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IN THE SUPREME COURT OF THE UNITED STATES

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AIR WISCONSIN AIRLINES :  
CORPORATION, :  
Petitioner : No. 12-315

v. :

WILLIAM L. HOEPER :

- - - - - x

Washington, D.C.

Monday, December 9, 2013

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:03 a.m.

APPEARANCES:

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Petitioner.

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Respondent.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 12-315, Air Wisconsin  
5 Airlines v. Hoyer.

6 Mr. Cohn.

7 ORAL ARGUMENT OF JONATHAN F. COHN

8 ON BEHALF OF THE PETITIONER

9 MR. COHN: Mr. Chief Justice, and may it  
10 please the Court:

11 Not even Mr. Hoyer can defend the decision  
12 below and for good reason. Under the plain terms of the  
13 statute and consistent with this Court's First Amendment  
14 precedence, truth matters, and airlines should not lose  
15 their ATSA immunity, unless their statements are  
16 materially false. None of that is in dispute anymore.

17 Also not in dispute, I think, is that Air  
18 Wisconsin was justified in picking up the phone, calling  
19 TSA, and conveying certain core facts; namely, that  
20 Mr. Hoyer was mad at the airline; that he was a Federal  
21 flight deck officer or FFDO; that he had walked out on  
22 his training, his last chance to keep his job; and he  
23 was about to board a plane. I don't believe any of  
24 those facts are in dispute.

25 What is in dispute is how those facts were

1 framed or phrased to TSA in that call. How the report  
2 was packaged and did --

3 JUSTICE SCALIA: I'm -- I'm not sure it --  
4 you said it is conceded that -- that those things should  
5 have been brought to the airline's attention. Has that  
6 been conceded? I'm not sure.

7 MR. COHN: I think they conceded--

8 JUSTICE SCALIA: I think -- I think they  
9 said if it -- if they were brought, they should have  
10 been brought in a different fashion, but I'm not -- I'm  
11 not sure they -- they have conceded that.

12 MR. COHN: I believe they have conceded,  
13 Justice Scalia, that those facts could have been  
14 conveyed, justifiably. If we had conveyed those core  
15 facts using different words, there would not be any  
16 issue here.

17 JUSTICE SCALIA: Well, you could convey  
18 anything justifiably, sure, I agree with that.

19 MR. COHN: And the question, Justice Scalia,  
20 is whether we framed or phrased the report in an  
21 adequate manner. And in assessing that issue, the  
22 question comes down to how much breathing space airlines  
23 should be given in making these reports, how much room  
24 there should be for permissible characterization and  
25 expression in making these reports. And context should

1 be kept in mind in answering that question, three things  
2 in particular.

3 First, these reports are being made by  
4 airline employees, such as pilots and flight attendants  
5 and baggage handlers and ticket agents, who are being  
6 told by TSA they have to report in realtime, without  
7 investigation, without calling their lawyer, without  
8 stopping to think on how to refine the perfect script,  
9 and they are being told to do this based upon their  
10 suspicions, in some cases, suspicions of other people's  
11 emotions or state of mind. That's one critical piece of  
12 context.

13 JUSTICE ALITO: Well, Mr. Cohn, on the --

14 JUSTICE GINSBURG: Can -- can we go back to  
15 your response to Justice Scalia? You said that the  
16 Respondents conceded, but -- but isn't it the case that  
17 it was the Colorado supreme court that said that the  
18 airline likely would have been immune if they had  
19 phrased the report more cautiously?

20 MR. COHN: That's exactly right, Justice --

21 JUSTICE GINSBURG: So it's -- it's the  
22 Colorado supreme court, not the Respondent?

23 MR. COHN: Well, I believe the Respondents  
24 have also acknowledged that a call could have been made  
25 conveying a certain fact. You're completely correct,

1 Justice Ginsburg, that the Colorado supreme court said  
2 we'd be likely immune if only we had used different  
3 words, and those different words are immaterial. That  
4 lower court engaged in hairsplitting --

5 JUSTICE KENNEDY: You had -- you're  
6 saying -- you're saying there were three critical facts.  
7 One is that these reports have to be made on suspicions  
8 right away in realtime, by people like baggage handlers.  
9 And your second point was?

10 MR. COHN: The second point of context is  
11 that these reports are being made to TSA and other  
12 reasonable air safety officials, for the purpose of  
13 passenger safety and aviation security. And TSA tells  
14 the airlines, if you have any doubt, report; if you see  
15 something, say something. And if you don't say  
16 something --

17 JUSTICE KENNEDY: And then the third? And  
18 your third?

19 MR. COHN: And the third piece of context is  
20 the consequences of a failure to make a report can be  
21 catastrophic for passenger safety and aviation security.  
22 And that's why TSA says, if you don't report  
23 sincerely-held concerns, you might be sanctioned by us  
24 for failing to make the report, placing airlines between  
25 a rock and a hard place.

1 JUSTICE KENNEDY: In this context, it's not  
2 clear to me what the issue is that's before us. My  
3 understanding is, is that there was no finding of  
4 falsity. Now, the jury was instructed that it had to be  
5 defamatory. Lawyers know that that means it has to be  
6 false, I assume. And are you saying that -- you know,  
7 the jurors weren't instructed as to the definition of  
8 "defamatory"? Is that the point?

9 MR. COHN: No, the issue is not about the  
10 jury instructions, Justice Kennedy. The question's  
11 about the statutory immunity and the Aviation  
12 Transportation Security Act, ATSA, and whether that  
13 immunity requires a determination of whether or not the  
14 statement was materially false.

15 JUSTICE KENNEDY: By the court.

16 MR. COHN: By the court in our view. We  
17 think, under any standard, we should prevail.

18 JUSTICE KENNEDY: What -- what position --  
19 although they'll tell us in a minute -- does Respondent  
20 take on that issue that a determination by the jury  
21 suffices? As you understand their brief. They can talk  
22 for themselves in a few minutes.

23 MR. COHN: I believe two things. One, I  
24 believe they concede the legal question that material  
25 falsity is part of the ATSA analysis, and that's the

1 question on which this Court granted cert. On the  
2 second question, which is not before the Court, is who  
3 should decide this issue, the court or the jury?

4 I believe they feel the jury should answer  
5 that question. Again, that issue is not strictly before  
6 the Court, but I think, on the issue that is before the  
7 Court, they agree that material falsity is part of the  
8 ATSA analysis.

9 JUSTICE KENNEDY: But isn't that implicit in  
10 the instruction to the jury, that it has to be  
11 defamatory? Now, if you say, well, even if it is, the  
12 judge -- the court has a duty to determine, as a matter  
13 of law, at the outset, then that's something else.

14 MR. COHN: Well, the jury -- and this is a  
15 question of the jury instructions, which are not being  
16 challenged, are not before the Court, but the jury was  
17 not given instruction on materiality.

18 The jury, also, was not given instruction on  
19 clear and convincing. They're not given instruction  
20 that the decision should be about what the effect would  
21 be on TSA. So the jury didn't answer that question.  
22 The jury shouldn't have answered that question. But --

23 JUSTICE SCALIA: But does defamatory require  
24 that it be materially false? Can't I defame somebody  
25 with a statement in -- in which the derogatory



1 information is not material to anything at all, but it's  
2 just derogatory?

3 MR. COHN: Under the common law, Justice  
4 Scalia, the statement has to be materially false. We  
5 agree with that. And we also think that --

6 JUSTICE SCALIA: Has to be materially false  
7 to sustain what?

8 MR. COHN: To sustain a defamation judgment.  
9 Of course, it depends upon State law, but generally,  
10 under the common law, the statement has to be materially  
11 false --

12 CHIEF JUSTICE ROBERTS: Material to -- to  
13 what?

14 MR. COHN: In --

15 CHIEF JUSTICE ROBERTS: I mean, you can have  
16 a defamatory statement about a pilot that's not material  
17 to -- you know, air safety. Is that what materiality  
18 goes to, the particular reason that the statement is  
19 made?

20 MR. COHN: Mr. Chief Justice, that's a very  
21 important distinction because, in the common law  
22 context, you're concerned about the effect on the  
23 person's reputation -- his general reputation in the  
24 community, whereas, in the ATSA context, you're talking  
25 about a very particular listener. The listener is TSA

1 or a reasonable air safety official.

