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## A SLIP OF THE TONGUE: HOW THE SUPREME COURT PLACED AIRLINE IMMUNITY IN THE CLOUDS

CHASE COBERN\*

**I**N RESPONSE TO THE most catastrophic breach of air transportation security in U.S. history, Congress created the Transportation Security Administration (TSA) to “receive, assess and distribute intelligence information related to transportation security.”<sup>1</sup> Seeking to “encourage[ ] airline employees to report suspicious activities” to the TSA, Congress granted airlines immunity from civil liability arising from such reports.<sup>2</sup> As an exception, immunity is not extended to airlines for statements “made with actual knowledge that the disclosure was false, inaccurate, or misleading” or “made with reckless disregard as to the truth or falsity of that disclosure.”<sup>3</sup> Interpreting this provision in *Air Wisconsin Airlines Corp. v. Hoeper*,<sup>4</sup> the Supreme Court considered whether Congress, in using terms “borrowed” from free speech precedent, meant to adopt the accompanying First Amendment “cluster of ideas” for purposes of Aviation and Transport Security Act (ATSA) immunity.<sup>5</sup> Holding that it did, the Court invoked the standard of *New York Times Co. v. Sullivan*<sup>6</sup>

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<sup>1</sup> Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, § 101, 115 Stat. 597 (2001) (codified at 49 U.S.C. § 114(f)(1) (2012)).

<sup>2</sup> ATSA § 125 (codified at 49 U.S.C. § 44941) (capitalization and boldface type omitted).

<sup>3</sup> *Id.*

<sup>4</sup> 134 S.Ct. 852 (2014).

<sup>5</sup> *Id.* at 861.

<sup>6</sup> See 376 U.S. 254, 279–280 (1964) (requiring “actual malice”—a statement made “with knowledge that it was false or with reckless disregard of whether it was false or not”).

and its progeny,<sup>7</sup> bolstering immunity for airlines absent a showing a report was “materially false.”<sup>8</sup>

Having answered the question it granted certiorari to decide, the majority then proceeded to reach beyond its scope of review by *applying* the standard as a matter of law,<sup>9</sup> rather than following its usual practice of remanding fact-intensive questions back to the lower court.<sup>10</sup> The allocation of the “materiality” determination underlying airline immunity—whether for judges, as the majority’s application might imply, or for juries, as the standard’s precedent expresses—is of critical importance for future cases involving false or misleading reports to the TSA. In examining the legal and practical implications of the Supreme Court’s overreach, this note argues that *Hoeper* threatens the jury’s vital role as the arbiter of credibility in an area deserving of its deference—the uniquely sensitive context of post-9/11 air transportation security.

William Hoeper was a pilot for Air Wisconsin Airlines Corporation, but after six years of flying, the airline ended flights from his home base on all aircraft for which he was certified.<sup>11</sup> Thus, to continue flying for Air Wisconsin, Hoeper needed to gain certification to fly a new aircraft.<sup>12</sup> After failing on three attempts to certify, Hoeper was granted a “Last Chance Agreement” by Air Wisconsin, in which he understood he would likely lose his job if he failed again.<sup>13</sup> On his fourth attempt, Hoeper performed poorly in a flight simulation and angrily accused his instructor of “railroading the situation.”<sup>14</sup> The instructor later called the airline’s fleet manager, Patrick Doyle, to discuss the incident, relaying that Hoeper had “blown up” and was “very angry.”<sup>15</sup> Doyle then booked Hoeper a flight home and contacted the

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<sup>7</sup> See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986) (actual malice requires *falsity*); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (*falsity* must be *material*).

<sup>8</sup> See *Hoeper*, 134 S. Ct. at 861.

<sup>9</sup> See *id.* at 864.

<sup>10</sup> See *Holland v. Florida*, 560 U.S. 631, 654 (2010) (acknowledging “the prudence, when faced with a [ ] . . . fact-intensive inquiry, of allowing lower courts to undertake it in the first instance”).

<sup>11</sup> See *Hoeper*, 134 S. Ct. at 858.

<sup>12</sup> *Id.*

<sup>13</sup> See *Air Wis. Airlines Corp. v. Hoeper (Hoeper II)*, 320 P.3d 830, 844 (Colo. 2012) (en banc).

<sup>14</sup> See *Hoeper*, 134 S. Ct. at 858.

<sup>15</sup> See *Hoeper v. Air Wis. Airlines Corp. (Hoeper I)*, 232 P.3d 230, 234 (Colo. App. 2009).

