No. 22-CV-7855

In the Supreme Court of the United States

EMMANUELLA RICHTER,

Petitioner,

v.

CONSTANCE GIRARDEAU,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

TEAM 17

Counsel For Petitioner

QUESTIONS PRESENTED

1. Whether the extension of the *New York Times v. Sullivan*, 376 U.S. 254 (1964) actual malice standard to limited-purpose public figures is constitutional.
2. Whether the U.S. Court of Appeals for the Fifteenth Circuit erred in concluding that the Physical Autonomy of Minors Act ("PAMA") is neutral and generally applicable.
3. Whether *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990), which holds that generally applicable laws not targeting specific religious practices do not violate the Free Exercise Clause of the First Amendment, should be overruled.

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JURISDICTION

The judgment of the court of appeals was entered on December 1, 2022. Petitioner filed a timely petition for writ of certiorari, which this Court granted. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. CONST. amend I.

The Physical Autonomy of Minors Act ("PAMA"):

> [F]orbids the procurement, donation, or harvesting of the bodily organs, fluids, or tissue, of a minor (an individual under the age of sixteen) regardless of profit and regardless of the minor's consent. R. at 6.

STATEMENT

A. Factual Background

Thirty-three years ago, Petitioner Emmanuella Richter founded the Church of the Kingdom ("Kingdom Church" or "the Church") in Pangea. Richter Aff. ¶ 1. Mrs. Richter, a scholar in comparative religion, spent several years interpreting the sacred foundational texts of world faiths

and synthesized what she deduced to be the core, archetypal essence of the religious experience. *Id.* Since its founding, the Church has garnered a large following. R. 22. In 2000, a military coup overthrew the democratic government of Pangea. *Id.* Mrs. Richter, her husband, and the Kingdom Church congregation fled to the United States seeking asylum to escape the targeted religious persecution at the hands of their own government. *Id.* Ultimately, the Church found refuge in Beach Glass, Delmont, where it established an intentional community for the devout, and over the past 20 years, has grown throughout the southern portions of the state. *Id.*

To be a Kingdom Church member, one must be at least 15 years old and undertake an intense doctrinal study prior to their confirmation. Richter Aff. ¶ 8. A core tenet of the Church is that members cannot accept blood or donate blood to someone outside of the Church. R at 23. To protect the health and welfare of its members, Kingdom Church members routinely donate blood at a local hospital and comply with American Red Cross ("ARC") guidelines. *Id.* All of the Church's religious practices revolve around community enhancement and service. Richter Aff. ¶ 12. As a result, the Church enjoyed a good reputation in Delmont for nearly two decades. R at 23. However, in 2020, when the *Beach Glass Gazette* published an article about the Church's enterprise, including details on its blood-banking beliefs, the Church's public perception soured, causing the Church to become the target of the Delmont government. R at 23–24.

Before 2021, individuals under the age of 16 could not consent to blood donations unless it was for autologous donations or medical emergencies of consanguineous relatives. R at 24. Less than a year after the *Gazette*'s article and the backlash it garnered against the Church's blood-banking practices, the Delmont General Assembly introduced and enacted the Physical Autonomy of Minors Act ("PAMA"). *Id.* PAMA removed the exceptions in prior Delmont law. *Id.* At the same time Respondent Governor Girardeau was made aware of PAMA, she was also briefed on

the *Gazette*'s article. Girardeau Aff. ¶ 3. The Delmont Assembly and Governor Girardeau claim that PAMA was created to address a national spike in child abuse and neglect between 2016 and 2020. Girardeau Aff. ¶ 4. Governor Girardeau not only signed PAMA into law but also has long been an advocate for the legislation. R at 7–8.

Since PAMA's enactment, Governor Girardeau has weaponized the media to ostracize the Kingdom Church and garner support for her reelection campaign. Governor Girardeau is quoted using condescending and defamatory language, such as calling Mrs. Richter a "vampire" and describing the church that Mrs. Richter spent decades building as an exploitative "cult" that "preys on children." R. at 26–27. Moreover, Governor Girardeau announced at a major fundraiser for Delmont University that she commissioned a task force specifically to investigate the Church and its members. R at 26. With each press event where the Governor demonized the Church, polling and focus group results revealed that her targeted tactics garnered significant support among her constituents, and she included it in her fundraising efforts. R at 26.

B. Proceedings Below

In response to the Governor's investigation, Mrs. Richter filed suit on January 25, 2022, seeking an injunction to prevent the task force from gathering information about private internal church activity because the investigation and PAMA violated Kingdom Church members' First Amendment right of free exercise. R. at 26. Later, in response to the Governor's very public and inflammatory statements about her, Mrs. Richter amended her complaint to include an action for defamation against the Governor. R. at 26–27. The Governor moved for summary judgment under Rule 56(a) of the Federal Rules of Civil Procedure, stating that there was no dispute as to the material fact or law, the task force investigation is constitutional, and the defamation action fails

the actual malice standard applicable to limited-purpose public figures like Mrs. Richter. *Id.* The district court granted the Governor's motion, and the court of appeals affirmed.

