No. 10-_____ 10-902

In The
Supreme Court of the United States

WALTER MCGILL, PETITIONER,

v.

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS AND THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AN UNINCORPORATED ASSOCIATION.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Religious Freedom Restoration Act provides that the "government" may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government demonstrates that the application of the burden to the person is "the least restrictive means of furthering" a "compelling governmental interest." 42 U.S.C. § 2000bb-1.

The Act defines the term "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." *Id.* § 2000bb-2(1). Further, the Act provides that it "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." *Id.* § 2000bb-3(a).

The question presented is:

Whether the Religious Freedom Restoration Act applies to a private civil action under a federal statute in federal court, even when the United States is not a party to the action.

PARTIES TO THE PROCEEDING

The parties are as stated in the caption.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	1
INTRODUCTION	1
STATEMENT OF THE CASE	2
A. Statutory Framework	2
B. Factual Background	5
REASONS FOR GRANTING THE PETITION	10
REVIEW IS NECESSARY BECAUSE SIX COURTS OF APPEALS ARE EVENLY DIVIDED AS TO WHETHER ALL PRIVATE LITIGATION APPLYING FEDERAL LAW IN FEDERAL COURTS IS EXCLUDED FROM RFRA'S SCOPE	10
A. The Ruling Below Joins One Side Of A Circuit Split Regarding RFRA's Application That Will Not Be Resolved Absent This Court's Review	10
B. The Decision Below Contravenes RFRA's Text And The History Of Its 2000 Amendments	15

TABLE OF CONTENTS—Continued

Page

1. RFRA's broad text demonstrates its applicability to all private civil actions in federal court 15

2. The ruling below is contrary to RFRA and its amendment's legislative history 20

C. The Sixth Circuit's Holding Addresses An Issue Of Continuing Importance And This Case Presents The Issue In An Ideal Posture 23

CONCLUSION 26

Appendix A: Opinion of United States Court of Appeals for the Sixth Circuit, dated August 10, 2010 ..... 1a

Appendix B: Opinion of the United States District Court for the Western District of Tennessee, dated January 6, 2010 ..... 33a

Appendix C: Relevant statutes 37a

TABLE OF AUTHORITIES

Page

CASES:

Barr v. City of Sinton, 295 S.W.3d 287 (Tex. 2009) 24

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987) 19

Boggan v. Mississippi Conference of the United Methodist Church, 433 F. Supp. 2d 762 (S.D. Miss. 2006), aff'd, 222 Fed. App'x 352 (5th Cir.), cert. denied, 552 U.S. 813 (2007) 13

Boy Scouts of America v. Dale, 530 U.S. 640 (2000) 19

Christians v. Crystal Evangelical Free Church (In re Young), 82 F.3d 1407 (8th Cir. 1996), vacated, 521 U.S. 1114 (1997), reinstated, 141 F.3d 854 (8th Cir.), cert. denied, 525 U.S. 811 (1998) 12, 16

Christians v. Crystal Evangelical Free Church (In re Young), 141 F.3d 854 (8th Cir.), cert. denied, 525 U.S. 811 (1998) 4, 13, 15

City of Boerne v. Flores, 521 U.S. 507 (1997) 4, 18, 24

Combs v. Homer-Center School District, 540 F.3d 231 (3d Cir. 2008) 24

Cutter v. Wilkinson, 544 U.S. 709 (2005) 4

Diggs v. Snyder, 775 N.E.2d 40 (Ill. App. Ct. 2002) 24

Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) 16

TABLE OF AUTHORITIES—Continued

Page

EEOC v. Catholic University of America, 83 F.3d 455 (D.C. Cir. 1996).....13, 15

Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990).....2, 3, 17

Guinan v. Roman Catholic Archdiocese of Indianapolis, 42 F. Supp. 2d 849 (S.D. Ind. 1998).....24

Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006).....8, 9, 11, 12, 13

Hunt v. Hunt, 648 A.2d 843 (Vt. 1994).....22

In re Multi-Circuit Episcopal Church Property Litigation, 76 Va. Cir. 873 (2008).....24

Intermountain Fair Housing Council v. Boise Rescue Mission, No. CV-08-205, 2010 WL 1913379 (D. Idaho May 12, 2010).....24

Jones v. Wolf, 443 U.S. 595 (1979).....17

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).....17

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).....17

Palmore v. Sidoti, 466 U.S. 429 (1984).....19

Powell v. Stafford, 859 F. Supp. 1343 (D. Colo. 1994).....24

Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969).....17

TABLE OF AUTHORITIES—Continued

Page

Redhead v. Conference of Seventh-day Adventists, 440 F. Supp. 2d 211 (E.D.N.Y. 2006).....24

Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008).....12, 15

Sutton v. Providence St. Joseph Medical Center, 192 F.3d 826 (9th Cir. 1999).....14

Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir.), cert. denied, 549 U.S. 881 (2006).....13

Tort Claimants Committee v. Roman Catholic Archbishop of Portland (In re Roman Catholic Archbishop of Portland), 335 B.R. 842 (Bankr. D. Or. 2005).....23

United States v. Wilkerson, 361 F.3d 717 (2d Cir.), cert. denied, 543 U.S. 908 (2004).....12

Urantia Found. v. Maaherra, 895 F. Supp. 1335 (D. Ariz. 1995).....23

Watson v. Boyajian, 309 B.R. 652 (B.A.P. 1st Cir. 2004).....23

Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110 (9th Cir. 2000), cert. denied, 532 U.S. 958 (2001) 14, 15, 23

U.S. CONSTITUTION AND STATUTES:

U.S. Const. amend. I 17, 19

U.S. Const. amend. XIV 4

TABLE OF AUTHORITIES—Continued

Page

Lanham Act, 15 U.S.C.
§ 1114 6
§ 1125(a) 6
§ 1125(c) 6
§ 1125(d)(1) 6
Religious Freedom Restoration Act, 42 U.S.C.
§ 2000bb(a)(2) 3
§ 2000bb(a)(4) 3
§ 2000bb(b)(1) 3, 17
§ 2000bb(b)(2) 3
§ 2000bb-1 15
§ 2000bb-1(a) 3
§ 2000bb-1(b) 18
§ 2000bb-1(b)(2) 3
§ 2000bb-1(c) 3
§ 2000bb-2 4
§ 2000bb-2(1) 15, 18
§ 2000bb-2(4) 5
§ 2000bb-3(a) 5, 11
Religious Land Use and Institutionalized Persons Act, 42 U.S.C.
§ 2000cc 4
§ 2000cc-5(7) 5

TABLE OF AUTHORITIES—Continued

Page

Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 ..... *passim*

Religious Land Use and Institutionalized Persons Act (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc et seq.) 4, 5, 22, 24

LEGISLATIVE MATERIALS:

David Ackerman, Congressional Research Serv., Library of Congress, *The Religious Freedom Restoration Act and the Religious Freedom Act: A Legal Analysis* (1992) 20

Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil & Const. Rights of the H. Comm. on the Judiciary, 102d Cong. (1992) 21

The Religious Freedom Restoration Act: Hearing on S. 2969 Before the Senate Comm. on Judiciary, 102d Cong. (1992) 21

Religious Liberty: Hearing Before the S. Judiciary Comm., 106th Cong. (1999) 19, 22

H.R. Rep. No. 106-219 (1999) 20, 22

145 Cong. Rec. H5588 (daily ed. July 15, 1999) 22

145 Cong. Rec. H5590 (daily ed. July 15, 1999) 19

145 Cong. Rec. H5591 (daily ed. July 15, 1999) 22

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

Availability of Money Damages under the Religious Freedom Restoration Act, 18 Op. O.L.C. 180 (1994) 18

BLACK'S LAW DICTIONARY (8th ed., 1st reprint 2004) 16

Brief of United States as Intervenor, *In re Young*, 82 F.3d 1407 (8th Cir. 1996) (No. 93-2267) 16

Drew S. Days, III, *When the President Says 'No': A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence*, 3 J. APP. PRAC. & PROCESS 509 (2001) 16

PETITION FOR A WRIT OF CERTIORARI

Walter McGill respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Sixth Circuit (App., *infra*, 1a-32a) is reported at 617 F.3d 402. An earlier decision of the district court is reported at 624 F. Supp. 2d 883. The opinion of the district court entering a finding of contempt (App., *infra*, 33a-36a) is not reported but is available at 2010 WL 99404.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on August 10, 2010.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Religious Freedom Restoration Act is set forth at App., *infra,* 37a-40a.

INTRODUCTION

The court of appeals weighed in on a circuit split regarding the proper interpretation of the Religious Freedom Restoration Act (RFRA). The recurring question that has now evenly divided six circuits is whether RFRA has any application to civil actions between private parties in federal court applying

federal law. The issue arises in varied circumstances, including intellectual property disputes, employment discrimination claims, and bankruptcy proceedings.

The better view is that RFRA offers a defense to all federal laws, including federal laws that are enforced by private parties in civil actions in federal court. That is so because the burden on the individual's exercise of religion is no less caused by the government because it results from a private federal cause of action resolved by a federal court than through direct government enforcement. That is the view followed by the Second, Eighth, and D.C. Circuits. And that view is supported by the text and history of RFRA.

