No. 16-452

# In the Supreme Court of the United States

ROBERT R. BENNIE, JR.,
*Petitioner*,

v.

JOHN MUNN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NEBRASKA DEPARTMENT OF BANKING AND FINANCE, *ET AL.*,
*Respondents*.

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

## BRIEF OF *AMICI CURIAE* THE STATES OF ARIZONA, MICHIGAN, MONTANA, NEVADA, OHIO, OKLAHOMA, TEXAS, AND WISCONSIN IN SUPPORT OF PETITIONER


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## INTEREST OF *AMICI CURIAE*[1]

As the chief law enforcement authorities of sovereign States, the Attorneys General are interested in the preservation of the free speech rights of all citizens. Integral to the machinery of protecting these rights is the standard of review courts apply to acts of retaliation like those inflicted by agents of the State of Nebraska on the Petitioner in this case.

The Constitution prohibits State officials from retaliating against individuals exercising their protected right to free speech. Although State Amici may sometimes have the responsibility of defending employees accused of prohibited retaliation, that duty does not obscure Amici's view of the legal standards governing these disputes. Among those is the expectation that a finding of constitutional fact, including the finding that a person of "ordinary firmness" would have declined to speak in light of the government's adverse action, should be reviewed de novo on appeal.

## SUMMARY OF ARGUMENT

State Amici agree with Petitioner that the petition for certiorari should be granted. The decision of the Eighth Circuit Court of Appeals failed to apply the appropriate standard of review to the ordinary firmness determination. Review should be granted to prevent the Eighth Circuit's error from prevailing and establishing a less searching standard of review for

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[1] Arizona submits this brief pursuant to Supreme Court Rule 37.4. Counsel of record for all parties received timely notice of State Amici's intent to file this brief.

private citizens' speech than is accorded to government employees or the incarcerated.

This Court has consistently recognized that First Amendment law is intricately bound up in the factual circumstances of each case. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). Indeed, so vital are the facts in these cases that appellate courts conduct an independent review of the core "constitutional facts" on which the case turns. *Id.* at 511. This standard of review differs from the clear-error standard that applies to findings of historical fact or determinations of witness credibility.

In order to demonstrate why the standard urged by Petitioner and consistent with this Court's precedent is so essential, this brief first reviews the factual record and then explains the distinction between historical facts and constitutional facts. By refusing to treat an "ordinary firmness" determination as a constitutional fact, the Eight Circuit Court of Appeals has erred and certiorari should be granted to prevent this mistaken precedent from endangering the First Amendment rights of American citizens.

## BACKGROUND

Petitioner in this case, Robert Bennie, has been an active participant in the local Tea Party movement in his hometown of Lincoln, Nebraska. *See Bennie v. Munn*, 822 F.3d 392, 395 (8th Cir. 2016). This public activity by which Bennie pursued the good of his community and his country upset some of his fellow citizens who had differing political perspectives. Unfortunately for Bennie, these fellow citizens happened to be in a position of regulatory authority

over the profession in which he made his livelihood. Bennie worked as a financial advisor at LPL Financial, a brokerage firm, which holds assets and executes financial transactions. *Id.* at 394. His disgruntled regulators worked for the Nebraska Department of Banking and Finance, which regulates brokerage firms like LPL by monitoring their advertisements for compliance with financial regulations. *Id.* The Department also possesses the power to sanction brokerage firms and their employees by fining them and even barring them from operating in Nebraska. *Id.* Before becoming active in the Tea Party, Bennie had not received any disciplinary attention either from his employer or the Department.

### A. Bennie's Political Speech Draws Attention from State Regulators

All of this changed in 2009 and 2010. Department officials Rodney Griess, Jack Herstein, and John Munn, prompted by Bennie's appearance in newspaper articles and television ads, focused the regulatory apparatus of the Department against Bennie in an effort to retaliate against him for his political speech.

