No. 22-7654

IN THE

Supreme Court of the United States

EMMANUELLA RICHTER,
Petitioner,
v.

CONSTANCE GIRARDEAU,
Respondent.

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

BRIEF FOR RESPONDENT

TEAM 4
COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether withdrawing the First Amendment protections established in *New York Times v. Sullivan* for critics of limited-public figures is constitutionally required.

II. 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 not, whether *Employment Division, Department of Human Resources of Oregon v. Smith* should be overruled.

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JURISDICTION

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

STATEMENT OF THE CASE

The United States Department of Health and Human Services reported in 2020 that child abuse sharply rose over the previous years, reversing a pre-2016 trend. R. at 39. Worryingly, CDC data on the teenage suicide epidemic that shows over a quarter of children who commit suicide experience suspected or confirmed cases of abuse or neglect. R. at 7, 40.

On January 4, 2021, the Governor for the State of Delmont, Constance Girardeau, was briefed on the Physical Autonomy of Minors Act (PAMA), a piece of legislation designed to curb child abuse in Delmont. R. at 39. PAMA forbids the procurement, donation, or harvesting of bodily organs, fluids, or tissue of a minor without exception, regardless of the consent of the minor. R. at 2. Mindful of the pervasiveness of child abuse, Governor Girardeau informed the leadership of the Delmont General Assembly of her support for PAMA. R. at 40.

The Kingdom Church is a religious group in Delmont. R. at 3-4. Kingdom Church members may not accept blood from or donate blood to a non-member. R. at 5. Because of this, children in the Kingdom Church were required to bank their blood at local blood banks in case they or their family needed donations. R. at 5. Upon the passage of PAMA, however, all Delmont children, including Kingdom Church children, were forbidden to donate blood. R. at 6.

On January 17, 2022, a large multi-car crash involving many Kingdom Church members occurred. R. at 6. Adam Suarez, a 15-year-old Kingdom Church minor, donated blood to his cousin who was involved in the crash. R. at 6. His blood donation went awry, and Adam was hospitalized, an event that garnered widespread media coverage. R. at 6. Afterward, Governor Girardeau commissioned a task force to investigate whether Kingdom Church's blood donation requirement for minors violated PAMA. R. at 7. Petitioner Emmanuella Richter, founder of Kingdom Church, requested injunctive relief, seeking to stop the investigation by claiming the enforcement of PAMA violated the Free Exercise Clause. R. at 3, 7-8. PAMA does not name Kingdom Church or any religious group in its text, and Governor Girardeau's support for PAMA was unrelated to Kingdom Church. R. at 37.

On January 27, 2022, in response to a question on Petitioner's attempt to block the investigation, Governor Girardeau said, "What do you expect from a vampire who founded a cult that preys on its own children?" R. at 8. Petitioner then additionally sued for defamation. R. at 8.

SUMMARY OF ARGUMENT

I. *New York Times v. Sullivan* is no ordinary First Amendment case; it is the exemplar of this nation's profound commitment to free speech and has served as the lodestar of First Amendment jurisprudence for the past 60 years. Its reasoning is simple: for freedom of speech to flourish, it must have breathing space, and that breathing space must be guarded against encroachment from defamation law. Those with great power in public discourse can, and therefore should, bear the great responsibility of proving actual malice in defamation suits. This includes public officials and public figures alike. Artificially excising limited-purpose public figures from the category of public figures would subvert the core rationale of *Sullivan* and its long line of progeny, as both all-purpose and limited-purpose public figures influence matters of

public debate and voluntarily choose to reap the risks and rewards of that influence. The many guardrails imposed upon the category of limited-purpose public figures prevents its boundaries from sweeping in too many individuals. Critics of *Sullivan* fail to recognize that recent changes to the news media present old problems this Court has grappled with and resolved consistently in favor of expansive First Amendment protections. There is no other "special justification" under the doctrine of stare decisis for departing from *Sullivan*'s foundational, deep-rooted precedent.

II. The Fifteenth Circuit did not err in concluding that PAMA is neutral and generally applicable. Both lower courts found that PAMA was enacted to combat the broader dangers threatening Delmont minors and applies without exception to all children; those factual findings merit extraordinary deference. PAMA is thus constitutional under *Employment Division v. Smith*.

Smith, in turn, should not be overruled because it embodies the correct understanding of the Free Exercise Clause. The ordinary meaning of the clause's text does not prohibit incidental burdens on religious exercise by generally applicable laws. Multiple historical sources confirm that Founding Fathers and ordinary citizens alike at the time of ratification understood there to be no right of religious exemption. This Court agreed as early as 1878 in *Reynolds*; *Smith* merely laid out in explicit terms what this Court had done for over a century. *Sherbert*'s "compelling state interest" standard was not, as has been claimed, a shift in this Court's free exercise jurisprudence: only once in 27 years was it applied to grant a religious exemption from a generally applicable law, and that case, *Yoder*, has been recognized as an outlier.

