No. 22-CV-7654

In the

Supreme Court of the United States

March Term 2023

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 RESPONDENT

TEAM 26
Counsel for Respondent
January 31, 2023

QUESTIONS PRESENTED

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

II. Whether the United States Court of Appeals for the Fifteenth Circuit correctly concluded that the Physical Autonomy of Minors Act is neutral and generally applicable, and if so, should *Employment Division, Department of Human Resources of Oregon v. Smith* be overruled.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit entered final judgment on December 1, 2022. R. at 38. Petitioner then filed a writ of certiorari, which this Court granted. R. at 45-46. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Emmanuella Richter ("Petitioner") founded the Church of the Kingdom ("Kingdom Church") in the country of Pangea in 1990 and relocated to Delmont in 2000 after a military coup. R. at 3. Kingdom Church members separate themselves from the rest of the state's populace by living and working in designated compounds. R. at 4.

To join the church, a private confirmation process is required, which includes "a course of intense doctrinal study." R. at 4. Only those who obtained "the state of reason[,]" which is fifteen years old, may undergo the process. R. at 4. Once confirmed, members of the Kingdom Church "may not accept blood from or donate blood to a non-member." R. at 5. Further, members must "bank their blood at local blood banks in case of medical emergencies." R. at 5. Since blood banking is a "central tenet of the faith," the requirement extends to confirmed minors. R. at 5. The church's homeschool monthly projects include blood donations. R. at 5.

In 2020, *The Beach Glass Gazette* ran an expose on the blood-banking practices. R. at 5. The story caused an outcry from the community "about the ethics of the practice[,]" with the primary concern being the involvement of minors and their consent. R. at 5.

In 2021, the Delmont General Assembly passed PAMA ("Physical Autonomy of Minors Act") which "forbade 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. On January 17, 2022, a Kingdom Church van "was involved in a massive, multi-car crash." R. at 6. The driver, Henry Romero, needed a donor with a matching blood type. R. at 6. Romero's cousin, Adam Suarez, a recently confirmed fifteen-year-old Kingdom Church member, was identified as a match. R. at 6. Prior to PAMA, the donation was permissible because Romero is a relative and there was an emergency. R. at 6.

With his parents present, Adam Suarez donated the "American Red Cross's recommended maximum amount of blood for the first time." R. at 6. For unknown reasons, Adam's blood pressure became elevated, and he went into acute shock. R. at 6. The hospital moved him to the intensive care unit to save his life. R. at 6. During this time, multiple members of the Kingdom Church were interviewed by the media. R. at 6-7. In one of these interviews, Petitioner publicly defended the Kingdom Church's practices of blood donations as "a central tenet of our faith and a reasonable means of protecting the health and welfare of our members." R at 43. Adam eventually recovered, but doctors advised against blood donations for the foreseeable future. R. at 7.

On January 22, 2022, Constance Girardeau ("Respondent"), at a major campaign fundraiser, "stated her particular concern that Delmont's children faced a crisis as to their mental, emotional, and physical well-being." R. at 7. The State of Delmont created "a task force of

government social workers to begin an investigation into the Kingdom Church's blood-bank requirements for children" and determine if these practices violate PAMA. R. at 7.

On January 25, 2022, Petitioner sued Respondent in the Beach Glass Division of the Delmont Superior Court, seeking injunctive relief claiming that PAMA violates the Free Exercise Clause of the First Amendment. R. at 7–8. Two days later, at a large press event, Respondent stated, "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?" R. at 8. The next day, Petitioner "amended her complaint to include an action for defamation." R. at 8.

Respondent moved for summary judgment on both the defamation claim and the question of the constitutionality of the task force investigation. R. at 8-9. On September 1, 2022, the district court granted summary judgment on both issues. R. at 20. On December 1, 2022, the Fifteenth Circuit affirmed the judgment of the district court. R. at 38. The Fifteenth Circuit held Petitioner was a limited-purpose public figure that is unable to meet the actual malice standard and that the task force investigation under PAMA was constitutional. R. at 38. Petitioner appealed the Fifteenth Circuit's ruling, and this Court granted certiorari to address "(1) whether the extension of the *New York Times v. Sullivan* standard to limited-purpose public figures is constitutional, and (2) whether [PAMA] is neutral and generally applicable, and if so, should *Emp. Div., Dep't of Hum. Res. v. Smith* be overruled." R. at 45-46.

