No. 07-1500

In The

Supreme Court of the United States

TIMOTHY SULLIVAN AND
LAWRENCE E. DANSINGER,

Petitioners,

v.

CITY OF AUGUSTA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Circuit erred in concluding that the City of Augusta's parade ordinance did not violate the First Amendment by charging parade organizers with the costs of traffic control when ample alternative channels of communication were available for use without a fee?

2. Whether the First Circuit erred in reviewing *de novo* the district court's determination that sidewalks are never a sufficient alternative channel of communication to justify a content-neutral time, place, or manner regulation on parades along the City's streets?

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INTRODUCTION

Contrary to the claims of the Petitioners, this case involves a basic application of the established principles regarding time, place, and manner regulations of speech in public streets. Petitioners are incorrect in asserting that the First Amendment requires the public to pay for traffic control so they can march in the street, when other channels of communication – sidewalks, parks, and other public spaces – are available for use by demonstrators. The First Circuit's method of review and ultimate decision apply the law set forth in previous cases from the Court, and this case deserves no further review or consideration.

The First Circuit determined that the City of Augusta's parade ordinance did not run afoul of the First Amendment by charging parade organizers with the reasonable cost of traffic control to close down the City's streets. The First Circuit correctly held that the parade ordinance was a content-neutral, time, place, or manner regulation, and that alternate channels of communication – the sidewalks – were available to those who wished to organize a march without paying the costs of traffic control. The First Circuit's decision is consistent with the Court's ruling in *Cox v. New Hampshire*, 312 U.S. 569 (1941), that a parade ordinance requiring organizers to pay up to $300 in municipal costs was constitutional. Although Petitioners claim that there is a split among the federal circuits on this issue, a review of the relevant cases reveals no legal conflicts, but merely different

outcomes depending on the facts presented in each case.

The Petitioners also challenge the First Circuit's application of a *de novo* standard of review to the district court's findings. The First Circuit's approach is consistent with the Court's decisions in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), and is adhered to by the vast majority of appellate courts, both state and federal. No court appears to have adopted the Petitioners' preferred asymmetrical standard of review in the past fifteen years. Moreover, to the extent that a split among the lower courts remains, this is not an appropriate case to resolve the question. The "facts" that the Petitioners seek to insulate from appellate review are not facts, but rather the relevant legal conclusions regarding whether an alternate channel of communication is constitutionally sufficient to justify a time, place, or manner regulation. Other cases, including a Tenth Circuit case that is active and may come before the Court in the near future, present better vehicles for reconsidering the issue should the Court find it necessary to do so.

STATEMENT OF THE CASE

In February 2004, Timothy Sullivan, on behalf of the "March for Truth Coalition," applied to the City of

Augusta (the "City"), the state capital of Maine, for a permit to hold a parade in the City's streets. Petition at 3a. The City indicated that it would grant the permit if Sullivan paid an administrative fee of $100 plus the estimated cost of deploying extra police officers and police vehicles to control and divert traffic during the event. *Id.* The total fee is calculated based on factors that are unrelated to the content of speech, but instead reflect the traffic control requirements of a street parade. *Id.* at 137a. These factors include the parade route, the duration and size of the parade, the extent of necessary road closures, and the existence of other scheduled events or circumstances that conflict with or otherwise affect the anticipated cost of providing police services for the proposed parade. *Id.* There was no evidence to suggest that the City discriminates in the issuance of permits based on the content or subject matter of the parade. *See id.* at 133a. In addition to street parades, numerous groups have held successful sidewalk marches in the City that did not require payment of any fee or police expenses.

Sullivan sued the City in the United States District Court for the District of Maine in March 2004 challenging, *inter alia*, the constitutionality of the fees imposed under the City's parade ordinance. *Id.* at 4a. Sullivan, however, did pay the required fee and his group conducted its parade. *Id.* In September 2004 Sullivan amended his complaint to add Lawrence E. Dansinger, who had applied for a parade permit in August, as an additional plaintiff. *Id.* When

the City indicated that the cost of the parade on his chosen route would be almost $2,000, Dansinger requested a waiver on the ground that he was unable to pay. *Id.* No waiver was granted, and the parade was not held. *Id.* at 5a. Following discovery and submission of the case on a stipulated record, the District Court held, *inter alia*, that the City's parade ordinance was unconstitutional because the ordinance did not provide an indigency exception to the fee requirement. *See id.* at 164a. The District Court held that an indigency exception was required under the Constitution because, in its view, adequate alternative forms of expression were not available. *Id.* at 155a-58a. In so ruling, the District Court relied on the testimony of a sociologist, Prof. Joe H. Bandy III – who had never examined the parade route in question or any potential alternatives – that sidewalk marches were not adequate alternatives to street marches because street marches promote camaraderie and provide "euphoric muscular bonding" among the marchers and sidewalk marches do not. *See id.* at 155a-56a.