Smith is not only deeply rooted in text, history, and precedent, but its highly workable, bright-line standard has come to serve as the foundation for modern free exercise jurisprudence, which has in turn defended the rule of law and democratic liberty against anarchy on the one

hand and centralized federal power on the other. Finally, because no special justification exists straying from longstanding precedent, *stare decisis* also counsels against overturning *Smith*.

ARGUMENT

I. THE COURT'S LONG-STANDING APPLICATION OF *SULLIVAN* TO ALL PUBLIC FIGURES IS REQUIRED BY THE FIRST AMENDMENT.

A. *Sullivan* Is Jurisprudential Bedrock for Broader First Amendment Principles.

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) has been repeatedly applied and affirmed by this Court for nearly 60 years.[1] Its actual malice standard, which raises the standard public officials and public figures must meet to successfully bring a defamation suit, stems from a "profound national commitment to the free exchange of ideas" that recognizes that speech needs "breathing space" to thrive. *Id.* at 272 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). Overruling this standard even in part would endanger the unbroken line of freedom of press decisions built upon *Sullivan*'s recognition of the right to engage in "uninhibited, robust, and wide-open" debate on "the major public issues of our time." *Sullivan*, 376 U.S. at 270-71.

Sullivan's powerful reasoning has reached beyond the defamation context to become foundational precedent for other decisions as well. In seminal cases ensuring the freedom of speech in areas ranging from public protest to campaign finance, this Court has recognized *Sullivan* as its First Amendment lodestar. *See Snyder v. Phelps*, 562 U.S. 443, 452 (2011); *Citizens United v. FEC*, 558 U.S. 310, 326–27 (2010). Chipping away at *Sullivan* destabilizes

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[1] *See Masson v. New Yorker*, 501 U.S. 496, 508 (1991); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988); *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 761 (1985); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984); *Wolston v. Readers Digest Ass'n*, 443 U.S. 157, 168-69 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 455 (1976).

much more than defamation law – it endangers a wide array of decisions and their corresponding protections for religious and political advocacy. In light of the systemic risk a cramped reading of *Sullivan* poses to First Amendment jurisprudence more broadly, this Court should not hesitate to reaffirm *Sullivan* and its strong commitment to free speech.

B. *Sullivan*'s Reasoning Logically Includes Limited-Purpose Public Figures.

1. *Sullivan*'s standard was intended to encompass more than public officials.

In *Sullivan*, the Court held that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'" 376 U.S. at 279-80. Though the facts of the case only involved a public official, *Sullivan* plainly evinces the Court's intention that its actual malice standard encompass other types of non-government individuals. The opinion's language sweeps broadly, casting itself as defending not the meager right to speak about government employees, but the "freedom of expression upon public questions" so as to preserve the people's ability to "bring[] about [] political and social changes." *Id*. at 269-70. Its text explicitly left open future courts' ability to "specify categories of persons who would or would not be included." *Id*. at 283 n.23. And, tellingly, the Court explicitly spoke of "private persons" whose rights the Court would have to balance against the rights of critics or commentators. *Id*. at 281.

Just four years later, in the companion cases *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and *Associated Press v. Walker*, 389 U.S. 28 (1967), the Court responded to *Sullivan*'s invitation to specify those "categories of persons," holding the actual malice standard to reach both public figures and public officials. This was emphatically endorsed in subsequent years: "Today, there is no question that public figure libel cases are controlled by the *New York Times* standard." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989).

2. Excising limited-purpose figures subverts *Sullivan* and its progeny.

Public figures are those who have "assumed roles of especial prominence in the affairs of society." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). In rare instances, individuals will have enough general fame and persuasive power to be deemed public figures in every circumstance; these are "all-purpose" figures. *Id*. More commonly, an individual will "thrust themselves to the forefront of a public controversy in order to influence the resolution of the issues involved"; these are "limited-purpose" figures. *Id.* The latter are only subject to the actual malice standard in connection with issues about which they invite attention. *See, e.g.*, *Kahl v. Bureau of National Affairs, Inc.*, 856 F.3d 106 (D.C. Cir. 2017).

Cabining the actual malice standard solely to all-purpose public figures creates a double standard unmoored from the purpose of *Sullivan*, as the same reasoning applies equally to both groups. Both types of public figures play crucial roles in the public's right to be informed on matters of legitimate interest, and both types possess a level of influence that opens them up to comment while providing them the platform and communication channels to rebut falsehoods. An attack on *Sullivan*'s application to limited-purpose public figures is a frontal assault on *Sullivan*'s coverage of public figures generally.

i. Both types of public figures influence matters of public debate.

