No. 22-CV-7654

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 PETITIONER

Counsel for Petitioner

Team 021

QUESTIONS PRESENTED

1. Whether the extension of the *New York Times v. Sullivan* standard to limited-purpose public figures is constitutional.

2. Whether the United States Court of Appeals for the Fifteenth Circuit erred in concluding that the Physical Autonomy of Minors Act is neutral and generally applicable, and if so, should *Emp. Div., Dep't of Hum. Res. v. Smith* be overruled.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner Richter appeals the Fifteenth Circuit's holding that Petitioner is not a private individual when determining requisite intent for defamation under the First Amendment of the United States Constitution, and that Delmont's Physical Autonomy of Minors Act does not violate the freedom of religious expression under the First Amendment of the United States Constitution. These constitutional and statutory provisions are reproduced in the Appendix. App. at A.1.

JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit issued a final judgement and this Court granted a writ of certiorari upon the petition of Emmanuella Richter. The Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Petitioner, Emmanuella Richter is the founder and leader of the Church of the Kingdom (commonly known as Kingdom Church). R. at 3. Kingdom Church was established in 1990 in the South American country of Pangea. *Id*. Shortly after a military coup toppled the democratically elected government of Pangea in 2000, Kingdom Church became a target of governmental repression. *Id*. Petitioner, her husband, and a large contingent of the church congregation received asylum in the United States on religious persecution grounds. *Id*.

Since immigrating, Petitioner and her husband have become U.S. citizens and settled with their congregation in Beach Glass, Delmont. *Id*. Kingdom Church has grown over the past several decades, expanding beyond the city limits of Beach Glass into the southern portions of

the state. R. at 3-4. Kingdom Church members live in designated compounds, providing for their own needs through agriculture and the commercial sale of their tea – marketed as "Kingdom Tea" – which Plaintiff's husband continues to oversee. The church compounds have good reputations in their respective communities. R. at 4.

The Petitioner is not involved in the tea business as she dedicates herself solely to church matters. *Id*. She does most of her work inside the compound, primarily organizing church seminars that provide information about the church's beliefs, history, and lifestyle. *Id*. The seminars are open to the public and are conducted by a panel of church elders. *Id*. The church also conducts door-to-door proselytization. *Id*. Petitioner does not engage in either of these public activities. *Id*.

To join Kingdom Church, individuals undertake a course of doctrinal study and undergo a private confirmation ritual. *Id*. The process is open to those who have obtained "the state of reason" – fifteen years of age. *Id*. Once an individual has been confirmed, they must marry within the faith and raise their children within the Kingdom Church belief system. *Id*.

Kingdom Church children are homeschooled, and their curriculum includes monthly "service projects." *Id*. These educational projects include organic gardening, grounds cleaning, collecting for local food banks and clothes closets, and blood donations. R. at 5. These projects are intended to instill a "servant's spirit," which is one of their educational curriculum's objectives. *Id*.

In 2020, the local newspaper ran a story about Kingdom Church and its immensely popular Kingdom Tea. *Id*. The article also provided details on one of the central tenets of the Kingdom Church faith: blood banking. *Id*. Church members, once confirmed, may not accept blood from or, donate blood to, a non-member. *Id*. Confirmed members are required to bank their blood at local blood banks in case of medical emergencies in accordance with the American

Red Cross guidelines. *Id*. Additionally, the donations were fully compliant with Delmont law, which prohibits minors under the age of sixteen from consenting to blood, or any other body part, donation, except for emergency circumstances.

The newspaper article focused on the involvement of minors, the authenticity of their consent, and concerns that minors were being procured for blood-banking purposes by church officials. *Id*. The article raised a public outcry regarding the ethics of requiring minors to donate blood. R. at 5-6. Following the public outcry over the ethics of the Kingdom Church's blood banking practices, the Delmont General Assembly enacted a state statute in 2021, the "Physical Autonomy of Minors Act" (PAMA) forbidding the procurement, donation, or harvesting of the bodily organs, fluids, or tissue, of an individual under the age of sixteen. R. at 6 The Respondent, Governor Constance Girardeau, strongly advocated for this legislation and signed it into law. *Id*.

On January 17, 2022, a Kingdom Tea van was involved in a multi-car crash on a bay outside the city of Beach Glass. *Id*. Dozens died, including ten church members. *Id*. Henry Romero, the sole church member to survive, was admitted to the hospital in critical condition. *Id*. Doctors determined Romero needed lifesaving surgery, and a call went out to the Kingdom Church compounds to identify a donor with a matching blood type. *Id*. Fifteen-year-old Adam Suarez, Romero's cousin and a recently confirmed Kingdom Church member, was identified as a match for Romero. *Id*. Adam's blood donation to Romero would have been legally permissible prior to PAMA's enactment, as it was made to a relative during a medical emergency. *Id*. However, PAMA does not allow these less restrictive exceptions. *Id*.

