No. _____



# In The Supreme Court of the United States



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**LINDA LEBOON,**

*Petitioner,*

**v.**

**LANCASTER JEWISH COMMUNITY CENTER ASSOCIATION,**

*Respondent.*

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

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## PETITION FOR WRIT OF CETIORARI

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**J. Michael Considine, Jr.**
***Counsel of Record***
**12 East Barnhard Street**
**Suite 100**
**West Chester, PA 19382**
**(610) 431-3288**
**Participating Attorney for The Rutherford Institute**

**John W. Whitehead**
**Douglas R. McKusick**
**THE RUTHERFORD INSTITUTE**
**1440 Sachem Place**
**Charlottesville, VA 22901**
**(434) 978-3888**

***Counsel for Petitioner***

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

## QUESTIONS PRESENTED

1. Where an organization is not controlled by a church, synagogue, board of elders or rabbis (none of whom are on its independent board), is not funded by a church, synagogue or religious organization, was granted a tax-exemption as an educational (not a religious) organization, did not require staff to adhere to any code of beliefs or behavior based on its religion, all of whose federal and state filings indicate its purposes are other than religious, and agreed to a United Way policy banning religious discrimination, is it entitled to a religious exemption in a matter in which an employee with an excellent work record was fired for attending Messianic worship at her Protestant church?

2. Should the court grant certiorari because the lower court's decision conflicts with cases in the Third, *Little v. Wuerl*, 929 F.2d 944, 951 (3rd Cir. 1991), Fourth, *Shaliehsabou v. Hebrew Home of Washington*, 363 F.3d 299 (4th Cir. 2004), Ninth, *EEOC v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458, 461 (9th Cir. 1993), *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988) & Eleventh Circuits, *Samford v. Killinger*, 113 F.3d 196 (11th Cir. 1977), and of this Court in *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 329 (1987), and is unsupported by the legislative history or any other case?

3. Where the legislative history of the religious exemption of Title VII requires

organizations considered "religious" to be "wholly owned by the religious order" or a "wholly church supported organization" and since mere "affiliations" are insufficient under § 702 (a), and respondent is controlled by a board independently elected by its members and not receiving money from nor is it controlled by synagogues or any religion sect, did the Third Circuit contradict the legislative history by granting the religions exemption by ignoring the funding and control issues and measuring the "religiosity" of Respondent, though a court is not competent to declare religious orthodoxy?

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# In the Supreme Court of the United States

No.

LINDA LEBOON, *Petitioner,*
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LANCASTER JEWISH COMMUNITY
CENTER ASSOCIATION, *Respondent.*

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## PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported as *LeBoon v. Lancaster Jewish Community Center Association*, 503 F.3d 217 (3d Cir. 2007), and is set forth in the Appendix beginning at A-1. The order of the Court of Appeals for the Third Circuit denying the petition for rehearing is not reported and is set forth in the Appendix beginning at A-49. The order and opinion of the United States District Court for the Eastern District of Pennsylvania granting the Respondent's motion for summary judgment is not reported and is

set forth in the Appendix beginning at A-50. The order and opinion of the United States District Court for the Eastern District of Pennsylvania on rehearing granting Repondent's motion for summary judgment is not reported and is set forth in the Appendix beginning at A-71.

## STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Third Circuit, which is the subject of the instant Petition, was entered on September 19, 2007 (A-1). The Petitioner timely filed a petition for rehearing with the Court of Appeals, which was denied in an order entered on October 16, 2007 (A-49). This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Code, Title 42, § 2000e-1, provides, in parts relevant to this Petition, as follows:

(a) **Inapplicability of title to certain aliens and employees of religious entities.** This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation,

association, educational institution, or society of its activities.

