No. 08-071500

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "clearly erroneous" standard of appellate review in Rule 52(a) applies to the factual findings of a district court that support a holding in favor of First Amendment claims, as three circuits have held, or whether those findings should instead be subject to the plenary review that this Court has justified as necessary to ensure that First Amendment rights are not improperly abridged, as four circuits have held, including the First Circuit in this case?

2. Whether the First Amendment requires an indigency exception when government imposes large permit fees on the fundamental constitutional right of the people to assemble and march on public streets to engage in political protests, an issue on which the circuits are split?

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INTRODUCTION

Over a dissent, the First Circuit reversed the district court's ruling that the First Amendment requires an indigency exception to the $2,000 permit fee charged by the City of Augusta, Maine for political marches on its public streets. The court of appeals ruled instead that a sidewalk march was an adequate, free alternative. In so holding, the First Circuit widened existing circuit splits on two fundamental issues of First Amendment law.

The first is whether the exception to Rule 52(a)'s "clearly erroneous" standard of review applies not only when the First Amendment claims have been rejected by a district court, but also when they have been sustained. Here, applying a plenary standard of review to all "controverted matters," the panel majority disregarded the detailed factual findings of the trial court that a sidewalk march was a greatly inferior alternative to a street march in many respects, including that it would be less safe and thereby deter participants. In refusing to follow Rule 52(a)'s "clearly erroneous" standard of review, the First Circuit's decision directly conflicts with holdings of the Fourth, Seventh and Ninth Circuits. Since Justice White's dissent from denial of *certiorari* on this exact issue twenty years ago, the circuit split has only further widened to a 4-3 split.

The 2-1 panel decision of the First Circuit rejecting an indigency exception to large government fees on street marches also widens a pre-existing circuit split. That decision is in accord with a ruling of the Sixth Circuit but is in conflict with decisions of the Second and Eleventh Circuits. In 1990, this

Court granted *certiorari* to review the ruling of the Eleventh Circuit "that the First Amendment forbade the charging of more than a nominal fee for a permit to parade on public streets," but the Court ultimately found it unnecessary to decide that issue, which remains open today. Two of the five active Judges on the First Circuit voted to rehear this case and a third Judge stated that "the difficult constitutional issue in this case is significant and would benefit from consideration by the Supreme Court."

OPINIONS BELOW

The opinion of the First Circuit is reported at 511 F.3d 16 (1st Cir. 2007), and reprinted in the appendix at 1a-88a. The final order and findings of fact of the district court are reported at 406 F. Supp.2d 92 (D. Me. 2005), and are reprinted in the appendix at 89a-165a. The district court order granting a temporary restraining order is reported at 310 F.Supp.2d 348 (D. Me. 2004), and reprinted in the appendix at 166a-180a. The order of the First Circuit denying rehearing is not officially reported. It is reprinted in the appendix at 181a-182a.

JURISDICTION

The decision of the First Circuit was entered on December 14, 2007. A timely petition for rehearing was denied on February 29, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, ORDINANCES AND COURT RULES INVOLVED

First Amendment to the U.S. Constitution

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AUGUSTA, ME. REV. CODE. ORD. ch. 13, § 5 (Parade Ordinance)

(e) The cost of the permit shall be one hundred dollars ($100.00), plus the costs of traffic control per city collective bargaining agreement and clean up costs, as estimated by the Police Department. The permit fee will not include the cost of police protection for public safety. The one hundred dollar ($100.00) fee is payable at the time the application is submitted and the balance at the time of issuance. The City Council may modify this fee from time to time by Order.

Fed. R. Civ. P. 52(a)(6)

Setting Aside the Findings. Findings of fact, whether based on oral or other evidence, 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.

STATEMENT OF THE CASE

1. Petitioners Sullivan and Dansinger are longtime peace and justice activists who live in Maine and seek to protest and reform governmental

policies they believe promote needless violence and economic inequality. In order to express those views by organizing peaceful marches in the streets of Maine's capital, Petitioners must comply with the terms of Augusta's parade ordinance, which requires parade organizers to pay a fee of approximately $2,000 for the costs of traffic control and clean up. Unlike other cities, Augusta has no provision for waiving the fee on the grounds of indigency, thus conditioning access to the public streets on the ability to pay. Because Petitioners lack the resources to pay the fee that Augusta requires, the challenged ordinance directly impairs their First Amendment right to engage in this traditional and time-honored form of American protest.

