**No. 22-CV-7654**

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In The

**SUPREME COURT OF THE UNITED STATES**

March Term 2022

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**EMMANUELLA RICHTER,**

***Petitioner,***

v.

**CONSTANCE GIRARDEAU,**

***Respondent.***

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

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# BRIEF FOR THE PETITIONER

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TEAM 1
*Counsel for Respondent*
*January 31, 2023*

## QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifteenth Circuit erred in concluding that the *New York Times v. Sullivan* standard does not extend to limited-purpose public figures.
2. Whether the United States Court of Appeals for the Fifteenth Circuit erred in concluding that the Physical Autonomy of Minors Act is neutral and generally applicable, and if so, should *Emp. Div., Dep't of Hum. Res. v. Smith* be overruled.

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The opinion of the United States District Court for the District of Delmont Beach Glass Division is unpublished and may be found at *Richter v. Girardeau*, C.A. No. 22-CV-7855 (D. Delmont Sept. 1, 2022). The United States Court of Appeals for the Fifteenth Circuit opinion is unpublished and may be found at *Richter v. Girardeau*, C.A. No. 2022-1392 (15th Cir. 2022).

## STATEMENT OF JURISDICTION

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

## STATEMENT OF THE CASE

### I. Procedural History

In 2021, the State of Delmont enacted "Physical Autonomy of Minors Act" ("PAMA") and in response to Petitioner request for injunctive relief to the Beach Glass Division of the Delmont Superior Court, seeking to stop Respondent Governor Constance Girardeau's taskforce from investigating the legality of the church's blood donation policy under PAMA. R. at 1. Petitioner argued that PAMA is an unconstitutional violation of the Free Exercise Clause of the First Amendment. R. at 8. In addition, Petitioner alleged that a statement made by the Respondent accusing her of founding a cult that preys upon children was defamatory. R. at 7. As such, Petitioner amended the complaint to include the defamatory action. R. at 8. Respondent moved for summary judgment on both issues. R. at 1. On September 1, 2022, the district court granted summary judgment for Respondent holding that (1) Petitioner is not a limited-purpose public and

the actual malice standard does not apply, and (2) that PAMA is neutral and generally applicable, acting in accordance with the Free Exercise Clause. R. at 20.

The Fifteenth Circuit upheld the judgment of the district court on both the defamatory and Free Exercise Clause claims, holding that (1) Petitioner is a limited-purpose public figure and (2) PAMA is neutral and generally applicable under the *Smith* standard. However, the Fifteenth Circuit expressed concern over the applicability of the *Smith* standard, remarking that this Court has consistently found "numerous ways around the burdensome standard." R. at 27, 34. Following Petitioner's appeal of the Fifteenth Circuit's ruling, 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 the PAMA is neutral and generally applicable, and if so, should *Emp. Div., Dep't of Hum. Res. v. Smith* be overruled.

## II. Statement of the Facts

In 1990, the Church of Kingdom ("Kingdom Church") was founded by Petitioner, Emmanuella Richter, in the South American Country of Pangea. R. at 3. Emmanuella is a scholar in comparative religion, spending decades studying, researching, and interpreting the sacred texts of religions all over the world. *Id.* In this process, she united what she understood to be the fundamental, paradigmatic core of the religious experience—what would become the Kingdom Church. *Id.* Aside her husband, Vincent, Emmanuella funded a nationwide effort to expand the sacrosanct beliefs of Kingdom Church and, in the process, brought a massive following to the faith. *Id.*

In 2000, a military coup erupted in Pangea and overtook the democratic government. R at 3. As a result, Kingdom Church became a pariah to the newly instated government and fell victim to widespread religious repression. *Id.* Emmanuella sought and received asylum in the

U.S. on religious persecution grounds and the congregation found home in the city of Beach Glass in the state of Delmont. *Id.* Over the past several decades, Kingdom Church has greatly expanded through converts and Pangea immigrants joining asylum. R. at 4. In Delmont, Kingdom Church comprises of compounds where adherents live a self-sustaining lifestyle—providing their own agricultural, financial, and spiritual needs. *Id.* The compounds provide for their own needs through agricultural initiatives, and most members of the Kingdom Church choose to remain and work in the compounds. *Id.* Richter herself does most of her work inside the compounds, primarily through her behind-the-scenes work organizing church seminars. *Id.*

In order to seek entry into Kingdom Church, individuals must take part in a course of intense doctrinal study to achieve a state of enlightenment. R. at 4. Once complete, a confirmation ritual takes place, and the individual is considered "confirmed." *Id.* However, only members who have obtained what the church considers "the state of reason"—fifteen years of age—may be confirmed. *Id.* Confirmed members must abide by Kingdom Church practices which include marrying within the faith and raising children through a homeschooled curriculum of traditional secular classes and religious teachings. *Id.* In addition, confirmed members may not accept blood from non-members. R. at 5. The practice is known as blood-banking and it is a central tenet to their faith—contributing one's own blood to the community acts as a means of establishing a "servant's spirit," a ritual which furthers community bonds and expands spiritual growth. *Id.* The blood donations occur within terms acceptable under American Red Cross guidelines. *Id.*

