NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WINSLOW FRIDAY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, Winslow Friday, by and through his court appointed counsel, John Carlson, Assistant Federal Public Defender for the Districts of Colorado and Wyoming, respectfully requests this Honorable Court for leave to proceed *in forma pauperis* in filing the attached Petition for Writ of Certiorari. In support of this request, Petitioner states that undersigned counsel was appointed pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, by the United States Court of Appeals for the Tenth Circuit, and he is

unable to retain counsel and pay for the costs attendant to the proceedings before this Honorable Court.

WHEREFORE, the Petitioner, John Carlson, respectfully requests that he be granted leave to proceed *in forma pauperis*.

Respectfully submitted,

RAYMOND P. MOORE
Federal Public Defender

JOHN T. CARLSON
Assistant Federal Public Defender
Counsel of Record for Petitioner
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

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PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

RAYMOND P. MOORE
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QUESTIONS PRESENTED

1. Does the "constitutional facts doctrine," announced by this Court in *Bose v. Consumer's Union*, apply symmetrically, thereby requiring independent review of lower-court findings that favor as well as disfavor the constitutional petitioner?

2. Even if *Bose* applies symmetrically, does the Religious Freedom Restoration Act similarly require appellate courts to independently review findings made by the trier of fact, regardless of the prevailing party below?

LIST OF PARTIES

Winslow Friday and the United States

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IN THE SUPREME COURT OF THE UNITED STATES

WINSLOW FRIDAY, *Petitioner*,

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UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Winslow Friday respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on May 8, 2008.

OPINION BELOW

The published decision of the United States Court of Appeals for the Tenth Circuit, *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008), is appended to this petition. (App. 1).

STATEMENT OF JURISDICTION

Mr. Friday was charged in the District of Wyoming for a single count of violating the Bald and Golden Eagle Protection Act. An enrolled tribal member and a devout religious adherent, Mr. Friday moved to dismiss the charge under the Religious Freedom Restoration Act. After a lengthy evidentiary hearing, the district court granted his motion and dismissed the case. The government appealed. The Tenth Circuit reversed, its jurisdiction arising under 28 U.S.C. § 1291. Mr. Friday sought review of the panel's

decision by the *en banc* court. On July 7, 2008, his request for *en banc* review was denied. Mr. Friday invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY TEXT INVOLVED

This case turns in part on the Religion Clause of the First Amendment, which reads: "Congress shall make no law respecting an establishment of a religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. 1.

The case also involves the Religious Freedom Restoration Act, which states that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). There is one exception to the Act: government may impose such a burden "only if it demonstrates that application of the burden . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b).

STATEMENT OF THE CASE

Background Facts

Winslow Friday is an enrolled member of the Northern Arapaho Indian Tribe. For centuries, and through long periods of suppression by the United States government, members of his tribe have performed an annual religious ceremony called the Sun Dance. The 7-day ceremony, which takes place within an open-air "offering lodge," requires the sacrifice of a single live eagle. The bird is a gift from the Creator, according to Arapaho belief.

The Sun Dance unfolds around a group of men who alternate between periods of fasting and dancing. When dancing, they are tethered to a large pole placed at the center of the lodge, on top of which is mounted the eagle's tail fan. Festooned with the bird's feathers, the dancers chant and blow whistles made from the hollow bones that support its long wings, wings that carry the prayers of the Northern Arapaho to the Creator.

Each year a sponsor of the Sun Dance is selected. It is the duty of the sponsor to erect the offering lodge and obtain the eagle necessary for the ceremony. The Friday family sponsored the 2005 Sun Dance. As the ceremony approached, no eagle had been secured. One day in March, Winslow spotted a bald eagle perched on a tree near his home on the Wind River Reservation, in Wyoming. It was the eagle given to his family by the Creator. He shot and killed the bird, and later danced at the ceremony, beneath the Creator's gift.

The government prosecuted Friday under the Bald and Golden Eagle Protection Act, which criminalizes the "taking" of eagles, subject to a handful of exceptions that permit the taking. *See* 16 U.S.C. § 668(a). One of those exceptions is authorized by something known as a fatal-take permit, issued by the Fish and Wildlife Service to enrolled tribal members for a "bona fide" religious use. *See* 50 C.F.R. 22.22(c). Friday did not apply for a fatal-take permit.

