mental stability. Indeed, petitioner admitted in response to Hoeper's interrogatories that "it did not view plaintiff has [sic] a security threat or security risk prior to December 8th, 2004." JA 100-01. To the contrary, AWAC itself had selected Hoeper to be an FFDO only ten months earlier. *Id.* 198. Hoeper passed the extensive psychological screenings necessary to take on that responsibility. *Id.* 199. And Hoeper had a lengthy, exemplary employment record during which AWAC

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passenger safety – [w]hy was the call late, and not paramount?" JA 595. Relatedly, during a sidebar, the trial judge voiced his frustration with Doyle's evasive testimony, noting that "if this guy could give anyone a straight answer, we wouldn't have been here for all this time." *Id*. 100.

entrusted him with instructing other pilots and teaching self-defense to its flight attendants. Tr. 1247, 1264.

Doyle nonetheless tried to buttress his claims about Hoeper's mental health by pointing to an alleged prior incident on October 14 in which, he said, Hoeper had engaged in a similar outburst that led Doyle to fear for his own safety and the safety of others in the building. JA 155-58. But the jury had every reason to believe that the incident was a complete fabrication after watching the story unravel under cross-examination. Doyle admitted that the notes he produced to substantiate the incident had been created after he spent the evening of December 8 on the phone with TSA officials and others discussing how to prevent another incident like the one Doyle had precipitated that day. *Id.* 154-55. He further acknowledged that he had subsequently altered the notes to make the incident seem even more alarming (adding that he feared not only for his own safety, but also for the safety of others). *Id.* 157.

Moreover, both Doyle and Orozco testified that if the incident had actually happened as Doyle later alleged, Doyle would have been required to report it and Hoeper's training would have ended. Ex. 1101 at 97 (Orozco Depo.). But Orozco denied that Doyle had ever made such a report, JA 436-37, and Doyle acknowledged that he never made any contemporaneous record of the incident, *id.* 155. Moreover, rather than end Hoeper's training, Doyle continued it. *Id.* 98. Indeed, he acknowledged that on the night of the allegedly threatening behavior, he had food and drinks with Hoeper at a restaurant near their hotel. *Id.* 157-58. And the jury heard that

Doyle had lied under oath about the incident during an arbitration proceeding challenging Hoeper's dismissal, claiming that he had taken Hoeper straight to the airport, rather than disclosing their amicable time in the restaurant together. *Id.* 102-105.[23]

Relevance of LaWare's Beliefs. Petitioner attempts to argue that Doyle's beliefs and inactions are entirely irrelevant because "the decision to call TSA was made, not by Doyle, but by his boss's boss, LaWare." Petr. Br. 36.

But the question here is not about the decision to make a call; it is about the decision to allege that Hoeper was mentally unstable. And *that* decision was made by Doyle – LaWare testified that he did not intend for Doyle to say that Hoeper was "mentally unstable" and others in the meeting confirmed that there was no discussion indicating that anyone believed that Doyle was in fact unstable. JA 93, 271-272, 462, 556. Accordingly, it was untrue of Doyle to say that "we [are] concerned about [Hoeper's] mental

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[23] Doyle also attempted to fabricate further evidence. At trial, but not in its brief to this Court, petitioner pointed to a note created by Todd Hanneman purportedly describing a training event in November during which he wrote that Hoeper "[s]eems to be unstable." JA 177. But Doyle admitted that he asked Hanneman to create the note, and even admitted he may have made the request after the December 8 incident. *Id.* 160. Moreover, the note was never placed in Hoeper's training folder and conflicted with the notes Hanneman had written on the official form documenting the sessions. *Id.* 397; Tr. 3203-04. In the end, Hanneman testified that Hoeper had never been threatening to him or anyone else. Tr. 3201.

stability" because – even assuming, wrongly, that it would have been "reasonable to conclude from [the] events that Hoeper was unstable," Petr. Br. 33 (quoting Pet. App. 33a (Eid, J., dissenting)) – the jury was entitled to conclude that no one at AWAC, including Doyle, actually held that belief.

Materiality. The difference between what Doyle said (*i.e.*, that Hoeper was unstable and that AWAC was concerned about his mental stability) and what was true (*i.e.*, that Hoeper was briefly upset but perfectly rational, and that AWAC was not in fact concerned about his mental stability) is surely material. Petitioner cannot seriously contend that it makes no difference to TSA's threat perception whether an individual is mentally unstable or not. Certainly someone who is "unstable" poses a far greater potential threat than someone who is simply upset, as many airline passengers are (often at the airline). And because TSA had no time to verify Hoeper's mental state for itself before having to decide whether to take dramatic action, it necessarily depended substantially on AWAC's statement that it was subjectively concerned about Hoeper's stability. As between being told a lie, and being told the truth, TSA would have wanted to know that AWAC was not in fact concerned about Hoeper's mental stability.

Tellingly, Doyle and others at AWAC plainly believed that claiming Hoeper was mentally unstable would be a material lie. At trial, Doyle steadfastly denied that he ever made a statement regarding Hoeper's mental stability to TSA, even after being confronted with his own notes and TSA records that unambiguously showed the opposite. JA 92-93, 108-09. The only reason for Doyle to lie about what he

said was that he recognized the gravity of the falsehood. Indeed, Doyle acknowledged that making such a statement likely would cause Hoeper "undue harm," while other AWAC executives asserted that they did not want Doyle to communicate that Hoeper was mentally unstable. *Id.* 93-94, 271-72, 462, 556. Orozco similarly agreed that claiming to TSA that Hoeper was "mentally unstable" could give TSA the impression of a "very bad situation," *id.* 470, that "would cause TSA to . . . respond in a different way to the call," provoking a "more dramatic" response, *id.* 474-75. LaWare likewise understood why such a statement could be viewed as conveying that Hoeper was a "potential threat" to a flight, giving rise to "great concerns about the safety" of the passengers and crew. *Id.* 271-72.

Potentially Armed/Concerned About Firearm's Whereabouts. Doyle's statements that Hoeper "may be armed" and that AWAC was "concerned about . . . the whereabouts of his firearm," Pet. App. 111a, were likewise both materially false.

Assertion That Hoeper "May Be Armed" And Claimed Subjective Concern About The Whereabouts Of His Firearm. Petitioner acknowledges that Hoeper was not actually armed and that it had no reason to believe that he was. Frisch, for example, testified that he had no reason to believe that Hoeper was "sneaking" his weapon on the aircraft. JA 551.

But petitioner contends that its statements were substantially true because Hoeper was authorized to carry a gun and because AWAC did not know for certain where his gun was. Petr. Br. 31. But AWAC had no reason to conclude Hoeper might actually be armed. Not a single person at the simulation center

suggested that Hoeper had his gun with him on December 8. It would have been against rigid FFDO protocol for Hoeper to bring his gun with him to training, and at least one AWAC executive at the December 8 meeting was an FFDO who understood this protocol. JA 542-44; Ex. 1107 at 68, 75-76 (Frisch Depo.). Furthermore, Hoeper had never violated protocol in the past, nor did AWAC have any reason to believe Hoeper had violated it on December 8. JA 181; Tr. 1360-61. And there was nothing to suggest that Hoeper had planned ahead, snuck past security in Denver, and brought his firearm to his training in Virginia on the off chance the training went badly and he decided he needed to commandeer another company's plane to punish AWAC for its anticipated misdeeds.

Accordingly, Doyle had no more reason to say that Hoeper "may be armed" than he would with respect to any of the 43% of Americans who have a gun in their home and who also would have been violating the law to bring it with them on a plane.[24] Even more, by the time Doyle called TSA (minutes before the flight's scheduled departure), Hoeper would have passed through security at Dulles, where he would have either been required to register his weapon (if he had it) or pass through magnetometers (which would have detected it). JA 142-43.[25]

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[24] *See Guns*, Gallup (last visited Oct. 23, 2012), *available at* www.gallup.com/poll/1645/guns.aspx.

