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It's Dispositive: Considering Constitutional Review for First Amendment Retaliation Claims

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NOTE

It's Dispositive: Considering Constitutional Review for First Amendment Retaliation Claims

Bennie v. Munn, 822 F.3d 392 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 814 (2017)

Abigail E. Williams[*]

I. INTRODUCTION

The standard of appellate review is rarely a point of contention.[1] The proper standard is typically second nature to both judges and lawyers, and it is seldom debated during oral argument or the court's deliberations.[2] But the standard of review serves as the foundation for every appellate decision.[3] Every federal appellate brief must articulate the standard of review,[4] and courts often restate the standard in their opinions. The standard of review defines an appellate judge's discretion, and effective lawyers use the standard to help advise clients whether to appeal at all and then to frame their arguments.[5]

In some areas of the law, though, the standard of review has not been explicitly declared or developed.[6] In these areas, the standard becomes contentious, especially where its application might be dispositive.[7] In *Bennie v. Munn*, state regulators subjected Robert Bennie, a financial advisor at the investment firm Linsco Private Ledger Financial ("LPL"), to heightened regulation after he made negative comments about President Barack Obama and

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1. DANIEL P. SELMI, PRINCIPLES OF APPELLATE ADVOCACY 33 (2013).
2. *See id.*
3. *See id.* at 31.
4. FED. R. APP. P. 28.
5. *See* SELMI, *supra* note 1, at 33.
6. *Id.*
7. *Id.* at 34 (citing Robert R. Baldock et al., *What Appellate Advocates Seek from Appellate Judges and What Appellate Judges Seek from Appellate Advocates*, 31 N.M. L. REV. 265, 266 (2001)).

actively participated in the Tea Party political movement.[8] Bennie filed a retaliation claim against the state regulators, alleging that the Nebraska Department of Banking and Finance's ("Department") investigation and inquiries violated his First Amendment right to free speech.[9] The Eighth Circuit discussed three potential standards of review for the "person of ordinary firmness" prong of a First Amendment retaliation claim – de novo, clear error, and independent review.[10] The court of appeals indicated that this decision was important because the standard of review would likely be dispositive.[11]

Despite the seemingly well-defined rule that factual findings on appeal must be reviewed for clear error, U.S. Supreme Court precedent suggests an alternative standard, known as "independent" or "constitutional" review, which is used to apply facts to specified constitutional standards.[12] *Bennie v. Munn* hardly addresses independent review, but this precedent indicates that the conditions that typically trigger independent review are present in the question of whether government action would have chilled a "person of ordinary firmness."

Part II of this Note introduces the facts and holding in the Eighth Circuit case, *Bennie v. Munn*. Part III explains the three potential standards of review considered by the court in *Bennie* and then provides a history of the independent review standard. Part IV gives the court's analysis and explains the court's reasoning for its holding. Part V examines the policy and legal considerations courts have and should address before deciding whether an issue should receive independent review; ultimately, this Part concludes that the person of ordinary firmness prong of a First Amendment retaliation claim warrants independent review. Part VI concludes this Note.

II. FACTS AND HOLDING

Until November 2010, Robert Bennie was a financial advisor at LPL.[13] As a broker-dealer, LPL and its employees are subject to regulation by the Department.[14] The Department's financial regulators investigated Bennie and

8. Bennie v. Munn, 822 F.3d 392, 395–96 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 814 (2017).

9. *Id.* at 396.

10. *Id.* at 397–98 & n.3.

11. *Id.* at 397–98.

12. *See, e.g.*, Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984) ("[I]n cases raising First Amendment issues we have repeatedly held that 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.'" (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 284–86 (1964))).

13. *See Bennie*, 822 F.3d at 394.

14. *Id.* (citing NEB. REV. STAT. ANN. § 8–1120 (West 2017)). The department can "deny, suspend, or revoke registration of any broker-dealer, issuer-dealer, agent"

LPL on multiple occasions, the most noteworthy of which occurred after a newspaper published Bennie's negative comments about President Obama.[15] Bennie subsequently filed a claim for injunctive relief from the regulators' alleged violation of his First Amendment right.[16]

The regulators' first investigation of Bennie's activity occurred in late 2009, when a Department employee, Rodney Griess, reviewed a Certificate of Deposit ("CD") that Bennie had sent to his clients.[17] Griess determined that the CD failed to meet the Department's disclosure requirements.[18] Near the same time, Griess reviewed a television commercial in which Bennie rode a horse and offered customers "a hundred dollars towards the purchase of a firearm" if they agreed to do business with him.[19] Griess thought the offer "unusual" and scheduled a conference call for early February 2010 to talk with LPL about Bennie's marketing activity.[20]

A few days before the conference call, the *Lincoln Journal Star* ran a story that highlighted Bennie's role in the Tea Party political movement.[21] The article quoted Bennie's statement that President Obama was "dishonest," a "communist," and "an evil man."[22] The article also mentioned Bennie's work with LPL and included a photograph of Bennie at his work office.[23] During the call, Department employees and LPL discussed the CD, the commercial, and the *Lincoln Journal Star* article.[24] Department employees also inquired whether LPL had any guidelines about agents publicly communi-

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for failing to comply with applicable rules for the publishing of advertisements and other public statements. NEB. REV. STAT. ANN. § 8–1103(9)(a)–(b) (West 2017).

15. *Bennie*, 822 F.3d at 394.

16. Bennie v. Munn, 58 F. Supp. 3d 936, 937 (D. Neb. 2014), *aff'd*, 822 F.3d 392 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 814 (2017). Bennie brought his First Amendment retaliation claim under 42 U.S.C. Section 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (2012).

17. *Bennie*, 822 F.3d at 394–95.

18. *Id.* at 395. For a list of these disclosure requirements, see § 8–1103.

19. *Bennie*, 822 F.3d at 395.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

cating their political views.[25] Not long after the call, Griess reviewed a mass mailing in which Bennie invited prospective customers to discuss their investment plans over dinner.[26] Griess concluded that the invitation violated Department rules and ordered LPL to cancel all scheduled dinners.[27] Griess threatened both Bennie and LPL with "whatever administrative action deemed necessary and appropriate under its authority . . . to insure compliance."[28]

In late February, Bennie alerted Nebraska Governor David Heineman to the Department's targeting of Bennie's political views.[29] Governor Heineman then called the Department to discuss the situation.[30] After this exchange, Griess investigated another mailing from Bennie and again concluded that the advertisement violated the Department's disclosure rules.[31] In early November 2010, LPL fired Bennie.[32] In mid-2011, Bennie filed a public records request and obtained the Department's investigation files.[33] He then stopped publicly criticizing President Obama and arranging Tea Party events.[34]

Bennie filed a retaliation claim against the state regulators on the theory that the Department's investigation and inquiries violated his First Amendment right to free speech.[35] The Eighth Circuit has held that to establish a First Amendment retaliation claim under 42 U.S.C. Section 1983, the plaintiff must show that "(1) he engaged in a protected activity, (2) the government official[s] took adverse action against him that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity."[36] Bennie argued that the state regulators' increased monitoring of his business was motivated by his political speech and that this increased monitoring would chill a person of ordinary firmness.[37] The state regulators argued that their