2 And the purpose of the report --

3 CHIEF JUSTICE ROBERTS: So you're saying you  
4 can't defame -- someone gets immunity for a statement  
5 that would be defamatory in the common law context if  
6 made generally, but because it's made in the context of  
7 information about flight safety, that's somehow immune?

8 MR. COHN: Correct, Mr. Chief Justice. The  
9 statement might be deemed defamatory if you don't have  
10 the ATSA immunity, but because of the ATSA immunity,  
11 it's not materially false.

12 CHIEF JUSTICE ROBERTS: So you call some TSA  
13 official and say this pilot -- you know, is having an  
14 affair. That's immune?

15 MR. COHN: That would not be immune because  
16 that would not be relevant to a suspicious transaction,  
17 suspicious activity, or passenger safety, so --

18 JUSTICE SCALIA: But it would still support  
19 a defamation, wouldn't it?

20 MR. COHN: Correct. It would probably --

21 JUSTICE SCALIA: Because it is material to  
22 the person's reputation.

23 MR. COHN: Correct. And it would not be  
24 immune. But the report we had here is not that  
25 someone's having an affair, but, rather, the report we

1 made is that someone might possibly be giving rise to a  
2 concern.

3 JUSTICE ALITO: Well, on the report that was  
4 made here, suppose that the report said that the  
5 Respondent -- we believe the Respondent is mentally ill,  
6 or we believe the Respondent has serious mental  
7 problems. Would you -- would you make the same argument  
8 if that's what was said?

9 MR. COHN: With those words, I think I  
10 would, Justice Alito, because --

11 JUSTICE ALITO: You would?

12 MR. COHN: The same argument, yes. Now, I  
13 think there are words that would cross the line. I  
14 don't believe those words do because -- a couple things.  
15 First, the gist of the statement is still the same. The  
16 gist is this is a person who might possibly have a gun  
17 and might possibly be in a state of mind --

18 JUSTICE ALITO: Well, the facts, as I  
19 understand it, were that he became very angry during a  
20 test -- during a flight simulation test. He took off  
21 his headset, pushed back his chair, threw the headset,  
22 started cursing at the instructor, and then later,  
23 he was -- he was showing anger and cursing for a period  
24 of time in other parts of the facility.

25 Does it go beyond that? Is that fair?

Official

1 MR. COHN: That's a fair characterization.

2 JUSTICE ALITO: All right. And you think,  
3 based on that, you could say, we believe this man is  
4 mentally ill?

5 MR. COHN: Justice Alito, I'm keeping in  
6 mind the first important piece of context, which is  
7 these reports are being made by tens of thousands of  
8 aviation employees on the ground that could have  
9 different educations and socioeconomic backgrounds and  
10 might not all speak the way we do, especially in an  
11 uncertain context in which the facts are rapidly  
12 evolving.

13 JUSTICE SOTOMAYOR: I'm sorry. What's so  
14 difficult about simply saying he's angry? Why choose  
15 the word "mentally unstable"? Isn't it with an intent  
16 to connote something more than the facts?

17 MR. COHN: A couple things, Justice  
18 Sotomayor. First, it's not -- the question is whether  
19 the gist of the statement is the same. It's up to TSA  
20 to draw the connotations, the implications --

21 JUSTICE SOTOMAYOR: Well, yes, but from  
22 facts. So isn't there a difference between saying  
23 someone's angry and someone's mentally ill --

24 MR. COHN: I think --

25 JUSTICE SOTOMAYOR: -- has a mental problem

1 or is mentally unstable? Don't you think that the  
2 intent is to convey something else?

3 MR. COHN: Justice Sotomayor, I think that  
4 different people express the same thought in different  
5 ways. I think a baggage handler in Boston or a flight  
6 attendant in LaGuardia might use different words, such  
7 as "he lost it," "he went off the deep end," "he was  
8 acting irrationally," "he blew up."

9 And the lower court said --

10 JUSTICE SCALIA: Yes, you could say he's  
11 nuts, but the question isn't whether somebody would say  
12 it. The question is whether that is false. I mean, the  
13 mere fact that -- that a lot of people will -- will  
14 exaggerate and say things that are simply not true  
15 doesn't make it okay.

16 MR. COHN: Justice Scalia, a couple things  
17 in response. First, this is not a situation in which  
18 there's a simple statement and the person hangs up.  
19 There's a conversation with TSA, in this case, a  
20 10-minute conversation, in which they probe behind the  
21 facts and they found out what happened, that Mr. Hoyer  
22 was angry and upset and he blew up that morning at  
23 training.

24 And second, the lower court recognized this  
25 and said, if we simply had used "irrational and blew

1 up," we'd be immune, as opposed to saying "mentally  
2 ill."

3 JUSTICE SCALIA: But the point is that  
4 somebody ought to determine whether the exaggeration or  
5 whatever it was, was material, whether -- whether it  
6 would have made any difference to TSA if it had been  
7 described otherwise. And in this case, as I understand  
8 it, as -- as the Colorado supreme court said, nobody has  
9 made that determination; right?

10 The Colorado supreme court says it doesn't  
11 make any difference whether -- whether it would have  
12 affected TSA or not, putting it -- putting it the proper  
13 way, right?

14 MR. COHN: Correct, Justice Scalia,  
15 absolutely correct.

16 JUSTICE SCALIA: So that's what we're  
17 confronted with, simply, the -- the need for somebody to  
18 make that factual determination, right? And you're  
19 saying what? There's no need to make it at all?

20 MR. COHN: Oh, no, no, Justice Scalia, we  
21 say that there is a need to make that determination.  
22 The lower court said no need, material falsity is not  
23 part of the ATSA analysis.

24 JUSTICE BREYER: Where did it say  
25 "material"? I thought -- I thought -- I think, so far

1 as I've read this, the argument is about the truth or  
2 falsity of the statement. And you're saying that the  
3 Colorado supreme court should have said it has to be  
4 false. Isn't that your argument?

5 MR. COHN: They had to say it.

6 JUSTICE BREYER: Okay. Now, I've looked  
7 at -- I've looked at footnote 17 -- or footnote 6 or  
8 whatever it is on page 17, and I think that their  
9 characterization of the Colorado supreme court is right;  
10 that is, the Colorado supreme court is going to be very  
11 surprised if we tell them that they never said it has to  
12 be false.

13 What they said here is, "In the  
14 determination of immunity, we need not and, therefore,  
15 do not decide whether the statements were true or  
16 false." Correct.

17 Why not? Because, they say, "The trial  
18 court properly submitted the case to the jury.  
19 Accordingly, the jury was entitled to determine the  
20 elements of a defamation claim, including whether the  
21 statements were false."

22 So, as I read that, which I think you'll  
23 hear from the other side in about -- a few minutes,  
24 the -- the Colorado supreme court says, look, the jury  
25 found that the statement was false, so we don't have to

1 worry about that, we're worried about whether the false  
2 statement was made with reckless disregard of its truth  
3 or falsity or knowledge that it was false. Okay?

4 That's how I read the footnote. And they  
5 say something like that on -- on page 30 and 31 of their  
6 brief.

7 So -- so if I'm right about that, what are  
8 we supposed to do? Are we supposed to say that matters  
9 of truth or falsity are not for the jury? Are we  
10 supposed to say that the jury went beyond what any  
11 reasonable person would go -- would do here? What is it  
12 we're supposed to do?

13 MR. COHN: Justice Breyer, the lower court  
14 recognized that the ATSA immunity question is for the  
15 court to decide. And because they left that issue,  
16 material falsity, to the jury, they said it's not part  
17 of the ATSA immunity analysis, and that's error. It  
18 should --

19 JUSTICE GINSBURG: But did the jury -- did  
20 the jury find falsity? Do you recognize that? Did this  
21 jury find that the statement was, as you say, materially  
22 false?

23 MR. COHN: Yes, Justice Ginsburg. The jury  
24 did make that determination, but --

25 JUSTICE GINSBURG: And how did -- how did



1 they make it? Because the only thing I see is the  
2 special verdict sheet and it doesn't ask that question.

3 MR. COHN: Correct. What the jury did,  
4 first of all -- first of all, it shouldn't have gone to  
5 the jury because it's part of the ATSA immunity  
6 analysis, which is for the court to decide.

7 But, second, the jury did not ask whether or  
8 not our statement would have a different effect on TSA,  
9 which is the proper test here.

10 JUSTICE SCALIA: There are two -- there are  
11 two different issues of falsity that we're talking about  
12 here, of materiality. One is the defamation issue, and  
13 it is material to say that somebody is mentally unstable  
14 when all that he did was lose his temper. Okay? That's  
15 my view of it.