[25] Consequently, even if it were possible, as AWAC claims, to bypass security at the Denver airport, that would have made no difference. AWAC has never claimed that it was possible to

Materiality. Again, the difference between what Doyle said (*i.e.*, that Hoeper might be armed and that AWAC was concerned about the whereabouts of his weapon) and what was true (*i.e.*, that Hoeper was no more likely to be armed than any other FFDO traveling off duty that day and that AWAC was not genuinely concerned about the location of his weapon) would clearly be material to law enforcement. Surely the degree of likelihood that an individual boarding a plane actually has a gun is a critical piece of information to any reasonable security official.

Petitioner argues that telling TSA that Hoeper "may be armed" is the same thing as expressing abject ignorance on the subject. Petr. Br. 31-32. Not so. TSA would not expect an airline to report that a passenger "may be armed" simply on the ground that it knew the passenger was a law enforcement officer, soldier, or ordinary gun owner. Otherwise, airlines would be calling every time an off-duty FFDO booked a flight or an FBI agent took a vacation.[26] The only reason to say "may be armed" in the context of such a

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bypass security at Dulles with a gun, and Hoeper's security expert testified at trial that it was not, given that Dulles is "one of the highest secured airports in the country." JA 115.

[26] There are more than 670,000 law enforcement officers nationwide. United States Department of Justice, Federal Bureau of Investigation, Crime in the United States 2012, tbl. 74 (October 2013), *http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/74tabledatadecoverviewpdfs/table_74_full_time_law_enforcement_employees_by_population_group_percent_male_and_female_2012.xls*.

call is to convey that there is a greater than normal possibility that the individual has broken protocol and is carrying his weapon. TSA's dramatic response suggests that this is exactly how it reasonably understood Doyle's claim.

Finally, an otherwise misleading statement is not rendered materially true by the fact that "[n]othing prevent[s] TSA from following up to determine whether" the misleading statement is, in fact, false. Petr. Br. 32. Doyle was obliged to tell the truth, even if TSA might eventually discover that he lied.

Terminated Today. AWAC admits the statement that Hoeper was terminated that day was not true. Petr. Br. 30. But it insists that the falsity is immaterial because Hoeper knew that his termination was imminent and therefore was "under job-related stress because of events that adversely affected his employment with Air Wisconsin." Petr. Br. 31. While this assertion is the least important falsehood, it is nonetheless materially misleading.

Assertion That Hoeper Was "Terminated Today." The truth was that at the time Doyle made the call to TSA, Orozco had not decided whether Hoeper would be terminated. JA 460. More importantly, the jury was not required to accept that Hoeper believed that he had been, or would inevitably be, fired, and therefore had a motive to take down a plane. Quite to the contrary, Schuerman (who conducted the aborted training sessions) testified he believed that Hoeper would be rescheduled for further training. *Id.* 18. And Hoeper called Orozco, with his union lawyer on the other line, to get permission to fly

home to ensure that by leaving town he would not forfeit that opportunity. *Id.* 209-10.

Materiality. As a consequence, the difference between Doyle's statement and its underlying connotation (*i.e.*, that Hoeper knew he had been, or was about to be, fired and therefore had a motive to retaliate against AWAC) and what was true (*i.e.*, Hoeper reasonably believed he was not going to be terminated without being afforded another opportunity to pass his proficiency check test) is material. The presence of motive to engage in acts of violence must be a critical consideration to TSA's assessment of any threat report.

3. The Overall Message Conveyed By Doyle Was Materially False And Misleading.

Despite all the ink spilled parsing Doyle's statements in the top-side briefs, everyone now seems to agree that it is the overall implication, or gist, of the report that matters most. *See* Petr. Br. 29; U.S. Br. 24. Here, the Colorado Supreme Court explained, "the crux of [Doyle's] defamatory statements was that Hoeper was so mentally unstable that he might constitute a threat to aircraft and passenger safety." Pet. App. 26a-27a. That implication was materially untrue.

Indeed, petitioner has never claimed to the contrary. As described above, Hoeper was not mentally unstable and no one actually believed that he posed a genuine threat. For example, when asked whether any of the participants in the meeting "express[ed] any type of concern to you at that time that Mr. Hoeper was a threat and should be pulled

off of a commercial flight," Frisch testified, "Oh, no. Not at all." JA 550.

But TSA's dramatic response to the call – akin to a hijacking-in-progress response – confirms that Doyle's call in fact conveyed the opposite. Tr. 867. The aircraft was blocked in by a snowplow to prevent its further movement. *Id.* 1394. Hoeper was physically removed from the plane by two armed officers. *Id.* 1396-97. His belongings were strewn across the jet bridge as he was thoroughly interrogated regarding the whereabouts of his firearm which, all along, was safely stowed in Denver. JA 211-12.

It may be difficult to know exactly what TSA would have done if Doyle had simply stated the truth as he understood it on December 8 (*i.e.*, "Several hours ago I booked an FFDO on a plane home; he was angry this morning after an aborted training exercise, and may be fired as a result of the training failure, but we have no reason to believe he has his gun or otherwise poses a threat."). But surely the difference between *that* and what Doyle implied (*i.e.*, Hoeper was so mentally unstable as a result of his recent termination that he might use a gun, which there was a reasonable chance he actually had, to injure passengers or commandeer a plane) was "predictably capable of affecting" a reasonable security officer's evaluation of whether, and to what extent, Hoeper presented a security threat. *Kungys*, 485 U.S. at 771.

Petitioner insists that even if Doyle falsely conveyed that Hoeper presented a genuine security threat, such false reports can never be actionable under ATSA because "TSA, not the airline industry,

is responsible for assessing potential security threats." Petr. Br. 34. That argument misses the mark. While it may be TSA's duty to assess security risks, it is the airline's obligation to report what it knows truthfully; nothing in ATSA gives airlines license to lie to TSA so long as they lie only about their assessment of whether a passenger presents a genuine threat or the degree of the danger the passenger poses.

To the contrary, Congress would have understood that although TSA must ultimately reach its own conclusion, it must necessarily rely on airlines' representations as to facts that are material to the threat assessment. This necessarily includes whatever the airline has to say about its own assessment of a suspect's mental state and its beliefs about the likelihood of the suspect being armed. Often, only the airline is in a position to observe a passenger's demeanor or evaluate an employee's present conduct in the context of a broader employment history. It may not be possible to adequately convey (particularly under time pressure) the underlying basis for an airline's belief that a person has crossed the threshold from the kind of everyday frustration and distress commonly experienced by ordinary employees and air travelers every day into a state of mental instability that gives rise to genuine security concerns.

Petitioner thus cannot seriously suggest that TSA simply disregards an airline's assertion that a passenger is mentally unstable or may be armed, acting as if neither fact is true until TSA completes its own inquiry. Nor can petitioner plausibly contend that TSA treats "'virtually every report'" it receives

as conveying the same generic message that "a threat might possibly exist." Petr. Br. 35 (citation omitted). Surely airline security is too important, and time is too much of the essence, for TSA to treat the details of an airline report – including the airline's implications regarding the *degree* of the potential threat – as entirely irrelevant to its deliberations about how to respond. The details matter because TSA does not make a simple, binary decision about whether to investigate or not. Instead, TSA must also judge the magnitude and immediacy of any particular threat and calibrate its reaction accordingly.

If Congress thought otherwise, it would have simply provided blanket immunity for all reports, regardless of their content, so long as they related to a "suspicious transaction." 49 U.S.C. § 44941(a).

This is not to say that airlines have an obligation to investigate and make an assessment of the degree of danger posed by a suspicious passenger. It is only to say that if an airline undertakes to convey to TSA its beliefs about the magnitude of a potential security threat – by asserting, for example, that it is worried about an employee's mental stability, believes a passenger is mentally unstable, or is concerned that the passenger may be armed – it must honestly believe what it is saying. If the report is honest, the airline is immune, even if it may turn out later to have been wrong.

