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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:

JONATHAN F. COHN, ESQ., Washington, D.C.; on behalf of Petitioner.

ERIC J. FEIGIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

KEVIN K. RUSSELL, ESQ., Washington, D.C.; on behalf of Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

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

Mr. Cohn.

ORAL ARGUMENT OF JONATHAN F. COHN

ON BEHALF OF THE PETITIONER

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

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

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

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 --

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.

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: I believe the Respondents have
24 also acknowledged that a call could have been made
25 conveying certain facts. 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, 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, the
7 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? I
4 believe they feel the jury should answer that question.
5 Again, that issue is not strictly before the Court, but
6 I think on the issue that is before the Court, they
7 agree that material falsity is part of the ATSA
8 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.

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 goes
18 to, the particular reason that the statement is made?

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

1 report --

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

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

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

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

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

19 MR. COHN: Correct. It would --

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

22 MR. COHN: Correct. And it would not be
23 immune. But the report we had here is not that
24 someone's having an affair, but, rather, the report we
25 made is that someone might possibly be giving rise to a

1 concern.

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

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

10 JUSTICE ALITO: You would?

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

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

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

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

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

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

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

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

23 MR. COHN: I think --

24 JUSTICE SOTOMAYOR: -- has a mental problem
25 or is mentally unstable? Don't you think that the

1 intent is to convey something else?

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

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

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

23 And second, the lower court recognized this
24 and said if we simply had used "irrational and blew up,"
25 we'd be immune, as opposed to saying "mentally ill."

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

8 The Colorado Supreme Court says it doesn't
9 make any difference whether -- whether it would have
10 affected TSA or not, putting it -- putting it the proper
11 way, right?

12 MR. COHN: Correct, Justice Scalia,
13 absolutely correct.

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

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

22 JUSTICE BREYER: Where did it say
23 "material"? I thought -- I thought -- I think so far as
24 I've read this, the argument is about the truth or
25 falsity of the statement. And you're saying that the

1 Colorado Supreme Court should have said it has to be
2 false. Isn't that your argument?

3 MR. COHN: They had to say it.

4 JUSTICE BREYER: Okay. Now, I've looked at
5 -- I've looked at footnote 17 or footnote 6 or whatever
6 it is on page 17, and I think that their
7 characterization of the Colorado Supreme Court is right.
8 That is, the Colorado Supreme Court is going to be very
9 surprised if we tell them that they never said it has to
10 be false. What they said here is: "In the
11 determination of immunity, we need not and therefore do
12 not decide whether the statements were true or false."
13 Correct?

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

19 So as I read that, which I think you'll hear
20 from the other side in about a few minutes, the -- the
21 Colorado Supreme Court says: Look, the jury found that
22 the statement was false, so we don't have to worry about
23 that. We're worried about whether the false statement
24 was made with reckless disregard of its truth or falsity
25 or knowledge that it was false. Okay? That's how I

1 read the footnote. And they say something like that on
2 page 30 and 31 of their brief.

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

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

15 JUSTICE GINSBURG: But did the jury -- did
16 the jury find falsity? Do you recognize that? Did this
17 jury find that the statement was, as you say, materially
18 false?

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

21 JUSTICE GINSBURG: And how did -- how did
22 they make it? Because the only thing I see is the
23 special verdict sheet and it doesn't ask that question.

24 MR. COHN: Correct. What the jury did,
25 first of all -- first of all, it shouldn't have gone to

1 the jury because it's part of the ATSA immunity
2 analysis, which is for the court to decide.

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

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

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

21 There are two different questions.
22 Materiality for defamation is -- is quite different from
23 the materiality for purposes of obtaining the immunity
24 under this Act. The latter question is for the court,
25 but the former is for the jury, it seems to me.

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

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

7 MR. COHN: My answer, Justice Breyer, to
8 your question is that the jury answered a different
9 question. They answered a question about whether it's
10 material under defamation law, not whether it's material
11 to TSA as required by ATSA and that determination not go
12 to the jury. That's for the court to decide. And the
13 lower court said: I'm not going to -- we're not going
14 to address that question, we're not going to address it
15 because it's not part of ATSA, and that was legal error,
16 as even Mr. Hoeper concedes.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 Mr. Feigin.

19 ORAL ARGUMENT OF ERIC J. FEIGIN,
20 FOR UNITED STATES, AS AMICUS CURIAE,
21 SUPPORTING THE PETITIONER

22 MR. FEIGIN: Mr. Chief Justice, and may it
23 please the Court:

24 It's essentially undisputed that in order to
25 encourage airlines to report suspicious activity to

1 proper authorities the ATSA immunizes such reports when
2 they're materially true. I want to emphasize two main
3 points about the scope of that immunity.

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

14 JUSTICE ALITO: And, Mr. Feigin --

15 JUSTICE KENNEDY: Do you think that the
16 statute, 44941, was intended by the Congress to
17 incorporate the New York Times-Sullivan standard, the
18 Masson v. New Yorker standard? And -- and if so, then
19 it -- it seems to me that the airline is under a duty
20 more strict than the one that you have just explained
21 and the Petitioner's counsel has explained.