The court below, by contrast, incorrectly held that RFRA had no application to this civil suit regarding whether federal law and federal courts could prohibit petitioner from using the term "Seventh-day Adventist" in the name of his church. The failure to apply RFRA's statutorily-mandated strict scrutiny was error that warrants this Court's review.

STATEMENT OF THE CASE

A. Statutory Framework

1. The Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488, was a response to this Court's decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). Congress explained, in the express statutory findings accompanying RFRA,

that *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). Congress found, however, that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id.* § 2000bb(a)(2).

Congress thus articulated two purposes in enacting RFRA. First, "to guarantee" the application of the "compelling interest test" in "all cases where free exercise of religion is substantially burdened." *Id.* § 2000bb(b)(1). And second, "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." *Id.* § 2000bb(b)(2).

To fulfill these purposes, Congress provided that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government demonstrates that the application of the burden to the person is "the least restrictive means of furthering" a "compelling governmental interest." 42 U.S.C. § 2000bb-1(a) & (b)(2). A person may assert a violation of RFRA "as a claim or defense in a judicial proceeding" and may "obtain relief against a government." *Id.* § 2000bb-1(c).

As originally enacted, RFRA defined "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State." It provided that RFRA applied "to all

Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act."

2. This Court held in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that RFRA was not constitutional as applied to State and local governments because it exceeded Congress's enumerated powers under the Fourteenth Amendment. The lower courts subsequently held that RFRA was still valid as applied to the federal government and federal territories and possessions. *See, e.g.*, *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854 (8th Cir.), cert. denied, 525 U.S. 811 (1998).

In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc et seq.). Unlike RFRA's broad application to "all" state law, RLUIPA targeted specific state and local practices that Congress believed were particularly burdensome to religious exercise. *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005). Congress did so under its authority under the Spending and Commerce Clauses and the Fourteenth Amendment. *Id.* at 715.

In addition, RLUIPA amended RFRA in three ways. First, it amended the definition of "government" in Section 2000bb-2 of RFRA to remove reference to States and their subdivisions, and to add references to the District of Columbia, Puerto Rico and federal territories. Second, RLUIPA removed the

reference to "State law" in Section 2000bb-3(a) of RFRA. And third, RLUIPA amended the definition of "exercise of religion" in Section 2000bb-2(4) of RFRA to incorporate a new, more expansive definition of the term adopted in Section 2000cc-5(7) of RLUIPA.

B. Factual Background

1. Petitioner was the founder and pastor of a church in Guys, Tennessee, that he named "A Creation Seventh Day & Adventist Church," and which is part of a worldwide body he named "The Creation Seventh Day & Adventist Church." Petitioner named the church based on a divine revelation. App., *infra*, 5a-6a; Dt. Ct. Dkt. 30, Exh. A at 2.

Petitioner has also created internet domain names, including "creation-7th-dayadventist-church.org," "creationseventhday-adventistchurch.org," "creations da.org," and "csda.us." App., *infra*, 6a.

Respondent General Conference of Seventh-day Adventists was formed in 1863. Since the official formation of the church, the names "Seventh-day Adventist" and "SDA" have been used by the Seventh-day Adventist Church. Respondent General Conference Corporation of Seventh-day Adventists holds title to all of the church's assets. It has registered the marks "Seventh-day Adventist," "Adventist," and "General Conference of Seventh-day Adventists," with the United States Patent and Trademark Office. Respondents have not granted petitioner any licenses to use their marks. App., *infra*, 5a-6a.

2. Respondents filed a complaint against petitioner in federal district court alleging trademark infringement, unfair competition, and dilution of marks under the federal Lanham Act, 15 U.S.C. §§ 1114, 1125(a), 1125(c); cybersquatting under 15 U.S.C. § 1125(d)(1); as well as parallel Tennessee state law claims. App., *infra*, 6a-7a.

Respondents asked the district court to enter an injunction prohibiting petitioner from using the marks, delivering to the Clerk of the Court all infringing materials for destruction, and transferring all petitioner's internet domain names to respondents. Dt. Ct. Dkt. 1 at 18-19. In addition, respondents asked the district court to award actual and statutory damages as well as attorneys' fees and costs. *Id.* at 19.

Petitioner moved to dismiss the claims on the ground that, *inter alia*, RFRA barred application of federal law in a way that substantially burdened his exercise of religion. The district court denied this portion of petitioner's motion to dismiss on the ground that petitioner had waived the RFRA defense by failing to raise it in his answer. App., *infra*, 7a.