SUMMARY OF THE ARGUMENT

I. Question Presented 1.

This Court should affirm the decision of the Fifteenth Circuit because the extension of the actual malice standard to limited-purpose public figures is constitutional. The founders clearly intended for the First Amendment to promote the free marketplace of ideas. The limited-purpose public figure doctrine is the correct mechanism for promoting this ideal because the self-censorship that results from the cost of litigating defamation claims is unacceptable.

Also, this Court should follow *stare decisis* and uphold *Gertz*. Gertz draws a clear line between public and private figures that is consistently followed by the lower courts. Further, there is no evidence that it is inconsistent with other law. Simply put, *Gertz* was not decided in error, as the historical basis for the decision, among other considerations, illustrates its reasoning remains high quality. Therefore, the limited-purpose public figure doctrine should be upheld.

II. Question Presented 2.

This Court should affirm the decision of the Fifteenth Circuit because PAMA is neutral and generally applicable. PAMA does not include animus towards religious exercise in its text, history, or effect and does not include an avenue for invidious discrimination from the government. Delmont's legislature passed this statute to protect minors from growing abuse and the dangers associated with blood donation, not to discriminate against any religious practice. Also, PAMA is without any exceptions or discretion from the government and is applied equally to all minors under the age of sixteen.

Additionally, *stare decisis* favors the continuation of *Smith* because it is workable by lower courts, it is consistent with other related decisions, and it is the correct interpretation of the Free Exercise Clause. The Supreme Court consistently applies *Smith* and provided a clear analysis for lower courts. Therefore, the Court should not depart from its wisdom.

ARGUMENT

I. THE LIMITED-PURPOSE PUBLIC FIGURE DOCTRINE IS CONSTITUTIONAL, AND THE FIFTEENTH CIRCUIT COURT OF APPEALS DID NOT ERR WHEN THEY HELD THE PETITIONER MUST PROVE ACTUAL MALICE.

This Court should affirm the Fifteenth Circuit decision to require the Petitioner to prove actual malice because the limited-purpose public figure doctrine is supported by the history of the First Amendment and *stare decisis*. Whether the Petitioner is a limited-purpose public figure is not at issue in this case. The Petitioner only challenges the doctrine's constitutionality, and in doing so, asks this Court to overrule *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court created the actual malice standard to balance the state's interest in providing compensation to those harmed by defamatory statements with the First Amendment guarantees of freedom of speech. *Gertz*, 418 U.S. at 343. The standard requires proof the alleged defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Sullivan*, 376 U.S. at 280. Originally, the standard only applied to public officials. However, three years after *Sullivan*, the Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) extended it to statements against private individuals who are public figures. Shortly after *Butts*, the Court made the status of the individual irrelevant and held that one merely associated with an issue of public concern must show actual malice. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

The fallout of *Rosenbloom* led to *Gertz*, which finalized the doctrine in its modern form. The Court in *Gertz* overturned *Rosenbloom*, holding it would abridge the state interest to remedy defamatory falsehoods to a degree that is "unacceptable." *Gertz*, 418 U.S. at 346. Regarding private individuals, states may define the standard for themselves so long as they do not impose

strict liability. *Id.* at 343. However, actual malice is required when the plaintiff is a public official or a public figure. *Id.*

Gertz described two types of public figures: those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes[,]" and those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345. The latter, the limited-purpose public figure, is at issue today. Thus, when the Petitioner challenges the constitutionality of the extension of the actual malice standard to limited-purpose public figures, they are also asking the Court to overrule *Gertz*.

A. Historical Underpinnings Support the Constitutionality of the Limited-Purpose Public Figure Doctrine.

1. *The History and Tradition of The First Amendment Justify the Extension of the Actual Malice Standard to Limited-Purpose Public Figures.*

The historical justification for *Sullivan*, *Butts*, and *Gertz* traces back to one of the founding principles of the First Amendment, the free marketplace of ideas. This principle is then "carried to the states by the Fourteenth Amendment." *Butts*, 388 U.S. at 149; *see also Gitlow v. New York*, 268 U.S. 652 (1925). *Butts* held that these amendments required the Court to "guarantee to individuals [] their personal right to make their thoughts public." *Butts*, 388 U.S. at 149. Citing an eighteenth-century case, the Court said, "History shows us that the Founders were not always convinced that unlimited discussion of public issues would be for the benefit of all of us but that they firmly adhered to the proposition that the true liberty of the press permitted every man to publish his opinion." *Id.* at 149-50 (citing *Respublica v. Oswald*, 1 U.S. 319, 325 (1788)).