2. In February 2004, Timothy Sullivan applied to the City of Augusta for a permit to hold a march in the streets of the city on the anniversary of the invasion of Iraq. The purpose of the march was to increase public awareness of what Sullivan believes to be the adverse effects of the war in Iraq and to advocate for affordable health care, veterans' rights and benefits, living wage jobs, and greater honesty and openness in government. The march was scheduled for March 20, 2004, and Sullivan proposed three alternative parade routes.

Under the terms of Augusta's Parade Ordinance, Sullivan was informed that he would have to pay a $100 application fee, plus an amount intended to cover the police costs necessary to control and divert traffic during the march, as well as the costs of clean-up after the event. The costs of this additional fee varied with the route. Sullivan was told that the first proposed route would cost $2,077.44, the second

proposed route would cost $1,761.20, and the third proposed route would cost $1,543.08.[1] Sullivan was unable to afford the required fees; however, he was able to borrow the required amount from a sympathetic organization, and the March 20th march went ahead as scheduled. The prospect of having to pay another large fee that he could not afford deterred Sullivan from even applying for a second parade permit for a march that he was planning for April 10, 2004 in response to a major offensive in Iraq.

In August 2004, Lawrence E. Dansinger applied to the City of Augusta for a permit to hold a peace march on October 10, 2004, in conjunction with the Million Worker March that was scheduled to be held on the same weekend in Washington, D.C. Under the terms of Augusta's Parade Ordinance, Dansinger was told that he would have to pay $1,979.32, in addition to the initial application fee of $100, to obtain the permit. After his request for an indigency waiver was denied, Dansinger cancelled the planned march.

As of March 2004, Sullivan was a self-employed craftsman who made decorative model boats. He was earning between $500 and $750 per month, most of which was used to pay his living expenses. In addition, he had approximately $90 in liquid assets. Dansinger's sole income is a monthly payment of

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[1] The City of Augusta also required Sullivan to obtain event insurance for the march. That requirement was struck down by the district court, App. at 176a-180a, and later repealed by the City, *id.* at 4a.

$700 that he receives as a consultant. He is 60 years old and has very few assets.

3. In March 2004, Sullivan filed a complaint in federal district court, with jurisdiction based on 42 U.S.C. § 1983, challenging various provisions of Augusta's Parade Ordinance.[2] An amended complaint was filed in September 2004, and Dansinger was added as a plaintiff. Following discovery, both sides moved for judgment based on a stipulated record. Applying intermediate scrutiny, the district court struck down several provisions of the Parade Ordinance.[3]

Most significantly here, the district court accepted Petitioners' contention that Section 13-5(e) of the Parade Ordinance was unconstitutional, on its face and as applied, because it does not "provide any exception or reduction to the large permit fee for citizens or groups for whom the fee causes a substantial hardship."[4] Though the City argued that an indigency waiver for a street march was not

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[2] The complaint also challenged a second City Ordinance regulating mass outdoor gatherings. The First Circuit ultimately determined that Petitioners lacked standing to challenge this ordinance because it did not apply to their planned activities. *See* App. at 13a-26a. Petitioners do not seek review of that ruling.

[3] The district court had earlier granted a temporary restraining order that enjoined the City from enforcing the event insurance requirement for the March 20th parade. *See* n.1, *supra.*

[4] App. at 151a. The district court also found that the permit fee system was constitutionally flawed because it lacked sufficiently clear guidelines to channel administrative discretion. That holding was reversed by the First Circuit, and is not at issue here.

necessary given the availability of free alternatives, including a sidewalk march and a stationary rally, the district court rejected that defense.The district court supported its holding that an indigency waiver was necessary with a series of factual findings based on the record evidence, including the extensive testimony of Petitioners' expert witness, an associate professor at Bowdoin College. App. at 51a-52a, 156a-157a. In particular, the district court determined that a march is greatly superior to both a stationary rally and a sidewalk march as a means of communicating Petitioners' message to their intended audience, including the following key findings of fact:

First, because a sidewalk march would force participants to cross intervening streets carrying traffic, "the march would be less safe than a parade where traffic is stopped and there is a police presence." *Id.* at 157a. Such well-founded safety concerns "may deter some would-be participants." *Id.* In addition, if a march were held on a sidewalk, the marchers "might be forced to halt altogether to let traffic pass" through on side streets. *Id.*

Second, because a sidewalk march would not interrupt traffic and change routines, it "would not likely garner as much attention" from the media, government officials or the public. *Id.*

Third, a sidewalk march is inferior to a march down a public street for "logistical reasons." *Id.* "[T]he demonstrations would be narrower, which would not allow for wide placards or banners to be carried and may make the march look smaller." *Id.*

Fourth, the narrowness of a sidewalk march "may dampen camaraderie by preventing people from marching side-by-side with a critical mass of fellow protestors." *Id.* A street march, by contrast, is "more effective at promoting camaraderie and movement-building." *Id.*

Fifth, sidewalk marches have "less symbolic significance" than street marches. *Id.* Street marches resonate more with the public and media because of America's long history of such protest marches successfully spurring reform, such as the 1963 March on Washington. *Id.* at 156a-157a.

Based on these detailed factual findings that both a stationary rally and a sidewalk march are greatly inferior alternatives to the traditional street protests that Petitioners seek to organize and that have long been a part of American political life, the district court then concluded:

> To block indigents from using the public streets to convey their message, by pointing out channels of communication that may be used free of charge, but are inadequate, is unconstitutional. It is the equivalent of a determination that those who cannot afford to pay the fee either have a less important message to convey or must convey it in a less effective way.

Id. at 158a-159a.[5]

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[5] The district court also held that Petitioner Sullivan was unconstitutionally overcharged because the estimated fee that he was required to pay in advance was significantly less than the actual police costs incurred. *Id.* at 149a-150a.

Finally, the district court rejected the City's claim that it would be administratively impracticable to administer an indigency exception. After noting that Augusta and other governmental entities around the country routinely make indigency determinations in a variety of different contexts without apparent difficulty, the district court observed: "The question is not so much whether the exception would swallow the rule, but whether the rule would swallow the right." *Id.* at 154a n.28

4. By a 2-1 vote, the First Circuit reversed the district court's holding that the absence of an indigency exception to the $2,000 permit fee violates the First Amendment.

At the outset, the majority announced that, because this case involves a claimed abridgement of First Amendment rights, "[o]ur review of the controverted matters is plenary," including "the facts" embraced by the First Amendment claims at issue. *Id.* at 12a-13a (citation and internal quotation marks omitted). In defining the scope of appellate review, the majority explicitly rejected Petitioners' argument that it should make a distinction in its standard of review of fact findings between cases in which the First Amendment claim was rejected below, and cases like this one, in which the First Amendment claim was initially upheld by the district court. *Id.* at 13a n.1.

As a result, the First Circuit felt no need to declare the district court's fact findings about the greater safety and other major communicative advantages of street marches clearly erroneous under Rule 52(a), Fed. R. Civ. P., or, indeed, to grant

them any deference at all. Instead, the majority freely substituted its own factual findings for the factual findings of the district court regarding the suitability of the available free alternatives to a street demonstration. For example, the district court made the factual finding that a sidewalk "march would be less safe than a parade where traffic is stopped and there is a police presence." *Id.* at 157a; *see also id.* at 73a (Lipez, J., dissenting) (crediting trial court's critical factual finding that "safety concerns 'may deter some would-be participants' from joining a sidewalk march because of the need to cross traffic and the lesser police presence"). The majority chose to ignore this key fact finding of the district court.

Similarly, without any claim that the trial court had committed clear error, the panel majority disregarded or substituted other facts for the district court's central factual findings that for "logistical" reasons sidewalk marches are inferior to street marches in (1) reaching a wider and changing audience, (2) making the demonstration appear larger and attracting media attention, (3) enabling marchers to carry the wide placards or banners that are a standard part of political demonstrations, (4) building camaraderie and hence a movement, and (5) resonating with the public and media because of America's long history of protest marches. For example, the majority discounted the expert testimony credited by the district court concerning the serious disadvantages of a sidewalk march, and instead chose to rely on the testimony of the City's Deputy Police Chief, "that several groups have used sidewalk marches to engage in expressive activities,

indicating the availability of the sidewalk alternative and its appeal to some persons." *Id.* at 55a.

