No. 22-CV-7654

IN THE SUPREME COURT OF THE UNITED STATES

EMMANUELLA RICHTER
***Petitioner*,**
v.

CONSTANCE GIRARDEAU
***Respondent*.**

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

BRIEF OF EMMANUELLA RICHTER, PETITIONER

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QUESTIONS PRESENTED

I. Whether the extension of the *New York Times v. Sullivan* standard to limited-purpose public figures is constitutional when the Internet and social media has democratized communication in a way such that limited-purpose public figure are now more similar to private individuals than public figures.

II. Whether the Fifteenth Circuit erred in concluding that the "Physical Autonomy of Minors Act" was neutral and generally applicable where the statute's objective and real effect was to suppress the Kingdom Church's religious practice of blood-banking, and, if so, whether *Emp. Div., Dep't of Hum. Res. v. Smith* should be overruled.

JURISDICTIONAL STATEMENT

The Circuit Court of Appeals for the Fifteenth Circuit issued its opinion on December 1, 2022. R. at 38. Emmanuella Richter timely petitioned for a writ of certiorari. R. at 45. This Court granted the writ and has appellate jurisdiction to hear this case pursuant to 28 U.S.C. § 1254(1). It is appropriate for this Court to review the instant case, as it involves constitutional questions, an area over which this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

STATEMENT OF THE CASE

Emmanuella Richter ("Plaintiff") founded the Church of the Kingdom (commonly known as the "Kingdom Church") in the South American country of Pangea. R. at 3. In 2000, after a military coup overthrew the democratically elected government of Pangea, the Kingdom Church became the target of governmental repression. *Id.* Ms. Richter and a large contingent of the Kingdom Church received asylum from the United States on religious persecution grounds, and the group settled in the state of Delmont. *Id.* The Kingdom Church's adherents all live together in designated compounds, separate from the rest of the state's populace. R. at 4. The compounds are entirely self-sufficient through agricultural initiatives and the commercial sale of their popular tea, "Kingdom Tea." *Id.* Despite this separation, the church compounds have good reputations in their communities. R. at 5.

To join the Kingdom Church, individuals undertake a course of "intense doctrinal study" to achieve a state of enlightenment. R. at 4. After finishing the course, individuals undergo a private confirmation ritual and get "confirmed." *Id.* Only individuals older than fifteen are allowed to be confirmed, as the Kingdom Church believes individuals obtain "the state of reason" at fifteen. *Id.* Once confirmed, these individuals, who are homeschooled, participate in blood

banking, a central tenet of the Kingdom Church's faith. R. at 5. Every month, these confirmed students participate in blood drives according to American Red Cross guidelines. *Id.* These blood drives are dedicated to providing for the confirmed students' own future medical needs, for the medical needs of their families, and as a means of establishing a "servant's spirit." *Id.* Donating blood at the drives is especially important as confirmed members may not accept blood from or donate blood to a non-member of the Kingdom Church. *Id.* A confirmed student is allowed to skip a donation if they are ill on a blood drive day. *Id.* Blood banking is seen in the Kingdom Church as a way to develop spiritual growth and better their community. *Id.*

Due to the popularity of Kingdom Tea, the local Delmont newspaper, *The Beach Glass Gazette*, published a 2020 story about the Kingdom Church, their blood banking practices and beliefs, and their tea. *Id.* This story resulted in public outcry, with blood banking at the center of a statewide controversy in Delmont. *Id.* Members of the community raised concerns about the ethics of blood banking, the involvement of minors, and the authenticity of the minors' consent. *Id.* Following the outcry, in 2021, the Delmont General Assembly passed the "Physical Autonomy of Minors Act" (or "PAMA"). R. at 6. The PAMA 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." *Id.* This statute superseded Delmont's prior law that prohibited minors under the age of sixteen from consenting to blood, organ, or tissue donations *except* for autologous donations and in the case of medical emergencies for consanguineous relatives. R. at 5. Constance Girardeau ("Defendant") was strongly advocated for the legislation. R. at 6.

In early 2022, there was a car crash in Delmont that resulted in multiple casualties. *Id.* Ten members of the Kingdom Church died, and the only surviving member was Henry Romero who

was admitted to the hospital in critical condition and needed blood for a lifesaving operation. *Id.* Adam Romero, Henry's cousin, was identified as a match. *Id.* The fifteen-year-old, confirmed member of the Kingdom Church was accompanied by his parents to donate the American Red Cross-recommended maximum amount of blood. *Id.* Prior to the PAMA, Adam's donation would have been legally permissible, as Adam consented to donating the blood for the use of family in an emergency. *Id.* However, the PAMA does not allow this exception. *Id.* For undetermined reasons, Adam went into acute shock and was admitted into the hospital's intensive care unit but eventually recovered. R. at 6, 7. The local news reported on the circumstances of Adam's donation, the details of the Kingdom Church's blood banking practices, and the PAMA. R. at 7.