Adam, accompanied by his parents, donated blood for Romero's emergency medical procedure. *Id*. While donating, Adam's blood pressure became elevated and he went into acute shock. *Id*. Adam was transferred to the intensive care unit and was advised to not donate blood.

R. at 6-7. News of Adam's story became part of on-going media reporting, with church members, including the Petitioner and her husband, being interviewed as they visited the hospital to see Adam. *Id*. During these interviews, Petitioner explained that blood banking is a central tenet of the Church's faith, and is a reasonable means of protecting the health and welfare of its members. R. at 43.

Five days later, during a campaign fundraiser on January 22, 2022, Respondent discussed her concerns regarding the mental, emotional, and physical well-being of Delmont's children. R. at 7. Respondent cited federal statistics that showed a marked spike in child abuse and neglect between 2016 and 2020. *Id*. The statistics also showed more than a quarter of children who died by suicide experienced child abuse or neglect, with children of immigrants suffering especially high rates of such harm. *Id*.

When asked about the recent tragedy involving the death of ten Kingdom Church members, the Respondent stated she commissioned a government task force to investigate the Kingdom Church's blood-bank requirements for children. *Id*. She explained the task force would help her determine whether PAMA, or any other law, was implicated in what she called "the exploitation of the Kingdom Church's children." *Id*. According to polling and focus group results, Respondent's statements garnered great support among her constituents, and her campaign included it in fundraising efforts. *Id*. However, in her affidavit dated July 27, 2022, Respondent stated that "nothing with respect to the Kingdom Church, the Kingdom Tea van crash, or Adam Suarez's blood donation served as the impetus for her support of PAMA. R. at 40.

On January 25, 2022, Petitioner requested injunctive relief from the District Court seeking to stop Respondent's task force from conducting its investigation, claiming that the state's action constituted a violation of the First Amendment's Free Exercise Clause. R. at 7-8.

On January 27, 2022, at a large press event following a campaign rally, Respondent was asked about Petitioner's request for injunctive relief. *Id*. Specifically, reporters wanted a response to the Petitioner's claims that Respondent was persecuting the church for its religious beliefs. *Id*. Respondent replied "I'm not surprised at anything Emmanuella Richter does or says. What do you expect from a vampire who founded a cult that preys on its own children?" *Id*. On January 28, 2022, Petitioner amended her complaint to include an action for defamation. *Id*.

SUMMARY OF THE ARGUMENT

The first issue before the Court is whether the extension of the *New York Times* actual malice standard to limited-purpose public figures is unconstitutional. *New York Times* has been expanded twice since its release, first in *Curtis Publishing* where the Court held public figures must show actual malice to recover, and again in *Gertz* when the Court created two sub-categories of public figures, both of which must show actual malice to recover. However, the expansions were unable to take into consideration the explosion of social media and other internet media outlets. The definition has not been adjusted to reflect the evolution of modern technology, and has led to the limitation of a private individual's right to recovery. Thus, the *New York Times* extension to limited-purpose public figures is unconstitutional.

The second question before the Court is a two-part inquiry. First, the Court must decide whether the Fifteenth Circuit erred in holding PAMA as neutral and generally applicable. Second, the Court must decide whether the ruling of *Emp. Div., Dep't of Hum. Res. v. Smith* should be overruled.

The Circuit Court erred in finding PAMA neutral since it is clear that the statute was enacted with hostile intent toward the Petitioner's religious blood banking practices. PAMA is not generally applicable because it has been selectively enforced only against Kingdom Church. In the alternative, if the Court finds PAMA is neutral and generally applicable, Petitioner's case

represents a hybrid scenario under Smith because the Fourteenth Amendment's right of a parent to direct their child's education is restricted. Regardless, a strict scrutiny analysis is required. PAMA fails strict scrutiny because it does not provide the requisite evidentiary support for a compelling state interest as demanded by the First Amendment and is not narrowly tailored since it is broadly restricts an entire class of individuals from donating blood with no room for exceptions.

Finally, *Smith* should be overruled because it lacks constitutional support and is applied inconsistently. The creation of the "hybrid" exception must be overturned as First Amendment protections should not require a secondary constitutional violation in order to be viewed under strict scrutiny. As a result, *Smith* fails to preserve the Free Exercise Clause and must be overturned.

ARGUMENT

I. The extension of the *New York Times Co. v. Sullivan* standard to limited-purpose public figures is unconstitutional.

The first issue for the Court to decide is whether the extension of the *New York Times* standard to limited-purpose public figures is constitutional. For reasons we expand upon below, this extension is unconstitutional.