Because the majority held that the available alternatives were constitutionally adequate – even assuming that they resulted in a "diminution in the quantity of speech, a ban on a preferred method of communication, and a reduction in the potential audience," *id.* at 56a – it did not decide whether an indigency exception would be constitutionally required if those proffered alternatives were, in fact, inadequate.

Judge Lipez dissented. While agreeing with the majority that an alternative avenue of communication need not be precisely equivalent to be regarded as "ample" for First Amendment purposes, "under any meaningful standard of review," he wrote, "that alternative forum cannot be [deemed] ample if it lacks the qualities that make the streets a uniquely powerful forum for expression, and thereby leaves indigent speakers and the public they seek to influence with a substantially different and diminished First Amendment experience." *Id.* at 80a-81a. In contrast to the majority, he reviewed the factual findings of the district court and supporting record evidence at length and determined, based on that evidence, that the alternatives offered by the City failed to satisfy this constitutional standard. *See* App. at 80a. (Lipez, J., dissenting) ("The streets thus remain the only publicly accessible forum that offers speakers both the immediacy of personal contact and – in contrast to sidewalks – the realistic potential for attracting a large audience and widespread attention with a powerful message undiluted by space constraints."). Accordingly, he

voted to strike down the permit fee in the absence of an indigency exception.

5. A timely petition for rehearing and rehearing en banc was denied on February 29, 2008, by a 3-2 vote. In explaining his vote to deny *en banc* review, Judge Howard said: "While I doubt that en banc review would improve upon the analyses set forth in the panel opinions, the difficult constitutional issue in this case is significant and would benefit from consideration by the Supreme Court." *Id.* at 182a.

REASONS FOR GRANTING THE WRIT

This case presents two questions that have long divided the circuits and that are of fundamental importance in a constitutional democracy that honors free speech and that has long recognized, in this Court's words, that "streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO,* 307 U.S. 496, 515 (1939).

First, does the "clearly erroneous" standard of review in Rule 52(a) apply to the factual findings of a district court that support a holding in favor of the First Amendment, or should those findings instead be subject to the plenary review that this Court has justified as necessary to ensure that First Amendment rights are not improperly abridged?

Second, absent an indigency exception, does the imposition of a large permit fee on the right to march in the streets violate the core First Amendment

principle that "[f]reedom of speech [is] available to all, not merely to those who can pay their own way"? *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943).

Both questions warrant this Court's review because of their significant effect on First Amendment rights. Both questions have produced serious and longstanding circuit splits. The answers to both questions provided by the First Circuit are, moreover, inconsistent with this Court's First Amendment jurisprudence.

A. The Circuits Are Divided, 4-3, On The Proper Standard Of Appellate Review In Cases Upholding First Amendment Rights.

This case presents a widespread and well-developed circuit conflict concerning the important issue whether the Rule 52(a) "clearly erroneous" standard of appellate review "applies to trial courts' findings of fact in cases striking down governmental restrictions on speech as contrary to the First Amendment." *Don's Porta Signs, Inc. v. City of Clearwater*, 485 U.S. 981 (1988) (White, J., dissenting from denial of *certiorari*). Since Justice White's dissent from denial of *certiorari* on this exact issue twenty years ago, the circuit split has only deepened. Now, four circuits have definitely ruled one way and three other circuits have definitely ruled the other way.

1. In *Bose Corp. v. Consumer's Union*, this Court held that the deference to trial court fact findings required by Rule 52(a) gives way when appellants are claiming interference with First Amendment rights. 466 U.S. 485, 509-10 (1984). De novo review of the record on appeal of denial of First

Amendment claims or defenses is justified "under the settled principle that [in] cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded." Id.

This Court, however, has never resolved the converse question that this case presents. To date, the sole exception in free speech cases recognized by this Court to the Rule 52(a) standard of review has been limited to factual findings that reject or limit free speech claims, thereby triggering "a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995). The constitutional justification for overriding Rule 52(a) in these special circumstances is to assure that the lower court's "judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* at 568. This rationale for a heightened standard of review on appeal based on the unusual importance of First Amendment rights in our constitutional system only applies to lower court findings adverse to the "vindication of rights protected under the First Amendment." *Ferris v. Cuevas*, 118 F.3d 122, 125 (2d Cir. 1997).