TSA.<sup>16</sup> In the ensuing defamation action, a Colorado jury found that Doyle told the TSA that Hoyer “may be armed,” the airline was “concerned about his mental stability and the whereabouts of his firearm,” and an “[u]nstable pilot . . . was terminated today.”<sup>17</sup> Hoyer was in fact authorized as a Federal Flight Deck Officer to carry a firearm “while engaged in providing air transportation,”<sup>18</sup> but he was not authorized to carry a firearm on the flight to and from his testing location.<sup>19</sup> In response to Doyle’s report, the TSA ordered Hoyer’s plane back to its gate and sent officers aboard to seize him, only to find after questioning that he was not carrying a firearm.<sup>20</sup> Hoyer was permitted to board a later flight and was fired by Air Wisconsin the following day.<sup>21</sup>

Hoyer sued Air Wisconsin in Colorado state court for defamation, among other claims.<sup>22</sup> Raising immunity under the ATSA, Air Wisconsin moved for summary judgment and later for directed verdict, but was denied twice by the trial judge who ruled that “the jury was entitled to find the facts pertinent to immunity.”<sup>23</sup> The trial judge instructed the jury to allow Hoyer’s case to go forward if he had proved the airline made a § 44941(b) disclosure,<sup>24</sup> but did not state the provision protects disclosures that are “materially true.”<sup>25</sup> The jury found for Hoyer and later awarded him \$1.2 million on his defamation claim.<sup>26</sup> On appeal, Air Wisconsin “primarily assert[ed]” that the trial judge erred in submitting the immunity question to the jury.<sup>27</sup> Noting a circuit split on the “allocation of decision-mak-

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<sup>16</sup> See *Hoyer*, 134 S. Ct. at 858–59.

<sup>17</sup> See *id.* at 859.

<sup>18</sup> ATSA, Pub. L. No. 107-71, §126, 115 Stat. 597 (2001) (codified as amended at 49 U.S.C. § 44903 (2012)).

<sup>19</sup> See *Hoyer*, 134 S. Ct. at 859.

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See *id.* at 859–60.

<sup>24</sup> See 49 U.S.C. § 44941(b) (2012) (removing immunity for disclosures “made with actual knowledge that the disclosure was false, inaccurate, or misleading” or “made with reckless disregard as to the truth or falsity of that disclosure”).

<sup>25</sup> See *Hoyer*, 134 S. Ct. at 860.

<sup>26</sup> See *id.*

<sup>27</sup> See *Hoyer v. Air Wis. Airlines Corp. (Hoyer I)*, 232 P.3d 230, 233 (Colo. App. 2009).

ing between judge and jury” for immunity in other contexts,<sup>28</sup> the Colorado Court of Appeals affirmed, finding that where ATSA immunity turns on disputed issues of material fact, the question should be submitted to the jury.<sup>29</sup> An en banc Colorado Supreme Court disagreed, declaring ATSA immunity a question of law and allowing judges to “make necessary findings of fact relevant to the determination.”<sup>30</sup> The state’s high court performed an exhaustive analysis of Doyle’s individual statements, ultimately finding, as did the jury, that Air Wisconsin was not entitled to immunity.<sup>31</sup> The U.S. Supreme Court granted certiorari to resolve “whether ATSA immunity may be denied under § 44941(b) without a determination that a disclosure was materially false.”<sup>32</sup> After answering this question in the negative, the majority applied the material falsity standard to Doyle’s report, ultimately restoring the airline’s immunity and reversing the jury verdict repeatedly upheld by the Colorado courts.<sup>33</sup>

All nine justices agreed Congress “adopt[ed] the cluster of ideas that were attached to each borrowed word” from *Sullivan* and its progeny, and had thus meant to remove ATSA immunity only for materially false statements.<sup>34</sup> Drawing on defamation case law to define speech not protected by the First Amendment, the Court explained that “[m]inor inaccuracies” are insufficient where “the substance, the gist, the sting, of the [report is] justified.”<sup>35</sup> A statement is not materially false unless it produces a different effect on the mind of the “relevant listener” than the “truth would have produced.”<sup>36</sup> In the ATSA context, the Court identified a “reasonable TSA officer” as the relevant listener, and defined the test as whether “a reasonable [TSA] officer would consider [the falsehood] important in determining a response to the supposed threat.”<sup>37</sup>

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<sup>28</sup> See *id.* at 237 n.6 (noting that the Fifth, Sixth, Ninth, and Tenth Circuits “have permitted [immunity] to go to juries,” while the First, Fourth, Seventh, and Eleventh Circuits “reserve [the question of immunity] for the court”).

<sup>29</sup> See *id.* at 236.

<sup>30</sup> See *id.*

<sup>31</sup> *Air Wis. Airlines Corp. v. Hoeper (Hoeper II)*, 320 P.3d 830, 837–40 (Colo. 2012) (en banc).