The First Circuit reversed, holding that adequate alternatives to a street parade were in fact available to indigent protesters in the City, including sidewalk parades, gatherings on the statehouse steps or other state properties, leafleting, vehicular processions, and mass outdoor gatherings of fewer than 200 people. *Id.* at 57a-58a. None of these alternatives require payment of a fee. The First Circuit concluded: "The plaintiffs have access to numerous speech alternatives,

making a fee waiver to march in the streets unnecessary." *Id.* at 56a-57a.

REASONS FOR DENYING THE WRIT

Contrary to Petitioners' assertions, there is no circuit split on the issue of whether the First Amendment requires that a city parade ordinance assessing organizers for the reasonable costs of traffic control include an indigency exception. Different results in the lower courts do not stem from any legal *disagreement, but rather from different conclusions* on the facts by those courts about the availability of alternative channels of communication for First Amendment activities. Taken as a whole, the cases agree that when adequate alternative channels are available, an indigency exception is not required. If there are no adequate alternative channels, then an *indigency exception may be necessary to comply with* the First Amendment. The First Circuit's decision in this case is consistent with other circuit decisions and the Court's decision in *Cox v. New Hampshire*, 312 U.S. 569 (1941). The Court should decline to grant the petition on this question.

The Court also should decline to grant the petition on the other question presented by the Petitioners: whether the standard of review on appeal for factual findings in First Amendment cases should change, depending on which party won below. The Petitioners exaggerate the extent of the "circuit split"

on this issue; eight other federal appellate courts join the First Circuit in reviewing *de novo* the findings of the district court in a First Amendment case without regard to which party won below. The recent trend supports this approach, and it is possible, if not likely, that the remaining appellate courts may yet join this majority and resolve the differences.

Even if the Court were inclined to consider the issue, this case is a poor candidate for review. The "facts" cited by the Petitioners were not findings specific to the availability of the sidewalks in Augusta on the date and time of the parade in question. Instead, the findings at issue go to the general question of whether sidewalks are a sufficient alternative to streets for First Amendment purposes. This is a legal determination, and is thus subject to plenary review in any case. Finally, other cases pending in the lower courts would present a better opportunity for the Court to address the standard of review question, if it is inclined to do so.

I. THERE IS NO GENUINE CIRCUIT SPLIT REGARDING THE NECESSITY OF AN INDIGENCY EXCEPTION

With respect to the Petitioners' first issue – whether the First Amendment requires an indigency exception to a parade fee requirement – the purported circuit split does not in fact exist. The Petitioners contend that a decision by the Sixth Circuit "held that an indigency exception to a street parade

traffic control fee was not required by the First Amendment," while a decision of the Eleventh Circuit held that the First Amendment does require an indigency exception to such fees. Petition at 24. A review of these cases, however, reveals that the circuits are in agreement that a parade fee may be unconstitutional if adequate alternative means of expression for indigent individuals do not exist. The divergent outcomes in these cases do not reflect a circuit split as to controlling legal principles, but rather the fact that the Sixth Circuit concluded that adequate alternative means of expression existed, while the Eleventh Circuit found otherwise.

In *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir. 1991), the Sixth Circuit rejected a challenge to a parade fee on the ground that it did not include an indigency exception. The Sixth Circuit distinguished the cases on which the *Stonewall Union* plaintiffs relied, because:

> In each of these cases, failure to satisfy the fee prerequisite precluded the prospective participants' involvement in the constitutionally protected activity. In contrast, in the present case, an alternative forum is available – the Columbus sidewalks which parallel the street are free for purposes of conducting a parade and the parks are available without cost for related speech activities.

Id. at 1137. In other words, the Sixth Circuit held that the parade fee was not unconstitutional because

an adequate alternative forum for expression was available.