22 MR. FEIGIN: Well, Your Honor, I think
23 there's a distinction between Masson and this case.
24 Masson follows the more general defamation law rule
25 about whether a statement is materially false in terms

1 of a person's reputation, whereas here the focus is on
2 what a reasonable security official would believe, and
3 we think that's fairly seen in the text of the statute,
4 which, again, protects statements about any suspicious
5 transaction relevant to possible violation of law or
6 regulation.

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

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

20 MR. FEIGIN: Well, Your Honor, I think the
21 only reason real difference is the context. I think in
22 Masson, you were talking about readers of a general
23 interest magazine, The New Yorker Magazine, whereas
24 here, the audience for these reports is much more
25 specialized. It's law enforcement officers who are

1 receiving reports of suspicious activity.

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

7 And I think it's particularly important that
8 the Court give wide latitude to statements in this
9 context because there's a substantially similar
10 provision that protects individuals who make reports to
11 law enforcement authorities. That's in 6 U.S.C. 1104.
12 And I think it would be very unfortunate if someone
13 responding to the TSA's ubiquitous "See something, say
14 something" campaign were to inadvertently or recklessly,
15 as later concluded by a jury, have some sort of
16 exaggeration about what they were reporting and then
17 find themselves liable for civil damages just for trying
18 to --

19 JUSTICE BREYER: I accept that for the
20 moment, accept all that. What's bothering me, a picky
21 little point. But the picky point is that your
22 statement of the question: Whether ATSA immunity may be
23 denied without a determination that the air carrier's
24 disclosure was materially false? No, can't be. But I
25 read the footnote, Footnote 6, last sentence. It says

1 there was such a determination. The jury made it, and
2 we don't have to go back over it.

3 So what are you arguing? Are you arguing
4 that there should be like, as there is in free speech
5 cases, you know, a special duty upon an appellate court
6 to go back over such a jury finding? Are you saying the
7 Colorado Supreme Court was wrong in the second part of
8 Footnote 6 when it says the jury made it? What am I
9 supposed to do in your opinion?

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

14 JUSTICE BREYER: They may have waived it,
15 you know.

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

24 JUSTICE ALITO: My understanding of what the
25 Colorado Supreme Court did is this: On the issue of

1 ATSA immunity, it said very clearly that is for the
2 court. And it says in Footnote 5 it gives no weight to
3 the jury's findings of fact with respect to the facts
4 that it found on the immunity question. And then at the
5 end of Footnote 6 what it said was, having found that
6 there is no immunity, then it was proper for the trial
7 judge to submit the defamation issue to the jury and the
8 jury made findings on the defamation issue. Is that --
9 is that your understanding as well?

10 MR. FEIGIN: That's my understanding of the
11 Supreme Court of Colorado's opinion, Your Honor.

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

16 MR. FEIGIN: Well, Your Honor, I don't think
17 this is encompassed within the question presented, but
18 our view, as we explain in Footnote 6 of our brief, is
19 that under ATSA, questions of historical facts, such as
20 what was actually said on the call and what actually
21 happened, would be submitted to the jury.

22 Materiality is a mixed question of law and
23 fact. We believe that also, it should be submitted to
24 the jury, but with very careful jury instructions,
25 making clear the very wide latitude that airlines have

1 in this context. And because airlines have such wide
2 latitude in this context, we think very often the courts
3 will be able to get rid of these kinds of cases at the
4 motion to dismiss --

5 JUSTICE SOTOMAYOR: So you disagree with
6 Justice Scalia? He drew a distinction between two forms
7 of materiality, whether something's materially false,
8 meaning is it misleading. That, presumably, would go to
9 a jury. But whether or not this misleading statement
10 would be material to the TSA or to security officers is
11 a question for the court. You disagree with that
12 position by him?

13 MR. FEIGIN: Again, Your Honor, we don't
14 think the Court needs to address it here. We actually
15 think a jury would resolve the materiality question
16 under the ATSA --

17 JUSTICE SCALIA: You'd give the jury two
18 different instructions? You are to find materiality for
19 purposes of whether it's defamatory or not and then,
20 having found that it is defamatory, you must make a
21 second materiality finding, namely, would this
22 defamatory statement have caused TSA -- if it had been
23 accurate, would TSA not have taken the action that it
24 did, not have removed this man from the flight? You're
25 going to give the jury those two instructions on

1 materiality?

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

8 What I'd really like to emphasize here is
9 that --

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

14 (Laughter.)

15 MR. FEIGIN: Your Honor, we are comfortable
16 with the Court saying that it's a question for the
17 court. Our reading of the statute is that it would be a
18 question for the jury. There'd be an instruction, as
19 there was in this case, although not a proper
20 instruction, on all the elements of ATSA, with the court
21 making the law very clear to the jury that it has to
22 apply for ATSA, and then if the jury gets past that,
23 they would get a separate set of instructions.

