No. 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, RESPONDENTS

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, we certify that respondent General Conference Corporation of Seventh-day Adventists is a District of Columbia non-profit corporation. Respondent General Conference of Seventh-day Adventists is a Maryland unincorporated association. As such, neither respondent has a parent or publicly held company owning 10% or more of its stock.

QUESTION PRESENTED FOR REVIEW

Whether the Petitioner preserved a defense under the Religious Freedom Restoration Act ("RFRA") and, if so, whether the Sixth Circuit erred in holding that RFRA is not a defense available to him where, unlike the cases Petitioner cites, he was sued under a statute that is not subject to government enforcement?

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INTRODUCTION

Petitioner McGill incorrectly asserts that this case presents a circuit split as to whether the Religious Freedom Restoration Act of 1993 ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488, applies to actions brought by private parties. In fact, as the court below recognized, McGill's argument improperly conflates two very different lines of cases: Some involve statutes, like the federal laws prohibiting employment discrimination, that provide for enforcement by *both* private parties and by government agencies. Other statutes, like the trademark laws involved in this case, provide *only* for private enforcement. Although there is a very shallow—and likely transitory—conflict as to the first type of statute, there is no conflict at all as to the second. Indeed, to our knowledge the decision below was the first circuit court decision to determine whether RFRA applies in the context of a federal statute that is *not* subject to governmental enforcement.

But even if this case involved a genuine conflict, serious vehicle problems counsel against review here. For one thing, McGill did not timely present his RFRA argument before the trial court, which ruled that the argument had been waived, and the Sixth Circuit did not disturb that ruling. Moreover, the trial court ultimately entered a default judgment against McGill based not on the merits, but on his independent, willful violations of the court's orders. As the Sixth Circuit held, McGill waived any argument to reverse the default judgment on appeal. Thus, even if this Court were to reach the RFRA issue and rule in McGill's favor on that point, such a ruling could not have any effect on the ultimate disposition of this case. And even if it could, it would be

far better to choose another case that does not arise in the highly unusual circumstance of a dispute between two religious organizations.

STATEMENT

The Parties. Respondent General Conference of Seventh-day Adventists ("General Conference") is an unincorporated association that represents the interests of the Seventh-day Adventist Church, an unincorporated association. Pet. 3a. The General Conference was formed in 1863 and grew out of several congregations with the shared belief that Jesus Christ's Second Advent was imminent and that the Sabbath should be observed on the seventh day of the week. *Ibid.* Since the official formation of the Church, the names "Seventh-day Adventist" and "SDA" have been used by the Seventh-day Adventist Church as the Church's name, and as its trade name in advertising and publishing. *Ibid.*

Respondent General Conference Corporation of Seventh-day Adventists ("Corporation") is a District of Columbia corporation that holds title to the trademarks "Seventh-day Adventist," "Adventist," and "General Conference of Seventh-day Adventists," registered with the United States Patent and Trademark Office. *Id.* at 3a-4a.

Petitioner McGill was originally baptized in a Seventh-day Adventist church. *Id.* at 5a-6a. After several years, McGill separated from that church and formed a church he calls "A Creation Seventh Day & Adventist Church" or "Creation Seventh Day Adventist Church." *Id.* at 6a. McGill is the pastor of this three-member church, which is associated with a second three-member church in Canada. *Ibid.* McGill also created internet domain names asso-

ciated with his church, including "7th-day-adventist.org," "creation-7th-day-adventist-church.org," "creation seventhday-adventistchurch. org," "creationsda.org," and "csda.us." *Ibid.* Although aware of SDA's trademarks, McGill has used names that infringe the Seventh-day Adventist and SDA trademarks without any license granted by the Corporation or the General Conference. *Ibid.*

The Litigation. Accordingly, on September 22, 2006, the General Conference and Corporation ("the Church") filed suit against McGill alleging trademark infringement, unfair competition, and dilution of marks under the Lanham Act, 15 U.S.C. §§ 1114, 1125(a), 1125(c); cyber-squatting under 15 U.S.C. § 1125(d)(1); unfair and deceptive trade practices under the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101; common-law trademark infringement and unfair competition; and injury to business reputation and dilution of marks under Tenn. Code Ann. § 47-25-513.

McGill appeared *pro se* and filed his answer. Pet. 6a-7a; Dist. Ct. Dkt. Doc. 4. But he did not raise any defenses based on RFRA.[1] Dist. Ct. Dkt. Doc. 4. Shortly thereafter, on two occasions (November 29 and December 11, 2006), attorneys appeared on the record on behalf of McGill, but again did not raise RFRA. Dist. Ct. Dkt. Docs. 6-7. McGill served discovery responses and initial disclosures in February

[1] RFRA precludes the federal government from substantially burdening a person's exercise of religion unless it can show that the burden: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

2007, but again failed to raise RFRA. Dist. Ct. Dkt. Docs. 13-14. Then, when he was deposed in April 2007, McGill again did not mention RFRA as a possible defense. Dist. Ct. Dkt. Doc. 19. When McGill filed his expert report on August 6, 2007, he again failed to raise RFRA.