In *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985), the Eleventh Circuit applied the same legal standard that the Sixth Circuit applied in *Stonewall*, but found a parade fee unconstitutional:

> The granting of a license permit on the basis of the ability of persons wishing to use public streets and parks to demonstrate, to pay an unfixed fee for police protection, *without providing for an alternative means of exercising First Amendment rights*, is unconstitutional.

Id. at 1523-24 (emphasis added). The difference between the outcome in *Stonewall* (parade fee constitutional) and *Walsh* (parade fee unconstitutional) turned not on any disagreement between the Sixth and Eleventh Circuits as to constitutional interpretation, but on the fact that alternative means of expression were determined to exist in *Stonewall*, but did not exist in *Walsh*.

Here, the First Circuit applied the same standard applied in *Stonewall* and *Walsh*, and held that an indigency exception was not required under the First Amendment because adequate alternatives existed: "Our conclusion is simply that there are sufficient alternatives for speech as not to require, constitutionally, that Augusta provide an indigency exception here." Petition at 58a; *see also id.* at 55a ("[A]s in *Stonewall*, the availability of gathering

places for protests, here including especially the state house steps, with its potential for media coverage, demonstrates the ample range of speech alternatives in the City. While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid *if the remaining modes of communication are inadequate. . . .*") (emphasis added) (internal quotation marks omitted).

Likewise, Judge Lipez's dissent in this case focused only on the constitutional adequacy of the alternative channels available to the Petitioners; it did not address the constitutional necessity of an indigency exception for any parade ordinance. *See* Petition at 68a (Lipez, J., dissenting) ("The question thus becomes whether streets provide such a unique forum for the communication of views that other public fora, including sidewalks, cannot be deemed adequate alternatives.").

The focus of the First, Sixth, and Eleventh Circuits on the existence of adequate alternatives is consistent with the Court's decision in *Bullock v. Carter*, 405 U.S. 134 (1942), in the analogous context of ballot access fees. The Court in *Bullock* held that Texas ballot access fees were unconstitutional because, other than paying the fee, the State provided "no reasonable alternative means of access to the ballot." *Id.* at 149; *see also Lubin v. Panish*, 415 U.S. 709, 718 (1974) ("[W]e hold that *in the absence of reasonable alternative means of ballot access*, a State

may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay.") (emphasis added). The same issue of adequate alternatives informs the decisions of the First, Sixth, and Eleventh Circuits on the parallel issue of parade permit fees.

Petitioners' reliance on *Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050 (2d Cir. 1983) is somewhat mysterious, as the holding there had nothing to do with an indigency exception. Rather, the decision turned on the fact that there was "no evidence that the administrative fee charged and to be charged to plaintiffs is equal to the cost incurred or to be incurred by defendants" in connection with the proposed demonstration, a totally different issue. *See id.* at 1056 (internal quotation marks omitted). Petitioners engage in substantial understatement in conceding that the absence of an indigency exception was "not the exclusive basis" for the Second Circuit's decision since the indigency exception issue had no bearing whatsoever on the decision.

In sum, there is no circuit split involving an indigency exception for the Court to resolve. The circuits that have addressed the issue agree that a parade fee requirement may be unconstitutional *if* adequate alternative fora for expressive activity do not exist. No circuit disagrees with the First Circuit on this point, and the divergent outcomes in these cases simply reflect differing conclusions as to the existence of adequate alternatives on the particular facts presented.

II. THE PAST FIFTEEN YEARS HAVE SEEN A CONSISTENT TREND AWAY FROM THE ASYMMETRICAL STANDARD OF REVIEW ADVOCATED BY THE PETITIONERS

A. The Petition overstates the split among lower courts, as the majority of courts apply a consistent standard of review to the facts in First Amendment cases.

Contrary to the Petitioners' claim that federal appellate courts split 4-3 on the standard of review in First Amendment cases, at least *twelve* federal appellate courts have addressed the applicable standard of review, and nine of them *decline* to apply the asymmetrical standard of review.[1] Thus, the clear majority of circuits take the same position as the First Circuit:

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[1] Some of these courts distinguish between independent review of "critical facts" or "constitutional facts," and other facts that, even in a First Amendment case, are appropriately reviewed for clear error. *See, e.g., United States v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008) (noting that "the special *Bose* rule applies only to 'constitutional facts'"); *Tavoulareas v. The Washington Post Co.*, 759 F.2d 90, 108 (D.C. Cir. 1985) (stating that "if the Court's statement in *Bose* [regarding *de novo* review] is not limited to the ultimate constitutional fact . . . then we see no rational stopping point short of holding all factual issues in a First Amendment case are for the court. . . . There is no indication that *Bose* was meant to set forth such a sweeping proposition") (quotation marks and citations omitted). To the extent that courts vary in the approach they take on this point, the difference does not depend upon which party prevailed in the district court, and it is therefore not implicated by this petition.

they decline to alter the standard of review based on which party prevailed in the district court. In fact, no court appears to have adopted the Petitioners' proposed asymmetrical standard since 1993.