Thus, both the holding and reasoning in *Bose* and its progeny leave unanswered the question whether Rule 52(a) deference can be set aside on appeal in favor of plenary review "of district court findings that favor as well as disfavor the First Amendment

claimant." *United States v. Friday*, 2008 WL 1971504 at *8 (10th Cir. May 8, 2008); *see also* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 245-46 (1985).

Here the First Circuit held that *Bose*'s plenary review applies, and Rule 52(a) does not, even when First Amendment claims are upheld in the trial court: "Our review here of the controverted matters is plenary," including "the facts" embraced by the First Amendment claims at issue. *Id.* at 12a-13a (citation and internal quotation marks omitted).[6] In

[6] In explaining its decision to apply plenary review "of the controverted matters," the First Circuit did refer to its own precedent applying de novo review to "mixed law/fact matters which implicate core *First Amendment* concerns." App. at 12a-13a. In light of the First Circuit's other statements in its opinion expressly rejecting a less than plenary standard of review for any part of the district court's controverted findings and the First Circuit's disregard of obvious historical fact findings of the trial court, its passing reference to mixed questions of law and fact cannot reasonably be interpreted as a silent acknowledgment that any of the district court's fact findings were entitled to substantial deference under Rule 52(a). In any event, this Court has stated that "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina College* v. *Russell*, 499 U.S. 225, 233 (1991) (citation omitted). Even when de novo review is warranted of a mixed question of law and fact, this Court has further instructed that the "reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges." *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *see also United States v. Friday*, 2008 WL 1971504 at *8 (10th Cir. May 8, 2008) ("Of course, the special *Bose* rule applies only to 'constitutional facts' and not to the basic

defining the scope of appellate review, the majority explicitly refused to make a distinction between appeals from the denial of a First Amendment claim and cases, like this one, in which the First Amendment claim was upheld by the district court. *Id.* at 13a n.1. Rather, the First Circuit extended the plenary review required in *Bose* for the review of the denial of First Amendment claims to cases, like this one, where such extraordinary review could only serve to defeat First Amendment claims upheld by the trial court.

A decision by this Court in favor of Petitioners on this standard of review issue would require that the decision of the First Circuit be either reversed or vacated. In reaching its ruling that an indigency exception was not required for the City's large permit fee, the First Circuit panel majority decision relied on the plenary standard of review to disregard several key factual findings of the district court. *See discussion at* pages 10-11, *supra.* Appellate courts, however, cannot avoid obligations to defer to the fact findings made in the trial court by ignoring them or by substituting their own. For example, this Court has recently ruled that an appellate court that owed deference to facts found at trial violated the standard of review both when it "disregarded critical evidence favorable to petitioner" and when it "discredited petitioner's evidence . . . by giving weight" instead to other evidence in the record. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 152-53 (2000). In *Reeves,* this Court concluded that by these actions

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historical facts upon which the claim is grounded, which are subject to the usual 'clearly erroneous' standard of review".).

"the Court of Appeals impermissibly substituted its judgment" for that of the factfinder at trial. Although *Reeves* involved review under Rule 50 on appeal of fact findings by a jury, this same logic applies when an appellate court reviews fact findings of the district court under Rule 52(a). *See Anderson v. Bessemer City*, 470 U.S. 560, 574 (1985) (interpreting Rule 52(a) to require reversal of court of appeals when it "improperly conducted what amounted to a *de novo* weighing of the evidence in the record" even when the district court's fact findings were based on "physical or documentary evidence or inferences from other facts" or even "essentially undisputed evidence").

2. In applying the plenary review required by *Bose* beyond this Court's holding and reasoning, the First Circuit aligned itself with three other Circuits—the Fifth, Tenth and Eleventh—that have "applied heightened review to all constitutional holdings defining the perimeters of unprotected categories of speech, regardless of whether the lower court held that speech was protected or unprotected." *United States of America v. Frabizio*, 459 F.3d 80, 96 (1st Cir. 2006) (Torruella, J., concurring) (citing *Don's Porta Signs, Inc.* v. *City of Clearwater*, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987); *Lindsay* v. *San Antonio*, 821 F.2d 1103, 1107-08 (5th Cir. 1987).); *see also United States v. Friday*, 2008 WL 1971504 at *8 (10th Cir. May 8, 2008) ("The circuits have long been split on this issue. Although we have never explained why, this Circuit has applied *Bose* even when First Amendment claims prevailed below, and thus taken the side of symmetry.").