Friday moved to dismiss the case under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et sec*., arguing that enforcement of the Eagle Act impermissibly burdened his religion. He further argued that the supposed availability of the fatal-take

permit constituted little or no accommodation to his religious practice, because the government operated what amounted to a secret permit program.

Evidence Presented at the Hearing

Judge Downes held a 3-day evidentiary hearing, at which Friday and five tribal elders testified. They all said they had never heard of the fatal-take permit. Six more witnesses testified on behalf of the government, from whose testimony emerged several facts salient to Friday's secret-permit argument:

1. Under cross-examination, a local game warden from the Fish and Wildlife Service testified, "Currently there's no provision for Native Americans to obtain a permit to kill eagles." (On re-direct, the prosecutor coaxed him into recalling the existence of the permit program.)

2. The chief raptor biologist for the Fish and Wildlife Service conceded that his agency does not train or inform its field-level employees about the permit. Referring to his own agency, he did not dispute that "potentially" there could "be folks out there that were unfamiliar with [the permit program]."

3. The "FAQ" (Frequently Asked Questions) portion of the Fish and Wildlife Web site titled "How can I obtain eagle feathers or parts?" said not a word about the existence of the fatal-take permitting process. Instead, it linked directly to the Web site of a government-created warehouse north of Denver, Colorado, called the National Eagle Repository. The Repository collects eagle carcasses from throughout the country, many of them the result of power-line electrocutions. Most of the remains suffer various stages

of decomposition. After sorting through the carcasses, government workers mail feathers and other parts of the birds—often spoiled and fetid—to tribal members who have submitted applications to the Repository. The wait time for a whole eagle is 3-4 years.

4. Government scientists charged with administering the permit program admitted they prefer that tribal members use the Repository instead of the fatal-take permit to obtain eagle parts. In the more than 20 years of the permit program's existence, no individual tribal member has ever applied for or received a fatal-take permit. At the time of the hearing, only three permits had been issued, to two different tribes in the southwest represented by legal counsel, as opposed to individual Indians.

The District Court's Findings

Judge Downes made a series of findings characterizing the unsatisfactory functioning of the permit program and describing the motivation of the government actors responsible for operating the program. He called the process "biased and protracted." He labeled the government's attitude toward the religious needs of the Northern Arapaho as "callous indifference." He described the "futility [of] the application process," as well as what he termed the government's "policy of discouraging requests for eagle take permits." And finally he found that the government "has no intention of accommodating the religious beliefs of Native Americans except on its own terms and in its own time."

On the strength of these findings, the Judge accepted Friday's RFRA defense, holding that "the present application of the permitting process is not the least restrictive means" of advancing what the Judge accepted as the government's compelling interest in

protecting eagles. Judge Downes dismissed Friday's prosecution. After the government appealed, the court of appeals reversed the district court's judgment and reinstated the case against Mr. Friday.

The Panel's Decision

The panel acknowledged that "[i]n the ordinary case, it is possible that [the district court's] conclusions would be characterized as factual," and therefore would be reviewed "only for clear error." *United States v. Friday*, 525 F.3d at 949. Under such an appellee-friendly standard, the case almost certainly would have come out differently. But this was no ordinary case, said the panel.

"[A]ssessments of this sort are better seen as constitutional facts, subject to our 'independent examination.'" *Id*. As support, the panel invoked the doctrine announced in *Bose Corp. v. Consumers Union of U.S.*, Inc., 466 U.S. 485, 491, 501-02 (1984), in which this Court held that the First Amendment altered the ordinary rules of deference to fact finders, displacing deferential with aggressive review. (The government never raised *Bose* on appeal, and the issue was not discussed at oral argument.)

In *Bose*, the district court found that the author of a harsh consumer review acted with "actual malice" and thus was liable for damages under *New York Times Co. v. Sullivan*. This Court ruled that because the lower court's finding implicated a "First Amendment question [ ] of constitutional fact," the appellate court should engage in independent review. *Bose*, 466 U.S. at 508 n.27.

The panel's application of *Bose* entailed two steps. First, the panel extracted the constitutional facts doctrine from the First Amendment and applied it to a statutory defense in a criminal prosecution. This it accomplished by deciding that "[t]he Bose rule [ ] logically extends to appellate review under RFRA," citing cases in which courts have applied the doctrine outside the law of defamation. *United States v. Friday*, 525 F.3d at 950. The panel justified this statutory extension on the ground that RFRA "asks courts to draw on constitutional doctrines developed under the Free Exercise Clause." *Id*.