For over two decades, Kingdom Church existed in peace with the citizens of Delmont—many of whom bought and enjoyed "Kingdom Tea," a leafy-tea produced and sold by the compounds. R. at 5. This peaceful coexistence lasted until 2020 when a local newspaper, *The*

*Beach Glass Gazette*, ran a story about Kingdom Church, its holistic enterprise, and the process of blood-banking. *Id.* The article produced immense outcry from the community of Delmont regarding the Church's ethics—particularly, the ability of fifteen-year-olds to give consent to blood-banking. *Id.*

Until 2021, Delmont law 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. *Id.* In response to the controversy of Kingdom Church's blood banking practices, in 2021, the Delmont General Assembly passed the "Physical Autonomy of Minors Act" ("PAMA") that "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. The strongest supporter of PAMA was Respondent, Governor Giradeau. *Id.*

On January 17, 2022, a tragic car accident occurred killing ten Kingdom Church members and leaving one, Henry Romero, critically injured. *Id.* Romero required lifesaving surgery and a plea went out to all Kingdom Church members to find a matching blood type. *Id.* The only match was Romero's fifteen-year-old cousin, Adam Suarez, a recently confirmed Kingdom Church member. The autologous blood donation, which would have been legal prior to PAMA, was successful but not without complications—leaving Suarez in the ICU for a short period of time. *Id.*

News stations hawked over the story and interviewed Emmanuella as she was leaving the hospital after visiting Suarez. R. at 7. On January 22, 2022, Governor Giradeau, at a re-election fundraiser attended by stakeholders and celebrities, was questioned about her agenda if re-elected. *Id.* The Governor remarked over concerns that "Delmont's children faced a crisis as to

their mental, emotional, and physical well-being—citing reports to spikes in child abuse, neglect, and suicide. *Id.* When asked about the Suarez story, the Governor boasted that she created a task force of government social workers to begin an investigation into the Kingdom Church's blood-bank requirements. *Id.* She said the taskforce would help her determine whether PAMA was implicated in what she called "the exploitation of the Kingdom Church's children."

On January 27, 2022, at a press conference following a campaign rally, the Governor was asked about a recent request for injunctive relief from Emmanuella seeking to stop the taskforce from conducting its investigation relating to the enforcement of PAMA. R. at 7–8. The Governor was pressed by reporters citing to reports that she was persecuting the church for its religious beliefs, akin to the repression the church received from the military dictatorship in Pangea. R. at 8. The Governor responded, "I'm not surprised at anything Emmanuella Richter does or says. What do you except from a vampire who founded a cult that preys on its own children?"

## SUMMARY OF ARGUMENT

**I.** Extending the *New York Times v. Sullivan* "actual malice" standard of liability for defamation to limited-purpose public figures is unconstitutional. Doing so forces people who would be private individuals but for becoming involuntarily involved in a controversy to become limited-purpose public figures. This directly contradicts the purpose of the First Amendment of protecting uninhibited and robust discourse regarding public issues and the public officials involved.

By categorizing Emmanuella Richter as an involuntary public figure, the law forces her to prove that false and defamatory statements made against her were made with actual malice before being able to recover. This leaves people like Respondent, who have much greater influence over public discourse, free to lambast private citizens with false allegations with

impunity. The only recourse these private citizen have is to take the issue to court, but they are prevented from doing so by the limited-purpose public figure doctrine.

**II.** This Court should reverse the decision of the Fifteenth Circuit regarding Petitioner's right to Free Exercise because PAMA is neither neutral nor generally applicable. Further, even if this Court finds PAMA to be neutral and generally applicable, this Court should overrule the burdensome and unworkable established in Smith.

First, Delmont's enaction of PAMA is not neutral under Smith as evidenced by Delmont's persecution against Kingdom Church followers and the political agenda of Governor Girardeau coinciding with the enactment of the law. Second, PAMA is not generally applicable because there are conceivable situations where a discretionary exception must be made, and because a finding of a law's failure to satisfy the neutrality requirement under Smith is an indication of a failure to satisfy the general applicability requirement. Third, PAMA is subject to and fails strict scrutiny because it is underinclusive and not narrowly tailored to achieve the government's interest of protecting Delmont's children's well-being. Finally, even if this court finds PAMA to be neutral and generally applicable, the Smith standard utilized by this Court to evaluate Free Exercise claims is an unworkable standard as evidenced by nearly three decades of holdings where this Court finds Smith inapplicable and should therefore be overturned.