The core of *Sullivan* is the protection of the citizenry's constitutional right to "inform and be informed on matters of legitimate interest." *Curtis*, 388 U.S. at 163-64 (Warren, C.J., concurring in judgment). Whether the speaker is labelled an "all-purpose" or a "limited-purpose" public figure is irrelevant when assessing how their words impact public discourse. Whether a movie star or simply a passionate advocate, a vocal contributor to a high-profile issue invites

comment and attention on their words and on themselves; the debate on that issue hinges on the ability of all to comment on those involved who disproportionately affect the conversation.

Restricting the free flow of comment and criticism to only a portion of those "intimately involved in the resolution of important public questions," *id.*, merely because of their status in unrelated contexts, would chill speech on those limited-purpose public figures who instead should be subject to the most rigorous discussion and scrutiny. The "prized American privilege to speak one's mind" about matters of public concern should not turn on such an artificial distinction between individuals. *Sullivan*, 376 U.S. at 269 (Goldberg, J., concurring in judgment). *Sullivan* should not be read to reach such an arbitrary result.

ii. Both types of public figures choose to accept the risks of wielding influence, and in return, both enjoy greater opportunities for rebuttal.

One would understandably be sympathetic if limited-purpose figures were often subject to a heightened defamation standard through no decision of their own. But limited-purpose figures are practically never passive bystanders who find themselves embroiled in public debate against their will: they are individuals who voluntarily "thrust themselves to the forefront of a public controversy" to seize the risks and rewards that come with power and influence. *Gertz*, 418 U.S. at 345. "[T]he instances of truly involuntary public figures must be exceedingly rare." *Id.* Those who choose step into the public arena to influence events can appropriately be expected to accept a greater risk of falsehoods hurled their way.

In return, both limited-purpose and all-purpose figures enjoy access to remedies that private individuals go without. Unlike private individuals, public figures, like public officials, are more likely to have effective opportunities for self-help when they are defamed because they generally enjoy significantly greater access to channels of effective communication. *See id*. at

344. But because private individuals without access to the same means are "more vulnerable to injury," the state interest in protecting them is "correspondingly greater." *Id*. Thus we have one standard for private individuals and another for public officials and public figures, with each standard commensurate to each group's circumstances.

iii. The boundary of limited-purpose public figures is tightly drawn.

The worry that the dawn of social media unacceptably enlarges the number of public figures has no basis in law, as the reasoning in *Sullivan* and its progeny imposes multiple guardrails that prevent the category of limited-purpose public figures from sweeping in too many individuals. For one, absent sufficient access to media attention, individuals are simply not public figures; this in itself screens out most individuals who may have moderate social media followings but are in no sense of the word famous. *See, e.g.*, *Hutchinson v. Proxmire*, 443 U.S. 111, 134 (1979). Additionally, courts focus on whether plaintiffs voluntarily injected themselves into a controversy to avoid capturing innocent bystanders, which prevents critics from converting private individuals into public figures by virtue of their own allegations. *See, e.g.*, *id*. at 135-36; *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976). And perhaps most importantly, the allegedly defamatory statement must be related to limited-purpose public figure's role in the relevant public controversy to receive the actual malice standard. *See Gertz*, 418 U.S. at 351-52. This prevents speakers from using an individual's prominence in one particular area to justify spreading falsehoods in an unrelated part of the figure's life. In the end, it is a rather small number of individuals who are able to jump through all the hoops to become a public figure.

C. Recent Changes In The Media Ecosystem Should Not Diminish This Court's Commitment To Free Speech.

Many critics of the *Sullivan* standard properly identify contemporary challenges in defamation but fail to give proper weight to countervailing First Amendment interests. Some have argued that changes in the economics of news and the media ecosystem undercut policy rationales for affirming the actual malice rule. *See* David McGowan, *A Bipartisan Case Against New York Times v. Sullivan*, 1 J. Free Speech L. 509, 513 (2022). "[T]he distribution of disinformation – which costs almost nothing to generate . . . has become a profitable business while the economic model that supported reporters, fact-checking, and editorial oversight has deeply eroded." *Berisha v. Lawson*, 141 S. Ct. 2424, 2426-27 (2021) (Gorsuch, J., dissenting).

While the spread of erroneous information is lamentable, the solution is not to cave to a modified heckler's veto, stripping law-abiding citizens of their First Amendment right to speak freely simply because a small number of unscrupulous individuals spew falsehoods. Instead, this Court, having confronted this dilemma numerous times, should continue to abide by its judgment that "constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *Button*, 371 U. S. at 445. Far from blind to this phenomenon, the Court recognized that "erroneous statement[s] [are] inevitable in free debate" and yet must be protected to guarantee free expression. *Sullivan*, 376 U.S. at 271-72 (quoting *Button*, 371 U.S. 415). "[T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *Id*. at 278. In light of the Court's "consistent[] refus[al] to recognize an exception for any test of truth…and especially one that puts the burden of proving truth on the speaker," this Court should not falter in its constitutional commitments now. *Id*. at 271.