A. Libel law and the expansion of the *New York Times* standard.

Delmont's libel standard is identical to that of Virginia's. To succeed on a claim of defamation, a plaintiff must show that the defendant (1) published (2) an "actionable" statement with (3) the requisite intent. *Jordan v. Kollman*, 612 S.E.2d 203, 206 (Va. 2005) (internal citation omitted). A statement is only actionable if it is "both false and defamatory." *Id*. (internal citation omitted). To determine the applicable requisite intent, the Petitioner must be classified as either a public official, public figure, or private individual. *See Time, Inc. v.*

Firestone, 424 U.S. 448, 455 (1976) (courts must characterize the injured party for "determining constitutional protection"). The only dispute before the lower courts was the appropriate characterization of the Petitioner. R. at 28.

Following the ratification of the Fourteenth Amendment, but prior to *New York Times*, the libel standard for public officials, public figures, and private individuals was nonexistent. Rather, a defamed individual only needed to prove there was "a false written publication that subjected him to hatred, contempt or ridicule." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 765 (1985) (White, J., concurring in judgment) (citing RESTATEMENT OF TORTS §569, Comment b).

Society's viewpoints evolved in the middle of the 20th century when the Civil Rights Movement gained momentum. In order "[t]o avoid placing such a handicap upon the freedoms of expression" the Court created a new, harsher standard for public officials claiming defamation. *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964). A public official can only prevail on a defamation claim if they can show the defamatory statements were published with "actual malice." *Id.* at 280. The Court justified the implementation of a new standard as they feared no citizen could "safely utter anything but faint praise about the government or its officials." *Id*. at 269-270. Although these noble intentions inspired the creation of the actual malice standard, the unconstitutional extension of the standard has effectively led to the demise of the private individual's route to recovery under the First Amendment.

1. The extension of *New York Times* standard to 'public-figures' provided the foundation for the standard's subsequent unconstitutional overreach.

The actual malice standard was soon extended to those that could be classified as a "public figure." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967). Public figures are individuals who "are nevertheless intimately involved in the resolution of important public

questions or, by reason of their fame, shape events in areas of concern to society at large." *Id*. at 164 (Warren, C.J., concurring in result). Instead of leaving the public figure determination to state legislators, the Court sought to identify the circumstances that would allow the public figure standard to be applied under ordinary tort rules. *Id.* at 154.

In *Curtis*, the Court found both petitioners had thrust themselves into the "vortex of an important public controversy" through their public stature and purposeful activities. *Id.* at 155. Moreover, the petitioners had sufficient resources to defend themselves from the fallacies of the defamatory statements. *Id.* Finding that public figures share many of the same characteristics of public officials, the Court believed "libel actions… cannot be left entirely to state libel laws…but that the rigorous federal requirements of *New York Times*" must be applied. *Id*. Thus, the Court extended the actual malice standard to individuals who are public figures. *Id*.

The Court's holding in *Curtis* ultimately served as the basis for further extension of *New York Times* despite Justice Harlan's assurance that "[n]othing in this opinion is meant to affect the holdings in *New York Times* and its progeny." *Id*.

2. The extension of *New York Times* standard to limited-purpose public figures is unconstitutionally broad and inconsistently applied.

Seven years after *Curtis*, the *Gertz* Court created two characterizations of public figures; all-purpose and limited-purpose public figures. *See Gertz v. Robert Welch*, 418 U.S. 323, 351 (1974). A person that "achieve[s] … pervasive fame or notoriety" is classified as an all-purpose public figure. *Id*. All-purpose public figures generally consist of celebrities. An individual that "voluntarily injects himself or is *drawn into* a particular public controversy" is classified as a limited-purpose public figure. *Id*. (emphasis added). However, the Court noted that "it may be possible for someone to become a public figure through no purposeful action of his own, but the

instances of truly involuntary public figures must be exceedingly rare." *Id*. at 345. Regardless of whether an individual is classified as an all-purpose or limited-purpose public figure, they must show the statement was published with actual malice.

The *Gertz* Court neglected to provide specific characteristics that define a limited-purpose public figure. Even though the petitioner in *Gertz* was "active in the community and professional affairs," "served as an officer of local civic groups and various professional organizations," and "published several books and articles on legal subjects," he was not deemed an all-purpose, or even a limited-purpose, public figure. *Gertz*, 418 U.S. at 351. There have been a number of cases where individuals were labeled a limited-purpose public figure based on much less. *See James v. Gannet Co.*, 353 N.E.2d 834, 840 (N.Y. 1976) (finding a professional belly dancer was a limited-purpose public figure due to her "welcom[ing] publicity regarding her performances"); *Mzamane v. Winfrey*, 693 F.Supp.2d 442, 505 (2010) (holding plaintiff was a limited-purpose public figure since her "status as headmistress invited public comment about her performance in executing her responsibilities"); *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 737 (1985) (finding plaintiff an "involuntary, limited-purpose public figure" due to his role as an air traffic controller in a major public aviation accident").