Here, a jury, the trial court, and two appellate courts have studied the record in this case and concluded that Doyle's conduct did not conform to that reasonable and easily attainable standard. Doyle was, instead, the prototypical "bad actor" to

which ATSA immunity does not extend. Petitioner has provided this Court with no reason to conclude otherwise or to disturb the concurrent findings of the Colorado courts.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Supreme Court should be affirmed.

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APPENDIX

Excerpts of Petitioner Air Wisconsin's Opening Brief in the Colorado Supreme Court

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III. SUMMARY OF THE ARGUMENT

[15] This Court should reverse the court of appeals because its opinion was legally incorrect, and creates confusion and ambiguity regarding airlines' responsibilities for reporting suspicious conduct or potential threats to aviation security under federal law. Indeed, there is a serious danger that the court of appeals' decision will discourage airlines from reporting suspicious transactions or potential threats because of their fear of liability. Because information and intelligence provided by airlines is vital to aviation security, this Court must examine the policy considerations underlying the court of appeals' decision.

First, the court of appeals erred in finding that it was appropriate to submit the issue of AWAC's immunity to the jury because federal courts generally require resolution of qualified immunity as a matter of law early in the litigation. ATSA was intended to assuage concerns about airline liability by providing immunity for reporting any "suspicious transaction" affecting aviation safety to TSA. By their nature, reports of "suspicious transactions" are, and will always be, subjective, often made under stressful circumstances and with less than perfect or incomplete information. If, as the court of appeals found, the issue should always be decided by a jury due to the fact-dependent nature of the inquiry, there is an inherent risk that the jury will second-guess the

airline's report in the calm of a courtroom, with [16] the benefit of hindsight and, perhaps, more complete information. It was improper to submit qualified immunity to the jury.

Second, this Court must independently review the record and determine whether there was clear and convincing proof of actual malice to support the presumed and punitive damages. In purportedly conducting its independent examination, the court of appeals concluded that "Doyle had obvious reasons to doubt that Hoeper posed a threat to airline passenger safety." However, Doyle did not report that Hoeper was a threat, he raised concerns about whether Hoeper was armed, his mental stability, and the whereabouts of his firearm under the "when in doubt, report" policy. When examined in this light, the record lacks clear and convincing evidence of actual malice. The court of appeals misapplied constitutional principles and did not properly weigh the evidence.

Third, the trial court erred in submitting the defamation claim to the jury because Doyle's statements were expressions of opinion or substantially true. In the context of ATSA and TSA policy, it was clear Doyle was reporting his suspicions about Hoeper. Indeed, Doyle's report to TSA was couched in terms of a concern or suspicion rather than a statement of fact. By definition, a report of suspicion cannot be objectively proven true or false. Instead, an expression of [17] suspicion is a subjective view based on incomplete or imperfect information. Thus, the trial court erred in submitting the statements to the jury.

IV. ARGUMENT

A. THE COURT OF APPEALS ERRED IN HOLDING THAT THE ISSUE OF ATSA IMMUNITY WAS PROPERLY SUBMITTED TO THE JURY.

Relying exclusively upon Colorado authority interpreting C.R.S. § 19-3-309, the court of appeals ruled that the issue of ATSA immunity was properly submitted to the jury because ATSA required fact finding on two levels: (1) whether a transaction was "suspicious"; and (2) whether the report was made with reckless disregard. *Hoeper*, 232 P.3d at 237. This ruling cannot stand because, under federal law, qualified immunity presents a question of law that should not be submitted to the jury.

1. Standard of Review.

The standard of review for a claim of ATSA immunity presents an issue of first impression. *Hoeper*, 232 P.3d at 237. Because the standard of review is a procedural matter governed by the law of the forum, Colorado law determines the standard of review *Kirwan v. Chicago Title Ins. Co.*, 624 N.W.2d 644, 650 (Neb. 2001); *State v. Thurman*, 846 P.2d 1256, 1267 (Utah 1993). Under Colorado law, the proper standard of review is de novo because ATSA immunity involves the [18] interpretation of a federal statute and the application of facts to that statute. *People v. Romero*, 953 P.2d 550, 555 (Colo. 1998); *Robles v. People*, 811 P.2d 804, 806 (Colo. 1991). This issue was preserved in AWAC's motions for summary judgment and directed verdict, which were both denied. (*Lexis/Nexis #14751110 at 18-23, #18644861 at 5-6 #16074249; Tr. 2489:1-16*).

2. The Court of Appeals Erred in Ruling, Based on Colorado Law, that ATSA Requires Fact Finding by a Jury at Two Levels.

This Court should reverse the court of appeals' decision because Congress did not intend for ATSA to be interpreted based upon dissimilar state law. The interpretation of a federal statute presents a question of federal law "absent a clear indication to the contrary...." *Western Air Lines v. Bd. of Equalization*, 480 U.S. 123, 129 (1987). Courts presume "that 'in the absence of a plain indication to the contrary, ... Congress when it enacts a statute is not making the application of the federal act dependent on state law.'" *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989). This presumption exists because "federal statutes are generally intended to have uniform nationwide application," and because of "the danger that 'the federal program would be impaired if state law were to control.'" *Id*. at 43-44.

ATSA affords airlines and their employees qualified immunity for voluntarily disclosing "any suspicious transaction relevant to a possible violation [19] of law or regulations, relating to air piracy, a threat to aircraft or passenger safety, or terrorism," provided the disclosure is not made with actual knowledge it is false or with reckless disregard for its truth or falsity. (*Appendix C*). Its purpose was to "to improve aircraft and passenger safety by encouraging airlines and airline employees to report suspicious activities to the proper authorities." 147 Cong. Rec. S 10432, 10439 (2001) (statement of Sen. Leahy). As the court of appeals recognized, "[a]ir carriers are perhaps the most obvious source of useful

threat information for TSA." *Hoeper*, 232 P.3d at 236. Nothing in the legislative history or purpose of ATSA suggests that Congress intended for state law to govern the allocation of decision making authority between judge and jury. Accordingly, this Court must presume that Congress did not intend for state law to govern the allocation of decision making authority between judge and jury. *Miss. Band of Choctaw Indians*, 490 U.S. at 43.

By holding that Colorado law determines the allocation of decision making authority between the judge and jury in ATSA immunity cases, the court of appeals has, essentially, mandated non-uniform application of ATSA. Airlines in one state may have the issue of ATSA immunity decided by the court at an early stage of the proceedings, but, in another state, be subjected to a jury trial, depending entirely on when questions of immunity are decided under the law of [20] the particular state. The court of appeals' decision will discourage airlines and employees from reporting suspicious transactions to TSA out of fear that they may face a full blown jury trial, depending on state law, in the event their suspicions are not true.

Rather than relying on dissimilar state law, the court of appeals should have looked to federal law governing qualified immunity. *Compare Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (qualified immunity encourages public officials to vigorously exercise their official authority) *with* 147 Cong. Rec. S. 10432, 10439 (2001) (purpose of ATSA is to encourage reporting of suspicious activity). Under federal law, qualified immunity should be decided "at the earliest possible stage in litigation" because

immunity is not only a defense from judgment but a defense from the burden of litigation. *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009).

The determination of whether a defendant is entitled to qualified immunity generally presents a question of law for the court. *Curley v. Klem*, 499 F.3d 199, 208-209 (3d Cir. 2007) (discussing circuit split and noting that qualified immunity is a question of law for the court in the "First, Fourth, Seventh, and Eleventh Circuits" and that the Second and Eighth Circuits appear to be moving in that direction). While a minority of federal courts allow qualified immunity to be [21] submitted to the jury, they do so only "'in exceptional circumstances' [where] historical facts [are] so intertwined with the law that a jury question is appropriate as to whether a reasonable person in the defendant's position would have known that his conduct violated [the] right [at issue]." *Gonzales v. Duran*, 590 F.3d 855, 859 (10th Cir. 2009). The court of appeals erred because it held the trial court properly submitted the issue of qualified immunity under ATSA to the jury without making any determinations.