In short, critics fail to explain why news outlets that try their best to get the facts right should forfeit the standard simply because bad actors exist. And they also underestimate the

chilling effect that *Sullivan* sought to counteract by creating breathing space for speech and expression. As a practical matter, excising limited public figures from the category of public figures will empower influential individuals to silence dissenting and critical voices who equally deserve to be a part of public debate. The courts have used the actual malice standard for nearly 60 years as a tool to ensure that critics and commentators on significant public events and powerful individuals are not stifled. This deeply-rooted standard is not a defective outlier.

Finally, critics assume that the lack of libel judgments means that the actual malice standard has turned into something of an immunity. *See Berisha*, 141 S. Ct. at 2428; McGowan, *supra* at 535. First, it should be noted that the past few years show no shortage of public figure and public official plaintiffs that have adequately alleged actual malice, belying any contention that *Sullivan* slammed shut the courthouse doors on such claims.[2] But, even if critics find these numbers low, they ignore another more obvious reason for the lack of such judgments: generally, the press is not in the business of hawking false information.

D. *Stare Decisis* Compels The Court To Affirm *Sullivan*.

Finally, it would be contrary to the established principles of *stare decisis* to alter *Sullivan*'s scope, which has stood for the better part of a century. "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Though *stare decisis* is not an "inexorable command," *id*. at 828, this Court has always required a "special

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[2] *See, e.g.*, *Jones v. Pozner*, No. 03-18-00603-CV, 2019 WL 5700903 (Tex. App. Nov. 5, 2019); *Nunes v. Lizza*, 12 F.4th 890 (8th Cir. 2021); *U.S. Dominion, Inc. v. Powell*, 554 F. Supp. 3d 42 (D.D.C. 2021).

justification" when straying from precedent over and above an argument that the prior case was wrongly decided. *Haliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). That special justification does not exist here.

Five factors are taken into account in deciding whether to overrule a past decision: the quality of the decision's reasoning, its consistency with related decisions, developments of law or fact since, reliance on the decision, and the workability of the rule it established. *See Janus v. AFSCME*, 138 S. Ct. 2448, 2478-79 (2018). All five factors militate against overruling the actual malice requirement for public figures, whether limited or all-purpose. The quality of *Sullivan*'s reasoning has been displayed above, as has its consistency with this Court's First Amendment cases and philosophy; the remaining three factors merit further discussion.

Developments since *Sullivan* have only made clearer the need for heightened defamation standards. At the time, *Sullivan* was pivotal in curtailing state abuses of defamation law, which leveraged the ease of winning defamation suits to effectively muzzle news outlets that reported on the horrid treatment of civil rights advocates. *See* Elena Kagan, *A Libel Story*: *Sullivan Then and Now*, 18 L. & Soc. Inquiry 197, 203 (1993). Since then, the number of press outlets and the coverage of media reporting has grown, and with it, the necessity of protecting speech and press. *Sullivan* continues to enable reporting and commentary on significant issues regardless of whether they occur locally or at the national level without fear of being bankrupted by overly litigious individuals.

Relatedly, reliance on the standard has increased over time. With the proliferation of online publication, news is now available 24/7 and nationwide. *See Berisha*, 141 S. Ct. at 2427 (Gorsuch, J., dissenting) ("[T]his new media world has many virtues—not least the access it affords those who seek information about and the opportunity to debate public affairs.") All

contributors to this lively public debate, from professional journalists down to Twitter users, rely on *Sullivan*'s First Amendment umbrella to speak freely. Excising limited-purpose public figures would force everyone to proceed cautiously, knowing they could be sued under the most punitive state defamation standard given the possibility of national forum shopping. The inevitable result would be a climate of censorship and unpredictability.

Finally, the actual malice standard has proven workable in defamation cases for over five decades. Cases subsequent to *Sullivan*, such as *Curtis* and *Gertz*, have provided adaptable, concrete standards that allow courts to respond to practical problems as they develop while maintaining the Court's commitment to free speech and press.

In short, overturning *Sullivan* as it applies to limited-purpose public figures has no basis in the law, no basis in fact, and would be substantially disruptive.