SUMMARY OF ARGUMENT

This Court should reverse the decision of the U.S. Court of Appeals for the Fifteenth Circuit and hold the extension of the *New York Times v. Sullivan*, 376 U.S. 254 (1964) actual malice standard to limited-purpose public figures unconstitutional because it places an unfair burden on private citizens and is contrary to core First Amendment principles. In the digital age, the limited-purpose public figure classification has become increasingly vague and expansive, resulting in a dramatic increase of individuals affected by the *Sullivan* standard. The ability of citizens to protect their names and reputations has decreased to the point of extinction because proving actual malice has shown to be almost impossible. As a result, the actual malice standard has become a shield for defamation, allowing powerful figures like Governor Girardeau to make defamatory statements with no risk of being held accountable. This outcome shortchanges the value placed on private citizens' reputations and conflicts with the key principles the First Amendment was understood to safeguard. To rectify *Sullivan*'s unintended consequences, this Court should overrule the actual malice requirement it imposes on limited-purpose public figures and instead apply the less stringent negligence standard. This would eliminate the nearly unsurmountable burden the *Sullivan* standard imposes on private citizens and better align with the principles of the First Amendment.

Additionally, the Fifteenth Circuit erred in concluding that the Physical Autonomy of Minors Act ("PAMA") is neutral and generally applicable, as required by *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990), because PAMA was designed to specifically target and prohibit the Kingdom Church's blood-banking practice. Blood banking has long been a core tenant of the Kingdom Church. R at 23. For 20 years, Kingdom Church members safely and legally

engaged in this practice in Delmont with no government interference. R. at 24. Only after a local article sparked public outrage did the Delmont General Assembly draft and enact PAMA—prohibiting Kingdom Church members from legally engaging in the practice. Moreover, the only difference between PAMA and the prior law is that it removed the medical emergencies or autologous donation exceptions—the aspect of the law that Kingdom Church members relied on for two decades. R. at 25. Though Delmont contends that PAMA is in furtherance of curbing child abuse and neglect, it points to no evidence that PAMA actually furthers that objective. Further evidence of PAMA's targeted design is in the calculated actions of Governor Girardeau, who not only signed PAMA into law but also stoked the flames of the recent public outrage to further her reelection campaign.

Finally, Petitioner contends that regardless of satisfying *Smith*, this Court should overrule Smith and reinstate its prior precedent, *Sherbert v. Verner*, 374 U.S. 398 (1963), because *Smith* is an unworkable standard that is unsupported by precedent or history. For nearly 30 years, the U.S. Supreme Court did not distinguish between facially neutral and explicitly targeted laws burdening free exercise. Under *Sherbert* and its progeny, the Free Exercise Clause "require[ed] the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." *Smith*, 494 U.S. at 894. Moreover, *Smith* is an unworkable standard, causing courts to go to great lengths to avoid applying it. Lastly, a return to *Sherbert* is further supported by history and text. Looking to early state constitutions and the First Amendment framers' intent, it is clear that the Free Exercise Clause does not require that laws target a particular religious practice to violate free exercise, and the Court should return to *Sherbert* to realign itself with the original intent of the U.S. Constitution.

ARGUMENT

I. The extension of the *Sullivan* standard to limited-purpose public figures is unconstitutional because it imposes an unfair burden on private citizens and conflicts with core First Amendment principles.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court held that elected public official defamation plaintiffs must prove "actual malice," demonstrating that a "defamatory statement was made with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 280. Three years later, the Court extended the actual malice standard to unelected public figures. *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967); *Associated Press v. Walker*, 389 U.S. 889 (1967). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court extended the standard even further by applying it to "all-purpose" public figures who have achieved "pervasive fame or notoriety" and "limited-purpose public figures" who "voluntarily inject" themselves or are "drawn into a particular public controversy." 418 U.S. at 351. For a private figure, the standard of proof is a showing of ordinary negligence. *Id.* at 352. Limited-purpose public figures are not significantly different than private citizens. The extension of the *Sullivan* standard to limited-purpose public figures is unconstitutional because it places an unfair burden on private citizens and eliminates their chance to protect their names and reputations. This impact of *Sullivan* shortchanges the value placed on plaintiffs' reputations and conflicts with core First Amendment principles.

