No. 08-6651

IN THE SUPREME COURT OF THE UNITED STATES

WINSLOW FRIDAY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the "independent examination" rule of appellate review associated with Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984), applies to cases under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb, and, if so, whether the standard of review changes depending on which party prevailed below.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 525 F.3d 938. The opinion of the district court (App., infra, 1-12) is not published in the Federal Supplement but is available at 2006 WL 3592952.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2008. A petition for rehearing was denied on July 7, 2008. The petition for a writ of certiorari was filed on October 1, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Bald and Golden Eagle Protection Act

In 1940, Congress enacted the Bald Eagle Protection Act (1940 Act), ch. 278, 54 Stat. 250, in response to a "major decline" in the population of bald eagles. 72 Fed. Reg. 37,367 (July 9, 2007). In the 1940 Act, Congress explained that "the bald eagle is no longer a mere bird of biological interest but a symbol of the American ideals of freedom" and that "the bald eagle is now threatened with extinction." Ch. 278, 54 Stat. 250 (preamble). As a result, Congress prohibited the taking, possession, sale, barter, purchase, transport, export, and import of bald eagles or any parts of bald eagles, except as permitted by the Secretary of the Interior (Secretary). See 16 U.S.C. 668(a), 668a.

Young golden eagles can be very difficult to distinguish from young bald eagles. 64 Fed. Reg. 36,455. In 1962, Congress passed the Bald and Golden Eagle Protection Act (Eagle Act), Pub. L. No. 87-884, 76 Stat. 1246, which extends the 1940 Act's prohibitions to golden eagles as well.

The Eagle Act abrogated the treaty rights of numerous Indian tribes to hunt eagles on their lands. See United States v. Dion, 476 U.S. 734, 743-745 (1986). In lieu of those lost treaty rights, the Eagle Act authorizes the Secretary "to permit the taking, possession, and transportation of [eagles and eagle parts] * * * for the religious purposes of Indian tribes." 16 U.S.C. 668a. The

Eagle Act defines the term "take" to include "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb." 16 U.S.C. 668c. The Secretary may issue such permits only if he determines "that [doing so] is compatible with the preservation of the bald eagle or the golden eagle." 16 U.S.C. 668a. Under the Secretary's regulations, an applicant must identify the species and number of eagles or feathers proposed to be taken and the state and local area where the proposed taking would occur. 50 C.F.R. 22.22(a).

In processing applications for permits under the Eagle Act's Indian-tribes exception, the Department of the Interior's Fish and Wildlife Service (FWS) considers whether the applicant is a member of a federally recognized Indian tribe, see 25 U.S.C. 279a-1, and "[t]he direct or indirect effect which issuing such a permit would be likely to have upon the wild populations of bald or golden eagles." 50 C.F.R. 22.22(c). The FWS also considers the tribe's longstanding cultural or religious needs and whether the National Eagle Repository (Repository), which collects eagle carcasses, parts, and feathers and distributes them free of charge to members of federally recognized tribes, Gov't C.A. App. 64, 67, could satisfy the applicant's need, Pet. App. 1, at 8; Gov't C.A. App. 64, 67, 90.

The FWS has issued "take" permits to the Hopi tribe on an annual basis since 1986. Pet. App. 1, at 9; Gov't C.A. App. 174.

Those permits have authorized the Hopi to take up to 40 golden eagles from the wild per year for religious purposes. Ibid. The FWS has also issued permits to members of the Navajo tribe and to a Taos Pueblo member. Pet. App. 1, at 9; Gov't C.A. App. 90-91, 174.

b. The Religious Freedom Restoration Act

In Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), "this Court held that the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws." Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 424 (2006) (O Centro Espirita). "Congress responded by enacting the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb et seq., which adopts a statutory rule comparable to the constitutional rule rejected in Smith." O Centro Espirita, 546 U.S. at 424; see 42 U.S.C. 2000bb(b)(1). RFRA provides that the federal government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person" is both "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(b). In enacting RFRA, Congress sought to provide "a workable test for striking sensible balances between religious

liberty and competing prior governmental interests." 42 U.S.C. 2000bb(a)(5); see Cutter v. Wilkinson, 544 U.S. 709, 722 (2005).