The First Circuit followed these other circuits based on the paradoxical reasoning that by applying plenary review on appeal of factual findings in favor of First Amendment claims the reviewing "court may reduce the likelihood of a 'forbidden intrusion on the field of free expression.'" App. at 13a (quoting *AIDS Action Comm. v. MBTA*, 42 F.3d 1, 7 (1st Cir. 1994)). That stated justification, however, supports the opposite conclusion that plenary review should not apply to trial court findings in favor of First Amendment claims.

In ruling as it did, the First Circuit only deepened a widespread division among the circuits, because at least three other circuits — the Fourth, Seventh and Ninth Circuits — have reached a contrary conclusion. *See Multimedia Publ'g 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); *Planned Parenthood Ass'n Chicago Area v. Chicago Transit Authority*, 767 F.2d 1225, 1229 (7th Cir. 1985). As the Ninth Circuit has explained "[w]hen 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 . . . we review the district court's findings of fact for clear error." *Munro*, 838 F.2d at 383. These three circuits that have decided not to apply plenary review to trial court factual findings in favor of free speech claims have all reasoned that no special solicitude need be accorded "the government's claim that it has been wrongly prevented from

restricting speech." *Planned Parenthood,* 767 F.2d at 1229.

The Fourth Circuit has justified this non-symmetrical standard of review on the ground that the requirement of plenary review in *Bose* "rested upon special solicitude for claims that First Amendment rights have been unduly abridged, requiring appellate courts 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." *Multimedia Publishing Co.*, 991 F.2d at 160. (citing *Bose,* 466 U.S. at 499) (emphasis in original; omitting other citations and internal quotation marks). Thus, like the Seventh and Ninth Circuits, but unlike the court below, the Fourth Circuit applies "the normal standard of review" to the district court's factual findings in support of First Amendment claims, requiring it to "sustain [those findings] absent clear error. Fed. R. Civ. P. 52(a)." *Id.*

The time is ripe for this Court to resolve the 4-3 split in the circuits and clarify that factual findings in favor of First Amendment claims are subject to appellate review under the normal Rule 52(a) clearly erroneous standard. Free speech rights are too important for this Court to leave unresolved such a clear "lack of uniformity among the circuit courts . . . as to the appropriate standard of appellate review in First Amendment free speech cases."[7]

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[7] L. Steven Grasz, *Critical Facts and Free Speech: The Eighth Circuit Clarifies Its Appellate Standard of Review for First Amendment Free Speech Cases,* 31 CREIGHTON L. REV. 387, 401 (1998) ("The one thing that stands out from a review of the

3. The First Circuit's analysis of this issue was also incorrect. Indeed, applying plenary appellate review in favor of the government when it appeals a ruling favoring free speech rights turns the logic of this Court's ruling in *Bose* completely on its head.[8] The purpose of de novo independent review in First Amendment cases is "to preserve the precious liberties established and ordained by the Constitution." *Bose*, 466 U.S. at 511. When the government does not rely on any First Amendment claims, as here, there is no basis on appeal for any heightened standard of review in contravention of Rule 52(a).

Just last year, this Court emphasized 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) (Roberts, C.J.). Thus, although symmetry is often a virtue in applying legal standards, symmetry is inappropriate when applying a heightened standard of review designed to protect, not suppress, free speech activities. As one scholar

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decisions from the various circuits is that there clearly exists a lack of uniformity among the circuit courts of appeal as to the appropriate standard of appellate review in First Amendment free speech cases. The formulation of the standard of review in free speech cases needs clarification from the Supreme Court in order to make appellate review more uniform in all circuits.").