16 That does not answer the question of whether  
17 calling him mentally unstable, instead of he lost his  
18 temper or just saying he lost his temper, would have  
19 produced the same effect with the airlines, whether the  
20 airlines, even if he had said, well, he lost his temper,  
21 he's been fired from his job, he may have a -- he may  
22 have a gun, whether that alone, without saying he was  
23 mentally unstable, would have induced the airline to  
24 take him off the flight.

25 There are two different questions.

1 Materiality for defamation is -- is quite different from  
2 the materiality for purposes of obtaining the immunity  
3 under this Act. The latter question is for the court,  
4 but the former is for the jury, it seems to me.

5 MR. COHN: I agree completely, Justice  
6 Scalia. That's absolutely correct. And unless this  
7 Court has further questions, I would like to --

8 JUSTICE BREYER: I do. I'd like an  
9 answer -- well, you can do it in your rebuttal, but I'd  
10 like an answer to my question.

11 MR. COHN: My answer, Justice Breyer, to  
12 your question is that the jury answered a different  
13 question. They answered a question about whether it's  
14 material under defamation law, not whether it's material  
15 to TSA as required by ATSA and that determination should  
16 not go to the jury, that's for the court to decide.

17 And the lower court said, I'm not going  
18 to -- we're not going to address that question, we're  
19 not going to address it because it's not part of ATSA,  
20 and that was legal error, as even Mr. Hoeper concedes.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
22 Mr. Feigin.

23 ORAL ARGUMENT OF ERIC J. FEIGIN,  
24 FOR UNITED STATES, AS AMICUS CURIAE,  
25 SUPPORTING THE PETITIONER

1           MR. FEIGIN:           Mr. Chief Justice, and may it  
2 please the Court:

3           It's essentially undisputed that, in order  
4 to encourage airlines to report suspicious activity to  
5 proper authorities, the ATSA immunizes such reports when  
6 they're materially true. I want to emphasize two main  
7 points about the scope of that immunity.

8           First, ATSA gives airlines very wide  
9 latitude in how they describe the suspicious activities.  
10 These reports are made against an inherently uncertain  
11 factual backdrop, and that's why the statute protects  
12 reports of any suspicious transaction relevant to a  
13 possible violation of law or regulation relating to air  
14 safety. Misconceptions and exaggerations can occur, not  
15 only because of confusion about the facts, but because  
16 of the emotion, the stress, and potentially even the  
17 fear that may go along with making one of these reports.

18           JUSTICE KENNEDY:           Mr. Feigin, do you think  
19 that the statute, 44941, was intended by the Congress to  
20 incorporate the New York Times-Sullivan standard, the  
21 Masson v. New Yorker standard?

22           And -- and if so, then it -- it seems to me  
23 that the airline is under a duty more strict than the  
24 one that you have just explained and the Petitioner's  
25 counsel has explained.

1           MR. FEIGIN:           Well, Your Honor, I think  
2 there's a distinction between Masson and this case.  
3 Masson follows the more general defamation law rule  
4 about whether a statement is materially false in terms  
5 of a person's reputation, whereas, here, the focus is on  
6 what a reasonable security official would believe.

7           And we think that's fairly seen in the text  
8 of the statute, which, again, protects statements about  
9 any suspicious transaction relevant to possible  
10 violation of law or regulation.

11           So what the statements are intended to  
12 convey is a suspicion of a possible threat, and the gist  
13 in this context, what has to be true in this context, is  
14 the suspicion of the possible threat. Now, I want to  
15 emphasize that because the statute talks about  
16 suspicions and possibilities, that the actual factual  
17 basis for what's reported doesn't need to be  
18 particularly strong.

19           JUSTICE KENNEDY:        So -- so you want us to  
20 write an opinion to say that the -- that the statute  
21 here is to be interpreted differently than if it were a  
22 New York Times and Sullivan case or Masson-New Yorker  
23 case?

24           MR. FEIGIN:           Well, Your Honor, I think the  
25 only real difference is the context. I think, in

1 Masson, you were talking about readers of a general  
2 interest magazine, The New Yorker Magazine, whereas,  
3 here, the audience for these reports is much more  
4 specialized. It's law enforcement officers who are  
5 receiving reports of suspicious activity.

6 Now, they're not interested in someone's  
7 reputation as a general matter. What they're interested  
8 in is what kind of threat the person might pose and what  
9 might happen to an airplane in the next period of time  
10 that they have to worry about.

11 And I think it's particularly important that  
12 the Court give wide latitude to statements in this  
13 context because there's a substantially similar  
14 provision that protects individuals who make reports to  
15 law enforcement authorities. That's in 6 U.S.C. 1104.

16 And I think it would be very unfortunate if  
17 someone responding to the TSA's ubiquitous "See  
18 Something, Say Something" campaign were to inadvertently  
19 or recklessly, as later concluded by a jury, have some  
20 sort of exaggeration about what they were reporting and  
21 then find themselves liable for civil damages, just for  
22 trying to --

23 JUSTICE BREYER: I accept that for the  
24 moment -- accept all that. What's bothering me, a picky  
25 little point, but the picky point is that your statement

1 of the question, whether ATSA immunity may be denied  
2 without a determination that the air carrier's  
3 disclosure was materially false? No, can't be. But I  
4 read the footnote, footnote 6, last sentence, it says  
5 there was such a determination, the jury made it, and we  
6 don't have to go back over it.

7 So what are you arguing? Are you arguing  
8 that there should be like, as there is in free speech  
9 cases -- you know, a special duty upon an appellate  
10 court to go back over such a jury finding? Are you  
11 saying the Colorado supreme court was wrong in the  
12 second part of footnote 6 when it says the jury made it?

13 What am I supposed to do, in your opinion.

14 MR. FEIGIN: Well, what you're supposed to  
15 do in this case, Your Honor, is that the jury -- the  
16 finding that the jury made -- first of all, the jury  
17 wasn't actually instructed on materiality --

18 JUSTICE BREYER: They may have waived it --  
19 you know.

20 MR. FEIGIN: But assuming, for the sake of  
21 argument, the jury found the statements were materially  
22 false, it only did so in the context of the State law  
23 defamation verdict. And as Justice Scalia explained and  
24 as I tried to explain earlier, there's a difference  
25 between materiality from the perspective of someone's

1 reputation and materiality for purposes of the TSA  
2 in inquiry that's --

3 JUSTICE ALITO: My understanding of what the  
4 Colorado supreme court did is this: On the issue of  
5 ATSA immunity, it said, very clearly, that is for the  
6 court. And it says, in footnote 5, it may -- it gives  
7 no weight to the jury's findings of fact with respect to  
8 the facts that it found on the immunity question.

9 And then, at the end of footnote 6, what it  
10 said was, having found that there is no immunity, then  
11 it was proper for the trial judge to submit the  
12 defamation issue to the jury, and the jury made findings  
13 on the defamation issue.

14 Is that -- is that your understanding as  
15 well?

16 MR. FEIGIN: That's my understanding of the  
17 supreme court of Colorado's opinion, Your Honor.

18 JUSTICE ALITO: And are they right that, in  
19 determining ATSA immunity, the jury has no role, doesn't  
20 make findings of historical fact, who said what,  
21 anything like that?

22 MR. FEIGIN: Well, Your Honor, I don't think  
23 this is encompassed within the question presented, but  
24 our view, as we explain in footnote 6 of our brief, is  
25 that, under ATSA, questions of historical facts, such as

1 what was actually said on the call and what actually  
2 happened, would be submitted to the jury.

3 Materiality is a mixed question of law and  
4 fact. We believe that, also, it should be submitted to  
5 the jury, but with very careful jury instructions,  
6 making clear the very wide latitude that airlines have  
7 in this context.

8 And because airlines have such wide latitude  
9 in this context, we think, very often, the courts will  
10 be able to get rid of these kinds of cases at the motion  
11 to dismiss --

12 JUSTICE SOTOMAYOR: Then you disagree with  
13 Justice Scalia? He drew a distinction between two forms  
14 of materiality, whether something's materially false,  
15 meaning is it misleading; that, presumably, would go to  
16 a jury. But whether or not this misleading statement  
17 would be material to the TSA or to security officers is  
18 a question for the court.