2. Petitioner is a member of the Northern Arapaho Tribe of Wyoming. Pet. App. 1, at 5-6. In March 2005, he shot and killed one of only two bald eagles that were then nesting on the Wind River Indian Reservation, which the Northern Arapaho share with the Eastern Shoshone Tribe. Id. at 7, 9. Petitioner made no attempt to obtain a take permit before shooting the eagle, even though, as a member of a federally recognized tribe, he was eligible to apply for such a permit. Id. at 9, 15, 17; see 50 C.F.R. 22.22. Petitioner later testified that he was aware of the Repository but not of the permitting process that may have permitted him to take a live eagle. Pet. App. 1, at 9.

In testimony before the district court, petitioner acknowledged having known "that it was illegal just in terms of the laws of the United States and the laws of the State of Wyoming and actually the tribal law to kill an eagle." Gov't C.A. App. 58. Petitioner further acknowledged that he did not consult with anyone "who knew about the traditional ways * * * to see if it was, in their opinion, appropriate to shoot an eagle" in order to obtain it for use for religious purposes. Id. at 62-63. Petitioner initially denied having killed the eagle when he was approached by a tribal warden shortly after the shooting, and petitioner and a friend were playing video games when the warden arrived. Id. at

59.

3. Petitioner was charged by information with a misdemeanor violation of the Eagle Act. He moved to dismiss the information, arguing that the prosecution violated RFRA. Pet. App. 1, at 10.[1]

The district court granted petitioner's motion to dismiss. App., infra, 1-12. The court first held that, notwithstanding his failure to seek a permit, petitioner had standing to challenge the permitting process because the court concluded that it would have been futile for petitioner to have sought a permit. Id. at 5-7. The court acknowledged that petitioner would have been legally eligible to apply for a take permit. Id. at 6. But it observed that petitioner and other tribal members who testified on his behalf "were not aware of the possibility of obtaining a permit to take an eagle," and it stated that the FWS had "no outreach programs advising Native Americans of the take permitting process." Ibid. The court observed that "very few applications for fatal take permits for Indian religious purposes have been submitted and even fewer granted," and it concluded that "[b]ased upon the agency's conduct in every other respect, it is clear that [petitioner] would not have been accommodated by applying for a take permit." Id. at 6-7.

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[1] Before the district court, petitioner also asserted that this prosecution violated his rights under the Free Exercise Clause of the United States Constitution. App., infra, 1-2. Neither the district court nor the court of appeals addressed petitioner's Free Exercise claim, and it is not before this Court. See Pet. i, 12.

On the merits, the district court determined that the prohibition on killing eagles without a permit substantially burdened petitioner's religion, reiterating its previous statement about "the futility of the process for obtaining a fatal take permit" and noting that petitioner "contends that eagles from the Repository are not acceptable for" his particular religious purposes. App., infra, 8. The court determined that there was "no real dispute" that the government has a compelling interest "in preserving our eagle populations and in protecting Native American culture," but it concluded "that the pre-permitting process [was] not the least restrictive means of preserving the eagle populations given the recovery of the bald eagle in recent years." Id. at 8-9. The court acknowledged "that the demand for eagles and eagle parts for religious purposes is very high," id. at 10, and it agreed "that some regulation of the taking of eagles is necessary to further [the government's] compelling interests," id. at 11. But the court viewed the government as having a "policy of discouraging requests for eagle take permits for Indian religious purposes, and limiting the issuance of such permits to almost none," and it criticized what it considered to be "the biased and protracted nature of the process." Ibid.

4. The court of appeals reversed. Pet. App. 1. The court noted that petitioner had "concede[d] that the government's interest in protecting the bald eagle is compelling." Pet. App. 1,

at 11. The court also determined that it was not necessary "to decide issues related to the Repository," because the government had "concede[d] that [petitioner's] religious exercise [was] sincere" and did not argue on appeal "that the availability of frozen [eagle] parts from the Repository" would have alleviated the burden on petitioner's ability to practice his religion. Ibid. As a result, the court determined that the only issues before it involved "the combined effect of the requirement that eagles be taken only with a permit and the regulations making permits available for Native American religious uses." Ibid.