Gertz's expansion of *New York Times* to public figures was not universally supported. Chief Justice Burger "prefer[ed] to allow this area of law to continue to evolve…rather than embark on a new doctrinal theory which has no jurisprudential ancestry." *Gertz*, 418 U.S. at 355 (Burger, C.J., dissenting opinion) (emphasis added). Justice Douglas viewed the expansion as a "continued erosion of First Amendment protection" given that the rights of free press and speech "were protected by the Framers in verbiage whose prescription seems clear." *Id*. at 360, 356 (Douglass, J., dissenting opinion).

Lower courts are also struggling with the extension. With no contours of the elusive limited-purpose public figure, analyses have been less than consistent. In *Firestone*, the Supreme Court of Florida affirmed a District Court of Appeal's ruling, finding the ex-wife of a prominent man was a public figure. *Time, Inc. v. Firestone*, 305 So.2d 172, 178 (1974). Respondent Firestone appealed to the Supreme Court, which held she was "not a public figure." *Firestone*, 424 U.S. at 455. The respondent "did not assume any role of especial prominence in the affairs of society…and she did not thrust herself to the forefront of any particular public controversy." *Id*. at 453. The Court reasoned that an individual resorting "to the judicial process…is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court." *Id*. at 454 (citing *Boddie v. Connecticut*, 401 U.S. 371, 376-377 (1971)). Clearly, filing a civil action should not make an individual a limited-purpose public figure.

This disconnect occurred again at the district court level when a plaintiff was found to be a limited-purpose public figure since his "contempt conviction for failure to appear before a grand jury investigating espionage invites press and public [attention]." *Wolston v. Reader's Digest Ass'n, Inc.*, 429 F.Supp.167, 176 (1977). However, when reviewed by the Supreme Court, it was again concluded that the plaintiff "was [not] a public figure." *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 161 (1979). The Court reasoned that the plaintiff "was dragged unwillingly into the controversy" and the fact that he "voluntarily chose not to appear before the grand jury…is not decisive on the question of public-figure status." *Id*. at 166-167. While failing to appear before a grand jury, and subsequent conviction for contempt, may be "newsworthy…the simple fact that these events attracted media attention" was not enough to conclude the plaintiff was a public figure. *Id*. at 167. Libel defendants "must show more than

mere newsworthiness to justify application of the demanding burden of *New York Times*." *Id*. at 167-168.

B. The extension of the *New York Times* standard to limited-purpose public figures unconstitutionally limits a private individual's right to recover damages.

Courts have justified requiring limited-purpose public figures to show actual malice based on the presumption that these individuals have greater access to media, thereby assuming some measure of risk when entering a public controversy. This may have been an appropriate conclusion for the Court to reach in the pre-social media era. However, media dissemination has grown at a rapid pace, and its influence is now substantially greater.

Under *Gertz*, an individual can be deemed a limited-purpose public figure even if they have not voluntarily thrust themselves into public controversy, but were drawn into the controversy. *See Gertz*, 418 U.S. at 345 (stating "it may be possible for someone to become a public figure through no purposeful action of his own"). This standard has only broadened due to technological advancements, increasing the burden on injured parties attempting to pursue a remedy in the modern age.

Today, "private citizens can become 'public figures' on social media overnight" and they can be "deemed famous because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most." *Berisha v. Lawson*, 141 S. Ct. 2424, 2429 (Mem.) (2021) (Gorsuch, J., dissenting from the denial of certiorari); *see also Hibdon v. Grabowski*, 195 S.W.3d 48, 59 (Tenn. Ct. App. 2005) (holding an individual who "entered into the jet ski business and voluntarily advertised on…an internet site that is accessible worldwide" as a limited-purpose public figure).

The overextension of *New York Times* has once again been misapplied by the lower courts in the present case. Although the Petitioner is a leader of a church, she performs the

majority of her work from inside the compound, operating out of the public eye. She does not partake in the seminar panels, nor does she engage in door-to-door proselytization. R. at 3.

The Circuit Court points to Petitioner's position as the head of a growing religion, stating that she has "sought public attention" by speaking to the media about Kingdom Church. This is a mischaracterization of the circumstances surrounding Petitioner's comments. Petitioner was subjected to a forced interview with the media, following a tragic car accident that resulted in the death of ten of her fellow church members. Even during her brief interview, she did not attempt to influence the resolution of the controversy. Instead, she merely explained how blood banking of confirmed minors establishes a "servant's spirit," which is an objective of the church's educational curriculum. It is grossly unfair to characterize her statements regarding the medical necessity of obtaining a blood donation from a fifteen-year old member during a medical emergency as a "voluntary insertion into the controversy." R. at 32. But-for the Petitioner being forced to participate in an interview, she would not have voluntarily put herself in the forefront of the controversy. When viewed in the light most favorable to the Petitioner, she should have been properly characterized as a private individual.