25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 395–96.
29. *Id.* at 396.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 397 (alteration in original) (quoting Revels v. Vincenz, 382 F.3d 870, 876 (8th Cir. 2004)). "In brief, the plaintiff must show the official took the adverse action because the plaintiff engaged in the protected speech." *Revels*, 382 F.3d at 876; *see* 42 U.S.C. § 1983 (2012).
37. *Bennie*, 822 F.3d at 399–400.

actions were lawful because they simply made routine, "legitimate inquiries" regarding Bennie's advertising activities.[38]

After a bench trial, the U.S. District Court for the District of Nebraska determined the state regulators' investigations of Bennie and LPL "were motivated, to varying degrees, by the content of [Bennie's] speech" and were "arguably unconstitutional."[39] Despite this finding, the court held that if there was a constitutional violation it was "de minimis" because the state regulators' actions did not chill Bennie's political speech.[40] The court dismissed Bennie's First Amendment retaliation complaint,[41] and Bennie appealed to the Eighth Circuit.[42]

The Eighth Circuit recognized that the first element of the First Amendment retaliation claim was satisfied because Bennie indisputably engaged in a protected activity.[43] The second element, whether "the government official[s] took adverse action against [Bennie] that would chill a person of ordinary firmness from continuing in the activity," was the focus of the appeal.[44] The Eighth Circuit did not reach the third element.[45] Before analyzing whether the district court erred in concluding that the state regulators' actions against Bennie would not have chilled an ordinary person's speech, the panel stated that the standard of review would likely be dispositive.[46]

Bennie argued that the proper standard was de novo because the district court "held the adverse acts he alleged were insufficient as a matter of law, which is necessarily a legal conclusion."[47] The Eighth Circuit rejected Bennie's argument on the ground that the district court's reference to the alleged retaliation as "de minimis" was not a legal ruling but instead, "encapsulate[d] the factual finding that, on the evidence presented, the state regulators' actions were insufficiently substantial to be actionable."[48]

The Eighth Circuit reviewed the district court's finding for clear error, meaning that a reversal was warranted only if, "upon a review of the entire record" the court formed a "definite and firm conviction that a mistake has been committed."[49] The court held that the district court did not clearly err

38. Bennie v. Munn, 58 F. Supp. 3d 936, 942 (D. Neb. 2014), *aff'd*, 822 F.3d 392 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 814 (2017).

39. *Id.* at 943.

40. *Id.*

41. *Id.* at 944.

42. *Bennie*, 822 F.3d at 392.

43. *Id.* at 397.

44. *Id.* (first alteration in original) (quoting Revels v. Vincenz, 382 F.3d 870, 876 (8th Cir. 2004)).

45. *Id.*

46. *Id.* at 397–98.

47. *Id.* at 398 (internal quotation marks omitted).

48. *Id.* (internal quotation marks omitted).

49. *Id.* (quoting Ridgway v. United Hosps.-Miller Div., 563 F.2d 923, 927 (8th Cir. 1977)); *see also* FED. R. CIV. P. 52(a)(6) ("Findings of fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the

when it determined the state regulators' investigations into Bennie's political speech would not have "chill[ed] a person of ordinary firmness from continuing in the activity."[50]

After the Eighth Circuit affirmed the district court's dismissal of Bennie's claim, Bennie petitioned the Supreme Court for a writ of certiorari.[51] Both Bennie and the state regulators indicated that the threshold issue on certiorari would be the proper standard of review for First Amendment retaliation claims.[52] The Supreme Court denied certiorari, leaving important questions (explored in this Note) for another day.[53]

III. LEGAL BACKGROUND

The standard of review defines the level of deference an appellate court grants the district court.[54] In *Bennie*, the Eighth Circuit discussed three potential standards of review for the person of ordinary firmness prong of a First Amendment retaliation claim – de novo, clear error, and independent review.[55] This Part first addresses the elements of a First Amendment retaliation claim. It then explains the three potential standards of review for the person of ordinary firmness prong and provides an analysis of the legal history of independent review.

A. First Amendment Retaliation Claim

To establish a First Amendment retaliation claim, an individual must show that "(1) he engaged in a protected activity, (2) the government official[s] took adverse action against him that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity."[56]

The "ordinary firmness test" is well established in First Amendment jurisprudence.[57] The test is "designed to weed out trivial matters from those deserving the time of the courts as real and substantial violations of the First

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trial court's opportunity to judge the witnesses' credibility."); Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (clarifying that the "clearly erroneous" standard does not allow a reviewing court to reverse simply because it would have decided differently).

50. *Bennie*, 822 F.3d at 397 (quoting Revels v. Vincenz, 382 F.3d 870, 876 (8th Cir. 2004)).

51. *See* Petition for Writ of Certiorari, *Bennie*, 822 F.3d 392 (No. 14-3473).

52. *See id.* at 18; Brief in Opposition to Petition for Writ of Certiorari at 25–26, *Bennie*, 822 F.3d 392 (No. 14-3473).

53. Bennie v. Munn, 137 S. Ct. 812 (2017).

54. *See* SELMI, *supra* note 1, at 35.

55. *See Bennie*, 822 F.3d at 397–98 & n.3.

56. *Id.* at 397 (alteration in original) (quoting Revels v. Vincenz, 382 F.3d 870, 876 (8th Cir. 2004)); *see* 42 U.S.C. § 1983 (2012).

57. Garcia v. City of Trenton, 348 F.3d 726, 728 (8th Cir. 2003).

Amendment."[58] The Eighth Circuit has reiterated these words of Judge Richard Posner of the Seventh Circuit: "The effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable."[59] Thus, a "chilling effect" can stem from the threat "'of continued and heightened regulatory scrutiny' . . . regardless of whether it ultimately results in sanctions being imposed."[60] Further, "[a]lthough it is true that 'how [a] plaintiff acted might be evidence of what a reasonable person would have done,' the ordinary-firmness inquiry is at bottom 'an objective one, not subjective.'"[61]

B. Three Potential Standards of Review for the Person of Ordinary Firmness Prong

As discussed in *Bennie*, there are three potential standards of review for the person of ordinary firmness prong – de novo, clear error, and independent review.[62] De novo review applies when an appellate court reviews a question of law.[63] The court need not defer to the lower court's declaration of the law because it is the duty of the judge, and not the fact finder of the lowest court, to declare and apply the law.[64] When an appellate court reviews an issue de novo, it decides "without reference to any legal conclusion or assumption made by the previous court to hear the case."[65] Thus, an appellate court hearing a case de novo "may refer to the lower court's record to determine the facts" but will not "rule on the evidence and matters of law without deferring to that court's findings."[66] Appellants favor de novo review because the appellate court's limited deference to the trial court allows greater opportunity for reversal.[67]

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58. *Id.* (citing Bart v. Telford, 677 F.2d 622 (7th Cir. 1982)).

59. *Id.* at 729 (quoting *Bart*, 677 F.2d at 625).

60. *Bennie*, 822 F.3d at 399 (quoting Blankenship v. Manchin, 471 F.3d 523, 532 (4th Cir. 2006)).

61. *Id.* at 400 (second alteration in original) (quoting *Garcia*, 328 F.3d at 729). In *Garcia*, the Eighth Circuit held that the government's issuing of thirty-five-dollar parking tickets in response to plaintiff's "speaking out" presented an issue of material fact as to whether the government's action would chill an individual of ordinary firmness. *Garcia*, 328 F.3d at 729.

62. *See Bennie*, 822 F.3d at 397–98 & n.3.

63. *See* Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 134 S. Ct. 1744, 1748 (2014).