## STATEMENT OF THE CASE

Petitioner Linda LeBoon ("LeBoon") filed this action under Title VII, 42 U.S.C. § 2000e, claiming that she was terminated by her former employer, Respondent Lancaster Jewish Community Center Association ("LJCC") because of her religious beliefs (she is an evangelical Christian), and for opposing race discrimination. The District Court did not reach the merits of LeBoon's claim that her termination occurred because of her religious beliefs and practices or because she voiced opposition to discrimination against others. Instead, LeBoon's claims were dismissed without any hearing because the courts below concluded, in a way that conflicts with the rulings of other courts and over the dissenting opinion of Circuit Judge Marjorie O. Rendell, that LJCC is a "religious corporation, organization or institution" exempt from the coverage of Title VII under 42 U.S.C. § 2000e-1(a).

This Court should grant the instant Petition to resolve the conflict among the circuit courts over the scope of Title VII's religious organization exemption identified in Judge Rendell's dissenting opinion and allow LeBoon a fair hearing on her claims of discrimination.

LeBoon was employed as a bookkeeper for LJCC, a nonprofit corporation located in Lancaster County, Pennsylvania. LJCC's stated mission was to "enhance and promote Jewish life, identity and continuity." (A-3). Its § 501 (c)(3) application of November 30, 2003, states that its purpose on November 30, 2003 is to "provide and foster culture, social, physical, recreational and educational well-being and to preserve spiritual and cultural values of Judaism through its program." Its purpose is not to proselytize Judaism. Robert Matlin, its board chairman and corporate designee, said its purpose was to advance Jewish identity and continuity, and that it is not religious. The mission and purpose of LJCC is to celebrate Jewish culture. LJCC espouses Jewish values: 1) healing the world, 2) helping those in need, and 3) tolerance of other faiths. In Charitable Organization Registration Statements filed with the Commonwealth, its stated purpose is "to provide educational, recreational, social, cultural and human services to all members of the community."

LJCC was not open only to Jews, and the majority of some programs had non-Jews attending. Neither Board nor Staff members were required to sign a statement of faith or statement of conformance to a mission, and employees were overwhelmingly Gentile (A-23). Its employee handbook and policy statement, in effect from 1998-2002 bans discrimination on the basis of religion. Its agreements with the United Way and the Office of Aging ban religious discrimination. Its bylaws

mention "sensitivity to Jewish concerns" but nowhere mentions religious purpose or synagogue input. Its preschool consists of all religions. It does not teach Judaism, but Jewish values. It had diversity content.

Non-kosher foods are served by LJCC. No mashgiach ensured foods were kosher after 1999. Non-kosher food, including ham, was served. When mashgiach Marilyn Klein resigned in 1999 (A-21) she wondered, "why it was necessary to have a Kosher Kitchen...?" After Klein resigned, LJCC never hired another mashgiach (A-21).

LJCC's 1998-1999 Annual Report reveals that its mission is to develop a cohesive Jewish community. Its website, on March 10, 2004, stated that its mission is to sustain a Jewish community. Nowhere does it state that its mission is religious Jews are not favored over Gentiles for board membership. Non-Jews are on the Board. On August 8, 1946, it obtained tax-exempt status as an educational organization. Upon dissolution, LJCC's assets are not required to be paid to a religious organization or Jewish group, but to a § 501(c)(3) organization.

LJCC's budget was funded by five or six sources, including the United Way. No synagogue provided funding. According to one LJCC representative, funds in the amount of $10,000 - $20,000 came from non-Jewish organizations, $30,000-50,000 from the United Way and $20,000–

30,000 from Jews and non-Jews. Half of the $200,000 programming budget comes from non-Jews. It rented out its facilities to Jewish and non-Jewish organizations. On one occasion, it rented space to a Hindu group for meetings (A-23).

A fully independent board, not synagogues or rabbis, controls the organization. The bylaws do not grant rabbis voting power, and the idea of LJCC programs taking place at synagogues was rejected. Rabbis are non-voting board members.