The district court subsequently granted respondents' summary judgment on their infringement claims with respect to "Seventh-day Adventist," but denied summary judgment with respect to "Adventist" and "SDA." App., *infra*, 7a-8a.

Prior to any further proceedings on the merits, the district court referred the case to a magistrate judge for purposes of mediation after counsel had

agreed to mediate. Petitioner then filed a motion to amend the pretrial order to remove the mediation requirement because his "religious convictions will not allow him to compromise his faith." App., *infra*, 8a. The district court denied petitioner's motion to amend. App., *infra*, 8a-9a.

After petitioner refused to participate in mediation, the district court granted respondents' motion for a default judgment. App., *infra*, 9a. It entered an injunction that prohibited petitioner from "using the mark SEVENTH-DAY ADVENTIST, including the use of the words SEVENTH-DAY or ADVENTIST, or the acronym SDA, either together, apart, or as part of, or in combination with any other words, phrases, acronyms or designs * * * in the sale, offering for sale, distribution, promotion, provision or advertising of any products and services, and including on the Internet." Dt. Ct. Dkt. 98 at 12 n.9. The injunction required petitioner to deliver any infringing "labels, signs, prints, packages, wrappers, receptacles, and advertisements" to respondents or permanently dispose of them himself. *Id.* at 13 n.9.

The injunction stated that "[s]ubject to the foregoing," petitioner could "use these terms in a non-trademark sense." *Ibid.* The injunction gave examples of such permitted uses: "oral or written use of the marks to refer to the [respondents]" or "oral or written use of certain terms in a non-trademark descriptive sense, such as 'this Church honors the Sabbath on the "seventh day,"' or 'the members of this church believe in the "advent" of Christ.'" *Ibid.*

3. The court of appeals affirmed. App., *infra*, 1a-32a. The court addressed the applicability of RFRA because it determined that the default judgment did not preclude review of whether the motion to dismiss should have been granted. App., *infra*, 10a.

The court of appeals held that "RFRA would appear to trigger strict scrutiny in this case." App., *infra*, 16a. It explained that to trigger strict scrutiny, a party must show a governmental action that "(1) substantially burden[s], (2) a religious belief rather than a philosophy or way of life, (3) which belief is sincerely held." App., *infra*, 16a. The court noted that "no one has questioned the sincerity of [petitioner's] belief that God requires him to continue his infringing use of the plaintiffs' marks." The court also acknowledged that "[b]eing compelled to stop could substantially burden his religious practice." App., *infra*, 16a.

The court of appeals held, nonetheless, that petitioner "cannot claim the benefit of RFRA" because "the defense does not apply in suits between private parties." App., *infra*, 17a. The court relied almost exclusively on the dissenting opinion by then-Judge Sotomayor in *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006). App., *infra*, 17a-19a.

The court of appeals expressly refused to "follow the *Hankins* majority" that "found RFRA's language broad enough to apply 'to an action by a private party seeking relief under a federal statute against another private party who claims that the federal statute

substantially burdens his or her exercise of religion.'" App., *infra*, 19a (quoting *Hankins*, 441 F.3d at 103).

Because the court of appeals ruled against petitioner's RFRA claim on that threshold ground, it did not decide whether the district court erred in finding that RFRA was an affirmative defense that had to be raised in his answer to the complaint. App., *infra*, 17a n.3.

The court of appeals then held that, absent RFRA's application, summary judgment was properly entered for respondents under the Lanham Act with regard to the "Seventh-day Adventist" mark. App., *infra*, 27a-32a.

4. While the case was on appeal, respondents sought to enforce the injunction against petitioner. The district court found that petitioner had willfully failed to abide by the injunction by, *inter alia*, using signs and promotional materials that used respondents' marks. App., *infra*, 34a.

The district court thus authorized respondents and their agents "to remove and permanently dispose of [petitioner's] signs and promotional materials that violate the Injunction Order." App., *infra*, 36a. Respondents' agents removed the church signs and other infringing materials from petitioner's church on

February 16, 2010, Dt. Ct. Dkt. 136 at 6, and again on October 6, 2010, Dt. Ct. Dkt. 148 at 4.[1]

Respondents believe they possess the "ongoing authority to remove and permanently dispose of [petitioner's] signs and promotional materials that violate the Injunction Order" based on the "standing authority of the prior Orders of the Court." Dt. Ct. Dkt. 148 at 4 n.1.