## ARGUMENT

### I. THE EXTENSION OF THE NEW YORK TIMES V. SULLIVAN STANDARD TO LIMITED-PURPOSE PUBLIC FIGURES IS UNCONSTITUTIONAL.

The *New York Times v. Sullivan* "actual malice" standard of liability for cannot Constitutionally be extended to limited-purpose public figures. The *New York Times* standard was created to protect public discourse, but its extension to limited-purpose public figures has the exact opposite effect. People who are not truly public figures and do not have the same influence over public discourse are barred from preventing other potentially powerful and influential people from making false and defamatory statements.

States may define for themselves the appropriate standard of liability for defamation, so long as they do not "impose liability without fault." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 324 (1974). In the state of Delmont, the standard for libel is identical to that of Virginia. There are three factors: a plaintiff must show that the defendant (1) published (2) an "actionable" statement with (3) the requisite intent. *Jordan v. Kollman*, 612 S.E.2d 203, 206 (Va. 2005). An actionable statement is any statement that is both false and defamatory." *Id.* (citing *M. Rosenberg & Sons v. Craft*, 29 S.E.2d 375, 378 (Va. 1944); *Ewell v. Boutwell*, 121 S.E. 912, 916 (Va. 1924)). Here, the defamatory and false nature of Respondent's statements are uncontested.

The First Amendment protects the freedom of speech. U.S. CONST. amend. I. In particular, statements made about public figures are protected to allow for robust, uninhibited debate on public issues. The threat of an expensive lawsuit by a public figure would have such a disastrous chilling effect that people would not be free to express themselves on important public issues. The suppression of the dissenting voices of private individuals by public figures who naturally have a greater influence over public opinion is antagonistic to the basic values of the

United States. This is even more so the case when the public figure in question is a public official wielding the power and authority of their office. In this case, it is Respondent, a public official, who has made the false and defamatory statements in question.

In *New York Times Co. v. Sullivan*, the Supreme Court established a separate standard of liability for statements made about public figures. In that case, the New York Times had published a full-page advertisement containing various allegations regarding L. B. Sullivan, who was Commissioner of the Police Department, Fire Department, Department of the Cemetery, and Department of Scales for Montgomery, Alabama. *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964). The article alleged that Sullivan's police force had acted in a cruel and discriminatory way towards African Americans and student protestors. *Id.* However, several of these allegations were either false or exaggerated. *Id.* at 258. Sullivan sued the New York Times for libel, and the Alabama state court found that the ad was libelous *per se*. *Id*. at 262.

In reviewing the case, the Supreme Court decided that a plaintiff who is deemed to be a public figure must establish that the defamatory statements were made with actual malice, meaning that the defendant knew that the statement was false or acted with reckless disregard of the truth. This higher standard was created to protect uninhibited and robust discussion about matters of public or general concern. Because the "public benefit from publicity is so great and the chance of injury to private character so small," the protection of statements made about public issues which naturally include the public officials embroiled in them serves to promote public discourse. *Id.* at 281. In the present case, it is undisputed that the Emmanuella Richter is not a public figure under the *New York Times* standard.

Since *New York Times Co.*, the Supreme Court has expanded the doctrine to include two main types of "public figures" in defamation cases: all-purpose public figures and limited-

purpose public figures. All-purpose public figures are those that "hold governmental office" and those who, "by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures." *Gertz*, 418 U.S. at 342. The latter of these are treated differently because their notoriety gives them a platform and makes them much more influential, but also much more likely to be the target of defamatory statements. The idea is that these public figures will be more capable of responding to the defamatory allegations their notoriety may attract. On the other hand, limited-purpose public figures are people who "have thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved." *Id.* at 345. In the present case, the Fifteenth Circuit had held that Emanuella Richter was a limited-purpose public figure because she publicly opposed PAMA, a major piece of legislation possibly bearing national consequences. This opposition came in the form of filing for injunctive relief on behalf of the Church in an attempt to protect them from the restrictions of the new legislation.

This court defined what a limited-purpose public figure was in *Gertz v. Robert Welch, Inc.* In that case, the petitioner was a reputable attorney who was retained by the family of a victim of a police shooting to represent them in civil litigation against Nuccio, the shooter. *Id.* at 325. The respondent published an article claiming that the petitioner had an extensive criminal history and was part of a Communist conspiracy working to destroy local police by framing Nuccio for the crime. In that case, the court found that the petitioner was not a limited-purpose public figure because he was only involved in the civil action, whereas the respondent's conspiracies focused on the criminal prosecution. *Id.* at 352. However, it is easy to see that, had respondent's article focused on the civil action, this would have created a "controversy," the

forefront of which the petitioner would necessarily thrust himself into when he agreed to represent the victim's family.

