NO. 07-_____

IN THE

Supreme Court of the United States

Peter Boggan,
Petitioner,

v.

Mississippi Conference of the United Methodist Church.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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April 27, 2007

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to resolve the six-to-one circuit conflict over whether the Religious Freedom Restoration Act is constitutional as it applies to federal law?

2. Should this Court grant certiorari to resolve the one-to-one circuit conflict over whether the alleged ministerial exception to Title VII of the Civil Rights Act of 1964 is valid under the Religious Freedom Restoration Act?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Peter Boggan, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-2a) is unpublished. The district court's order granting the motion to dismiss in favor of respondent (Pet. App. 3a-9a), dated May 5, 2006, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 2007. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

The Religious Freedom Restoration Act (RFRA) provides the following:

> (1) Whether the claims sought by the plaintiff are in furtherance of a compelling governmental interest; and
> (2) Whether those claims are the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §2000bb-1(b).

STATEMENT

Petitioner alleges that respondent violated Title VII of the Civil Rights Act of 1964 by placing him on administrative leave without pay for not spending the night at the church's parsonage for at least five (5) nights out of the week while numerous white pastors who do not spend the night at their church's parsonage for at least five (5) nights out of the week had no adverse action taken against them. In addition, petitioner and other black pastors who are employed by the respondent have not been promoted to higher paying church positions because of their race.

It is alleged that the respondent has continually only offered churches with majority black congregations to its black pastors, which on average pay less to their pastors than churches with majority white congregations while numerous white pastors with less experience are promoted over black pastors with more experience to churches with higher salaries. Respondent has argued that Title VII does not apply because of an alleged ministerial exception. In the current case, the Fifth Circuit continued to maintain a split in the circuits by holding that the RFRA does not apply to federal law.

1. Reverend Boggan, filed his charge of discrimination against the Mississippi Conference of the United Methodist Church with the Equal Employment Opportunity Commission on March 31, 2005, alleging race discrimination. He was issued a Notice of Right to Sue letter by the Equal Employment Opportunity Commission on July 1, 2005 and proceeded to file his Complaint against the respondent

on August 2, 2005 in the Circuit Court for the First Judicial District of Hinds County, Mississippi.

2. In his Complaint, petitioner alleged claims of race discrimination pursuant to Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. The respondent consented to the jurisdiction of and removed the current case to the United Stated District Court for the Southern District of Mississippi, Jackson Division on September 12, 2005. On October 11, 2005, respondent filed its Answer wherein its sixth defense, the respondent plead the doctrine of the "ministerial exception." Subsequently, on March 2, 2006, the respondent filed its Motion to Dismiss alleging that the respondent is exempt from the requirements and provisions of Title VII and 42 U.S.C. § 1981, under the so-called "ministerial exception." On May 5, 2006, the district court granted the respondent's motion to dismiss.

3. On May 10, 2006, the petitioner appealed the district courts opinion to the United States Court of Appeals for the Fifth Circuit. On February 1, 2007, the Fifth Circuit affirmed the district court's opinion that the RFRA was unconstitutional as it applies to federal law, and that an alleged "ministerial exception" applies to Title VII claims of race discrimination.

This petition followed.

REASONS FOR GRANTING THE WRIT

The circuits are intractably split over both questions presented by the petitioner. Given the importance of the RFRA and Title VII, such a conflict is untenable. This case presents the ideal vehicle to decide these important and frequently litigated issues. Finally, the Fifth Circuit erred in concluding that the RFRA is unconstitutional as applied to federal law, and that an alleged "ministerial exception" exists under Title VII.

I. The Courts of Appeals Are Intractably Split over the Questions Presented.

In response to this Court's opinion in *Employment Division, Department of Human Resources of Oregon, et al. v. Smith*, 494 U.S. 872 (1990), Congress passed the RFRA, creating a two-part test:

> (1) Whether the claims sought by the plaintiff are in furtherance of a compelling governmental interest; and
> (2) Whether those claims are the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §2000bb-1(b). The intent of Congress in enacting the RFRA was clearly to reestablish the "compelling interest" test set out in *Sherbert v. Verner,* 374 U.S. 398 (1963). This Court later declared that the RFRA exceeded Congress' Section 5 enforcement powers in *City of Boerne v. P.F. Flores, et al.,* 521 U.S. 507 (1997), and held that the RFRA

was unconstitutional as it applies to state law.