64. *See* STEPHEN C. YEAZELL, CIVIL PROCEDURE 607 (8th ed. 2012).

65. *De Novo*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/de_novo (last visited Feb. 1, 2018).

66. *Id.*

67. SELMI, *supra* note 1, at 33.

De novo review is contrasted with the clear error standard, which the Eighth Circuit determined was the proper standard of review in *Bennie*.[68] Appellate courts apply the clear error standard when they review a trial court's *factual* findings.[69] When reviewing a finding of fact, an appellate court must defer to the fact finder because it is the duty of the jury (or in the case of a bench trial, the trial court) to make findings of fact.[70] This standard is codified in Federal Rule of Civil Procedure 52(a), which states, "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."[71]

In *Anderson v. City of Bessemer City*, the Supreme Court expanded upon the meaning of the clear error standard.[72] The Court noted, "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[73] Thus, if the district court's account of the evidence "is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."[74] The Court emphasized that this rule has no exceptions.[75] An appellate court reviewing a trial court's factual findings must defer to the trial court unless the trial court's findings were clearly erroneous.[76] Thus, the appellate court typically takes the verdict or findings by the jury or a judge in a bench trial as conclusive.[77]

A final standard, which the court in *Bennie* hardly considered, is known as independent or constitutional review.[78] This standard applies when the

68. *See* Bennie v. Munn, 822 F.3d 392, 398 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 814 (2017).

69. *See* SELMI, *supra* note 1, at 30. Appellate courts generally give the same level of deference to the fact-findings of a judge in a bench trial as that given to jury verdicts. 5 C.J.S. *Appeal and Error* § 936 (2017).

70. *See* YEAZELL, *supra* note 64, 606–07.

71. FED. R. CIV. P. 52(a)(6).

72. *See* Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985).

73. *Id.* (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)).

74. *Id.* at 573–74 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

75. *Id.* at 574.

76. *Id.* at 573–74. "Rule 52(a) 'does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous.'" *Id.* at 574 (quoting Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982)).

77. *Appeal and Error*, *supra* note 69, at § 919.

78. *See* Bennie v. Munn, 822 F.3d 392, 398 n.3 (8th Cir. 2016) ("At oral argument, Bennie for the first time invoked the rule that [a]n appellate court's review . . . is unique in the context of a First Amendment Claim, requiring an independent examination of the whole record." (alteration in original) (internal quotation marks omitted) (quoting Doe v. Pulaski Cty. Special Sch. Dist., 306 F.3d 616, 621 (8th Cir.

appellate court reviews a mixed question of fact or law or a trial court's application of facts to a constitutional standard.[79] Independent review requires an independent examination of the portion of the record that relates to the constitutional determination.[80] Thus, this standard is essentially a de novo review of the case's constitutional facts.[81]

The following example, drawn from *Ornelas v. United States* discussed in this Part below,[82] illuminates the differences among a question of law, a question of fact, and a mixed question of fact and law.[83] As indicated above, this distinction determines which standard of review applies. For example, under the Fourth Amendment, "when must an officer show probable cause to engage in a search?" is a question of law.[84] "What did the officer know before engaging in a search of the defendant's property?" is a question of fact.[85] "Would the knowledge of the officer at the time of the search lead an objectively reasonable officer to believe there was probable cause?" is a mixed question of fact and law.[86]

Similarly, the person of ordinary firmness prong of a First Amendment retaliation claim is a mixed question of fact and law. Whether the government officials' actions were adverse is a question of fact, and whether the officials' actions went beyond that permitted under the First Amendment is a

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2002) (en banc))), *cert. denied*, 137 S. Ct. 814 (2017). Courts also use the following terms to describe constitutional fact review: "de novo," "free," and "plenary." STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 2.14 (3d ed. 1999).

79. *See, e.g.*, Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688 (1989).

80. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 514 n.31 (1984).

81. *Id.*

82. *See infra* discussion at notes 132–137.

83. This example is derived from commentary in an amicus brief written by nine law professors who are experts in appellate practice. *See* 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 at 6, *Bennie*, 822 F.3d 392 (No. 14-3473)

84. *See* Ornelas v. United States, 517 U.S. 690, 696–97 (1996) ("The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact: '[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.'" (alterations in original) (quoting Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982))).

85. *See id.*

86. *See id.*

question of law. Whether the government officials "took adverse action . . . that would chill a person of ordinary firmness from continuing in the activity"[87] is a mixed question of fact and law.

The Eighth Circuit's decision to apply the clear error standard to the person of ordinary firmness prong of a First Amendment retaliation claim does not differ from the decisions of other circuits.[88] The absence of a split among the circuits may have led the Supreme Court to deny certiorari, but further examination of constitutional jurisprudence indicates reasons to consider the independent review standard for the person of ordinary firmness prong. In its swift dismissal of independent review in *Bennie*, the Eighth Circuit created the impression that the independent review standard is used only when the issue is whether activity constituted a protected category of speech.[89] In actuality, the standard has been applied in other instances,[90] and many constitutional scholars have argued that the realm of independent review should include cases such as *Bennie*.[91] Thus, the final portion of this Part develops the legal history and framework of the independent review standard, which will be examined throughout the remainder of this Note.

87. Bennie v. Munn, 822 F.3d 392, 397 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 814 (2017).

88. While Bennie argues that there is a circuit split on the standard of review for the "person of ordinary firmness" prong of the First Amendment retaliation claim, this is not the case. *See* Petition for Writ of Certiorari*, supra* note 51, at 15 ("In determining that an appellate court should review a trial court's 'ordinary firmness' holding for clear error, the Eighth Circuit exacerbated a split among the circuit courts."). In reality, every circuit that has addressed the issue has held that the person of ordinary firmness prong of a First Amendment retaliation claim receives clear error review. *See, e.g.,* Starr v. Dube, 334 F. App'x 341, 343 (1st Cir. 2009) (per curiam) ("[W]e cannot say that a reasonable fact-finder could conclude that inmates of 'ordinary firmness' would be deterred from continuing to exercise their constitutional rights merely because of the filing of a disciplinary charge carrying potentially severe sanctions."); Espinal v. Goord, 558 F.3d 119, 129 (2d Cir. 2009) ("[W]e have no trouble finding on the record in this case that there is a triable issue of fact as to whether a severe beating by officers over the course of thirty minutes would deter a person of 'ordinary firmness' from exercising his rights."). The First Circuit, Second Circuit, Third Circuit, Fifth Circuit, Sixth Circuit, Eighth Circuit, Ninth Circuit, Tenth Circuit, and Eleventh Circuit have each addressed this issue. Brief in Opposition to Petition for Writ of Certiorari*,* supra note 52, at 30–31.

89. *See Bennie*, 822 F.3d at 398 n.3.

90. *See, e.g.*, *Ornelas*, 517 U.S. at 697 (applying independent review to the issue of whether an officer had probable cause to search under the Fourth Amendment).

91. *See* 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, *supra* note 83.

