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

Motion for Leave to File Brief *Amici Curiae* and Brief *Amici Curiae* of Nine Law Professors Who Write About Appellate Review in Support of Petitioner

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MOTION FOR LEAVE TO FILE BRIEF

Counsel for Profs. Jonas Anderson (American University–Washington College of Law), S. Alan Childress (Tulane University Law School), Joshua B. Fischman (Northwestern University Pritzker School of Law), Steven Morrison (University of North Dakota School of Law), Amanda Peters (South Texas College of Law), Max Schanzenbach (Northwestern University Pritzker School of Law), Steven Semeraro (Thomas Jefferson School of Law), Ned Snow (University of South Carolina School of Law), and Eugene Volokh (UCLA School of Law) moves for leave to file an *amici curiae* brief in support of petitioner, pursuant to Supreme Court Rule 37.2(b). *Amici* are filing this motion because respondents have withheld consent for filing this brief.

This brief may assist the Court in determining whether to grant certiorari. All *amici* are among the few scholars who have written regarding standards of appellate review. *Amici* believe that the principle of independent appellate review of mixed questions of law and fact related to constitutional rules—and, in particular, related to the "ordinary firmness" inquiry in First Amendment cases—is important to a wide range of cases, and thus merits this Court's attention.

Amici therefore request that the Court grant this motion for leave to file this brief *amici curiae*.

Respectfully submitted,

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QUESTION PRESENTED

To prevail on a First Amendment retaliation claim, a plaintiff must show that the government action would have chilled the exercise of First Amendment speech rights by a person of "ordinary firmness." Should such determinations by trial courts be reviewed for clear error, or using the independent appellate review prescribed by *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984)?

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INTEREST OF *AMICI CURIAE*[1]

The *amici curiae*—Profs. Jonas Anderson (American University–Washington College of Law), S. Alan Childress (Tulane University Law School), Joshua B. Fischman (Northwestern University Pritzker School of Law), Steven Morrison (University of North Dakota School of Law), Amanda Peters (South Texas College of Law), Max Schanzenbach (Northwestern University Pritzker School of Law), Steven Semeraro (Thomas Jefferson School of Law), Ned Snow (University of South Carolina School of Law), and Eugene Volokh (UCLA School of Law)—all belong to the regrettably small group of law professors who have written on standards of appellate review.[2] Profs.

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[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief. Parties were given timely notice of the intent to file this brief; petitioner consented to the filing (via a blanket consent), but respondents did not.

[2] *See* J. Jonas Anderson, *Specialized Standards of Review*, 18 Stan. Tech. L. Rev. 151 (2014); S. Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 Tul. L. Rev. 1229 (1996); S. Alan Childress, *A Standards of Review Primer*, 125 F.R.D. 319 (1989) (cited in *United States* v. *Bloomfield*, 40 F.3d 910 (8th Cir. 1994)); S. Alan Childress & Martha S. Davis, *Federal Standards of Review: Civil, Criminal and Administrative* (4th ed. 2010) (second edition cited in *Barker* v. *Ceridian Corp.*, 193 F.3d 976 (8th Cir. 1999), *McKnight by and Through Ludwig* v. *Johnson Controls, Inc.*, 36 F.3d 1396 (8th Cir. 1994), and *Keenan* v. *Computer Assocs. Int'l, Inc.*, 13 F.3d 1266 (8th Cir. 1994)); Joshua B. Fischman & Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing*, 40 J. Legal Stud. 405 (2011); Steven R. Morrison, *Strictissimi Juris*, 67 Ala. L. Rev. 247, 282-84

Childress, Morrison, Semeraro, Snow, and Volokh have also written on the First Amendment. *Amici* believe that the principle of independent appellate review of mixed questions of law and fact related to constitutional rules is important to a wide range of cases, and that it therefore merits this Court's review.

SUMMARY OF ARGUMENT

This case involves a question that can arise in nearly every First Amendment retaliation appeal: Should de novo review or clear error review apply to decisions about whether a person of "ordinary firmness" would be chilled by the adverse government action?

The answer should be de novo review, under basic principles of appellate review relating to mixed questions of law and fact as well as the special rules for constitutional cases set forth by this Court. Granting certiorari in this case would let this Court uphold important principles of appellate review, and reaffirm the requirement of independent review in cases implicating First Amendment rights.