24 CHIEF JUSTICE ROBERTS: Of course, you
25 don't -- there's no reason, and presumably a good trial

1 judge wouldn't instruct the jury on those two separate
2 questions using the same word, right? I mean, you could
3 articulate what you mean by "material" in -- in each
4 context. In other words, you don't have to say it would
5 be material to TSA. It would say just, as my colleague
6 has suggested, whether or not TSA would have done
7 anything different if a different formulation had been
8 used.

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

13 JUSTICE SCALIA: And you'd -- you'd feel
14 snug and comfortable in making reports to airlines,
15 knowing that whether you're going to be held liable is
16 going to be up to some jury who is going to see that
17 this person, his career was ruined, and it's going to be
18 up to the jury to say whether he can recover or not?

19 MR. FEIGIN: Your Honor, we're
20 comfortable --

21 JUSTICE SCALIA: That doesn't give me a lot
22 of comfort. If you're really concerned about enabling
23 people to come forward without fear when they have a
24 suspicion of something I'm saying, well, you know, some
25 jury will decide whether you put it wrongly or not and

1 if you're putting it wrongly would have made a
2 difference, it doesn't make me happy.

3 MR. FEIGIN: Your Honor, I think what's
4 going to provide the adequate good feelings that
5 airlines have making these reports, to make them feel
6 safe making these reports, is for this Court to
7 emphasize the very wide scope that the ATSA gives to how
8 airlines characterize --

9 JUSTICE KAGAN: Well, Mr. Feigin, they have
10 that wide scope because of the actual malice standard,
11 that somebody needs to show that there was actual
12 knowledge of falsity or reckless disregard as to
13 falsity. And you're saying that we should do something
14 different. You're saying that we should expand what
15 falsity means in this context as a sort of extra
16 protection, and I guess why is that true?

17 MR. FEIGIN: Well, Your Honor, I don't think
18 we're doing anything different from the actual malice
19 standard except taking account of the context. In this
20 particular context, where there's a lot of factual
21 uncertainty, a lot of emotion mixed in, and the audience
22 aren't readers of, for example, a general interest
23 magazine, they are security officials looking for
24 suspicion of a possible threat, we think the scope of
25 the materiality test is very broad.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Russell.

4 ORAL ARGUMENT OF KEVIN K. RUSSELL

5 ON BEHALF OF THE RESPONDENT

6 MR. RUSSELL: Mr. Chief Justice, and may it
7 please the Court:

8 There are two sets of questions before the
9 Court here. There's a legal question about the proper
10 interpretation of ATSA and maybe some subsidiary
11 questions about the division of authority between judge
12 and jury and what the materiality standard is; and then
13 there's a question about what to do with this case. And
14 those two sets of things should be considered
15 differently because much of what's being argued here
16 today was not presented to the lower courts.

17 JUSTICE KENNEDY: So suppose I'm the trial
18 judge and I conclude that if Air Wisconsin had said to
19 the TSA, along the lines of Justice Scalia's earlier
20 question, We have an employee who was terminated today.
21 He probably knew it. He lost his temper during a test.
22 He might think that some of our employees are out to get
23 him and there may even be some truth to that. He's
24 authorized to carry a gun. We don't know if he has one
25 or not. We're giving you that information. Suppose I'm

1 the trial judge. I conclude that if that information
2 had been given to TSA, TSA quite properly stopped this
3 plane to examine the pilot. Do I send the case to the
4 jury?

5 MR. RUSSELL: Let me unpack that. I think
6 there is three parts to that question. The first is,
7 implicit in that is ATSA immunity factual questions for
8 the court or for the jury? And we agree with the
9 government that you should apply the ordinary qualified
10 immunity standards and historical disputes about the
11 facts are handled by the jury. Of course, if the court
12 can say, look, even on the plaintiff's view of the facts
13 immunity is proper, you can enter summary judgment.

14 The second question is what is the
15 materiality standard. Justice Scalia, you've suggested
16 that the standard is would TSA have done the same thing
17 any way? And I take the government even to be saying
18 that that's not the right test, because we can't know
19 because TSA won't tell us. TSA has to keep secret its
20 procedures about what it would do and when; and as a
21 consequence, I think the proper standard is the standard
22 that applies under New York Times and in other
23 defamation cases, which is the Masson standard: Would a
24 true statement have a different effect on the security
25 officials' mind? And we think you can have a gloss on

1 that.

2 JUSTICE KENNEDY: The Masson reporter for
3 the New Yorker Magazine spent months on this article.
4 They had proofreaders, they had editors in New York.
5 And you're saying the same standard applies to the
6 baggage handler who has only 10 minutes to decide what
7 he's going to say?