The next step represented what the panel called "one more complication," as it observed that the factual findings in favor of Friday were protective, not restrictive, of the underlying constitutional right. "[T]he *Bose* opinion," said the panel, "does not make clear whether its more searching review—whose purpose was to avoid 'a forbidden intrusion' on First Amendment rights [citing *Bose*]—applies symmetrically to district court findings that favor as well as disfavor the First Amendment claimant." *Id*. Although the panel acknowledged a circuit split on whether *Bose* is a two-way street, it nevertheless felt itself bound by two earlier decisions of the Tenth Circuit. *See id*. (citing *Revo v. Discipl. Bd. of Supreme Court*, 106 F.3d 929, 932 (10th Cir. 1997), and *Hardin v. Santa Fe Rptr., Inc*., 745 F.2d 1323, 1326 (10th Cir. 1984)). The panel conceded, however, that neither *Revo* nor *Hardin* "explained why[] this Circuit has applied *Bose* even when First Amendment claims prevailed below, and thus taken the side of symmetry." *United States v. Friday*, 525 F.3d at 950.

REASONS FOR GRANTING THE WRIT

This case presents two important questions to a Court and a Nation committed to protecting the basic human freedoms of speech and religion. The first has long divided the federal circuits, forging two camps on the proper standard of appellate review in cases resting on factual findings upholding First Amendment rights. The second question raises an issue of statutory interpretation: whether the congressional drafters of the Religious Freedom Restoration Act, irrespective of the First Amendment's requirements, would have condoned appellate fact-finding that narrows the range of protected religious expression.

1. The Circuits Are Divided 4-3 on the Symmetric Application of the Bose Doctrine.

Even if it is true, as the panel asserted, that *Bose* did not "make clear" whether its rule governs regardless of the nature of the findings below (be they in favor of First Amendment claimants or against them), one thing is beyond quarrel. The purpose of the rule is to ensure that First Amendment rights are protected. *Bose* drives home this point repeatedly.

The constitutional facts doctrine, said the *Bose* Court, stems from an "obligation to make an independent examination of the whole record in order to make sure that the judgment [of the district court] does not constitute a forbidden intrusion on the field of free expression." *Bose*, 466 U.S. at 499 (internal quotation marks omitted). Needed "in cases involving restrictions on the freedom of speech protected by the First Amendment,"

id. at 503, the rule is designed "to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas," *id*. at 505.

In this case, by requiring appellate judges to engage in aggressive fact finding where the First Amendment claimant prevailed below, the panel further upset the institutional role of the appellate court. It also defied the basic point of the *Bose* doctrine, "which is about appealing censorship, not enabling appellate censorship." Steven Alan Childress, "Constitutional Fact and Process: A First Amendment Model of Censorial Discretion," 70 Tul. L. Rev. 1229, 1322 (1996).

"The rule thus reflects a special solicitude for claims that the protections afforded by the First Amendment have been unduly abridged," said the Seventh Circuit in refusing to apply the constitutional facts doctrine symmetrically. *Parenthood Ass'n./Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1229 (7th Cir. 1985). The doctrine "has never been thought to afford special protection for the government's claim that it has been wrongly prevented from restricting speech." *Id*. Two other circuits agree, the Fourth and the Ninth. *See Multimedia Publishing Co. v. Greenville-Spartanburg Airport Dist*., 991 F.2d 154, 160 (4th Cir. 1993); *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir. 1988).

Rather than apply *Bose* symmetrically, as the panel did here, these courts use different standards for reviewing First Amendment facts depending on the nature of the claim:

> When a district court holds a restriction on speech constitutional, we conduct an independent, de novo examination of the facts. When the government challenges the district court's holding that the government has unconstitutionally restricted speech, on the other hand, we review the district court findings of fact for clear error.

Daily Herald v. Munro, 838 F.2d at 383. These courts spurn the paradox of applying a pro-speech case like *Bose* in a manner that protects the government in its effort to stifle speech. These courts understand that government power is much more a threat to the individual than vice versa. And so the doctrine these courts pronounce is a hedge against the enormous power government can deploy, and has deployed in the past, to stifle dissent and restrict human freedoms. This lesson is particularly apt here, in view of the tragic historical record surrounding the government's effort to suppress the Sun Dance. *See United States v. Friday*, 525 F.3d at 942.