The court of appeals should have held, based on the qualified immunity framework, that ATSA immunity presents a question of law for the Court. The court of appeals also erred in holding that "under ATSA, a defendant air carrier or its employees must prove that they are within the protection of the statute." *Hoeper*, 232 P.3d at 238. Once AWAC asserted the defense of qualified immunity, the trial court should have placed the burden on Hoeper to present evidence to prove that ATSA immunity was inapplicable. *McBeth v. Himes*, 598 F.3d 708, 716

(10th Cir. 2010). Thus, this Court should reverse the court of appeals and interpret ATSA in a manner that will facilitate its uniform application nationwide. [22]

3. The Trial Court Improperly Found That the Suspiciousness of Hoeper's Conduct Presented a Jury Question.

The court of appeals incorrectly found that the trial court properly submitted immunity to the jury because reasonable jurors could conclude that Hoeper was not engaged in a suspicious transaction. Rather than submitting this issue to the jury, the trial court should have applied 49 U.S.C. § 44941 and determined whether the disclosures to TSA concerned a suspicious transaction related to a threat to aircraft or passenger safety. *Curley*, 499 F.3d at 208-209.

ATSA does not define "suspicious transaction," so dictionary definitions may be used to interpret that phrase. *People v. Holwuttle*, 155 P.3d 447, 450 (Colo. App. 2006). "Suspicious" means "arousing or apt to arouse suspicion; questionable." *The American Heritage Dictionary* 1225 (2d Coll. Ed. 1991). Suspicion means:

> [t]he act of suspecting, or the state of being suspected; imagination, generally of something ill; distrust; mistrust; doubt. The apprehension of something without proof or upon slight evidence. Suspicion implies a belief or opinion based upon facts or circumstances which do not amount to proof.

Black's Law Dictionary 1447 (6th ed. 1990).

The court of appeals declined to consider "whether Hoeper's behavior was a 'suspicious transaction' under ATSA." *Hoeper*, 232 P.3d at 239.

However, the information AWAC had when it called TSA was sufficient to arouse subjective [23] belief that Hoeper's conduct was "suspicious" and relevant to a possible violation of the law or regulations, or related to a threat to an aircraft or passengers. Hoeper exhibited angry outbursts during training, his termination was imminent, AWAC could not confirm he was not armed, and at least two other airplanes had been hijacked under similar circumstances with tragic consequences. Given the extremely broad language of immunity provision, and its overriding purpose of encouraging airlines to report potential threats, the trial court and court of appeals should have found that AWAC reported a suspicious transaction to TSA as a matter of law.

4. The Trial Court Improperly Found That Exceptions to 49 U.S.C. § 44941 Presented a Jury Question.

The court of appeals incorrectly found that the trial court properly submitted the immunity issue to the jury because, based on the evidence, reasonable jurors could find Doyle acted recklessly. Federal courts have repeatedly held that "where First Amendment concerns are at issue," courts must conduct an "'independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *U.S. v. Friday*, 525 F.3d 938, 949-50 (10th Cir. 2008). Because Hoeper's defamation claim implicates First Amendment rights and because the disclosure required by federal [24] statute is a matter of public concern, *Hoeper*, 232 P.3d at 240, the trial court should have independently reviewed the whole record de novo.

Indeed, section 44941(b) appears to incorporate the *New York Times* actual malice standard by providing that immunity does not apply to disclosures made with actual knowledge that the disclosure was false, inaccurate, or misleading, or with reckless disregard as to the truth or falsity of the disclosure. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). Therefore, the trial court should have determined, as a matter of law, whether Hoeper presented clear and convincing evidence that AWAC made its disclosure with reckless disregard to its truth or falsity. *DiLeo v. Koltnow*, 613 P.2d 318, 323 (Colo. 1980) (constitutional defamation cases are well suited for resolution on summary judgment because determining whether plaintiff has established clear and convincing evidence of actual malice is a question of law).

Here, the court of appeals erred in affirming the trial court's decision to submit the immunity issue to the jury. The trial court denied AWAC's summary judgment motion without any explanation. (*Lexis/Nexis #16066966 at 1*.) It also denied AWAC's directed verdict motion, reasoning that ATSA presented jury questions because it did not define "suspicious transaction" or "reckless disregard." (*Tr. at 2486:2-20, 2489:1-16*.) The trial court held that "reckless disregard" almost [25] always presented a jury question without examining the evidence. (*Tr. at 2489:1-16*.) Because the trial court did not conduct an independent evaluation of the record, the court of appeals erred in ruling that it properly submitted the question of immunity to the jury.

B. THE COURT OF APPEALS DID NOT PROPERLY CONDUCT A DE NOVO REVIEW BECAUSE THE RECORD LACKS CLEAR AND CONVINCING PROOF OF ACTUAL MALICE.

The court of appeals concluded that there was clear and convincing evidence showing that Doyle's report to TSA was made with actual malice. Although the court of appeals claimed it performed a de novo review, it either failed to consider or assigned no weight to undisputed facts negating actual malice. At the same time, it assigned substantial weight to disputed facts that it found suggested Doyle acted with actual malice. A true de novo review of the record reveals that the evidence relied upon by the court of appeals is hardly clear or convincing evidence of actual malice.

1. Standard of Review.

The court of appeals correctly ruled that the statements to TSA involved a matter of public concern. *Hoeper*, 232 P.3d at 239-240. Accordingly, the jury's award of presumed and punitive damages based upon those statements only passes First Amendment muster if it is supported by clear and convincing evidence of actual [26] malice. *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 763 (1985); *WJLA-TV v. Levin*, 564 S.E.2d 383, 391-392 (Va. 2002).

"The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657,

685 (1989). As the Court held in *Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 (1984):

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Therefore, "an appellate court is obliged to scrutinize independently the record and decide whether the evidence suffices to show that defendants acted with the requisite knowledge of falsity or reckless disregard as to truth or falsity. The prescribed review has been characterized as 'de novo.'" *Lewis v. McGraw-Hill Broadcasting Co.*, 832 P.2d 1118, 1124 (Colo. 1992). This issue was preserved in AWAC's motions for summary judgment, directed verdict, and judgment notwithstanding the verdict, which were all denied. (*Lexis/Nexis #14751110 at 18-23, #18644861 at 5-6, 11-12, #19155532 at 11-15, #16074249 #19870796; Tr. 2502:7-12.*) [27]

2. The Law Governing "Reckless Disregard."

The element of "reckless disregard" under *New York Times* is highly focused and exacting. It means that a defamatory statement is "made with [a] high

degree of awareness of [its] probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *Jordan v. Kollman*, 612 S.E.2d 203, 209 (Va. 2005). Spite, ill will, or intent to harm does not establish constitutional malice, absent "intent to inflict harm through falsehood." *Garrison*, 379 U.S. at 74; *Jackson v. Hartig*, 645 S.E.2d 303,310 (Va. 2007). Failure to investigate or negligence is also insufficient to establish actual malice. *Harte-Hanks*, 491 U.S. at 692; *Jackson*, 645 S.E. at 310. Nor does falsity of the statement alone establish reckless disregard. *Id*. In *New York Times*, the Court found insufficient evidence of reckless disregard even where information in the newspaper's own files revealed the falsity of the publication, since knowledge of the information was not "brought home to the persons ... having responsibility for the publication." 376 U.S. at 287.

In *St. Amant v. Thompson*, 390 U.S. 727 (1968), the Court provided the most telling illustration of the meaning of "reckless disregard":

> St. Amant had no personal knowledge of Thompson's activities; he relied solely on Albin's affidavit although the record was silent as to Albin's reputation for veracity; he failed to verify the information with those in the union office who have known the facts; he gave no consideration to whether or not the statements defamed Thompson and went ahead heedless of the consequences; and he mistakenly believed he had no [28] responsibility for the broadcast because he was merely quoting Albin's words.

Id. at 730. The Court reasoned:

> These considerations fall short of proving St. Amant's reckless disregard for the accuracy of his statements about Thompson ... [Our] cases are clear that reckless conduct is not measured by whether a reasonable 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 doubt as to the truth of his publication.