A. The extension of the Sullivan *standard to limited-purpose public figures imposes an unfair burden on private citizens.*

Plaintiffs are limited-purpose public figures when they "voluntarily inject" themselves or are "drawn into a particular public controversy." *Gertz*, 418 U.S. at 351. For lower courts, this standard has been "much like trying to nail a jellyfish to the wall." *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978). Despite similar

facts, courts have inconsistently defined a limited-purpose public figure and found many categories of plaintiffs to be both private and public figures. *Compare Mathis v. Cannon*, 573 S.E.2d 376 (Ga. 2002) (holding a municipal contractor is a public figure because of his efforts to help develop a governmental project) *with Mahoney v. State*, 665 N.Y.S.2d 691 (N.Y. App. Div. 1997) (holding a government contractor is not a public figure because receipts of public funds and involvement in a controversial industry alone do not confer public figure status on an individual). *Compare Blum v. State*, 255 A.D.2d 878 (N.Y. App. Div. 1998) (holding a professor is a limited-purpose public figure because he publicized his disagreements with the school) *with Sewell v. Trib. Publ'ns, Inc.*, 622 S.E.2d 919 (Ga. Ct. App. 2005) (holding a professor who made public comments about the Iraq War is not a limited-purpose public figure).

Because of the vague definition of a limited-purpose public figure, the standard has become too broad in its application and is increasingly leaving ordinary citizens without recourse for grievous defamation. Courts now hold that private individuals can become limited-purpose public figures simply by defending themselves from false statements. *See Berisha v. Lawson*, 973 F.3d 1304 (11th Cir. 2020); *see also McKee v. Cosby*, 139 S. Ct. 675 (2019) (THOMAS, J., concurring in denial of certiorari) (slip op., at 1). Ordinary citizens advertising items for sale may be treated as limited-purpose public figures. *See Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 720–21 (Nev. 2002); *see also Hibdon* v. *Grabowski*, 195 S.W.3d 48, 59, 62 (Tenn. Ct. App. 2005) (holding that an individual was a limited-purpose public figure because he voluntarily advertised his jet ski business on a website). Even filing a defamation claim in court can turn an otherwise private citizen into a limited-purpose public figure. R. at 32 (stating that "[t]he Petitioner further inserted herself into the controversy by filing suit against the Governor for her defamatory statements").

Changes in the nation's media landscape also contribute to the standard's overly broad application because there is no longer a bright line between private and public figures. *Gertz*, 418 U.S. at 364 (Brennan, J., dissenting) (stating that "voluntarily or not, we are all public [figures] to some degree"). In *Gertz*, the Court distinguished between private and limited-purpose public figure plaintiffs. *Id.* at 351–52. However, even if the Court's distinction between limited-purpose public figures and private individuals was valid in 1974, the reasoning no longer applies and can now be used to take advantage of private citizens. At the time *Gertz* was decided, public figures were individuals who often appeared on television, such as government officials, athletes, and entertainers. Benjamin Barron, *A Proposal to Rescue* New York Times v. Sullivan *by Promoting a Responsible Press*, 57 AM. U. L. REV. 73, 89 (2007). Today, the internet has become our public square, allowing any private citizen to publish anything for immediate consumption anywhere in the world. *See* David A. Logan, *Rescuing Our Democracy by Rethinking* New York Times Co. v. Sullivan, 81 OHIO ST. L.J. 759, 760 (2020). Social media platforms provide private citizens with means to express their opinions publicly and communicate with government officials, news providers, and celebrities. *Id.* at 763. There is no longer a bright line between individuals who choose to lead a public life and those who wish to remain private. An innocuous post meant to be viewed by a few friends and family could catapult someone into the middle of a controversy.

Because of the broad definition of limited-purpose public figures and the dramatic changes in the media landscape brought by the internet era, private individuals can become limited-purpose public figures overnight. When deemed limited-purpose public figures, private citizens must meet the burdensome actual malice standard, which has proven to be almost impossible. *Id.* at 778 ("Proving 'actual malice' is so daunting that it amounts to near immunity from liability and thus a license to publish falsehoods. . . . [T]he data show that very few public plaintiffs recover substantial

damages because the 'actual malice' standard is extremely difficult to satisfy, especially on appeal."); *McKee*, 139 S. Ct. at 1 (THOMAS, J., concurring in denial of certiorari) (stating that the plaintiff is subject to the "almost impossible" standard). As a result, the *Sullivan* standard is now a shield against defamation, and plaintiffs' ability to protect their name and reputation from defamatory statements has decreased to the point of extinction.

B. The extension of the Sullivan *standard to limited-purpose public figures shortchanges the value placed on private citizens' reputations and conflicts with core First Amendment principles.*

The facts of *Sullivan* presented the central concern of the First Amendment: the use of government power to stifle speech on matters important to the public. *Sullivan*, 376 U.S. at 269. Sullivan, a government official, sued the New York Times for publishing an advertisement that allegedly libeled Sullivan. *Id.* at 256. The lawsuit was part of a larger strategy to silence criticism from the northern press regarding violent reactions to the demands for equal rights during the Civil Rights Movement. *See* David McGowan, *A Bipartisan Case Against* New York Times v. Sullivan, 1 J. FREE SPEECH L. 509 (2022). Viewing the First Amendment as a shield against these silencing attempts, the Court issued its holding:

> [T]he constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Sullivan, 376 U.S. at 279–80. As the Court saw it, the actual malice standard was critical for the proper functioning of the democratic process and necessary to provide "breathing space" for free and robust debate, which inevitably results in erroneous statements. *Id.* at 272.