LeBoon also presented substantial evidence that her termination was the result of religious discrimination in violation of Title VII. It is undisputed that LeBoon is an evangelical Christian (A-51). In 1998, LJCC's Executive Director, Ted Busch, ordered LeBoon to remove a screen saver from her computer that read "protect me, O God, for in thee I put my trust", telling her that others might be offended. Busch also told LeBoon she must refrain from trying to convert people the Christianity and that she was not allowed to give Christmas cards to colleagues. Busch stated "stating "Jews do not write about Moses so why should you write about Jesus Christ?" Busch also told LeBoon that a Messianic Jew could not be a member of LJCC.

Evidence presented below also showed that while two Jewish employees were allowed to receive paid vacation before working for LJCC for a full year, LeBoon was not given paid vacation until after her one-year anniversary (A-51).

In January 2002, an organization called Messiah Truth Project, the goal of which is to counter efforts to convert Jews to Christianity, gave a seminar at LJCC, gave a seminar at LJCC and was given logistical support by LJCC without charge. One week before she was terminated, she attended a Jews for Jesus concert at her church. She saw there the local head of the Messiah Truth Project and spoke with him. One week later, LeBoon was terminated (A-54). An LJCC receptionist testified that she overheard Natalie Featherman, LeBoon's supervisor, tell board members that the Messiah Truth Project's leader had reported to Featherman that LeBoon was at the Jews for Jesus concert; Featherman derided LeBoon about this and indicated she did not trust LeBoon (A-54).

The parties filed cross-motions for summary judgment, which were presented to a magistrate judge. In its original order and opinion, the magistrate judge granted LJCC judgment on LeBoon's religious discrimination claim, determining that LJCC was a "religious corporation" exempt under 42 U.S.C. § 2000e-1. The magistrate judge emphasized that 75-80% of LJCC's funding came from a Jewish organization and that rabbis were ex officio members of LJCC's board (A-59). Thereafter, the magistrate judge vacated this order in favor of LJCC because it was in error with respect to the funding percentage; in fact, only 12.4% and 21.07% of LJCC's funding came from the particular Jewish organization (A-73). Nonetheless, the magistrate

judge again granted summary judgment to LJCC on the basis that it is primarily a religious organization (A-80).

On appeal, the Court of Appeals for the Third Circuit affirmed on this issue, with Circuit Judge Rendell dissenting. The majority opinion noted that Title VII does not define what constitutes "a religious corporation, association, educational institution or society," but that all the relevant characteristics of the organization must be considered to determine whether its purpose and character are primarily religious (A-16). It identified the following characteristics as supporting LJCC's claim to the Title VII exemption: (1) its mission is to enhance and promote Jewish life, identity, and continuity (A-17); (2) it espouses Jewish values, although these values are universal; (3) three local rabbis play advisory roles in its management; (4) it receives funding from local synagogues and Jewish organizations, although it was financially independent of the synagogues (A-18); (5) it maintained close ties with the local synagogues, although it endeavored not to be identified with any of them, allowing the synagogues' literature in its facility (A-19); (6) its building was rededicated in 1998 at Hanukkah by three local rabbis and mezuzahs were affixed on the premises (A-20); and (7) it observed Jewish holidays in some of its activities (A-20).

The majority opinion wrote as follows:

> To summarize, the LJCC saw itself as a center for the local Jewish community, identified itself as Jewish through the mezuzah on its doorway, relied on coreligionists for financial support, and offered instructional programs with a Jewish content. The Jewish religious calendar provided the rhythm for the LJCC's yearly (and even weekly) activities; the three area rabbis were involved in management decisions, including the search for an executive director; and the Board of Trustees began meetings with Biblical readings and remained acutely conscious of the Jewish character of the organization. These characteristics of the LJCC, taken together, clearly point to the conclusion that the LJCC was primarily a religious organization.

(A-22). It went on to specifically reject the contrary decision in *EEOC v. Townley Eng'g & Mfg. Corp.*, 859 F.2d 610 (9th Cir. 1988), that only those institutions with extremely close ties to organized religions would be covered, churches and entities similar to churches being the paradigm.