II. THE LOWER COURTS DID NOT BOTH ERR IN CONCLUDING THAT PAMA WAS NEUTRAL AND GENERALLY APPLICABLE.

The procedural posture of this case constrains this Court's review. It is this Court's well-settled rule that factual findings agreed upon by both lower courts will be deferred to absent a "very obvious and exceptional showing of error." *Berenyi v. Dist. Dir., INS*, 385 U.S. 630, 670 (1967) (quoting *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)). Petitioner cannot make that exceptional showing. The doubly established facts resolve this case under the longstanding precedent of *Employment Division v. Smith*, which holds that neutral and generally applicable laws that only incidentally burden religious practices are constitutional and do not offend the First Amendment's Free Exercise Clause. 494 U.S. 872, 878-80 (1990).

A. PAMA Is Neutral Because It Was Enacted to Protect Delmont Minors from Abuse and Does Not Target the Kingdom Church

A statute is not neutral if it "targets religious conduct for distinctive treatment" either facially in its text or otherwise in its operation. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). Merely showing an "adverse impact" on religious conduct does not prove the absence of neutrality; the adverse impact must be the product of a "religious gerrymander" that is "intended to cover" only the religious conduct in question. *Id*. at 535-36.

PAMA is neutral both facially and in operation. PAMA does not name Kingdom Church, or any religious group, for that matter, in its text. And, as both lower courts determined, PAMA was enacted in response to the broader dangers threatening Delmont minors – rising rates of child physical abuse, neglect, and teenage suicide – and not in any way to target the Kingdom Church. Petitioners do not come close to carrying their burden of showing this finding is "a very obvious and exceptional" error, *Berenyi*, 385 U.S. at 670. Any impact on Kingdom Church's blood donation practice is incidental to PAMA's neutral object of protecting Delmont's minors.

B. PAMA Is Generally Applicable Because It Covers All Delmont Minors and Does Not Impose a Selective Burden.

Neutrality and general applicability are interrelated requirements of *Smith*, and satisfying one is a likely indication of satisfying the other. *See Lukumi*, 508 U.S. at 531. So it is here.

A statute is not "generally applicable" if it either "provid[es] a mechanism for individualized exemptions" from the statute, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (internal quotations omitted), or it imposes burdens "in a selective manner," *Lukumi*, 508 U.S. at 543. Courts identify selectivity by looking at how the statute applies to comparable activities or persons. *See South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief).

PAMA's blanket coverage is the archetype of general applicability. Applying to all minors in Delmont regardless of religion or group, PAMA neither provides a mechanism for individualized exemptions nor selectively considers the religious status of a minor before protecting them from potential exploitation and abuse. Secular children are treated no differently from religious children, and children of one religion no differently from children of another.

III. *SMITH* STANDS ON ITS OWN MERITS AND IS FURTHER SUPPORTED BY *STARE DECISIS* CONSIDERATIONS.

A. *Smith* Embodies the Correct Understanding of the Free Exercise Clause's Original Meaning in Light of its Text and History.

1. The text of the Free Exercise Clause is naturally read to protect religious conduct from intentional suppression but not incidental burden.

Only an implausibly strained reading of the text of the Free Exercise Clause could sweep generally applicable laws into its reach. When interpreting the Constitution, "its words and phrases" should be given their "normal and ordinary" meaning. *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008). The First Amendment states that "Congress shall make no law . . . prohibiting the free exercise [of religion]. U.S. Const. amend. I. The key word "prohibit" has the same meaning today as it did at the Founding – "to prohibit" means "to forbid." *Prohibit*, A Dictionary of the English Language (Johnson 1755). The ordinary use of "prohibit" requires that more than an incidental burden be placed on the conduct in question. It is no more sensible to say that a bar on the use of peanuts in the kitchen "prohibits" or "forbids" one from cooking than it is to say that PAMA's bar on potentially exploitative conduct toward minors, which happens to cover Kingdom Church's blood drives, "prohibits" or "forbids" Kingdom Church members from exercising their religion.

Unsurprisingly, this Court understands the ordinary meaning of other clauses in the First Amendment this way. Take the Freedom of Press Clause, which is nearly identical to the Free Exercise Clause in structure: "Congress shall make no law . . . abridging the freedom of . . . press." U.S. Const. amend. I. "To abridge" also means today what it has meant since the Founding – "to contract, to diminish," *Abridge,* A Dictionary of the English Language (Johnson 1755) – and is arguably a broader word than "prohibit" (after all, one can diminish an activity without forbidding it outright). If an incidental burden on religion "prohibits" the free exercise of religion, then it should be the case that an incidental burden on press "abridges" the freedom of press. Yet "civil or criminal statutes of general applicability . . . may be enforced against the press as against others, despite the possible burden that may be imposed." *Branzburg v. Hayes*, 408 U.S. 665, 682-83 (1972); *see also, e.g.*, *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws."). The text of the Free Exercise Clause holds religious groups to the same standard.

2. The history behind the Free Exercise Clause suggests it was never understood to provide exemptions from generally applicable laws.