Shortly after, during her re-election campaign, the Defendant attended a major fundraiser with many celebrities. *Id.* When asked about any new plans if re-elected, the Defendant stated that her particular concern would be the mental, emotional, and physical well-being of Delmont's children. *Id.* She cited federal statistics from the Department of Health and Human Services which revealed a spike in child abuse and neglect between 2016 and 2020 and data from the U.S. Centers for Disease Control and Prevention which stated that over a quarter or children who died by suicide experienced child abuse or neglect. *Id.* The Defendant said immigrants suffered especially high rates of such harm. *Id.* The Defendant was also asked about Adam, and she said that she commissioned a task force of government social workers to investigate the Kingdom Church's blood-bank requirements for children. *Id.* This investigation garnered support among her constituents. *Id.*

In response, Ms. Richter requested injunctive relief claiming the state's investigation relating to the enforcement of the PAMA constituted a violation of the Free Exercise Clause. R. at 8. Ms. Richter related this infringement to the persecution the Kingdom Church faced in Pangea.

Id. When asked about the request for injunctive relief at a campaign rally, the Defendant said, "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.* Upset, Ms. Richter amended her complaint to include an action for defamation. *Id.*

The District Court for the District of Delmont held Ms. Richter to be a limited-purpose public figure and that the defamation action failed to meet the applicable actual malice standard R. at 19, 20. The District Court also held the PAMA to be neutral and generally applicable, and thus constitutional. R. at 20. Therefore, the District Court granted the Defendant's motion for summary judgment on both the defamation claim and the constitutional challenge to the investigation enforcing the PAMA. *Id.* Although the Circuit Court of Appeals for the Fifteenth Circuit questioned the constitutionality of applying the actual malice standard to limited-purpose public figures, the Fifteenth Circuit affirmed the judgment of the District Court. R. at 28, 38. Ms. Richter then filed petitioned for a writ of certiorari, which was granted by the Supreme Court. R. at 45, 46.

SUMMARY OF THE ARGUMENT

The Fifteenth Circuit's decision, holding that the malice standard should apply in the defamation suit against the defendant and that the PAMA in neutral and generally applicable, should be reversed for two reasons. First, the actual malice standard articulated in *New York Times v. Sullivan* upended 200 years of practice and has no basis in the text, structure or history of the Constitution. The actual malice requirement for defamation arose against the backdrop of the civil rights era and involved the freedom of the national press. The Court should decline to apply *Sullivan* outside of these narrow factual circumstances, which do not include limited-purpose public figures. Additionally, with the increased popularity of social media, the doctrine of limited-

purposes threatens to swallow up defamation protections. This Court should not apply the actual malice standard since, given its vague nature, it invites arbitrary and unfair results.

Secondly, the PAMA should be held unconstitutional under the Free Exercise Clause. PAMA fails the neutrality and generally applicability prongs of the *Smith* test because the statute's objective and effects was to suppress the religious beliefs of Kingdom Church. PAMA also fail strict scrutiny because the government does not have a compelling interest in preventing young members of Kingdom Church from following their religious beliefs by freely donating blood under the Red Cross guidelines. Moreover, PAMA is not narrowly tailored because it prohibits blood donation in situations, such as a medical emergency, where the little to no risk of child abuse. At the act is underinclusive, because there in no suggestion that Delmont has taken steps to prohibit other concerning forms of child abuse. However, even if PAMA is neutral and generally applicable, the original public meaning, text, and structure of the Free Exercise Clause suggests: 1) that *Smith* should be limited to situations where the public peace or safety is threatened and 2) that, at the very least, intermediate scrutiny should apply in this instance. The PAMA still fails this alternative form of heightened scrutiny because the application of the act to Kingdom Church is not justified by an important governmental interest and the act is not sufficiently tailored.

For the foregoing reasons, we respectfully request that this Court reverse the decision of the Fifteenth Circuit.

ARGUMENT

I. THE FIFTEENTH CIRCUIT SHOULD BE REVERSED AND REMANDED, SINCE THE ACTUAL MALICE STANDARD SHOULD NOT BE APPLIED TO LIMITED-PURPOSE PUBLIC FIGURES.

New York Times Co. v. Sullivan requires public officials to meet a higher standard to prove defamation claims. 376 U.S. 254 (1964). To recover damages in a defamation claim, a public official must not only show the normal elements of defamation and also prove that a defamatory statement was made with "actual malice." *Id.* at 280. Actual malice is shown when a statement was made with "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*

New York Times should no longer be extended to limited-purpose public figures. As noted by the Fifteenth Circuit, the actual malice standard introduced by *New York Times* has only a shaky foundation relation to the text, history, or structure of the Constitution. This questionable constitutional foundation alone is reason enough for the actual malice standard to no longer apply to limited-purpose public officials. But the actual malice standard no longer makes sense for limited-purpose public officials for another reason. The advent of the social media age has sufficiently erased the line between limited-purpose public figures and private figures, making the standard counterproductive. Finally, application of the actual malice rule to limited-purpose public figures invites arbitrary distinctions between defamation plaintiffs, leading to unfair results. This Court should cabin *New York Times v. Sullivan* to its facts and not extend this unworkable standard to limited-purpose public figures.