To be sure, these courts do not speak for all the federal circuits. In addition to the panel here, three other circuits see *Bose* as a two-way street, stressing that the constitutional facts doctrine aims at developing and refining constitutional rules. *See Sullivan v. City of Augusta*, 511 F.3d 16, 25 n.1 (1st Cir. 2007); *Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053-54 n.9 (11th Cir. 1987); *Bartimo v. Horsemen's Benevolent & Protective Ass'n*, 771 F.2d 894, 897 (5th Cir. 1985). Like the Tenth Circuit, the courts in this camp apply the doctrine even though the free-speech claimant prevailed below. They accept the chilling effect that naturally arises from forcing defenders of the First Amendment—be they religious worshipers, parade marchers, or

journalists—to face two separate and independent judicial proceedings, each one aimed at challenging their actions, first at the trial-court level, and again *de novo* on appeal.

The question of *Bose's* application has similarly divided the state courts. *Compare Lewis v. Colorado Rockies Baseball Club*, Ltd., 941 P.2d 266, 271 (Colo. 1997) ("de novo review is appropriate . . to determining whether speech on government property can constitutionally be regulated."), with *Brown v. K.N.D. Corp*., 529 A.2d 1292, 1295 (Conn. 1987) ("We fail to see how allowing an appellate court to conduct an independent review and to draw its own inferences from the facts and to find liability, where the trial court has found that none exists, advances the cause of freedom of expression.").

Academic commentators are pitted against each other as well. One argued that applying *Bose* symmetrically amounted to little more than mindless formalism. "The only justification for the two-way street is a wholly formal thinking that makes equal process apply regardless of the speaker." Childress, above, 70 Tul. L. Rev. at 1322 (1996). *See also* Lee Levine, "Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart," 35 Am. U.L.Rev. 3, 76 (1985) ("If . . . a jury finds that a plaintiff has not proven actual malice with convincing clarity, the court should have no authority, under the guise of independent review, to dislodge the jury's verdict.") On the other hand, at least one article has defended the two-way street, claiming that "independent[-]judgment review of the [lower court's] decision is valuable even when the defendant won at trial." Eugene Volokh & Brett McDonnell, "Freedom of Speech and Independent Judgment Review in Copyright Cases," 107 Yale L.J. 2431, 2442 (1998). According to these co-

authors: "Whoever won, independent review should produce more refinement of the legal standard, something *Bose* says is constitutionally valuable."

The *Bose* Court viewed its rule as vital to "the majestic protection of the First Amendment." *Bose*, 466 U.S. at 504. And though the Court recently declared that "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it," *FEC v. Wisc. Right to Life, Inc*., 127 S.Ct. 2652, 2659 (2007), it has never adequately answered a question that has vexed lower courts and commentators since *Bose* was decided: Does the constitutional facts doctrine apply even if the district court's findings are protective of the First Amendment?

Right now, the answer depends on where the question is asked. In 4 circuits the doctrine applies regardless of the nature of the findings. In 3 others it applies only if the findings narrowed protected expression. This Court, the ultimate interpreter of the Constitution, should decide the issue and remove it from the irrelevancy of geography.

2. RFRA's Intent Makes It Particularly Inappropriate to Apply the Bose Doctrine Symmetrically.

Beyond the question "how should *Bose* be applied?" lies the question "whether it should have been applied in the first instance?" The Tenth-Circuit panel cited authority for the proposition that the constitutional facts doctrine, despite its origins in the Free Speech Clause, was sometimes applied in cases arising under the Establishment Clause of the First Amendment. "We see no reason for free exercise to be left behind," concluded the panel. *United States v. Friday*, 525 F.3d at 950.

It is a fair point. But it masks something important. The panel did not symmetrically apply *Bose* to a Free Exercise defense. It symmetrically applied *Bose* to a statutory defense. And thus it is problematic to claim, as the panel did, that RFRA "draw[s] on constitutional doctrines developed under the Free Exercise Clause." *Id*. For RFRA draws not so much on *constitutional* doctrine as it does *congressional* doctrine.

In 1990, this Court held that the First Amendment is not implicated where a neutral law of general application burdens religion. *Employment Div. v. Smith*, 494 U.S. 872 (1990). The case ignited a bipartisan uproar in Congress, which responded by enacting RFRA with overwhelming majorities in both houses. The statute's express intent was to undo *Smith* and restore the strict-scrutiny test to laws that, while neutral and generally applicable, nevertheless substantially burden the practice of religion. RFRA directed courts to apply the test in all cases covered by the statue. *See* 42 U.S.C. § 2000bb(b).