<sup>32</sup> *Hoeper*, 134 S. Ct. at 858.

<sup>33</sup> *Id.* at 864.

<sup>34</sup> *Id.* at 861–62 (quoting *FAA v. Cooper*, 132 S. Ct. 1441, 1449 (2012)).

<sup>35</sup> *Id.* at 861 (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991)).

<sup>36</sup> *Id.* at 863.

<sup>37</sup> *Id.* at 864–65.

Drawing a partial dissent, the majority went on to “apply the material falsity standard to the facts.”<sup>38</sup> Stating it recognized “the prudence . . . of allowing the lower courts to undertake a fact-intensive inquiry,” the majority reasoned that “the need for clear guidance on a novel but important question of federal law . . . weighs in favor of our applying the ATSA immunity standard.”<sup>39</sup> Despite its decision to apply the standard, the majority expressed it was *not* taking a position on *who* is to apply the standard underlying ATSA immunity.<sup>40</sup> Not ignoring the issue altogether, however, the majority stated that “even if a jury were to find the historical facts in the manner most favorable to Hoeper, Air Wisconsin is entitled to ATSA immunity as a matter of law.”<sup>41</sup> The majority’s analysis consisted of applying the material falsity standard to each of Doyle’s individual statements.<sup>42</sup> Emphasizing the ambiguity of phrases such as “mentally unstable,” the majority reasoned that legal connotations of the phrase, which include “people suffering from serious mental illnesses,” is “hardly the only manner in which the label is used.”<sup>43</sup> In closing, the majority opined that if such “slips of the tongue” could remove airline immunity, “no airline would contact the TSA” without “the hesitation that Congress aimed to avoid.”<sup>44</sup>

In light of Congress’s clear intention of encouraging reports to the TSA, the Supreme Court properly bolstered airline immunity with the “breathing space” afforded by the First Amendment.<sup>45</sup> However, the Court failed to resolve a fundamental threshold issue and compounded this error by reaching out to decide a fact-intensive inquiry as a matter of law.<sup>46</sup> As a result of

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<sup>38</sup> *Id.* at 864.

<sup>39</sup> *Id.* at 863 n.4.

<sup>40</sup> *Id.* at 864.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 864–67.

<sup>43</sup> *Id.* at 866.

<sup>44</sup> *Id.*

<sup>45</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (noting that “inevitable” erroneous statements “must be protected if the freedoms of expression are . . . to survive”).

<sup>46</sup> The importance of first identifying *who* determines material falsity is perhaps illustrated by the considerable attention the Court devoted to the issue at oral argument. See Transcript of Oral Argument at 16, 23, 24–25, 28, 30–31, *Air Wis. Airlines Corp. v. Hoeper*, 134 S. Ct. 852 (2014) (No. 12-315) (Justice Breyer: “Are we supposed to say that matters of truth or falsity are not for the jury?”; Justice Alito: “[A]re they [viz. the Colorado Supreme Court] right that in determining ATSA immunity the jury has no role?”; Justice Scalia: “You’re going to give the jury those two instructions on materiality?”; Justice Sotomayor: “I actually

determining immunity, while also purporting *not* to take a position on whether judges or juries should make such determinations, the majority sent mixed messages to judges handling airline immunity in future cases. As the following suggests, the *Hoeper* Court's analysis epitomizes the legal and practical dangers of excluding juries from ATSA immunity.

The Court's integration of the First Amendment and ATSA was only piecemeal, as illustrated by the majority's omission of a basic free-speech principle of materiality: deference to juries.<sup>47</sup> In the partial dissent joined by Justices Kagan and Thomas, Justice Scalia acknowledged that "materiality is the sort of mixed question of law and fact that has typically been resolved by juries."<sup>48</sup> Scalia defined the jury's role as "vital . . . in the materiality inquiry," requiring "delicate assessments of the inferences a reasonable [TSA officer] would draw from a given set of facts and the significance of those inferences to him."<sup>49</sup> Moreover, these assessments typically include witness testimony,<sup>50</sup> and courts have long given deference to the jury's "opportunity to observe the demeanor of the witnesses" and resulting credibility judgments.<sup>51</sup> This deference extends to the immunity context, where a judge considering whether to grant summary judgment to a defendant raising immunity "must adopt . . . the plaintiff's version of the facts" unless "no reasonable jury could believe it."<sup>52</sup> Even the United States as *amicus curiae* in support of Air Wisconsin conceded that "[o]ur reading of the statute is that [immunity] would be a question for the jury" and "[m]ateriality

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would like your opinion . . . on whether this is an issue for the court or the jury."; Justice Kennedy: "Do I send the case to the jury?"; Justice Ginsburg: "Can we go back to the 'who decides' question. I find it very confusing. . . . So who decides? Is it . . . the court or the jury?").