This Court has repeatedly held that, in constitu-

(2015); Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 Lewis & Clark L. Rev. 233 (2009); Steven Semeraro, *Worse Than the Tower of Babel? Remedying Antitrust's False Dichotomy Through De Novo Appellate Review*, 5 Wm. & Mary Bus. L. Rev. 413 (2014); Ned Snow, *Fair Use as a Matter of Law*, 89 Denv. U. L. Rev. 1, 17-37 (2011); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 Yale L.J. 2431 (1998); Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 Nw. U. L. Rev. 1009 (1996).

tional cases involving "mixed finding[s] of law and fact," "an appellate court has an obligation to 'make 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.'" *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 499, 501 (1984) (internal citations omitted).

And how a person of "ordinary firmness" would react to government action is a classic instance of a "mixed question of law and fact." It is not a question of historical fact—how the speaker in this case actually reacted—for which clear error review may be proper. Rather, it is a question of how to apply the legal "person of ordinary firmness" standard to the historical facts. This Court has required independent appellate review for many mixed questions of law and fact, including questions that have to do with how an ordinary or reasonable person would react under given circumstances, *e.g.*,

- whether certain statements are so "likely to provoke the average person to retaliation" as to be fighting words;
- whether certain facts would warrant a police officer of "reasonable prudence" to believe that there is probable cause for a search;
- whether certain facts would lead a "reasonable person" to feel not free to leave (the standard for determining who is in "custody" for *Miranda* v. *Arizona* purposes).

And there are three good reasons for applying independent review to such questions. First, as *Bose* noted, such review helps correct erroneous denials of constitutional rights. Appellate judges are as able as

trial judges to apply legal standards such as "would chill a person of ordinary firmness" or "would provoke the average person to retaliation."

Second, such review provides greater consistency and equality of treatment. The "person of ordinary firmness" standard should not differ from one trial judge or jury to another. When two different cases involve highly similar facts, they should come out the same way even in different federal courtrooms. Yet under the clear error standard of review, two trial court decisions reaching opposite results when applying the same legal standard to the same facts would both be affirmed.

Third, the process of independent appellate review of mixed questions of law and fact, whether in First Amendment cases or other cases, helps set precedents that make the legal rule clearer and more precise. Indeed, this is the way that the common law is supposed to work. If, for instance, this Court grants certiorari in this case and then either affirms or reverses the district court decision using de novo review, future judges and government decision makers will know more about where the "person of ordinary firmness would be chilled" line is drawn.

But under the decision below, which used clear error review, no such precedent is set. All people know is that a particular decision by a particular judge was not clearly erroneous—but a different judge would be free to reach the opposite result on the same facts. That is not helpful for the rational development of the law, or for maintaining viewpoint neutrality in the application of the First Amendment.

Moreover, this case offers a perfect opportunity for

this Court to clarify this area of the law, because here, as the court below acknowledged, "[t]he standard of review * * * likely is dispositive," Pet. A-9. Even if the court below was correct that the district court decision was not clearly erroneous, "the record in this case might well have supported a conclusion that an ordinary person's speech would have been chilled." Pet. A-13.

For these reasons, this Court should grant the petition for writ of certiorari and make clear that a district court's "ordinary firmness" determination is to be reviewed de novo, just like other mixed findings of law and fact in constitutional cases.

ARGUMENT

I. This Case Offers This Court an Opportunity to Clarify the Lower Court Jurisprudence Regarding Appellate Review of Mixed Questions of Law and Fact in Constitutional Cases

A. The "Ordinary Firmness" Inquiry Is a Mixed Question of Law and Fact

There are questions of historical fact, there are questions of law, and there are "mixed questions of law and fact." Mixed questions of law and fact—also called questions of the applications of law to fact—arise when "'[t]he historical facts are admitted or established, the rule of law is undisputed, and the issue is * * * whether the rule of law *as applied to the established facts* is or is not violated.'" *Ornelas* v. *United States*, 517 U.S. 690, 696-67 (1996) (emphasis added) (quoting *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982)).