In fact, this court admitted that there was a third class of public figure: involuntary public figures. *Id.* at 345. The court agreed that "it may be possible for someone to become a public figure through no purposeful action of his own." *Id*. Other courts have also recognized the reality that the law forces people to become involuntary public figures. *See Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999). This court has since neglected to address the issue of involuntary public figures, leaving a vital question of free speech unanswered. *See* Daniel Thomas Pesciotta, *Speaking Freely on Public Issues: Criminal Suspects As Involuntary Limited-Purpose Public Figures*, 24 U. FLA. J.L. & PUB. POL'Y 359, 369 (2013). The fact that extending the *New York Times* standard to limited-purpose public figures inadvertently creates a class of involuntary public figures is critically damaging to the freedom of speech that it is meant to protect. This glaring flaw in defamation jurisprudence should be remedied by ruling the extension unconstitutional.

In this case, Emmanuella Richter is put in a similar position as the petitioner in *Gertz* would have been if the respondent in that case had focused his attention on the civil action. Richter was living her life quietly as a private individual, more private than most, rarely even leaving her community. Shortly after the Kingdom Church's blood banking practices became the topic of discussion, in 2021, the Delmont General Assembly passed PAMA, which specifically targeted and criminalized the Kingdom Church's religious practices. Governor Girardeau strongly advocated for PAMA, and even based her re-election campaign heavily on enforcing it and investigating the Kingdom Church. These actions forced Emmanuella to defend herself and her church. Under the doctrine established in *Gertz*, this means that she "thrust herself to the forefront" of the controversy and made herself a limited-purpose public figure. Richter's

situation shows that the extension of the *New York Times* actual malice standard to limited-purpose public figures can easily force private individuals to become involuntary public figures and prevent them from recovering against people who make false and defamatory statements against them.

The injustice of this doctrine is clear. Emmanuella Richter was a private individual who was forced to defend her way of life. She could not do so without becoming a limited-purpose public figure. She had no control over legislation being passed that specifically targeted her religious practices, not the actions of Girardeau in her re-election efforts. Legally, she "thrust herself to the forefront" of the controversy, but the undeniable truth is that she was dragged, despite her best efforts, again into a situation where she faced religious persecution from the government.

In *Gertz*, the court acknowledged that "[t]o extend the *New York Times* standard to media defamation of private persons whenever an issue of general or public interest is involved would abridge to an unacceptable degree the legitimate state interest in compensating private individuals for injury to reputation." *Id.* at 323. However, this is functionally what the extension of the *New York Times* standard to limited-purpose public figures does. Petitioner was a private person who unwillingly became involved in an issue of public interest.

Extending the *New York Times* standard to limited-purpose public figures leaves Governor Girardeau free to accuse Emmanuella Richter of being "a vampire who founded a cult that preys on its own children" with impunity, simply because Richter was dragged into a controversy that Girardeau played a significant role in creating. Coming from an elected official, these statements are greatly defamatory. And yet, the law categorizes Richter as a public figure and protects the Governor's false and defamatory statements.

There have been numerous criticisms of the *New York Times* line of cases, some coming from this very court. In *McKee v. Cosby*, the question was whether a purported sexual misconduct victim's allegations against a celebrity necessarily thrust her to the forefront of a public debate regarding those very allegations and transformed her into a limited-purpose public figure. Justice Thomas claimed that the *New York Times* and the subsequent decisions extending it were "policy-driven decisions masquerading as constitutional law." *McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring). This criticism has been repeated by others who similarly recognize that the effect of these decisions are inimical to the intention behind the First Amendment protection of free speech. *see Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, *cert. denied*, 142 S. Ct. 427 (2021) (Silberman, J., dissenting)

## II. THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT ERRED IN CONCLUDING THAT DELMONT'S PHYSICAL AUTONOMY OF MINORS ACT IS NEUTRAL AND GENERALLY APPLICABLE UNDER *SMITH*, AND *EMP. DIV., DEP'T OF HUM. RES. v. SMITH* SHOULD BE OVERRULED.

The Fifteenth Circuit erred in holding that PAMA is neutral and generally applicable under *Emp. Div., Dep't of Hum. Res. v. Smith*, and, even if PAMA is not neutral and generally applicable under the *Smith* test, this Court should overrule the holding of *Smith* as it is an unworkable standard which this Court has consistently made carveouts to.

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…." U.S. CONST., amend. I, XIV. The language of the Free Exercise Clause attaches to the states through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). In *Cantwell* the court opined that the Free Exercise Clause encompasses two concepts of religious freedom: act and beliefs, the former is "absolute," while the latter requires deeper scrutiny. *Id.* at 303–04.

Accordingly, the Free Exercise Clause protects, "first and foremost, the right to believe and profess whatever religious doctrine one desires, *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872, 877 (1990), and therefore the government cannot "regulat[e] religious beliefs." *Sherbert v. Verner*, 373 U.S. 398, 402 (1963).