A year after suit was filed, McGill filed a motion to dismiss, asserting RFRA as a defense for the first time. Pet. 7a; Dist. Ct. Dkt. Doc. 30. In response to the Church's opposition, Dist. Ct. Dkt. Doc. 36, which showed that McGill had waived any defense under RFRA by failing timely to plead it, McGill requested leave to amend his pleadings. Dist. Ct. Dkt. Doc. 49. By that time, the deadline to amend pleadings had long passed, Dist. Ct. Dkt. Doc. 9, and the Church had already filed a motion for summary judgment. Dist. Ct. Dkt. Doc. 37.

The district court agreed with the Church that McGill was estopped from raising any defense under RFRA as a result of his failure timely to plead it. Dist. Ct. Dkt. Doc. 61. It therefore denied McGill's request to amend his pleadings, concluding that his original answer had not provided fair notice that he was relying on RFRA:

> In the present case, Defendant's answer does not give Plaintiffs "fair notice" that Defendant is relying on the RFRA as a defense. Although Defendant was pro se when he filed his answer, his attorneys filed notices of appearance shortly thereafter—on November 29, 2006, and December 11, 2006. However, defense counsel did not seek to amend the answer until almost a year later when the reply to Plaintiffs' response was filed on November 23, 2007. Defendant has offered no

> reason for the delay in seeking to amend his [answer]. Moreover, Plaintiffs' motion for summary judgment is pending and, thus, Plaintiffs would be prejudiced if the amendment is allowed.

Pet. 7a. The district court thus denied McGill's motion to dismiss. *Ibid.* It then granted the Church's motion for summary judgment with respect to the infringement claims as to "Seventh-day Adventist," but denied it with respect to "Adventist" and "SDA" on the basis that there were material facts left to be resolved. *Id.* at 7a-8a.

The parties agreed to mediate the remaining claims before the magistrate judge. *Id.* at 8a. But shortly before the mediation, McGill refused to appear, asserting now that his religious convictions did not allow him to attend. *Ibid.* One of his attorneys then withdrew. *Ibid.* The court ordered another mediation, but McGill again refused to attend. *Id.* at 9a. The Church moved for sanctions, including default judgment and permanent injunctive relief, and on May 28, 2009, the district court granted the motion, entering a default judgment order and injunctive relief. *Ibid.*

McGill moved to stay the injunction pending his appeal to the Sixth Circuit, but that motion was denied. Dist. Ct. Dkt. Doc. 103. Nevertheless, McGill still refused to comply with the injunction. See Dist. Ct. Dkt. Doc. 111. The Church thus applied for an order to show cause why McGill should not be sanctioned. Dist. Ct. Dkt. Doc. 105. McGill declined to attend the hearing to explain his actions and, instead, his attorney appeared only to enter general objections. See Dist. Ct. Dkt. Doc. 111. The district court held McGill in contempt for his willful failure to

abide by the court's orders. Dist. Ct. Dkt. Doc. 112. McGill continued to refuse to comply with the injunction, and in March 2010, the Church again applied for an order to show cause and for sanctions. See Dist. Ct. Dkt. Doc. 136. In June 2010 the magistrate judge recommended the motions be granted. *Ibid.*

The Sixth Circuit Decision. Meanwhile, McGill proceeded with his appeal, in which he now sought to press his RFRA argument. Pet. 10a. On appeal, the Church showed that, although McGill had specified entry of the default judgment as an error, he had waived any argument about the default because he had failed to argue for its reversal in his opening brief. *Ibid.* The Church further showed that, separate from McGill's waiver of his appeal of the default judgment, he had, as the trial court found, waived any defense under RFRA by failing timely to plead it. Appellate Ct. Dkt. Doc. 616312181, at 53-56.

The Sixth Circuit agreed that McGill had waived any argument that the default judgment should not have been entered. However, the court stated that it was not clear whether the default judgment superseded the summary judgment order, and on that basis concluded that the default judgment did not preclude its review of whether the Church's allegations, if accepted as true, were sufficient to state a claim and support a judgment of liability. Pet. 10a.

Moving to the RFRA issue, which the Church had not briefed on the merits,[2] the Sixth Circuit specifi-

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[2] In a footnote to its appellate brief, the Church noted that the Sixth Circuit had previously not ruled on whether RFRA applies to private parties. However, the Church itself took no position on that issue, instead resting on the ground that McGill was es-

cally noted that it was not reaching the question whether, as the trial court had concluded, McGill had waived this defense. *Id.* at 17a n.3. Instead, the Sixth Circuit concluded that it did not need to address the waiver issue because, in its view, RFRA does not apply as a matter of law to suits brought under the Lanham Act, *id.* at 20a-21a—a statute that can be enforced only by private parties and not by the federal government. *Ibid*.