Thus, for instance, "When does the Fourth Amendment require probable cause for a search?" is a question of law. "What did this police officer know about the defendant's conduct?" is a question of historical fact. The probable cause question involved in *Ornelas*, 517 U.S. at 696—"[Are] the known facts * * * sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found[?]"—is a mixed question of law and fact.

The court below in this case incorrectly concluded that it was reviewing a "factual finding" that, "on the evidence presented, the state regulators' actions were 'insufficiently substantial' to be actionable," Pet. A-9. But that is not a question of historical fact; it is a mixed question of law and fact.

The rule of law is undisputed: A First Amendment retaliation claim is established if "government official[s] took adverse action," motivated at least partly by a speaker's constitutionally protected activity, "that would chill a person of ordinary firmness from continuing in the activity," *Revels* v. *Vincenz*, 382 F.3d 870, 876 (8th Cir. 2004). The historical facts are established. Applying the rule to the facts requires legal judgment as to whether the state regulators' actions were "insufficiently substantial." "[T]he issue is * * * whether the rule of law as applied to the established facts is or is not violated,'" which is not "a determination of historical facts, but * * * a mixed question of law and fact," *Ornelas*, 517 U.S. at 696-97 (internal quotation marks omitted).

B. This Court Has Held That Mixed Questions of Law and Fact Related to Constitutional Questions—Especially First Amendment Questions—Should Be Reviewed De Novo

This Court has concluded in other cases that the Constitution commands de novo review of mixed questions of law and fact that bear on a constitutional test. That is what this Court held as to probable cause in *Ornelas*, *see supra* Part I.A. It is what this Court held as to whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave," the test for whether a defendant was "in custody" for *Miranda* v. *Arizona* purposes. *Thompson* v. *Keohane*, 516 U.S. 99, 112-13 (1995) ("This * * * determination, we hold, presents a 'mixed question of fact and law' qualifying for independent review."). And that is what this Court held as to the First Amendment in *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), and many other cases. As this Court held in *Hurley*,

> The "requirement of independent appellate review * * * is a rule of federal constitutional law," which does not limit our deference to a trial court on matters of witness credibility, but which generally requires us to "review the finding of facts by a State court * * * where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."

515 U.S. at 567 (citations omitted); *see also, e.g.*, *Bose*, 466 U.S. at 505-09 (applying the requirement of in-

dependent appellate review to review of federal court findings); *Ridley* v. *Massachusetts Bay Transp. Auth.*, 390 F.3d 65, 75 (1st Cir. 2004) ("We engage in de novo review of * * * mixed questions of law and fact in First Amendment cases.") (citing *Bose* and *Hurley*).

Indeed, this Court has repeatedly used such independent appellate review when a constitutional standard turns on how a reasonable or ordinary person would react to certain facts. This Court did this as to a reasonable police officer's evaluation of probable cause in *Ornelas*. This Court did this as to a reasonable person's perception of whether he or she was free to leave (and thus not in custody for *Miranda* purposes) in *Thompson*.

And in the First Amendment context, this Court has applied independent review with regard to the "fighting words" inquiry, which is "whether particular remarks" are "so inherently inflammatory as to come within that small class of 'fighting words' which are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.'" *Bose*, 466 U.S. at 505 (citation omitted). What actual words were said may be a pure question of historical fact. What constitutes the definition of "fighting words" may be a pure question of law. But whether the words that were said are indeed "likely to provoke the average person to retaliation" is a question of application of law to fact, which the appellate court must review independently, *id.* Likewise, whether government officials' actions "would chill a person of ordinary firmness from continuing in the activity" should also be reviewed independently. *See, e.g.*, *Braun* v. *Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1120-21 (11th Cir. 1992) (applying *Bose* to

independently review the question whether an advertisement "would convey to a reasonably prudent publisher that it created a clearly identifiable unreasonable risk that the advertiser was available to commit serious violent crimes," and thus would constitute unprotected commercial speech).

Indeed, in First Amendment cases, this Court has generally required independent review whenever mixed questions of law and fact arise: not just as to fighting words, but as to libel, obscenity, incitement, symbolic expression, and more. *Bose*, 466 U.S. at 505-08 (citing cases); *Hurley*, 515 U.S. at 567-68.[3] But the fighting words example is especially relevant to this case, because it shows the need for de novo review of constitutional judgments about what a reasonable person or ordinary person would do given particular facts.