Referencing Thomas Jefferson and James Madison, the Court in *Gertz* justified their ruling by highlighting the free marketplace of ideas, stating, "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz*, 418 U.S. at 339-40. Chief Justice Rehnquist, who was in the *Gertz* majority, said he regarded the above statement as "an exposition of the classical views of Thomas Jefferson and Oliver Wendell Holmes that there was no such thing as a false "idea" in the political sense, and that the test of truth for political ideas is indeed the marketplace and not the courtroom." *Ollman v. Evans*, 471 U.S. 1127, 1129 (1985) (Rehnquist, J., dissenting).

Further, the founders commonly hurled defamatory insults at one another during political discourse. Famously during the 1800 election, Thomas Jefferson and John Adams exchanged offensive hyperbole. *See e.g.*, Jed Handelsman Shugerman, *The Golden or Bronze Age of Judicial Selection?*, 100 Iowa L. Rev. Bull. 69, 74 (2015). This evidences that the tactic of using defamatory hyperbole was commonplace among those who created the First Amendment. Therefore, it is clear that those who used such tactics intended them to be part of the political discourse when creating the First Amendment.

Thus, it is clear the doctrine has a significant basis within the founders' intent when creating the First Amendment. The public should decide the winning ideas in the free marketplace, not the courts. As recent scholarship illustrates, the intent of the founders is found within both the actual malice standard and its extension to the limited-purpose public figure. *See* Matthew Schafer, *In Defense: New York Times v. Sullivan*, 82 La. L. Rev. 81 (2021); Wendell Bird, *The Revolution in Freedoms of Press and Speech: From Blackstone to the First Amendment and Fox's Libel Act* (2020). Therefore, historical underpinnings supporting the constitutionality of the limited-purpose public figure doctrine exist.

2. The Limited-Purpose Public Figure Doctrine is the Best Means for Achieving the Historical Intent of the First Amendment.

The limited-purpose public figure doctrine remains the correct mechanism for achieving the historical First Amendment interest highlighted above. The First Amendment requires "breathing space" to survive, and limits on speech must be narrowly tailored where "First Amendment activity is chilled." *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021) (citing *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963)). The Court created the actual malice standard and later extended it to limited-purpose public figures for this purpose. *Gertz,* 418 U.S. at 342.

The Court reasoned that without the actual malice standard the burden is placed on the defendant to prove their assertion and it will not only censor falsehood. *Sullivan*, 376 U.S. at 279. The Court correctly recognized a difference between truth and provable truth. *Id.* Thus, many valid positive contributions to the public discourse would be censored over a fear of what is provable in court, as well as the expense to do so. *Id.* The doctrine does not just prevent litigation. It generally prevents litigation in the summary judgment stage, thus the costs associated with exercising one's First Amendment rights. Without the actual malice standard and its subsequent extension, there becomes a price on speech and the First Amendment is "chilled."

The limited-purpose public figure doctrine is a sufficient and limited means to solve this issue. When a private citizen makes the decision to step forward and attempt to influence the outcome of a policy of public interest, criticism of that person is just as important as criticism of a government official. *See Butts*, 388 U.S. at 148. The extension is natural because those who are public officials are similarly situated to public figures or limited-purpose public figures. *See Gertz*, 418 U.S. at 344-45. Just as public officials do, limited-purpose public figures "thrust

themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" and thus "invite attention and comment." *Id.*

Further, both voluntarily expose themselves to criticism as an exchange for trying to influence policy. The Court also likened public figures to public officials by noting that they "enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 344.

Importantly, both comparisons are applicable here. The Petitioner spoke to the media as the head of an influential religion with ample means to communicate to the masses. Further, by actively defending the practices of her church in media interviews, she also is attempting to influence policy and the perception of PAMA. Thus, like a government official, she opened herself up to criticism.

These considerations illustrate the extension of the actual malice standard to the limited-purpose public figure remains the best method for protecting the First Amendment. Simply put, it is not a policy-driven decision, but a decision driven by the history and intent of the First Amendment.

B. This Court Should Adhere to *Stare Decisis* and Uphold the Extension of the Actual Malice Standard to Limited-Purpose Public Figures.