In reaching this conclusion, the Sixth Circuit distinguished the Second Circuit's ruling in *Hankins* v. *Lyght*, 441 F.3d 96 (2d Cir. 2006), which had held that RFRA applied to a suit by a private party under the Age Discrimination in Employment Act ("ADEA"), Pub. L. No. 90-202, 81 Stat. 602. Pet. 19a. The Sixth Circuit concluded that *Hankins*' reasoning, right or wrong, simply does not apply to a lawsuit, like this one, brought under a statute that contains no provision for government enforcement:

> [T]he *Hankins* majority limited its holding to the application of RFRA vis-à-vis federal laws that can be enforced by private parties *and* the government. That case concerned an action under the ADEA by a clergyman who had been forced into retirement. The ADEA claim could have been brought by the EEOC, and the majority [in *Hankins*] sought to avoid disparate application of the statute based on who brings discrimination charges. There is no EEOC-like agency that can bring trademark-enforcement actions.

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topped from raising the defense, as the trial court had concluded. Appellate Ct. Dkt. Doc. 616312181, at 56 n.3.

Pet. 19a-20a (emphasis in original; citations omitted). The court went on to note that, even as to that limited ruling, "a different panel of the Second Circuit already has expressed 'doubts about *Hankins'* determination that RFRA applies to actions between private parties.'" *Id.* at 20a (quoting *Rweyemanu* v. *Cote*, 520 F.3d 198, 203 (2d Cir. 2008)).

On that basis, the Sixth Circuit panel proceeded to unanimously affirm the district court's denial of McGill's motion to dismiss, its grant of partial summary judgment in favor of the Church, and its default judgment against McGill. Pet. 32a.[3]

McGill's Subsequent Activities. Since the Sixth Circuit's decision, McGill has continued to willfully disobey the district court's orders. Despite having been ordered to cease using the Church's trademarks, McGill has continued to do so. And although he has relocated beyond the jurisdictional reach of the district court—to Africa—McGill has directed his agent in the United States, Lucan Chartier, to continue to disobey the court's orders.

Indeed, following a recent evidentiary hearing, the magistrate judge handling this litigation entered a Report and Recommendation on December 23, 2010, finding:

> According to the testimony of Mr. Chartier, Defendant McGill and he exchanged messages about his latest sign restorations in October. As such,

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[3] Contrary to McGill's claim, the Sixth Circuit did not conclude that "petitioner plainly has sincerely-held religious beliefs." Pet. 25. Indeed, because it concluded that neither the First Amendment's free-exercise clause nor RFRA applied to the Church's trademark claims as a matter of law, the court had no need to reach that question. *Id.* at 11a-21a.

> the Court again finds that Messrs. McGill and Chartier continue to operate in tandem to violate the District Court's Orders, and that their actions are intentional and in contempt of said orders. It is clear that Defendant McGill is able to instruct and manipulate his young protégé to accomplish these contemptible acts. It continues to be apparent that Defendant McGill accomplishes this from a distance, well beyond the reach of this Court.

Dist. Ct. Dkt. Doc. 160, at 2; see also Dist. Ct. Dkt. Doc. 162 (McGill's objections to magistrate report).

REASONS FOR DENYING THE PETITION

The decision below does not implicate any circuit split. As we explain in more detail below, most of the decisions on which McGill relies do not even address whether RFRA applies to private actions. And aside from the decision below, *none* decided whether RFRA applies to private actions where the underlying statute does not also provide for government enforcement. The Sixth Circuit's ruling was the first to decide that specific question, and its result does not conflict with the law in any other circuit.

The only actual split in the decisions McGill cites concerns a question that is not presented by this petition: whether RFRA applies to private lawsuits under statutes that *also* contemplate government enforcement. And even that split is narrow—involving only two circuits, the Second and the Seventh—and does not justify this Court's intervention. Indeed, the Second Circuit holding relied upon by McGill has more recently been criticized by another panel of that court, and there is a strong possibility that it will be overturned *en banc*, thus erasing the narrow split that now exists.

But even if this case did implicate a genuine circuit split, it suffers from fatal vehicle problems. For one, McGill's RFRA defense was waived before the district court. Moreover, his continued and willful failure to obey court orders resulted in a default judgment that independently resolved the claims against him. Thus, even if this Court were to reach the RFRA question and decide it in McGill's favor, that decision would likely have no effect on the underlying action. Finally, the Church's institutional interests as a religious body may prevent it from vigorously defending the Sixth Circuit's RFRA ruling on the merits, thus making more difficult the kind of adversarial debate that a grant of *certiorari* is intended to produce.