Clearly the Petitioner does not exhibit any of the characteristics of someone trying to influence the policy of Delmont, or who courted publicity in order to become a cause celebre. According to the Circuit Court, Petitioner is a limited-purpose public figure due to her filing for injunctive relief and for her subsequent suit against the Respondent. R. at 32. However, consistent with *Firestone*, resorting to the judicial process does not trigger the heightened standard of actual malice. *Firestone*, 424 U.S. at 454 (internal citation omitted).

There is no clear reasoning by the courts that explains "why exposing oneself to an increased risk of becoming a victim necessarily means forfeiting the remedies legislatures put in place for such victims." *Berisha*, 141 S.Ct. at 2425 (Mem) (2021) (Thomas, J., dissenting in

denial of certiorari). Additionally, there is no reasoning "why the rule still applies when the public figure has not voluntarily sought attention." *Id*. (internal citation omitted). When there is a blatant lack of textual and historical support for a court-made doctrine, reconsideration of this unconstitutional expansion is necessary in order to preserve the right for a private individual to pursue a just recovery.

II. The Fifteenth Circuit erred in holding PAMA is neutral and generally applicable under *Smith*, and because *Smith* is poorly defined and inconsistently applied, it should be overturned.

The Constitution commits the government to religious tolerance, and upon "even slight suspicion [of] animosity to religion or distrust of its practices," the government must consider its "high duty to the Constitution and to the rights it secures." *Masterpiece Cakeshop, Ltd. V. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1731(2018) (internal citation omitted).

A. PAMA is not neutral and generally applicable because the statute was enacted with hostile intent toward Petitioner's religious beliefs.

The government cannot "regulat[e] religious beliefs", *Sherbert v. Verner*, 374 U.S. 398, 402 (1963), since it is well established that the Free Exercise Clause protects "the right to believe and profess whatever religious doctrine one desires." *Smith*, 494 U.S. at 877. In *Smith*, the Court upheld the government's denial of unemployment benefits to Native Americans based upon their illegal use of peyote as part of a religious ceremony. *Id*. at 890. Under *Smith*, a law that infringes on the Constitution's guarantee of free exercise of religion is reviewed under strict scrutiny unless it is proven to be neutral and generally applicable. *Smith*, 494 U.S. at 879. *See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (if the law fails to act neutrally or is not generally applicable, the government must show that it serves a compelling interest and is narrowly tailored). Additionally, "[n]eutrality and general applicability are interrelated, and… failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531.

1. PAMA is not neutral.

To be neutral, a law must first be facially neutral. *Lukumi*, 508 U.S. at 534. A law lacks facial neutrality "if it refers to a religious practice without a secular meaning discernible from the language or context." *Id.* Petitioner agrees that PAMA is facially neutral as it does not explicitly restrict a religious practice, nor does it provide a non-secular meaning separate from the language or context.

However, this Court has also held the government "fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1877 (2021). *See also Lukumi*, 508 U.S. at 534 (stating "[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt").

In the instant case, the District Court held that PAMA's complete "*silence* toward any church, religion, or group strongly indicates *neutral behavior*." R. at 18 (emphasis added). This argument is merely a repetition of the facially neutral argument, *supra*, and provides no additional evidence that PAMA wasn't enacted in a manner intolerant of religious beliefs as Petitioner argues. Even if, *arguendo*, this Court feels compelled to accept the District Court's assertion that Delmont's "silence" constitutes a form of "neutral behavior", the timing and context of PAMA's passage, as well as the explicit conduct by Respondent, suggest government hostility which is barely masked.

To determine if there is any masked hostility, the "Court must survey meticulously the circumstances of governmental categories to eliminate . . . religious gerrymanders." *Lukumi*, 508 U.S. at 534 (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). In its opinion, the Circuit Court states that PAMA was "enacted to protect minors against the growing risk of abuse, neglect, and domestic violence." R. at 37. Petitioner

disagrees with both the District and Circuit Courts on this conclusion. Although Respondent alleges that her support of PAMA was informed by her reading of a report published by the U.S. Department of Health and Human Services (DHHS), nothing in the record suggests that Delmont's General Assembly considered these statistics when drafting PAMA.

As the Circuit Court noted in its opinion, courts look to "specific series of events leading to the enactment or official policy in question" when determining neutrality. R. at 18. *See also Lukumi*, 508 U.S. at 540 (stating "[r]elevant evidence includes…the historical background of the decision under challenge, the specific series of events leading to the enactment") (internal citations omitted); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 717 (1981) ("[i]n a variety of ways we have said 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.'") (internal citation omitted). Petitioner draws the Court's attention to the following facts in the record which clearly demonstrate masked hostility by the Respondent and Delmont's legislators when enacting PAMA.