Id. at 730-31. The *St. Amant* "serious doubt" test, which has been recognized and adopted in Virginia, concerns the subjective beliefs at the time of the publication. *Jackson*, 645 S.E.2d at 308-309; *Jordan*, 612 S.E.2d at 209.

Furthermore, actual malice must be proven by clear and convincing evidence. "'Clear and convincing evidence' is 'that evidence which is stronger than a 'preponderance of the evidence' and which is unmistakable and free from serious or substantial doubt.'" *DiLeo*, 613 P.2d at 323; *Fred C. Walker Agcy. Inc. v. Lucas*, 211 S.E.2d 88,92 (Va. 1975). In *Long v. Arcell*, 618 F.2d 1145, 1148 (5th Cir. 1980), the court explained:

> If the applicable burden of proof had been a preponderance of the evidence, a jury verdict either way would have to stand. … We repeat, however, that the plaintiff's burden was to prove actual malice by clear and convincing evidence. This record simply does not contain clear and convincing evidence that the defendants knew that their information was incorrect or had a high

> degree of awareness of ... [its] probable falsity. [29]

Because the court of appeals did not find that Doyle knew that his report to TSA was false, *Hoeper*, 232 P.3d at 245, the only question before this Court is whether the record contains clear and convincing evidence that Doyle made the statements to TSA with reckless disregard of their truth or falsity. Under this framework; the court of appeals' finding that "Doyle had obvious reason to doubt the accuracy of his statements" is illogical, at odds with First Amendment principles, and is not supported by a de novo review of the evidence.

3. The Court of Appeals' Finding of Actual Malice is Illogical When Considered in Proper Context.

In assessing the adequacy of the evidence of actual malice, "the New York Times standard must be applied to the actual words used by the defendant." *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446,452 (3d Cir. 1987). "[T]he meaning of the alleged defamatory language cannot, by innuendo, be extended beyond its ordinary and common acceptation." *Carwile v. Richmond Newspapers, Inc.*, 82 S.E.2d 588, 591-92 (Va. 1954). Innuendo "cannot introduce new matter, nor extend the meaning of the words used, or make that certain which is in fact uncertain." *Id*.

In its opinion, the court of appeals incorrectly suggests that Doyle reported that Hoeper posed a threat to airline safety. That is not what Doyle reported. As discussed above, AWAC was not permitted to investigate potential threats or make

threat [30] assessments. Instead, it was required to report "suspicious" activity, even when in doubt, so that TSA could conduct its own investigation and threat assessment. When Doyle's precise statements to TSA are considered in this context, it is clear that Doyle only raised a possibility, concern, or suspicion that Hoeper might pose a threat so TSA could conduct its own investigation. (*Ex. 25*.) Doyle reported that Hoeper "may be armed" and that "we were concerned about his mental stability and the whereabouts of his firearm." These statements express uncertainty about whether Hoeper was armed, the whereabouts of his firearm, and his mental stability.

It is in this context that this Court must examine the lower court's finding that "Doyle had obvious reasons to doubt that Hoeper posed a threat to airline passenger safety." *Hoeper*, 232 P.3d at 246. Doyle's statements were not made with actual malice because they raised AWAC's uncertainty and doubt. Because he was reporting suspicions, concerns and uncertainties, the only way Doyle could have acted with reckless disregard is if he actually knew Hoeper was not armed or if he knew Hoeper was mentally stable. However, the court of appeals did not find that Doyle knew his statements were false. Therefore, it is illogical to find, as the court of appeals did, that Doyle acted with actual malice because he had reasons to doubt whether Hoeper posed a threat when Doyle's report, in and of itself, expressed doubt and uncertainty. [31]

4. Doyle's Statements to TSA Were Not Made with Reckless Disregard for their Truth or Falsity.

The court of appeals found that "Hoeper presented clear and convincing evidence Doyle entertained significant doubt as to the accuracy of his statement about Hoeper's mental instability" and that "Doyle had obvious reasons to doubt that Hoeper posed a threat to airline passenger safety." *Hoeper*, 232 P.3d at 246. However, Doyle's statements to TSA were a rational interpretation of the events known at the time.

When a defendant's "adoption of the language chosen was 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive challenges," the defendant's choice of language does not constitute actual malice even if it reflects a misconception. *Bose Corp*., 466 U.S. at 512-13 (quoting *Time Inc. v. Pape*, 401 U.S. 279, 290 (1971)). This "protection for rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying upon ambiguous sources." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496,519 (1991) (emphasis in original). [32]

i. Doyle's Statements Concerning Hoeper's Mental Stability was a Rational Interpretation of Events.

Doyle's statements to TSA about Hoeper's mental stability were not made with actual malice because they were a rational interpretation of events known

at the time. It was undisputed that Hoeper became angry during the training session and became angry in prior training sessions. (*Tr. at 1600:18-22; 1601:8-11; 1602:2-4; Ex. 19; Tr. at 1111:22-1112:9; 1541:25-1542:23; 3183:23-3184:7; Ex. H at AWAC 0128; Ex. Z at AWAC 0151-0152*.) Hoeper even exclaimed: "This is a bunch of shit," told his instructor he was "railroading the situation," and "it's not realistic," and said "You win, I'm calling ALPA legal." (*Tr. 1378:10-11, 1601:18-1602:1*.) It was also undisputed that, upon stopping his "last chance" training, Hoeper's termination was inevitable, which he knew; in fact Hoeper was terminated the next day. (*Tr. at 793:4-7; 1410:11-21; 1630: 21-1631:6; 2580:19-2581:8; Ex. 1101 at 157:9-13, 16-22*.) Doyle believed Hoeper was unstable and was concerned about Hoeper's mental state given his impending termination. (*Tr. at 818:4-24; 1206:13-21.*) Under these circumstances, Doyle's statement that "we were concerned about Hoeper's mental stability" was a rational interpretation of the events on December 8.

Nonetheless, the court of appeals found that Doyle acted recklessly because LaWare, Frisch and Orozco "did not express their concerns about Hoeper's mental [33] state" or "provide specific information from which Doyle could draw that conclusion"; because LaWare and Orozco would not have used the same words; and because Frisch had no reason to question Hoeper's mental stability. *Hoeper*, 232 P.3d at 246. However, Doyle's choice of words about Hoeper's mental stability was a rational interpretation of his conversations with them. There was evidence that LaWare, Orozco and Frisch were all concerned about Hoeper's mental state. All three testified they had never seen or heard of a

professional pilot acting like Hoeper did on December 8. (*Tr. at 826:9-13; 1154:10-1155:9; 2625:6-10; 2678:24-2679:25; 2898:17-24; 3108:14-16*.) LaWare viewed Hoeper's behavior as "a fairly significant outburst" of the sort he had not seen before. (*Tr. at 2577:25-2579:23*). Orozco believed Hoeper was "irrational." (*Ex. 1101 at 160:19-23; 179:23-180:2*.) The fact that other AWAC employees might have used different words does not demonstrate that Doyle acted with reckless disregard.

The court of appeals found that Doyle acted recklessly because he "agreed ... he was incapable of judging Hoeper's mental stability." *Hoeper*, 232 P.3d at 246. However, this is not clear and convincing evidence that he doubted the accuracy of his statements to TSA, particularly when contrasted with his undisputed testimony that he believed Hoeper was not stable and was concerned about Hoeper's mental state because of his likely termination. (*Tr. at 818:4-24;* [34]*1206:13-21*.) The court of appeals apparently disregarded this evidence in its analysis. *Hoeper*, 232 P.3d at 246. Even if Doyle's statements were misconceptions based on his inability to assess Hoeper's mental stability, they were still a rational interpretation of the events given Hoeper's angry outburst that day, his prior outbursts, and his impending termination.

ii. Doyle's Report of Suspicious Activity was a Rational Interpretation of Events.