The petition correctly identifies four of the circuit courts that, relying on the Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), eschew the unequal treatment of facts found in First Amendment decisions when reviewed on appeal: the First Circuit, *see United States v. Frabizio*, 459 F.3d 80, 96 (1st Cir. 2006) (Torruella, J., concurring) and this case; the Fifth Circuit, *see Lindsay v. City of San Antonio*, 821 F.2d 1102, 1109 (5th Cir. 1987); the Tenth Circuit, *see United States v. Friday*, 525 F.3d 938 (10th Cir. 2008), *pet. for reh'g en banc filed* June 19, 2008; and the Eleventh Circuit, *see Don's Porta Signs, Inc. v. City of Clearwater, Fla.*, 829 F.2d 1051, 1053 (11th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988).

The Petitioners fail, however, to note that five other circuits have joined these courts in reviewing *de novo* the findings of fact in First Amendment challenges that are successful in the district court. These courts include the Second Circuit, *see Bronx Household of Faith v. Board of Educ. of the City of New York*, 331 F.3d 342, 348 (2d Cir. 2003); the Third Circuit, *see Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 542 n.3 (3d Cir. 1984); the Sixth Circuit, *see Compuware Corp. v. Moody's Investors Services, Inc.*, 499 F.3d 520, 525-26 (6th Cir. 2007); the Eighth Circuit, *see Jacobsen v. City of Rapid City, S.D.*, 128

F.3d 660, 662 (8th Cir. 1997); and the D.C. Circuit, *see Tavoulareas v. The Washington Post Co.*, 759 F.2d 90, 98 (D.C. Cir. 1985).

At the state level, the Colorado Supreme Court has specifically addressed the question and rejected an asymmetrical standard of review. *See Lewis v. Colorado Rockies Baseball Club*, 941 P.2d 266, 270-71 (Colo. 1997). The Massachusetts Appeals Court, while declining to decide the issue, also conducted plenary review rather than defer to the factual findings that supported the lower court's decision that a First Amendment violation had occurred. *See T & D Video, Inc. v. City Of Revere*, 848 N.E.2d 1221, 1232 (Mass. App. Ct. 2006).

These cases establish a clear and definite trend away from adopting the asymmetrical standard of review urged by the Petitioners. Respondents have not found a federal appellate or state high court that has adopted the asymmetrical standard since the Fourth Circuit did so in 1993. *See Multimedia Publ'g Co. of South Carolina, Inc. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154 (4th Cir. 1993). Prior to that decision, the last court to adopt the asymmetrical standard was the Ninth Circuit in 1988 (before Justice White's dissent from the denial of certiorari in *Don's Porta Signs*). The clear majority of circuits review *de novo* the relevant facts in First Amendment cases, regardless of which party prevailed in the lower court.

B. The Court's decision in *Hurley* post-dates the circuit court decisions using an asymmetrical standard of review, and may yet resolve any remaining differences.

One reason why there have been no recent converts to the asymmetrical standard of review is the Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). In that case, the Court re-emphasized the need for independent review in First Amendment cases generally, and did not distinguish between those cases in which the First Amendment challenge succeeded in the district court and those in which it failed:

> [O]ur review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984). . . . This obligation rests upon us simply 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, 515 U.S. at 567 (emphasis added). In referring to this "obligation," the Court did not reserve the

need for independent review only in those cases where the First Amendment claim failed in the district court. Instead, the court said that *de novo* review was necessary to decide those cases in which the conduct falls on the "far side" of constitutional protection – which is what the First Circuit did in this case.

Academic commentators also have criticized the asymmetrical standard. "In our view, independent 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 standards, something *Bose* says is constitutionally valuable." Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 Yale L.J. 2431, 2442 (1998).