Respondent claims that, on January 4, 2021, she received a "briefing" regarding a 2020 news article that featured Kingdom Church's blood donation practices, and was informed about the proposed PAMA legislation. R. at 39. Respondent avers that "nothing with respect to the Kingdom Church, the…van crash…or Adam Suarez's blood donation served as the impetus for supporting PAMA." R. at 40. However, the Respondent's assertions are contradictory, as she boasted about her recent investigation into Kingdom Church's blood-bank requirements at a fundraising event during her re-election campaign. R. at 7.

The record further states the Delmont General Assembly passed PAMA "following the outcry over the ethics of the Kingdom Church blood banking practices." R. at 24. Despite the suspicious timing of PAMA's enactment, the District Court opined that any link between PAMA

enactment and the statewide controversy around the church's blood banking practices was "tenuous at best" and could easily be linked to other factors such as "the rising rate of child abuse." R. at 18. The record does not provide any evidence supporting this assertion, or any other natural factors, as the impetus for PAMA other than Respondent's misleading and disingenuous statements in her affidavit, as detailed below.

During her January 22, 2022 campaign event, Respondent cited federal statistics from a 2020 Department of Health & Human Services (hereinafter "DHHS") report as the basis of her concern for the wellbeing of Delmont children. Child. Bureau, *U.S. Dep't of Health & Hum. Serv., Admin. for Child. and Fam., Admin. on Child., Youth and Fam.*, Child Maltreatment 2020 (2022), https://www.acf.hhs.gov/cb/report/child-maltreatment-2020. According to the Respondent, these statistics revealed "the percentage change of child victims of abuse and neglect spiked from a 59.8 percent decrease to a 214 percent increase." *Id*. at 39. It is important to note that, unless the Respondent obtained a pre-publication copy of the report, it would be impossible to use the DHHS report to enact PAMA as the DHHS did not issue its 2020 report until 2022.

Notwithstanding the fact that Respondent was using an unpublished report, Respondent's alleged basis for her support is an inaccurate recital and ultimately misleading portrayal of the report's statistics. Viewing the information within the report, child abuse increased marginally between 2016 and 2019, but decreased in 2020 to levels below the 2016 rates. *Id.* at 21. It would be reasonable to assume that the Delmont General Assembly did not have the 2020 report during its deliberations. But even if they did have the report, it nevertheless points to factors *at the state level* as the important indicator for child abuse and neglect, and those factors do not include blood or organ donations.

2. PAMA is not generally applicable.

"A law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 141 S. Ct. at 1877 (internal citations omitted). A law also fails to be generally applicable if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id*. Every law is somewhat selective, "but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Lukumi*, 508 U.S. at 542.

At first glance PAMA appears to be generally applicable, but the Respondent cannot deny that, as Governor, she authorized an investigation into Kingdom Church through the application and enforcement of PAMA. R. at 7. Respondent actively worked to associate Kingdom Church with child abuse after PAMA's enactment, including her overtly offensive statement to the media that Kingdom Church is a "cult that preys on its own children." *Id*. Respondent showed a blatant lack of sympathy for the tragic loss of life sustained by the Church and used the unfortunate consequence of Adam Suarez's heroic act of donating blood to announce her investigation. *Id*. If there was any doubt as to why PAMA was enacted, it became crystal clear when Respondent targeted Petitioner and Kingdom Church specifically. Delmont has also created a statute that appears to have no real basis in fact, and conflicts with nearly every other state and American Red Cross guidelines, all of which allow blood donations by minors with parental consent. AMERICAN RED CROSS, https://www.redcrossblood.org (last visited Jan. 28, 2023). With no sound reasoning to achieve its objective of reducing child abuse, Respondent has effectively launched a crusade against Kingdom Church with her hostile promise to determine whether PAMA was implicated in what she called "the exploitation of the Kingdom

Church's children." R. at 7. By solely investigating the Kingdom Church, PAMA is not generally applicable.

3. In the alternative, should the Court find PAMA is neutral and generally applicable, it should still evaluate PAMA under strict scrutiny since PAMA also creates a hybrid situation by violating a parent's right to direct their child's education under the Fourteenth Amendment.

Delmont's enactment of PAMA violates the parental rights of all Kingdom Church members to direct their children's education, and to provide for their wellbeing, as established under the 14th Amendment. *See Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925) (holding "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations"); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (stating "we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption").

This Court has applied a strict scrutiny analysis, bypassing *Smith*'s neutral and generally applicable test, when a law attempts to "regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs." *Smith*, 494 U.S. at 882. In her affidavit, Petitioner stated the blood drives for confirmed members who are fifteen years and older are "a means of establishing a "servant's spirit," which is one of their curriculum's objectives." R. at 43. The blood donations are also conducted in accordance with American Red Cross guidelines. *Id*. at 5. Similar to *Yoder*, there is no governmental justification for denying blood or organ donation when it is an integral part of their educational curriculum, especially when the Respondent has failed to demonstrate how prohibiting blood and organ donation will

have any effect on preventing child abuse. For the aforementioned reasons, this Court must evaluate PAMA under strict scrutiny.

