IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	**PETITION FOR**
Plaintiff-Appellant,	)	**REHEARING *EN BANC***
v.	)	
	)	
WINSLOW FRIDAY,	)	CASE NO. 06-8093
	)	(District of Wyoming)
Defendant-Appellee.	)	

INTRODUCTION

When the district court dismissed Friday's prosecution, the government appealed. A panel of this court reversed and remanded his case for trial. *See United States v. Friday*,525 F.3d 938 (10th Cir. May 8, 2008) (Attachment 1). Friday now asks for rehearing *en banc*.

His petition concerns only the panel's self-styled "independent examination" of the district court's factual findings. It raises a question of exceptional importance warranting rehearing *en banc*: Does the "constitutional facts" doctrine announced by the Supreme Court in *Bose v. Consumers Union* apply symmetrically to district court findings that favor as well as disfavor the First Amendment claimant?

As the panel itself recognized, its decision to apply *Bose* symmetrically, that is, its decision to eschew the otherwise controlling "clearly erroneous" standard

of review and instead independently examine findings protective of the First Amendment, puts the Tenth Circuit squarely at odds with several other circuits. Citing two previous decisions from this court, discussed below, the panel apparently felt bound to reach the "symmetric" result, but it noted that those earlier decisions neither discussed the controversy nor explained their reasoning.

The courts on the opposite side of the question, the Fourth, Seventh, and Ninth Circuits, refuse to apply the constitutional facts doctrine beyond the manner in which it was deployed in *Bose*. They apply the clearly erroneous standard to findings protective of the First Amendment, while giving *de novo* review to findings restrictive of the First Amendment. In addition to fostering a disagreement among the federal circuits, the symmetric application of *Bose* also divides the state courts, as well as academic commentators.

FACTUAL BACKGROUND

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 advise 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.[1]

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.

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[1]The Sun Dance requires the use of a whole eagle.

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 court accepted as the government's compelling interest in protecting eagles. He dismissed Friday's prosecution. The government appealed.

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 the Supreme Court held that the First Amendment altered the ordinary rules of deference to fact finders, displacing deferential with aggressive review. (Despite initial and supplemental briefing, 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*. The Supreme 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 analytic 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," observing 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 by this court. *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.[2]

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[2]It is possible that the panel misperceived the extent to which it was bound by earlier decisions of this court to apply *Bose* symmetrically. Although *Hardin* and *Revo* gave independent review to the district court's findings, they each resulted in affirmances, not reversals. We cannot say, then, that their

REASONS FOR GRANTING REHEARING

1. <u>The panel's decision widened an existing circuit split.</u>

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). The rule is needed "in cases involving *restrictions* on the freedom of speech protected by the First Amendment," *id*. at 503 (emphasis added), and is designed "to eliminate the danger that *decisions by triers of fact may inhibit the expression of protected ideas*," *id.* at 505 (emphasis added).

In this case, by requiring appellate judges to engage in aggressive fact finding where the First Amendment claimant prevailed below, the panel further

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"[un]explained" use of *Bose* was essential to their outcomes, for both would have affirmed equally under either independent review or the clearly-erroneous standard. It follows that their symmetric application of *Bose* may be dicta. Should the panel accept this observation as an invitation to reconsider its decision under Rule 40, Friday of course does not object.

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 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). These courts apply the doctrine even though the free-speech claimant prevailed below.

The matter 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.").

And it has pitted academic commentators against one another, too. *Compare* Steven Alan Childress, *above*, 70 Tul. L. Rev. at 1322 (1996) ("The only justification for the two-way street is a wholly formal thinking that makes equal process apply regardless of the speaker."), *and* 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."), *with* Eugene Volokh & Brett McDonnell, "Freedom of Speech and Independent Judgment Review in Copyright Cases," 107 Yale L.J. 2431, 2442 (1998) ("[I]ndependent judgment review of the idea-expression decision is valuable even when the defendant won at trial: 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 critical 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*: Does the rule apply even if the district court's findings are protective of the First Amendment? Never briefed or discussed before the panel, it is a question this circuit should address *en banc*.

2. <u>RFRA is particularly ill-suited to the symmetric application of *Bose*.</u>

Beyond the question "how should *Bose* be applied?" lies the question "whether it should have been applied in the first instance?" The 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, the Supreme 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 set off 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 burdened the practice of religion. Strict scrutiny was a test the Supreme Court had inconsistently applied in the past, and RFRA directed lower courts to apply it in all cases covered by the statue. 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 important to bear in mind that RFRA exists precisely because the Constitution does <u>not</u> protect a broad range of conduct considered to be religiously motivated, conduct Congress intended to protect. The point is only that RFRA is not the Constitution. It is something different, something broader.[3]

Perhaps this difference matters little for purposes of the constitutional facts doctrine. But it is a decision that should be made by the full court, with the benefit of briefing, and only after the court considers what the panel overlooked:

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[3]RFRA does not even apply to the states, in sharp contrast to the First Amendment. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

the clear legislative intent behind RFRA, to make the statute more protective of free exercise than the Constitution. For even if the Constitution requires the symmetric application of the *Bose* rule, there is every reason to believe Congress intended the exact opposite result with respect to RFRA.

The full court should also grapple with the consequences of applying *Bose* symmetrically not just in RFRA cases but in all cases arising under statutes or rules "revolving in constitutional law orbits." *See* Ira C. Lupu, "Statutes Revolving in Constitutional Law Orbits, 79 Va. L. Rev. 1, 14 -15 (1993). Like RFRA, statutes such as 42 U.S.C. § 1985(3) and the Equal Access Act, as well as many agency decisions, both regulatory and adjudicative, are formulated in terms closely derived from the Constitution and its doctrines, including First-Amendment doctrines. Without well-defined limits imposed by the full court, appellate judges in this circuit stand poised to usher in a new era of aggressive fact-finding on appeal.

It is a step that should not be taken lightly.

Respectfully submitted,

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing **PETITION FOR REHEARING *EN BANC*** :

(1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and;

(2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program Symantec AntiVirus Corporate Edition version 10.1.6.6000, Virus Definition File Dated: 06/17/2008 rev. 17, and, according to the program, are free of viruses.

s/ John T. Carlson
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **PETITION FOR REHEARING *EN BANC*** furnished to the following on the 19th day of June, 2008:

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