REASONS FOR GRANTING THE PETITION

REVIEW IS NECESSARY BECAUSE SIX COURTS OF APPEALS ARE EVENLY DIVIDED AS TO WHETHER ALL PRIVATE LITIGATION APPLYING FEDERAL LAW IN FEDERAL COURTS IS EXCLUDED FROM RFRA'S SCOPE

A. The Ruling Below Joins One Side Of A Circuit Split Regarding RFRA's Application That Will Not Be Resolved Absent This Court's Review

There is now a 3-to-3 circuit split on the question presented. Contrary to the decision below, the Second, Eighth, and D.C. Circuits have held that RFRA creates a defense in private civil litigation

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[1] Currently pending before the district court is a report and recommendation by a magistrate judge that petitioner be found in contempt for encouraging another person to restore the signs to the church, as well as for failing to comply with discovery requests. Dt. Ct. Dkt. 136 at 6, 8. Petitioner himself is currently in Africa doing mission work. *Id.* at 3.

involving federal law. The Sixth Circuit acknowledged that this was an issue that had divided the courts of appeals (App., *infra*, 19a), and joined the views of the Fifth and Seventh Circuits. The Ninth Circuit has expressed doubts about RFRA's applicability to private civil actions, but twice avoided resolving the issue. This Court's review is necessary so that RFRA's broad protections are uniformly available nationwide.

1. In *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006), the Second Circuit held (over a dissent from then-Judge Sotomayor) that RFRA applied in a private suit brought by a minister who sued his church regarding his compulsory retirement under the federal Age Discrimination in Employment Act (ADEA).

The majority in *Hankins* explained that RFRA's statutory text provides that it applies to "all federal law, and the implementation of that law" and permits a defendant to assert a violation of RFRA "as a defense in a judicial proceeding." *Id.* at 103 (quoting 42 U.S.C. §§ 2000bb-3(a), 2000bb-1(c)). This broad language "easily covered" the case before the court, the majority held. *Ibid.* The court held that the "only conceivably narrowing language"—which prescribed that a litigant could "obtain appropriate relief against a government"—was best read as broadening the remedies of the statute. *Ibid.* The majority held that RFRA applied to all litigation in which federal law substantially burdened the exercise of religion, not

merely that litigation in which the government was a party. *Ibid.*[2]

The Eighth Circuit also has held that RFRA applies in a case in which the United States was not a party. *See Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1416-1417 (8th Cir. 1996), vacated, 521 U.S. 1114 (1997), reinstated, 141 F.3d 854 (8th Cir.), cert. denied, 525 U.S. 811 (1998). The court explained that "[t]he bankruptcy code is federal law, the federal courts are a branch of the United States, and [the court's] decision would involve the implementation of federal bankruptcy law." *Id.* at 1417. It thus held that a federal court's implementation of federal law falls within the ambit of "government" as defined by RFRA, rendering the statute applicable. *Ibid.* More broadly, the Eighth Circuit held that RFRA must be interpreted as amending all federal law, "engraft[ing] [an] additional clause to [the Bankruptcy Code] that a recovery that places a substantial burden on a debtor's exercise of religion will not be allowed" unless it satisfies the

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[2] *Hankins* remains the law in the Second Circuit. The Sixth Circuit noted (App., *infra*, 20a) that in a subsequent case a different panel of the Second Circuit expressed a preference for the views of the dissent in *Hankins*. *See Rweyemamu v. Cote*, 520 F.3d 198, 204 (2d Cir. 2008). But that decision did not and could not have overturned *Hankins*. *See United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir.) (panel bound by prior panel decision unless overruled en banc or by Supreme Court), cert. denied, 543 U.S. 908 (2004).

exception provided by RFRA. *In re Young*, 141 F.3d at 861.

The D.C. Circuit also applied RFRA to bar a private plaintiff's federal action in *EEOC v. Catholic University of America*, 83 F.3d 455, 467-470 (D.C. Cir. 1996). That appeal arose from two actions—one brought by a private plaintiff and one brought by the EEOC. By applying RFRA to bar the private plaintiff's claims as well as the EEOC's, the D.C. Circuit effectively held that RFRA applies to private parties.

2. The Seventh Circuit, by contrast, has held that RFRA does not apply to suits between purely private parties and rejected the *Hankins* decision. *See Tomic v. Catholic Diocese of Peoria,* 442 F.3d 1036 (7th Cir.), cert. denied, 549 U.S. 881 (2006). Citing the use of the word "government" in RFRA, Judge Posner summarily concluded: "The decision [*Hankins*] is unsound. RFRA is applicable only to suits to which the government is a party." *Id.* at 1042.

Likewise, the Fifth Circuit, in an unpublished opinion, affirmed a published district court decision holding that RFRA does not apply to private parties. *Boggan v. Mississippi Conference of the United Methodist Church*, 433 F. Supp. 2d 762 (S.D. Miss. 2006), aff'd, 222 Fed. App'x 352 (5th Cir.), cert. denied, 552 U.S. 813 (2007).