B. Since PAMA is not neutral or generally applicable, and violates both the First and Fourteenth Amendments, a strict scrutiny analysis is required pursuant to *Smith*.

In accordance with *Smith*, since PAMA has failed to be neutral and generally applicable, the law must be analyzed under the lens of strict scrutiny. *Fulton*, 141 S. Ct. at 1876. Under the strict scrutiny analysis, a law is found to be constitutional if it is "justified by a compelling state interest and is narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531-532. For the following reasons expanded upon below, PAMA is not supported by a compelling interest, nor is it narrowly tailored. Therefore, PAMA is unconstitutional.

1. The enactment of PAMA does not serve a compelling state interest.

This Court has held that the compelling state interest "effectuates the First Amendment's command that religious liberty is an independent liberty…and that the Court will not permit encroachments upon this liberty." *Smith*, 494 U.S. at 895 (O'Connor, J., concurring opinion) (internal citation omitted). Unless required by clear and compelling governmental interests "of the highest order," the law will not survive the strict scrutiny analysis. *Id*.

Although it is within the government's purview to act preventatively to protect children, the enactment of a religiously restrictive law must be accompanied with evidentiary support. *See Thomas*, 450 U.S. at 719 (finding the government is limited in relying on mere speculation about potential harms, and *evidentiary support is required for a refusal of religious exemptions*) (emphasis added); *Smith*, 494 U.S. at 911 ("this Court's prior decisions have not allowed a government to rely on mere speculation about potential harms, but have demanded evidentiary support for a refusal to allow a religious exception") (Blackmun, J., dissenting opinion). Here,

Delmont must provide sufficient evidentiary support to permit a law that will encroach on a constitutionally protected right.

They have nevertheless failed to do so. Instead, Respondent cites to federal statistics regarding child abuse and neglect to support the law's passage. However, as stated in the aforementioned sections, the federal statistics concerning such issues were unreleased at the time of the statement. These statistics also fail to illustrate child abuse, neglect, and suicide specific to the State of Delmont. Without this requisite date, the actual harm suffered by children in Delmont should be considered 'speculative' evidentiary support at best.

Arguably, prohibiting all minors from donating blood is directly adverse to protecting public welfare. In 2022, the American Red Cross, *supra*, reported the need for blood had reached crisis levels. According to Donate Life America, more than 1,700 children received life-saving transplants in 2020, matched from nearly 900 pediatric organ donors. While the donors ranged in age from newborns to age seventeen, most were between eleven and seventeen years old — though in 2020, more than 120 pediatric organ donors were babies under the age of twelve months. DONATE LIFE AMERICA, https://www.donatelife.net (last visited Jan. 30, 2023).

The restriction of *all* minors' ability to donate blood and organs is formed upon a speculative basis and eliminates a class of individuals who would otherwise assist in the blood donation crisis. This will ultimately harm both Kingdom Church's children, and Delmont's children. It is convincingly clear that the implementation of PAMA does not advance a compelling state interest of the "highest order." *Yoder*, 406 U.S. at 215.

2. PAMA is not narrowly tailored to serve a compelling state interest.

The narrow tailoring of a statute is crucial when First Amendment activity is challenged, even if indirectly, "because First Amendment freedoms need breathing space to survive."

Americans for Prosperity Foundation v. Bonta, 141 S. Ct. 2373, 2384 (2021) (citing *NAACP* v. *Button*, 371 U. S. 415, 433 (1963)). The Court reasoned that, "[b]road and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution." *Americans for Prosperity Foundation*, 141 S. Ct. at 2384 (citing to *Baird* v. *State Bar of Ariz*., 401 U. S. 1, 6 (1971)).

PAMA is not narrowly tailored to achieve a compelling state interest: it implements a blanket, sweeping, restriction of *all* minors from donating blood and organs, with no exceptions, in complete disregard of documented shortages. Not only are the Respondent's federal statistics 'speculative' evidentiary support, but they also fail to provide a sufficient nexus to the law's explicit language. Therefore, not only is PAMA not narrowly tailored, it has failed to serve a compelling state interest at all.

C. *Smith* presents a constitutional outlier that must be overturned.

The release of *Smith* has "eviscerated" the Free Exercise Clause. *See* Kent Greenawalt, *Religion and the Rehnquist Court*, 99 Nw. U.L. Rev. 145, 149-151 (2004). It has also "produced wide-spread disbelief and outrage." Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. Ct. Rev. 1, 2-3. Due to the lack of textual support for the test in the Constitution, and the continuous refusal of the Court to apply the test, *Smith* must be overruled once and for all.