C. De Novo Review of "Ordinary Firmness" Determinations Is Supported by This Court's Rationales in *Bose Corp.* v. *Consumers Union*

The rationales invoked by this Court in *Bose* apply to First Amendment retaliation cases. First, "the constitutional values protected by the [no-retaliation] rule make it imperative" that appellate judges "make sure that it is correctly applied." *Bose*, 466 U.S. at 502. (*Bose* requires independent appellate review by intermediate appellate courts as much as by this Court. *See, e.g.*, *Carver* v. *Nixon*, 72 F.3d 633, 639 (8th Cir. 1995).) The rule here is that speakers are

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[3] This independent review amounts to de novo review of the particular application of law to fact, *Bose*, 466 U.S. at 508 n. 27, though not necessarily of the judgment as a whole, *id.* at 514 n. 31.

protected against retaliation that would chill a person of ordinary firmness. This rule protects constitutional values just as much as do the rules defining the scope of various First Amendment exceptions.

Second, "[t]he principle of viewpoint neutrality that underlies the First Amendment * * * also imposes a special responsibility on judges whenever it is claimed that a particular communication is unprotected." *Bose*, 466 U.S. at 505. Independent review can help prevent viewpoint discrimination, both by regulators and by factfinders, because it provides greater consistency and equality of treatment.

The "person of ordinary firmness" standard should not vary from one trial judge (or one jury) to another; indeed, such variation may often unconsciously stem from a factfinder's sympathy or antipathy towards the speech involved in each case. Independent appellate review can help make sure that lower court decisions about what constitutes retaliation are consistent. And the fact that each such decision would set a binding precedent for future cases—cases that would foreseeably involve very different kinds of speech—can help check the human tendency to apply vague standards in ways that favor speakers whose views we share.

Third, "the content of the rule" involved here—just as with the rule in *Bose*—"is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication; though the source of the rule is found in the Constitution, it is nevertheless largely a judge-made rule of law." *Id.* at 502. Independent appellate review of the applications of this rule "is the process through which the rule itself evolves and its integrity

is maintained." *Id.* at 503.

"When the standard governing the decision of a particular case is provided by the Constitution, this Court's role"—and the role of appellate courts more generally—"in marking out the limits of the standard through the process of case-by-case adjudication is of special importance." *Id.* And it is particularly important that the "person of ordinary firmness" standard be better elaborated, to offer further guidance both to lower courts and to government regulators.

CONCLUSION

Whether a government official's actions suffice to chill a speaker of ordinary firmness is a classic mixed question of fact and law—and a question that is part of the test for what constitutes unconstitutional retaliation. This question should be reviewed de novo, both under sound principles of appellate review and under the First Amendment rules set forth by this Court in cases such as *Bose*.

Respectfully submitted,

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November 4, 2016

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Re: Motion for Leave to File Brief *Amici Curiae* and Brief *Amici Curiae* of Nine Law Professors Who Write About Appellate Review 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 Motion for Leave to File Brief *Amici Curiae* and Brief *Amici Curiae* of Nine Law Professors Who Write About Appellate Review 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.* The Petitioner has filed blanket consent.

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

Donna J. Wolf

Enclosures

CERTIFICATE OF SERVICE

I, Donna J. Wolf, hereby certify that 40 copies of the foregoing Motion for Leave to File Brief *Amici Curiae* and Brief *Amici Curiae* of Nine Law Professors Who Write About Appellate Review 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 Next Day Service to the U.S. Supreme Court, and 3 copies were sent via Next Day Service and e-mail to the following parties listed below, this 4th 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 4, 2016.

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

Date: November 4, 2016

Notary Public

[seal]

JOHN D. GALLAGHER
Notary Public, State of Ohio
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 Motion for Leave to File Brief *Amici Curiae* and Brief *Amici Curiae* of Nine Law Professors Who Write About Appellate Review in Support of Petitioner contains 2,861 words, and the Motion contains 204 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.

Executed on November 4, 2016.

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Sworn to and subscribed before me by said Affiant on the date designated below.

Date: November 4, 2016

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