In August 2009, Bennie aired television ads for LPL Financial in which he remarked that "it's a basic American right to keep and bear arms" and "if we decide to do business, I'll contribute $100 towards your purchase of a firearm. God Bless You and God Bless America." The ad comported with the pertinent financial regulations allowing gifts of up to $100 for new customers. About that same time, Griess discovered a promotional CD-ROM distributed by Bennie that Griess assumed to be in violation of various disclosure regulations. In fact, the CD-ROM

had been distributed to clients three years earlier, before those disclosure requirements were in effect. Nevertheless, Griess asked LPL to "talk to Bennie." 822 F.3d at 395. LPL agreed to do so in an email, which Griess forwarded to Herstein. In response, Herstein replied: "Bob [Bennie] always is seen wearing a cowboy hat lately, so I say 'Hang Him High.' " *Id.*

The scrutiny accelerated after Bennie was featured in a February 1, 2010 article on the Lincoln Tea Party which ran in the *Lincoln Daily Star*. *Bennie v. Munn*, 58 F. Supp. 3d 936, 938-39 (D. Neb. 2014). The article—which became the "flashpoint" for the regulators' retaliation—discussed Nebraska's Tea Party movement. *Id.* at 941. The article quoted Bennie's critical remarks about President Obama and other elected officials in both parties. While the column's coverage of Bennie's political role in the local Tea Party movement did not implicate the Department's regulatory authority, Griess was perturbed. The very next day, this State regulator promised to crack down on Bennie for "activities" including the "gun slingin [sic] ads, and calling Obama a 'communist,' " neither of which implicated any State financial (or other) regulation. *Id.* at 939.

### B. State Regulators Retaliate Against Bennie for His Political Speech

The Nebraska regulators proceeded to use the Department's substantial regulatory powers to retaliate against Bennie for his political speech. What began with a conference call suggesting that LPL take "heightened supervisory actions" to appease the Department, blossomed over the next month. Department regulators questioned whether LPL had

sufficient guidelines regarding its employee's political statements and then found cause to order all of Bennie's "one on one" dinner meetings to be cancelled immediately, and forbade the planning of future events using Bennie's invitation until compliance was achieved. 822 F.3d at 399. After cancelling the events, LPL's counsel emailed Griess, protesting that the invitation was fully compliant with all advertising regulations. *Id.* at 396. Bennie, suspicious of politically motivated retaliation, called Governor Dave Heineman, explained what he believed was happening, and asked the Governor to intervene. *Id.* A week later, the Department changed course, and allowed Bennie to continue with the meetings as scheduled. *Id.*

Bennie was fired by LPL at the beginning of November 2010. At that point, Bennie was still active in the Tea Party movement. In mid–2011, Bennie filed a public-records request and received the department's internal communications regarding its 2010 investigations. According to Bennie, after learning what people in the Department wrote about him, he stopped arranging Tea Party events and writing letters to the editor and restrained himself from publicly criticizing the President.

### C. The District Court Rules Against Bennie; the Eighth Circuit Affirms

Bennie filed a civil rights lawsuit under 42 U.S.C. § 1983 against Griess, Herstein, and Munn, alleging that the Department retaliated against him for engaging in activities protected by the First Amendment. *Id.* In the Eight Circuit, a plaintiff seeking to prevail on such a claim must show that: (1) his speech is protected by the First Amendment,

(2) the government took an adverse action that was motivated in part by the plaintiff's speech, and (3) the adverse action was severe enough to chill a person of ordinary firmness from continuing to speak. *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003).

The district court expressly "disapprove[d] of the defendants' conduct." 58 F. Supp. 3d at 937. After hearing testimony from both sides, the court rejected the regulators' contention that they had simply made "legitimate inquiries" regarding Bennie's advertising activities. *Id.* at 942–43. The court made numerous credibility and fact determinations, noting that it was "apparent, from [ ] emails and the follow-up inquiries of LPL, that the Department had an interest in [Bennie's] statements of political opinion" and that the regulators' "testimony to the contrary [was] simply not credible." *Id.* The court also found that Griess, Herstein, and Munn "were looking for reasons" to go after Bennie after they read his statements about President Obama in the *Lincoln Journal Star*. *Id.* "Some of the questions [the regulators] asked of LPL would not have been asked had it not been for the plaintiff's political activity." *Id.* These findings regarding the regulators' motives and the plausibility of their proffered excuses for retaliation against Bennie's speech are the type of findings for which district courts are uniquely suited. At no point has Petitioner urged their reconsideration on appeal.