I. This Case Implicates No Circuit Split.

In his petition, McGill asserts that the Sixth Circuit's decision creates a 3-3 circuit split between the Second, Eighth and D.C. Circuits on one side, and the Fifth, Sixth, and Seventh Circuits on the other. Pet. 10-14. He is wrong. Indeed, he fails to acknowledge the critical distinction, recognized in most of the decisions he cites, between statutes that provide for government enforcement and those that do not.

1. Where the government can enforce a statute, some courts have held that RFRA, which is intended to ensure that the government does not burden religious exercise without compelling justification, applies even to suits between private parties. But no court has ever held that RFRA applies to suits between private parties where, as here, there is no possibility of government enforcement.

For this reason, there is no conflict between the ruling below and the Second Circuit's decision in

Hankins v. *Lyght*, 441 F.3d 96 (2d Cir. 2006). See Pet. 11-12. *Hankins* involved a claim under the ADEA, which provides for government enforcement actions through the EEOC. See 29 U.S.C. § 626. Although the lawsuit in *Hankins* was brought by a private plaintiff—a clergyman challenging his early retirement—the same claim could have been brought as a government enforcement action by the EEOC.

As the Sixth Circuit noted below, moreover, "the *Hankins* majority limited its holding to the application of RFRA vis-à-vis federal laws that can be enforced by private parties *and* the government." Pet. 19a (emphasis in original). That holding does not apply to the situation presented here because, as the Sixth Circuit noted, "[t]here is no EEOC-like agency that can bring trademark-enforcement actions." Pet. 20a.

Indeed, the Second Circuit in *Hankins* expressly recognized that it was addressing only situations where government enforcement of a statute was a possibility:

> We need not, however, decide whether the RFRA applies to a federal law enforceable only in private actions between private parties. The ADEA is enforceable by the EEOC as well as private plaintiffs, and the substance of the ADEA's prohibitions cannot change depending on whether it is enforced by the EEOC or an aggrieved private party.

441 F.3d at 103. The *Hankins* majority's principal concern—that the scope of statutory rights should not differ based on whether they are enforced by a private party or by the government—simply does not

apply where, as here, the statute does not provide for government enforcement.

More recently, the Second Circuit again confirmed that the holding in *Hankins* is limited to a statute enforceable by the federal government itself. In *Rweyemanu* v. *Cote*, 520 F.3d 198, 203 (2d Cir. 2008), that court characterized *Hankins* as a "determination that RFRA applies to actions between private parties when the offending federal statute is enforceable by a government agency." That analysis confirms that the Second Circuit's holding in *Hankins* would not apply here, where the trademark statutes at issue contain no government enforcement provision.

2. McGill is also incorrect to assert a conflict with the Eighth Circuit's ruling in *Christians* v. *Crystal Evangelical Free Church*, 82 F.3d 1407 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir. 1998), which involved a lawsuit by a bankruptcy trustee challenging the debtor's contribution to her church as a fraudulent transfer. Pet. 12-13. The *Christians* cases, decided shortly after RFRA's enactment, did not even discuss whether RFRA applies to suits by private parties. Those cases addressed only whether RFRA was constitutional and could be applied retroactively. *Christians*, 82 F.3d at 1416-17; *Christians* v. *Crystal Evangelical Free Church*, 141 F.3d 854, 859-63 (8th Cir. 1998).

Nor is there any basis for McGill's claim that in *Christians,* the Eighth Circuit ruled *sub silentio* that all private actions against religious institutions must be subject to the strictures of RFRA. A bankruptcy trustee—who was the plaintiff in *Christians*—is not a true private party, but instead acts on behalf of the

government and in the public interest. As the Second Circuit noted in *Hankins*:

> A bankruptcy trustee is arguably "acting under color of law" and therefore falls within the RFRA's definition of "government." 42 U.S.C. § 2000bb-2(1). United States trustees are part of the executive branch and protect the interests of the United States in the liquidation. See 28 U.S.C. § 586(a); 11 U.S.C. §§ 701(a)(1), 703(b)-(c) and 704(9); *In re Schoenewerk*, 304 B.R. 59, 62-63 (Bankr. E.D.N.Y. 2003).

441 F.3d at 103 n.4.[4] Thus, the holding of *Christians,* like those of *Hankins* and *Rweyemanu,* does not conflict with the Sixth Circuit's determination that RFRA does not apply where there is no possibility of government enforcement.