3. Finally, in this case, the Sixth Circuit relied on two Ninth Circuit cases that further demonstrate the need for this Court's review. App., *infra*, 20a.

In *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826, 837-838 (9th Cir. 1999), the Ninth Circuit merely held that the defendant hospital was not acting under "color of law" when it refused to hire a plaintiff who would not provide his social security number to the hospital as federal law required.

Subsequently, the Ninth Circuit declined to resolve the "knotty question" whether RFRA applied to private litigation. It simply assumed it did and held that the defendant had not demonstrated a substantial burden on its exercise of religion. The court noted, however, that "[i]t seems unlikely that the government action Congress envisioned in adopting RFRA included the protection of intellectual property rights against unauthorized appropriation." *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000), cert. denied, 532 U.S. 958 (2001).

The division in the courts of appeals is mature, recurring and widespread. No appellate court that has decided the question presented has switched sides, and there are reasoned rulings on both sides of the conflict. There is no reason to believe that this conflict can be resolved absent this Court's review. On that basis alone, certiorari should be granted.

B. The Decision Below Contravenes RFRA's Text And The History Of Its 2000 Amendments

The Court also should grant review because the ruling below cannot be reconciled with RFRA's text and history.

1. RFRA's broad text demonstrates its applicability to all private civil actions in federal court

a. By its plain language, RFRA applies to "all Federal law." 42 U.S.C. § 2000bb-1. By using such expansive text, RFRA is best understood as an amendment to the "*entire* United States Code" to prohibit unwarranted substantial burdens on the exercise of religion. *Rweyemamu v. Cote*, 520 F.3d 198, 202 (2d Cir. 2008) (emphasis added); *see also In re Young*, 141 F.3d at 856; *Worldwide Church of God*, 227 F.3d at 1120; *Catholic Univ. of Am.*, 83 F.3d at 468. RFRA therefore amended every federal statute creating private causes of action, including the Lanham Act, to limit their applicability in cases where a significant burden is placed on the exercise of religion. Had Congress intended to cabin RFRA like the ruling below, it would have drafted the statute to apply only to "all Federal law in cases where the United States is a party."

b. RFRA's definition of "government" as including a "branch" of the United States, 42 U.S.C. § 2000bb-2(1), further demonstrates that RFRA applies to private civil actions brought in federal

court. The term "branch" of the United States unambiguously includes the federal courts. BLACK'S LAW DICTIONARY 864 (8th ed., 1st reprint 2004) (defining "judiciary" as that "branch of government responsible for interpreting the laws and administering justice"). Indeed, the United States has urged the same reading of RFRA. It argued that "a ruling by this Court itself concerning applicability of [the bankruptcy provision] would constitute 'implementation' of that law [by a government], since RFRA applies to all branches and units of federal, state, and local government." U.S. Brief as Intervenor at 29, *In re Young*, 82 F.3d 1407 (8th Cir. 1996) (No. 93-2267). The Eighth Circuit reached the same conclusion on this point. *In re Young*, 82 F.3d at 1416-1417.[3]

RFRA's definition of "government" as including a "person acting under color of law" likewise demonstrates RFRA's application to civil litigation. A federal judge is plainly acting under color of law. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) (judge "beyond all question is a state actor"). And, at many stages of a civil action, a private litigant may also act "under color of law." *See, e.g.*, *id.* at

[3] The United States ultimately withdrew its appellate brief in that case (which urged that RFRA applied but that the religious claimant should lose) because the President did not believe it was supportive enough of the religious claimant. *In re Young*, 82 F.3d at 1413; Drew S. Days, III, *When the President Says 'No': A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence*, 3 J. APP. PRAC. & PROCESS 509, 517-518 (2001).

623-628 (jury selection); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 (1982) ("invoking the aid of state officials to take advantage of state-created attachment procedures").[4]

c. Moreover, Congress intended RFRA to mimic the scope of the Free Exercise Clause, which applies in civil litigation where the government is not a party because courts are part of the government. *See, e.g.*, *Jones v. Wolf*, 443 U.S. 595 (1979); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (First Amendment applies to state law governing private tort actions).

RFRA's preambulatory findings and statement of purpose made clear that Congress intended to supplement the Free Exercise Clause (as interpreted by this Court in *Smith*) by applying the "compelling interest test" in "*all* cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1) (emphasis added). Indeed, in holding RFRA unconstitutional as applied to state and local governments, this Court explained:

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[4] In this case, for example, respondents claim that the district court gave them the "ongoing authority" to enter petitioner's church "to remove and permanently dispose of [petitioner's] signs and promotional materials that violate the Injunction Order." Dt. Ct. Dkt. 148 at 4 n.1.

> Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. * * * Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

d. Nor does the fact that Section 2000bb-1(b) imposes the obligation on the "government [to] demonstrate * * * that the application of the burden" is the least restrictive means of furthering a compelling governmental interest counsel against the application of RFRA to this case. App., *infra*, 18a-19a.

There is nothing unusual about a private party being required to prove that a statute satisfies heightened scrutiny. For example, RFRA authorizes individuals to bring RFRA claims seeking appropriate relief from "official[s]" and "other person[s] acting under color of law." 42 U.S.C. § 2000bb-2(1). That authorization encompasses suits against federal officials in their individual capacities for money damages. *See Availability of Money Damages under the Religious Freedom Restoration Act*, 18 Op. O.L.C. 180, 182-183 (1994). In those suits, the federal government is not a necessary party and the Department of Justice may not represent the named individual. In such instances, a private individual must demonstrate that the substantial burden on religion

was justified by a compelling interest and was narrowly tailored to that interest.

Indeed, private parties often have been called on to demonstrate that a statute is narrowly tailored and furthers a compelling government interest. *See, e.g.*, *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000) (in private suit under state law that involved burden on First Amendment right to associate, Court addressed State's compelling interest even in absence of State as party); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (same); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (in custody suit between private parties in which state court considered race, Court applied strict scrutiny even in the absence of State as a party).[5]

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[5] That was, moreover, precisely what Congress expected would happen. *See* 145 Cong. Rec. H5590 (daily ed. July 15, 1999) (statement of Rep. Conyers) (federal law "would require individuals proceeding under such State and local antidiscrimination law to prove that the law they wish to utilize is a least restrictive means of furthering a compelling governmental interest"); *see also Religious Liberty: Hearing Before the S. Judiciary Comm.,* 106th Cong. 155, 163 (1999) (in response to questions on this point, Gene C. Schaerr and Chai Feldblum both noted that the burden would initially fall on private plaintiffs but that relevant government agencies and interest groups could intervene to defend the law if needed).

2. *The ruling below is contrary to RFRA and its amendment's legislative history*

Review is also warranted because the ruling below cannot be reconciled with RFRA's legislative history.

RFRA was enacted against the backdrop of private litigation burdening the exercise of religious freedom. Many of the problems Congress heard about prior to enacting RFRA involved civil litigation between private parties. In enacting the original statute, Congress relied on a Congressional Research Service report that cited a number of examples, including a private wrongful death suit in which a Jehovah's Witness's decision to refuse blood transfusions was relied on to avoid liability; a private discrimination suit against the Boy Scouts under a public accommodations law; a private suit to enforce the Age Discrimination in Employment Act; a private suit by an associate pastor against a church for wrongful termination; and a private suit by Planned Parenthood against an anti-abortion activist. *See* David Ackerman, Congressional Research Serv., Library of Congress, *The Religious Freedom Restoration Act and*

the Religious Freedom Act: A Legal Analysis 14-17 (1992).[6]

Moreover, after this Court held in *City of Boerne* that RFRA was unconstitutional as applied to state and local governments, Congress again considered whether the compelling interest standard should apply to States and localities in a proposed act called the Religious Liberty Protection Act (RLPA), which would have also amended RFRA.

Opposition arose on the ground that the compelling interest standard would be used to challenge the application of anti-discrimination laws in employment, housing, and public accommodation—all of which were enforceable through private civil actions. Because RLPA would, like RFRA, "authorize[] individuals to raise a religious liberty affirmative defense in any judicial proceeding," the defense "could be asserted against federal civil rights plaintiffs in cases concerning disability, sexual orientation, familial status and pregnancy." H.R. Rep. No. 106-219, at 38 (1999) (dissenting views). And opponents to RLPA noted that RFRA had previously been applied to private

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[6] Extensive hearing testimony provided further examples before Congress. *See, e.g.*, *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil & Const. Rights of the H. Comm. on the Judiciary*, 102d Cong. 363-369 (1992) (testimony regarding private civil litigation where Free Exercise claim was raised and where RFRA would apply a different test); *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the Senate Comm. on Judiciary*, 102d Cong. 52-55, 65, 158-159 (1992) (same).

civil actions. *See Religious Liberty: Hearing Before the Senate Judiciary Comm.,* 106th Cong. 68 (1999) (statement of Sen. Leahy) (discussing court's reliance on RFRA in child support dispute in *Hunt v. Hunt*, 648 A.2d 843 (Vt. 1994)); 145 Cong. Rec. H5591 (daily ed. July 15, 1999) (statement of Rep. Conyers) (warning that passage of RLPA would permit reliance on statutory religious liberty defense in private actions for child support, wrongful death, and civil discovery requests).

