Case No. 22-CV-7654

In The
SUPREME COURT OF THE UNITED STATES

EMMANUELLA RICHTER,
Petitioner,

v.

CONSTANCE GIRARDEAU,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifteenth Circuit

BRIEF FOR PETITIONER

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Dated: December 17, 2023

QUESTION PRESENTED

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

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

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JURISDICTIONAL STATEMENT

This case arises from a dispute between the parties concerning state law and the Federal Constitution and therefore is a federal question under 28 U.S.C. §1331. The Fifteenth Circuit issued its opinion on December 1, 2022. Petitioner timely sough certiorari. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

I. Factual History

The Church of the Kingdom, also known as the "Kingdom Church," was founded in 1990 by the Petitioner, a comparative religion scholar, in the South American country of Pangea. Inspired by the texts of various faiths, Petitioner and her husband, Vincent, financed door-to-door proselytization efforts and introductory seminars that helped the church gain a wide following.[1] In 2000, Kingdom Church became the target of government oppression.[2] The Petitioner, and a large number of church members received asylum in the United States on grounds of religious persecution.[3] Since immigrating, the Petitioner and her husband have become U.S. citizens and settled in the port city of Beach Glass in the state of Delmont.[4]

Through the sale of their famous Kingdom Tea, Kingdom Church has become an independent and self-sustaining institution.[5] Spread throughout the southern portion of Delmont, Kingdom Church members live together as a community.[6] The Petitioner is not involved in the tea business and dedicates herself solely to church matters.[7] Education is a serious part of the Kingdom

[1] R. at 3.
[2] R. at 3. 4.
[3] R. at 3.
[4] R. at 3,4.
[5] R. at 4.
[6] *Id*.
[7] *Id*.

faith as joining the Kingdom Church requires individuals to undertake a course of intense study and achieve a state of enlightenment. After completing this process, they undergo a private confirmation.[8] The process is open to those who have obtained "the state of reason" — fifteen years of age.[9] Confirmed children are homeschooled with a combination of traditional curricular classes and religious instruction.[10]

Kingdom Church members may not accept blood from or donate blood to a non-member.[11] Therefore, blood banking is a central tenet of the faith.[12] The Kingdom Church's homeschool activities include blood donations as part of monthly "Service Projects." Blood drives are dedicated to providing for the confirmed students' own future medical needs, for those of their families, and as a means of establishing a "servant's spirit." The blood donations occur on a schedule and on terms permissible under American Red Cross guidelines.[13] If a confirmed student is ill on a particular blood drive day, the donation is skipped.[14]

Due to the immense popularity of Kingdom Tea, *The Beach Glass Gazette* ran a story about Kingdom Church which caused an outcry over their blood-banking service projects.[15] The outcry centered primarily on the involvement of minors and that minors were being procured for blood-banking purposes by church officials.[16] Until 2021, Delmont law allowed minors under the age of sixteen to consent to blood, donations for autologous donations, and in the case of medical

[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] R. at 5.
[12] *Id*.
[13] *Id*.
[14] R. at 5.
[15] *Id*.
[16] *Id*.

emergencies for consanguineous relatives.[17] Due to the public outcry, the Delmont General Assembly passed the Physical Autonomy for Minors Act (PAMA) which prohibited the procurement and donation of bodily fluids by a minor regardless of the minor's consent. Then, the Respondent advocated strongly for PAMA and signed it into law.[18]

Following PAMA's enactment in January 2022, a Kingdom Church member was involved in a car accident and required a blood donation to survive.[19] A fifteen-year-old member of the church, Adam, was related to the injured Church member and was a matching blood type.[20] The procurement of Adam's blood would have been permissible under the pre-PAMA law.[21] However, Adam had his own medical complications occur during the donation, which became a large part of the news coverage of the car accident.[22] Petitioner was interviewed by the media in connection with the accident and follow-up stories included references to the earlier reporting on the Church's blood banking service projects.[23]

Respondent stated that she was concerned for the children of Delmont, citing federal statistics from the Department of Health and Human Services (HHS) showing a spike in child abuse and neglect between 2016 and 2020.[24] Additionally, Respondent cited U.S. Center for Disease Control and Prevention (CDC) statistics on child neglect and abuse playing a large role in the suicide of minors.[25] Then, Respondent announced that she had ordered a task force to

[17] R. at 5, 6.
[18] R. at 6.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] R. at 6, 7.
[23] R. at 6, 7.
[24] R. at 7.
[25] *Id*.

investigate the Kingdom Church's blood-bank practices.[26] They would help determine if PAMA was being violated and classified it as "the mistreatment of the Kingdom Church's children."[27] This move was well-received by her constituents, as shown by survey and focus group results, and was also included in her campaign's fundraising efforts.[28]