Religious beliefs are not to be dismissed on face value by courts or juries. *See United States v. Ballard*, 322 U.S. 78, 87 (1944) (holding that whether a religious belief is true or false is irrelevant to a judicial determination, as long as the belief is sincerely held). Moreover, this Court held that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection," a stance which has all but eliminated questions of sincerity and discretion from discussion. *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 714 (1981). Nevertheless, an individual's genuine religious beliefs do not "excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate." *Smith*, 494 U.S. at 878–79. Accepting carte blanche all acts originating from religious beliefs would be "permit every citizen to become a law unto himself." *Reynolds v. United States*, 98 U.S. 145, 166–167 (1878).

Furthermore, the Free Exercise Clause extends beyond mere belief. *Smith*, 494 U.S. at 877. In *Smith*, this Court enshrined the current test for whether a law violates the Free Exercise Clause. This Court reasoned 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 (quoting *United States v. Lee*, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring)). In brief, laws burdening religious practice which lack neutrality or general applicability are subject to

strict scrutiny by courts. *Id.* at 878–82. However, a law which incidentally burdens religion is reviewed under a rational basis so long as it is both neutral and generally applicable. *Id.* at 879.

Holding with Free Exercise Clause jurisprudence, this Court should reverse the Fifteenth Circuit's holding and find Delmont's PAMA unconstitutional for two reasons: First, PAMA fails to satisfy either the neutrality or general applicability requirements under *Smith* and is subsequently unable to survive strict scrutiny. Second, even if this Court finds PAMA neutral and generally applicable, the *Smith* test is an unworkable standard and should be overruled.

### A. Under the Smith standard, PAMA is not neutral, generally applicable, and fails to pass strict scrutiny.

PAMA is an unconstitutional act under *Smith* as it fails neutrality, general applicability, and strict scrutiny. PAMA, and its enforcement through Respondent's investigation of the Kingdom Church, violates the Free Exercise Clause of the First Amendment by forbidding fifteen-year-old Kingdom Church members from practicing their sincerely held religious beliefs.

The *Smith* test holds that if a law is (1) neutral and (2) generally applicable, it is analyzed under rational basis review; however, if the law fails either neutrality or general applicability it is analyzed under strict scrutiny. *Fulton v. City of Philadelphia*, 141 S. Ct. 1668, 1876 (2021). A law which is (3) analyzed under strict scrutiny "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32.

Delmont's enaction of PAMA is a violation of the Free Exercise Clause because (1) Delmont did not act neutrally when enacting PAMA as evidenced by Governor Girardeau's animus towards the Kingdom Church, (2) PAMA is not generally applicable because the law leaves room for discretionary exceptions in emergency circumstances, and (3) PAMA's inability

to satisfy neutrality and general applicability requires an examination of strict scrutiny by the Court, a hurdle it fails to clear as Delmont cannot make a showing that the law is justified by a compelling governmental interest.

*1. PAMA is not neutral under Smith.*

Delmont's enaction of PAMA is not neutral under *Smith* as evidenced by Delmont's persecution against Kingdom Church followers and the political agenda of Governor Girardeau coinciding with the enactment of the law. This Court held that the "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877 (citing *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1718, 1731–32 (2018)).

When assessing a law's neutrality, courts first look to the text of the law to determine if it is neutral on its face—if the statutory text discriminates religion by referring to a religious practice without a secular meaning distinguishable from "language or context" the law lacks facial neutrality. *Lukumi*, 508 U.S. at 534. Petitioner concedes that PAMA satisfies this preliminary test because the Act makes no textual mention of the Kingdom Church's religious practice of blood-banking.

That being said, "facial neutrality is not determinative." *Id.* at 534. The Free Exercise Clause "forbids subtle departures from neutrality" and "covert suppression of particular religious beliefs." *Id.* (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971); *Bowen v. Roy*, 476 U.S. 693, 703 (1986)). The Free Exercise Clause was enshrined to protect against historical instances of religious persecution and intolerance—a concept at the core of all neutrality inquiries. *Bowen*, 476 U.S. at 703. When determining whether a law is neutral, the Court should use an equal

protection form of examination by considering both direct and circumstantial evidence. *Lukumi*, 508 U.S. at 540.

First, courts should examine the "specific series of events leading to the enactment or official policy in question" and the "historical background of the decision." *Id.* at 540. Findings of "masked" or "overt" government "hostility" in the historical background of enaction is evidence that the law is not neutral. *Id.* at 534. The government "fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877. Next, courts will look to the effect of the law in practice. If the "burden of the [law], in practical terms, falls on [religious observers] but almost no others," or if a law "proscribe[s] more religious conduct than is necessary to achieve its stated ends" then it is not neutral. *Lukumi*, 508 U.S. at 536, 538. Thus, the "effect of [the] law in its real operation is strong evidence of its object." *Id.* at 535–36.