In *Gertz*, the Court attempted to strike a balance between the needs of the press and the individual's right to protect their reputation. 418 U.S. at 343 (1974). The Court found that the

actual malice standard accommodates the interest of the reputation of both public officials and public figures. *Id.* at 344–45. First, the Court reasoned that these plaintiffs have greater access to channels of communication to contradict lies or correct errors and minimize adverse impacts on their reputation. *Id.* at 344. Second, the Court found they are less deserving of protection because they assumed the risk by voluntarily entering the spotlight. *Id.* Recognizing the disadvantage private citizens face in remedying their reputations compared to more public individuals, the Court limited the actual malice standard to public officials, public figures, and limited-purpose public figure plaintiffs. *Id.*

In an increasingly globalized and connected world, the reasoning behind *Sullivan* and its various extensions no longer applies. Because of the increasingly vague and expansive limited-purpose public figure classification, there is an increase in private citizens affected by the *Sullivan* standard. As a result, private citizens such as professors, private nursing homes, probation officers, and priests are dumped into the same legal hopper as major officials like members of Congress or the President. *Grossman v. Smart*, 807 F. Supp. 1404 (C.D. Ill. 1992); *Drs. Convalescent Ctr., Inc. v. E. Shore Newspapers, Inc.*, 104 Ill. App. 2d 271 (Ill. App. Ct. 1968); *Britton v. Koep*, 470 N.W.2d 518 (Minn. 1991).

One example of this is *McKee v. Cosby*, 139 S. Ct. 675 (2019). In *McKee*, the court found that, by disclosing her sexual assault allegations to a reporter, the plaintiff thrust herself to the forefront of public controversy and, thus, was a limited-purpose public figure. *Id.* The court ultimately dismissed the defamation claim because the plaintiff could not satisfy the "almost impossible" actual malice standard. *Id.* at 2 (THOMAS, J., concurring in denial of certiorari). Applying *Sullivan*, and its progeny, the court constrained a victim of sexual assault by the same rule that constrains major public officials. Under *Sullivan*'s reasoning, the sacrifice of public

officials is accepted because of the importance of the ability to comment on and criticize public officials, their conduct, and their qualifications. *Sullivan*, 376 U.S. at 272. But does the First Amendment require a victim of sexual assault to accept the same sacrifice? The answer is no.

As then-professor Elena Kagan explained, even when viewed broadly, "*Sullivan* relied upon two essential predicates: a certain kind of speech and a certain kind of power relationship between the speaker and the speech's target." Elena Kagan, *A Libel Story:* Sullivan *Then and Now*, 18 LAW & SOC. INQUIRY 197, 209 (1993). In *Sullivan*, the New York Times had little circulation and no influence in the relevant community, while the target of its criticism had great power derived from a government position. *Id.* These facts do not resemble *McKee*, nor do they resemble any other case involving a limited-purpose public figure. The idea that the plaintiff in *McKee* should overcome the hurdle of the actual malice standard because she shared the story of her assault bears no relationship to *Sullivan*'s original purpose to check on abuse of power and ensure the proper functioning of the democratic process.

This standard shortchanges the value placed on private citizens' reputations. "The obvious dark side of the *Sullivan* standard is that it allows grievous reputational injury to occur without monetary compensation or any other effective remedy." *Id.* at 205. The Court attempted to justify these added costs in *Gertz*, but neither the plaintiff in *McKee* nor any other limited-purpose public figure plaintiff enjoys the offsetting privileges on which *Gertz* relied. Limited-purpose public figure plaintiffs cannot issue counter-speech that can reach the same audience as major media outlets or high-profile officials. Moreover, limited-purpose public figure plaintiffs do not assume the same risk of defamation as major public officials and celebrities. However, the actual malice standard treats them all in the same manner. Justice White highlighted this disconnect in his dissent in *Gertz*:

> In a democratic society such as ours, the citizen has the privilege of criticizing his government and its officials. But neither *New York Times* nor its progeny suggests that the First Amendment intended in all circumstances to deprive the private citizen of his historic recourse to redress published falsehoods damaging to reputation or that, contrary to history and precedent, the Amendment should now be so interpreted.

Gertz, 418 U.S. at 387 (White, J., dissenting).