While this Court has not addressed the constitutionality of the RFRA as it applies to federal law, six circuits -the Second, Fourth, Seventh, Eighth, Ninth, and D.C. Circuit- squarely hold that the RFRA is constitutional when applied to federal law. *Hankins v. Lyght*, 441 F.3d 96, 105 (2nd Cir. 2006); *See also O'Bryan v. Bureau of Prisons,* 349 F.3d 399, 401 (7th Cir. 2003); *Guam v. Guerrero,* 209 F.3d 1210, 1221 (9th Cir. 2002); *Henderson v. Kennedy,* 265 F.3d 1072, 1073 (D.C.Cir. 2001); *Kikumura v. Hurley,* 242 F.3d 950, 960 (9th Cir. 2001); *Christians v. Crystal Evangelical Free Church (In re Young),* 141 F.3d 854, 856 (8th Cir. 1998) and *Madison v. Riter,* 355 F.3d 310, 315 (4th Cir. 2003). In contrast, the Fifth Circuit has held that the RFRA is unconstitutional when applied to federal law. *Reverend Pamela Combs v. The Central Texas Annual Conference of the United Methodist Church, et al.,* 173 F.3d 343 (5th Cir. 1999).

Additionally, this Court has made no opinion as to the applicability of the alleged "ministerial exception" to Title VII. In 1972, the Fifth Circuit acknowledged the existence of an alleged "ministerial exception" to Title VII. *McClure v. The Salvation Army* 460 F.2d 553 (5th Cir. 1972*), cert. denied,* 409 U.S. 896 (1972). Since this opinion was published, a total of seven additional circuits have acknowledged the alleged "ministerial exception." *Natal v. Christian & Missionary Alliance,* 878 F.2d 1575 (1st Cir. 1989); *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.,* 213 F.3d 795 (4th Cir. 2000); *Young v. N. Ill. Conference Of United Methodist Church,* 21 F.3d 184 (7th Cir. 1994); *Scharon v. St. Luke's Episcopal*

Presbyterian Hospital, 929 F.2d 360 (8th Cir. 1991); *Werft v. Desert S.W. Annual Conference of the United Methodist Church,* 377 F.3d 1099 (9th Cir. 2004); *Gellington v. Christian Methodist Episcopal Church, Inc.,* 203 F.3d 1299 (11th Cir. 2000); *Petruska v. Gannon University, et al,* 448 F.3d 615 (3rd Cir. 2006) and *Minker v. Baltimore Annual Conference of the United Methodist Church,* 894 F.2d 1354 (D.C. Cir. 1990). In contrast, the Second Circuit held that "ministerial exception" to Title VII did not exist. *Hankins v. Lyght*, 441 F.3d 96, 105 (2nd Cir. 2006).

While numerous circuits have discussed the constitutionality of the RFRA and the alleged "ministerial exception" to Title VII, only two circuits have addressed the applicability of the RFRA to Title VII and the "ministerial exception." *See Hankins v. Lyght*, 441 F.3d 96, 105 (2nd Cir. 2006); *Reverend Pamela Combs v. The Central Texas Annual Conference of the United Methodist Church, et al.,* 173 F.3d 343 (5th Cir. 1999).

II. The Circuit Conflict is Untenable Given the Importance of the Questions Presented.

Millions of employees currently employed in the United States are protected by Title VII. As of May 2005, there were an estimated 36,590 clergy employed across the United States. U.S. Department of Labor, Bureau of Labor Statistics, at http://www.bls.gov/oes/current/oes212011.htm (last visited March 25, 2007). Because the Act covers so many employees, the questions presented are of great importance to the national economy and to the issue of separation of church and State.

It is therefore unsurprising that nine circuits have taken a position on the "ministerial exception," seven circuits have taken a position on the constitutionality of the RFRA, and some have faced these same issues repeatedly. The importance of this question is heightened because it is outcome determinative. Where claims of race discrimination by clergy are available, they are able to vindicate their rights in the federal courts. In contrast, where the cognizability of such claims have been rejected, pastors are left without a remedy when they have been subjected to policies that unfairly disadvantage them and subject them to race discrimination.