The court of appeals determined that, "[w]ithout any evidence that [petitioner's] religious tenets are inconsistent with using an application process," the requirement that petitioner not take an eagle without first obtaining a permit did not, in and of itself, impose "a substantial burden" on his ability to practice his religion. Pet. App. 1, at 12. The court chose not to "rest [its] decision on the lack of a substantial burden," however, because it "conclude[d] that the permit process is a reasonable accommodation of [petitioner's] religious beliefs and is narrowly tailored to achieve the government's compelling purposes." Ibid.

The court of appeals concluded that both the determination of "whether a governmental interest is compelling within the meaning of RFRA" and the "application of the least-restrictive-means (or 'narrow-tailoring') test to a given set of facts" present issues of

law that are reviewable de novo on appeal. Pet. App. 1, at 13. The court noted that, "[b]eyond its resolution of these aspects of the RFRA test, the district court offered a number of observations about the unsatisfactory functioning of the regulatory scheme," and it stated that, "[i]n the ordinary case, it is possible that these conclusions would be characterized as factual." Ibid. The court of appeals sua sponte determined, however, that "assessments of this sort are better seen as constitutional facts, subject to our 'independent examination.'" Ibid. (citing, inter alia, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984)); see id. at 13-15.

Turning to the merits, the court of appeals noted that petitioner "did not apply for a permit to take an eagle." Pet. App. 1, at 15. As a result, the court concluded that petitioner was not entitled to "raise arguments based on burdens to his religion that might have occurred, or might have been averted, if he had applied." Ibid. In contrast, the court stated that petitioner was "permitted to argue that the process contains so many obstacles that it would effectively have been futile for him to apply for a permit." Ibid.

The court of appeals explained that petitioner was "legally eligible for a [take] permit." Pet. App. 1, at 17. The court did not disagree with the district court's assessment that the FWS "'prefers' those who can to use the Repository, and indeed imposes

a rule that permits will be granted only to those whose needs cannot be satisfied by frozen parts from the Repository." Id. at 18 (quoting App., infra, 6). But the court of appeals stated that "[t]he record demonstrates that permits are in fact granted," and it determined that "[t]he record reveals no reason to believe that an application to take a single eagle * * * submitted by [petitioner] would have been treated any less favorably than the Navajo and Hopi applications to take golden eagles, which have been granted in the past." Ibid. The court also acknowledged the district court's statement "that the FWS engages in no 'outreach'" about the availability of take permits, ibid. (quoting App., infra, 6), but it stated that "[t]his is obscurity, not futility." Ibid.; see id. at 21.

Finally, although the court of appeals stated that the district court "may well [have been] justified" in being "frustrated" with what it regarded as "undue footdragging by the FWS with respect to fatal take permits," it concluded that "the evidence in the record does not come close to demonstrating that the process is so protracted as to be futile." Id. at 21. To the contrary, the court of appeals explained that the evidence showed "that the Hopi permit took approximately three months to process the first time," and it observed that a comparable period "would have given [petitioner] ample time before the" religious ceremony for which he claimed to have needed the eagle he shot without

seeking a permit. Ibid.[2]

5. Petitioner filed a petition for rehearing, which the court of appeals denied.

ARGUMENT

The issues on which petitioner seeks this Court's review are narrow. As was the case below (Pet. App. 1, at 11), petitioner does not deny that the government has a compelling interest in the protection of bald eagles. Petitioner does not seek further review of the court of appeals' conclusion (id. at 12) that the mere existence of a permitting requirement is not "a substantial burden" on his ability to practice his religion within the meaning of RFRA. And petitioner does not ask this Court to review the merits of the court of appeals' rejection of the claim that it would have been futile for him to have applied for a take permit (id. at 17-19), or its resolution of various other challenges to this prosecution (id. at 19-24). See, e.g., United States v. Oliver, 255 F.3d 588 (8th Cir. 2001) (per curiam) (holding that prosecuting a member of a federally recognized Indian tribe for taking an eagle without a permit does not violate RFRA); United States v. Hugs, 109 F.3d 1375 (9th Cir. 1997) (per curiam) (same).

Instead, petitioner challenges only one discrete portion of the court of appeals' discussion of the applicable standard of

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[2] The court of appeals also rejected a variety of other claims that petitioner does not renew before this Court. Pet. App. 1, at 19-24.

appellate review. Specifically, petitioner argues that (1) the court of appeals erred in applying sua sponte the "independent examination" rule associated with Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984), in the RFRA context (Pet. 12-15); and (2) even if the "independent examination" rule applies in RFRA cases, that rule does not apply in circumstances where a trial court has ruled in favor of, rather than denied, a religious-liberty claim (Pet. 8-12).