Judge Rendell wrote a lengthy dissent, characterizing the majority's reasoning as a "hybrid-scattershot test" that "disregard[s] basic canons of statutory interpretation, invite[s] ill-advised judicial forays into the minutiae of private religious practice

and, worst of all, sanction[s] discriminatory employment decisions that go far beyond those Congress intended to exempt from Title VII." (A-38).

Because the phrase "religious corporation, organization or institution" is not defined by Title VII, Judge Rendell held that any analysis must begin with the legislative history, which "makes clear that Congress intended the phrase 'religious corporation' to mean those orgnizations funded or controlled by a religious group." (A-39, 40). The dissent cited to Congressional debate over the interplay of the exemption at issue here for religious corporations (§ 702(a) of the Civil Rights Act of 1964) and a separate exemption for religiously-affiliated educational institutions (§ 703(e)(2)) (A-41 to -43). That debate showed that the educational institution exemption was enacted only because Congress believed that the religious corporation exemption was limited to organizations that were wholly church supported and not merely affiliated with a religion.

Judge Rendell wrote as follows:

> Therefore, the distinction between § 702(a) and § 703(e)(2) is that the former requires an extremely close nexus between the entity and the religion while the latter requires a lesser showing. . . . Thus, § 703(e)(2) applies only to an entity that is "in whole or in substantial part, owned, supported, controlled or managed by a particular

> religion," while § 702(a) requires a showing that the entity *is more than* "in substantial part, owned, supported, controlled or managed by a particular religion." This leaves very little room for an organization financially or structurally independent of a religious order to avail itself of the § 702(a) exemption.

(A- 43, 44). Examining LJCC under this standard, Judge Rendell had "no doubt that it does not qualify under § 702(a)." LJCC was not governed by a synagogue and it was not financially supported by a religious entity. The dissent also pointed out that even though the panel majority was averse to trying to decide whether certain beliefs and practices are central to a faith, "this is exactly the sort of scrutiny that the majority applies to the LJCC, giving us a five-page analysis of the particulars of the Center's commitment to Judaism — an analysis exemplified by its pronouncement that 'the LJCC's tolerance of non-kosher foods on its premises is balanced by its continued attempt to maintain a kosher kitchen.'" (A-47).

## REASONS FOR GRANTING THE WRIT

This Court should grant the instant petition in order to resolve the split among the Circuit Courts concerning the proper scope of Title VII's "religious corporation" exemption that is created by the

decision below. The panel majority candidly admitted (A-25, 26) that its decision to exempt LJCC from LeBoon's Title VII claim was contrary to the Ninth Circuit's decision in *EEOC v. Townley Eng'g & Mfg. Corp.*, 859 F.2d 610 (9th Cir. 1988), which refused to apply the "religious corporation" exception to an employer that was not a church or otherwise controlled by a religious entity.

The decision at issue here also conflicts with *Fike v. United Methodist Children's Home, Inc.*, 547 F. Supp. 286 (E.D. Va. 1982), *aff'd*, 709 F.2d 284 (4th Cir. 1983). The court there held that even though the employer, a home for orphans, was established by the Methodist Church in order to inculcate Christian values to these children, the operation of the home had changed over the years. The court noted that children were no longer required to attend church services. Moreover, the Board of Trustees operated wholly independent of the Methodist Church, and the home was a corporation separate and apart from the church. *Id.* at 289. Rejecting the applicability of the exemption, the court wrote as follows:

> While the purpose of caring for and providing guidance for troubled youths is no doubt an admirable and a charitable one, it is not necessarily a religious one. For an organization to be considered "religious" requires something more than a board of trustees who are members of a church.

> The Court, therefore, holds that for the purposes of the exemption in § 2000e-1 the United Methodist Children's Home is, quite literally, Methodist only in name. It is a secular organization.

*Fike*, 547 F. Supp. at 290.