8 MR. RUSSELL: I'm saying the same standard
9 of material truth applies. Actual malice, the
10 subjective good faith, is the principal protection
11 afforded to the baggage handlers. Even if what he says
12 is blatantly materially false, so long as he believe it,
13 so long as he acted in good faith, he's protected here.
14 So the question is, what happens when somebody like
15 Mr. Doyle, who has been found to have acted in bad
16 faith, and that's not challenged here -- does he
17 nonetheless get immunity because what he said was
18 materially true? We think the standard --

19 JUSTICE GINSBURG: Can we go back to the
20 "who decides" question. I find it very confusing. Now
21 everybody seems to say, well, it's the jury that decided
22 -- that decides, but the Colorado Supreme Court said
23 that it recognized that the court was to decide this
24 question, not the jury. And in this case the jury
25 decided it. That was error, the Colorado Supreme Court

1 said, but it was harmless.

2 So who decides? Is it -- is it the court or
3 the jury?

4 MR. RUSSELL: I think that the answer to the
5 legal question is that you have the same division that
6 you have in qualified immunity, that material disputes
7 of facts are resolved by the jury and then the court
8 reviews those -- those findings under the normal --

9 JUSTICE KENNEDY: So under my question I
10 first asked you, I'm the trial judge, I have made the
11 determination that TSA would have acted the same way. I
12 still have to submit this to the jury?

13 MR. RUSSELL: If -- if you think that
14 there's no disputes about those facts, that no
15 reasonable jury could conclude otherwise on those facts,
16 and you think --

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

20 MR. RUSSELL: All right.

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

23 MR. RUSSELL: I don't -- I think the
24 materiality question goes to the jury, subject to review
25 by the court on the motion for directed verdict,

1 whatever. But there's also -- I also want to make clear
2 that I disagree with the premise of that question about
3 what the standard of materiality is, and it's not
4 whether TSA would have acted differently. It's whether
5 TSA would have had a different impression about facts
6 that are undoubtedly material to their determination not
7 only about the extent of the threat, but also what to do
8 in the immediate aftermath.

9 They have to make a decision from the
10 get-go, not only whether to investigate or not, but
11 whether or not to respond by sending an officer down or
12 scrambling a SWAT team. And certainly being told that
13 somebody is mentally unstable and may be armed is going
14 to be materially -- be a materially different impression
15 on their minds about those questions.

16 JUSTICE KAGAN: I guess I'm not sure what
17 you just said, because even the way you just phrased
18 that, you're asking what TSA would have done. How else
19 can we think about materiality other than by asking,
20 well, if you were a TSA officer and you heard this what
21 would you have done?

22 MR. RUSSELL: You apply the Masson test,
23 which is would a truer statement have a different effect
24 on the mind of the reader? It doesn't mean that they
25 have to have done something differently. It's just that

1 they understand the facts differently than they do based
2 on what was said.

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

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

9 CHIEF JUSTICE ROBERTS: If the difference --
10 if the difference in the language causes TSA to do
11 anything differently, then you lose immunity?

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

15 CHIEF JUSTICE ROBERTS: A different effect
16 -- a different effect on who?

17 MR. RUSSELL: The listeners, the TSA.

18 CHIEF JUSTICE ROBERTS: The TSA. So, but
19 that's what I'm saying. Let's say the TSA person looks
20 at it and says, ah, this is -- you know, if it had been
21 phrased as you say, ah, this is silly, I'm not going to
22 do anything. But he says, well, it looks silly to me,
23 but I'm going to send it to my supervisor. That's a
24 different effect on the listeners' mind and you say that
25 difference causes the airline to lose immunity.

1 MR. RUSSELL: I think so. And in addition,
2 whatever you say about this, you should also keep in
3 mind what was actually argued below. Let me say a few
4 things about how this went down.

5 JUSTICE ALITO: Well, before you get to
6 that, before you get to that, to finish up on the point
7 you were making earlier, suppose that the report is he
8 ranted for 10 minutes, and then suppose the jury found
9 he ranted for 7 minutes. Now, maybe those 3 minutes
10 would make a difference, make a difference in the
11 impression on the TSA. That would be enough in your
12 view?

13 MR. RUSSELL: I think it has to make a
14 difference in the way that they would evaluate the
15 existence, nature, or extent of the threat. And so it
16 wouldn't make a difference to the way that they
17 evaluated the nature or the extent of the threat then
18 it's not material. But keep in mind, the way that this
19 case was litigated below, they themselves proposed the
20 Masson standard. And it's -- we've reproduced their
21 brief to the Colorado Supreme Court. It's on page 30a.
22 They say: "A statement is not considered false
23 unless" --

24 JUSTICE SCALIA: Where are you reading?

25 MR. RUSSELL: Page 30a of the Red Brief. It

1 is where we reproduced their Colorado Supreme Court
2 brief. And on page 30a, they say: "A statement is not
3 considered false unless it would have a different effect
4 on the mind of the reader than what the pleaded truth
5 would have produced," and they cite Masson. "This
6 new-found ATSA-specific materiality test comes largely
7 from the United States' invitation to brief at the cert
8 stage in this case." And they never asked for an
9 instruction on materiality at all, much less an
10 ATSA-specific materiality instruction to the jury. They
11 never argued for an ATSA-specific materiality test in
12 the lower court.