Equally troubling is that the standard seems to conflict with key principles the First Amendment was understood to safeguard. The Court's formulation of a limited-purpose public figure imposes an added cost to a person who "voluntarily injects himself or is drawn into a particular public controversy." *Id.* at 351. By contrast, those who avoid participation in public life or limit participation in public commentary avoid the actual malice burden. *See* Kagan, *supra*, at 210. The Fifteenth Circuit declared Mrs. Richter a limited-purpose public figure because she exercised her right to engage in public commentary. Mrs. Richter would not face this burden had she not participated in the marketplace of ideas that the First Amendment protects. Thus, rather than safeguard the foundational principles of the First Amendment, the actual malice standard discourages the very participation that the First Amendment guarantees.

This Court can rectify *Sullivan*'s unintended consequences by declaring the actual malice standard, as it applies to limited-purpose public figures, unconstitutional. "This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)." *Fed. Election Comm'n v. Wis. Right to Life, Inc.,* 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in judgment) (internal quotation marks omitted). Because limited-purpose public figures are no better at mitigating reputational harm than any other ordinary citizens, the ordinary negligence standard will better balance plaintiffs' interest in protecting their reputation. By applying the negligence standard to limited-purpose public figure

defamation plaintiffs, this Court would eliminate the heavy burden *Sullivan* imposes on private citizens and rectify the distortion of the First Amendment.

II. The lower court erred in finding that the Physical Autonomy of Minors Act ("PAMA") was neutral and generally applicable because it was targeted specifically toward Kingdom Church.

Looking at the circumstances surrounding PAMA's enactment, it is clear it was specifically designed to prohibit Kingdom Church members' ability to engage in their sacred blood-banking practice. Under *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990), a neutral and generally applicable law does not violate the Free Exercise Clause, regardless of its impact. 494 U.S. at 878. However, a law that facially satisfies this standard may still be declared unconstitutional if the motivations underlying the law are targeted and discriminatory. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). Courts must look into the intent and motivation behind the law's enactment. *See id.* Had the lower court properly looked into the events surrounding PAMA's enactment and the motivations and actions of Governor Girardeau, it would have plainly seen that PAMA specifically targets the Church.

A. PAMA substantially burdens Kingdom Church members' right to the free exercise of religion.

Emmanuella Richter and the Kingdom Church established themselves in Delmont after escaping religious persecution in 2000. Richter Aff. ¶ 13. For nearly 20 years, the Kingdom Church has engaged in its blood-banking practices without government interference. *See* R. at 23. Throughout those two decades, the Kingdom Church enjoyed a good reputation in Delmont until the *Gazette*'s article instigated public outcry about the involvement of 15-year-old Kingdom Church members in the Church's blood-banking practice in 2020, and PAMA was passed shortly after. R. at 24.

The present case is similar to *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). In *Gobitis*, the Court upheld a law punishing Jehovah's Witness schoolchildren for not reciting the Pledge of Allegiance because it was general in scope, "not directed against doctrinal loyalties of particular sects," and national unity constituted a compelling governmental interest. *Gobitis*, 310 U.S. at 594. Like the law in *Gobitis*, PAMA appears general in scope and is not specifically directed toward a particular religious group. However, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) overruled *Gobitis* just three years later. *See* 319 U.S. at 643 (noting that two justices from the *Gobitis* majority now advocate for its overruling). The *Barnette* Court held that although the law was general, the conduct compelled by the law impermissibly prohibited the petitioner's free exercise. *See id.* at 642. Although PAMA appears to be facially neutral, it still impermissibly prohibits Kingdom Church members' free exercise by prohibiting a core tenant of their religion. Like *Barnette*, the Court should measure PAMA against strict scrutiny.

B. The public outcry against the Church's practices was the motivation for PAMA.

Although PAMA was not enacted until after the *Gazette*'s story stirred public outcry, the lower court stated that "natural factors may have just as significantly provided the impetus for [PAMA], including the rising rate of child abuse." R. at 18. However, the court failed to inquire into the motives of the Delmont General Assembly. A closer inquiry reveals that PAMA was enacted in direct response to the public outcry and designed to specifically target the Church.

Laws permitting the government to discriminate out of animus toward particular religions are plainly unconstitutional under the Free Exercise Clause. Though the lower court contended that "natural factors" may have been the impetus for PAMA, dual or mixed motivations cannot save laws influenced by religious animus. *See Wisconsin v. Yoder*, 406 U.S. 205, 219–20 (1972). The Court held that "[a] regulation neutral on its face may, in its application, nonetheless offend

the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Id. See Smith*, 494 U.S. at 894 (O'Connor, J. concurring) (stating "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such").

It was not until after the public outcry that PAMA was enacted. Before 2021, Delmont law prohibited minors under 16 years old from consenting to blood, organ, or tissue donations except for autologous donations and medical emergencies for blood relatives. R. at 24. For 20 years, the Kingdom Church abided by this law and ARC guidelines with no government interference or public scrutiny—until the *Gazette*'s story. Importantly, PAMA differed from Delmont's previous law in only one meaningful way—it removed the exceptions in prior Delmont law, which Kingdom Church members relied on to engage in their blood-banking practice for two decades. R. at 25.