1. The *Smith* test lacks constitutional support.

"The First Amendment…*does not distinguish* between laws that are generally applicable and laws that target particular religious practices." *Smith*, 494 U.S. at 894 (O'Connor, J., concurring opinion) (emphasis added). It is well established that the First Amendment does not offer an absolute protection for the freedom to act as it does for the freedom to believe. *See Cantwell*, 310 U.S. at 304; *Reynolds v. United States*, 98 U.S. 145, 161-167 (1878). Prior to *Smith*, First Amendment jurisprudence abided by the "First Amendment's express textual

mandate and the governmental interest in regulation of conduct" and required laws to meet the compelling interest test in order to stand. *Smith*, 494 U.S at 894 (O'Connor, J., concurring opinion) (citations omitted).

While the *Smith* Court began its opinion by reiterating the text of the First Amendment, it would go on to state "[a]s a textual matter, we do not think the words *must* be given that meaning." *Smith*, 494 U.S. at 878 (emphasis added). Rather than creating a new test to avoid the ambiguity in the First Amendment, the Court should have "determine[d] the reading of the text that is most probable and…g[a]ve that reading presumptive weight unless there [wa]s good evidence based on extratextual sources that it [wa]s wrong." Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1115 (1990).

Not only did the test lack textual support, the Court also justified its creation by "mischaracterizing this Court's precedents [by] discard[ing] leading free exercise cases such as *Cantwell v. Connecticut* and *Wisconsin v. Yoder* as 'hybrid.'" *Smith*, 494 U.S. at 908 (Blackmun, J., dissenting opinion) (internal citations omitted). The majority opinion cited cases where the Court found applying strict scrutiny inappropriate in their attempt "to hint that the Court has repudiated that standard altogether." *Id*. A test that has no Constitutional backing, and tenuous precedential support, is abhorrent and must be overturned.

2. The *Smith* Court's creation of the "hybrid" exception is unconstitutional.

Smith held that a neutral and generally applicable law will be reviewed under rational basis scrutiny, unless the Free Exercise challenge is brought "in conjunction with other constitutional protections." *Id*. at 881. This hybrid exception has caused much confusion. For these cases, the Free Exercise challenge and the other constitutional claim, if not brought in conjunction with each other, would be insufficient to succeed. But if those claims are brought

together, somehow they are not only adequate to succeed, but adequate to warrant a strict scrutiny analysis.

Professor Greenawalt noted this hybrid exception creates three anomalies. First, is the claim that two constitutional challenges, which are insufficient to stand alone, could combine to warrant a strict scrutiny analysis. Greenawalt, *supra*, at 153. The second anomaly is how the courts would determine if there was a second "constitutional claim… in play" to allow for the hybrid exception to even apply. *Id*. at 154. The final anomaly is that, in order for a Free Exercise challenge to carry sufficient weight in a hybrid case, *Yoder* "requires courts to evaluate the strength of free exercise claims and state interests in just the manner that Justice Scalia treats as unacceptable when free exercise claims stand alone." *Id*. Professor Greenawalt speculates "the concept was artificially manufactured to accommodate the Amish situation" given the vast list of problems that arose with the hybrid exception's creation. *Id*.

Smith "fails to safeguard even acts of worship central to a faith." *Id*. In their conclusion, the *Smith* Court stated that disadvantaging minority religions is an "unavoidable consequence of democratic government." *Smith*, 494 U.S. at 890. "[W]e must worry that if the majority of the population is repelled by a religious faith, a legislature may cleverly adopt a law to discourage its exercise, but do so in an ostensibly neutral way that successfully disguises its real motivation." Greenawalt, *supra*, at 154. This is exactly what occurred in Delmont. The Respondent does not understand the faith and religious requirements of Kingdom Church. But rather than educate herself about the Petitioner's faith, she cleverly adopted a facially neutral statute to prevent members who are minors from practicing their faith. The *Smith* Court egregiously set the precedent allowing lower courts to uphold this unconstitutional legislation, but the time has come for the Court to overrule *Smith* and return to its pre-*Smith* First Amendment jurisprudence.

CONCLUSION

Based on the aforementioned reasons, the extension of *New York Times* actual malice standard to limited-purpose public figures is unconstitutional, the Circuit Court erred in holding PAMA neutrally and generally applicable, and *Emp. Div., Dep't of Hum. Res. v. Smith* should be overruled.

Respectfully submitted,

/s/ Team 21

Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

Pursuant to Rule III(C)(3) for the 2023 Seigenthaler-Sutherland Moot Court Competition we hereby certify and submit that: (i) The following work product is a brief written by members of Team 021; (ii) Team 021 has complied fully with their school's governing honor code; and (iii) Team 021 has complied with all of the Rules of the Competition.

APPENDIX

1. The First Amendment to the United States 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.

2. The Fourteenth Amendment to the United States Constitution provides: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Delmont Physical Autonomy of Minors Act (PAMA) forbids 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.