A. The actual malice standard upended 200 years of practice and has no grounding in the text, history, or structure of the Constitution.

When evaluating a constitutional question, the justification for *stare decisis* is at its weakest. *Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2228, 2243 (2022); *see also Ramos*

v. Louisiana, 140 S. Ct. 1390, 1410 (2020) (Kavanaugh, J., concurring). In determining whether a prior decision was "grievously or egregiously wrong," the Court should look to an analysis of the "precedent's reasoning, consistency, and coherence with other decisions, changed law, changed facts, and workability, among other factors." *Ramos*, 140 S. Ct. at 1414–15. Foremost among these considerations is how the precedent squares with the original meaning of the Constitution.

Here, the original meaning of the Constitution was borne out in nearly two centuries of consistent practice. The Founders knew that democracy would not be able to function without the "free exchange of ideas," so they included in the First Amendment protections for both the freedom of speech and of the press. *Berisha v. Lawson,* 141 S. Ct. 2424, 2425 (2021) (Gorsuch, J., dissenting from denial of certiorari); U.S. Const. amend. I. But from the time of the Founding, these freedoms were understood to have a corresponding duty to "try to get the facts right" or otherwise answer for the injuries caused. *Berisha*, 141 S. Ct. at 2426.

Prior to *New York Times,* centuries of common law developed and affirmed this balance between free expression and the duty of truth. William Blackstone recognized, "[e]very freeman has an undoubted right to lay what sentiments he pleases before the public," but those who public falsehoods "must take the consequence of his own temerity." 4. W. Blackstone, Commentaries on the Laws of England 151–52 (1769). Justice Story, when writing about the law of libel, explained "the liberty of speech, or of the press, has nothing to do with this subject." *Dexter v. Spear*, 7 F. Cas. 624 (No. 3,867) (C.C.R.I. 1825). Indeed, these freedoms "are not endangered by the punishment of libellous publications. The liberty of speech and the liberty of the press do not authorize malicious and injurious defamation." *Id.* "This was '[t]he accepted view' in this Nation for more than two centuries.'" *Berisha*, 141 S. Ct. at 2426 (Thomas, J., dissenting from denial of

certiorari) (quoting *Herbert v. Lando*, 441 U.S. 153, 158–59, and n. 4 (1979) (Gorsuch, J., dissenting from denial of certiorari)). State courts and legislatures bore out these principles and developed norms and elements for traditional defamation claims.

In one fell swoop, *New. York Times* "overturned 200 years of libel law." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 766 (1985) (White, J., concurring). The Court "federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law" in nearly all the states and replaced the prevailing negligence standard with the actual malice standard. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 370 (1974) (White, J., dissenting). The *New York Times* court rested their decision in a discussion of policy. To the *New York Times* majority, the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *New York Times*, 376 U.S. at 269 (quoting *Roth v. United States,* 354 U.S. 476, 484 (1957)). While powerful rhetorically, and perhaps even pragmatically, the decision ignored the historical record that pointed in the opposite direction. Prior to *New York Times*, courts had struck a balance between the interests of "unfettered interchange of ideas" and the interest in the truth. *New York Times* scrambled that balance in favor of a federalized, unduly heightened standard. Even Justice White, who joined the majority in *New York Times*, later "expressed 'doubts about the soundness of the Court's approach' in *New York Times*" after reviewing the historical record. *McKee v. Cosby,* 139 S. Ct. 675 (2019) (Thomas, J., concurring in denial of certiorari) (quoting *Dun & Bradstreet*, *Inc.*, 472 U.S. at 767 (White, J., concurring)).

B. The prevalence of the Internet and social media communication has changed the landscape and erased the distinction between limited-purpose public figures and private figures, undercutting the policy behind *New York Times*.

New York Times was decided against the backdrop of the civil rights movement. This context made the "Court's decision attractive as a policy matter." *Tah v. Global Witness Publishing, Inc.,* 991 F.3d 231, 253 (2021) (Silberman, J., dissenting). The *New York Times* majority saw its imposition of the heightened actual malice standard as necessary "protection to cover the civil rights movement." *Id.* at 254. Indeed, then-Professor Elena Kagan recognized that, in the eyes of the *New York Times* majority and their concern over the civil rights movement, "the actual malice standard may have appeared by far the best approach." Elena Kagan, *A Libel Story:* Sullivan *Then and Now*, 18 L. & Soc'y Inquiry, 197, 203 (1993).