Similarly, in *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 460 (9th Cir. 1993), the court reiterated, in accordance with *Townley,* that § 2000e-1's exception is not a broad one and does not exempt an institution that is merely affiliated with a religious organization. Reviewing the reported cases construing the exemption, the court wrote as follows:

> In view of the narrow reach of the § 2000e-1 exemption, it is not surprising that we have found no case holding the exemption to be applicable where the institution was not wholly or partially owned by a church. *See Little v. Wuerl*, 929 F.2d 944 (parochial school operated by parish); *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (school wholly owned and operated by Assembly of God Church); *Rayburn v. Gen. Conf. of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (sex discrimination by a church); *EEOC v. Pacific Press Pub. Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (affiliated with and

> overseen by Seventh Day Adventist Church; published only religious materials); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. Unit A 1981) (owned and operated by Southern Baptist Convention); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980) (owned and operated by Mississippi Baptist Convention)[.]

*Kamehameha Sch./Bishop Estate*, 990 F.2d at 461, n. 7.

This reading is consistent with this Court's decision concerning the exemption in *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). Without expressing any disagreement, this Court noted that the lower court had applied a test for determining whether a gymnasium operated by the Church of Latter Day Saints looked first at "the tie between the religious organization and the activity at issue with regard to such areas as financial affairs, day-to-day operations and management." *Id.* at 332, n. 6. The exemption was found applicable only because the gymnasium was "intimately connected" to the Church financially and in matters of management. *Id.* at 332. *See also Killinger v. Samford Univ.*, 113 F.3d 196, 199 (11th Cir. 1997) (university was covered by the § 702(a) exemption where it was founded as a theological institution, its trustees must be Baptist, its largest single source of funding was from the Baptist Convention, and the

university reports financially to both the Convention and the Alabama Baptist State Board of Missions).

Like Judge Rendell in this case, the *Townley* court reviewed legislative history to divine the meaning of the exemption contained in 42 U.S.C. § 2000e-1(a). This is in accord with this Court's directive that "Where . . . the resolution of a question of federal law turns on a statute and the intention of Congress, we first look to the statutory language and then to the legislative history if the statutory language is unclear." *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

That history clearly indicates that the phrase "religious corporation" means organizations funded or controlled by a religious group. Under § 702(a), organizations with an educational purpose were not to be exempt. Rep. Purcell offered an amendment that would create the exception now located in § 703(e)(2) and stated "generally the church-affiliated schools and colleges are not protected by these two attempts to exempt them. Almost without exception, the term 'religious corporation' would not include church-affiliated schools. . . . Actually most church-related schools are chartered under the general corporation statutes as nonprofit institutions for the purpose of education." *EEOC Legislative History of Titles VII and XI of the Civil Rights Act of 1964*, at 3197 (1968).

Rep. Roberts inquired about whether a religious orphanage in his district would be

considered exempt under § 702(a). In response, Rep. Roosevelt asked whether "the organization . . . [was] *wholly owned* by [the] religious order." *Id.* at 3201. When Roberts responded that it was, Roosevelt said that it would "unquestionably" be exempt under § 702(a). *id.* Rep. Celler, then Chairman of the Judiciary Committee and instrumental in the drafting of the Civil Rights Act, said the orphanage would fall under § 702(a) "[i]f it [was] a *wholly church supported* organization, that is, a religious corporation that comes under section [702(a)]." *Id.* at 3204,

Thus, "[t]he consensus was that [religious corporations] were not protected [under § 702(a)] if they were merely 'affiliated' with a religious organization." *Townley*, 859 F.2d at 617. Because § 702(a) already exempted religious "educational institution[s]," there would have been no need to create a new section if Congress already intended § 702(a) to encompass relationships in which schools or colleges were not actually owned or controlled by a formal religious organization. The distinction between § 702(a) and § 703(e)(2) is that the former requires an extremely close nexus between the entity and the religion while the latter requires a lesser showing. *Fike*, 547 F. Supp. at 290 n.3 (describing the § 703(e)(2) exemption as the "more lenient exemption" of the two). Thus, § 703(e)(2) applies only to an entity that is "in whole or in substantial part, owned, supported, controlled or managed by a particular religion," while § 702(a) requires a showing that the entity *is more than* "in substantial

part, owned, supported, controlled or managed by a particular religion." This leaves no room for an organization financially or structurally independent of a religious order to avail itself of the § 702(a) exemption.