[8] Grasz, *supra* n. 7, at 388 n.7 (1998) ("The utilization of a pure de novo standard of review by some courts in First Amendment free speech cases seems clearly at odds with the United States Supreme Court's standard of review described in Bose and more recently applied in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).")

has concluded, "if de novo review applies because of the First Amendment, the symmetrical scrutiny of pro-speech findings defies the basic point of the doctrine."[9]

When the free speech claimant wins below, as was the case here, plenary review is not justified by the First Amendment because there is no risk that the factfinder has erroneously abridged a constitutional right. To the contrary, plenary appellate review in this situation can only increase, rather than decrease, the risk of erroneously restricting speech protected by the First Amendment. [10]

Engaging in plenary review of factual findings on appeal of rulings in favor of First Amendment claims "would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." *Anderson v. Bessemer City*, 470 U.S. at 574. De novo review also unnecessarily and unfairly adds to the already heavy

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[9] Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1323 (1996); *see also* Edward H. Cooper, *Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 661 n. 58 (1988) ("If searching review is justified primarily by the desire to protect free expression, it might be argued that less searching review is appropriate if the district court has upheld a claimed first amendment right.").

[10] Grasz, supra n.7, at 396 ("If the appellate court feels free to disregard the trial court's fact findings, it can easily reinterpret the evidence and change the decision based on the appellate judges' opinions of the controverted issue. Complete de novo review of constitutional fact claims, therefore, would enhance the danger of an improper denial of a constitutional rights claim.")

burden of litigation for the parties: "the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much." *Id.*

Finally, plenary appellate review of factual findings also casts aside the important advantages of deferring to such findings by a trial judge, "who is more closely in touch than the appeals court with the milieu out of which the controversy before him arises," and who has the greater "expertise" in making accurate factual findings. *Id.* at 580.

B. The Circuits Are Divided On Whether A First Amendment Permit Requirement Can Be Upheld Without An Indigency Exception When The Effect Is To Deny Those Without An Ability To Pay Access To A Quintessential Public Forum.

The second question presented, which has also long divided the circuit courts, is whether government may restrict with large permit fees the fundamental constitutional right of the people to assemble and protest through a street march without regard to an applicant's ability to pay. The 2-1 panel decision of the First Circuit rejecting the need for an indigency exception to large government fees on free speech is in harmony with a ruling of the Sixth Circuit, but is in conflict with prior decisions of the Second and Eleventh Circuits.

1. This Court has previously considered whether permit fees for protest marches on public

streets are permissible under the First Amendment, but it has never resolved whether an indigency exception is required. In *Cox v. New Hampshire*, 312 U.S. 569 (1941), the Court upheld a parade permit fee capped at $300, but it did not consider whether there should be an exception if the fee caused substantial hardship to an indigent applicant.[11] In the intervening years, this Court and other courts "have . . . refined the general rule announced in *Cox*, subjecting mandatory license and fee requirements to closer constitutional analysis." *Van Arnam v. GSA*, 332 F. Supp. 2d 376, 391 (D. Mass. 2004).

In 1992, this Court granted *certiorari* to review the ruling of the Eleventh Circuit "that the First Amendment forbade the charging of more than a nominal fee for a permit to parade on public streets." *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 138 (1992) (Rehnquist, C.J., dissenting). The majority in *Forsyth*, however, found it unnecessary to decide the issue for which review was granted because of other constitutional defects in the parade permit scheme at issue. 505 U.S. at 133 (holding parade permit ordinance unconstitutional because of undue discretion allowed in determining the amount of the fee); *id.* at 133-137 (finding parade permit scheme unconstitutional because part of the fee was based on costs due to hostile reaction of listeners).

This Court should now reach the issue left open by its rulings in *Cox* and *Forsyth* by deciding

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[11] *See Cent. Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1522 (11th Cir. 1985)("Importantly, the Court did not address circumstances where persons who wish to demonstrate are unable to pay the required fee . . . .").

whether the First Amendment prohibits government from imposing large fees on core free speech activities, such as political protest marches on public streets, without an exception for indigent persons who cannot afford to pay.

2. In rejecting an indigency exception, the First Circuit panel majority decision relied heavily on the ruling of the Sixth Circuit in *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir. 1991). In *Stonewall Union*, the Sixth Circuit held that an indigency exception to a street parade traffic control fee was not required by the First Amendment because of "the availability of the sidewalks and parks provides a constitutionally acceptable alternative for indigent paraders." *Id.* at 1137.