But the world has changed since *New York Times.* In the 1960s and 1970s, where public expression was mostly limited to newspapers, it made sense under the balance test to institute a heightened standard for defamation claims. With the growth of the Internet has come a substantial rebalancing of the interests at stake in *New York Times.* "Anyone with access to the Internet may take advantage of a wide variety of communication . . . methods" and "[a]ny person or organization with a computer connected to the Internet can 'publish' information." *Reno v. ACLU*, 521 U.S. 844, 851, 853 (1997). In fact, "the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen." *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996).

This instantaneous and autonomous access to free public expression has swung the pendulum back towards favoring the protection of one's reputation. *See* Aaron Perzanowski, Comment, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 Cal. L. Rev. 833, 834 (2006) ("New technologies, most notably the internet, democratized

communication in ways inconceivable to the *Gertz* Court"). "Unlike the media of the 1970s, the internet allows users to contribute as publishers to its vast repository of content and as participants in the global conversation it makes possible." *Id.* Thus, the rise of the Internet has been a factual development since *New York Times* that has swept away the very reason for the heightened actual malice standard in the first place. By expanding communication capabilities to give everyone an equal ability to publish their thoughts, the Internet, and social media in particular, has eroded the need for heightened protections for the media.

The changed media landscape also affects the application of the actual malice standard to limited-purpose public figures. Due to the Internet and social media, limited-purpose public figures are more similar to private individuals than public figures. A limited-purpose public figure is usually defined as those who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345. The Court justified this in the 1960s and 1970s when it was difficult to attain public figure status by virtue of few people having "significantly greater access to the channels of effective communication," such as newspapers. *Id.* at 344. However, through the use of social media, such as Twitter, anyone with access to the Internet is now able to "invite attention and comment," thereby transforming into limited-purpose public figures with the click of a mouse. *Id.* at 345.

Under *Gertz*, any citizen who tweets or posts a blog could be subject to the heightened standard because they are choosing to voluntarily engage in discourse. The division between who is a private individual or a public individual is rooted in outdated assumptions about access to media and ability to participate in open debate with others. *See Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284, 1291 (9th Cir. 2014) ("With the advent of the Internet and the decline in print and broadcast media . . . the line between the media and others who wish to comment on political

and social issues becomes far more blurred."). Therefore, *New York Times* and its progeny should no longer be extended to limited-purpose public figures because, with the proliferation of the Internet and social media, every private citizen that is active on social media would likely be classified as a limited-purpose public figure under *Gertz*, and to subject so many citizens to the arbitrary, unconstitutional heightened standard of actual malice just for exercising their constitutional right to free speech is chilling.

C. Applying the actual malice standard to limited-purpose public figures invites arbitrary and unfair results.

In the Internet era, determining who has "voluntarily" thrust themselves into the public eye is not only difficult, but opens the door for courts to make arbitrary determinations that result in unfairness. Indeed, members of this Court have recognized the potential unfairness introduced by a broadly-drawn limited-public figure rule. "Public figures or private, lies impose real harm." *Berisha,* 141 S.Ct. at 2425 (2021) (Thomas, J., dissenting from denial of certiorari). Recalling the story of Kathrine McKee, who was subjected to a heightened actual malice standard in a defamation suit after she accused Bill Cosby of rape, Justice Thomas argued that "this Court should not remove a woman's right to defend her reputation in court simply because she accuses a powerful man of rape." *Id.*

When the line between "private" and "limited-purpose" public figures is already blurred thanks to social media, distinguishing between those who belong in the former or latter category becomes less about concrete, determinate facts and more about court discretion.

In Ms. Richter's case, it's not at all clear that the label "limited-purpose" public figure should apply. Ms. Richter is the founder of Kingdom Church, but since moving to the United States to seek asylum, has taken a behind-the-scenes role within the church community. R. at 4. She is not involved in Kingdom Church's tea business, and although she organizes church

seminars, she herself does not conduct or participate in them. *Id.* The lower court rested its determination that Ms. Richter was a limited-purpose public figure on the fact that she brought both lawsuits at issue here. R. at 14. However, the court could have easily drawn the opposite conclusion—as they did in *Time, Inc. v. Firestone*—and determine that Ms. Richter, as head of Kingdom Church, was obligated to bring these suits. 424 U.S. 448, 454 (1976) (holding that the wife of a wealthy businessman was not a limited-purpose public figure for purposes of her defamation claim about news reports on her divorce, because the wife was compelled to go to court).

Eliminating the application of the actual malice requirement to limited-purpose public figures would eliminate this potential for arbitrary decisions. This precedent is unworkable in practice—and even more so now given the social media age. *New York Times v. Sullivan* was incorrect when decided, and the policy it implemented has become obsolete with the advent of the Internet age. This standard should no longer be applied to limited-purpose public officials.

II. THE FIFTEENTH CIRCUIT'S DECISION SHOULD BE REVERSED AND REMANDED, AS THE PHYSICAL AUTONOMY OF MINORS ACT VIOLATES THE FREE EXERCISE CLAUSE.

