No. 06-1459

IN THE

Supreme Court of the United States

PETER BOGGAN,

Petitioner,

v.

MISSISSIPPI CONFERENCE OF THE UNITED METHODIST CHURCH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, Mississippi Conference of United Methodist Church, is a religious institution that is a Mississippi not for profit corporation with no publicly traded stock.

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RELEVANT STATUTORY PROVISIONS

Although Petitioner's Complaint is based upon Title VII and 42 U.S.C. § 1981, the petition raises only the Religious Freedom Restoration Act ("RFRA") as the relevant statutory provision. In addition to Petitioner's statutory provisions, Respondent submits the RFRA's substantive provisions states in full the following:

42 U.S.C. § 2000bb-1

> (a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> > (1) is in furtherance of a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (c) Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-1. According to section 2000bb, the purposes of the RFRA are as follows:

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b)(1-2).

STATEMENT OF THE CASE

Petitioner filed his Complaint under Title VII of the Civil Rights Act of 1964 against the Mississippi Conference of the United Methodist Church ("Respondent") alleging racial discrimination in his employment. Petitioner's allegations of discrimination are not at issue in this appeal. The issue is jurisdictional – whether the Federal courts have the authority to look into employment practices of a church. According to the ministerial exception (also referred to as the "minister-clergy exception") as pronounced by the Fifth Circuit in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) and followed by nine other Circuits, the Free Exercise Clause of the First Amendment precludes courts from intruding into the employment relationship between a church and its ministerial employees.

REASONS FOR DENYING THE PETITION

Petitioner has presented no "compelling reason" for his Petition for a Writ of *Certiorari* to be granted. *See* Sup. Ct. R. 10. Petitioner asserts that this case presents the ideal vehicle to decide his questions presented. However, this case is less than ideal since Petitioner's questions presented are not even the relevant issues presented to the District Court and Fifth Circuit Court of Appeals. Should Petitioner wish to seek this Courts determination as to the application of the RFRA, such determination should involve a case that actually includes the RFRA as an actual issue.

Petitioner's questions presented essentially revolve around the application of the RFRA. However, the RFRA should not be at issue in this appeal: (a) the RFRA was not raised as a claim or defense by either party, (b) the RFRA does not apply to disputes between private parties as involved here, and (c) Petitioner cannot show that the government has enacted a federal law that has substantially burdened his exercise of religion.

Further, despite the statements by Petitioner, the Courts of Appeals are not intractably split over the application of the ministerial exception – ten (10) of the Circuits have upheld the ministerial as to Title VII claims while the other two have not squarely dealt with the issue.

The District Court and Fifth Circuit correctly ruled in favor of Respondent. Accordingly, no compelling reason exists in this case allowing this Court to grant a petition for writ of certiorari herein.

I. The RFRA is not applicable to this case.

Prior to responding to any of the assertions made by Plaintiff, it should be clearly noted that the RFRA should not even at issue in this case.

Petitioner's argument for application of the RFRA is based upon the requirement of review under a two part test from the RFRA – conditioned upon the instance that the RFRA as applied to Federal law is not unconstitutional.[1] This attempt by Petitioner should not be considered by this Court because (a) neither party raised the RFRA as a claim or as a defense in this case; (b) the RFRA does not apply to disputes between private parties; and (c) the RFRA is not applicable as Plaintiff cannot show that the government has enacted a federal law that has substantially burdened his exercise of religion.

A. The RFRA was not raised by either party as a claim or a defense.

Plaintiff's Complaint is based upon alleged violations of Title VII and 42 U.S.C. § 1981. Nowhere did Plaintiff asserted any claim under the RFRA, nor has Respondent raised the RFRA as a defense. Not until Respondent raised the RFRA in its response to Respondent's motion to dismiss did the RFRA surface.

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1. The Fifth Circuit addressed the RFRA and its application in regard to the decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) by finding the RFRA to be unconstitutional. *Combs v. Central Texas Ann. Conf. of the United Methodist Church*, 173 F.3d 343, 348 (5th Cir. 1999); *see also City of Boerne v. Flores*, 521 U.S. 507 (1997). Regardless of whether the RFRA is unconstitutional as a whole or if the RFRA still applies to Federal laws is immaterial in this case.

Accordingly, Plaintiff's attempt to raise the RFRA or any application of the RFRA should not be considered by this Court.

B. The RFRA does not apply to disputes between private parties.

The RFRA prohibits federal governments from substantially burdening a person's exercise of religion unless the government could demonstrate that the burden is in furtherance of a compelling governmental interest and is the least restrictive means.