C. The Legal History and Framework of Independent Review

Historically, issues that receive independent review typically have fallen into one of two categories.[92] The issue is either (1) an intermingled question of fact and law or (2) an important constitutional right. The standard first surfaced under the first category.[93] In a line of decisions that did not implicate First Amendment speech, the Supreme Court emphasized:

> [A federal appellate court] will review the finding of facts by a state court (1) where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and *(2) where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.*[94]

Thus, initially, an appellate court's independent review of factual findings occurred only in the context of federal appellate court review of a state court's findings.[95] The Court applied this standard to avoid having state court factual findings adversely influence federal law.[96]

In *Norris v. Alabama*, the Supreme Court used this justification to apply the independent review standard to a due process claim.[97] *Norris* reversed the Supreme Court of Alabama's affirmance of the convictions of seven African American males on the ground that the convictions denied due process of law.[98] In reviewing the lower court decisions, the Court recognized that the issue depended on application of facts to a legal standard.[99] The Court ap-

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92. *Compare* N. Pac. Ry. Co. v. North Dakota, 236 U.S. 585, 593 (1915) (noting that a federal appellate court will review findings of fact by the state court where "findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts"), *with* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) (noting that an independent examination of the record must be made in order to ensure that the judgment does not constitute an intrusion on a constitutional right).

93. *See N. Pac. Ry.*, 236 U.S. at 593.

94. *Id.* at 593 (emphasis added) (citing Kan. City S. Ry. Co. v. C. H. Albers Comm'n Co., 223 U.S. 573, 591 (1912); Creswill v. Grand Lodge Knights, 225 U.S. 246, 261 (1912); Wood v. Chesborough, 228 U.S. 672, 678 (1913)).

95. *See id.*

96. *See Kan. City S. Ry.*, 223 U.S. at 591 (noting that "where the conclusiveness of findings of fact by a state court was elaborately considered, it was recognized that where the question is 'of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court'" (citing Dower v. Richards, 151 U.S. 658, 667 (1894))).

97. Norris v. Alabama, 294 U.S. 587, 590 (1935).

98. *Id.* at 588. The Court held that a violation of Due Process occurred because "the trial court had failed in the light of the circumstances disclosed . . . to make an effective appointment of counsel to aid them." *Id.*

99. *Id.* at 589.

plied independent review because "whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."[100] The *Norris* Court's rationale for independent review mirrored the "intermingled" language of the Court's earlier precedent,[101] but the Court's decision to use the standard also included a trace of the second category of independent review cases – those that address issues of important constitutional rights.[102]

The first line of decisions that applied the "important constitutional rights" justification for de novo review of constitutional facts occurred in the area of administrative law.[103] In *Crowell v. Benson*, the Court considered the constitutionality of the Longshoremen's and Harbor Workers' Compensation Act under the Due Process Clause of the Fifth Amendment.[104] In determining that it would review the case de novo, the Court emphasized that "the statute contains no express limitation attempting to preclude the court . . . from making its own examination and determination of facts whenever that is deemed to be necessary to enforce a constitutional right properly asserted."[105] But the Court made explicit that de novo review in this context was warranted only in cases involving constitutional rights.[106] Otherwise, "the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final."[107]

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100. *Id.* at 590. The Court further avowed,

> That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights.

Id. at 589–90.

101. *Compare id.* at 590 ("[W]henever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."), *with* N. Pac. Ry. Co v. North Dakota, 236 U.S. 585, 593 (1915) ("[W]here a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts.").

102. *Norris*, 294 U.S. at 590.

103. *See* Ng Fung Ho v. White, 259 U.S. 276, 277–78 (1922); Crowell v. Benson, 285 U.S. 22, 36–37 (1932).

104. *Crowell*, 285 U.S. at 36–37. The employer argued that the claimant was not "at the time of his injury an employee . . . and his claim was not 'within the jurisdiction' of the Deputy Commissioner." *Id.* at 37.

105. *Id.* at 46.

106. *Id.*

107. *Id.*

About a decade after *Crowell*, the Court began applying independent review in the First Amendment context.[108] *Pennekamp v. Florida*, a landmark First Amendment decision, emphasized that appellate courts should apply independent review to ensure the protection of important constitutional rights.[109] The Court asserted that the Constitution imposed on it "final authority to determine the meaning and application of those words of that instrument," and that this responsibility compelled it "to examine for [itself] the statements in issue and the circumstances under which they [are] made."[110]

Nearly twenty years after *Pennekamp*, *New York Times Co. v. Sullivan* applied independent review to First Amendment speech claims.[111] In *Sullivan*, the Court addressed whether a state's libel law abridged the freedom of speech and the press guaranteed by the First and Fourteenth Amendments.[112] Determining that independent review applied, the Court noted, "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied."[113] According to the Court, this standard of review was especially applicable in *Sullivan* because "the question [was] one of alleged trespass across the line between speech unconditionally guaranteed and speech which may legitimately be regulated."[114] The Court then reviewed the record to determine whether evidence demonstrated actual malice by the *New York Times*.[115]

In *Bose Corp. v. Consumers Union*, considering again whether an action constituted "actual malice" in the First Amendment context, the Court expanded upon *Sullivan*'s independent review rule.[116] *Bose* first emphasized that independent review, as articulated in *Sullivan*, is consistent with Rule 52(a), which defines the clearly erroneous standard.[117] The *Sullivan* rule re-

108. Pennekamp v. Florida, 328 U.S. 331, 335 (1946).

109. *Id.*

110. *Id.* The Court continued, "When the highest court of a state has reached a determination upon such an issue, we give most respectful attention to its reasoning and conclusion but its authority is not final. Were it otherwise the constitutional limits of free expression in the Nation would vary with state lines." *Id.*; *see also* Jacobellis v. Ohio, 378 U.S. 184, 189 (1964) (holding that an individual's conviction for the possession of obscene film should be independently reviewed).

111. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964).

112. *Id.*

113. *Id.*

114. *Id.* (internal quotations omitted) (quoting Speiser v. Randall, 357 U.S. 513, 525 (1958)). The Court continued, "We must make an independent examination of the whole record, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* (citation and internal quotation marks omitted) (quoting Edwards v. South Carolina, 372 U.S. 229, 235 (1963)).

115. *Id.* at 287. The Court noted, "The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false . . . ." *Id.*

116. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501 (1984).

117. *Id.* at 499.

quires an appellate court to make an independent review of the entire record, and Rule 52(a) "never forbids such an examination."[118]

Further, *Bose* noted that "Rule 52(a) commands that 'due regard' shall be given to the trial judge's opportunity to observe the demeanor of the witnesses; the constitutionally-based rule of independent review permits this opportunity to be given its due."[119] According to the Court, constitutional questions, such as the determination of whether an act constitutes "actual malice," do not just involve Rule 52(a) questions for the trier of fact but instead are issues that involve "central legal question[s]."[120]

Next, *Bose* defined three key considerations that *Sullivan* applied to determine the propriety of independent review.[121] First, the Court noted that *Sullivan* applied independent review because the actual malice rule's "common-law heritage" assigned "an especially broad role to the judge in applying it to specific factual situations."[122] Second, courts should apply independent review where "the content of the rule 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."[123] Finally, *Bose* considered whether "the constitutional values protected by the rule make it imperative that judges – and in some cases judges of this Court – make sure that it is correctly applied."[124] The Court emphasized the importance of its duty to "preserve the precious liberties established and ordained by the Constitution."[125] Like *Sullivan*, *Bose* involved a question of whether a category of speech required First Amendment protection;[126] however, *Bose* implied that courts could apply independent review in other contexts, such as those in-