19 You disagree with that position by him?

20 MR. FEIGIN: Again, Your Honor, we don't  
21 think the Court needs to address it here. We actually  
22 think a jury would resolve the materiality question  
23 under the ATSA --

24 JUSTICE SCALIA: You'd give the jury two  
25 different instructions? You are to find materiality for



1 purposes of whether it's defamatory or not and then,  
2 having found that it is defamatory, you must make a  
3 second materiality finding, namely, would this  
4 defamatory statement have caused TSA -- if it had been  
5 accurate, would TSA not have taken the action that it  
6 did, not have removed this man from the flight?

7 You're going to give the jury those two  
8 instructions on materiality?

9 MR. FEIGIN: We do think the court should  
10 give the jury separate instructions on ATSA, and then,  
11 if it passes the ATSA bar, you'd go on to defamation  
12 law. But, Your Honor, I'm not going to fight the Court  
13 too hard if it wants to say that this is a question for  
14 the Court.

15 What I'd really like to emphasize here is  
16 that --

17 JUSTICE SOTOMAYOR: I -- I actually would  
18 like your opinion, the SG's opinion, on whether this is  
19 an issue for the court or the jury. I mean, you don't  
20 have to fight us. What -- what is your view?

21 (Laughter.)

22 MR. FEIGIN: Your Honor, we are comfortable  
23 with the Court saying that it's a question for the  
24 court. Our reading of the statute is that it would be a  
25 question for the jury. There'd be an instruction, as

1 there was in this case, although not a proper  
2 instruction, on all the elements of ATSA, with the court  
3 making the law very clear to the jury that it has to  
4 apply for ATSA.

5 And then, if the jury gets past that, they  
6 would get a separate set of instructions.

7 CHIEF JUSTICE ROBERTS: Of course, you  
8 don't -- there's no reason -- and, presumably, a good  
9 trial judge wouldn't instruct the jury on those two  
10 separate questions using the same word, right? I mean,  
11 you could articulate what you mean by "material" in --  
12 in each context.

13 In other words, you don't have to say it  
14 would be material to TSA. It would say just, as my  
15 colleague has suggested, whether or not TSA would have  
16 done anything different if a different formulation had  
17 been used.

18 MR. FEIGIN: That's right, Your Honor. I  
19 think you could ask how TSA would have understood the  
20 statement with their particular eye towards the  
21 suspicion of a possible threat that's being conveyed.

22 JUSTICE SCALIA: And you'd -- you'd feel  
23 snug and comfortable in making reports to airlines,  
24 knowing that whether you're going to be held liable is  
25 going to be up to some jury who is going to see that

1 this person, his career was ruined, and it's going to be  
2 up to the jury to say whether he can recover or not?

3 MR. FEIGIN: Your Honor, we're  
4 comfortable --

5 JUSTICE SCALIA: That doesn't give me a  
6 lot -- a lot of comfort. If you're really concerned  
7 about enabling people to come forward without fear, when  
8 they have a suspicion of something, I'm saying,  
9 well -- you know, some jury will decide whether --  
10 whether you put it wrongly or not, and if you're putting  
11 it wrongly, it would have made a difference, it doesn't  
12 make me happy.

13 MR. FEIGIN: Your Honor, I think what's  
14 going to provide the adequate good feelings that  
15 airlines have making these reports, to make them feel  
16 safe making these reports, is for this Court to  
17 emphasize the very wide scope that the ATSA gives to how  
18 airlines characterize --

19 JUSTICE KAGAN: Well, Mr. Feigin, they have  
20 that wide scope because of the actual malice standard,  
21 that somebody needs to show that there was actual  
22 knowledge of falsity or reckless disregard as to  
23 falsity.

24 And you're saying that we should do  
25 something different. You're saying that we should

1 expand what falsity means in this context as a sort of  
2 extra protection, and I guess why is that true?

3 MR. FEIGIN: Well, Your Honor, I don't think  
4 we're doing anything different from the actual malice  
5 standard, except taking account of the context. In this  
6 particular context, where there's a lot of factual  
7 uncertainty, a lot of emotion mixed in, and the audience  
8 aren't readers of, for example, a general interest  
9 magazine, they are security officials looking for  
10 suspicion of a possible threat, we think that the scope  
11 of the materiality test is very broad.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Russell.

15 ORAL ARGUMENT OF KEVIN K. RUSSELL

16 ON BEHALF OF THE RESPONDENT

17 MR. RUSSELL: Mr. Chief Justice, and may it  
18 please the Court:

19 There are two sets of questions before the  
20 Court here. There's a legal question about the proper  
21 interpretation of ATSA and maybe some subsidiary  
22 questions about the division of authority between judge  
23 and jury and what the materiality standard is. And then  
24 there's a question about what to do with this case. And  
25 those two sets of things should be considered

1 differently because much of what's being argued here  
2 today was not presented to the lower courts.

3 JUSTICE KENNEDY: So suppose I'm the trial  
4 judge and I conclude that, if Air Wisconsin had said to  
5 the TSA, along the lines of Justice Scalia's earlier  
6 question, We have an employee who was terminated today,  
7 he probably knew it, he lost his temper during a test,  
8 he might think that some of our employees are out to get  
9 him, and there may even be some truth to that, he's  
10 authorized to carry a gun, we don't know if he has one  
11 or not, we're giving you that information.

12 Suppose I'm the trial judge. I conclude  
13 that, if that information had been given to TSA, TSA  
14 quite properly stopped this plane to examine the pilot.  
15 Do I send the case to the jury?

16 MR. RUSSELL: Let me unpack that. I think  
17 there is three parts to that question. The first is  
18 implicit in that is ATSA immunity factual questions for  
19 the court or for the jury? And we agree with the  
20 government that you should apply the ordinary qualified  
21 immunity standards and historical disputes about the  
22 facts are handled by the jury.

23 Of course, if the court can say, look, even  
24 on the plaintiff's view of the facts, immunity is  
25 proper, you can enter summary judgment.

1           The second question is what is the  
2 materiality standard. Justice Scalia, you've suggested  
3 that the standard is would TSA have done the same thing  
4 anyway? And I take the government even to be saying  
5 that that's not the right test because we can't know,  
6 because TSA won't tell us.

7           TSA has to keep secret its procedures about  
8 what it would do and when. And, as a consequence, I  
9 think the proper standard is the standard that applies  
10 under New York Times and in other defamation cases,  
11 which is the Masson standard. Would a true statement  
12 have a different effect on the security officials' mind?

13           And we think you can have a gloss on that,  
14 that says --

15           JUSTICE KENNEDY:           Well, the Masson reporter  
16 for The New Yorker Magazine spent months on this  
17 article. They had proofreaders. They had editors in  
18 New York. And you're saying the same standard applies  
19 to the baggage handler who has only 10 minutes to decide  
20 what he's going to say?

21           MR. RUSSELL:           I'm saying the same standard  
22 of material truth applies. Actual malice, the  
23 subjective good faith, is the principal protection  
24 afforded to the baggage handlers. Even if what he says  
25 is blatantly materially false, so long as he believed

1 it, so long as he acted in good faith, he's protected  
2 here.

3 And so the question is, what happens when  
4 somebody like Mr. Doyle, who has been found to have  
5 acted in bad faith, and that's not challenged here --  
6 does he, nonetheless, get immunity because what he said  
7 was materially true?

8 And we think the standard --

9 JUSTICE GINSBURG: Can we go back to the  
10 "who decides" question? I find it very confusing. Now,  
11 everybody seems to say, well, it's the jury that  
12 decided -- that decides, but the Colorado supreme court  
13 said that it recognized that the court was to decide  
14 this question, not the jury.

15 And in this case, the jury decided it. That  
16 was error, the Colorado supreme court said, but it was  
17 harmless. So who decides? Is it -- is it the court or  
18 the jury?

19 MR. RUSSELL: I think that the answer to the  
20 legal question is that you have the same division that  
21 you have in qualified immunity, that material disputes  
22 of facts are resolved by the jury and then the court  
23 reviews those -- those findings under the normal --

24 JUSTICE KENNEDY: So in my -- under my  
25 question, I first asked you, I'm the trial judge, I have

1 made the determination that TSA would have acted the  
2 same way. I still have to submit this to the jury?

3 MR. RUSSELL: If -- if you think that  
4 there's no disputes about those facts, that no  
5 reasonable jury could conclude otherwise on those facts,  
6 and you think --

7 JUSTICE KENNEDY: No, I thought that, even  
8 if the facts had been reported much more accurately than  
9 they were, that the TSA still had a duty to investigate.