The Fifteen Circuit erred in concluding that the Physical Autonomy of Minors Act was neutral and generally applicable. The PAMA violates the Free Exercise Clause by suppressing the Kingdom Church's religious practices and failing strict scrutiny. Alternatively, even if the PAMA is a neutral law, the text, structure, and history of the Free Exercise Clause suggest that intermediate scrutiny should apply. The PAMA also fails under this standard.

A. The PAMA violates the Free Exercise Clause under the *Smith* framework, as it is not a neutral law of general applicability and fails under strict scrutiny.

A law burdening the free exercise of religion must be neutral, both facially and operationally, and generally applicable. *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S.

872, 879 (1990). Otherwise, the law will be subject to strict scrutiny. Here, the PAMA is not operationally neutral because it was enacted and applied to specifically target and suppress the Kingdom Church's blood-banking practice. Therefore, the PAMA should be subject to strict scrutiny, which it fails.

1. The PAMA is not neutral because the statute's objective and its real effect was to suppress the Kingdom Church's religious practices.

Neutrality is the requirement that the objective of a law cannot be the disapproval of either "a particular religion or of religion in general." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). Facial neutrality is the "minimum requirement" of neutrality, *id.* at 533, but "[f]acial neutrality is not determinative." *Id.* at 534. A law must also be operationally neutral, as "the effect of a law" is also strong evidence of an impermissible governmental objective. *Id.* at 535. Under the Free Exercise Clause, a law may not "target[] religious conduct for distinctive treatment," *id.* at 533, and the protections apply wither the law "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is *undertaken for religious reasons*." *Id.* at 532 (emphasis added). The free exercise protections also extend to the "covert suppression" of religious beliefs and practices. *Bowen v. Roy*, 476 U.S. 693, 703 (1986).

For example, in *Lukumi*, the Court struck down a city's ordinances for failing *Smith*'s neutrality requirements—and violating the Free Exercise Clause—by imposing prohibitions targeting the religious practices of Santeria adherents. *Lukumi*, 508 U.S. at 542. The Santeria faith was brought to the United States by Cuban exiles after the Santeria adherents had faced "widespread persecution in Cuba." *Id.* at 525. However, the announcement of a planned Santeria church in the city of Hialeah was "distressing" to the community. *Id.* at 526. In response, the city passed ordinances banning animal sacrifices, a "central element" of the Santeria faith. *Id.* at 534.

Despite additionally citing other concerns unrelated to religious animosity, such as "the suffering or mistreatment . . . [of] the sacrificed animals and health hazards from improper disposal" of the animal carcasses, the Court found that the ordinances accomplished an impermissible "religious gerrymander" that targeted the Santeria religion. *Id.* at 535.

The Court's conclusion was further supported by "historical background [], the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.* at 540. For example, despite experiencing "significant problems resulting from the sacrifice of animals" prior to the announcement of the church plans, the city did not make any attempts to address the "supposed problem" prior to the announcement of the church opening. *Id.* at 541. Additionally, at a city council meeting, several residents raised concerns over "religious practices inconsistent with public morals, peace, or safety." *Id.* at 526. Overall, "[t]he Free Exercise Clause commits government itself to religious tolerance, and upon even *slight suspicion* that . . . state intervention stem[s] from animosity to religion or distrust of its practices," the Court must adhere to the Constitution and to the rights it secures. *Id.* at 547.

The *Lukumi* case is directly analogous to the instant case. Just as the Santeria faith has been historically maligned and its adherents persecuted in Cuba, the Kingdom Church was targeted in Pangea, which forced the congregation to seek asylum in the United States. Additionally, similar to the animal sacrifices of the Santeria faith raising concerns for the city's "public morals, safety, and peace," the Kingdom Church's practice of blood-banking became the center of public controversy after a newspaper ran a story on the practice. The "outcry" from the Delmont community was centered around "the ethics" of the blood-banking practice, specifically citing concerns over the "authenticity" of the minors' consent. R. at 5. As a result, within the year, the

General Assembly passed a state statute disallowing minors under sixteen from being able to donate blood "regardless of the minor's consent," a change from the prior law which allowed minors under sixteen to consent to donate blood for "autologous donations" and emergencies for consanguineous relatives. R. at 5, 6. This change was specifically targeted to impose prohibitions on the Kingdom Church religion because the practice of blood-banking was specifically to have blood for the donors and their families, the very two exceptions that were allowed under the prior rule. In the year after the passage of the PAMA, Delmont officials suggested that the PAMA was in an effort to alleviate child abuse. Similar to the Hialeah community also citing concerns about public health and animal mistreatment, this concern about child abuse is secondary and pretextual at best; the clear target of the PAMA is the Kingdom Church's religious practice of blood-banking, as both before and after the PAMA's enactment, Delmont has not made any other attempts at preventing child abuse. Here, there is more than a slight suspicion that the PAMA was intended to target the Kingdom Church. The PAMA is not an operationally neutral statute, so it must be subject to strict scrutiny.