<sup>47</sup> For example, though the Court relied heavily on *Masson v. New Yorker Magazine, Inc.* in defining "materiality," the majority left out *Masson's* accompanying standard of judicial review: to determine whether "[a] reasonable jury could find a material difference between the defendant's statement and the truth." See 501 U.S. 496, 522 (1991) (emphasis added).

<sup>48</sup> See *Hoeper*, 134 S. Ct. at 868 (Scalia, J., dissenting) (internal quotation marks omitted).

<sup>49</sup> *Id.* (internal quotation marks omitted).

<sup>50</sup> For example, in *Hoeper*, the jury heard a former TSA Federal Security Director testify that while Doyle's statements warranted a security response, "the actual truth did not even warrant a call to TSA." See Brief for Respondent at 42 n.18, *Air Wis. Airlines Corp. v. Hoeper*, 134 S. Ct. 852 (2014) (No. 12-315).

<sup>51</sup> See *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989).

<sup>52</sup> See *Hoeper*, 134 S. Ct. at 868 (citing *Scott v. Harris*, 550 U.S. 372, 378-380 (2007)).

is a mixed question of law and fact. We believe that also, it should be submitted to the jury.”<sup>53</sup>

Although the Court assured its standard “is an objective one, involving the hypothetical significance of an omitted or misrepresented fact to a reasonable security official,”<sup>54</sup> it neither provides, nor can it provide, any truly objective guideline for assessing the significance of threats to airline security. As pointed out in Hoepfer’s brief, a burden of proof encompassing how the TSA *would have* responded had it known the truth is likely an “impossible task,” recognizing the agency’s “need to maintain secrecy regarding airline security operations.”<sup>55</sup> Indeed, Congress authorized the TSA to prescribe regulations prohibiting disclosure of “sensitive security information” it deems “detrimental to transportation safety.”<sup>56</sup> Accordingly, the agency expansively defines “sensitive security information” to include, among other things: “security programs,” “any security incident response plan,” and “methods used to gather or develop threat information.”<sup>57</sup> The United States likewise acknowledged that the ATSA “should not be interpreted to require exploration of [TSA] procedures in private litigation.”<sup>58</sup> While both parties in this case called former federal employees to testify as expert witnesses concerning TSA procedures, the United States informed the Supreme Court that such testimony was “not authorized and not necessarily accurate in describing TSA policy.”<sup>59</sup> Nevertheless, the majority presumed a judicial capability for making objective findings from the perspective of a reasonable TSA officer.

Moreover, by criticizing the dissent’s use of legal connotations, the majority eliminated yet another tool of judicial inter-

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<sup>53</sup> See Transcript of Oral Argument, *supra* note 46, at 23.

<sup>54</sup> See *Hoepfer*, 134 S. Ct. at 864 (majority opinion).

<sup>55</sup> Brief for Respondent, *supra* note 50, at 42.

<sup>56</sup> 49 U.S.C. § 40119(b)(1) (2012).

<sup>57</sup> 49 C.F.R. § 15.5 (2014).

<sup>58</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 27 n.5, *Air Wis. Airlines Corp. v. Hoepfer*, 134 S. Ct. 852 (2014) (No. 12-315) (citing Department of Homeland Security Appropriations Act, Pub. L. No. 109-295, § 525(d), 120 Stat. 1382 (2007)) (explaining that though Congress allows civil litigants in federal court to access sensitive security information upon a showing of “substantial need,” this provision would likely not extend to ATSA immunity cases).

<sup>59</sup> See *id.*; *cf.* *MacLean v. Dep’t of Homeland Sec.*, 714 F.3d 1301 (Fed. Cir. 2013), *cert. granted*, 134 S. Ct. 2290 (U.S. May 19, 2014) (deciding whether the TSA may terminate federal employees for disclosing § 40119(b)(1) information, even where such disclosures are made pursuant to whistleblower protections).



pretation.<sup>60</sup> The majority's own connotative analysis of Doyle's statements, and concurrent rejection of connotations that "lawyers and judges may in some contexts apply,"<sup>61</sup> begs the question: what makes the majority's application any exception? This paradox leaves judges considering whether to determine materiality in a conundrum: if they follow the majority's reasoning and conduct their own connotative analysis of statements, they become susceptible to criticism, under the same reasoning,<sup>62</sup> simply because they are judges. To be sure, the majority fails to identify *any* tool of legal analysis that would facilitate a judge's own connotative analysis—that is, *its* own analysis—in place of a jury's.<sup>63</sup>