Petitioner filed for injunctive relief in the Beach Glass Division of the Delmont Superior Court.[29] The Respondent responded to the claim by saying "I'm not surprised at anything Emmanuella Richter does or says. What do you expect from a vampire who founded a cult that preys on its own children?"[30] This statement deeply upset the Petitioner and believed it to be defamatory. Therefore, on January 28, 2022, the Petitioner amended their complaint to include legal action for defamation.[31]

II. Procedural History

The Superior Court denied Petitioner's claim in summary judgement, finding that the actual malice standard was not met, and the task force was constitutional. The District Court for the District of Delmont Beach Glass Division reviewed the facts and held that the Petitioner is a limited-purpose public figure which requires an actual malice standard to show defamation.[32] Concerning the free exercise claim, the District Court held that PAMA was neutral and generally applicable and therefore was a constitutional law.[33] Additionally, the District Court held that this case did not fall within the hybrid right exception to the *Smith* test.[34] The District Court entered

[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] R. at 7, 8.
[30] *Id*.
[31] *Id*.
[32] R. at 14, 15.
[33] R. at 18.
[34] R. at 19.

summary judgment for the Respondent.[35] The Petitioner appealed to the Fifteenth Circuit Court of Appeals arguing that the lower court erred in finding that there was no genuine issue of material facts regarding Petitioner's status as a private individual in her defamation claim and that the District Court's finding that PAMA is neutral and generally applicable as applied is incorrect as a matter of law.[36] The Fifteenth Circuit affirmed the judgment of the District Court.[37]

SUMMARY OF THE ARGUMENT

The extension of the actual malice standard from *New York Times v. Sullivan* to limited-purpose public figures is unconstitutional. It subjects, otherwise private, individuals to negligent defamatory statements in connection with public debates, even though they made no attempt to be involved in the public spotlight. In the present case, Petitioner had no intent to be at the center of a public debate about the ability of children to consent to blood donations for autologous use. Due to the actual malice standard, Petitioner's free speech has been unconstitutionally chilled as limited public figures do not have access to the same self-help remedies, which motivated the higher standard for all-purpose "Kardashian-like" public figures.

Moreover, *Employment Division v. Smith* should be overturned. Nothing in the *Smith* test can be inferred from the text and structure of the Constitution to allow neutral and generally applicable laws to burden religious exercise. At the time of its decision, *Smith* went against both *Sherbert v. Verner* and *Wisconsin v. Yoder* which allowed more protections for religious exercise. This Court should restore religious freedom by applying the strict scrutiny standard announced in *Sherbert*. This Court announced in *Dobbs v. Jackson Women's Health Org.* a framework for overturning precedent by looking at factors such as the nature of the error, the quality of its

[35] R. at 20.
[36] R. at 21.
[37] R. 38.

reasoning, the workability of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.

If this Court does not overturn *Smith*, Petitioner's claim should still reach strict scrutiny. First, PAMA cannot be said to be the product of neutral legislation because its drafting can be traced to public outcry and bias towards the Kingdom Church members. If this Court holds that PAMA can pass the *Smith* test, then PAMA can still reach strict scrutiny through the hybrid rights exception outlined in *Smith*. PAMA restricts the same rights of parents to direct the education of their children that was at issue in *Yoder*.

If PAMA reaches strict scrutiny it will fail. For a law to pass strict scrutiny it must be narrowly tailored to achieve a compelling government interest. In the present case, PAMA does not serve the alleged compelling government interest put forth by the government as Respondent is clearly using public animosity towards the Kingdom Church for political gain. Nothing in PAMA can be said to target child abuse or neglect, and the Respondent puts forth no evidence to that effect. Moreover, this Court has the ability, through strict scrutiny, to fashion a new system of exceptions when a law does not use the least restrictive means. Here, PAMA does not allow for any exceptions for religions or nonprofits which is overly restrictive and substantially burdens religious and philanthropic exercise.

ARGUMENT

I. *New York Times v. Sullivan* Chills Free Speech

Under *New York Times Co. v. Sullivan*, public figures must meet the "actual malice" standard for defamation claims.[38] To foster vigorous debate about government and public affairs in a democratic republic, the First Amendment's freedom of speech and press gives more protection to

[38] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

libelous words about a public figure than a private individual.[39] *New York Times*, requires that a public figure prove a defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."[40]

Later cases went on to distinguish between "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."[41] However, "limited-purpose" public figures have been thrusted to the front "of particular controversies in order to influence the resolution of the issues involved."[42] All public figures must meet the actual malice standard.