The intervening decision in *Hurley*, combined with the trend away from and criticism of the asymmetrical standard, raises the real possibility that the few outlying courts will recognize the weight of authority and resolve the issue in favor of symmetrical review. The Court should therefore decline to step in now and, instead, wait to see of the issue resolves itself in future cases.

III. EVEN IF THE COURT WERE INCLINED TO ADDRESS THE STANDARD OF REVIEW ISSUE, THIS CASE IS NOT THE IDEAL VEHICLE TO RESOLVE THE QUESTION

A. The standard of review was not addressed in any detail in the First Circuit's opinion.

Although a variety of cases have discussed the merits and disadvantages of an asymmetrical standard of review in First Amendment cases, this is not one of them. The issue was touched upon only in passing in the parties' briefs before the First Circuit, and the court did not address the issue directly in its opinion. *See* Petition at 12a-13a. Even the dissent by Judge Lipez did not accord any deference to the factual findings of the District Court, and instead engaged in a lengthy independent review of the record. *Id.* at 70a-82a (Lipez, J., dissenting). Judge Howard, concurring in the denial of *en banc* review, suggested that the Court consider reviewing the indigency exception but did not refer to the standard of review question. *See* Petition at 182a (referring to "the difficult constitutional *issue* in this case") (emphasis added).

In contrast to this case, there have been other cases that have fleshed out this issue and discussed it in far greater detail. At least one of those cases may yet come to the Court, and presents a much better vehicle for resolving this issue. *See Friday*, 525 F.3d 938 (petition for rehearing en banc filed on June 19th,

2008). If, as petitioner contends, the split is likely to continue, then other cases will provide a more fully developed record and basis for the Court's decision.

B. The "facts" at issue here are actually legal conclusions, which are subject to *de novo* review in any case.

The "facts" that the Petitioners identify in this case as deserving the protection of the "clearly erroneous" standard, notwithstanding the language of *Bose*, are not "facts" at all, at least not in the way envisioned by Rule 52(a). Instead, these "facts" are legal conclusions that go to the primary legal issue in this case: whether the Augusta parade ordinance is a valid content-neutral, time, place, or manner restriction that "leave[s] open ample alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The specific "facts" identified by the petitioners are:

- that sidewalk marches are less safe, and that this may deter some people from participating;

- that sidewalk marches would not interrupt traffic and change routines, and therefore would not garner as much attention from the media;

- that a sidewalk march would be narrower and not allow for wide placards and banners, and would make the march look smaller;

- that a sidewalk march would dampen the camaraderie among participants by preventing side-by-side marching;

- that a sidewalk march lacks the symbolic significance of a street march.

Petition at 7-8.

These conclusions are not the type of facts that asymmetric review is intended to protect. Instead, they are the relevant *legal conclusions* necessary to determine whether the sidewalks were constitutionally sufficient alternative channels of communication for the Petitioners. Even applying an asymmetric standard to facts, this inquiry would be subject to *de novo* review as the relevant legal question in the case.

Compare the "facts" listed above with the findings made by the district court in *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985), a case that applied asymmetrical review. In that case, the findings of fact at issue were whether the Chicago Transit Authority (CTA) had a "consistently-enforced policy of rejecting controversial public-issue advertising." *Id.* at 1229-30. This determination involved the review of evidence of past actions by the CTA, as well as witness statements regarding the CTA's policies and enforcement. *Id.* at 1230. The Court also reviewed for clear error the district court's finding as to whether the CTA's concerns about disruption, rider discomfort, and a loss in revenue. *Id.* at 1231.

Facts such as those considered in *Planned Parenthood Ass'n/Chicago Area* are traditional, historical facts that may affect the outcome of a constitutional case, but require specific testimony and findings. If the district court in this case had found that the sidewalks of Western Avenue in Augusta were impassable or dangerous because of their condition, or that the amount of traffic along the route was significantly greater than the traffic that passes the statehouse steps, then those facts might be entitled to greater deference *if* asymmetrical review applied. *Cf. Pouillon v. City of Owosso*, 206 F.3d 711, 718 (6th Cir. 2000) (noting that "[w]hat constitutes such a channel is a matter of law," but that whether or not a particular channel was available is a question for the fact-finder).