2. The PAMA fails to satisfy strict scrutiny because the government's justification that it was enacted to prevent child abuse is not compelling where the PAMA limits the Kingdom Church's First Amendment rights and the government has not taken any other measures to protect children from abuse.

If a law is not both neutral and generally applicable, it must survive strict scrutiny. *Lukumi*, 508 U.S. at 546. This is a high burden, as "a law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny *only in rare cases*." *Id*. (emphasis added). Under strict scrutiny review, a law is invalid unless it is justified by a compelling governmental interest and is narrowly tailored to advance that interest. *Fulton v. City of Phila., Pa.*, 141 S. Ct. 1868, 1881 (2021) (citing *Lukumi*, 508 U.S. at 546). Particularly in cases that implicate the First Amendment,

which is a "highly sensitive constitutional area," only the "gravest abuses, endangering paramount [governmental] interest, give occasion for permissible limitation." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

In cases where a government restricts conduct protected by the First Amendment but "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Lukumi*, 508 U.S. at 546–47; *see also Florida Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring) (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)) ("[A] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."). In *Lukumi*, the ordinances in question failed strict scrutiny because they were underinclusive in relation to the government's proffered interests in protecting against animal cruelty and health hazards. *Lukumi*, 508 U.S. at 543. The ordinances were underinclusive because they "fail[ed] to prohibit nonreligious conduct that endanger[ed] these interests in a similar or greater degree than Santeria sacrifice [did]." *Id.* This underinclusion was "substantial, not inconsequential." *Id.*

Similarly, the PAMA is underinclusive because it does not protect all minors. The PAMA, like the law that it superseded, only cover minors through the age of sixteen. However, child abuse affects all minors up through the age of majority, eighteen. If the PAMA was really enacted in order to protect the children of Delmont from abuse, then the statute would have been drafted to protect all children. Instead, just as the *Lukumi* ordinances were "careful[ly] draft[ed]" to ensure that, "although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished," Delmont's statute was carefully drafted to ensure that only the Kingdom Church's blood-banking efforts in their schools were being prevented. *Id.*

at 536. If Delmont was truly concerned about protecting all of the children in Delmont, as opposed to just preventing blood-banking, the PAMA would have been drafted to define a minor as an individual under the age of eighteen. Thus, the PAMA fails under strict scrutiny and violates the Free Exercise Clause.

B. Even if the PAMA is a neutral law of general applicability, it should still be held as unconstitutional under the text, structure, and history of the Free Exercise Clause.

This case illustrates the fundamental failings of the *Smith* rule. If the PAMA, as the Fifteenth Circuit held, is indeed a neutral law of generally applicability, then younger members of Kingdom Church will be legally prevented from banking or donating blood as required by their sincerely held religious beliefs. In turn, this will make it increasingly difficult for other co-religionists, such as Henry Romero, to receive life-saving transfusions that do not conflict with their religious beliefs. Given the disparaging remarks directed by the Defendant against Kingdom Church, the current enforcement by the investigatory task force also raises substantial concerns of government discrimination against Kingdom Church. The Free Exercise Clause was designed to prohibit such intolerance by government officials. Therefore, the Court, if necessary, should take this opportunity to revisit and revise the *Smith* rule to more faithfully reflect the text, history, and tradition of the Free Exercise Clause.

1. *Smith*, as currently applied, is at odds with the plain text and structure of the First Amendment.

The protection of the Free Exercise Clause extends not just to "worship" or "freedom of belief" but broadly encompasses the "free exercise" of religion. U.S. Const. amend. I. Although the framers were aware of state constitutions that only protected acts of "worship," they eschewed such constrained language in favor of "free exercise," a formulation evocative of public action. *See* Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*,

103 Harv. L. Rev. 1409, 1458–61 (1990). *Smith*, however, ignores the plain meaning of the constitutional text and offers no protection for religious exercise unless the government discriminates between comparable religious and secular conduct.

Smith's struggle against the text and structure of the Constitution fractures the coherence of the First Amendment. While religious exercise can be freely prohibited by a neutral law of general applicability under the Free Exercise Clause, most forms of speech or expressive activity are protected by at least *some* level of scrutiny under the Free Speech Clause. *See Texas v. Johnson*, 491 U.S. 397 (1988) (subjecting restriction on burning of venerable objects to intermediate scrutiny review); *McCullen v. Coakley*, 573 U.S. 464 (2014) (subjecting content-neutral time, place, or manner restriction on speech to intermediate scrutiny review); *Reed. v. Town of Gilbert*, 576 U.S. 155 (2015) (subjecting content-based restrictions on speech to strict scrutiny review). As a result, the semicolon between these clauses serves not as a grammatical pause between interconnected restraints on governmental power, but as a deceptively insignificant demarcation between conflicting jurisprudential approaches.