There is no doubt that LJCC does not qualify under § 702(a). With respect to governance, LJCC, during the relevant time period, was not run by a synagogue, but by a board independently elected by the Center's members. While the rabbis from three local synagogues attended board meetings, they only "played an advisory role," serving as "honorary, non-voting members" of the Board. With respect to financial assistance, there is no evidence, nor has LJCC contended, that any of the local synagogues gave LJCC any money in any of the years at issue. Instead, LJCC sustained itself largely by dues and income from the rental of its facilities. The only support it received from an arguably "religious" organization was, as the majority points out, from the Lancaster Jewish Federation. LJCC has not argued that the Federation was akin to a synagogue. Therefore, far from being more than "in substantial part, owned, supported, controlled or managed by a particular religion," LJCC was an independent entity not controlled by any religious sect while it employed LeBoon and cannot now use § 702(a) to shield itself from her suit.

The majority decision below found LJCC to be entitled to the exemption "because its structure and purpose" are primarily religious (A-15). But the

majority discusses neither structure nor purpose; instead, it catalogued Jewish attributes of LJCC's daily operations, such as the features of its programming, its observance of the Sabbath, its pre-school curriculum and the extent to which the Jewish calendar "provided the rhythm" of its activities. This approach is entirely too nebulous, as pointed out in Judge Rendell's dissent. Moreover,

> the majority offers a series of caveats, which dictate that a religious corporation may avail itself of § 702(a) and still "engage in secular activities," fail to conform to "the strictest tenets" of its faith, declare its intention not to discriminate even while doing just that, and, finally, hire persons who subscribe to other faiths while reserving the right to fire those same employees, solely on the basis of their religion, should it choose to do so at some point in the future.

(A-46, 47).

The approach used by the majority is contrary to the principle that "'[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). This is the sort of scrutiny that the court applies to the LJCC: providing a five-page analysis of the

particulars of the Center's commitment to Judaism – an analysis exemplified by its pronouncement that "the LJCC's tolerance of non-kosher foods on its premises is balanced by its continued attempt to maintain a kosher kitchen."

By adopting a test that turns on the attributes of LJCC's religious practice, the majority below mistakenly assumed that it has the competence to sort through the activities of a religiously inclined organization and pick out those that are meaningful and those that are not. Courts have declined to do this. *See Africa v. Pennsylvania*, 662 F.3d 1025, 1030 (3d Cir. 1981) ("Judges are not oracles of theological verity, and the Founders did not intend for them to be declarants of religious orthodoxy."); *DeHart v. Horn*, 227 F.3d 47, 55-57 (3d Cir. 2000) (reluctance to evaluate the particulars of religious practice). It is not practical, desirable and is unnecessary given Congress's intent.

Congress intended § 702(a), 42 U.S.C. § 2000e-1(a), to cover only those entities that, unlike LJCC, are controlled by a religious sect. *Townley*, 859 F.2d at 617 ("All assumed that only those institutions with extremely close ties to organized religion would be covered [by § 702(a)]. Churches, and entities similar to churches, were the paradigm."). The failure of the majority below to follow the intent of Congress in applying the exemption is a fundamental error that not only created uncertainty in the application of Title VII, but deprived LeBoon of her day in court on substantial claims that she was the

victim of religious discrimination. The instant petition should be granted to rectify both the conflict in the law and the injustice done to LeBoon.

## CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that the Petition be granted.

Dated: January 14, 2008

Respectfully submitted,

J. Michael Considine, Jr.
*Counsel of Record*
12 East Barnard Street
Suite 100
West Chester, PA 19382
(610) 431-3288
Participating Attorney for
The Rutherford Institute

John W. Whitehead
Douglas R. McKusick
The Rutherford Institute
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

Attorneys for the Petitioner