10 MR. RUSSELL: All right.

11 JUSTICE KENNEDY: Can't I make that  
12 determination as a matter of law?

13 MR. RUSSELL: I don't -- I think the  
14 materiality question goes to the jury, subject to review  
15 by the court on the motion for directed verdict --  
16 whatever. But there's also -- I also want to make clear  
17 that I disagree with the premise of that question about  
18 what the standard of materiality is, and it's not  
19 whether TSA would have acted differently.

20 It's whether TSA would have had a different  
21 impression about facts that are undoubtedly material to  
22 their determination, not only about the extent of the  
23 threat, but also what to do in the immediate aftermath.

24 They have to make a decision from the  
25 get-go, not only whether to investigate or not, but



1 whether or not to respond by sending an officer down or  
2 scrambling a SWAT team. And certainly being told that  
3 somebody is mentally unstable and may be armed is going  
4 to be materially -- be a materially different impression  
5 on their minds about those questions. And that --

6 JUSTICE KAGAN: I guess I'm not sure what  
7 you just said because, even the way you just phrased  
8 that, you're asking what TSA would have done. How else  
9 can we think about materiality, other than by asking,  
10 well, if you were a TSA officer and you heard this, what  
11 would you have done?

12 MR. RUSSELL: You apply the Masson test,  
13 which is would a truer statement have a different effect  
14 on the mind of the reader? It doesn't mean that they  
15 have to have done something differently. It's just that  
16 they understand the facts differently than they do based  
17 on what was said.

18 CHIEF JUSTICE ROBERTS: So you're saying, if  
19 it made a difference in their mind whether to send one  
20 officer to his house or a SWAT team somewhere else,  
21 that's material, and you lose immunity?

22 MR. RUSSELL: That's materially false, yes,  
23 if the difference would have made a difference --

24 CHIEF JUSTICE ROBERTS: If the difference --  
25 if the difference in the language causes TSA to do

1 anything differently, then you lose immunity?

2 MR. RUSSELL: I think you would, but that's  
3 not the question. The question is, would the statement  
4 have a different effect on the readers or the listeners.

5 CHIEF JUSTICE ROBERTS: A different  
6 effect -- a different effect on who?

7 MR. RUSSELL: The listeners, the TSA.

8 CHIEF JUSTICE ROBERTS: The TSA. So -- but  
9 that's what I'm saying. Let's say the TSA person looks  
10 at it and says, ah, this is -- you know, if it had been  
11 phrased as you say, ah, this is silly, I'm not going to  
12 do anything.

13 But he says, well, it looks silly to me, but  
14 I'm going to send it to my supervisor. That's a  
15 different effect on the listeners' mind, and you say  
16 that difference causes the airline to lose immunity.

17 MR. RUSSELL: I think so. And in addition,  
18 whatever you say about this, you should also keep in  
19 mind what was actually argued below. Let me say a few  
20 things about how this went down --

21 JUSTICE ALITO: Well, before you get to  
22 that -- before you get to that, to finish up on the  
23 point you were making earlier. Suppose that the report  
24 is he ranted for 10 minutes, and then suppose the jury  
25 found he ranted for 7 minutes.

1           Now, maybe those 3 minutes would make a  
2 difference -- make a difference in the impression on the  
3 TSA. That would be enough, in your view?

4           MR. RUSSELL:           I think it has to make a  
5 difference in the way that they would evaluate the  
6 existence, nature, or extent of the threat, and so it --  
7 you know, it wouldn't make a difference to the way that  
8 they evaluated the nature or the extent of the threat,  
9 then it's not material.

10           But keep in mind, the way that this case was  
11 litigated below, they, themselves, proposed the Masson  
12 standard. And it's -- we've reproduced their brief to  
13 the Colorado supreme court. It's on page 30a. They  
14 say, "A statement is not considered false unless" --

15           JUSTICE SCALIA:           Where are you reading?

16           MR. RUSSELL:           Page 30a of the Red Brief. It  
17 is where we reproduced their Colorado supreme court  
18 brief. And on page 30a, they say, "A statement is not  
19 considered false unless it would have a different effect  
20 on the mind of the reader than what the pleaded truth  
21 would have produced," and they cite Masson.

22           "This new-found ATSA-specific materiality  
23 test comes largely from the United States' invitation to  
24 brief at the cert stage in this case." And they never  
25 asked for an instruction on materiality at all, much

1 less an ATSA-specific materiality instruction to the  
2 jury.

3 They never argued for an ATSA-specific  
4 materiality test in the lower court.

5 JUSTICE KENNEDY: Well, I think you're  
6 right. They seem to rely mostly on the proposition that  
7 this all should have been submitted to the judge.

8 MR. RUSSELL: That's correct. That was  
9 their principal argument below, and that's clearly  
10 wrong. And the United States agrees with us, that  
11 that's not the right way to -- to go about dealing with  
12 this.

13 This is a statute that is premised on --  
14 that is based on the model of qualified immunity. In  
15 the Federal courts, qualified immunity factual issues  
16 are submitted to the jury and subject to ordinary  
17 appellate review, sometimes heightened appellate review  
18 with --

19 JUSTICE GINSBURG: What are -- what are the  
20 factual issues? You said the factual issues. I didn't  
21 think that there was much dispute about what was said to  
22 the air traffic safety. So what are -- what are the  
23 disputed facts that the jury would find relevant to the  
24 immunity?

25 MR. RUSSELL: So the materiality consider

1 compares what was said -- and you're right, there's no  
2 dispute about that -- and what was true, and there's a  
3 lot of dispute about that.

4 But we think that, at the end of the day,  
5 even if you say that it's a question of law for the  
6 court, even if you take it upon yourselves to decide it,  
7 we don't think that there's any way in which they can  
8 say that these statements were materially true.

9 CHIEF JUSTICE ROBERTS: So am I right in  
10 understanding that there be two -- you would view these  
11 two scenarios differently? The same historic facts.  
12 Somebody calls and said this happened, this happened,  
13 this happened. He was acting crazy. And the next one,  
14 this happened, this happened, this happened, and he's  
15 crazy.

16 Do you think you lose immunity in the latter  
17 case, but not the former case?

18 MR. RUSSELL: No, I think you'd lose in  
19 both.

20 CHIEF JUSTICE ROBERTS: You would lose in  
21 both?

22 MR. RUSSELL: Yes. I mean, I think in  
23 both --

24 CHIEF JUSTICE ROBERTS: So a layperson -- a  
25 layperson who -- you know, just looks at this and said,

1 he's acting crazy, they're not immune from that? If  
2 they called TSA and say that, everything is true, I  
3 guess you would say up until that characterization.

4 MR. RUSSELL: Well, let me be clear about  
5 that then. If they give all the -- all the facts -- and  
6 I'm not sure what all the this is true, this is true,  
7 this is true -- they simply explained all the facts and  
8 then appended to it their evaluation that showed he was crazy,  
9 I don't think they would be immune. I think they lose  
10 immunity for that.

11 But that's not what happened.

12 CHIEF JUSTICE ROBERTS: But they would be --  
13 the airline would be immune?

14 MR. RUSSELL: The airline would be immune,  
15 correct. But that's not what happened in this case.

16 CHIEF JUSTICE ROBERTS: No, no. I know.  
17 But I'm trying to find out if you think there's a  
18 difference between the person's subjective, uneducated  
19 evaluation, "He was acting crazy," and a difference  
20 between that person saying, "He's crazy."

21 MR. RUSSELL: I don't think there's a  
22 difference between that. What's -- the difference is  
23 when the person asserts that somebody is mentally  
24 unstable as a fact and doesn't give the background facts  
25 to allow somebody to make an alternative --

1 JUSTICE SOTOMAYOR: So other than proving at  
2 trial that these statements were misleadingly false --  
3 or false, how did you prove that the statements would  
4 have had an effect on a reasonable security officer?

5 MR. RUSSELL: Well, let me -- sure.

6 JUSTICE SOTOMAYOR: How do you -- what's the  
7 evidence that you expect parties to present and what was  
8 it you presented to show that their response would have  
9 been different?

10 MR. RUSSELL: Well, let me ask -- answer the  
11 second question first, which is we had an expert witness  
12 who was formerly in charge of writing security  
13 regulations for TSA and the FAA before that who  
14 testified that, in light of the truth, a call wasn't  
15 even warranted, but that he perfectly understood why TSA  
16 acted the way it did, given the contents of the call.