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

16 MR. RUSSELL: That's correct. That was
17 their principal argument below and that's clearly wrong.
18 And the United States agrees with us that that's not the
19 right way to -- to go about dealing with this.

20 This is a statute that is premised on --
21 that is based on the model of qualified immunity. In
22 the Federal courts, qualified immunity factual issues
23 are submitted to the jury and subject to ordinary
24 appellate review, sometimes heightened appellate review
25 with --

1 JUSTICE GINSBURG: What are the factual
2 issues? You said the factual issues. I didn't think
3 that there was much dispute about what was said to the
4 air traffic safety. So what are -- what are the
5 disputed facts that the jury would find relevant to the
6 immunity?

7 MR. RUSSELL: So the materiality consider
8 compares what was said -- and you're right, there's no
9 dispute about that -- and what was true, and there's a
10 lot of dispute about that. But we think that at the end
11 of the day, even if you say that it's a question of law
12 for the court, even if you take it upon yourselves to
13 decide it, we don't think that there's any way in which
14 they can say that these statements were materially true.

15 CHIEF JUSTICE ROBERTS: So am I right in
16 understanding that there be two -- you would view these
17 two scenarios differently? The same historic facts.
18 Somebody calls and said this happened, this happened,
19 this happened. He was acting crazy. And the next one,
20 this happened, this happened, this happened and he's
21 crazy.

22 Do you think you lose immunity in the latter
23 case, but not the former case?

24 MR. RUSSELL: No, I think you'd lose in
25 both.

1 CHIEF JUSTICE ROBERTS: You would lose in
2 both.

3 MR. RUSSELL: Yes. I mean, I think in
4 both --

5 CHIEF JUSTICE ROBERTS: So a layperson -- a
6 layperson who, you know, just looks at this and said
7 he's acting crazy, they're not immune from that. If
8 they called TSA and say that, everything is true, I
9 guess you would say up until that characterization.

10 MR. RUSSELL: Well, let me be clear about
11 that then. If they give all the -- all the facts -- and
12 I'm not sure what all the this is true, this is true,
13 this is true -- they simply explained all the facts and
14 then appended to it their evaluation that he was crazy,
15 I don't think they would be immune. I think they lose
16 immunity for that. But that's not what happened.

17 CHIEF JUSTICE ROBERTS: But they would be --
18 the airline would be immune.

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

21 CHIEF JUSTICE ROBERTS: No, no. I know.
22 But I'm trying to find out if you think there's a
23 difference between the person's subjective, uneducated
24 evaluation, "he was acting crazy," and a difference
25 between that person saying "he's crazy."

1 MR. RUSSELL: I don't think there's a
2 difference between that. What's the difference is when
3 the person asserts that somebody is mentally unstable as
4 a fact and doesn't give the background facts to
5 allow somebody to make an alternative --

6 JUSTICE SOTOMAYOR: So other than proving at
7 trial that these statements were misleadingly false, or
8 false, how did you prove that the statements would have
9 had an effect on a reasonable security officer?

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

11 JUSTICE SOTOMAYOR: How do you -- what's the
12 evidence that you expect parties to present and what was
13 it you presented to show that their response would have
14 been different?

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

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

24 JUSTICE BREYER: But we have granted cert on
25 this question. So -- so given that fact, could we do

1 this: One, yes, it has to be false; two, the Colorado
2 Supreme Court, because of Footnotes 5 as well as 6,
3 which I haven't picked up, and other things they've
4 said, is at least ambiguous about the role the jury's
5 finding played. And given that fact, what we'll do is
6 we'll go through and see where the parties agree about
7 what happened in -- in the world, and insofar as they
8 agree, we'll take it, you see. Your side will get the
9 underlying assumption and looking at it as it's agreed
10 upon, we find either that it would be or wouldn't be
11 within the scope of the immunity. And on that one you
12 might lose. But is there -- is there -- what do you
13 think of that procedure?

14 MR. RUSSELL: I definitely think that it
15 would be appropriated for this Court to write an opinion
16 that says, look, to the extent Footnote 6 suggests that
17 some true statements aren't protected by ATSA, that's
18 wrong.

19 JUSTICE BREYER: No, it doesn't say that.
20 It says -- Footnote 6 has to be read with Footnote 5,
21 which I hadn't picked up. And once I put those two
22 footnotes together, I have no idea what the Colorado
23 Supreme Court says.

24 MR. RUSSELL: Well, I think you can say,
25 look, we don't know what it means, but to the extent it

1 means that ATSA doesn't affect all true statements,
2 that's wrong. But in this case, the jury found, and
3 three courts -- Colorado courts affirmed, that the
4 statements weren't true.

5 And, Justice Ginsburg, there was an
6 instruction to the jury, and in Instruction No. 9 at
7 page 579 of the Joint Appendix, AWAC told the jury that
8 to enter a verdict, they had to find that the statement
9 was false.