Contrary to the court of appeals' finding, the jury did not find that Doyle reported that Hoeper "posed a threat to airline passenger safety." Doyle reported suspicious behavior, informing TSA that Hoeper

"was an FFDO who may be armed," that "we were concerned about his mental stability and the whereabouts of his firearm" and that he "was terminated today." *See Dunn*, 833 F.2d at 452 ("*New York Times* standard must be applied to the actual words used by the defendant...."). In this context, Doyle's report was a rational interpretation of the events known at the time.

First, the court of appeals found that Doyle acted recklessly because he knew that Hoeper's termination was likely but Hoeper had not yet been terminated. *Hoeper*, 232 P.3d at 246. However, when Hoeper stopped the December 8 training, "it was a given" that he would be terminated. (*Tr. at 2580:19-2581:6*). Hoeper was notified of his termination the very next day. (*Id. at 1410:11-21*.)

[35] Therefore, Doyle's statement was not reckless. *Levan v. Capital Cities/ABC, Inc*., 190 F.3d 1230, 1240 (11th Cir. 1999) ("If the gist is substantially true, then minor inaccuracies are insufficient to prove actual malice.").

Second, the court of appeals found that "Hoeper should not have had his firearm with him, per FFDO procedures, and [Doyle] lacked information that Hoeper had ever violated any procedures required by his FFDO certification." *Hoeper*, 232 P.3d at 246. However, the court of appeals ignored the fact that Doyle merely expressed that Hoeper "<u>may</u> be armed" and "we were <u>concerned</u> about ... the whereabouts of his firearm." The court also disregarded the undisputed fact that other AWAC FFDOs previously brought their firearms to training against FFDO protocols. (*Tr. at 1067:9-1068:23*.) As Doyle explained:

> I had no idea whether he was following protocol or not. We had had other pilots in the past not follow FFDO protocol and had shown up at the simulator center with their weapons in their possession.

(*Tr. at 774:12-19*.) The court failed to consider the undisputed facts that FFDOs could bypass security with a firearm at Denver, the airport from which Hoeper departed for training, and that AWAC could not confirm whether Hoeper was unarmed. (*Tr. at 775:223-776:3, 1065:25-1067:1, 2582:6-21, 2582:23-2583:3, 2684:21-24, 2685:12-25, 2686:15-20; Ex. 1101 at 179:1-5*.) Given these facts, [36] Doyle did not have reasons to doubt the accuracy of his statement that Hoeper "may be armed."

Third, the court of appeals found that the connotation that "Hoeper posed a threat" was "inherently improbable" because Hoeper had never previously been considered a threat. *Hoeper*, 232 P.3d at 246. Again, the court ignored other undisputed evidence. Because Hoeper was an FFDO, had an angry outburst on December 8, and his termination was imminent, Doyle did not have obvious reasons to doubt the accuracy of his statements that Hoeper was "an FFDO who may be armed," and that "we were concerned about his mental stability and the whereabouts of his firearm" on that day. This is particularly true given that, on at least two prior occasions, airline employees who were facing termination or had been terminated, hijacked airplanes. (*Tr. at 791:24-792:19; 791:24-792:19; 935:18-21*.) Because a rational interpretation of the events supports Doyle's statements to TSA,

there was insufficient evidence to establish actual malice.

5. Doyle's Credibility and Post-December 8 Conduct Cannot Establish Actual Malice.

The court of appeals relied heavily on Doyle's lack of credibility based upon his conduct on December 8, 2004 and afterwards. *Hoeper*, 232 P.3d at 246. Although discredited testimony "does not rebut any inference of actual malice that the record otherwise supports ... it is equally clear that it does not constitute clear [37] and convincing evidence of actual malice." *Bose Corp.*, 466 U.S. at 512. Thus, "a determination of actual malice cannot be predicated on the factfinder's negative assessment of the speaker's credibility at trial." *Bressler v. Fortune Magazine, Div. of Time, Inc.*, 971 F.2d 1226, 1248 (6th Cir. 1992).

Here, Doyle's conduct between Hoeper's angry outburst and the report to TSA does not demonstrate that Doyle had obvious reasons to doubt the information he communicated. There were simple explanations for all of the conduct the court of appeals relied upon. Doyle did not warn Scharf about Hoeper because he was not "fearful for Mr. Scharf's safety." (*Tr. at 773:15-19*.) He caused Hoeper to be booked on a flight before the AWAC management discussed the situation and decided to report to TSA. (*Ex. HH*) He contacted TSA rather than United Airlines because, under the "when in doubt, report" policy and AWAC's AOSSP, AWAC was supposed to report suspicious transactions to TSA, and because TSA administered the FFDO program. *(Tr. at 783:10-14, 926:14-24; 1006:3-10, 1060:24-1061:19, 2538:22-*

2539:1, 2539:5-8, 2572:15-2574:9,2585:25-2586:1, 2687:9-10, 2688:4-9, 3348:4-10; Ex. 1101 at 161:4-19, 159:10-14, 190:10-14.)

Orozco directed Doyle to postpone the discussion about Hoeper because Orozco had a meeting. (*Tr. at 770:6-16; 774:1-6*.) The delay in contacting TSA [38] was also attributable to the length of the discussion, and the fact that the group was dealing with operational issues during the discussion. (*Tr. at 1059: 1-1060:23, 1069:23-1070: 12*). Initially, LaWare was unsure whether AWAC was required to report Hoeper's conduct to TSA; he only determined AWAC should report Hoeper after the discussion. (*Tr. at 783:10-14, 793:1-10, 2536:14-17, 2586:2-21; Ex. 1101 at 161:4-19; 162:4-16, 187:16-188:1.*) Under these circumstances, Doyle's conduct is not clear and convincing evidence of actual malice.

The court of appeals also relied on Doyle's "attempt to bolster the grounds for the threat connotation of the TSA call by exaggerating the events of October 14" in his notes. *Hoeper*, 232 P.3d at 246. Yet Hoeper admitted there was a basis for Doyle's notes, conceding he raised his voice and used profanities, repeatedly had to be told to sit down, and that it was reasonable for Doyle to think that he was blowing up. (*Lexis/Nexis #14751110, Ex. 8, Part II, at 246:14-21, 248:19-23, 247:7-14, 249:5-9; Lexis/Nexis #15283838, Ex. 11, at 143:23-144:2; Tr. at 1326:7-1327;13; 1541:22-1542:23*.) Moreover, actual malice must be based upon facts known at the time, not on hindsight. *Bose Corp.* 466 U.S. at 498 (error in finding actual malice where there was no evidence publisher entertained serious doubts about truthfulness of statement "at the time of its

publication"); *Cordero v. Cia Mexicana de Aviacion, SA.*, 681 F.2d 669, 672 (9th Cir. 1982) (determination [39] whether passenger "is inimical to safety" is "tested on the information available to the airline at the moment a decision is required"). Thus, Doyle's conduct after he contacted TSA is not, and cannot be, clear and convincing evidence he acted recklessly.

The court of appeals further relied on Doyle's testimony that he did not tell TSA that AWAC had concerns about Hoeper's mental stability. *Hoeper*, 232 P.3d at 247. Even assuming that Doyle's testimony regarding what he told TSA was discredited, that does not amount to clear and convincing evidence of actual malice. *Bose Corp*., 466 U.S. at 512 ("When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion.").

C. THE COURT OF APPEALS ERRED IN FINDING THAT DOYLE'S STATEMENTS WERE NOT SUBSTANTIALLY TRUE AND NON-NONACTIONALBE STATEMENTS OF OPINION.

The court of appeals held that AWAC's statements to TSA were actionable because they "conveyed the factual connotation that Hoeper was a threat to aircraft or passenger safety." *Hoeper*, 232 P.3d at 242. This holding was erroneous because AWAC did not report that Hoeper was a threat and, to reach its conclusion, the court of appeals transformed AWAC's report from an expression of uncertainty into a report of objective facts. The court of appeals' holding [40] threatens to discourage

reporting, particularly when airlines are required to report uncertain or incomplete information.

