NO. 08-6651

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

REPLY TO BRIEF IN OPPOSITION

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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REPLY TO BRIEF IN OPPOSITION

The Interlocutory Nature of the Decision

The government offers three reasons why Mr. Friday's petition does not warrant further review. The first points to the interlocutory nature of the court of appeals' decision, and argues that on this fact alone his petition should be denied. This view overlooks an important point.

Only an interlocutory appeal could have brought Mr. Friday to this Court. That is to say, the question he presents in his petition could not have arrived in any form other than an interlocutory decision from the court of appeals.

It took several steps. First, the district court had to set a pre-trial hearing on Mr. Friday's motion to dismiss under RFRA. Next, Mr. Friday had to obtain, as he did, a favorable ruling on his motion, and it had to be based, as it was, on the strength of factual

findings made in his favor by the district judge. The government then had to take an interlocutory appeal, at which it had to prevail, as it did, at least in part because the panel reviewed *de novo* the findings made by the district court. All of these events, and no other events, had to precede Mr. Friday's writ of certiorari to this Court, which challenges the appellate court's standard of review as inconsistent with the rule announced in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). There was no path but the interlocutory path.

What is more, Mr. Friday cannot ensure the preservation of his issue. When the final judgment of conviction is ultimately entered (as it surely will, *see* below), his *Bose*-based challenge to the appellate standard of review, applied during this appeal, will have already been litigated and decided. It will not recur in any subsequent appeal. That is because this appeal and the issue it presents require an interlocutory decision.

And even if it were true that Mr. Friday could somehow return to this Court in the future, final judgment in hand, and re-present the same issue, one thing is plain: the record will be in no better position for purposes of deciding the *Bose* issue. That issue needs no further ripening.

Nor is there any reason to fear delay. In the event this Court grants certiorari and ultimately rules on the merits in favor of the government, the proceedings will not have delayed a trial. Mr. Friday has already admitted all facts relevant to his offense, testimony he gave at the RFRA hearing before the district judge. He could not have

prevailed at that hearing had he denied taking the bald eagle, or had he claimed that he held a permit from the government to do so.

Upon remand, Mr. Friday will undoubtedly and immediately enter a plea of guilty. There will be no trial. The fear of delaying one, an important reason for this Court's policy disfavoring interlocutory appeals, is therefore of little concern, and so the lack of a final judgment does not counsel refusing to review what otherwise is a meritorious question.

The Circuit Split

The government's second reason for opposing review rests on a narrow definition of the phrase "conflict between the circuit courts."

The government denies there is any disagreement in the appellate courts over the issue presented in Mr. Friday's petition. Yet it does not deny that the courts are split 4-3 on the application of the constitutional facts doctrine, announced in *Bose*. Nor does it deny that in reversing and reinstating Mr. Friday's prosecution, the court of appeals believed there to be a fracture within the lower courts.

"There is one more complication," said Judge McConnell, writing for the panel, "the *Bose* opinion does not make clear whether its more searching review—whose purpose was to avoid a forbidden intrusion on First Amendment rights—applies symmetrically to district court findings that favor as well as disfavor the First Amendment claimant." *United States v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008) (internal citations

and punctuation omitted). "The circuits have long been split on this issue," he added, after citing various law review articles on both sides of the debate. *Id*.

The court of appeals, in other words, saw what the government refuses to see: that by applying *Bose* symmetrically, it was entering contested terrain. Granted, this is the first time the question of *Bose's* symmetric application has emerged from a RFRA case. To the government, this means there is no disagreement among the circuit courts. It is an argument that rests on an overly specific notion of a circuit split. Whether arising under the First Amendment's Speech or Religion Clauses, or a statute codifying one of them, as RFRA does the latter, the question is the same: Is *Bose* a 1-way street or 2-way street? The "RFRA-ness" of the container matters little, since the underlying doctrine presented here is indistinguishable from that presented in the cases that have created what the government acknowledges are the fractured lower-court decisions.

What is more, as Judge McConnell observed, "[s]ubsequent cases have applied *Bose* well beyond the narrow context of constitutional defenses to libel," the context in which *Bose* itself arose. *See Friday,* 525 F.3d at 949-50, *citing*, among others, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567-68 (1995) (expressive association); *Rankin v. McPherson*, 483 U.S. 378, 385-86 & n. 9 (1987) (public employee speech); *Homans v. City of Albuquerque*, 366 F.3d 900, 904 (10th Cir. 2004) (campaign finance reform); and Henry P. Monaghan, Constitutional Fact

Review, 85 Colum. L.Rev. 229, 241 (1985) ("[Bose] made clear that this requirement is not a special rule for public figure defamation cases.").