By contrast, the district court's ruling that the First Amendment requires such an indigency waiver is consistent with the rulings of two circuits that free speech fees similar in size or smaller than those at issue here were unconstitutional as applied to indigent persons. The Eleventh Circuit has ruled that a $1,436 fee, without an indigency exception, for a demonstration in city streets and parks was unconstitutional because "indigent persons who wish to exercise their First Amendment rights of speech and assembly and as a consequence of the added cost of police protection, are unable to pay such costs, are denied an equal opportunity to be heard." *Walsh*, 774 F.2d at 1523.. The Second Circuit has made a similar ruling striking down a governmental fee imposed, without an indigency waiver, on a protest march to be held on a dirt road used as a public forum. *E. Conn. Citizens Action Group v. Powers*, 723 F.2d 1050, 1053, 1056-57 (2nd Cir. 1983). Although

not the exclusive basis for its decision, the Second Circuit upheld the appellants' contention that the $200 administrative fee and the insurance requirement costing $780 violated the First Amendment, even if facially valid, as applied to parties "who are demonstrably unable to comply and whose speech is therefore chilled by state action." *Id.* at 1053. In holding these fees unconstitutional, the court of appeals emphasized that they were being "applied to persons who have 'affirmatively alleged that they were *unable,* not *unwilling,* to pay.'" *Id.* at 1056.[12] *Cf. Lubin v. Panish*, 415 U.S. 709, 718 (1974) ("[I]n 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.").

3. Here, again, the First Circuit's approach is not only in conflict with other circuits, but inconsistent with this Court's precedents. Public streets have long been identified as a traditional public forum entitled to the highest level of First Amendment protection. *See, e.g., Perry Educators*

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[12] *See also Wilson ex rel. United States Nationalist Party v. Castle*, No. 93-3002, 1983 WL 276959, *4 (E.D. Pa. July 15, 1993) (insurance requirement invalid because not narrowly tailored at least as applied to persons "who are financially and otherwise unable to obtain coverage"); *Invisible Empire of the Knights of the KKK v. Mayor of Thurmont*, 700 F. Supp. 281, 286 (D. Md. 1988) (holding that requirement of reimbursing town for police protection and cleanup, even if valid in some cases, was unconstitutional because it was not "waived or modified for indigents"); *Invisible Empire of Knights of KKK v. City of West Haven*, 600 F. Supp. 1427, 1435 (D. Conn. 1985) (bond requirement was unconstitutional as applied to those unable to afford a bond).

Ass'n v. Perry Local Education Ass'n, 460 U.S. 37, 45 (1983) (citation omitted). The "rights of the State to limit expressive activity are sharply circumscribed" in traditional public forums precisely because "use of the streets and other public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of the citizens," *Hague,,* 307 U.S. at 515.

Moreover, this Court has repeatedly emphasized that parades, especially protest marches, "'reflect an exercise of . . . basic constitutional rights in their most pristine and classic form.'" *Hurley*, 515 U.S. at , 568-69 (citation omitted). In *Hurley*, this Court ruled unanimously that parades are a "form of expression, not just motion" and that attracting media attention is a critical aspect of the unique effectiveness of a parade in conveying grievances. 515 U.S. at 568. Indeed, this Court has repeatedly ruled that "'symbolism is a primitive but effective way of communicating ideas'" and that "the First Amendment shields such acts as . . . 'marching, walking, or parading.'" *Id.* (citations omitted).

Not only did the Court in *Hurley* acknowledge that parades have historically been an especially effective method for those living in this country to convey grievances to their government, but the Court also recognized the critical importance of media attention as an aspect of the effectiveness of a parade: "Indeed, a parade's dependence on watchers is so extreme that nowadays, as with Bishop Berkeley's celebrated tree, 'if a parade or demonstration receives no media coverage, it may as well not have happened.'" *Id.* at 568 (citation omitted).

The lack of an exemption for indigent persons or groups from large permit fees for marches in public streets leaves many in this country without the "open, ample alternatives for communication" mandated by the First Amendment. *Forsyth County*, 505 U.S. at 130. This Court has never countenanced that result and the First Amendment does not permit it. *See, e.g., Murdock v. Pennsylvania, 319 U.S. 105..*

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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