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

19 JUSTICE ALITO: Well, on two of the -- on
20 two of the three statements, the difference between the
21 literal -- the very strict truth and what was said is
22 very slight. You dispute that. They'd said he's an FFO
23 officer and he may be armed.

24 MR. RUSSELL: I think that there's a huge
25 difference. There's no reason to say that he may be

1 armed.

2 JUSTICE ALITO: That's literally true. It's
3 literally true. He's an FFO officer. He has a gun. He
4 may be armed.

5 MR. RUSSELL: Suppose I were to know that
6 there is a lawyer in town who has a concealed carry
7 permit, and I know he has a hearing at the courtroom --
8 at the courthouse down the road later today. If I were
9 to call the security folks there and say, hey, just to
10 let you know, there's a -- there's a lawyer coming to
11 the argument and he may be armed, everybody would
12 understand that I was saying to them that there was
13 something more than the theoretical possibility that
14 he's armed and that I have some information to believe
15 that he is violating or intending to violate the law
16 that prohibits him from bringing that gun to the court.

17 JUSTICE ALITO: What would be a true
18 statement?

19 MR. RUSSELL: True statement would be --

20 JUSTICE ALITO: Not with respect to the
21 lawyer; with respect to your client.

22 MR. RUSSELL: I think it would have been
23 true for them to say, look, we're calling to let you
24 know because Mr. Hooper's an FFDO, we don't have any
25 reason to believe that he has gun with him, but we can't

1 tell for sure, so we just thought we would tell you in
2 case you have any questions and want to investigate
3 further.

4 By not saying -- by not qualifying "may be
5 armed" with the statement that "we have no reason at all
6 to believe that he actually has a gun," which is the
7 truth, I think they gave a very different impression --
8 and Mr. LaWare, for example, the vice president who made
9 the decision to make the call, testified that if he had
10 been told, as a pilot, that a mentally unstable person
11 who may have a gun was boarding his plane, it would make
12 him very concerned about the safety of his crew and
13 passengers. This is at JA 72 to 272.

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

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

24 MR. RUSSELL: Well, again, I don't think
25 it's that subtle. I think an ordinary person would --

1 would think I was being misrepresenting in the example
2 that I gave, which I think is the same. But in any
3 event --

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, that's what

1 you were saying.

2 (Laughter.)

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

7 MR. RUSSELL: No, it doesn't. I'm sorry. I
8 didn't mean to be facetious about it. But the point is
9 that whether they said "unstable" or "mentally
10 unstable," everybody understood it was the same thing,
11 and it had the same implication, which is very serious.

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

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

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

23 JUSTICE ALITO: Well, do you think it makes
24 a difference we're talking here about a pilot? I mean,
25 my impression of pilots is that they are supposed to

1 remain perfectly calm even when terrible things happen.
2 Well, all the -- you know, all engines are on fire and
3 one of the wings has fallen off, but, you know, you
4 don't start ranting and screaming. And so someone
5 described him as acting in a manner that was more
6 unprofessional than they had ever seen. Do you think
7 that makes a difference?

8 MR. RUSSELL: I think you could take that
9 into account. But you also have to recognize that,
10 hopefully, this wouldn't be the same because most people
11 don't get treated as unfairly as Mr. Hoyer was. And I
12 think there is abundant evidence for the jury to
13 conclude that he was acting with, maybe not the best
14 way, but he was acting within the -- the spectrum of
15 normal human reaction to being treated that unfairly
16 with respect to something that important.

17 JUSTICE ALITO: But maybe for ordinary
18 people, but how about for pilots.

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

1 made.

2 And Mr. Orozco talked to him briefly before
3 he boarded the flight, and he knew at that point that he
4 was an FFDO, he was a pilot, he knew about the last
5 chance letter, he knew about the prior incidents of
6 pilots taking down airplanes. And he told him: Go
7 ahead, and 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. Even if they are willing
13 to say now, through their lawyers, that they had
14 concerns about his mental stability, the fact that they
15 weren't willing to say that he was mentally unstable
16 shows that they recognized that there's a material
17 difference between those two statements. Otherwise they
18 would have said: Yes, he was mentally unstable because
19 we had concerns about his mental stability and that's
20 the same thing.

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

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

6 MR. RUSSELL: I understand.

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

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

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

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

7 JUSTICE KAGAN: Mr. Russell, weren't you
8 yourself suggesting the twist on the materiality
9 standard? You said it shouldn't be -- in the usual
10 case, we said would it have had a different effect on
11 the mind of essentially the average reader, the
12 reasonable reader. And you say: No, here we're not
13 supposed to think of the reasonable person generally;
14 we're supposed to think about the reasonable TSA
15 officer. Haven't you conceded that yourself?