3. Finally, McGill suggests a conflict between the decision below and the D.C. Circuit's holding in *EEOC* v. *The Catholic University of America*, 83 F.3d 455, 457 (D.C. Cir. 1996), a case in which Catholic

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[4] Accord, *e.g.*, *United States* v. *Liporace*, 133 F.3d 541, 545 n.1 (7th Cir. 1998) (bankruptcy trustee is a "a court-appointed fiduciary serving in the public interest" with a "public role"); *Taunt* v. *Barman (In re Barman)*, 252 B.R. 403, 412-413 (Bankr. E.D. Mich. 2000) (holding that Fourth Amendment protections extend to search carried out by bankruptcy trustee because "every aspect of a trustee's position and function is subject to either statutory obligation or to federal executive or judicial branch control" and "these circumstances surrounding the status and function of a trustee in a chapter 7 case all suggest a sufficient nexus to the government and its power"); *Novak* v. *Clark*, No. 03-4136-JAR, 2004 WL 1293249, at *2 n.13 (D. Kan. June 4, 2004) (holding that Chapter 7 bankruptcy trustee was entitled to quasi-judicial immunity for acts "taken in his capacity as court-appointed trustee and at the direction of the United States Bankruptcy Court").

University was alleged to have discriminated against a female professor. Pet. 13. But like the Eighth Circuit in *Christians*, the D.C. Circuit did not speak to the question whether RFRA applies to private lawsuits, but rather only to whether the statute was constitutional and could be applied retroactively. *Id.* at 468-69.

Moreover, like *Christians*, the *Catholic University* case involved a statute (Title VII of the Civil Rights Act of 1964) that was and remains subject to government enforcement. See 42 U.S.C. § 2000e-5(f); *Gen. Tel. Co. of N.W.* v. *EEOC*, 446 U.S. 318, 325 (1980). Indeed, the EEOC was itself a plaintiff in the case. *Catholic University*, 83 F.3d at 459. Accordingly, nothing in *Catholic University* conflicts with the Sixth Circuit's holding that RFRA does not apply to private lawsuits under statutes with no provision for government enforcement.

4. Contrary to McGill's argument (at 13), the decisions he cites from the Fifth and Seventh Circuits are equally inapplicable here, for they likewise do not address statutes that create no possibility of government enforcement.[5] For example, in the Seventh Circuit case, *Tomic* v. *Catholic Diocese of Peoria*, a church music director sued for age discrimination under the ADEA, a statute enforceable by the federal government. 442 F.3d 1036, 1037 (7th Cir. 2006). To

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[5] Because, as McGill concedes, see Pet. 14, the Ninth Circuit has expressly refused to decide whether RFRA applies to *any* private litigation, its opinions obviously cannot create a circuit split. See*, e.g.*, *Worldwide Church of God* v. *Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir 2000) ("We need not decide this knotty question, however, for in the context of this case PCG has failed to demonstrate that the copyright laws subject it to a substantial burden in the exercise of its religion.").

be sure, the Seventh Circuit disagreed with the Second Circuit, concluding that RFRA does not apply to private lawsuits even where government enforcement is possible. *Id.* at 1042. But again, that is a different issue than the one decided by the Sixth Circuit in this case, which dealt only with the effect of RFRA on statutes that are *not* subject to government enforcement.

As for the Fifth Circuit, McGill cites *Boggan* v. *Mississippi Conference of the United Methodist Church*, an employment discrimination appeal decided by an unpublished, two-paragraph, *per curiam* opinion. 222 Fed. App'x 352 (5th Cir. 2007). *Boggan* did not discuss the applicability of RFRA to private suits. Rather, it held that the plaintiff minister's action was "barred by the so-called minister-clergy exception, which is firmly rooted in the Free Exercise clause of the First Amendment to the United States Constitution." *Id.* at 353. And, in any event, the case involved an action under Title VII, which as noted can be enforced by the federal government.

In short, if there is any circuit split on RFRA's application, it is not the 3-3 circuit split asserted by McGill. At most, there is a disagreement between the Second and the Seventh Circuits on the question whether RFRA applies to a private action under a statute that *also* provides for government enforcement. But as we have explained, that question is not presented by this case.

As to the issue that the Sixth Circuit did address—whether RFRA applies when government enforcement of a statute is *not* a possibility—the Sixth Circuit is the only circuit court to have decided this question. In every other case cited by McGill,

the federal government either was or could have been a party. The Sixth Circuit's holding is thus unique, and it is not in conflict with the decisions of the Second, Eighth, or D.C. Circuits.

5. McGill may respond that the possibility of government enforcement is irrelevant to a litigant claiming that his free exercise of religion has been infringed. Pet. 15-17. But McGill's conviction that the Sixth Circuit was wrong about this cannot create a circuit split where there is none.

In fact, the court below based its ruling on the conclusion that RFRA embodies a congressional desire for the *government* to remain "neutral" and "not substantially burden religious exercise without compelling justification." *Id.* at 19a (quoting 42 U.S.C. § 2000bb(a)). And that was the court's rationale for drawing a distinction between statutes that permit government enforcement and those that do not. *Id.* at 19a-20a.