Like *Gobitis* and *Barnette*, this law appears facially neutral; however, the removal of these exceptions directly targets the Kingdom Church. PAMA specifies that only minors under 16 are unable to donate blood. R at 24. It is no coincidence that the minimum age to become a member of the Kingdom Church and donate blood is 15 years old. Moreover, the fact that the Kingdom Church engaged in this practice for 20 years without issue and only after the *Gazette*'s story sparked public backlash was PAMA passed demonstrates that the law specifically targets the Kingdom Church.

The lower court erred in finding that the connection between the Church and the enactment of PAMA was "tenuous at best." R at 18. In its decision, the court pointed to no legislative history or other evidence that showed the General Assembly enacted PAMA to curb child abuse rather than in response to public outrage. Nor did the court or Delmont present any findings that Delmont children who choose to donate autologously or for the medical emergencies of their families are victims of abuse. Thus, PAMA plainly targets the Kingdom Church and must face strict scrutiny.

C. Governor Girardeau's crusade against the Kingdom Church is part of a calculated political agenda to further her reelection and is further evidence of PAMA's lack of neutrality and general applicability.

As Governor for the State of Delmont at the time of PAMA's enactment, the Court must also look to the motives of Constance Girardeau. In evaluating a legislature's objective, "[r]elevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Lukumi*, 508 U.S. at 540 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267–68 (1977)). *See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018).

At the same time Governor Girardeau was informed of the Delmont General Assembly's consideration of PAMA, she also received a briefing on the *Gazette*'s article. Girardeau Aff. ¶ 3. Governor Girardeau claims that her endorsement of PAMA comes solely from a report noting that, nationally, there was a sharp uptick in child victims of abuse and neglect between 2016 and 2020. Girardeau Aff. ¶ 4. However, no evidence connects the spiked reports of child abuse and neglect to individuals under 16, in Delmont or otherwise, who choose to donate autologously or for the medical emergencies of their families are victims of abuse. This justification for PAMA is a thinly veiled attempt to unjustly pass a discriminatory law as public health and safety legislation.

Governor Girardeau weaponized the enactment of PAMA and the media attention garnered from the article to further her own political agenda. Since PAMA's enactment, Governor Girardeau has taken every media opportunity to further ostracize the Kingdom Church and garner support for her reelection campaign. Despite being a religious scholar with decades of intense doctrinal study, Governor Girardeau reduced Mrs. Richter to an exploitative "vampire," describing the church that

Mrs. Richter spent decades building as a "cult" that "preys on children," without providing any evidence indicating such. R. at 26–27. Moreover, Governor Girardeau announced at a major fundraiser, seemingly unrelated to her campaign and filled with press, that she commissioned a task force specifically to investigate the Church and its members. R at 26. With each press event where the Governor demonized the Kingdom Church, her polling numbers went up. R at 26. This is further evidence that the impetus for PAMA enactment, and Governor Girardeau's continued endorsement, was the public outcry generated by the *Gazette*'s article.

III. The Court should overrule *Smith* and return to *Sherbert* because *Smith* is an impermissible departure from precedent and an unworkable standard for courts.

Regardless of satisfying *Smith*'s rational-basis test, the present case is an ideal vehicle to overrule *Smith* and reinstate *Sherbert v. Verner*, 374 U.S. 398 (1963), which required courts to examine free exercise violations under strict scrutiny, regardless of the law's alleged neutrality or general applicability. Not only is *Smith* a radical departure from existing free exercise precedent, but it has also proven to be an unworkable standard that courts are refusing to apply and states are actively trying to thwart. Therefore, the Court should overrule *Smith* in favor of a standard that allows courts to effectively review free exercise violations.

A. Smith *is a departure from nearly 30 years of precedent.*

Smith broke with a settled line of free exercise jurisprudence that held that the Free Exercise Clause provided heightened protection for religiously motivated conduct—even against neutral laws of general applicability. *Sherbert v. Verner*, 374 U.S. 398 (1963) marked the Court's first application of what became known as the "*Sherbert* test." The *Sherbert* test requires a plaintiff seeking a religious exemption from a statute to show: (1) that they hold a sincere religious belief and (2) a law prohibits them from exercising their belief. *See United States v. Seeger*, 380 U.S.

163, 165 (1965). If these two elements are satisfied, the burden shifts to the government to prove that the allegedly infringing law: (1) acts in furtherance of a "compelling state interest," (2) is narrowly tailored to achieve the state's interest, and (3) is the least restrictive means of achieving the state's interest. *Sherbert*, 374 U.S. at 403. If the government succeeds in proving these elements, the plaintiff is subjected to the law regardless of their religious exercises. If the government fails to meet its burden, the plaintiff is granted an exemption from the infringing law. In upholding *Sherbert*, the Court recognized that practitioners of non-mainstream faiths, like the Kingdom Church, lack the power to inform or affect the legislature to secure the protection of their religious liberty.