17 Now, this wasn't a focus because nobody made  
18 the argument that this could be a materially false --

19 JUSTICE BREYER: But we have granted cert on  
20 this question. So -- so given that fact, could we do  
21 this: One, yes, it has to be false; two, the Colorado  
22 supreme court, because of footnotes 5, as well as 6,  
23 which I haven't picked up, and other things they've  
24 said, is at least ambiguous about the role the jury's  
25 finding played.

1           And given that fact, what we'll do is we'll  
2 go through and see where the parties agree about what  
3 happened in -- in the world, and insofar as they agree,  
4 we'll take it, you see. Your side will get the  
5 underlying assumption, and looking at it, as it's agreed  
6 upon, we find either that it would be or wouldn't be  
7 within the scope of the immunity. And on that one, you  
8 might lose.

9           But is there -- is there -- what do you  
10 think of that procedure?

11           MR. RUSSELL:           Well, I definitely think that  
12 it would be appropriate for this Court to write an  
13 opinion that says, look, to the extent footnote 6  
14 suggests that some true statements aren't protected by  
15 ATSA, that's wrong.

16           JUSTICE BREYER:           No, it doesn't say that.  
17 It says -- footnote 6 has to be read with footnote 5,  
18 which I hadn't picked up. And once I put those two  
19 footnotes together, I have no idea what the Colorado  
20 supreme court says.

21           MR. RUSSELL:           Well, I think you can say,  
22 look, we don't know what it means, but to the extent it  
23 means that ATSA doesn't affect all true statements,  
24 that's wrong. But in this case, the jury found -- and  
25 three courts -- Colorado courts affirmed, that the



1 statements weren't true.

2 And, Justice Ginsburg, there was an  
3 instruction to the jury, and in Instruction No. 9 at  
4 page 579 of the Joint Appendix, I have been told the  
5 jury, that to enter a verdict, they had to find that the  
6 statement was false.

7 So the jury found that that was false. On  
8 appellate review, two courts of appeals found that there  
9 was sufficient evidence for that, even though they  
10 didn't ask for a materiality instruction. Those two  
11 courts resolved every material falsity claim or every  
12 materiality objection that AWAC actually raised, in the  
13 context in which it actually raised it, which was  
14 whether we had satisfied our version -- burden to prove  
15 the elements of common law defamation.

16 JUSTICE ALITO: Well, on two of the -- on  
17 two of the three statements, the difference between the  
18 literal -- the very strict truth and what was said is  
19 very slight. But you dispute that on -- they'd said he's  
20 an FFO officer, and he may be armed.

21 MR. RUSSELL: I think that there's a huge  
22 difference. There's no reason to say that he may be  
23 armed.

24 JUSTICE ALITO: That's literally true. It's  
25 literally true. He's an FFO officer. He has a gun. He

1 may be armed.

2 MR. RUSSELL: Suppose I were to know that  
3 there is a lawyer in town who has a concealed carry  
4 permit, and I know he has a hearing at the courtroom --  
5 at the courthouse down the road later today.

6 If I were to call the security folks there  
7 and say, hey, just to let you know, there's a -- there's  
8 a lawyer coming to the argument, and he may be armed,  
9 everybody would understand that I was saying to them  
10 that there was something more than the theoretical  
11 possibility that he's armed and that I have some  
12 information to believe that he is violating or intending  
13 to violate the law that prohibits him from bringing that  
14 gun to the court.

15 JUSTICE ALITO: And what would be a true  
16 statement?

17 MR. RUSSELL: A true statement would be --

18 JUSTICE ALITO: Not with respect to the  
19 lawyer; with respect to your client.

20 MR. RUSSELL: I think it would have been  
21 true for them to say, look, we're calling to let you  
22 know, because Mr. Hooper's an FFDO, we don't have any  
23 reason to believe that he has gun with him, but we can't  
24 tell for sure, so we just thought we would tell you, in  
25 case you have any questions and want to investigate

1 further.

2 By not saying -- by not qualifying "may be  
3 armed" with the statement that "we have no reason at all  
4 to believe that he actually has a gun," which is the  
5 truth, I think they gave a very different impression --  
6 and Mr. LaWare, for example, the vice president who made  
7 the decision to make the call, testified that, if he had  
8 been told, as a pilot, that a mentally unstable person  
9 who may have a gun was boarding his plane, it would make  
10 him very concerned about the safety of his crew and  
11 passengers. This is at JA 271 to 272.

12 And as a consequence, he said those aren't  
13 the words I would have anticipated being used because he  
14 recognized, as somebody in the industry, what effect  
15 those words would have on a reasonable security person.  
16 So that --

17 JUSTICE ALITO: But you're talking about a  
18 very subtle implication of the statement. And I agree  
19 with you, there's an implication there that may not be  
20 justified, but you're talking about something very  
21 subtle in -- in the context of -- of someone making a  
22 call to report a possible threat.

23 MR. RUSSELL: Well, again, I don't think  
24 it's that subtle. I think an ordinary person would --  
25 would think I was being misrepresenting in the example

1 that I gave, which I think is the same. But in any  
2 event --

3 JUSTICE KENNEDY: Well, just pursuing  
4 Justice Alito's point about the other statement, the  
5 other, that he was terminated today. Well, he didn't  
6 get notice. I mean, that -- that's --

7 MR. RUSSELL: We acknowledge that that is  
8 not an important part of our case.

9 JUSTICE KENNEDY: And then the final  
10 thing, I guess, was the same thing Justice Scalia had in  
11 mind, was that he's unstable.

12 MR. RUSSELL: Well, "Mentally unstable." And  
13 that's -- you know, this Court has used the phrase  
14 "mentally unstable" as a shorthand for describing people  
15 who are subject to involuntary commitment, and people  
16 who are barred by Federal law from owning a gun. These  
17 are trigger words in -- in this context. So that --

18 CHIEF JUSTICE ROBERTS: Well, you're not  
19 suggesting it would be a different case if they just  
20 said he's unstable, as opposed to he's mentally  
21 unstable, are you?

22 MR. RUSSELL: No, because I would understand  
23 that they're not saying that he might fall over.

24 CHIEF JUSTICE ROBERTS: Well, that's what  
25 you were saying.

1 (Laughter.)

2 CHIEF JUSTICE ROBERTS: When Justice Kennedy  
3 posed the question that he was unstable, you said,  
4 "mentally unstable." And my point is that that doesn't  
5 make any difference to your case, does it?

6 MR. RUSSELL: No, it doesn't.

7 CHIEF JUSTICE ROBERTS: Okay.

8 MR. RUSSELL: It doesn't. I'm sorry. I  
9 didn't mean to be facetious about it. But I-- the point is  
10 that whether they said "unstable" or "mentally  
11 unstable," everybody understood it was the same thing,  
12 and it had the same implication, which is very serious.

13 JUSTICE GINSBURG: Well, they didn't -- they  
14 said, we were concerned about his mental stability.

15 MR. RUSSELL: They said that, but they also  
16 said he is unstable. They said, "unstable pilot." And  
17 when you couple those together, even if they just said  
18 they were concerned, I think that would be false and  
19 misleading, in part, because they weren't.

20 I mean, we had testimony. We asked them,  
21 "Did you think that Mr. Hooper was mentally unstable?"  
22 And Mr. Orozco said, "I don't believe he was mentally  
23 unstable."

24 JUSTICE ALITO: Wouldn't you think it makes  
25 a difference we're talking here about a pilot? I mean,

1 my impression of pilots is that they are supposed to  
2 remain perfectly calm, even when terrible things happen.  
3 Well, all the -- you know, all engines are on fire and  
4 one of the wings has fallen off, but -- you know, you  
5 don't start ranting and screaming.

6 And so someone described him as acting in a  
7 manner that was more unprofessional than they had ever  
8 seen. Do you think that makes a difference?

9 MR. RUSSELL: I think you could take that  
10 into account, but you also have to recognize that,  
11 hopefully, this wouldn't be the same because most people  
12 don't get treated as unfairly as Mr. Hoeper was.

13 And I think there is abundant evidence for  
14 the jury to conclude that he was acting with -- maybe not the  
15 best way, but he was acting within the -- the spectrum  
16 of normal human reaction to being treated that unfairly,  
17 with respect to something that important.