For purposes of McGill's petition, it does not matter whether the Sixth Circuit was correct to carve at this joint. What matters is that the Sixth Circuit left open the possibility that it would rule differently in a case in which government enforcement *is* possible, just as the Second Circuit in *Hankins* left open the possibility that it would rule differently in a case in which government enforcement is *not* possible. There simply is no conflict between these two positions.

II. Whatever Split Does Exist Is Not Only Shallow, But Also Likely To Be Fleeting.

Even the disagreement that does exist among the lower courts is both shallow and ephemeral.

1. Of the cases cited by McGill, only two—the Second Circuit's ruling in *Hankins* and the Seventh Circuit's ruling in *Tomic*—squarely address the question of whether RFRA applies to actions by private parties—albeit both in the context of statutes that also provide for government enforcement. Of course, this Court could not resolve the disagreement between those two courts by granting review in this case, as the Sixth Circuit's ruling involves a statute with no government enforcement provision, and is thus on neither side of that split.

But even if the Court were inclined to overlook that dispositive fact, the shallowness of the split and the paucity of reasoned opinions from the lower courts would still counsel against granting review here, and in favor of awaiting further percolation in the courts of appeals. As Justice Brennan noted, where a circuit split exists but is still shallow, the law should be allowed to develop: "[T]here is already in place, and has been ever since I joined the Court, a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question." E. Gressman, K. Geller, S. Shapiro, T. Bishop & E. Hartnett, *Supreme Court Practice* 246 (9th ed. 2007) (quoting William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 *Judicature* 230, 233 (1983)).

2. That is especially true where, as here, the disagreement is not only limited, but likely fleeting. While it is true that the Second Circuit held in *Hankins* that RFRA applies to suits between private parties where the government could be a party, it did so over then-Judge Sotomayor's vigorous dissent. 441 F.3d at 114 (Sotomayor, J., dissenting) ("RFRA

by its terms does not apply to suits between private parties.").

The dissent's view was subsequently embraced by another panel of that same court. In *Rweyemanu*, the unanimous panel concluded that it did not have to decide whether RFRA applied to a private party suit because the defendant (like McGill here) had waived RFRA as a defense. 520 F.3d at 203-04. Nevertheless, it expressed its "doubts about *Hankins*'s determination that RFRA applies to actions between private parties when the offending federal statute is enforceable by a government agency." *Id.* at 203; see also *id.* at 203 n.2 ("we do not understand how [RFRA] can apply to a suit between private parties, regardless of whether the government is capable of enforcing the statute at issue").

McGill argues that *Rweyemanu* could not have overruled *Hankins* because a panel of a court of appeals is bound by a decision of a prior panel. Pet. 12 n.2. Of course. But that misses the point: What matters is that in a *future* case, the Second Circuit may well vote *en banc* to overrule its controversial 2-1 opinion in *Hankins*. If it does so, whatever circuit split there is now will vanish.

Given the shallowness of the split and the real possibility that it may soon resolve itself, there is no compelling need for this Court's intervention.

III. Even If There Were A Circuit Split Deserving Of Review, This Case Is The Wrong Vehicle.

Even if the matters McGill raises otherwise warranted review, this case would not be a suitable vehicle. For one, if this Court wished to address the narrow disagreement between the Second and Seventh Circuits, it would be better to grant review in

an employment discrimination suit, where government enforcement is a possibility, and which would present the same fact pattern that was present in both *Hankins* and *Tomic*. As the Rutherford Institute's *amicus* brief reflects, this is the setting in which RFRA's applicability to private lawsuits most often arises. See Br. of *amicus curiae* Rutherford Institute 4-7, 9-13.[6] Given that the question of RFRA's applicability to private suits overwhelmingly arises in that setting, it would make more sense to grant *certiorari*—if it is to be granted at all—in a case arising in that same context.

Beyond that, this case is an extremely poor vehicle for resolving the issue presented, for three additional reasons.

A. McGill waived his RFRA argument before the district court.

First, as explained previously, *supra* 4-5, the district court expressly held that McGill had waived, and was therefore estopped from asserting, RFRA as a defense. The district court explained that McGill had failed to include the defense in his answer; that he did not seek to amend his answer until almost a year later, after the deadline for amendment had passed; and that to allow the amendment at that late date would unfairly prejudice the Church, which had already submitted its motion for summary judgment pending. Dist. Ct. Dkt. Docs. 61. The Sixth Circuit

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[6] Indeed, the great majority of cases relied on by McGill involved employment discrimination actions based on statutes that either were, or could have been, enforced by the government. See *Boggan*, 222 Fed. App'x at 353 (Title VII); *Tomic*, 442 F.3d at 1037 (ADEA); *Hankins*, 441 F.3d at 103 (ADEA); *Catholic Univ. of Am.*, 83 F.3d at 457 (Title VII).

did not disturb that waiver finding. Indeed, the court of appeals did not even consider the issue, finding it unnecessary to rule on waiver because it decided RFRA did not apply as a matter of law. Pet. 20a.