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

21 JUSTICE KAGAN: Well, how do we know about
22 the reasonable TSA officer? I mean, you made the point
23 that we don't know a lot about TSA officers in terms of
24 what they are going to do with respect to any given set
25 of facts, and, you know, I find it a little bit hard to

1 think about the question, what does a reasonable TSA
2 officer think, without thinking about the question,
3 what's a reasonable TSA officer going to do.

4 MR. RUSSELL: Well, you have the same
5 problem with figuring out what he's going to do. In
6 fact, it's much harder. So I think whatever -- if you
7 adopt that standard, you have the same problem with my
8 standard. And I think my standard's easier to deal
9 with. I think you can look at -- you can have expert
10 testimony, as we did. You can look at -- you can ask
11 the people who are in the industry and involved in the
12 case, as we did. And they all seem to recognize that
13 saying somebody is mentally unstable versus saying we
14 have concerns about his mental state or that he is angry
15 would have a hugely different effect on a listener's
16 mind in that industry.

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

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

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

25 JUSTICE SOTOMAYOR: I'm more upset --

1 MR. RUSSELL: I'm more --

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

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

11 CHIEF JUSTICE ROBERTS: Well, but it affects
12 your belief is different in a context like this. It may
13 not affect your belief, but you may decide, but given
14 what's at stake, I don't think he's mentally unstable
15 just because somebody calls and says that, but I'm going
16 to send it up to my supervisor, make sure he feels the
17 same way. And you tell me that you lose immunity if he
18 says, I don't think he's mentally unstable and throws it
19 away, as opposed to when he says, I don't think he's
20 mentally unstable but let's see what the boss thinks.

21 MR. RUSSELL: Certainly what they do with
22 the information is reflective of the effect it has on
23 their minds. So we do think that in any case you could
24 show that TSA would have acted differently. You would
25 necessarily be showing that it had a different effect on

1 their mind.

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

11 In any event, even if this Court thought
12 that was the standard, even if you thought, and we're
13 willing to forgive them for not raising that standard in
14 the Colorado courts, we do think that on this evidence
15 there was a basis for concluding that TSA would have
16 acted differently had they known the truth. And that's
17 because, as I said before, we had expert testimony from
18 somebody who is very qualified in this area who said
19 that had he known the truth as a TSA official he
20 wouldn't have wanted to receive a call. And that -- he
21 perfectly understood the very dramatic response given
22 the content of what was actually said.

23 JUSTICE KAGAN: So what are the other things
24 TSA could have done? I mean, let's assume that this
25 call was made and it was a much more -- in tone, it was

1 much more factual and without using any of these words,
2 but it said the guy really lost his temper and, you
3 know, he has this license and we have no idea whether
4 he, in fact, is carrying a gun, but he could be? What
5 could the TSA officers have done? What do you think
6 they should have done short of what they did? Say that
7 they were concerned, they thought this might be a
8 problem? What are the midlevel possibilities of a
9 response?

10 MR. RUSSELL: So one possibility is -- it
11 depends very much on when the call was made. Part of
12 the difficulty here was raised was that Mr. Darr waited
13 for two and a half hours after receiving this
14 information before making the call. Had the call been
15 made earlier, there was testimony there was lots of
16 things they could have done. They could have called and
17 checked to see if he had checked in his gun at security.
18 They could have found him. They could have called him
19 on his cell phone.

20 But even having waited as long as they did,
21 they could have asked somebody on the airplane to just
22 go and ask him and talk to him and see if there was
23 reason to believe that there was something amiss that
24 would require going back to the gate.

25 Now, I acknowledge that, again because the

1 call was so late, there really wasn't a ton that could
2 be done, but that's not a reason to give them greater
3 leeway.

4 JUSTICE KENNEDY: So you want us to say the
5 call has to be made right away without reflection,
6 without talking to supervisors, without some quiet
7 discussion first? That's what you want us to put in the
8 opinion?

9 MR. RUSSELL: No. TSA has told people,
10 report what you know immediately. And so we do think
11 that Mr. Doyle's conduct, in which he wasn't consulting
12 with supervisors -- he did nothing during that
13 two-and-a-half hours that would reflect that he had an
14 actual concern about mental stability or danger here.

15 JUSTICE SOTOMAYOR: I thought I read
16 somewhere that after this incident there was a
17 discussion between or among Mr. Doyle and various
18 government agencies to figure out how to avoid something
19 like this in the future.

20 MR. RUSSELL: He did testify to that fact,
21 yes.

22 JUSTICE SOTOMAYOR: Who testified?

23 MR. RUSSELL: Mr. Doyle did.

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

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

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

18 Congress didn't think that the way to
19 promote airline security here is simply to give carte
20 blanche immunity to anybody who reports anything about
21 suspicious activity, if they thought they could have
22 ended at subsection A. Instead, they recognized that
23 there's a balance and that people who make bad faith
24 reports that are materially untrue ought not to be
25 immune, recognizing that there might be some deterrent

1 effect at the margins, but acknowledging the need to
2 strike this balance.