118. *Id.*
119. *Id.* at 499–500
120. *Id.* at 514.
121. *Id.* at 502.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 511.
126. *Id.* at 513. Following *Bose*, the Court continued to apply the independent review standard to questions regarding whether a type of speech is protected under the First Amendment. In Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657 (1989), the Court again applied the independent review standard to a question of whether speech involved "actual malice." *Harte-Hanks Commc'ns*, 491 U.S. at 686. The Court further emphasized the importance of independent review to ensure that protected speech is not discouraged. *Id.* In Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Bos., 515 U.S. 557 (1995), the Court determined whether a state could require private citizens to include a message in their parade that the citizens did not want to convey. *Hurley*, 515 U.S. at 559. The Court in *Hurley* emphasized that this was an "intermingled" decision of fact and law because "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace." *Id.* at 567.

volving a mixed question of fact and law, provided that courts consider the above factors.[127]

Following *Bose*, the Court applied independent review in constitutional contexts beyond the First Amendment.[128] For instance, in *Miller v. Fenton*, the Court applied independent review to scrutinize a confession's admissibility under the Due Process Clause of the Fourteenth Amendment.[129] In justifying this application, the Court noted that the case presented an instance in which the relevant legal principle was given meaning "only through its application to the particular circumstances of a case."[130] The Court noted that independent review could be justified in other cases, such as cases that raise concern that the trier of fact might be biased and those in which it is not necessary to give great deference to the trial court.[131]

Similarly, in *Ornelas v. United States*, the Court applied independent review to determine whether an officer had reasonable suspicion and probable cause to complete a warrantless search under the Fourth Amendment.[132] The Court said that the principal components of a reasonable suspicion or probable cause determination are "the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause."[133] The Court noted that the first part of this analysis is only a determination of "historical fact" but that the second is a "mixed question of law and fact," requiring independent review.[134] The Court concluded that deferring to the trial court in areas such as this would produce "varied results" and unclear precedent.[135] However, in his dissent, Justice Antonin Scalia argued that this law-clarifying justification requires generalization, and "probable cause and reasonable suspicion determinations are . . . resistant to generalization."[136] According to Justice Scalia, the facts in *Ornelas* that underlay the reasonable suspicion and probable cause analysis were specific and unique.[137]

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127. *See Bose*, 466 U.S. at 501.

128. Miller v. Fenton, 474 U.S. 104, 113 (1985); Ornelas v. United States, 517 U.S. 690, 697 (1996).

129. *Miller*, 474 U.S. at 115. In *Miller*, the ultimate issue was the "voluntariness" of the petitioner's confession. *Id.* at 108–09. Thus, the Court reviewed the record to determine whether the interrogation was "so offensive to a civilized system of justice that [it] must be condemned under the Due Process Clause of the Fourteenth Amendment." *Id.* at 109.

130. *Id.* at 114.

131. *Id.*

132. *Ornelas*, 517 U.S. at 696–97.

133. *Id.* at 696.

134. *Id.* at 696–97, 699.

135. *Id.* at 697.

136. *Id.* at 703 (Scalia, J., dissenting).

137. *Id.* at 704.

This survey of precedent indicates that independent review is applied in contexts beyond the question of whether a certain category of speech is protected.[138] Indeed, a court's determination of whether it should engage in independent review should not simply depend on an issue's type or category but instead requires more searching legal and policy considerations, which are discussed in Part V.

IV. INSTANT DECISION

In *Bennie v. Munn*, the Eighth Circuit held the district court did not clearly err when it determined that the state regulators' investigations into Bennie's political speech would not have "chill[ed] a person of ordinary firmness from continuing in the activity."[139] In an opinion authored by Judge William J. Riley, the court of appeals noted that the first element of a First Amendment retaliation claim, whether Bennie engaged in a protected activity, was not at issue.[140] The court did not reach the third element of whether "the adverse action was motivated at least in part by the exercise of the protected activity."[141] Thus, this appeal solely focused on the second element of a First Amendment retaliation claim: whether the government officials took adverse action that would "chill a person of ordinary firmness from continuing in the activity."[142]

The court first discussed the standard of review that should apply to a district court's determination that government action would not chill a "person of ordinary firmness."[143] The court noted that the standard of review applied "likely is dispositive."[144] The panel rejected the de novo standard in favor of clear error, concluding that the district court's reference to the state regulators' action as "de minimis" was not "to denote a legal ruling, but rather to encapsulate the factual finding that, on the evidence presented, the state regulators' actions were insufficiently substantial to be actionable."[145]

In a footnote, the court also rejected the independent review standard.[146] The court distinguished *Bennie* from other First Amendment decisions that applied the independent review standard.[147] The panel reasoned that courts had used independent review to determine whether a category of speech was protected.[148] Here, it was undisputed that Bennie's speech was protected.[149]

138. Miller v. Fenton, 474 U.S. 104, 115 (1985); *Ornelas*, 517 U.S. at 697.

139. Bennie v. Munn, 822 F.3d 392, 397, 401 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 812 (2017).

140. *Id.* at 397.

141. *Id.*

142. *Id.*

143. *Id.* at 397–98.

144. *Id.* at 398.

145. *Id.* (internal quotations omitted).

146. *Id.* at 398 n.3.

147. *Id.*

148. *Id.*

Instead, the issue was "the deterrent effect of the state regulators' actions," which according to the Eighth Circuit was "not the sort of finding that might trigger" independent review.[150] Thus, the Eighth Circuit concluded that independent review of the constitutional facts was not justified.[151]

When reviewing the district court's finding, the court in *Bennie* held that "while the record in this case might well have supported a conclusion that an ordinary person's speech would have been chilled, it did not compel such a finding."[152] In so holding, the court of appeals noted that except for the order demanding the canceling of Bennie's dinner meetings, "Bennie did not show the state regulators' actions directly affected him or his business in any way."[153]

Despite affirming the decision below, the Eighth Circuit cautioned against the manner in which the district court applied the person of ordinary firmness test.[154] The panel indicated that the district court incorrectly emphasized whether Bennie's speech was in fact chilled, instead of whether the speech of a person of ordinary firmness would have been chilled.[155] The panel stated, "This case illustrates some of the dangers of giving undue weight to how a particular plaintiff actually responded to government retaliation, rather than how a hypothetical reasonable person would have reacted."[156]

According to the Eighth Circuit, Bennie's response to the regulators' actions was particularly unrepresentative of an "ordinary person" because Bennie was unaware of the extent to which the regulators were acting against his speech.[157] Further, Bennie was unlike an ordinary person because he was "unusually resilient and determined."[158] Additionally, Bennie did not have total knowledge of the Department's actions until he requested the public records a year after he was fired from LPL.[159] Thus, the Eighth Circuit specified that Bennie's activity with the Tea Party movement in the meantime did not necessarily indicate that the regulators' actions would not have chilled an ordinary person's speech.[160] Applying the clear error standard, however, the

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 399 (citing Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985)).

153. *Id.*

154. *Id.* at 400.

155. *Id.* at 399–400. The Eighth Circuit noted that this more subjective approach was especially dangerous in this case because Bennie did not have total knowledge of the Department's actions until long after the Department had ended its investigations. *Id.* at 400–01.