Thus, if this Court were to grant review to consider the applicability of RFRA and reverse the Sixth Circuit on that point, it would likely have no effect on the outcome of this case, because McGill is independently estopped from relying on that defense. At the very least, this Court would have to remand to the court of appeals to consider, for the first time, the trial court's finding of waiver, thus making it likely that this Court's holding would be irrelevant to the very case in which it would have been entered.

This Court routinely denies review on questions that have not been preserved in the courts below. See, *e.g.*, *City of Springfield, Mass.* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (dismissing writ as improvidently granted: Court "ordinarily will not decide questions not raised or litigated in the lower courts," including where, contrary to Fed. R. Civ. P. 51, "the party seeking to argue the issue has failed to object to a jury instruction"). Just as Rule 51 requires a party to object to a jury instruction, Rule 8 requires a party to "affirmatively state" any "affirmative defense," see Fed. R. Civ. P. 8, and, in fact, McGill has *already* been found to have waived any RFRA defense on this basis.

McGill is thus asking this Court to grant review to consider the application of a defense that the trial court ruled he waived, and that the Church did not even brief the issue before the court of appeals. If, as McGill and his *amicus curiae* contend, the issue presented by this case is "recurring and widespread,"

then there will be no shortage of better vehicles in the future. Pet. 14.

B. McGill's claims were independently resolved by the district court's default judgment.

McGill not only waived his RFRA defense, but as a result of his willful disobedience of the trial court's orders, a default judgment was entered against him. As previously explained, *supra* 5-6, after McGill twice refused to attend court-ordered mediation to discuss a possible settlement, the trial court entered an order granting the Church default judgment and permanent injunctive relief. Pet. 9a. On appeal, the Sixth Circuit determined that McGill had waived any challenge to the default judgment order because he failed to brief it. *Id.* at 10a. Because the default judgment independently resolved the claims in this case,[7] any decision by this Court would be purely advisory,

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[7] The Sixth Circuit's uncertainty on this point was misguided. The district court's partial summary judgment was an interlocutory order that remained subject to revision until the entry of final judgment. Fed. R. Civ. P. 54(b); *Mallory* v. *Eyrich*, 922 F.2d 1273, 1282 (6th Cir. 1991); see *Marconi Wireless Tel. Co.* v. *United States*, 320 U.S. 1, 47 (1943). Thus, when the trial court subsequently entered a default judgment, there was no reason to think it was carving out from that judgment the issues it had addressed in its previous partial summary judgment. To the contrary, that default judgment was an alternative and ultimately dispositive basis for dismissing McGill's claims.

That conclusion is confirmed by the district court's subsequent decision denying McGill's motion to stay the injunction pending appeal. There the district court noted that, in the end, the "case was not decided on the merits of the claims," and it therefore concluded that McGill's First Amendment argument was "irrelevant to the substantive issues that will be decided on appeal." See Dist. Ct. Dkt. Doc. 103, at 3.

making this a doubly poor vehicle for a grant of *certiorari*.

And even if the default order did not independently resolve the claims at issue, McGill's willful disobedience of the district court's orders provides an independent basis to deny review, especially considering that McGill persists in such conduct even to this day. Ever since the district court and the Sixth Circuit ruled in the Church's favor, McGill has willfully disobeyed their decisions, continuing to use the Church's trademarks on signs and on the Internet. As the magistrate judge observed in a recent hearing, since moving to Africa, McGill has "instructed and otherwise aided [his deputy] Chartier to perform these acts in violation of the District Court's Orders." Dist. Ct. Dkt. Doc. 160, at 3. The magistrate observed that "Mr. Chartier readily conceded his actions were in violation of the District Court's Orders, and testified that he will continue to violate these orders." *Id.* at 1-2. The magistrate ultimately found McGill to be in contempt of court, explaining that "this Court can no longer ignore the continuing and contemptible violations of the District Court Orders by both Defendant McGill and Mr. Chartier." *Id.* at 3, 5.

It is one thing for a litigant to disagree with a court's order, but quite another to disrespect and disobey that order. Having flouted the authority of the lower courts, McGill now seeks the intervention of this, the nation's highest Court. This Court should not indulge a petitioner who comes before it with such unclean hands. See *Olmstead* v. *United States*, 277 U.S. 438, 483-484 (1928) (Brandeis, J., dissenting) ("[A] court will not redress a wrong when he who invokes its aid has unclean hands."), *overruled on*

other grounds by Katz v. *United States*, 389 U.S. 347 (1967); see also *ABF Freight Sys.* v. *NLRB*, 510 U.S. 317, 329-330 (1994) (Scalia, J., concurring) ("The 'unclean hands' doctrine 'closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.'") (citation omitted).