Further review is not warranted. The court of appeals' decision is interlocutory. Petitioner has failed to identify a conflict between the court of appeals' decision in this case and any decision of this Court, another court of appeals, or state court of last resort. And the standard of review did not affect the court of appeals' resolution of this case in any event.

1. The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial" of this petition for a writ of certiorari. Hamilton-Brown Shoe Co. v. Wolf Bros., 240 U.S. 251, 258 (1916); see VMI v. United States, 508 U.S. 946 (1993) (Scalia, J., concurring). This Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Robert L. Stern et al., Supreme Court Practice § 4.18, at 281 n.63 (9th ed. 2007). That general practice, which prevents unnecessary trial delays, should be followed here. The court of appeals reversed the

pre-trial dismissal of the information and remanded for trial. Pet. App. 1, at 6. If petitioner does not prevail on remand, he may then present his standard-of-review claim (and any other claims the court of appeals rejects) to this Court, following the entry of a final judgment, in a single consolidated petition.

2. The question before this Court in Bose involved the proper standard of review "of a District Court's determination that a false statement was made with the kind of 'actual malice' described in New York Times v. Sullivan, 376 U.S. 254, 279-280 (1964)." Bose, 466 U.S. at 487. This Court held that, as a matter of "federal constitutional law," id. at 510, reviewing courts have an obligation "to 'make an independent examination of the whole record'" with respect to that question, id. at 499 (quoting Sullivan, 376 U.S. at 285 (citation omitted)). In reaching that conclusion, the Court explained that "at least three characteristics" of the underlying actual-malice rule were relevant: (1) "the common-law heritage of the rule itself assigns an especially broad role to the judge in applying it to specific factual situations"; (2) "the content of the [actual-malice] rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication" ; and (3) "the constitutional values protected by the rule make it imperative that judges * * * make sure that it is correctly applied." Id. at 501-502. This Court has subsequently

applied Bose's "independent examination" rule in other cases involving application of Sullivan's actual-malice standard, see Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657, 659, 685-689 (1989), and to certain other questions involving the Constitution's Free Speech Clause, see, e.g., Randall v. Sorrell, 548 U.S. 230, 249 (2006) (opinion of Breyer, J.); Illinois ex rel. Madigan v. Telemarketing Assocs., 538 U.S. 600, 620-621 (2003); Hurley v. Irish-American Gay, Lesbian and Bissexual Group of Boston, 515 U.S. 557, 567 (1995); Gentile v. State Bar of Nevada, 501 U.S. 1030, 1038 (1991).

a. Petitioner has identified no conflict between the court of appeals' decision in this case and any decision of this Court, another court of appeals, or a state court of last resort. The threshold question is whether the Bose "independent examination" rule applies in the RFRA context. This Court has never addressed that question, and petitioner does not assert that the court of appeals' affirmative answer conflicts with any decision of any other court. In fact, the relevant section of the petition for a writ of certiorari (Pet. 12-15) cites no decisions at all other than the court of appeals' decision in this case and this Court's decision in Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), which involved a claim under the Free Exercise Clause and said nothing about standards of appellate review. The government is likewise unaware of any other

court of appeals decision that has addressed the applicability of Bose's "independent examination" rule to cases involving RFRA.[3]

b. Petitioner asserts (Pet. 8-12) that this Court should grant review to resolve what he asserts is a division in the lower courts about whether the "independent examination" rule that this Court recognized in Bose should be applied "symmetrically" (Pet. 9) to cases in which a trial court sustains, rather than rejects, a constitutional claim on the merits. That claim does not merit this Court's review.

i. Petitioner cites three court of appeals decisions and one state court decision that rejected a symmetrical application of Bose's "independent examination" rule. Like Bose itself, however, all of those cases involved constitutional claims under the Free Speech Clause. See Multimedia Pub. Co. of South Carolina, Inc. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154 (4th Cir. 1993) (see Pet. 9); Daily Herald Co. v. Munro, 838 F.2d 380 (9th Cir. 1988) (see Pet. 9); Planned Parenthood Ass'n/Chicago Area v.