18 JUSTICE ALITO: But maybe for ordinary  
19 people, but how about for pilots?

20 MR. RUSSELL: I think even for pilots. For  
21 example, Mr. Sherman, who is a pilot, who's trained in  
22 spotting threats, testified -- he's the one who got  
23 yelled at -- testified that, when he left the training  
24 center, he didn't think that Mr. Hoeper was acting  
25 irrationally, he didn't think that he was a threat.

1           He was shocked to learn that calls to TSA  
2 had actually been made. And Mr. Orozco talked to him  
3 briefly before he boarded the flight, and he knew, at  
4 that point, that he was an FFDO, he was a pilot, he knew  
5 about the last chance letter, he knew about the prior  
6 incidents of pilots taking down airplanes. And he told  
7 him, go ahead, get on the flight.

8           There really isn't -- these are the people  
9 who would know what is surprising and concerning about  
10 the conduct of our client in this case, and none of them  
11 were willing to say that he was, in fact, mentally  
12 unstable, and that's telling.

13           You know, even if they are willing to say  
14 now, through their lawyers, that they had concerns about  
15 his mental stability, the fact that they weren't willing  
16 to say that he was mentally unstable shows that they  
17 recognized that there's a material difference between  
18 those two statements.

19           Otherwise, they would have said, yes, he was  
20 mentally unstable because we had concerns about his  
21 mental stability. And that's the same thing.

22           JUSTICE BREYER:           All of us have had the  
23 experience -- at least I have, of -- if I get very angry  
24 at something, one of my children will say, God, he's  
25 mentally unstable. See, I mean, that's -- people use

1 that word in different contexts.

2 And what's worrying me is -- is that some  
3 real threat comes along and the lawyers get involved and  
4 the people are going to report it to the TSA, start  
5 watching their words and they don't know what the  
6 lawyers mean exactly -- and you understand the problem.

7 MR. RUSSELL: I understand --

8 JUSTICE BREYER: So why isn't the best thing  
9 to say is, look, there is leeway here -- considerable  
10 leeway on the part of the airline or anyone else who's  
11 reporting -- that are reporting things to TSA. All it  
12 means is they are going to search him more thoroughly.

13 MR. RUSSELL: There is enormous leeway  
14 already, and that is in the actual malice standard. So  
15 long as the person believes that what he is saying true,  
16 so long as he doesn't suspect that it's untrue, he has  
17 immunity, even if it's grossly untrue. And that's  
18 the -- that's, I think, one of the reasons why -- and  
19 you have that protection under the First Amendment to  
20 start with.

21 And that's one of the reasons why we're able  
22 to identify only six cases, and this is one of them, in  
23 the entire ten-year history of the statute, when  
24 anybody's even cited this provision in an opinion,  
25 published or unpublished, State or Federal.



1           And that's because the protection that's  
2           afforded by the actual malice standard, which comes in  
3           the First Amendment, but also in this statute, provides  
4           ample protection for people who are acting in good  
5           faith. And I don't think that you need to come up with  
6           some special materiality light standard under this  
7           statute, particularly when there's no reason to --

8           JUSTICE KAGAN:           Mr. Russell, weren't you,  
9           yourself, suggesting the twist on the materiality  
10          standard? You said it shouldn't be -- in the usual  
11          case, we said would it have had a different effect on  
12          the mind of, essentially, the average reader -- the  
13          reasonable reader.

14          And you say, no, here, we're not supposed to  
15          think of the reasonable person, generally; we're  
16          supposed to think about the reasonable TSA officer.  
17          Haven't you conceded that yourself?

18          MR. RUSSELL:           Well, I think that's -- that's  
19          an application of the Masson standard, which is if you  
20          know who the reader is. I think it's reasonable to ask  
21          the jury to think about who the reader is, and -- but  
22          it's a world of difference to say --

23          JUSTICE KAGAN:           Well, how do we know about  
24          the reasonable TSA officer? I mean, you made the point  
25          that we don't know a lot about TSA officers, in terms of

1 what they are going to do with respect to any given set  
2 of facts, and -- you know, I find it a little bit hard  
3 to think about the question, what does a reasonable TSA  
4 officer think, without thinking about the question,  
5 what's a reasonable TSA officer going to do?

6 MR. RUSSELL: Well, you have the same  
7 problem with figuring out what he's going to do. In  
8 fact, it's much harder. And so I think whatever -- if  
9 you adopt that standard, you have the same problem with  
10 my standard, and I think my standard's easier to deal  
11 with.

12 I think you can look at -- you can have  
13 expert testimony, as we did. You can look at -- you can  
14 ask the people who are in the industry and involved in  
15 the case, as we did. And they all seem to recognize  
16 that saying somebody is mentally unstable versus saying  
17 we have concerns about his mental state or that he is  
18 angry would have a hugely different effect on a  
19 listener's mind in that industry.

20 That's why Mr. LaWare said he would be very  
21 concerned if those words were used and said --

22 JUSTICE SOTOMAYOR: I'm sorry. Tell me the  
23 difference between having a huge effect on that  
24 listener's mind and the listener taking a different  
25 action? I'm not sure how -- what the difference is.

Official

1 MR. RUSSELL: Well, the difference is -- I  
2 mean, what Mr. LaWare was saying is it calls --

3 JUSTICE SOTOMAYOR: I'm more upset --

4 MR. RUSSELL: I'm more concerned--

5 JUSTICE SOTOMAYOR: -- but -- I'm more  
6 concerned, but I'm going to take the identical action?

7 MR. RUSSELL: Well, I'm saying that you  
8 don't have to figure out what they would have done. In  
9 part, this is just general defamation law, right? You  
10 are entitled to presume damages, so long as what is said  
11 affects your belief about this person. And there's  
12 nothing in this statute -- there's nothing in the text  
13 of the statute that alters that ordinary standard.  
14 It's --

15 CHIEF JUSTICE ROBERTS: Well, but it affects  
16 your belief is different in a context like this. It may  
17 not affect your belief, but you may decide, but given  
18 what's at stake, I don't think he's mentally unstable  
19 just because somebody calls and says that, but I'm going  
20 to send it up to my supervisor, make sure he feels the  
21 same way.

22 And you tell me that you lose immunity if he  
23 says, I don't think he's mentally unstable and -- you  
24 know, throws it away, in that -- as opposed to when he  
25 says, I don't think he's mentally unstable, but let's

1 see what the boss thinks.

2 MR. RUSSELL: Well, certainly, what they do  
3 with the information is reflective of the effect it has  
4 on their minds. So we do think that, in any case, you  
5 could show that TSA would have acted differently. You  
6 would necessarily be showing that it had a different  
7 effect on their mind.

8 But the problem is TSA is not going to tell  
9 us what they would have done if -- if a different  
10 statement had been made. This is not a standard that  
11 can actually be applied in the real world. And at the  
12 end of the day, it's not necessary because there is  
13 substantial protection already provided to good-faith  
14 speakers who will know that, so long as they are  
15 believing what they say, they can say whatever comes to  
16 their mind, without having to consult with their lawyer.

17 In any event, even if this Court thought  
18 that was the standard, even if you thought -- and we're  
19 willing to forgive them for not raising that standard in  
20 the Colorado courts, we do think that, on this evidence,  
21 there was a basis for concluding that TSA would have  
22 acted differently, had they known the truth.

23 And that's because, as I said before, we had  
24 expert testimony from somebody who is very qualified in  
25 this area who said that, had he known the truth, as a

1 TSA official, he wouldn't have wanted to receive a call.  
2 And that -- he perfectly understood the very dramatic  
3 response, given the content of what was actually said.

4 JUSTICE KAGAN: So what are the other things  
5 TSA could have done? I mean, let's assume that this  
6 call was made and it was a much more -- in tone, it was  
7 much more factual and without using any of these words,  
8 but it said the guy really lost his temper and -- you  
9 know, he has this license, and we have no idea whether  
10 he, in fact, is carrying a gun, but he could be? What  
11 could the TSA officers have done? What do you think  
12 they should have done, short of what they did?

13 Say that they were concerned, they thought  
14 this might be a problem? What are the midlevel  
15 possibilities about-- of a response?

16 MR. RUSSELL: So one possibility is -- it  
17 depends, very much, on when the call was made. Part of  
18 the difficulty here was raised was that Mr. Doyle waited  
19 for two-and-a-half hours after receiving this  
20 information before making the call.