The RFRA's substantive provisions repeatedly state that "government" shall not substantially burden the exercise of religion and that the appropriate relief shall be "against a government". *See* 42 U.S.C. § 2000bb-1; 42 U.S.C. § 2000bb.

The plain language of the RFRA, its legislative history, and its interpretation by courts since its inception demonstrate that the RFRA does not apply to suits between private parties. *See Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006) (Sotomayor, J., *dissenting*)

> the majority concedes that it is unable to locate a single court holding that directly supports its novel application of RFRA to a suit between private parties. . . . This is telling, for Congress enacted RFRA over twelve years ago. The plain language of the statute, its legislative history, and its interpretation by courts over the past twelve years demonstrate that RFRA does not apply to suits between private parties.

Each of the cases cited by Petitioner in regard to the RFRA being applicable to federal law includes some type of governmental entity as a party. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399 (7th Cir. 2003) (federal prisoner sued governmental entity Bureau of Prisons under RFRA alleging infringement of his right to practice his religion); *Guam v. Guerro*, 290 F.3d 1210 (9th Cir. 2002) (individual indicted on violating governmental entity's controlled substance importation laws moved to dismiss indictment asserting importation laws violated the RFRA); *Henderson v. Kennedy*, 265 F.3d 1072 (D.C. Cir. 2001) (individuals brought action under RFRA challenging governmental entity National Park Service's regulation banning sales of message bearing t-shirts in designated sections of the national mall); *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001) (federal prisoner brought suit under RFRA against governmental entity's prison officials for alleged denial of pastoral visits from Christian minister); *Christians v. Crystal Evangelical Free Church*, 141 F.3d 854 (8th Cir. 1998) (governmental entity's Chapter 7 bankruptcy trustee brought action under RFRA to recover preferential transfers of church tithes); *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) (state prisoner brought action against government entity's prison officials under Religious Land Use and Institutionalized Persons Act challenging denial of his requests for kosher meals).

The Seventh Circuit has found that the decision in *Hankins* "is unsound" and that the RFRA is applicable only to suits to which the government is a party. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) *citing* 42 U.S.C. §§ 2000bb-1(b), (c); *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1120-21 (9th Cir. 2000); *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826, 834-35 (9th Cir. 1999). A proper claimant may "obtain appropriate relief against a government". 42 U.S.C. § 2000bb-1(c).

Clearly, no governmental entity is involved in this case nor is any law enacted by the government burdening Plaintiff's exercise of religion involved in this case. As such, the RFRA should not apply to this matter between private parties.

C. Plaintiff's exercise of religion has not been substantially burdened.

RFRA is not applicable as Plaintiff has not shown that the government has enacted a federal law that has substantially burdened his exercise of religion.

The threshold inquiry under the RFRA is whether Plaintiff demonstrates a substantial burden on his religious practice. *Manley v. Fordice*, 945 F. Supp. 132, 134 (S.D. Miss. 1996) *citing American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995). In the present case, Plaintiff has failed to show any burden, much less a substantial burden, on his religious practice. The fact that Plaintiff is no longer a minister in the Mississippi Conference[2] does not present a burden upon his religious practice as he has ample alternative means of his religious practice.

Petitioner has not and is not able to show any burden, much less any substantial burden upon his exercise of religion. Accordingly, the RFRA does not apply in this case.

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2. See Plaintiff's Complaint at p. 3.

II. The Courts of Appeals are not intractably split over the questions presented.

A. The RFRA.

Petitioner's assertion as to this Court not having addressed the constitutionality of the RFRA as it applies to Federal law is correct. Petitioner indicates that six circuits are in favor of the proposition that the RFRA is constitutional when applied to Federal law versus the one circuit against it. As stated previously, each of the six circuits through the cases cited by Petitioner in regard to the RFRA being applicable to federal law includes some type of governmental entity as a party. *See supra.*

The question as to whether or not the RFRA applies to Title VII through this case is not material.

B. The ministerial exception.

Contrary to Petitioner's statements[3], ten (10) circuits have not only "acknowledged" the ministerial exception, but those ten circuits have upheld the ministerial exception as to Title VII claims. *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989) (affirming dismissal of clergyman's wrongful termination claim based upon Free Exercise clause); *Petruska v. Gannon University*, 462 F.3d 294 (3d Cir. 2006) (ministerial exception applied to bar former chaplain's Title VII claims); *E.E.O.C. v. Roman Catholic Diocese of Raleigh, NC*, 213 F.3d 795 (4th Cir. 2000) (cathedral choir director required to assist in planning

3. Petitioner states that a total of eight circuits have acknowledged the alleged "ministerial exception". *See* Petition at p. 5.