While the constitutionality of the limited-purpose public figure doctrine is supported on its own, *stare decisis* also favors affirmation of the doctrine. While "*stare decisis* is not an inexorable command[,]" it remains the "preferred course." *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). Further, while the rule of *stare decisis* is much stricter in cases of statutory

interpretation, in cases of constitutionality, the doctrine is considered more flexible. *Id.* at 828; *see also Ramos v. Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring in part).

However, overruling a constitutional decision is still "a serious matter" that is "not a step that should be taken lightly[,]" and in order to overturn a decision, the Supreme Court "demands special justification[,]" not just error. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2264 (2022); *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019). In recent decisions, the Court used six factors in their *stare decisis* analysis: quality of the reasoning, workability, changes in the law, coherence with other areas of the law, reliance interest, and nature of the error. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2479, 2481-82, 2484 (2018); *Dobbs*, 142 S. Ct. at 2265. When looking at the above factors, all factors favor affirming *Gertz*.

1. *Relevant Precedent Draws a Clear Consistent Line Between Private and Public Figures and is Applied Predictably.*

When considering workability, the Court asks "whether it can be understood and applied in a consistent and predictable manner." *Dobbs*, 142 S. Ct. at 2272. The limited-purpose public figure standard asks whether a plaintiff thrusted themselves into a public controversy to sway the controversy's resolution. *Gertz*, 424 U.S. at 345.

This is a consistent standard, as one must actively choose to participate in the public controversy to be considered a public figure. Plaintiffs dragged into controversies by another are not limited-purpose public figures and are routinely held as not being such. *See Time, Inc. v Firestone*, 424 U.S. 448 (1976); *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979); *Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999); *Cahill v. Edalat*, No. 17-56826, 2021 WL 2850588 (9th Cir. July 8, 2021); *Cockram v. Genesco, Inc.*, 680 F.3d 1046 (8th Cir. 2012). In contrast, the

lower courts classify plaintiffs as limited-purpose public figures when the plaintiff took some affirmative action to thrust themselves into the public sphere before they were defamed. *See Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576 (D.C. Cir. 2016); *Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666 (4th Cir. 1982); *Lluberes v. Uncommon Prods., LLC*, 663 F.3d 6 (1st Cir. 2011); *World Wide Ass'n of Specialty Programs v. Pure, Inc.*, 450 F.3d 1132 (10th Cir. 2006).

A comparison between the current case and *Firestone* illustrates this point. Petitioner became a limited-purpose public figure by defending the practices of Kingdom Church publicly in the media to sway a public controversy. Conversely, in *Firestone*, the plaintiff was not a limited-purpose public figure because she merely participated in divorce proceedings. *Firestone*, 424 U.S. at 453. Thus, she did not "thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it." *Id.* at 457.

While others may argue the advancement of technology blur the line between private and public figures, causing inconsistency, that is simply not the case. *See Berisha v. Lawson*, 141 S. Ct. 2424, 2427-29 (2021) (Gorsuch, J., dissenting); *Richter v. Girardeau*, C.A. No. 2022-1392, at *31 (15th Cir. Dec. 1, 2022). While the avenue for thrusting oneself into the public sphere is easier than fifty-years ago, this does not change that one must still thrust themselves into the controversy to be considered a limited-purpose public figure. One who chooses to post on social media about a heated political topic does not find themselves drawn into the controversy. By posting, they take some affirmative action to comment on the controversy. Thus, the line between what defines a public and private figure remains clear even in today's world.

If there truly are any workability issues, they are not with the extension of the doctrine to limited-purpose public figures but with the high bar the actual malice standard sets. This case is not the proper vehicle for redressing those issues. The effects created by the difficulty in meeting

the actual malice standard should not factor into whether the extension alone is constitutional. Since the Court decided *Gertz*, there is nothing that makes the extension of the standard to limited-purpose public figures unworkable.

2. Gertz and Butts are Consistent with Other Related Decisions.

The precedent's consistency with other laws and changes in the law can be addressed together. Shortly following *Gertz*, the Supreme Court applied the limited-purpose public figure doctrine twice and remained untouched since. *See Wolston*, 443 U.S. at 163-69; *Firestone*, 424 U.S. at 452-57. Even critics of the actual malice standard recognize that *Sullivan* and the cases flowing from it are the only real changes in defamation law. *Berisha*, 141 S. Ct. at 2426 (Gorsuch, J., dissenting).