The frequent recurrence of this issue and its importance to thousands of Americans makes the conflict among the circuits untenable. Under the current legal regime, the scope of an employee's federal rights varies within the location of his or her employment. As long as the circuits disagree, pastors in Jackson, New York (within the Second Circuit) are protected against race discrimination, whereas pastors in Jackson, Mississippi (within the Fifth Circuit) are not. The present situation also creates special difficulties for employees of religious organizations with multiple locations nationwide, most of whom are likely unaware that the acceptance of a transfer or promotion to another location may strip them of rights that they would otherwise have. Indeed, forum selection clauses in employment contracts may deprive even those employees who work within circuits that do not recognize the "ministerial exception" of the rights enjoyed by their neighbors.

The central role that Title VII, 42 U.S.C. §

1981 and the RFRA plays in thousands of Americans employment relationships underscores the need for clear guidance from this Court.

III. The Fifth Circuit's Decision is Wrong on the Merits.

Congress enacted Title VII in 1964 to forbid employers to "fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race..." 42 U.S.C. § 2000e-2(a)(1). Originally, the House version of §702 contained in H.R. 7152 granted religious organizations a blanket exemption from the provisions of Title VII. Yet, the exemption proposed by the House was sizeably limited by Substitute Senate Amendment No. 656, which was what ultimately became law.

This Amendment removed the generalized exemption of religious organizations. All that remained was a narrowly tailored exemption that allowed a particular denomination to refuse to hire anyone who is not of that denomination for positions involving ministerial functions. Clearly, the language and history of §702 leads one to believe that Congress did not intend that a religious organization should be exempt from the dictates of §702 merely because it is a religious organization.

Though the Fifth Circuit recognized the desire of Congress to prevent generalized legislative exemption in *McClure*, the Fifth Circuit became the first circuit to judicially recognize the "ministerial

exception" by refusing to apply the "compelling interest" test created by the Supreme Court in *Sherbert v. Verner,* 374 U.S. 398 (1963). Congress later incorporated the "compelling interest" test into statute by enacting the RFRA.

While the Fifth Circuit has declared that the RFRA was held unconstitutional as it applies to federal law, the Fifth Circuit has never given any explanation as to why it contends the RFRA is unconstitutional as applied to federal law. *Combs,* 173 F.3d 343 (5th Cir. 1999). This Court declared the RFRA unconstitutional as it applies to state law because it exceeded Congress' Section 5 enforcement powers. *City of Boerne,* 521 U.S. 507 (1997). Essentially, this Court found that Congress had created a law that surpassed the protections of the Fourteenth Amendment, and thus violated the separation of powers between federal and state. *Id.* While there is no dispute as to the reason why the RFRA is unconstitutional as applied to state law, that same reasoning would not hold true when the RFRA is applied to federal law.

The Fifth Circuit has argued that an individual's pursuit of a Title VII claim would involve a "governmental action" in the *McClure* case when it states:

> An application of the provisions of Title VII to the employment relationship which exists between The Salvation Army and Mrs. McClure, a church and its minister, would involve an investigation and review of these practices and decisions and

> would, as a result, **cause the State to intude upon matters of church administration** ...

McClure, 460 F.2d at 560 (emphasis added). Title VII is a neutral law designed to apply to every employer in order to protect every employee from discriminatory treatment.

> There is a compelling as well as reasonable government interest in the interdiction of racial discrimination which stands on the highest constitutional ground, taking into account the provisions and penumbra of the Amendments passed in the wake of the Civil War.

Green v. Connally, 330 F.Supp. 1150, 1167 (D.C. Cir. 1971). As such, it is clear that Title VII prohibits racial discrimination of pastors, and that the alleged "ministerial exception" does not exist.

Unless settled by this Court, this intractable and widely acknowledged split among the courts of appeals will continue to produce results that arbitrarily differ according to the jurisdiction in which Title VII claims brought by pastors are litigated. As a prototypical racial discrimination claim by a pastor, this case would serve as an ideal vehicle to examine whether an alleged "ministerial exception" actually exists. Finally, the decision reached by the court below incorrectly barred

petitioner's Title VII claim, and should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 27, 2007[1]

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[1] Counsel for petitioner was principally assisted by Robert Nicholas Norris, who is an associate with Louis H. Watson, Jr., P.A. that will be seeking admission before this Court at the completion of his third year of practice in October 2007.

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