In short, *Smith*'s rigid paradigm belies the weighty and nuanced freedoms guaranteed by the First Amendment. *Stare decisis*—which "applies with perhaps least force of all to decisions that wrongly denied First Amendment rights," *Janus v. Am. Fed'n of St., County, & Mun. Emps., Council 31,* 138 S. Ct. 2448 (2018)—does not save *Smith*, since none of the traditional factors weigh in its favor. *See Fulton*, 141 S. Ct. at 1924 (Alito, J., concurring).

Despite *Smith*'s shortcomings, members of the Court have exercised prudence, hesitating to replace *Smith* with "an equally categorical strict scrutiny regime." *Id*. at 1883 (Barrett, J., concurring). However, such a substantial doctrinal evolution is not necessary in this case. Before considering potential alternatives to *Smith*, it is necessary to first determine whether—consistent

with text, history, and tradition—the *Smith* rule should apply in a more limited set of circumstances.

2. The *Smith* rule should govern only in circumstances where the public peace or safety is threatened.

At the time of the ratification, most state constitutions contained protections for the free exercise of religion or religious conscience. *See* McConnell, *supra*, at 1455. In many respects, these provisions can be viewed as probative of the original public meaning of the Free Exercise Clause. *See City of Boerne v. Flores*, 521 U.S. 507, 553 (1997) (O'Connor, J., dissenting). Of particular importance, these state constitutions often contained provisos prohibiting the government from restricting religious exercise unless the "peace and safety" of the state was threatened. *See* McConnell, *supra*, at 1461; Ga. Const., Art. LVI, in 2 W. Swindler, *Sources and Documents of United States Constitutions* 449 (1979); *see also* Northwest Territory Ordinance of 1787, Art. I., 1 Stat. 52. According to Justice O'Connor, "these documents make sense only if the right to free exercise was viewed as generally superior to ordinary legislation, to be overridden only when necessary to secure important government purposes." *City of Boerne*, 521 U.S. at 555 (O'Connor, J., dissenting).

The *Smith* rule—that an individual's religious beliefs do not excuse him or her from compliance with an otherwise valid neutral law of generally applicability—stems from the reasoning of *Reynolds v. United States*. 98 U.S. 145, 166–67 (1879); *Smith*, 494 U.S. at 879. But *Reynolds* itself implicitly suggests that this principle should not apply to all situations where religion is incidentally burdened. In its analysis, the *Reynolds* court presents a parade of horribles, arguing that a uniform regime of religious exemptions would frustrate the government's ability to prohibit human sacrifice or a widow burning herself on her husband's funeral pyre. *See Reynolds*, 98 U.S. at 162. The court also presents historical evidence to demonstrate that "[p]olygamy has

always been odious among the northern and western nations of Europe." *Id*. at 164. Such distinctive justification for the banning of polygamy and other violent acts would be unnecessary if the government could prohibit any religious practice without exception. In addition, it is notable that the court's parade of horribles focuses on religious acts *that implicate public safety*, just like the state constitutional provisos. In short, Reynolds' anti-exemption holding can be seen as limited to situations where a religious practice endangers the public safety or, like polygamy, has long been considered "odious."

Justice Scalia sought to resist a similar cabining of the *Smith* rule (i.e., a neutral and generally applicable law can incidentally burden free exercise without scrutiny only to safeguard the public peace or safety) by arguing that "keeping 'peace' and 'order' seems to have meant, precisely, obeying the laws." *City of Boerne*, 521 U.S. at 539 (Scalia, J. concurring in part). Founding-era state court decisions, however, point to a more limited definition of the "public safety" exception to free exercise protection. In *State v. Chandler*, the Delaware Supreme Court considered a state free exercise challenge to a blasphemy conviction. 2 Del. 553, 569 (1837). The court unequivocally stated that "nothing is more clear, than that our state constitution denies to us such an exercise of power as that of punishing any man for a mere difference of religion . . . mere impiety is never indictable unless the peace of society is endangered by it." *Id*. at 575. The blasphemy conviction fell into this "peace of society" exception because "[e]veryone who outrages decency so far as to incite others to a breach of the peace, is indictable at common law." *Id*. at 569. In other words, if blasphemy, by its very nature, did not incite others to respond with lawless violence, then it would be constitutionally protected.

This conclusion is even more firmly supported by *People v. Phillips*, where a New York court exempted a Catholic priest from being forced to testify as to the contents of a confession.

See N.Y. Ct. of Gen. Sess. (1813), *reprinted in Privileged Communications to Clergymen*, 1 Cath. Law. 199 (1955). In determining whether the priest qualified for constitutional protection, the *Phillips* court took a decidedly narrow view of "peace or safety:" "The language of the constitution is emphatic and striking, it speaks of acts of licentiousness, of practices inconsistent with the tranquility and safety of the state . . . to acts committed, not omitted—offenses of a deep dye and of an extensively injurious nature." *Id*. at 208. To illustrate, the court provided several examples, such as "bacchanalian orgies or human sacrifices," practicing religious rites "in a state of nakedness," and the "burning of widows on the funeral piles of their deceased husbands." *Id*. at 208–09. The court concluded that securing the priest's testimony did not fall into this category and to assert otherwise "would be to . . . render the liberty of conscience a mere illusion. It would be to destroy the enacting clause of the proviso—and to render the exception broader than the rule." *Id*. at 208.