In addition to the lack of changes in the law, the doctrine is in line with other free speech cases. This Court listed *Gertz* and its extension of the actual malice standard among eleven other free speech cases defining when speech is and is not punishable. *See United States v. Alvarez*, 567 U.S. 709, 717 (2012). Further, this Court analogized the protections *Gertz* gives to false statements to the protections given to baseless litigation, holding that just as the "breathing space" principles that *Gertz* is founded on protect false statements, baseless litigation is protected by those same principles. *BE & K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 531 (2002). Thus, the doctrine remains consistent with the law surrounding it.

3. The Public Relies on the "Breathing Space" Provided by the Doctrine.

Recently, the Court in *Dobbs* rejected an intangible form of reliance and clarified that the Court is only equipped to evaluate concrete reliance interests such as property or contract rights. *Dobbs*, 142 S. Ct. at 2276. In this case, contract and property are not at stake. With that in mind, it is important to note that the extension of the actual malice standard to limited-purpose public

figures is fundamental to the current political discourse. The public relies on the "breathing space" the doctrine gives when letting their ideas battle in the marketplace. Undermining the half-century-old doctrine weakens those interests, dissuading the public from participating in public discourse and changing the way people think about free speech.

4. The Reasons Behind the Doctrine Remain Sound Today, and There is no Error.

Regarding the quality of the reasoning, the arguments used above are incorporated here to illustrate the reasons behind extending the actual malice standard to limited-purpose public figures are of high quality and favor adhering to *stare decisis*. Particularly, the historical underpinnings highlighted in Section I.A show the logic of *Gertz* remains sound. Regarding the nature of the error, for all the reasons mentioned above, there is no error. So, what nature it may have need not be addressed. However, even if there were an error, it is not an "egregiously wrong" error that requires overturning precedent. *Dobbs*, 142 S. Ct. at 2265.

Thus, based on the founding principles around the First Amendment, there is a significant historical basis to support the constitutionality of the extension of *Sullivan* to the limited-purpose public figure. Lastly, even if there is a question of constitutionality, under the doctrine of *stare decisis*, any potential constitutionality issues are not clear enough to warrant overturning *Gertz*.

II. THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT CORRECTLY CONCLUDED THAT PAMA IS NEUTRAL AND GENERALLY APPLICABLE, AND THIS COURT SHOULD NOT OVERRULE *SMITH*.

This Court should affirm the Fifteenth Circuit's decision because PAMA protects children through a valid neutral and generally applicable law. The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise" of

religion and applies to the states through the Fourteenth Amendment. U.S. Const. amend. I; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

"The [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell*, 310 U.S. at 303–04. However, the Court must root out covert government action that is prejudicial to unpopular religious practices. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). In doing so, the Court protects religious rights guaranteed by the Free Exercise Clause and prevents actions that are "in violation of social duties or subversive of good order." *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

In 1990, the Court laid out the current rule by stating that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990) (citing *United States v. Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring in judgment)).

A. Under *Smith*, PAMA is Neutral and Generally Applicable

PAMA is neutral and generally applicable, thus even if it incidentally burdens a particular religious practice, it "need not be justified by a compelling interest." *Lukumi*, 508 U.S. at 531.

1. *PAMA* is Neutral Because the Law Does not Target the Kingdom Church's Religion on its Face or in Effect.

PAMA exists to promote the safety and well-being of the children of Delmont, not to target the religious donation of blood from members of the Kingdom Church. Government action is not neutral if it is "specifically directed at [one's] religious practice" either "on its face[,]" or if religious exercise is its "object." *Smith*, 494 U.S. at 878; *Lukumi*, 508 U.S. at 533. Courts

scrutinize laws for animus toward religion in either its text, history, or operation. *See Lock v. Davey*, 540 U.S. 712, 725 (2004). If the law fails either requirement, it must survive "the most rigorous scrutiny" to be upheld. *Lukumi*, 508 U.S. at 521.

Because a law that targets religion "as such is never permissible[,]" the text must be free from animus on the face of the statute. *Id.* at 533 (citing *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion)). As stated in *Lukumi*, the "minimum requirement of neutrality is that a law not discriminate on its face." *Id.* A law discriminates on its face if it "refers to a religious practice without a secular meaning discernable from the language or context." *Id.* The Court found that words with "strong religious connotations" such as "sacrifice" or "ritual" were not conclusive because they carried a common usage secular meaning. *Id.* at 534.