3 And in this case, whatever you end up doing
4 in this case, and I would like to come back, before I
5 leave, to this point, that this case has been litigated
6 up the chain without any request for ATSA-specific
7 materiality instruction, with the court addressing every
8 material truth objection that was actually made in the
9 context in which it was made. And it's important to
10 point out that they never, even when they argued
11 material truth, argued that mentally unstable or were
12 concerned about mental instability was materially true.

13 The only argument they ever made about that,
14 and you can read it at the appendix to the Red Brief,
15 was that this was a protected statement of opinion
16 because it could not be true or false. And there's a
17 world of difference between saying that something isn't
18 true or false and saying that it is true. Because to
19 determine whether it's protected opinion, you only have
20 to look at the statement to determine whether it's
21 substantially true. You have to look at the evidence.
22 And so they have not -- at the very least, they have not
23 preserved any argument that the statement "mentally
24 unstable" was materially true.

25 So at the end of the day, we think that you

1 can satisfy the government's need for clarity about what
2 the legal standard is by simply saying ATSA protects
3 true statements, full stop, but, nonetheless, affirming
4 this case, the opinion in this case on the ground that
5 the Colorado court asked whether these statements were
6 true and said that there was sufficient evidence that
7 they were not and resolved every materiality objection
8 that they actually made in the course of their opinion.

9 The fact that they did it under a different
10 subheading, that they asked the right question under the
11 wrong subheading, isn't a ground for reversal in this
12 case.

13 JUSTICE GINSBURG: How do you add to the
14 question -- the question in this case was put by the
15 Court -- the question whether ATSA immunity may be
16 denied without a determination the air carrier's
17 disclosure was material and false?

18 MR. RUSSELL: The answer to that question is
19 no, with the caveat that an appellate court has no
20 obligation to resolve materiality objections unless
21 they're actually raised by the defendant.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Cohn, you have three minutes remaining.

24 REBUTTAL ARGUMENT OF JONATHAN F. COHN

25 ON BEHALF OF THE PETITIONER

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

3 Two very quick points: First, the mixed
4 question, the application of law to facts most certainly
5 should be decided by the Court, not the jury just like
6 this Court held in Muehler versus Mena or Nellis and
7 Congus.

8 The historical facts are a separate
9 question, but the ultimate question of materiality is
10 one that should be decided --

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

13 MR. COHN: How do we decide it?

14 JUSTICE SOTOMAYOR: How does -- how -- how
15 do we as judges? I'm not sure how juries would do it,
16 I'm not quite sure judges would do it. So what evidence
17 did you proffer? He says he had an expert. What did
18 you have at trial?

19 MR. COHN: We had experts, too. And judges
20 should resolve it just like they resolve issues of
21 reasonable force and probable cause. They have to use
22 judgment and common sense in light of the broad leeway
23 that TSA should be given in answering these question.
24 But the important thing is resolving that issue at the
25 earliest possible stage.

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

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

6 JUSTICE SOTOMAYOR: No, no. Not a question
7 of historical -- if there's a question about how a
8 reasonable officer would respond. There's competing
9 experts. Who decides that question?

10 MR. COHN: Well, the --

11 JUSTICE SOTOMAYOR: And there are some
12 levels of -- of force that we can say as a matter of law
13 don't qualify as excessive. And we have said that, but
14 when have we said that what might be excessive to one --
15 to some is a jury question?

16 MR. COHN: According -- Nellis said the
17 ultimate question is for a court to decide. But our
18 point is, first of all, the lower court here said the
19 question is for a court to decide for ATSA immunity.
20 But under any standard, we should still prevail because
21 the matter of law, the statement here simply is
22 immaterial. Falsity -- the alleged falsity is
23 immaterial. Under any standard, the Court should hold
24 as a matter of law the standard here is immaterial.

25 And the second point I was going to address

1 is the Court should address that application question in
2 this case because airlines need guidance. They need
3 clarity. They need predictability on what the law is.
4 And right now, there's no predictability because the
5 lower court held that hairsplitting distinctions make a
6 difference. That the difference between fire today and
7 fire tomorrow is a material difference. And the Court
8 should make clear those hairsplitting distinctions do
9 not make a difference.

10 JUSTICE KAGAN: Well, Mr. Cohn, what if I
11 think that a TSA might have reacted differently to what
12 was actually said and to what really should have been
13 said? Would they have reacted either way, they should
14 have done something either way, but they would have done
15 a different kind of thing? What if I think that? What
16 does that suggest about the proper resolution of this
17 case?

18 MR. COHN: I would say it matters on whether
19 that different thing is material. So, for instance, if
20 it's sending one officer versus two officers to the
21 plane, that's not material. That does not make a
22 difference. This is a case this Court should decide.
23 There's no material distinction between mental stability
24 and mental state or rationality or blow up.

25 Thank you, Mr. Chief Justice.

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CHIEF JUSTICE ROBERTS: Thank you, counsel.
The case is submitted.
(Whereupon, at 11:04 a.m., the case in the
above-entitled matter was submitted.)

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