21 Had the call been made earlier, there was  
22 testimony there was lots of things they could have done.  
23 They could have called and checked to see if he had  
24 checked in his gun at security. They could have found  
25 him. They could have called him on his cell phone.

1           But even when -- having waited as long as  
2 they did, they could have asked somebody on the airplane  
3 to just go and ask him and talk to him and see if there  
4 was reason to believe that there was something amiss  
5 that would require going back to the gate.

6           Now, I acknowledge that, again, because the  
7 call was so late, there really wasn't a ton that could  
8 be done, but that's not a reason to give them greater  
9 leeway.

10           JUSTICE KENNEDY:           So you want us to say the  
11 call has to be made right away, without reflection,  
12 without talking to supervisors, without some quiet  
13 discussion first? That's what you want us to put in the  
14 opinion?

15           MR. RUSSELL:           No. I mean, TSA has told people,  
16 report what you know immediately. And so we do think  
17 that Mr. Doyle's conduct, in which he wasn't consulting  
18 with supervisors -- he did nothing during that  
19 two-and-a-half hours that would reflect that he had an  
20 actual concern about mental stability or danger here.

21           JUSTICE SOTOMAYOR:           I thought I read  
22 somewhere that, after this incident, there was a  
23 discussion between or among Mr. Doyle and various  
24 government agencies to figure out how to avoid something  
25 like this in the future.

1 MR. RUSSELL: He did testify to that effect,  
2 yes.

3 JUSTICE SOTOMAYOR: Who testified? Doyle?

4 MR. RUSSELL: Mr. Doyle did.

5 JUSTICE SOTOMAYOR: And what was your  
6 sense -- I don't remember the testimony now. What --

7 MR. RUSSELL: I don't think he gave any  
8 details about the content of that discussion. But,  
9 certainly, you can understand why TSA would not want  
10 something like this to happen again because -- you know,  
11 when somebody is given false information that --  
12 particularly when it leads to an elevated response that  
13 wouldn't have been necessary under a proper report, that  
14 gives rise to security concerns and dangers in itself.

15 When you send armed men onto a plane full of  
16 nervous people, in close quarters, who don't know what's  
17 going on, and officers who believe that there may be a  
18 man on the gun -- with a gun, who's mentally unstable on  
19 the plane, that is a recipe for danger and for  
20 accidental things to happen and for people to get hurt,  
21 in addition to diverting attention from things that  
22 might be actual more -- more serious incidents that  
23 are going on at the same time.

24 Congress didn't think that the way to  
25 promote airline security here is simply to give carte

1 blanche immunity to anybody who reports anything about  
2 suspicious activity, if they thought they could have  
3 ended at subsection A. Instead, they recognized that  
4 there's a balance and that people who make bad-faith  
5 reports that are materially untrue ought not to be  
6 immune, recognizing that there might be some deterrent  
7 effect at the margins, but acknowledging the need to  
8 strike this balance.

9           And in this case -- whatever you end up  
10 doing in this case, and I would like to come back,  
11 before I leave, to this point, that this case has been  
12 litigated up the chain, without any request for  
13 ATSA-specific materiality instruction, with the court  
14 addressing every material truth objection that was  
15 actually made in the context in which it was made.

16           And it's important to point out that they  
17 never, even when they argued material truth, argued that  
18 mentally unstable -- or were concerned about mental  
19 instability was materially true.

20           The only argument they ever made about  
21 that -- and you can read it at the appendix to the Red  
22 Brief, was that this was a protected statement of  
23 opinion because it could not be true or false. And  
24 there's a world of difference between saying that  
25 something isn't true or false and saying that it is



1 true.

2 Because to determine whether it's protected  
3 opinion, you only have to look at the statement to  
4 determine whether it's substantially true. You have to  
5 look at the evidence. And so they have not -- at the  
6 very least, they have not preserved any argument that  
7 the statement "mentally unstable" was materially true.

8 So, at the end of the day, we think that you  
9 can satisfy the government's need for clarity about what  
10 the legal standard is by simply saying ATSA protects  
11 true statements, full stop, but, nonetheless, affirming  
12 this case -- the opinion in this case on the ground that  
13 the Colorado court asked whether these statements were  
14 true and said that there was sufficient evidence that  
15 they were not and resolved every materiality objection  
16 that they actually made in the course of their opinion.

17 The fact that they did it under a different  
18 subheading, that they asked the right question under the  
19 wrong subheading, isn't a ground for reversal in this  
20 case.

21 JUSTICE GINSBURG: How do you add to the  
22 question -- the question in this case was put by the  
23 Court -- the question whether ATSA immunity may be  
24 denied without a determination the air carrier's  
25 disclosure was material and false?

1 MR. RUSSELL: The answer to that question is  
2 no, with the caveat that an appellate court has no  
3 obligation to resolve materiality objections, unless  
4 they're actually raised by the defendant.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Cohn, you have three minutes remaining.

7 REBUTTAL ARGUMENT OF JONATHAN F. COHN

8 ON BEHALF OF THE PETITIONER

9 MR. COHN: Mr. Chief Justice, and may it  
10 please the Court:

11 Two very quick points: First, the mixed  
12 question, the application of law to facts most certainly  
13 should be decided by the court, not the jury just like  
14 this Court held in *Muehler v. Mena* or *Nellis and Congus*.

15 The historical facts are a separate  
16 question, but the ultimate question of materiality is  
17 one that should be decided by the --

18 JUSTICE SOTOMAYOR: Well, how do we decide  
19 what a reasonable security officer would do?

20 MR. COHN: How do we decide it?

21 JUSTICE SOTOMAYOR: How does -- how -- how  
22 do we as judges? I'm not sure how juries would do it,  
23 I'm not quite sure how judges would do it. So what evidence  
24 did you proffer? He says he had an expert. What did  
25 you have at trial?

1           MR. COHN:           We had experts, too. And judges  
2 should resolve it, just like they resolve issues of  
3 reasonable force and probable cause. They have to use  
4 judgment and common sense, in light of the broad leeway  
5 that TSA should be given in answering these questions,  
6 but the important thing is resolving that issue at the  
7 earliest possible stage.

8           JUSTICE SOTOMAYOR:           Yeah, but we don't  
9 decide whether it was reasonable force, if we think  
10 there's a question about that.

11          MR. COHN:           If there's a question of  
12 historical fact, if there --

13          JUSTICE SOTOMAYOR:           No, no. Not a question  
14 of historical -- if there's a question about how a  
15 reasonable officer would respond. There's competing  
16 experts. Who decides that question?

17          MR. COHN:           Well, the - the only

18          JUSTICE SOTOMAYOR:           And there are some  
19 levels of -- of force that we can say, as a matter of  
20 law, don't qualify as excessive, and we have said that.  
21 But when have we said that what might be excessive to  
22 one -- to some, is a jury question -- is a judge --

23          MR. COHN:           According -- Nellis said the  
24 ultimate question is for a court to decide. But our  
25 point is, first of all, the lower court here said the

1 question is for a court to decide for ATSA immunity.  
2 But under any standard, we should still prevail because  
3 the matter of law, the statement here simply is  
4 immaterial. Falsity -- the alleged falsity is  
5 immaterial. Under any standard, the Court should hold,  
6 as a matter of law, the standard here is immaterial.

7 And the second point I was going to address  
8 is the Court should address that application question in  
9 this case because airlines need guidance. They need  
10 clarity. They need predictability on what the law is.

11 And right now, there's no predictability  
12 because the lower court held that hairsplitting  
13 distinctions make a difference, that the difference  
14 between fire today and fire tomorrow is a material  
15 difference. And the Court should make clear those  
16 hairsplitting distinctions do not make a difference.

17 JUSTICE KAGAN: Mr. Cohn, what if I  
18 think that TSA might have reacted differently to what  
19 was actually said and to what really should have been  
20 said? Would they have reacted either way, they should  
21 have done something either way, but they would have done  
22 a different kind of thing? What if I think that? What  
23 does that suggest about the proper resolution of this  
24 case?

25 MR. COHN: I would say it matters on whether

1 that different thing is material. So, for instance, if  
2 it's sending one officer versus two officers to the  
3 plane, that's not material. That does not make a  
4 difference. This is a case this Court should decide.  
5 There's no material distinction between mental stability  
6 and mental state or rationality or blow up.

7 Thank you, Mr. Chief Justice.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 The case is submitted.

10 (Whereupon, at 11:04 a.m., the case in the  
11 above-entitled matter was submitted.)

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