liturgies); *McClure v. The Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (The Church's practices relative to its ministers' assignments, salaries, and duties, the court concluded, were "matters of church administration and government and thus, purely of ecclesiastical cognizance" and application of Title VII would result in state interference in matters of church administration and government); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007) (upholding the application of the ministerial exception precluding federal court subject matter jurisdiction); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003) (court lacked subject matter jurisdiction to address Title VII gender discrimination claims raised by plaintiff with ministerial duties); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991) (court's adjudication of hospital chaplain's Title VII and age discrimination claims was barred by First Amendment); *Werft v. Desert Southwest Annual Conference of the United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004) (minister's claims under Title VII were part of the employment relationship between church and minister and were therefore properly dismissed under the ministerial exception); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000) (minister's Title VII claims that he was retaliated against and constructively discharged as a result of assisting a female minister in her sexual harassment complaint was barred by Free Exercise Clause and Establishment Clause); *Pardue v. Center City Consortium Schools of the Archdiocese of Washington, Inc.*, 875 A.2d 669 (D.C. 2005) (former Catholic school principal's suit alleging race discrimination and retaliation claims was denied because trial court lacked subject matter jurisdiction

over discrimination and retaliation claims under ministerial exception).[4]

Petitioner heavily relies on the case of *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006) in support of its claim regarding application of the RFRA instead of through the ministerial exception. In a split decision with a long dissent, the Second Circuit in *Hankins* did not specifically find that the ministerial exception does not exist. *Hankins*, 441 F.3d at 102 (labeling the ministerial exception "an unresolved issue in this circuit"). However, the divided *Hankins* court held that that Congress impliedly had amended the antidiscrimination statutes (the ADEA) to make them enforceable without regard to the free exercise clause of the first amendment. *Id.* at 103.

The United States District Court for the Eastern District of New York (which is included in the Second Circuit) in *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211 (E.D.N.Y. 2006) followed *Hankins* but found that the RFRA and ministerial exception are not mutually exclusive. *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 220 (E.D.N.Y. 2006) *citing Gonzales v. O Centro Espirita*, 546 U.S. 418 (2006) (holding "judicially crafted exceptions" relevant to RFRA analysis).

The Court in *Redhead* followed the Seventh Circuit in stating that "a serious constitutional issue would be presented if Congress by stripping away the ministerial exception

4. The remaining circuit not to address the ministerial exception is the Tenth Circuit. In the case of *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002), the Tenth Circuit mentioned the ministerial exception but did not apply it due to the claims being based solely on communications that are protected by the First Amendment under the broader church autonomy doctrine.

required federal courts to decide religious questions. The exception is based on the establishment and free-exercise clauses of the First Amendment . . . , which place tight limits on governmental authority to regulate religion." *Redhead*, 440 F. Supp. 2d at 220 *citing Tomic*, 442 F.3d at 1042. The court went on to state:

> [W]hether applied directly or through the RFRA, the ministerial exception guards against excessive entanglement and is a tool for analyzing the nature of the alleged burden on religious exercise. It is a judicially created doctrine relevant to whether a religious organization's hiring decisions regarding a particular individual should be insulated based on First Amendment concerns. Applying the ministerial exception strikes a proper balance between the important aims of Title VII in eliminating discrimination, on the one hand, and safeguarding "matters of church government as well as those of faith and doctrine," on the other hand. For the RFRA analysis in particular, the ministerial exception is necessary for a case-specific application of the compelling interest test and is the kind of judicially crafted exception envisioned by the Court in *O Centro Espirita.*

Id. (internal citations omitted).

Accordingly, the ministerial exception is applicable to the current case.

III. The Courts Below Correctly Ruled in this Case.

The District Court ruled that that ministerial exception precluded Petitioner's suit. The District Court then addressed Petitioner's alternative argument and found Petitioner's reliance on the RFRA was "irrelevant and misplaced". The Fifth Circuit upheld the District Court's ruling that Petitioner's claims were bared by the minister-clergy exception, but made no specific finding or ruling as to the RFRA.

Regardless of whether the RFRA is applicable, the Courts below correctly ruled using the ministerial exception. The ministerial exception is based on the Free Exercise and Establishment Clauses of the United States Constitution and exempts church employment decisions affecting ministerial employees. Applying Title VII to an employment relationship between a church and a minister would result in a constitutional violation because of the resultant encroachment by the State into an area of religious freedom that it is forbidden to enter by the principles of the Free Exercise Clause of the First Amendment.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant his Petition for a Writ of *Certiorari*. For the foregoing reasons, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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