Supporters likewise understood that RLPA would extend to private civil actions. The House Report gave the examples of private "litigants attempting to discover sacred confessional information for use in civil lawsuits" as "instances where government action thwarts the fulfillment of religious sacraments." H.R. Rep. No. 106-219, at 9; *see also* 145 Cong. Rec. H5588 (daily ed. July 15, 1999) (statement of Rep. Canady) ("While RFRA was on the books, successful claimants included * * * the Catholic University of America, which was sued for gender discrimination by a canon-law professor denied tenure.").

In the end, Congress did not enact RLPA but enacted RLUIPA, which targeted state and local land use and treatment of prisoners. But at the same time, Congress did not reduce RFRA's breadth as applied to the federal government. Instead, Congress amended RFRA to remove its references to States in order to "clarif[y] that RFRA applies to federal law, policies, property, and employees." H.R. Rep. No. 106-219, at 13 n.48. It did nothing to restrict the RFRA's

scope, which had, to that point, consistently been applied broadly to encompass private civil actions.

C. The Sixth Circuit's Holding Addresses An Issue Of Continuing Importance And This Case Presents The Issue In An Ideal Posture

1. The Court should review and reverse the Sixth Circuit's decision because it affects a broad swath of law.

The question presented arises in numerous contexts on a regular basis in federal court where the government plays limited, if any, enforcement role in civil litigation. As in the present case, it can arise in cases involving intellectual property. *See Worldwide Church of God*, 227 F.3d at 1121 (copyright); *Urantia Found. v. Maaherra*, 895 F. Supp. 1335 (D. Ariz. 1995) (copyright and trademark).

It also comes up in the bankruptcy context, where efforts by creditors to recover funds the debtor gave a religious entity or to force the debtor to sell religious property to pay debts substantially burdens the debtors' exercise of religion. *See, e.g.*, *Tort Claimants Comm. v. Roman Catholic Archbishop of Portland (In re Roman Catholic Archbishop of Portland)*, 335 B.R. 842 (Bankr. D. Or. 2005); *Watson v. Boyajian*, 309 B.R. 652 (B.A.P. 1st Cir. 2004).

And private suits for employment discrimination against religious employers also arise on a regular

basis. *See Redhead v. Conference of Seventh-day Adventists*, 440 F. Supp. 2d 211 (E.D.N.Y. 2006) (pregnancy discrimination); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849 (S.D. Ind. 1998) (age discrimination); *Powell v. Stafford*, 859 F. Supp. 1343 (D. Colo. 1994) (age discrimination); *see also Intermountain Fair Housing Council v. Boise Rescue Mission*, No. CV-08-205, 2010 WL 1913379 (D. Idaho May 12, 2010) (claim of sex discrimination by religious organization under Fair Housing Act).

The interpretation of RFRA also has consequences for state law. Since *Boerne*, thirteen States have enacted provisions virtually identical to RFRA to govern their own laws and practices. *See Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 261 n.47 (3d Cir. 2008) (collecting laws). State courts, in turn, have looked to the federal courts' interpretation of the federal RFRA in giving content to these state laws. *See, e.g.*, *Barr v. City of Sinton*, 295 S.W.3d 287, 296 (Tex. 2009) ("Because TRFRA, RFRA, and RLUIPA were all enacted in response to *Smith* and were animated in their common history, language, and purpose by the same spirit of protection of religious freedom, we will consider decisions applying the federal statutes germane in applying the Texas statute."); *Diggs v. Snyder*, 775 N.E.2d 40, 44 (Ill. App. Ct. 2002) ("[w]e may therefore turn to federal cases for guidance"); *In re Multi-Circuit Episcopal Church Prop. Litig.*, 76 Va. Cir. 873, 879 (2008)

(looking to the federal RFRA as persuasive). These decisions further demonstrate the importance of definitively resolving RFRA's applicability to private litigation.

2. This case presents the ideal vehicle to address an issue that has divided the courts. As the court of appeals recognized, petitioner plainly has sincerely-held religious beliefs. App., *infra*, 16a. Further, the issue is properly preserved, having been both pressed by petitioner at every stage and passed on below.

Finally, the issue is purely one of statutory construction regarding the scope of RFRA's coverage. If the Sixth Circuit is reversed on that threshold question, the case will have to be remanded for further proceedings on whether petitioner has established a prima facie case under RFRA and, if so, whether the application of the Lanham Act to petitioner comports with strict scrutiny.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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