Multiple sources of historical evidence concurrent with the drafting of the Constitution show the Free Exercise Clause was understood at the Founding to provide no exemption from generally applicable laws. These include free exercise clauses in contemporaneous state constitutions, the views of key Founding Fathers, and the dearth of post-ratification religious exemption cases. (Note, too, that if the Free Exercise Clause provided exemption from generally applicable laws, one would think that such an extraordinary carve out for religious conduct would have been obvious in the records of the First Congress. Yet the legislative history of the

First Amendment is wholly unilluminating – something recognized even by detractors of *Smith*. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 550 (1997) (O'Connor, J., dissenting).)

The original meaning of the Free Exercise Clause is informed by the various state constitutions' free exercise clauses of the time. Twelve of the thirteen states at the time of the Founding contained such clauses, and in most, far from establishing religious freedom as a bulwark against generally applicable laws, these clauses were paired with explicit caveats for when free exercise clashed with "peace and safety." *See* Vincent P. Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 Harv. J.L. & Pub. Pol'y 1083, 1089-90 (2008); *see also, e.g.*, N.Y. Const. of 1777, art. XXXVIII ("[free exercise of religion] shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State"); Ga. Const. of 1777, art. LVI ("[free exercise of religion is allowed] provided it not be repugnant to the peace and safety of the State"). This is equivalent to stating that the clauses *did not* grant exemption to generally applicable laws – "[a]t the time these provisos were enacted, keeping 'peace' and 'order' seems to have meant, precisely, obeying the laws." *Boerne*, 521 U.S. at 539 (Scalia, J., concurring in part).

Critics of *Smith* have argued that reading the phrase "peace and safety" so broadly is incompatible with the dictionary meaning of the terms, which only encompasses activities that cause "disturbance" or "hurt." *See Fulton*, 141 S. Ct. at 1903-04 (Alito, J., concurring in part). But this Court has long recognized that the words of the Constitution are to be granted their ordinary, not dictionary, meaning, which "may of course include an idiomatic meaning." *Heller*, 554 U.S. at 577-78. "Peace" here has idiomatic meaning: common law courts were understood to have jurisdiction over any actions *contra pacem* – "against the peace" – a phrase that came to be

widely synonymous with violation of law. *See* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915, 918-19 (1992) ("[E]ighteenth-century lawyers made clear that 'every breach of law is against the peace'"). As early as the 14th century, violations of peace were understood to encompass not just violence and public disturbance, but also "economic offences" and breaches of "labour law." Stroud F.C. Milsom, HISTORICAL FOUNDATIONS OF THE COMMON LAW 427 (1981).

The lack of such caveats in the federal Free Exercise Clause is best understood not as providing an unqualified protection of religious exercise, but as an implicit inclusion of the "peace and safety" caveats seen in the state constitutions, which bar exemption to generally applicable laws. *See* Hamburger, *supra* at 926-29. This is made clear by the viewpoints of Thomas Jefferson and James Madison, both of whom were famously among the strongest defenders of religious liberty in nascent America, neither of whom thought sincere religious belief exempted citizens from generally applicable laws. *See* Michael J. Malbin, RELIGION AND POLITICS 25-29 (1978). If they would not establish such exemptions in the constitution of their home state of Virginia, "[t]here is no evidence to suggest that the First Congress adopted a different point of view." *Id*. at 37.

Proof that the Constitution's Free Exercise Clause did not grant an exemption to generally applicable laws is in the post-ratification pudding. If *Smith*'s rule were ahistorical, there would surely have been at least one case in the early days of the republic, in either state or federal court, striking down a generally applicable statute because of its failure to accommodate religious conduct. But there is not one. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1506-11 (1990); Gerald V.

Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 272 (1991). The silence in the record speaks volumes.

B. *Smith* Fits Neatly into More Than a Century of Free Exercise Doctrine.

1. Smith's jurisprudential roots go back to 1878.

The Fifteenth Circuit was incorrect in tracing *Smith*'s roots back to *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940). *Smith*'s roots go deeper – over 60 years deeper. In 1878, in the case *Reynolds v. United States*, this Court considered for the first time a First Amendment request for religious exemption to a generally applicable prohibition on polygamy; it unequivocally rejected the request, saying that to grant religious exemptions would be "introducing a new element into criminal law." 98 U.S. 145, 166-67 (1878). For nearly a century after *Reynolds*, this Court repeatedly declared loudly and with virtual unanimity that religion alone cannot exempt one from generally applicable laws. *See, e.g.*, *Davis v. Beacon*, 133 U.S. 333, 342 (1890) (*"*It was never intended or supposed that the [Religion Clauses] could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society."); *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940) ("The general regulation, in the public interest, of solicitation . . . is not open to any constitutional objection, even though the collection be for a religious purpose."); *Braunfeld v. Brown*, 366 U.S. 599, 603-04 (1961) ("[L]egislative power . . . may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion.").