In contrast, PAMA does not reference religion or religious terms. PAMA "forb[ids] the procurement, donation, or harvesting of the bodily organs, fluid, 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. The lower court's characterization of the text does not include religious connotations or terms that lack a secular meaning discernable from the language or context. The words "procurement," "donation," and "harvesting" all have secular meanings discernable from the text. Most people would strain to associate "procurement" or "harvesting" with common religious practice. Additionally, "sacrifice" and "ritual," which were held to be inconclusive, are more religiously associated than "donation." For these reasons, PAMA is facially neutral.

The Free Exercise Clause also protects against "subtle departures from neutrality" and "covert suppression of particular religious beliefs," therefore "[f]acial neutrality is not determinative," and courts must look beyond the face of the text to confirm neutrality. *Lukumi*,

508 U.S. at 534 (citing *Gillette v. United States*, 401 U.S. 437, 452 (1971); *Bowen v. Roy*, 476 U.S. 693, 703 (1986)).

Government action that "targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id.* (citing *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

The majority in *Lukumi* considered the intended and actual effect of the statute to snuff out covert oppression by looking at the "effect of [the] law in its real operation[,]" "the historical background of the decision under challenge, . . . and the legislative or administrative history." *Id.* at 535, 540; *see also Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1731 (2018). However, Justice Scalia and Chief Justice Rehnquist differed from the majority analysis by noting, "[t]he First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted. . . . This does not put us in the business of invalidating laws by reason of the evil motives of their authors." *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring in part and in judgment). Either way, neither the intended nor actual effect of the law evidence a lack of neutrality.

In *Lukumi*, the Court rested its conclusion of discrimination proved by actual operation because "almost the only conduct subject to [the] [o]rdinances . . . is the religious exercise of Santeria church members." *Id.* at 535. The local ordinance permitted secular animal slaughter while prohibiting religious slaughter. *Id.* at 542. Therefore, it was "gerrymandered." *Id.* Conversely, PAMA is not gerrymandered by only outlining permissible means of donation. In operation, PAMA prevents blood donations from all children under the age of sixteen equally.

Age restriction statutes, such as PAMA, are broad by design, ensuring that exemptions do not undermine the protection of minors. Age restrictions are prevalent in society including restrictions from tobacco, military service, alcohol, and driving.

Additionally, PAMA's history and operation do not suggest animosity toward religious exercise. Both lower courts rejected the proposition that PAMA arose from the controversy and ascribed natural factors, such as rising child abuse, as the impetus for the act. *Richter v. Girardeau*, C.A. No. 22-CV-7855, at *18 (D. Delmont Sept. 1, 2022); *Richter v. Girardeau*, C.A. No. 2022-1392, at *37 (15th Cir. Dec. 1, 2022); R. at 39 ("child victims of abuse and neglect spiked from a 59.8 percent decrease to a 214 percent increase. Of those abused, 16.5 percent are physically abused."). Further, statements about Petitioner by the Governor over a year after enactment have no bearing on the lack of neutrality. R. at 8.

Further, the Delmont legislature did not include any exceptions because they create a greater risk for the known dangers associated with giving blood; evidenced by Adam Suarez's post-donation emergency. *See* R. at 6. This Court should not ascribe evil motives where they do not exist.

2. *PAMA is Generally Applicable Because it is Devoid of Individualized Exemptions and Does not Prohibit Religious Conduct While Allowing Secular Conduct That Undermines the Government's Interest.*

In *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1878 (2021), the Court found "a mechanism for discretionary exceptions" when the foster care policy gave the commissioner sole discretion to grant exceptions. The Court found this formal mechanism was not generally applicable, thus, it was subject to strict scrutiny. *Id.* at 1881. However, PAMA applies uniformly and divests the government of any discretion to consider the motivations of a

person's conduct. Therefore, PAMA is generally applicable because there are no textual individual exemptions and no mechanism for such.

Also, the Court in *Fulton* held that a law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877 (citing *Lukumi*, 508 U.S. at 542-46). In *Lukumi*, the city claimed that the "disposal of animal carcasses in public places" was a danger to public health. *Lukumi*, 508 U.S. at 522. However, the Court highlighted that the ordinance did not restrict hunters or restaurants. *Id.* at 544-45. Therefore, the local ordinances "fail[ed] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than" the religious sacrifices did. *Id.* at 543. Killing animals was only prohibited when done for religious purposes.