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[3] In United States v. Israel, 317 F.3d 768 (7th Cir. 2003), a criminal defendant argued that requiring him to refrain from smoking marijuana as a condition of his supervised release violated the Free Exercise Clause and RFRA. The district court rejected that claim, and the court of appeals affirmed. In so doing, the court of appeals said that, "[w]here First Amendment concerns are at issue, appellate courts must conduct an 'independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.'" Id. at 770 (quoting Bose, 466 U.S. at 499). The court of appeals did not specifically address what standard of review was applicable to the defendant's RFRA claim.

Chicago Transit Auth., 767 F.2d 1225 (7th Cir. 1985) (see Pet. 9); Brown v. K.N.D. Corp., 529 A.2d 1292 (Conn. 1987) (see Pet. 11). This case, in contrast, involves religion rather than speech, and petitioner identifies no decisions that have rejected symmetrical application of Bose's "independent examination" rule in that context. Cf. New Life Baptist Church Academy v. Town of East Longmeadow, 885 F.2d 940, 941-942 (1st Cir. 1989) (Breyer, J.) (applying Bose's "independent examination" rule in a constitutional Free Exercise case where the private claimant had prevailed below), cert. denied, 494 U.S. 1066 (1990). In addition, this case involves a statutory defense rather than a constitutional one, and the relevant statute (RFRA) had not even been enacted when the decisions upon which petitioner relies were handed down. There is thus no conflict between the court of appeals' decision in this case and any of the decisions relied upon by petitioner.

ii. Even if this case presented the issue of whether Bose's "independent examination" rule should be applied symmetrically in the free speech context, moreover, that issue would not merit this Court's review. On October 8, 2008, this Court denied certiorari in Sullivan v. City of Augusta, No. 07-1500, which presented that very question and relied on the same putative division in lower-court authority relied upon by petitioner. See Pet. at i, 17-19, Sullivan, supra. There is no reason for a different result here.

Circumstances have changed significantly in the 20 years since

Justice White observed that the circuits were split on the question "whether the standard of review articulated in [Bose] applies to trial courts' findings of fact in cases striking down governmental restrictions on speech as contrary to the First Amendment." Don's Porta Signs, Inc. v. City of Clearwater, 485 U.S. 981 (1988) (White, J., dissenting from the denial of certiorari) (emphasis added). The clear majority of federal courts of appeals have now either expressly held that a trial court's factual findings are subject to independent examination on appeal regardless of which party prevailed below or have applied the "independent examination" standard in cases where the First Amendment claimant prevailed below.[4]

In addition, the lower-court decisions relied upon by petitioner -- all of which were decided between 1985 and 1993, see Pet. 9, 11 -- are of questionable precedential value given this Court's more recent decisions. In its 2006 decision in Randall,

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[4] See, e.g., Sullivan v. City of Augusta, 511 F.3d 16, 25 n.1 (1st Cir. 2007), cert. denied, 129 S. Ct. 112 (2008); Bronx Household of Faith v. Board of Educ. of New York, 331 F.3d 342, 348 (2d Cir. 2003); Bender v. Williamsport Area School Dist., 741 F.2d 538, 542 n.3 (3d Cir. 1984), vacated on other grounds, 475 U.S. 534 (1986); Moore v. Morales, 63 F.3d 358, 361 (5th Cir. 1995), cert. denied, 516 U.S. 1115 (1996); Compuware Corp. v. Moody's Investors Servs., Inc., 499 F.3d 520, 525-526 (6th Cir. 2007); Jacobsen v. City of Rapid City, 128 F.3d 660, 662 (8th Cir. 1997); Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987), cert. denied, 485 U.S. 981 (1988); Tavoulareas v. Piro, 817 F.2d 762, 776 (D.C. Cir.), cert. denied, 484 U.S. 870 (1987); see also Lewis v. Colorado Rockies Baseball Club, Ltd., 941 P.2d 266, 271 (Colo. 1997).

for example, this Court applied Bose's "independent examination" standard in a case in which the free-speech claimant and the government had cross-petitioned for certiorari, which undermines the minority circuits' conclusion that the identification of the proper standard of review turns on which party prevailed below. See 548 U.S. at 249 (opinion of Breyer, J.). In its 1995 decision in Hurley, which also postdates the four decisions on which petitioner relies, the Court likewise described the Bose test in a way that drew no distinction based on which party prevailed below. See 515 U.S. at 567 ("we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection"). As a result, even if this case presented an issue on which the circuits were currently split -- and, as explained previously, it does not -- certiorari would still be unwarranted because any division in lower-court authority may resolve itself without the need for this Court's intervention.