1. Standard of Review.

The determination of "whether allegedly defamatory language is constitutionally" protected opinion is a question of law and "a reviewing court must review the record de novo to insure that the trial court's judgment does not constitute forbidden intrusion on the field of free expression." *NBC Subsidiary (KCNC-TV) v. Living Will Ctr.*, 879 P.2d 6, 11 (Colo. 1994); *Am. Communications Network, Inc. v. Williams*, 568 S.E.2d 683, 685 (Va. 2002). The determination of whether a statement is fact or opinion is an issue of law subject to de novo review by a reviewing court even though it requires some degree of factual assessment concerning the "circumstances surrounding the publication." *Living Will Ctr.*, 879 P.2d at 11; *Raytheon Technical Servs. Co. v. Hyland*, 641 S.E.2d 84, 91 (Va. 2007). This issue was preserved in AWAC's motions for summary judgment, directed verdict, and judgment notwithstanding the verdict, which were all denied. (*Lexis/Nexis #14751110 at 15-18, #18644861 at 5, #19155532 at 5-11, #16074249, #19870796; Tr. 3624:3-14*). [41]

2. Law Governing Opinion and Material Falsity/Substantial Truth.

In Virginia, as in Colorado, statements of opinion cannot form the basis for a defamation claim. *Chaves v. Johnson*, 335 S.E.2d 97, 101-02 (Va. 1985); *NBC Subsidiary (KCNC-TV)*, 879 P.2d at 9. To be actionable, the alleged defamatory statement must "contain a provably false factual connotation," or

reasonably be interpreted "as stating actual facts about a person." *Tronfeld v. Nationwide Mut. Ins. Co*., 636 S.E.2d 447, 450 (Va. 2006). "A statement of opinion based on fully disclosed facts can be punished only if the stated facts are themselves false and demeaning." *Standing Comm. on Discipline of the United States Dist. Court v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995); *Restatement (Second) of Torts* § 566 cmts. b, c & Illus. 4 (1977) (judgments based on stated facts are "pure opinion").

"When a statement is relative in nature and depends largely on a speaker's viewpoint, that statement is an expression of opinion." *Hyland v. Raytheon Tech. Servs. Co.*, 670 S.E.2d 746, 751 (Va. 2009). "[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993).

"A speaker's choice of words and the context of an alleged defamatory [42] statement within the speech as a whole are factors to consider when deciding if a challenged statement is one of fact or opinion." *Fuste v. Riverside Healthcare Ass'n, Inc.*, 575 S.E.2d 858, 862 (Va. 2003). Specifically, courts consider "the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made." *Lapkoffv. Wilks*, 969 F.2d 78,82 (4th Cir. 1992) (applying Virginia law).

Furthermore, the issue of material falsity is frequently intertwined with the issue of actual malice. *See Masson*, 501 U.S. at 517 (even

intentionally false statements do not meet the actual malice test when the falsity is not material). To establish liability for defamation, a plaintiff must prove by clear and convincing evidence that the allegedly defamatory statement was materially false. *Id*. at 517; *Phila. Newspapers v. Hepps*, 475 U.S. 767, 777 (1986). A "statement is not considered false unless it 'would have a different effect on the mind of the reader from what the pleaded truth would have produced.'" *Masson*, 501 U.S. at 517. As explained in *Hepps*, this rule exists to avoid deterring "speech which the Constitution makes free." 475 U.S. at 777.

Indeed, true statements do not support a cause of action for defamation. *Jordan*, 612 S.E.2d at 206. "It is not necessary to prove the literal truth of [43] statements made. Slight inaccuracies of expression are immaterial provided the defamatory charge is true in substance." *Alexandra Gazette Corp. v. West*, 93 S.E.2d 274, 279 (Va. 1956). Thus, "[a] plaintiff may not rely on minor or irrelevant inaccuracies to state a claim for libel." *Jordan*, 612 S.E.2d at 207.

As will be demonstrated below, Hoeper cannot establish material falsity by clear and convincing evidence. Most of Doyle's statements were substantially true. And the rest of the statement, when considering the phrasing of the statement, the context in which it appears, the audience to whom it was directed, the broader social circumstances surrounding the statement, was an expression of opinion.

3. The Court of Appeals Incorrectly Found that AWAC's Statements Contained a Provably False Factual Connotation.

The court of appeals erred in holding that "TSA would have understood the statements as connoting that Hoeper was a threat to aircraft or passenger safety because Air Wisconsin, through Doyle, had no other reason to communicate with TSA about him, and TSA had no other use for the information than responding to a threat, which it did." *Hoeper*, 232 P.3d at 242. AWAC had a reason for calling TSA other than reporting a definite threat: to report its suspicions so that TSA could determine whether a threat existed. Such suspicions are exactly the sort of information ATSA encourages airlines to report. TSA uses such information to [43] investigate whether a definite threat exists, not merely to respond to a threat. When AWAC's report is considered in this light, the report would not be understood as reporting that Hoeper was a definite threat.

The court of appeals also improperly inferred the certain factual connotation that Hoeper was a threat from the uncertain and tentative language "may be armed" and "we were concerned about his mental stability and the whereabouts of his firearm." *See Carwile*, 82 S.E.2d at 591-592. Doyle did not report that Hoeper was a threat, or that Hoeper was armed or mentally unstable. Instead, he only reported that Hoeper "may be armed" and that it was concerned about "the whereabouts of his firearm" and his "mental stability." The language of the statements indicates they were intended to express AWAC's subjective suspicion of Hoeper's conduct, and its own

uncertainty regarding whether Hoeper was a threat. Such statements are not actionable. *Chapin v. Greve*, 787 F. Supp. 557, 567 (E.D. Va. 1992) (expressions of uncertainty not defamatory); *Raytheon*, 641 S.E.2d at 92 (statement that plaintiff "appeared to be unwilling" to accept feedback was non-defamatory where it was "not stated as a fact" but instead "conveyed from the perspective of the writer").

At most, AWAC's report to TSA connoted that Hoeper was a potential or possible threat. This connotation was not provably false, and therefore was a [45] protected statement of opinion. See *Garrett v. Tandy Corp.*, 2003 WL 21250679 at *11-12 (D. Me. May 30, 2003) (where officer asked store clerk whether any customer had acted suspiciously, clerk's responses were statements of opinion grounded in personal observation) (*Appendix F*); *Dobkin v. Johns Hopkins Univ.*, 1996 WL 254860 at *9-10 (D. Md. April 18, 1996) (statement that plaintiff "might be dangerous potentially" is not actionable because it is an opinion and cannot be proven false) (*Appendix G*); *Carozza v. Blue Cross and Blue Shield of Mass., Inc.*, 2001 WL 1517584 at *13 (Mass. Nov. 16, 2001) (defendant's report that plaintiff may be dangerous was expression of opinion protected under the First Amendment) (*Appendix H*).

The court of appeals relied on *Fuste*, holding that the existence of concerns was objectively verifiable because "evidence could be presented to show whether there were, in fact, concerns about the plaintiffs' competence." *Hoeper*, 232 P.3d at 243. However, *Fuste* is distinguishable because the allegedly defamatory statement implied that third parties had concerns about the competence of two

physicians. 575 S.E.2d at 860-62. Here, in contrast, AWAC's statements were statements of opinion because they expressed the subjective and relative concerns of AWAC management, rather than the concerns of third parties. *See Hyland*, 670 S.E.2d at 751.

[46] Furthermore, AWAC's statements of concern were non-actionable because they were based on the disclosed facts that Hoeper was a "pilot in the FFDO Program," who could be armed, that he had been "very upset and angry with Air Wisconsin simulator technicians and other personnel," and that he had "been displaying unstable tendencies and deflecting responsibility to others for failures recently." (*Appendix D*.) AWAC also advised TSA that it did "not believe [Hoeper was] in possession of a firearm at this time." (*Id*.) Statements like these, which are surmise based upon disclosed true facts, are not actionable. *Gross v. New York Times Co*., 82 N.Y.2d 146, 155 (N.Y. 1993) (accusations made in a serious tone are not defamatory where they are based on disclosed facts and it is clear that the accusation is surmise based on those facts); *Yagman*, 55 F.3d at 1439; *Restatement (Second) of Torts* § 566 cmts. b, c & Illus. 4.