156. *Id.* at 400.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

court of appeals held that the record did not compel a reversal of the district court's finding that the state regulators' actions would not have chilled a person of ordinary firmness.[161]

Judge C. Arlen Beam concurred in the court's decision to apply the clear error standard but dissented from the court's ultimate holding.[162] According to Judge Beam, the district court clearly erred in two respects – first, by relying "entirely on the actions of an unusually resilient and determined individual . . . as evidence of how a person of ordinary firmness would respond to the department's increased regulatory scrutiny"[163] and second by neglecting "to account for Bennie's self-censorship at the time he became fully aware of the department's retaliatory motivation in mid-2011."[164]

Judge Beam emphasized that to the extent a court examines the reaction of the retaliation's target to help determine how an ordinary person might react, "it must be the case that the recipient is *aware* of the retaliatory motivation behind the adverse action."[165] Judge Beam noted that once Bennie became aware of the Department's "marginally increased interest," his "unusually firm resolve gave way to self-censorship."[166] According to Judge Beam, it was clear error not to conclude that an ordinary person would have reacted similarly.[167] Because the Department's adverse action was clearly motivated at least in part by Bennie's political statements, Judge Beam would have held that "the [D]epartment's actions were motivated in part by retaliation against Bennie's speech and thus that each of the three elements of a First Amendment retaliation claim were satisfied."[168]

V. COMMENT

In determining the standard of appellate review in *Bennie*, the Eighth Circuit rejected independent review because the issue was not "whether Bennie's speech was protected by the First Amendment" but was instead whether

161. *Id.* at 401 (citing Anderson v. City of Bessemer City, 470 U.S. 564, 573–74 (1985)).

162. *Id.* at 401 (Beam, J., concurring in part and dissenting in part).

163. *Id.* at 401–02 (internal quotations and citation omitted).

164. *Id.* at 402.

165. *Id.* Judge Beam continued:

> Although Bennie knew the department was focusing on him in the spring of 2010 and suspected it was because of his political activities, it was not until mid-2011 that he knew the extent to which his political statements impelled the department's actions. In light of Bennie's resilient nature, the resulting self-censorship tends to demonstrate, if anything, that an ordinary, less resilient person would react similarly.

Id.

166. *Id.* at 402.

167. *Id.*

168. *Id.*

the state regulators' actions had a deterrent effect on Bennie's speech.[169] The Eighth Circuit implied that the independent review standard may be applied only where the issue on appeal is whether a category of speech warrants First Amendment protection.[170] But the Supreme Court has not drawn a fine line to determine when independent review is applicable.[171] As specified in Part III above, the Court's precedents indicate other circumstances in which independent review has been and can be applied.

The issues that receive independent review typically fall into one or both of these categories: (1) a mixed question of fact and law or (2) an important constitutional right.[172] This Part examines the policy and legal considerations courts have and should address before deciding whether an issue that falls into one of these categories should receive independent review. In *Bennie*, the Eighth Circuit did not explore whether the person of ordinary firmness prong of the First Amendment retaliation test falls in either or both of these categories but instead dismissed the standard in a footnote.[173] Thus, this Part examines these considerations within the context of *Bennie* to determine whether independent review should be expanded to the person of ordinary firmness prong of First Amendment retaliation claims. Ultimately, this Part concludes that the independent review standard could have been justified under either of the two categories.

A. Issues Involving a Mixed Question of Fact and Law

A mixed question of fact and law exists when "[t]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] . . . [constitutional] standard."[174] Here, the relevant "historical facts" are established and the rule of law is undisputed.[175] To establish a First Amendment retaliation claim, the plaintiff must show: "(1) he engaged in a protected activity, (2) *the government official took adverse action against him that would chill a person of ordinary firmness from continuing in the activity*, and (3) the adverse action was motivated at least in part by the exercise of the protected activity."[176] The question is not one of pure fact or law but is whether the facts satisfy the relevant constitutional standard. As indicated in Part III, whether the government officials' actions

169. *Id.* at 398 n.3 (majority opinion).

170. *Id.*

171. *See* Ornelas v. United States, 517 U.S. 690, 701 (1996) (Scalia, J., dissenting) (noting that there is "no rigid rule" with respect to when independent review is utilized).

172. *See supra* note 92 and accompanying text.

173. *Bennie*, 822 F.3d at 398 n.3.

174. *Ornelas*, 517 U.S. at 696 (second and third alterations in original) (quoting Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982)).

175. *See id.* at 696–97.

176. Bennie v. Munn, 58 F. Supp. 3d 936, 942 (D. Neb. 2014) (emphasis added), *aff'd*, 822 F.3d 392 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 814 (2017).

were adverse is a question of fact, and whether the officials' actions went beyond that permitted under the First Amendment is a question of law. Whether the government officials "took adverse action . . . that would chill a person of ordinary firmness from continuing in the activity"[177] is a mixed question of fact and law. Thus, the person of ordinary firmness prong of a First Amendment retaliation claim is a mixed question of fact and law.

But simply because an issue involves a mixed question does not automatically require an appellate court to utilize independent review.[178] When a mixed question of fact and law exists, appellate courts must balance various considerations in order to determine whether independent review should be applied.[179] These considerations include: the type of factual application to the law involved,[180] the need to clarify legal principles and unify precedent,[181] and the possible bias of the fact finder.[182] These considerations lead to one overarching question – whether the appellate judge is better positioned than the fact finder to make decisions regarding mixed questions of fact and law.[183]

1. The Type of Factual Application to the Law

The issue of whether an action would "chill a person of *ordinary* firmness" requires the application of a "reasonable person" standard.[184] A reasonable person standard does not seem to involve considerations that are better left to the trier of fact.[185] The issue does not turn on the credibility of witnesses, which would require the fact finder to observe witness demeanor.[186] Because a reasonable person standard is not a pure question of fact but instead involves the application of facts to a legal standard, the appellate court should review the constitutional facts de novo.

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177. *Bennie,* 822 F.3d at 397.

178. *Ornelas*, 517 U.S. at 701 (Scalia, J., dissenting) ("Merely labeling the issues mixed questions, however, does not establish that they receive de novo review . . . . [as] there is no rigid rule with respect to mixed questions." (internal quotations and citation omitted) (quoting First Option of Chicago, Inc. v. Kaplan, 514 U.S. 938, 948 (1995))).

179. *Id.*

180. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 517 (1984) (Rehnquist, J., dissenting).

181. *Ornelas*, 517 U.S. at 697.

182. Miller v. Fenton, 474 U.S. 104, 114 (1985).

183. *See Ornelas,* 517 U.S. at 701 (Scalia, J., dissenting).

184. Bennie v. Munn, 822 F.3d 392, 397 (8th Cir. 2016) (emphasis added), *cert. denied*, 137 S. Ct. 812 (2017).

185. *See Miller*, 474 U.S. at 114 ("[O]ther considerations often suggest the appropriateness of resolving close questions concerning the status of an issue as one of 'law' or 'fact' in favor of extending deference to the trial court.").

186. *Id.*

It is noteworthy that the Supreme Court has applied independent review in cases that required the application of the reasonable person standard.[187] For example, in *Ornelas* the issue was whether the "historical facts, viewed from the standpoint of an objectively reasonable police officer, amount[ed] to reasonable suspicion or to probable cause."[188] Similarly, in *Street v. New York* the Court applied the reasonable person standard to determine whether challenged remarks "were 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."[189]

Further, the person of ordinary firmness rule fits within the considerations defined by *Bose* to determine whether independent review should apply to a specific standard.[190] Like the rules at issue in *Sullivan* and *Bose*, the person of ordinary firmness rule stems from "common-law heritage," which "assigns an especially broad role to the judge in applying it to specific factual situations."[191] Additionally, "the content of the rule 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."[192] While the person of ordinary firmness standard for a retaliation claim stems from the First Amendment, it is defined and clarified by common law.[193] Thus, precedent indicates that appellate courts are just as capable as trial courts at determining whether an act would chill a person of ordinary firmness.[194]

187. *Ornelas*, 517 U.S. at 693; Street v. New York, 394 U.S. 576, 592 (1969).