Despite these findings, however, the district court dismissed Bennie's lawsuit because "even if there was a constitutional violation, it was *de minimis*—insufficiently substantial to support a claim for relief." *Id.* The court concluded that there was not enough

evidence to demonstrate that Department regulators had substantially impacted Bennie and, therefore, the retaliation could not be deemed severe enough to chill a person of ordinary firmness from continuing to speak on political issues. *Id.* at 944.

On appeal, the Eighth Circuit upheld the district court's decision. Concluding that the question of "ordinary firmness" is one which "encapsulate[s] the factual finding that . . . the state regulators' actions were 'insufficiently substantial' to be actionable," the Eighth Circuit panel reviewed the finding for clear error. 822 F.3d at 398. The panel also acknowledged that the standard of review was "likely . . . dispositive" of the outcome of the case. *Id.*

## ARGUMENT

In a free country, citizens may criticize their government without fearing reprisals from those who hold the levers of power. The United States Constitution guarantees that right to freedom of speech and, under 42 U.S.C. § 1983, citizens may bring actions to vindicate their civil rights when violated by governmental retaliation. The issue presented in this case—the standard of review applied by the Courts of Appeal to the finder of fact's determination that an adverse action would chill the free speech of a person of ordinary firmness—recurs in every retaliation case.

### A. The Standard of Review in First Amendment Cases for Constitutional Facts Is Clear

First Amendment jurisprudence establishes a hybrid standard of review. Traditional factual findings "must not be set aside unless clearly erroneous, and the

reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6). However, "constitutional" facts receive an independent or de novo review.

Constitutional facts are different because "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and 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." *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995). Accordingly, appellate courts are "obliged to make a fresh examination of crucial facts" in order to resolve First Amendment issues. *Id.* at 567. Whether the actions Department employees took against Bennie were enough to dissuade a speaker of ordinary firmness is a constitutional fact—"a crucial fact"—that determines the core issue of whether this particular retaliation violates the First Amendment.

This Court and others have applied the same standard to other crucial constitutional facts in various First Amendment cases. *See, e.g.*, *Street v. New York*, 394 U.S. 576, 592 (1969) (whether statements were "so inflammatory" as to qualify as "fighting words"); *Miller v. California*, 413 U.S. 15, 25 (1973) (whether printed material offended "community standards" and therefore could be regulated as obscenity); *United States v. Hanna*, 293 F.3d 1080, 1088 (9th Cir. 2002) (announcing a two-step process whereby the court first defers "to the jury's findings on historical facts, credibility determinations, and elements of statutory liability" and then "conduct[s] an independent review

of the record to determine whether the facts as found by the jury establish the core constitutional fact.").

An additional rationale, cited in *Bose*, for departing from Rule 52's default standard is the combination of fact and law present in "constitutional facts." The Court in *Bose* applied de novo review because the "'conclusion of law as to a Federal right and [the] finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.'" *Bose*, 466 U.S. at 508 n. 27 (quoting *Fiske v. Kansas*, 274 U.S. 380, 385–86 (1927)). In such cases, appellate courts must "'make an independent examination of the whole record,'" *id.* at 508 (citation omitted), consistent with their "power . . . to conduct an independent review of constitutional claims when necessary," *id.* at 506, (citation and quotation marks omitted).

This "rule of independent review assigns to [appellate] judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the fact finding function be performed in the particular case by a jury or a trial judge." *Id.* at 501. In order to fulfill that responsibility, the appellate court must review de novo the district court's findings about whether this level of retaliation is sufficient to deter a person of ordinary firmness, which depends on constitutional facts rather than historical ones.