C. For reasons of institutional policy, the Church may not be able to defend the Sixth Circuit's RFRA analysis.

A final reason why this case would be a poor vehicle for addressing the question presented is that, for institutional reasons, the Church may not be able to defend the Sixth Circuit's RFRA analysis if review were granted.

Because the Church is a religious organization and a staunch supporter of religious freedom, the Church's institutional interests favor a broad interpretation of RFRA. The Church has been among the most vocal proponents of RFRA, both before and since its enactment. Indeed, the Church has joined with other religious institutions in *amici* briefs before this Court and others to advocate a broad interpretation of RFRA in numerous cases—including, for example, the *Christians* case discussed above.[8] As a

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[8] See Supplemental Br. of *amici curiae* Christian Legal Society, The Nat'l Assoc. of Evangelicals, Americans United for Separation of Church and State, Concerned Women for Am., The Baptist Joint Comm. on Public Affairs, The Southern Baptist Convention, The Gen. Conference of Seventh-day Adventists, and The Evangelical Lutheran Church in Am. in Support of Def. Appellant, *Christians* v. *Crystal Evangelical Free Church*, No. 93-2667 (8th Cir. Dec. 10, 1993); see also Br. of the Resp. in Opp'n, *Clapper* v. *Chesapeake Conference of Seventh-day Ad-*

matter of institutional policy, therefore, it is entirely possible that the Church would not be able to defend the Sixth Circuit's RFRA analysis if review were granted.[9]

This institutional conflict provides an additional reason to select a different case for review, if review of this question is warranted at all. As this Court has often recognized, vigorous debate is critical to the Court's determination of which of two competing views should become the law of the land. In *United*

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ventists, No. 98-1566 (U.S. Oct. 1998); Br. of The Baptist Joint Comm. for Religious Liberty, The Nat'l Assoc. of Evangelicals, The National Council of Churches, The American Jewish Comm., The Stated Clerk of the Gen. Assembly of the Presbyterian Church (U.S.A.), The Gen. Conference of the Seventh-day Adventists, and the United States Conference of Catholic Bishops as *amicus curiae* in Support of Cross-Appellees Urging Affirmance on the Cross Appeal, *Rasul* v. *Rumsfeld*, No. 06-5222 (D.C. Cir. Mar. 16, 2007); Br. *amicus curiae* of James E. Andrews, as Stated Clerk of the Gen. Assembly of the Presbyterian Church (U.S.A.), The Church of Jesus Christ of Latter-day Saints, The Church of the Nazarene, The Comm'n of Social Action of Reform Judaism, The Evangelical Lutheran Church in Am., The First Church of Christ, Scientist, The Gen. Conference of the Seventh-day Adventists, The General Conference on Finance and Administration of the United Methodist Church, and The Worldwide Church of God, in Support of the Pet. for a Writ of *Mandamus*, *U.S. Catholic Conference, Inc.* v. *Ashby*, No. 95-0250 (Tex. Nov. 15, 1995).

[9] The Church took care in its briefing to the court of appeals not to argue against a broad application of RFRA, but rather to urge affirmance on grounds of waiver. See Appellate Ct. Dkt. Doc. 616312181, at 56 n.3. The Church's attorneys did not take such care before the trial court, where, although the principal argument was waiver, part of the language can be read as opposing an expansive application of RFRA. See Dist. Ct. Dkt. Doc. 36, at 10-13. But the Church would not consider itself bound by that position before this Court.

States v. *Johnson*, for example, this Court vacated a judgment in a case in which the defendant had invited the plaintiff to file a "friendly suit" that was "not in any real sense adversary." 319 U.S. 302, 304-05 (1943). The Court did so because the suit lacked "the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court." *Id.* (1943) (quoting *Chicago & Grand Trunk Ry. Co.* v. *Wellman*, 143 U.S. 339, 345 (1892)); see also *Poe* v. *Ullman*, 367 U.S. 497, 506 (1961).

This case does not involve a "friendly suit." But where institutional policy may preclude the Church from vigorously defending the Sixth Circuit's RFRA analysis, thereby depriving this issue of the adversarial debate it deserves, the rationale of *Johnson* applies with equal force. And if, as McGill and *amicus curiae* contend, this issue is "recurring and widespread," then there will be no shortage of better vehicles in the future. Pet. 14.

CONCLUSION

In sum, this case presents no issue worthy of this Court's review. And even if the case did present such an issue, it would be an unusually poor vehicle for resolving it. The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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