In contrast, PAMA prohibits all conceivable transfer of blood by minors under the age of sixteen regardless of motive or consent, including voluntary or post-mortem harvesting. R. at 6. PAMA is not underinclusive; it is necessarily all-inclusive, like all other age requirements. Therefore, there is no permissible conduct that undermines the government's interest in protecting minor children from the known dangers of blood donation. For these reasons, PAMA is both neutral and generally applicable.

Additionally, blood donation is not a hybrid claim. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972). While a state's interest in child education may yield to a sufficient alternative as in *Yoder*, courts have consistently held that the health of children is distinct. *See Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (compulsory vaccination); *Jehovah's Witnesses in State of Wash. v. King Cnty. Hosp. Unit No. 1 (Harborview)*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968) (the state's interest in the preservation of the child's life overcame parent's

refusal of blood transfusion); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (the state's role as parens patriae is not "nullified merely because the parent grounds his claim to the child's course of conduct on religion or conscience.").

B. *Stare Decisis* Suggest Affirming *Smith*.

The rules of *stare decisis* were laid out in Section I.B. The interpretation of the Free Exercise Clause in *Smith* is a constitutional issue, so the same legal rules apply here. Relevant *stare decisis* factors include workability, consistency with other decisions, reliance, quality of reasoning, and nature of the error. The change in the facts element is not relevant here because the essence of religion remains consistent.

1. Smith is Workable as Evidenced by its Nationwide Application.

The rule found in *Smith* promotes the orderly administration of government by allowing state legislatures to pass public welfare laws while preventing discriminatory targeting. The neutral and generally applicable rule is workable, evidenced by nationwide application by judicial and legislative government bodies.

Through *Smith*, courts can easily interpret the constitutionality of statutes and local ordinances by analyzing neutrality through text, history, and effect, and then, analyzing if the statute is fairly applied to all. *See e.g.*, Robin Cheryl Miller, Annotation, *What Laws are Neutral and of General Applicability Within Meaning of Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876*, 167 A.L.R. Fed. 663 (2001). Additionally, thousands of un-challenged neutral and generally applicable laws exist nationwide, all complying with the requirements set out in *Smith*.

However, the alternative to *Smith* is non-workable. It contradicts both constitutional history and common sense. As stated in *Smith*, "we are a cosmopolitan nation made up of people

of almost every conceivable religious preference, . . . [therefore] we cannot afford the luxury of deeming [laws] *presumptively invalid.*" *Smith*, 494 U.S. at 888 (citing *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)) (internal quotations omitted).

Smith provides a clear path for legislative and judicial bodies to ensure the rights protected by the Free Exercise Clause. Additionally, states may ensure greater protection than the Constitution requires by adopting the state equivalent of the Religious Freedom Restoration Act ("RFRA"). Sixteen states passed the equivalent by 2010. *See* Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State Rfras*, 55 S.D. L. Rev. 466, 466–67 (2010).

2. Smith is Consistent with Other Related Decisions

The Court in *Smith* defends its consistency by tracing their jurisprudence from *Reynolds* to *Smith*. *Smith*, 494 U.S. at 879. The Court emphasized that laws "cannot interfere with mere religious beliefs [but] . . . may with practices[;]" to hold otherwise would "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* (quoting *Reynolds*, 98 U.S. at 166-67).

The Court continued by citing a litany of case law asserting "that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879-80 (citing *United States v. Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring in judgment)) (internal quotations omitted).

Additionally, the Court distinguished any seemingly divergent cases by noting that these cases involved the Free Exercise Clause "with other constitutional protections." *Id.* at 881 (citing *Cantwell*, 310 U.S. at 304-07; *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)). Further, the Court clarified *Sherbert v. Verner*, 374 U.S. 398

(1963) and confined its reach to scenarios of unemployment compensation denial due to an applicant's unwillingness to work in conditions that conflict with his or her religion. *Smith*, 494 U.S. at 883. The Court points out that it refuses to follow the *Sherbert* test consistently and almost altogether abandoned it. *Id.* at 884-85. The Court concluded that "across-the-board criminal prohibition[s]" must only be neutral and generally applicable. *Id.*

Some critics emphasize that the greatest challenge with upholding *Smith* on *stare decisis* grounds is the tension between the neutral and generally applicable standard and "many aspects of the Supreme Court's broader Religion Clauses jurisprudence." Branton J. Nestor, *Revisiting Smith: Stare Decisis and Free Exercise Doctrine*, 44 Harv. J.L. & Pub. Pol'y 403 (2021). However, Justice Scalia refutes this claim by stating, "What [the compelling interest test] produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly." *Smith*, 494 U.S. at 886.