188. *Ornelas*, 517 U.S. at 696.

189. *Street*, 394 U.S. at 592 (internal quotations omitted) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942)).

190. *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501–02 (1984).

191. *Id.* at 502.

192. *Id.*

193. *See, e.g.,* Blankenship v. Manchin, 471 F.3d 523, 532 (4th Cir. 2006) (holding that "the threat of continued and heightened regulatory scrutiny" sometimes can have a chilling effect); Bennett v. Hendrix, 423 F.3d 1247, 1252 (11th Cir. 2005) ("There is no reason to 'reward' government officials for picking on unusually hardy speakers."); Garcia v. City of Trenton, 348 F.3d 726, 729 (8th Cir. 2003) (noting that although it is true that "how [a] plaintiff acted might be evidence of what a reasonable person would have done," the ordinary firmness inquiry is at bottom "an objective one, not subjective").

194. *See* Ornelas v. United States, 517 U.S. 690, 693 (1996) (applying independent review to a "reasonable person" standard); *Bose*, 466 U.S. at 502 (noting that independent review should be applied to standards that are defined and clarified through common law).

2. The Need to Clarify Legal Principles and Unify Precedent

In determining whether a mixed issue requires independent review, the Court also considers whether a need exists to clarify precedent.[195] This need surfaces most often when trial courts throughout a state or nation apply the law in different ways.[196] Further, clear precedent also ensures that appellate courts maintain control of important constitutional principles and that the factual application to these principles is applied consistently.[197] Fundamental rights such as freedom of expression and the right to privacy should not be unconstitutionally limited because of a trial court's error.[198]

For example, in *Ornelas* the Court asserted that unifying precedent in the area of reasonable suspicion and probable cause would "come closer to providing law enforcement officers with a defined set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified."[199] Viewing *Bennie* through the lens of this *Ornelas* rule yields further insight into whether the person of ordinary firmness standard should receive independent review. The determination of whether a government's actions would chill a person of ordinary firmness would be most effective if the outcome were reached consistently throughout the state or nation. Similar to the rule for determining reasonable suspicion or probable cause, clear lines of precedent would "come closer to providing [state actors] with a defined set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether [the government action] is justified."[200]

In *Bennie*, the District Court for the District of Nebraska decided the case in the state's favor and the Eighth Circuit applied clear error review to affirm.[201] It is conceivable that the same state actors could do even less in a different situation and that, without going against precedent, a different Nebraska court could find that their acts would chill a person of ordinary firmness. Because this claim was reviewed using clear error, there is currently no

195. *Ornelas*, 517 U.S. at 697.

196. *Id.* at 697–98.

197. *See* Miller v. Fenton, 474 U.S. 104, 114 (1985).

198. *See Ornelas,* 517 U.S. at 697 ("A policy of sweeping deference would permit, [i]n the absence of any significant difference in the facts, the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." (alterations in original) (internal quotations omitted) (quoting Brinegar v. United States, 338 U.S. 160, 171 (1949))).

199. *Id.* (internal quotations omitted) (quoting New York v. Belton, 435 U.S. 454, 458 (1981)).

200. *Id.* (internal quotations omitted).

201. Bennie v. Munn, 822 F.3d 392, 398, 401 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 814 (2017).

precedent in this area and, consequently, no guidance for state actors or judges.[202]

Using independent review would have resulted in unequivocal precedent that future courts would be required to follow. Had the Eighth Circuit used independent review, it would have likely held for Bennie.[203] Future government actors would then be put on notice that adverse action comparable to that which occurred in *Bennie* violates the First Amendment. The person of ordinary firmness test, together with the other prongs of a First Amendment retaliation claim, exists to ensure protections of freedom of speech and expression, values that our country holds dear.[204] These fundamental rights should not be inconsistent throughout a state or the nation.

In his *Ornelas* dissent, Justice Scalia argued that the need to clarify precedent is not necessarily a valid justification for independent review.[205] He asserted that law clarification requires generalization "and some issues lend themselves to generalization much more than others."[206] For instance, a case requiring a determination of whether an officer was reasonable in believing he had probable cause to conduct a search has many unique factors that will rarely be present in future cases.[207] Thus, according to Justice Scalia, precedent in this area is rarely useful.[208]

Similarly, the factors in a First Amendment retaliation claim will frequently differ. The type of the protected activity and the extent of the adverse action are rarely going to be the same from case to case. But this is an area in which precedent can, at the least, provide guidance to state actors.[209] Further, the varying factors have little relevance when determining whether a state employee's actions are enough to chill a person of ordinary firmness. The person of ordinary firmness prong focuses solely on how a state employee's actions will impact a reasonable person.[210] Thus, the circumstances of the *person* whose speech is chilled are not relevant because the reasonable person standard is applied in every case. But the governmental acts *do* matter. Precedent in this area would provide government employees and judges with a

202. *See id.* at 398.

203. *See id.*

204. *See* Colson v. Grohman, 174 F.3d 498, 507 (5th Cir. 1999) ("[C]riticism of public officials lies at the very core of speech protected by the First Amendment." (citing N.Y. Times Co. v. Sullivan, 376 U.S. 269–70 (1964))); *see also* Naucke v. City of Park Hills, 284 F.3d 923, 927 (8th Cir. 2002) ("Retaliation by a government actor in response to such an exercise of First Amendment rights forms a basis for § 1983 liability.").

205. *Ornelas*, 517 U.S. at 703–04 (Scalia, J., dissenting).

206. *Id.* at 703.

207. *Id.* at 703–04.

208. *Id.* at 703.

209. *Id.* at 697–98 (majority opinion).

210. Bennie v. Munn, 822 F.3d 392, 400 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 814 (2017).

gauge for measuring the constitutionality of various government acts, even though the acts typically differ depending on the situation.

3. The Possible Bias of the Fact Finder

Possible bias of the fact finder is one final consideration of the Court when determining whether the appellate judge is in a better position than the fact finder of the lower court to make decisions of mixed questions of fact and law.[211] This consideration typically carries less weight than those above[212] but is worth addressing in the context of First Amendment retaliation. As stated, when determining whether an action would chill a person of ordinary firmness, the type of speech is irrelevant. But a jury could easily be unconsciously driven to decide against an individual simply because jurors do not agree with the type of speech in which the individual engaged.[213] This possibility did not surface in *Bennie* because the issue was decided in a bench trial,[214] but future First Amendment retaliation cases could be tried before juries. This mixed question of fact and law is better left to a judge who can accurately understand and apply the law.[215]

B. Issues Involving an Important Constitutional Right

A second key justification for applying independent review is the presence of an important constitutional right.[216] According to the Supreme Court, the Constitution imposes on it the "final authority to determine the meaning and application of the words of that instrument" and this responsibility compels it "to examine for [itself] the statements in issue and the circumstances under which they [are] made."[217] Laws such as First Amendment retaliation, which exist to promote First Amendment values, fall under this category.[218]

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211. Miller v. Fenton, 474 U.S. 104, 114 (1985) ("[O]n rare occasions in years past the Court has justified independent federal or appellate review as a means of compensating for 'perceived shortcomings of the trier of fact by way of bias or some other factor.'" (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 518 (1984))).