Cases in the decades after *Reynolds* where this Court invalidated generally applicable laws for religious practices were always when other constitutional rights were involved – so-called "hybrid" cases. In these cases, the challengers' religious natures were not strictly

necessary for invalidation; the laws were often sufficiently unconstitutional on secular grounds, and the Court at times stated such explicitly. *See, e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943) (holding that the invalidation of a compulsory flag salute resolution, though brought on religious grounds by Jehovah's Witnesses, does "[not] turn on one's possession of particular religious views"). These cases lend scant support to the idea the First Amendment requires exemptions to generally applicable laws on purely religious grounds alone.

A wrinkle in this established post-*Reynolds* doctrine only arose in 1963, with *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Sherbert*, Seventh-day Adventist Church member Sherbert was fired by her employer because she refused to work on Saturday. *Id*. at 399. She filed for unemployment, but the state denied her claim, stating that her refusal to work Saturdays meant she failed to accept suitable work when offered, disqualifying her. *Id*. at 400-01. This Court held that because Sherbert's conscientious objection to Saturday work was not prohibited conduct, the individualized situation was distinguishable from prior cases where religious conduct directly clashed with a generally applicable law. *Id*. at 403. The Court instead assessed the burden on Sherbert's free exercise with a form of strict scrutiny, now known as the "*Sherbert* test," requiring the denial of unemployment benefits to be justified by a "compelling state interest." *Id*.

Sherbert, far from being the cornerstone of free exercise jurisprudence that critics of *Smith* now claim it to be, was highly limited in effect. Over the next 27 years, the "*Sherbert* test" was only ever satisfied four times. Three of those were nearly identical unemployment cases involving individualized considerations of religious refusals to work with no concomitant violation of generally applicable law: *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987), and *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989). In a

handful of other cases, the *Sherbert* test was nominally applied but easily found not to be satisfied in the face of a generally applicable law. *See, e.g.*, *Gillette v. United States*, 401 U.S. 437 (1971) (denying religious exemption to conscription law); *United States v. Lee*, 455 U.S. 252 (1982) (denying religious exemption to social security taxes). *Smith*'s arrival on the scene in 1990 was thus no shock – it merely applied the prevailing free exercise jurisprudence since *Reynolds* and clarified *Sherbert*'s narrow scope, which had been long been implicitly recognized.

The sole case where the *Sherbert* test was applied to grant a religious exemption to a generally applicable law is *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, the Court granted the Amish respondents a religious exemption from Wisconsin's compulsory school attendance law after reviewing the extensive factual record regarding the Amish community's admirable history and dedication to education – a "convincing showing" that "probably few other religious groups or sects could make" – and finding that Wisconsin did not have an outweighing compelling state interest in mandatory education for Amish children. *Id*. at 219-29, 234.

Both lower courts were right to cabin *Yoder* to its facts. *Yoder* was a unique case that, by its own language, was heavily dependent on its specific record. It has since been recognized as "an outlier in the free exercise lexicon." Marci R. Hamilton, *Employment Division v. Smith at the Supreme Court*, 32 Cardozo L. Rev. 1671, 1676 (2011). And, as noted in *Smith*, it, too, was a "hybrid" rights case, with much of Court's reasoning grounded in the right of parents to raise their children and not in the right of religious free exercise. *See Smith*, 494 U.S. at 881 n.4.

Smith is planted firmly in a century of precedent. On the other side are five cases: *Sherbert*, its three unemployment progeny, and *Yoder*. The first four do not involve violations of generally applicable laws and are thus unlike *Smith* itself, which, though it too arises in the unemployment context, is fundamentally about "the reach of [Oregon's] general criminal

prohibition" on peyote. *Smith*, 494 U.S. at 874. The last is *sui generis* and should not be expanded beyond its narrow facts.

2. Subsequent cases have built a clear and coherent framework atop Smith.

The Fifteenth Circuit's claim that *Smith* has been unworkable is also plainly incorrect. This Court's free exercise cases over the last 30 years are largely clarifications of *Smith*'s bright-line rule. The Fifteenth Circuit cites *Lukumi* as an example of *Smith*'s failings because the Court there found *Smith* inapplicable, not recognizing that *Lukumi*'s core holding, clarifying the terms "neutral" and "generally applicable," is a vindication, not a repudiation, of the basic doctrinal framework laid out three years prior in *Smith*. Then this Court issued a resounding reaffirmance of *Smith* in the face of a direct challenge from RFRA in *City of Boerne*, 521 U.S. at 511-14. Recent cases have continued to sharpen *Smith*'s edges but have never called its core holding into question. *See Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. 171, 189-90 (2012); *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2020-21 (2017). And lower courts apply *Smith* regularly without issue to this day. *See, e.g.*, *Swartz v. Sylvester*, 53 F.4th 693, 700-03 (2022) (applying *Smith* to workplace photography rules); *Kentucky v. Beshear*, 981 F.3d 505, 508-10 (2020) (applying *Smith* to COVID-19 school shutdowns). Far from being unworkable, *Smith* forms the stable, practicable foundation for modern free exercise jurisprudence.