In this case, the District Court's findings were not specific to Augusta or the issues in this case. Its concerns about the adequacy of sidewalks compared with street marches were general; one could draw the same conclusions about sidewalks in Philadelphia, or Wichita, or Seattle.[2] Because these "factual findings" were in fact the relevant legal determination – whether there were adequate alternative channels of

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[2] Indeed, the expert witness on whose testimony the District Court relied was a professor offered as an expert in "social movements"; he had never visited Augusta and had no information about the operation of the Augusta ordinance or the conditions or specifics of the Petitioners' proposed parade route. Petition at 155a-56a n.29.

communication available to the Petitioners – the First Circuit properly employed plenary review. Judge Lipez, in dissent, likewise conducted a plenary review of this issue, recognizing it as a legal inquiry: "I share the district court's view that the options proffered by the City fall short of the constitutional standard." Petition at 67a.

Legal issues are not facts, and nothing in *Bose* or *Hurley* supports a standard of review that defers to a district court's ultimate determination of the legal issues before the Court. The very point of the exception to Rule 52(a) announced in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Bose* is to ensure that these crucial decisions are carefully reviewed by the appellate court, to ensure maximum protection of the actual boundaries of the First Amendment. "This Court's duty is not limited to an elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." *Bose*, 466 U.S. at 508. Professor Monaghan has made a similar point:

> [I]f labeling something a question of constitutional fact guarantees that it will be treated like a question of law, then either party is entitled to independent appellate review. In *Bose* itself, the Supreme Court reviewed de novo the conclusion of a court of appeals that had sustained, not denied, the federal claim.

Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 245-46 (1985).

Because the "facts" that the Petitioners are urging are actually legal conclusions, this case is not an appropriate vehicle to decide the merits of an asymmetrical standard of review for First Amendment decisions.

IV. THE FIRST CIRCUIT'S DECISIONS WERE CORRECT

A. The First Circuit correctly determined that no indigency exception to Augusta's parade ordinance was necessary, given the ample alternative channels of communication available to the Petitioners.

Regulations concerning the use of a public forum that ensure the safety and convenience of the people are not "inconsistent with civil liberties but are one of the means of safeguarding the good order upon which civil liberties ultimately depend." *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002) (quoting *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941)). The First Circuit's decision was entirely consistent with more than fifty years of Supreme Court precedent, the decisions of other state and federal courts, and common sense.

The Petitioners' argument flies in the face of the Court's seminal opinion on the subject of fees for parades, *Cox v. New Hampshire*, 312 U.S. 569 (1941). In *Cox*, marchers challenged a New Hampshire statute requiring a license and payment of a fee of not

more than $300 before parading on public streets as an unconstitutional abridgement of their First Amendment rights. The New Hampshire Supreme Court had construed the statute as requiring a "reasonable fixing of the amount of the fee," which could vary from a nominal amount up to $300.[3] *Id.* at 576. In referring to the fee charged, the Court stated:

> The fee was held to be "not a revenue tax, but one to meet the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed." There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated. The suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair fee schedule to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.

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[3] Significantly, when adjusted for inflation, the $300 maximum fee permitted by the statute approved in 1941 in *Cox* would be $4,421.06 in today's dollars – more than twice the amount that the Petitioners were assessed under Augusta's parade ordinance. *See* Bureau of Labor Statistics inflation calculator, *available at* http://data.bls.gov/cgi-bin/cpicalc.pl. *See also Forsyth County, Georgia v. Nat'l Movement*, 505 U.S. 123, 139 (1992) (Rehnquist, J., dissenting) ("[In *Cox*], the Court expressly recognized that the New Hampshire state statute allowed a city to levy much more than a nominal parade fee.").

Id. at 577 (quoting *State v. Cox*, 16 A.2d 508, 513 (N.H. 1940) (emphasis added)).

Applying the Court's precedents, a number of courts have, like the First Circuit, refused to create a right for persons to close public roads to traffic at no cost. *See Stonewall Union*, 931 F.2d at 1133 ("[*Cox*] considered a municipality's right to impose a license fee for parade permits and found that as long as the fee was designed to meet the expenses incident to the administration of the law and the cost of maintaining public order for the parade, such a charge did not impermissibly burden First Amendment rights. Subsequent Supreme Court cases do not suggest otherwise."); *see also Sauk County v. Gumz*, 669 N.W.2d 509, 537-38 (Wis. Ct. App. 2003) (refusing to create indigency exception to parade ordinance where there are "ample alternative means of assembling and speaking," and finding that "the reasoning of *Stonewall* is sound"); *Gay and Lesbian Services Network, Inc. v. Bishop*, 841 F. Supp. 295, 296 n.3 (W.D. Mo. 1993) ("The Court now determines that Plaintiffs' additional objections, namely the lack of an indigency exception, and the alleged lack of procedural safeguards, are without merit."); *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109-10 (6th Cir. 1997) ("[A]n ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to

defraying expenses incurred in furtherance of a legitimate state interest.").