212. *See id.*

213. *See* Lisa Blue & Pamela Francis, *Know the Law of Your Jurisdiction – Challenges for Cause – Bias and Prejudice*, *in* 3 LITIGATING TORT CASES § 34:8 (2017).

214. *Bennie*, 822 F.3d at 396.

215. *Miller*, 474 U.S. at 114.

216. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) (noting that an independent examination of the record must be made in order to ensure that the judgment does not constitute an intrusion on a constitutional right).

217. Pennekamp v. Florida, 328 U.S. 331, 335 (1946).

218. *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 503–04 ("The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole. Under our Consti-

As the Eighth Circuit noted in *Bennie*, all of the First Amendment decisions that used independent review addressed the question of whether a particular category of speech was protected.[219] But these decisions did not limit independent review to these questions; in fact, these cases emphasized the importance of using independent review when a case involves an important constitutional question, such as one involving the First Amendment.[220] In clarifying the considerations enunciated in *Sullivan*, *Bose* explicitly stated that independent review was important in First Amendment cases because of the "constitutional values protected by the rule."[221] The Court also noted that an independent examination of the record was necessary to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression."[222]

The issue in *Bennie* does not involve the question of whether a particular category of speech is protected, but some of the same justifications for independent review applied in the other First Amendment decisions are relevant and applicable.[223] The First Amendment retaliation cause of action exists to ensure that individuals can engage in protected speech without experiencing adverse action from the government.[224] Thus, determining whether government action would chill a person of ordinary firmness protects important First Amendment values.[225] This determination also involves a ques-

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tution 'there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.'" (quoting Gertz v. Robert Welch, Inc. 418 U.S. 323, 339–40 (1974))).

219. *Bennie*, 822 F.3d at 398 n.3.

220. *See Sullivan*, 376 U.S. at 285 ("This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across the line between speech unconditionally guaranteed and speech which may legitimately be regulated." (internal quotations omitted)); *Bose*, 466 U.S. at 502 ("[T]he constitutional values protected by the rule make it imperative that judges – and in some cases judges of this Court – make sure that it is correctly applied."); Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Bos., 515 U.S. 557, 567 (1995) ("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.").

221. *Bose*, 466 U.S. at 502.

222. *Id.* at 507 (quoting *Sullivan*, 376 U.S. at 285).

223. *See supra* note 220 and accompanying text.

224. Bennie v. Munn, 58 F. Supp. 3d 936, 942 (D. Neb. 2014) ("The law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for speaking out."), *aff'd*, 822 F.3d 392 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 814 (2017).

225. *Id.* The person of ordinary firmness determination is one of three prongs within a First Amendment claim. *Id.*

tion of whether there existed a "forbidden intrusion on the field of free expression."[226] Because the state regulators repeatedly investigated Bennie and reviewed his work, and these investigations increased after Bennie engaged in political speech, the Eighth Circuit emphasized that the regulators' actions were "wholly inappropriate – and absolutely inconsistent with the First Amendment."[227] Thus, the regulators' actions undoubtedly intruded upon Bennie's field of free expression.

The Eighth Circuit's failure to apply independent review for the person of ordinary firmness prong denied Bennie the afforded remedy[228] for the violation of his constitutional right. Not only is Bennie without a declaratory judgment or injunctive relief, but no precedent prevents government actors from violating individuals' First Amendment rights in the future. Because of its decision to use the clear error standard of review, the Eighth Circuit had no option but to validate the actions of the state regulators, despite their clearly unconstitutional acts. Had the panel used independent review, the court would have reversed the district court because the district court incorrectly emphasized whether Bennie's speech was *in fact* chilled, instead of whether the speech of a person of ordinary firmness would have been chilled.[229] To remain consistent in protecting First Amendment values, courts should apply independent review to the person of ordinary firmness prong of First Amendment retaliation claims.

VI. CONCLUSION

In *Bennie v. Munn*, the Eighth Circuit held the district court did not clearly err in holding that the state regulators' actions, which included heightened regulation and scrutiny after Bennie made negative comments about President Obama and actively participated in the Tea Party political movement, would not have chilled a person of ordinary firmness.[230] The Eighth Circuit asserted that independent review did not apply because the issue presented was not whether Bennie's speech was protected but the deterrent effect of the state regulators' actions.[231] Issues addressing whether a category of speech is protected do receive independent review, but the considerations for whether an issue receives independent review are actually much broader. When determining whether an issue should receive independent review, the

226. *Bose*, 466 U.S. at 499 (quoting *Sullivan*, 376 U.S. at 285).

227. *Bennie*, 822 F.3d at 401. Because the reviewing court used the "clear error" standard, it could not reverse the district court's finding that the action would not chill a person of ordinary firmness. *See id.* at 398.

228. *Id.* at 397–98, 401. Bennie asked for a declaratory judgment and injunctions against future retaliation. *Id.*

229. *Id.* at 397–98.

230. *Id.* at 401.

231. *Id.* at 398 n.3.

Court considers whether the question is one of mixed fact and law and whether the question addresses an important constitutional issue.[232]

Despite the existence of both factors in *Bennie*, the Eighth Circuit swiftly dismissed the possibility of independent review, and the Supreme Court denied certiorari on the issue of the appropriate standard of review in this context. Independent review has never been used for the person of ordinary firmness prong of the First Amendment, but expansion of the use of the standard seems justified to preserve the country's fundamental constitutional values.

It is important, though, that independent review is not overused. Dissenting Justices have cautioned against independent review's expansion, emphasizing that in most cases, the district court is better positioned to make these determinations of fact.[233] Generations of scholars have noted that expansion of independent review could also overcrowd appellate courts.[234]

It can be explained why the Eighth Circuit did not apply independent review and why the Supreme Court did not grant certiorari, but room certainly remains for clarification in this area of the law. *Bennie* demonstrates the importance of examining the standard of review for cases in which it is unclear.[235] The standard of review not only structures the lawyer's argument and serves as the lens through which the judge views the case, but the standard is sometimes dispositive.[236] The Court's precedent indicates that independent review is justified for the person of ordinary firmness prong of a First Amendment retaliation claim because the prong involves a mixed question of fact and law and recognition of an important constitutional right, both of which trigger the application of independent review.

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232. *See supra* note 92 and accompanying text.

233. *See, e.g.,* Ornelas v. United States, 517 U.S. 690, 701 (1996) (Scalia, J., dissenting) ("[T]here is no rigid rule with respect to mixed questions. We have said 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." (internal quotations omitted) (quoting Salve Regina Coll. v. Russell, 499 U.S. 225, 233 (1991))).

234. *See, e.g.*, John Dickenson, Crowell v. Benson*: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact,*" 80 U. PA. L. REV. 1055, 1062 (1932) ("A principal reason for the introduction of administrative procedure and the establishment of administrative tribunals with quasi-judicial power has been to make possible new types of supposedly desirable governmental activity which could not be carried on at all if the burden had to be borne by the already overcrowded courts. In view of the volume of this added business, the courts, to the extent that they are called on to retry on new evidence fact-issues previously decided by administrative tribunals, will inevitably have their dockets so clogged as to impede the performance not merely of the additional business, but of their own proper business of handling private litigation as well.")

235. *Bennie,* 822 F.3d. at 398 ("The standard of review applied here likely is dispositive.").

236. *Id.*