c. Finally, the court of appeals was correct in concluding that the application of Bose's "independent examination" rule should not depend on which party prevailed below. The rule is a heightened standard of appellate review. It would be at best odd and highly atypical to conclude that the degree of deference owed to a trial court's decision with respect to a particular issue on appeal depends on which way the trial court ruled. The oddity would be particularly pronounced here because the Court adopted the

Bose rule in part because "the meaning of some concepts cannot be adequately explained in a simple statement," and enhanced appellate review is thus necessary to ensure appellate court control over "the process through which [the underlying constitutional] rule evolves and its integrity is maintained." 466 U.S. at 503. Cf. Ornelas v. United States, 517 U.S. 690, 697-699 (1996) (citing similar reasons for prescribing "independent appellate review" of trial courts' "determinations of reasonable suspicion and probable cause" under the Fourth Amendment).

3. Certiorari is also unwarranted because it is clear that, even if the court of appeals erred in concluding that the Bose "independent examination" rule is applicable here, the error had no impact on its resolution of this appeal. The court of appeals concluded that issues involving the "interpretation of RFRA," including the determination of whether a challenged action furthers a compelling government interest and the "application of the least-restrictive-means (or 'narrow tailoring') test to a given set of facts," present questions of law and are thus properly reviewed de novo on appeal. Pet. App. 1, at 13. Petitioner does not dispute that conclusion, and it is consistent with the decisions of other circuits. See ibid.

The court of appeals applied Bose's "independent examination" rule solely to "a number of [the district court's] observations about the unsatisfactory functioning of the regulatory scheme."

Pet. App. 1, at 13. The court of appeals did not conclude that these "observations" were findings of fact; it merely stated that "[i]n the ordinary case, it is possible that these conclusions would be characterized as factual." Ibid. (emphasis added). Accordingly, even if the court of appeals erred in concluding that Bose's "independent examination" rule applies in this particular context, that error could have no impact on the outcome of this case unless the court of appeals or this Court were to determine that the relevant conclusions were, in fact, matters that would otherwise be subject to review only for clear error and that the district court did not commit clear error.

Significantly, the court of appeals' decision makes clear that it would have reached the same result even had it applied the clearly erroneous standard of review to the "observations" (Pet. App. 1, at 13) in question. The court of appeals correctly determined that, because petitioner "did not apply for a permit to take an eagle," he was not entitled to pursue any claim "that the [permit] process might have taken too long, that he might have been wrongfully denied a permit even if he was entitled to one, or that the FWS might have imposed conditions that are religiously objectionable." Pet. App. 1, at 15. Instead, petitioner was required to demonstrate that the permitting process facially violates RFRA because it "is so ensnarled in delay and maladministration that the entire process is effectively futile."

Id. at 18.

The court of appeals correctly determined that petitioner could not satisfy that standard. The court of appeals did not disagree with the district court's statement that FWS "'prefers' Native Americans to use the Repository." Id. at 18 (quoting App., infra, 6). But it stated that that fact "did not render it 'futile' for [petitioner] to apply for a permit" because the evidence "demonstrate[d] that [take] permits are in fact granted" and "reveal[ed] no reason to believe that," if petitioner had applied for such a permit, his application "would have been treated any less favorably than the Navajo and Hopi applications to take golden eagles, which have been granted in the past." Ibid. The court of appeals likewise did not disagree with the district court's conclusions "that very few people apply for [take] permits and that the FWS engages in no 'outreach.'" Id. at 18 (quoting App., infra, 6). But the court of appeals correctly reasoned that "[t]his is obscurity, not futility." Ibid. And although the court of appeals stated that "the district judge['s] * * * frustrat[ion] with what he perceived as undue footdragging by the FWS with respect * * * to fatal take permits may well have been justified," it concluded that "the evidence in the record does not come close to demonstrating that the process is so protracted as to be futile." Id. at 19 (emphasis added). Because the defects that the court of appeals identified in the district court's analysis

principally concerned the legal scope of any "futility" exception, the standard of review with respect to the district court's "observations" had no impact on the court of appeals' ultimate disposition of this appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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