This analysis demonstrates that "peace and safety" was a limited and definite exception to state protections for free exercise at the time of ratification. *Smith* ignores this historical evidence by allowing laws unrelated to the public "peace and safety" to burden free exercise without any heightened judicial scrutiny. The Court should give effect to the original public meaning of the Free Exercise Clause by only applying *Smith* where such weighty governmental interests are present. Since granting an exemption to the Kingdom Church in this case would not threaten the "tranquility and safety of the state," *Smith* should not apply.

3. <u>Assuming it is neutral and generally applicable, the PAMA should be subject to intermediate scrutiny, which it fails.</u>

Statutes or governmental actions that discriminate against constitutionally protected rights or categories are generally subject to strict scrutiny in a variety of contexts. *See Lukumi*, 508 U.S. at 520 (subjecting a city ordinance gerrymandered to target religious practice to strict scrutiny

review); *Reed. v. Town of Gilbert*, 576 U.S. 155 (2015) (subjecting restrictions on speech that discriminate based on content to strict scrutiny review); *Adard Constr. v. Pena*, 515 U.S. 200 (1995) (subjecting all governmental classifications based on race or national origin to strict scrutiny review). As this Court recognized in *Smith*, neutral laws of general applicability that only incidentally burden religion do not invidiously discriminate against religion and thus should not be subject to strict scrutiny. *See Smith*, 494 U.S. at 882–90. However, as discussed in the previous section, it does not follow that such religious conduct should receive no constitutional protection at all.

This Court should adopt a unified approach to the First Amendment by analogizing neutral laws of general applicability to time, place, or manner restrictions in the speech context. *See McCullen v. Coakley*, 573 U.S. 464 (2014). These generally benign types of legislation are necessary as part of the government's broader coordinating function and should thus be subject to the more lenient standard of intermediate scrutiny review. Subjecting neutral and generally applicable laws that burden religion to intermediate scrutiny preserves government discretion while also giving jurisprudential substance to the original meaning of the Free Exercise Clause.

Under this Court's speech jurisprudence, a content-neutral regulation will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Narrow tailoring requires that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1968). According to the Court in *Turner Broadcasting Systems v. FCC*, "[w]hen the Government defends a regulation on speech as

a means to redress past harms or prevent anticipated harms, it must . . . demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." 512 U.S. 622, 664 (1994).

This test can be readily applied to the PAMA. The PAMA, as applied to the Kingdom Church, ostensibly enforces a governmental interest in preventing this religious denomination from abusing its younger members. The government might have a sufficient interest in applying PAMA to Kingdom Church if there were factual evidence that children were being forced to donate blood for profit or against their consent. However, there is no substantial government interest in prohibiting consenting minors from donating blood on terms permissible under American Red Cross guidelines and in faithfulness to their religious beliefs. There is no indication in the fact record that younger Kingdom Church members are being forced to give an excessive amount of blood or otherwise being treated in an abusive manner. Rather Kingdom Church's blood-banking practices are an effort to ensure that all community members are able to abide by their religious beliefs in the event of a health emergency that may require a blood transfusion. Again, while the government, in the abstract, may have an interest in preventing communities from abusing children, that is simply not the case here.

The asserted governmental interest here is also related to suppressing free exercise triggering the second prong of the intermediate scrutiny analysis. The current version of PAMA, which allows no exceptions for donating blood to a relative or for medical emergencies, was passed following popular outcry and controversy regarding Kingdom Church's blood banking practices. In addition, the revised legislation was strongly supported and signed into law by the Defendant, who has made public statements defaming Kingdom Church as a "cult that preys on its own

children." In short, PAMA was passed not to combat child abuse generally, but specifically to restrict and suppress the religious beliefs of Kingdom Church regarding blood-banking.

Furthermore, PAMA burdens substantially more religious activity than necessary and is thus not sufficiently tailored. Any potential governmental interest here lies in preventing the invidious exploitation of children for their blood and organs. However, the PAMA prevents not only exploitation, but blood donation that may be necessary to save the life of a family member as seen in the situation of Henry Romero. The act thus prohibits a substantial amount of conduct that does not implicate the asserted interest. On all of the factors, PAMA fails intermediate scrutiny and should thus be held unconstitutional under the Free Exercise Clause even if it is neutral and generally applicable.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court reverse the decision of the Fifteenth Circuit.

Respectfully submitted,

/s/ Team 25

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for the Petitioner, furnishes the following in compliance with the applicable rules:

We hereby certify that the work product contained in all copies of Team 25's brief is in fact the work product of Team 25's team members.

We hereby certify that Team 25 complied fully with their law school's governing honor code.

We hereby certify that this brief conforms to the Competition Rules.

Signed,

/s/ Team 25