To demonstrate, this Court in *Lukumi* struck down a city ordinance prohibiting ritualistic animal sacrifices as a violation of the Free Exercise Clause where the ritual was an inherent tenet of the Afro-Cuban religion of Santeria. The *Lukumi* Court found the historical background of the law's enactment troublesome—particularly because the City Council showed public and political animosity towards the religion of Santeria, its adherents, and practices in enacting the ordinance. *Id.* at 542. In its reasoning the Court opined that "the design of [the ordinance] accomplishes…a 'religious gerrymander,' an impermissible attempt to target petitioners and their religious beliefs." *Id.* at 535 (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970)).

First, PAMA departs from neutrality through its overt hostility towards Kingdom Church's practice of blood-banking. Respondent's repression of a religious practice can be established by looking to the series of events leading up to the enaction of PAMA. Similar to the

City Council in *Lukumi*, the impetus of PAMA's enaction can be traced to the public outcry and animosity towards Kingdom Church's sincere religious practices after *The Beach Glass Gazette* ran a story about the religion. R. at 5. Next, Governor Girardeau heavily lobbied Delmont's General Assembly to pass PAMA, created a taskforce to investigate "the exploitation of the Kingdom Church's children," and showed public distaste towards Emmanuella Richter—a clear pattern of government hostility. R. at 5, 7. Like the adherents of Santeria in *Lukumi*, members of the Kingdom Church are the subject of public and political persecution.

Second, PAMA restricts more religious conduct than necessary to achieve its interest of protecting Delmont's children. Respondents argue that the law was enacted to protect Delmont's children from a crisis in their mental, emotional, and physical well-being—citing to reports of an increase in child abuse and neglect and its correlation to suicide. Girardeau Aff. ¶¶ 4–5. However, nothing on the record indicates that the Kingdom Church's minor members, or even Delmont children for that matter, were experiencing these adverse effects due to consensual blood-banking. In contrast, the record is replete with evidence that PAMA was enacted to address public concerns which were intolerant and restrictive of Kingdom Church's genuine religious practices. R. at 7. This Court has held that the Free Exercise Clause is implicated where government actions favor a particular religion. *Lukumi*, 508 U.S. at 532. Here, the inverse is true; PAMA solely burdens Kingdom Church and its religious practices.

Third, PAMA is strategically gerrymandered to prohibit Kingdom Church's blood-banking practices. PAMA deliberately sets the age of a minor to sixteen and thus intentionally gerrymanders the Kingdom Church so that fifteen-year-old members who have reached a "state of reason" cannot practice their truly held belief of blood-banking. R. at 6. Even if the legislature was trying to protect minors, there is no discernable difference between a fifteen-year-old and a

sixteen-year-old's ability to provide consent for giving blood under Red Cross standards. R. at 5. Therefore, PAMA permits the secular conduct of a sixteen-year-old consensually donating blood but not the religious conduct of fifteen-year-old Kingdom Church members, a finding that demonstrates a failing of neutrality.

*2. PAMA is not generally applicable under Smith.*

PAMA is not generally applicable because there are conceivable situations where a discretionary exception must be made, and because a finding of a law's failure to satisfy the neutrality requirement under *Smith* is an indication of a failure to satisfy the general applicability requirement.

A law is generally applicable if it does not ostracize a single group against which the law applies. *Lukumi,* 508 U.S. at 543–45. Laws will fail the generally applicable requirement of Free Exercise claims if it "consider[s] the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton,* 141 S. Ct. at 1877 (quoting *Smith,* 494 U.S. at 884). In *Fulton*, this Court held that the government's creation of a formal mechanism to grant exceptions to its policy at its discretion indicated a failure to satisfy the requirement of general applicability. *Id.* at 1878. Further, the Court held that a "good cause" standard that grants the government discretion to grant exceptions in special circumstances is not generally applicable. *Id.* at 1868. However, a formal exception need not to have been made, the mere possibility of a discretionary exception is sufficient to fail general applicability. *Id.* at 1879.

Furthermore, a law may also fail to be generally applicable if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* Moreover, "[neutrality] and general applicability are interrelated, and…failure to satisfy one requirement is a likely indication that the other has not been

satisfied." *Lukumi,* 508 U.S. at 531. This is also true conversely: satisfying one requirement indicates the other is satisfied. *Id.*

PAMA fails to satisfy the generally applicable requirement of *Smith* because a law forbidding minors from consenting to donate blood or bodily organs will inevitably require exceptions. While nothing in PAMA indicates a formal mechanism to allow exceptions to the law, the Act provides the government arbitrary discretion where the law fails to define "minor's consent." R. at 3. It is inconceivable to imagine a world where a "minor's consent" will require exceptions in emergency circumstances. Governor Girardeau loudly supports the physical well-being of Delmont's children, so what happens when a child needs an organ transplant? R. at 7. Children cannot receive organ donations from adults because the size of the organs are too large to transplant to a child. *See* Jeffrey A. Sadowsky, MD, *How Organ Size Affects the Donation Process,* ORLANDO HEALTH (Apr. 15, 2016) https://www.orlandohealth.com/ how-organ-size-affects-the-organ-donation-process. However, under PAMA, it is against the law for children to donate organs. R. at 6.