The point is not that RFRA and the First Amendment are incommensurables. They are no doubt linked. But it is essential to recognize that the statute exists precisely because the Constitution does not protect a broad range of conduct considered to be religiously motivated, conduct Congress intended to protect. The point is that RFRA is not the Constitution. It is something different, something broader.

Perhaps the Tenth Circuit is right, and this difference matters little for purposes of the constitutional facts doctrine. That is a decision, however, that not only weakens RFRA but also subverts congressional intent. For if Congress intended the statute to be more protective of free exercise than the Constitution (as it surely did), it is fair to say that

even if the First Amendment requires the symmetric application of the *Bose* rule, there is every reason to believe Congress intended the exact opposite result with respect to RFRA.

RFRA is not the only statute affected by the Tenth Circuit's decision to apply *Bose* symmetrically. The federal courts decide a host of cases arising under statutes, rules, and administrative decisions "revolving in constitutional law orbits," regulating activities and behavior through standards formulated in terms closely derived from the Constitution and its doctrines, including the First Amendment. *See* Ira C. Lupu, "Statutes Revolving in Constitutional Law Orbits," 79 Va. L. Rev. 1, 14 -15 (1993). Consider just a few examples:

> (1) civil rights statutes like 42 U.S.C. § 1985(3), which proscribes race-based deprivations of the "equal protection of the laws," or 20 U.S.C. § 4071, which prevents schools that provide a "limited public forum" from discriminating against religious groups; or
>
> (2) judicial review of agency decisions, both regulatory and adjudicative, in which the underlying administrative ruling draws on or adopts entirely legal standards rooted in the First Amendment. *See, e.g.*, *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) (NLRB restrained union from distributing leaflets to shoppers at a shopping mall); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983) and *Navajo Nation v. Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (Indian tribes challenged permits awarded to ski area located on sacred lands); or
>
> (3) the Model Rules of Professional Conduct Rule 7.2(a), which addresses lawyer advertising, and Rule 7.3, regulating direct contacts with and solicitations of prospective clients.

Having pulled the constitutional facts doctrine outside the Constitution, the Tenth Circuit's decision offers no principled stopping point. Statutes and rules and administrative decisions requiring interpretation of language derived from the First

Amendment are now subject to a doctrine rooted in defamation law, and appellate judges handling these cases stand poised to usher in a new era of aggressive fact-finding on appeal. It is an institutional change this Court should halt.

3. This Case Sits in an Appropriate Posture to Decide the Issues Raised Here.

This case is a good vehicle for deciding the questions presented because it is based on a thorough evidentiary hearing. It is of no import that the case stems from an interlocutory appeal brought by the government. Mr. Friday testified at length during the evidentiary hearing, admitting that he took the eagle and explaining where and when he did so. Nor is there any outstanding legal issue to decide. If this petition is denied, Mr. Friday will return to the district court to plead guilty or proceed to trial on stipulated facts. In neither case will the additional proceedings bear on the issue presented here.

To the contrary, if this petition is denied the narrow questions it raises will disappear, and they will not be available to Mr. Friday on appeal from his final judgment. That is because Mr. Friday is challenging the application of an appellate standard of review, employed by the court of appeals to review *de novo* facts found in his favor by the district court. Those facts triggered both the dismissal of his prosecution and the responsive, interlocutory appeal taken by the government. There is simply no possibility that the questions raised here—dealing with appellate standards of review—will recur after judgment is entered. This is Mr. Friday's only opportunity to raise them.

CONCLUSION

For the reasons stated above, this Court should grant the petition for certiorari.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

John T. Carlson, Federal Public Defender for the Districts of Colorado and Wyoming, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel

for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid and addressed to:

Gregory G. Garre
Solicitor General of the United States
Room 5614
Department of Justice
10th Street and Constitution Avenue, N.W.
Washington, D.C. 20530

It is further attested that the envelope was deposited with the United States Postal Service, Denver, Colorado 80202, on _____, 2008, and all parties required to be served have been served.

_____
JOHN T. CARLSON
Assistant Federal Public Defender
Counsel of Record for Petitioner
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

STATE OF COLORADO)
) ss
COUNTY OF DENVER)

Subscribed and sworn to before me this ____ day of _____, 2008.

_____
Clarita B. Costigan
Notary Public