Additionally, the Fifteenth Circuit wrongly characterized post-*Smith* case law by stating, "Since its release, the Court has refused to apply the Smith test while finding numerous ways around the burdensome standard." R. at 34 (italics removed). The Fifteenth Circuit argues that the Court avoids applying the rational basis standard. R. at 35. However, the Court consistently applies the rational basis test when a law is truly neutral and generally applicable. *See e.g.*, Robin Cheryl Miller, Annotation, *What Laws are Neutral and of General Applicability Within Meaning of Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876*, 167 A.L.R. Fed. 663 (2001). Cases that appear to avoid the *Smith* standard do not. Instead, they refine the neutrality analysis to root out disguised discrimination. *See Lukumi*, 508 U.S. at 547.

3. State Legislatures and Courts Consistently Rely on Smith.

As noted in Section I.B.3, the reliance analysis is limited to concrete interests such as property or contract rights. *Dobbs*, 142 S. Ct. at 2276. This case involves neither. However, states around the country, including Delmont, rely on *Smith* to preserve the efficient regulation of public health.

Since 1990, state courts rely on *Smith* to strike down unconstitutional statutes that target religion and uphold statutes that do not. *See e.g.*, Robin Cheryl Miller, Annotation, *What Laws are Neutral and of General Applicability Within Meaning of Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876*, 167 A.L.R. Fed. 663 (2001). Overturning *Smith* will cause tremendous judicial waste by clogging up the courts in the relitigation of these issues. Additionally, each year, state legislatures pass many general welfare statutes that abide by the standard in *Smith*. This would burden every state with judicial and legislative waste.

4. Smith is the Correct Interpretation of the Free Exercise Clause

Regarding the quality of the reasoning, the arguments used above are incorporated here to illustrate that the reasoning behind *Smith* is of high quality and favors adhering to *stare decisis*. Logically, the Court analogized a right to a religious exemption from general welfare laws to a hypothetical newspaper complaining that the government limited the freedom of the press by requiring taxes. *Smith*, 494 U.S. at 878.

Additionally, the history surrounding discussions of a general religious exemption right proves that *Smith* correctly interprets the Free Exercise Clause. The two contending opinions on the existence of a Constitutional right to a religious exemption are outlined by Philip A. Hamburger and Michael W. McConnell. *See* Philip A. Hamburger, *A Constitutional Right of*

Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

Philip A. Hamburger helpfully points out that McConnell's assertion for a general right of religious exemption is impossible. In the eighteenth century, proponents of establishments and the leading publicists of the dissenters disavowed a general "constitutional right of religious exemption from civil laws." Hamburger, *supra*, at 945. He states, "Just as establishment writers could acknowledge that religion was based on an authority higher than the civil government, so too dissenters typically could admit that natural liberty was protected *only* through submission to civil government and its laws." *Id.* at 937 (emphasis added). This agreement illustrates the improbability that early framers contemplated a general right to religious exemptions.

This analysis is the historical and proper reading of the Free Exercise Clause. When a citizen's religious exercise comes in conflict with a legitimate law directed at the welfare of society, the religious exercise must yield. The state needs the ability to pass laws that apply to everyone equally; to hold otherwise, would allow each person to subjectively define the supreme law of the land. In conclusion, *Smith* did not contain error at all, and *stare decisis* suggests that this Court should not depart from its wisdom in *Smith.*

CONCLUSION

For the foregoing reason, the limited-purpose public figure doctrine is constitutional and was properly applied to the Petitioner. Further, PAMA is neutral and generally applicable, and this Court should adhere to *stare decisis* and uphold *Smith*. Therefore, Petitioner's challenge should be denied, and the judgment of the Fifteenth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

Team 26

Counsel for Respondent

APPENDIX A

Constitutional Provisions

U.S. Const. amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the 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. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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.

Statutory Provisions

28 U.S.C. § 1254(1).

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

CERTIFICATE OF COMPLIANCE

Following the requirements of Rule III(C)(3) of the Official Rules of the 2022-23 Seigenthaler-Sutherland Moot Court Competition, we, Counsel for Respondent, certify that:

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

2. Our team has complied fully with our Law school's governing honor code, and

3. Our team has complied with all Rules of the Seigenthaler-Sutherland Moot Court Competition.

Team 26
Counsel for Respondent