In addition to running afoul of the Court's prior holdings, elevating an indigency exception to a constitutional requirement would be unworkable in practice and bad policy. First, virtually any group could find an indigent person to "sponsor" an event, thereby evading the City's constitutionally permissible effort to defray public safety costs. An indigency exception would become the classic exception that swallows the rule.

Second, an indigency exception would raise problems of intrusive and complex evidentiary inquiries and line-drawing. An indigency exception would need to include adequate measures to protect the taxpayers from inaccurate claims of poverty. The City would face uncertainty as to whether it should analyze indigency based on an applicant, the sponsoring group, or the participants in the march. Topics of inquiry would include: (A) the resources of the sponsoring individual/group; (B) the budget for the event; (C) annual budget; (D) the potential attendance; (E) the individual/group's ability to raise and solicit donations; and (F) the intention to solicit donations. This will create difficult and time-consuming evidentiary inquiries into financial status, not to mention burdens on the First Amendment right to anonymous speech, *see McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), and association, *see NAACP v. Alabama*, 357 U.S. 449 (1958).

Third, Plaintiffs would, if successful, force City of Augusta taxpayers to subsidize their speech by paying for the police resources necessary to close the streets to traffic. If Plaintiffs wish to engage in expressive activities in the middle of a public road in the City of Augusta, it is not unreasonable for them to pay for the cost of closing the road to motor vehicles, much like they would pay to rent a room at the Augusta town hall for a meeting. It is entirely reasonable for those wishing to exercise their right to freedom of expression in a city street to bear the cost of safely diverting traffic from that location. The alternative would either be significant administrative difficulties or the foisting of those costs on the community. "The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (quotation marks omitted). "It is undeniable, of course, that speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State." *Capitol Sq. Review Bd. v. Pinette*, 515 U.S. 753, 761 (1995).

B. The First Circuit's independent review of the relevant facts complies with the Court's decisions in *Bose* and *Hurley*.

For many of the reasons already discussed, the First Circuit's decision to review *de novo* the district court's conclusion that ample alternative channels of

communication were available to Petitioners was correct. The Petitioners are proposing a standard that: (1) is inconsistent with the Court's statements in *Bose* and *Hurley*; (2) is fundamentally unfair; and (3) is detrimental to the development of law interpreting the First Amendment.

First, the asymmetric standard urged by Petitioners is in conflict with the principles set forth in *Bose* and *Hurley*. Those decisions were premised on the rationale that the appellate court must conduct a thorough review to ensure that the First Amendment claims received full and fair consideration. Nothing in those opinions, however, indicates that this review should be applied unevenly, based on which party won below. To the contrary, the Court in *Hurley* said that the purpose of plenary review was to ensure careful review of First Amendment claims to see whether they fell on the "near or far side of the line of constitutional protection." *Hurley*, 515 U.S. at 567.

Second, the Court should decline to adopt any standard of review that treats identically situated parties differently. Such an approach is inconsistent with the concept of equal justice under the law and is simply unfair. *Cf. Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1085 (3d Cir. 1984) (expressing "discomfiture" at the "abnormality" of a proposed asymmetric standard of review). Moreover, the insulation of certain "findings of fact" on appeal could lead to more inconsistency and conflict among the lower courts, as the importance of a district court's interpretation is increased and the appellate court's fundamental

ability to review is decreased. The asymmetric standard also would be difficult, if not impossible, to apply in some cases where the identity of the prevailing party is murky. What if, for example, on the basis of its factual findings, the Court rejects some First Amendment challenges to a particular regulation or statute but upholds others?

Finally, asymmetric review is unhelpful for the development of the law interpreting and applying the First Amendment. It deprives the appellate courts of the ability to analyze meaningfully the district court's opinion and consider "close cases" that may be important to delineating the contours of the First Amendment's applicability. *See* Volokh & McDonnell, 107 Yale L.J. at 2442.

CONCLUSION

For the reasons stated, respondents respectfully request that the Honorable Court deny the petition for a writ of certiorari.

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