Assuming *arguendo* that judges had some objective method for analyzing reports to the TSA, they would still face the amorphous task of analyzing a "disclosure" that is itself composed of multiple, potentially false or misleading statements.<sup>64</sup> As Osit points out, the majority oddly criticized the Colorado Supreme Court for "parsing so finely the distinctions between . . . hypothetical statements and the ones that Air Wisconsin actually made," while conducting its own analysis by similarly testing Air Wisconsin's statements individually.<sup>65</sup> Judges who attempt to apply the standard will be forced to choose between testing individual statements or, as illustrated by the partial dissent, testing disclosures in their totality.<sup>66</sup> As the conflicting opinions imply, the choice of method could very well be outcome-determinative.

Finally, the majority's overreach threatens the role of the jury in a context meriting its inclusion. Without clear guidance, courts will be left to determine the allocation of decision-making between judge and jury. On one hand, they might conclude

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<sup>60</sup> See *Hooper*, 134 S. Ct. at 866.

<sup>61</sup> *Id.*

<sup>62</sup> See *id.* ("[I]t is irrelevant whether lawyers or judges might with the luxury of time have chosen more precise words.").

<sup>63</sup> See *id.* at 869 (Scalia, J., dissenting) (observing that the majority "does not even attempt to describe another usage, let alone one that would be a materially accurate description of the facts of this case as a jury might find them").

<sup>64</sup> See Steven L. Osit, *If You See Something . . . Say Something Materially True: Air Wisconsin v. Hooper and Immunity Under the Aviation and Transportation Security Act*, 26 No. 4 AIR & SPACE LAW. 1, 18 (2014) (noting that the differing methods of analysis by the majority and dissent "demonstrate . . . the potential for reasonable jurists to disagree in this assessment").

<sup>65</sup> See *id.* (quoting *Hooper*, 134 S. Ct. at 864–67 (majority opinion)).

<sup>66</sup> See *id.* (quoting *Hooper*, 134 S.Ct. at 870) (Scalia, J., dissenting) (analyzing "circumstances [that] enhanced . . . the likelihood that [a falsehood] would have a material effect on the TSA's response").

that since the Supreme Court incorporated First Amendment safeguards into the ATSA, the corresponding precedent of those safeguards, emphasizing deference to juries, must likewise apply. On the other hand, they might read the majority's application of the material falsity standard as ostensibly enabling judges to determine similar findings of fact. As the dissenters humbly point out, the jury's role is designed to "inject a practical sense that judges sometimes lack."<sup>67</sup> This practical sense is particularly important in the context of air transportation security, where private airlines enjoy immunity customarily reserved for public entities.<sup>68</sup> Moreover, deference to the jury's ability to judge the credibility of threats is necessary to protect the civil rights of those directly affected by false reports.<sup>69</sup> False or misleading reports due to post-9/11 zeal waste TSA resources and divert attention from legitimate threats. While constitutional speech protections undoubtedly encourage airlines to report legitimate security threats to the TSA, these protections should not come without scrutiny.<sup>70</sup> In sum, the Court's advent of the First Amendment into the ATSA failed to preserve the jury's opportunity to weigh in on the meaning and impact of speech in an area deserving of its deference. Courts would do well to resolve this issue by pulling airline immunity out of the clouds of judicial interpretation and placing it back into reach of the jury.

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<sup>67</sup> *Hooper*, 134 S.Ct. at 870 (Scalia, J., dissenting).

<sup>68</sup> *See, e.g.*, 28 U.S.C. § 2680 (2012) (listing exceptions to statutory waiver of sovereign immunity).

<sup>69</sup> Since 9/11, both airline employees and TSA agents have been heavily criticized for a "surge in discrimination . . . against passengers perceived to be of Arab, Middle Eastern, or South Asian descent." Michael T. Kirkpatrick & Margaret B. Kwoka, *Title VI Disparate Impact Claims Would Not Harm National Security—A Response to Paul Taylor*, 46 HARV. J. ON LEGIS. 503, 513–14 (2009) (noting that from 2001–2009, the Department of Transportation received 1,022 civil rights complaints against U.S. airlines and the TSA received 1,080 against its personnel).

<sup>70</sup> *See* Nicholas Poppe, *Discriminatory Deplaning: Aviation Security and the Constitution*, 79 J. AIR L. & COM. 113, 146 (2014) (arguing that such scrutiny "would not interfere with the legitimate safety concerns of [airlines]; rather, it would simply ensure that such concerns were actually legitimate and not borne out of underlying discriminatory animus").