Delmont's legislature purposely refrained from defining "minor's consent" so that discretionary exceptions can be made in exigent circumstances. Like the "good cause" exception in *Fulton,* the possibility of an emergency exception here operates the same. The General Assembly created a mechanism for individualized exceptions which allows it to prohibit the religious conduct of Kingdom Church members while allowing leeway in circumstances where it need not apply the same restrictions for secular conduct. Respondent will argue that "minor's consent" is clearly defined, but—as evidenced the Governor's agenda to protect Delmont's children—when a child is dying and in need of a transplant, exceptions will surely be made.

Finally, because PAMA fails the neutrality requirement of *Smith*, *see supra* Section II.A.1., it presumptively fails the general applicability requirement. Failure to satisfy one requirement of *Smith* is an indication that it fails the other. *Lukumi*, 508 U.S. at 531.Therefore, because PAMA lacks neutrality, it also lacks general applicability.

*3. PAMA fails under strict scrutiny because the law is underinclusive and not narrowly tailored to achieve the government's interest.*

PAMA is subject to and fails strict scrutiny because it is underinclusive and not narrowly tailored to achieve the government's interest. Laws which have failed either the neutrality or general applicability requirements of *Smith* will be analyzed under strict scrutiny and can only survive if it "advance[s] 'interest of the highest order' and [is] narrowly tailored in pursuit of those interests." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020) (quoting *Fulton*, 141 S. Ct. at 1881). A law which "is fatally underinclusive because its 'proffered objectives are not pursued with respect to analogous nonreligious conduct'" fails strict scrutiny. *Id.* at 2261 (quoting *Lukumi*, 508 U.S. at 546).

Here, PAMA was passed "following the outcry over the ethics of the Kingdom Church's blood-banking practices" and was tenuously justified out of "concern that Delmont's children faced a crisis as to their mental, emotional, and physical well-being." R. at 5, 7. While the health of Delmont's children is certainly an "interest of the highest order," the means to which it is being advanced is far too attenuated to pass strict scrutiny. PAMA is not narrowly tailored as a restriction of a minor's ability to consensually donate blood is a far cry from the broad government interest of Delmont's children's well-being. Next, the enaction of PAMA is underinclusive because the prohibition of minor's donation of blood fails to address the myriad of factors which implicate the well-being of children such as education, healthcare funding, and

child-care. PAMA was enacted to crack down on Kingdom Church's religious practice, a justification which contravenes the Free Exercise Clause and fails to overcome strict scrutiny.

### B. The *Smith* Test is an unworkable standard and should be overturned by this Court.

The *Smith* standard utilized by this Court to evaluate Free Exercise claims is an unworkable standard as evidenced by nearly three decades of holdings where this Court finds *Smith* inapplicable and should therefore be overturned. Free exercise claims have not always been evaluated under the *Smith* standard. The Supreme Court's decision in *Smith* derived its reasoning from *Minersville School Dist. v. Gobitis*, where the Court upheld a law which required school children to salute the American flag and recite the Pledge of the Allegiance against a group of Jehovah's witnesses who claimed it violated their beliefs. *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 591–92 (1940). The Court held that the flag saluting law did not impede the Free Exercise Clause because the law was of "general scope [and] not directed against doctrinal loyalties of particular sets." *Id.* at 594. However, several years later the Court overruled *Gobitis*, holding that "if there is any fixed star in our constitutional constellation, it is that no official…can prescribe what shall be orthodox in politics, nationalism, religion, or matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

Following these cases, the Supreme Court officially validated the language of strict scrutiny for free exercise claims. *Sherbert*, 374 U.S. at 403. The holding in *Sherbert* enacted a balancing test which provided that a law burdening religious exercises must be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to

regulate." *Id.* The *Sherbert* court required the law to be the least restrictive means to advance a compelling state interest. *Id.*

The *Sherbert* standard lasted nearly three decades until the Court imposed the *Smith* standard of strict scrutiny. However, both the Court and Congress have consistently proven to limit *Smith'*s scope. To illustrate, Congress passed the Religious Freedom Restoration Act ("RFRA") in 1993 which reads that a law cannot "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). The RFRA made two exceptions to the standard when the law "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id*. As a result, the RFRA essentially revived the *Sherbert* balancing test as the standard for federal laws—a demonstration that Congress's will does not match this Court's decision in *Smith* and its progeny.