C. Overturning *Smith* Would Court Anarchy and Curtail Liberty.

1. A tsunami of religious challenges to generally applicable laws awaits.

Overturning *Smith* in favor of a "compelling state interest" requirement would "permit every citizen to become a law unto himself." *Reynolds*, 98 U.S. at 167. "Government could exist only in name under such circumstances." *Id*. This fear of "courting anarchy," *Smith*, 494 U.S. at 888, is not speculative. Religious exemptions have been sought for everything ranging from the

minimum wage, *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985), to anti-racial discrimination laws, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). *Id*. at 889.

Opponents of *Smith* argue that the fear over religious exemptions has not been borne out by the evidence, asserting that the rule of law was fine before *Smith* and fine after the enactment of the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb, which overrode *Smith* at the federal level. *See Fulton*, 141 S. Ct. at 1922 (Alito, J., concurring in judgment) ("experience has shown that this fear was not well founded"). This misses two crucial facts: first, as noted above, courts were long applying the logic of *Smith* before 1990, averting anarchy only by repeatedly upholding generally applicable laws; and second, post-RFRA, the federal government has tacitly continued to understand the need for *Smith*, exempting pieces of legislation from RFRA's scope when conflict with religion is likely. *See, e.g.*, Equality Act, H.R. 5, 117th Con. (2021). State governments, too, understand the necessity of *Smith*: in the minority of states that have enacted RFRA-equivalents, the state judiciaries have repeatedly interpreted their RFRA statutes as being akin to *Smith*. *See* Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. Rev. 466, 485-87 (2010). Overturning *Smith* would run contrary to what both legislatures and lower courts have long understood as the only viable state of affairs.

2. Shifting the power to decide the status of state laws effects a dangerous transfer of power from state legislatures to the federal judiciary.

The fear is not just that generally applicable laws may fall if *Smith* is overturned. As this Court has recognized time and time again, "[f]ederalism secures the freedom of the individual" by "allow[ing] States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times" and not subjecting citizens to the

views of a "remote central power." *Bond v. United States*, 564 U.S. 211, 221 (2011); *see also, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Severely troubling in and of itself, then, is the fact that those tasked with wading knee-deep into the quagmire of balancing law against religious practice would be federal judges, not politically accountable state legislatures. This federal aggrandizement of power would strip state citizens from having a say in their own communities—an essential component of individual liberty. This Court should take care not to upend the balance of power between state and federal governments, between elected legislatures and unelected judiciaries.

D. Stare Decisis Favors Upholding *Smith*.

In addition to the text, history, precedent, and policy considerations, *stare decisis* counsels in favor of upholding *Smith*. As with *Sullivan*, no "special justification" exists for straying from *Smith*'s longstanding precedent.

The relevant stare decisis considerations described in the *Sullivan* analysis apply here, and all five factors have been shown to be in *Smith*'s favor. As laid out above, *Smith*'s reasoning is firmly supported by the text and history of the Free Exercise Clause. Its holding is rooted in and consistent with nearly a century of this Court's free exercise jurisprudence, dating back to *Reynolds* in 1878. Subsequent cases have embraced and built upon its core rationale, and its necessity only grows as the nation becomes increasingly religiously diverse. Its bright-line rule has been workable by the lower courts for decades, and its areas of non-application have been clearly carved out in *Lukumi* and its progeny. And the majority of states that have not enacted a RFRA-equivalent (and many of the ones that have, too) continue to rely on *Smith* when passing neutral and generally applicable laws; to pull the rug out from them now after over three decades would be substantially disruptive.

CONCLUSION

The judgment of the Court of Appeals for the Fifteenth Circuit should be affirmed.

APPENDIX

U.S. CONST. amend. I

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

N.Y. CONST. OF 1777, art. XXXVIII

> . . . the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: Provided, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

GA. CONST. OF 1777, art. LVI

> All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State; and shall not, unless by consent, support any teacher or teachers except those of their own profession.

28 U.S.C. § 1254

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

CERTIFICATE OF COMPLIANCE

Team 4 hereby certifies that:

1. All work product within this brief is the work product of this team's members alone.
2. All work contained within this brief and all work performed during the formation of this brief complies with the governing honor code of Team 4's school.
3. All work contained within this brief and all work performed during the formation of this brief complies with all Competition Rules.

Team 4

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