Generally, courts apply strict scrutiny to laws that facially infringe on "fundamental constitutional rights" or prejudice the suspect classifications of race and national origin. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938). If the infringed right is fundamental, strict scrutiny is applied. Erwin Chemerinsky, *Constitutional Law* 946–47 (3d. ed. 2009). Because religious liberty is a fundamental right, this is how the Court decided *Sherbert*. *See* U.S. CONST. amend I; *see also Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940). The Supreme Court strictly applied the *Sherbert* test from its inception until 1990. *See Smith*, 494 U.S. at 894.

Smith marks the Court's abandonment of the *Sherbert* test as it pertains to neutral laws of general applicability that conflict with an individual's religious belief—relegating one of our nation's bedrock principles to the barest level of minimal scrutiny. *See id.* at 872. The *Smith* Court did not explicitly overrule the *Sherbert* test. Rather, the Court needlessly limited *Sherbert*'s use to cases where (1) the law intended to restrict religious practices on its face, (2) the law afforded individualized or categorical secular exemptions from its general requirements, or (3) a "hybrid situation," where more than simply free exercise rights were at stake, is present. *Id.* at 880–85.

Now, where free exercise rights alone are at stake, the *Smith* Court replaced the *Sherbert* test with a new rule upholding neutral and generally applicable laws even when they substantially burden a particular religious practice without regard to the justification for such burdens. *Id.* at 878, 882, 885.

B. Smith *is an unworkable outlier.*

In most cases, *Smith* has been found inapplicable, and in cases where *Smith* has applied, the law was found not neutral. *Smith* does not provide a precedent that effectively assists courts in free-exercise cases. As a result, since *Smith*'s inception, courts have gone to great lengths to avoid using *Smith*'s rational basis standard and, therefore, should be overruled in favor of a standard that courts are willing to apply. *See* R. 36.

This pattern of aversion began just three years after *Smith* in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* when the Court invalidated four Florida ordinances that prohibited the ritual sacrifice of animals on free exercise grounds. 508 U.S. at 521. Though facially neutral, looking at the record, the Court found that the ordinances were not neutral. *Id.* at 534. Moreover, because the ordinances granted exceptions for slaughterhouses and did not require the inspection of fish or game caught by hunters, the control of food disposed of by restaurants, or prohibit the killing of animals for nonreligious reasons, the Court found the ordinances were not generally applicable. *Id.* at 545–46. As a result, the Court found *Smith* was inapplicable.

The Court also declined to use *Smith* in *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018). Here, a bakery owner refused to custom design a cake for a same-sex wedding on religious grounds. 138 S. Ct. at 1723. The denied couple filed a charge with the Colorado Civil Rights Commission pursuant to the Colorado Anti-Discrimination Act ("CADA"), which prohibited discrimination based on sexual orientation in a place of business engaged in any

sales to the public and any place offering services to the public. *Id.* at 1725. Although CADA was facially neutral, the Court upheld the right of the owner to refuse to custom design a cake for a same-sex wedding on religious grounds because it found the Commission acted in a biased manner. *Id.* at 1729–30 (citing specific comments made by members of the Commission during their review of the case and that three other bakers had not violated CADA when refusing to make cakes that displayed specific messages opposing same-sex marriage). Here, the Court held that the Free Exercise Clause barred even subtle departures from neutrality on matters of religion. *Id.* at 1731.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), the Court held that the Missouri Department of Natural Resources violated the Free Exercise Clause when it found a church was ineligible under MO. CONST. art. I, § 7 to participate in a program offering reimbursement grants to qualifying nonprofit organizations. 137 S. Ct. at 2017. The Department's policy discriminated against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious status—a free exercise violation. *Id.* at 2019. The Court found that *Smith* was inapplicable here because it discriminated based on religious status and that this type of discrimination must "withstand the strictest scrutiny." *Id.* at 2022.

In *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020), the Court invalidated a state revenue department regulation prohibiting families from using its scholarships at religious schools, based on Montana Constitution's no-aid provision, MONT. CONST. art. X, § 6 on free exercise grounds. 140 S. Ct. at 2257. Here, the Court found *Smith* inapplicable because Montana's no-aid provision discriminated based on religious status, and strict scrutiny must apply. *Id. See* MONT. CONST. art. X. § 6 (stating that no "appropriation or payment from any public fund" may be given for any sectarian purpose or to aid churches).