Further, in cases involving the Free Exercise Clause, this Court has consistently found applying the *Smith* standard as inapplicable and created many a carveouts along the way. For instance, the Supreme Court has found in cases where the government intentionally targeted religious groups that the law is not neutral. *See Lukumi*, 508 U.S. at 520; *Masterpiece Cakeshop*, 138 S. Ct. at 1719. Next, the Court has ruled that laws which ostracize religious groups from government programs are not neutral and generally applicable. *See Trinity v. Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Espinoza*, 140 S. Ct. at 2246. Moreover, where the government leaves itself discretion to grant exceptions to a law the law is not neutral and generally applicable. *Fulton*, 141 S. Ct at 1868. Finally, the court has held that a law is not neutral and generally applicable if it is applied to religious institutions where there are alternative exemptions. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

The *Smith* test is an unworkable standard which should be overturned by this Court. Congress, by passing the RFRA, demonstrated that the will of the American people and the values of this nation align towards the balancing test of *Sherbert*, not the *Smith* test. Further, this Court time and time again finds the *Smith* test as inapplicable and creates new carveouts to the standard. The indecisiveness of the Court in applying the *Smith* test to Free Exercise claims makes it increasingly difficult for lower courts to apply the correct standard—a phenomenon which increases the likelihood of cases, like this one, landing at the doorstep of the Supreme Court on appeal. Therefore, this Court should condense its prior holdings and reinstate the *Sherbert* balancing test so that it aligns with the RFRA and releases pressure on lower courts in attempting to uphold an unworkable standard. As a result, this Court should overturn *Smith* and issue a new, all-encompassing standard.

## CONCLUSION

This case provides us with a perfect example of how extending the *New York Times* standard to limited-purpose public figures is unconstitutional. While the First Amendment's protection of free speech is meant to promote robust and uninhibited discussion on issues of general and public concern, applying the actual malice requirement to false and defamatory statements made against limited-purpose public figures only serves to leave otherwise private individuals defenseless against harmful and defamatory allegations. In this case, Respondent, an elected official, used the influence and power of her public office as well as her re-election campaign to make defamatory statements regarding Emmanuella Richter and her religious beliefs. Because Richter was fighting against the legislation that unjustly abridged her religious freedom, she is deemed a limited-purpose public figure and cannot recover against Respondent unless she can overcome the high bar of establishing actual malice.

Delmont's enaction of PAMA violates the Free Exercise Clause. First, PAMA is not neutral because Governor Girardeau and the General Assembly of Delmont demonstrated overt and intentional in enacting the legislation. Second, PAMA is not generally applicable because it leaves rooms for emergency exceptions at the government's discretion. Third, PAMA fails strict scrutiny because it is underinclusive in achieving the government's purported interest. Finally, even if this Court disagrees with Petitioner's arguments of neutrality and general applicability, the *Smith* test is an unworkable standard which should be overruled by this Court.

For these reasons, Petitioner respectfully requests that this Court overturn the Fifteenth Circuit's decision in granting summary judgment in favor of the Respondent and find that the extension of the *New York Times* standard to limited-purpose public figures is unconstitutional

and that Delmont's Physical Autonomy of Minors Act is an unconstitutional violation of the Free Exercise Clause of the First Amendment.

Respectfully submitted,

**TEAM 1**

*Counsel for Petitioner*

## APPENDIX

## CONSTITUTIONAL PROVISION

This concern challenges to the First Amendment of the United States Constitution. That amendment provides accordingly, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press…" U.S. CONST. amend. I.

## SATUTORY PROVISIONS

Petitioner makes an argument which references the Religious Freedom Restoration Act of 1993. 42 U.S.C. §§ 2000bb, *et seq.* Enacted by Congress in 1993, the act reads that a federal law cannot "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). The RFRA made two exceptions to the standard when the law "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a). In addition, the RFRA only applies to federal law, and not state statutes. 42 U.S.C. § 2000bb–3(a).

Finally, this case also entwines the newly enacted Delmont Physical Autonomy of Minors Act of 2021. The statute forbids "the procurement, donation, or harvesting of thee 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.

## CERTIFICATE OF COMPLIANCE

In accordance with Rule III.C.3 of the Official Rules of the 2023 Seigenthaler-Sutherland Moot Court Competition, we herby submit this certificate of compliance to certify that:

(i) The work product contained in all copies of this team's brief is the work product of the team members, and only the team members;

(ii) The team has complied with the governing honor code of our school; and

(iii) The team has complied with all of the Rules of the Competition.

Respectfully submitted,

/s/ Team 1

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*Counsel for Petitioner*

January 31, 2023