If *Bose* has long since burst its initial form, its rule extended to cases unrelated to libel, the logical next step is to decide the question left open by the Court: Does its rule demanding independent appellate review of constitutional facts, a rule "whose purpose was to avoid a forbidden intrusion on First Amendment rights," *Friday*, 525 F.3d at 950, apply even if the lower court's findings favor the constitutional petitioner?

The Effect of the Standard of Review on the Court of Appeals' Decision

Lastly, the government opposes review on the ground that the appellate panel's decision to invoke *Bose* played no role on its resolution of the appeal. This seems hard to believe.

For one thing, the court of appeals never hinted, still less did it say, that its decision to apply *Bose* was irrelevant to its decision. For another, in view of the findings arrayed against it, the government almost certainly would have lost the appeal had the appellate panel *not* reviewed the facts independently under *Bose*. The indispensable link between the resolution of the appeal and the refusal to accept the district court's findings is best illustrated by reviewing those findings.

"[T]he district court offered a number of observations about the unsatisfactory functioning of the regulatory scheme," said the court of appeals, referring to Mr. Friday's

challenge to the administration of the so-called fatal-take permit process. *Friday*, 525 F.3d at 949. (Mr. Friday, recall, claims the government operated a secret permit program,

dissembling or withholding information from tribal people and generally making the process more accommodating on paper than it was in practice.) These "observations" by the district court, which included a factual finding that the permit process is "biased and protracted" and that the government acted with "callous indifference" in administering the program, amounted to a harsh indictment of the government's conduct:

> It is not the permitting process itself that the Court finds objectionable. Rather, it is the biased and protracted nature of the process that cannot be condoned as an acceptable implementation of the [Eagle Act]. To show deference to the agency's implementation of the permitting process is to honor the hypocrisy of the process. Although the Government professes respect and accommodation of the religious practices of Native Americans, its actions show callous indifference to such practices. It is clear to this Court that the Government has no intention of accommodating the religious beliefs of Native Americans except on its own terms and in its own good time.

Id. at 946 (quoting the district court's findings). It is hard to imagine how the court of appeals could have accepted these findings and still have arrived at a decision to reverse the district court.

Indeed, had the court of appeals accepted, or at least deferred, to just one of the findings, namely, the finding that "the Government has no intention" to accommodate the religious beliefs of Indians "except on its own terms and in its own good time," the result

surely would have been different. For RFRA demands nothing if not the intent on the part of the government to accommodate the religious beliefs of Native Americans. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (U.S. 2006).

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
Email Address: cox_10ecf@fd.org

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AFFIDAVIT OF SERVICE

JOHN T. CARLSON, Assistant Federal Public Defender for the Districts of Colorado and Wyoming, hereby attest that pursuant to Supreme Court Rule 29, the preceding Reply to Brief in Opposition was served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid and addressed to:

Solicitor General of the United States
Department of Justice
10th and Pennsylvania Avenue, N.W.
Room 5614
Washington, D.C. 20530

and that the envelope was deposited in the United States Post Office, Denver, Colorado, 80202 on _____ _____, 2009, and further attests that all parties required to be served have been served.

_____
JOHN T. CARLSON
Assistant Federal Public Defender

STATE OF COLORADO)
) SS.
COUNTY OF DENVER)

Subscribed and sworn to before me this the _____ day of _____, 2009.

_____
Notary Public

My Commission expires: _____

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AFFIDAVIT OF MAILING

JOHN T. CARLSON, Assistant Federal Public Defender, a member of the Bar of this Court, attests that pursuant to Rule 29, the preceding the preceding Reply to Brief in Opposition was enclosed in an envelope, first-class postage prepaid and addressed to:

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United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

and the envelope was deposited in the United States Post Office, Denver, Colorado, 80201 on _____, 2009, and further attests that all parties required to be served have been served.

_____
JOHN T. CARLSON
Assistant Federal Public Defender

STATE OF COLORADO)
) SS.
COUNTY OF DENVER)

Subscribed and sworn to before me this the _____ day of _____, 2009.

_____
NOTARY PUBLIC

My Commission Expires:

_____