### B. Whether a Person of Ordinary Firmness Would Be Chilled Is a Constitutional Fact

"Ordinary firmness" determinations are constitutional facts rather than historical facts. In the present case, the district court found facts of both

kinds. The bench trial found the historical facts that Bennie was employed by LPL, that Department regulators hassled LPL to crack down on Bennie, that the local newspaper reported that Bennie had called President Obama a communist, and that the regulators' prextetual justifications for their actions were unconvincing. Beyond these pure fact determinations, the district court found the constitutional fact that Bennie's comments about the President were protected speech under the First Amendment. The finding that the Department's retaliatory actions were de minimis and therefore did not rise to constitutionally actionable retaliation is another constitutional fact (if not an outright legal conclusion) determined by the scope of the First Amendment. The contrast between the types of factual findings in this case illustrates the difference that the Eighth Circuit failed to take seriously. If it had honored this difference, that court could not have missed that "First Amendment questions of 'constitutional fact' compel . . . de novo review." *Bose*, 466 U.S. at 508 n.27 (collecting cases).

Additionally, independent review of constitutional facts is already commonplace in retaliation cases. Where a plaintiff asserts retaliation against a government employee or an incarcerated person, appellate courts consider the facts anew. *See*, *e.g.*, *Rankin v. McPherson*, 483 U.S. 378, 386 & nn.8–9 (1987) (citing *Bose* and "examin[ing] for ourselves the statements in issue and the circumstances under which they [were] made" to determine whether employee's speech could constitutionally form grounds for dismissal); *Mitchell v. Horn*, 318 F.3d 523, 531 (3d Cir. 2003) (applying "plenary review" over the question of

whether a state prisoner was deprived of a protected liberty interest). When the government is acting as regulator its power to restrict speech is even less than when the government is acting as employer or a jailer. Under these circumstances, independent review is especially appropriate. To let the Eighth Circuit's ruling stand would be to afford less attention to the protection of an ordinary citizen's involvement in the political process than is afforded to government employees during the workday and prisoners.

While the Eighth Circuit indicated that the standard of review is "likely dispositive" of the current case, 822 F.3d at 398, this Court need not answer the ultimate question of whether Mr. Bennie suffered a First Amendment violation. The question to which States and their regulators—to say nothing of individuals—require a clear answer is whether "constitutional facts" that are largely legal determinations will face independent review in the appellate courts.

## CONCLUSION

State Amici request that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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November 4, 2016

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Re: Brief of *Amici Curiae* States in Support of Petitioner in 16-452, *Robert R. Bennie, Jr., v. John Munn, in His Official Capacity as Director of the Nebraska Department of Banking and Finance, et al.*

Dear Mr. Harris:

Enclosed please find 40 copies of the Brief of *Amici Curiae* States in Support of Petitioner in 16-452, *Robert R. Bennie, Jr., v. John Munn, in His Official Capacity as Director of the Nebraska Department of Banking and Finance, et al.*

Also enclosed you will find one (1) additional copy with an addressed and metered envelope. Please file stamp this copy and return by U.S. Mail. Thank you for your courtesy in this matter. If you have any questions or concerns, please do not hesitate to contact us.

Very truly yours,

Donna J. Wolf

Enclosures

## CERTIFICATE OF SERVICE

I, Donna J. Wolf, hereby certify that 40 copies of the foregoing Brief of *Amici Curiae* States in Support of Petitioner in 16-452, *Robert R. Bennie, Jr., v. John Munn, in His Official Capacity as Director of the Nebraska Department of Banking and Finance, et al.*, were sent via Three Day Service to the U.S. Supreme Court, and 3 copies were sent via Three Day Service and e-mail to the following parties listed below, this 7th day of November, 2016:

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All parties required to be served have been served.

I further declare under penalty of perjury that the foregoing is true and correct. This Certificate is executed on November 7, 2016.

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Subscribed and sworn to before me by the said Affiant on the date below designated.

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Notary Public

[seal]


JOHN D. GALLAGHER
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My Commission Expires
February 14, 2018

**CERTIFICATE OF COMPLIANCE**

No. 16-452

ROBERT R. BENNIE, JR.,

*Petitioner*,

v.

JOHN MUNN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NEBRASKA DEPARTMENT OF BANKING AND FINANCE, *et al.*,

*Respondents.*

As required by Supreme Court Rule 33.1(h), I certify that the Brief *Amici Curiae* States in Support of Petitioner contains 2,680 words, excluding the parts of the Brief that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

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