From a policy perspective, the court's holding is particularly troubling. ATSA and the "when in doubt, report" policy reflect the reality of aviation security in the aftermath of 9-11, which depends on centralized collection of information about all potential threats, not just actual threats. To preserve aviation security, airlines must often make reports based on imperfect information and with limited time and ability to investigate. By holding that reports under ATSA,

even those of uncertain information, necessarily convey a factual connotation that the subject is a [47] threat, the court of appeals' decision leaves no room for uncertainty in reporting. Its holding will discourage airlines from reporting suspicious transactions or potential threats which are based on speculation, conjecture, hunches, or incomplete information, but which are still vital to national security. Such a situation is untenable given the realities of aviation security following 9-11 and, more recently, the Christmas Day incident involving Northwest Flight 253 (in which a passenger attempted to detonate plastic explosives). In August 2010, for example, an American Airlines flight from New York to Los Angeles was diverted to New Mexico "out of an abundance of caution" after passengers smelled smoke. Investigation revealed that a passenger lit a match so he could smoke. Nonetheless, a decision was made that the safety of 168 passengers could not be compromised, resulting in the stop and complete deboarding of all personnel.

4. The Statements Regarding Hoeper's "Mental Stability" Were Relative in Nature and not Provably False.

The court of appeals found that AWAC's statements that it was "concerned about [Hoeper's] mental stability" and that he was an "[u]nstable pilot" were provably false and not relative in nature because "this information was inextricably intertwined with his overall connotation that Hoeper was a threat to a departing airline flight." *Hoeper*, 232 P.3d at 242-243. This holding was erroneous. Doyle did not report that Hoeper posed a threat because of his mental state. Doyle [48] expressed

relative and subjective concerns about Hoeper's mental state which depended upon his own relative viewpoint. These are, by definition, statements of opinion. *Hyland*, 670 S.E.2d at 751. Indeed, courts have routinely held that similar statements cannot provide the basis for a defamation action. See *Lifton v. Bd. Of Educ. of the City of Chicago*, 416 F.3d 571, 579 (7th Cir. 2005) (statement that plaintiff was unstable was statement of opinion that does not contain an objectively verifiable factual assertion); *Haywood v. Lucent Technologies, Inc.*, 169 F. Supp. 2d 890, 915-916 (N.D. Ill. 2001) (statement that plaintiff was unstable was pure opinion, not objectively verifiable, and not actionable); *Kryeski v. Schott Glass Techs., Inc.*, 626 A.2d 595, 601 (Pa. 1993) (finding non-actionable a statement that plaintiff was "crazy and unstable"); *Filippo v. Lee Publ'ns, Inc.*, 485 F. Supp. 2d 969, 980 (N.D. Ind. 2007) ("statements about another person's attitudes, beliefs, and personality traits constitute protected opinions").

The court of appeals attempted to distinguish these cases because they did not contain statements with a "connotation that the speaker is urging or expecting action based on that characterization." *Hoeper*, 232 P.3d at 244. Yet *Haywood* involved a defamation claim based on an employer's verbal notification to security staff that an employee was "unstable." 169 F. Supp. 2d at 914. The context of the plaintiff's claim was thus very similar to the report to TSA at issue here.

[49] Nonetheless, the *Haywood* court found that the defendant's statement was "pure opinion" that

could not be verified with evidence, and therefore not actionable. *Id*. at 916.

The court of appeals also held that AWAC's statements regarding Hoeper's mental stability were verifiable because TSA would expect AWAC to communicate "unbiased information." *Hoeper*, 232 P.3d at 243. But terms like "mental stability" and "[u]nstable" are vague and susceptible of many different meanings. There are no criteria or objective measurements of Hoeper's mental stability in the airline security context that would permit AWAC's statements to be objectively proven true or false. In the absence of criteria or objective measurements, AWAC's statements regarding Hoeper's mental stability were non-actionable statements of opinion. *Gibson v. Boy Scouts of America*, 163 Fed. Appx. 206, 212-213 (4th Cir. 2006) (unpublished) (under Virginia law, statement that plaintiff was "'unfit' to be a Scoutmaster" was statement of opinion because there was no "discernible criteria against which to measure 'fitness.'") (*Appendix I*); *Lamb v. Weiss*, 2003 WL 23162338 at *6 (Va. Cir. Ct. July 9, 2003) (statements that plaintiff was "incompetent" and "spent too much money on advertising" were statements of opinion because no objective standard existed by which they could be proven or disproven) (*Appendix J*). [50]

5. The Statement that Hoeper was Terminated Today was Substantially True.

The court of appeals also held that AWAC's statement that Hoeper was "terminated today" was not substantially true and was not a harmless inaccuracy because "it presents an additional fact purporting to explain to TSA why Hoeper was

unstable, and thus, a threat." *Hoeper*, 243 P.3d at 244. This holding was incorrect. Though Hoeper technically may not have been terminated when the statement was made, the statement "terminated today" was substantially true because Hoeper's termination was a foregone conclusion when he stopped the mandatory training session. Hoeper even admitted he expected to receive notice of his termination after his failed training on December 8. (*Tr. at 1630:21-1631:6*.)

Hoeper cannot predicate a defamation claim on such a minor and insignificant technicality particularly where, as here, he was verbally informed of his termination the next day, (id. at 1410:11-21), and the difference in the date of termination was immaterial. *See Sivulich v. Howard Publ'ns, Inc*., 466 N.E.2d 1218, 1220 (Ill. App. Ct. 1984) (statement that plaintiff had been charged with aggravated battery was substantially true where civil action had been filed against him; error as to date charges were filed was immaterial). Terminated pilots pose the same security concerns as pilots facing imminent termination. (*Tr. at 791:24-* [51]*792:19, 792:15-19, 935:18-21*.) Thus, in this context, "terminated today" would have the same effect on the listener as the statement "terminated tomorrow." *See AIDS Counseling & Testing Centers v. Group W Television, Inc.*, 903 F.2d 1000, 1004 (4th Cir. 1990) (finding false statement immaterial where true statement would have substantially the same effect as false statement).

6. The Statement that Hoeper May be Armed and We Were Concerned About the Whereabouts of his Firearm is not Actionable.

The court of appeals held that Doyle's report connoted that Hoeper was a threat because Doyle reported Hoeper "may be armed" and that AWAC was concerned about the whereabouts of his firearm. *Hoeper*, 232 P.2d at 242. However, these statements are not actionable because they are either: (1) not materially false; or (2) expressions of suspicion. Hoeper was an "FFDO," "in [the] FFDO program," and "was traveling from lAD-DEN later that day." As an FFDO, Hoeper "may be armed" because he was authorized to carry a firearm. AWAC also advised TSA that it did "not believe [Hoeper was] in possession of a firearm at this time." (*Ex. 25 at WH51*.) Because AWAC could not confirm whether Hoeper was unarmed, it felt compelled to report its concern about the whereabouts of his firearm. Even the court of appeals stated, "[w]e will assume that stating an FFDO may be armed is always potentially true." *Hoeper*, 232 P.3d [52] at 244. Thus, the statement was an expression of concern or substantially true, and should not have been submitted to the jury.

7. Even if Only a Portion of Either Statement was a Statement of Opinion, the Court Must Order a New Trial.

The jury's verdict was based on two statements, which were both either statements of opinions or substantially true. Because the jury's verdict for

Hoeper cannot stand, this Court should reverse the judgment and enter judgment in AWAC's favor as a matter of law. If, however, this Court were to conclude that only portions of either statement should not have been submitted to the jury, it must order a new trial because it is impossible to determine whether the jury based its verdict on actionable or non-actionable portions of the statements. *See Raytheon*, 641 S.E.2d at 92.

V. CONCLUSION

For the foregoing reasons, Petitioners request that this Court reverse the trial court's judgment and enter judgment in their favor as a matter of law or, alternatively, remand for a new trial.