In *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the Court granted an application for a preliminary injunction against a California regulation that had the effect of restricting at-home Bible studies and prayer meetings by limiting all gatherings in private homes to no more than three households at a time. 141 S. Ct. at 1298. In its grant, the Court made four points. First, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id*. at 1297. Second, "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* Third, the government must establish that its restrictions on gatherings satisfy strict scrutiny. *Id.* at 1298. The Court concluded that the withdrawal or modification of a restriction during the course of litigation does not moot the case if plaintiffs remain under a constant threat that the government will reinstate the restriction. *Id.* While this case has yet to be decided on its merits, it is clear that the Court does not find *Smith* applicable. In addition to these examples, 12 state supreme courts have rejected *Smith* and adopted a greater standard of scrutiny for free-exercise claims. *RFRA: Myth vs. Reality*, BECKET, http://bit.ly/3WegtRc (last visited Jan. 13, 2023). Of the 12, eight states have adopted a strict scrutiny standard, further demonstrating the widespread aversion to *Smith*'s rational basis standard and acceptance of the *Sherbert* test. *Id.*

C. Congress and the states have repeatedly tried and failed to constrain Smith.

For over 30 years, states, courts, and the federal government have attempted to soften *Smith*'s harsh consequences. "On two separate occasions, Congress, with virtual unanimity, expressed the view that *Smith*'s interpretation is contrary to our society's deep-rooted commitment to religious liberty. In enacting the Religious Freedom Restoration Act [("RFRA")] of 1993 and the Religious Land Use and Institutionalized Persons Act of 2000**."** *Fulton v. City of Philadelphia,*

Pennsylvania, 141 S. Ct. 1868, 1889 (2021) (ALITO, concurring joined by THOMAS and GORSUCH, JJ. concurring) (citations omitted). *But see City of Boerne v. Flores*, 521 U.S. 507, 507 (1997) (holding that RFRA is unenforceable on the states). Twenty-three states have since passed laws similar to the federal RFRA to restore their citizens' free exercise rights. BECKET, *supra*.

These efforts have failed to fully restore the free exercise protection that existed under *Sherbert*, and as a result, deepens inequality. This judicial whiplash is a striking example of how *Smith* has led to a free exercise rights patchwork across the country. An individual's religious liberty should not be dependent on their zip code. The Court must restore balance to the People by overruling *Smith* so that *Sherbert* is controlling for laws incidentally burdening free exercise.

IV. The *Sherbert* test is supported by history and text.

As sources of ideas for the federal Bill of Rights, early state constitutions provide further evidence of the Framers' intent and, thus, the meaning of the First Amendment. These state constitutions provide direct evidence of the original understanding of the Free Exercise Clause because one can reasonably infer that those who drafted and adopted the First Amendment assumed the term "free exercise of religion" meant what it had meant in their states. McConnell, *Origins*, *supra*, at 1445; *cf. District of Columbia v. Heller*, 554 U.S. 570, 600–03 (2008) (interpreting the Second Amendment in light of analogous rights in state constitutions and rejecting interpretation "treat[ing] the Federal Second Amendment as an odd outlier").

By 1789, every state bar one had a constitutional provision protecting religious exercise. McConnell, *Origins*, *supra*, at 1445. "[A]lmost all of the[se provisions] had a common structure: a broad guarantee of free exercise or liberty of conscience, coupled with a caveat or proviso limiting the scope of the freedom when it conflicts with laws protecting the peace and safety, and sometimes other interests, of the state." Michael W. McConnell, *Freedom from Persecution or*

Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores, 39 WM. & MARY L. REV. 819, 830 (1998). For example, the Georgia Constitution of 1777 provided that "[a]ll persons whatever shall have the free exercise of their religion; *provided it be not repugnant to the peace and safety of the State*." GA. CONST. of 1777, art. LVI, *reprinted in* I FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 337, 338 (B. Poore 2d ed. 1878) (emphasis added).

These state free exercise clauses included exceptions for conduct threatening "peace and safety." Such language is seemingly an early equivalent of the "compelling interest" test utilized in *Sherbert*. Moreover, these state provisions expressly protect one's religious conduct. In creating a peace and safety exception, it follows that such exceptions would be unnecessary if the clauses were not understood to protect conduct. These state provisions were likely the model for the federal free exercise guarantee, and their acknowledgment of peace and safety exemptions constitutes strong evidence that the Framers intended for the First Amendment to enjoy a similar interpretation. This belief was shared by James Madison, the architect of the First Amendment, and reflects the original intent of the Free Exercise Clause. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 1785), https://bit.ly/3Qw93aG. Thus, a historical analysis further demonstrates that the Free Exercise Clause was intended to provide heightened protection against laws prohibiting free exercise—regardless of their alleged neutrality or general applicability—and the Court should return to *Sherbert* to realign itself with the original intent of the U.S. Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the Fifteenth Circuit should be reversed.

Respectfully submitted,

Team 17

Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

Team 17 affirms the following:

1. The work product contained in all copies of the team's brief is in fact the work product of the team members;

2. The team has complied fully with its law school's governing honor code; and

3. The team has complied fully with all Competition Rules.

/s/
Team 17