The difference in standard is due to the public figures' ability to rebut defamatory remarks as "public officials and public figures usually enjoy… greater access to the channels of… communication and… have a more realistic opportunity to counteract false statements. Private individuals are, therefore, more vulnerable to injury."[43] However, the circumstantial events that lead to a limited-purpose public figure does not guarantee that access. In the present case, Petitioner simply spoke to the media about their Church member's injury and filed this lawsuit.[44] These events are not related to PAMA and have led to Petitioner's reputation being thoroughly harmed. Due to respondent vilifying her, it is unlikely that Petitioner will be reached out to for comment or be taken seriously if she is. Moreover, this heightened standard is meant to protect the freedom of the press and not to stifle free speech by allowing public discourse about those figures

[39] Id. at 279-281.
[40] Id. at 280.
[41] Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).
[42] *Id*. at 345.
[43] *Id*. at 344.
[44] R. at 6, 7.

without a fear of being held liable, "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."[45]

However, the actual malice standard, as applied to limited-purpose public figures, has the opposite effect. *Gertz* recognized that, "it may be possible for someone to become a public figure through no purposeful action of his own."[46] When someone, such as the Petitioner, is at the center of a public debate through no fault of her own, they take reputational harm and are incentivized to not speak further out of fear of continued negligent defamation. Therefore, the free speech of Petitioner has been chilled unconstitutionally. This Court has recognized a property interest in reputation and safeguards should be afforded to limited-purpose public figures because they are not guaranteed the same ability to rebut negligent falsehoods.[47]

II. ***Employment Division v. Smith*** **Should Be Overturned**

Overturning *Employment Division v. Smith*[48] would reverse bad precedent that was rejected by Congress and 21 individual states.[49] *Smith* introduced a standard which allows the government to substantially burden religious exercise if the law in question is neutral and generally applicable, regardless of the impact on an individual's religious beliefs. Due to *Smith's*, legislatures can now decide what is a reasonable burden on religious liberty regardless of the Constitution's text. At its inception, *Smith* was contrary to precedent and enabled state governments to inhibit religious

[45] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).
[46] *Id*.
[47] *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).
[48] *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990).
[49] *See* 42 U.S.C. § 2000bb-1(a) (1993); State Religious Freedom Acts, https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx (last accessed Jan. 20, 2023).

exercise. When *Smith* was decided in 1990, it conflicted with *Sherbert v. Verner*[50] and *Wisconsin v. Yoder*.[51] Overturning *Smith* would restore religious freedom by applying strict scrutiny to all burdens on religious exercise.

This Court's should use this opportunity to overturn bad precedent, rather than sidestepping the question yet again.[52] *Smith* was interpreted only in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[53] and Justice Souter critiqued that the test was never briefed nor argued.[54] Although 25 years have elapsed, *Smith* was not applied in *Locke v. Davey*,[55] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[56] *Holt v. Hobbs*,[57] *Burwell v. Hobby Lobby Stores, Inc.*,[58] or *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.[59] All are significant free-exercise decisions since *Smith* and citations to *Smith* are insignificant.

Smith is rooted in the holding of *Minersville School Dist. v. Gobitis*,[60] which upheld state compulsion to salute the flag over the religious objections of Jehovah's Witnesses and was overturned three years later in *West Virginia Board of Education v. Barnette*,[61] just as *Lukumi* should have done to *Smith*. The strict scrutiny standard was later adopted for free-exercise claims by *Sherbert*.[62] In *Sherbert*, this Court held that the Free Exercise Clause of the First Amendment required that the state to provide unemployment compensation for those who were unemployed

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[50] *Sherbert v. Verner,* 374 U.S. 398 (1963).
[51] *Wisconsin v. Yoder*, 406 U.S. 205 (2012).
[52] *See Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2020) (Alito, J., concurring)
[53] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).
[54] 508 U.S. 520, 571-77 (1993). (Souter, J., concurring in the judgment).
[55] *Locke v. Davey*, 540 U.S. 712 (2004)
[56] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012)
[57] *Holt v. Hobbs*, 135 S. Ct 853 (2015).
[58] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).
[59] *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006)
[60] *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).
[61] *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).
[62] 374 U.S. 398, 406 (1963).

due to their religious belief.[63] Also, the Court held that the state's denial of unemployment benefits to Sherbert, imposed a burden on her free exercise of religion and that the state had not met its burden of demonstrating a compelling interest in denying benefits because of her unemployment due to religious beliefs.[64]

In *Yoder*, the Court held that the state's interest in compulsory school attendance was not sufficient to justify the infringement on the parent's rights to direct their children's religious upbringing and education.[65] The Court found that the parents' right to direct their children's religious upbringing and education was protected by the Free Exercise Clause of the First Amendment.[66] The *Yoder* Court went on to state, "a regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[67] Similar to South Carolina and Wisconsin, Delmont has no rational basis for criminalizing the Kingdom Church's free exercise, let alone a compelling interest. The Court should overturn *Smith* and restore *Sherbert* and *Yoder*, which requires that all laws that substantially burdens religious practice have a compelling governmental interest and be narrowly tailored.

Dobbs v. Jackson Women's Health Organization[68] supplies factors for overturning *Smith*, including, the nature of their error, the quality of their reasoning, the 'workability' of the rule, the disruptive effect on other areas of the law, and the absence of concrete reliance.[69]

a. Nature of the Error

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[63] 374 U.S. 398 (1963).
[64] *Id*.
[65] 406 U.S. 205, 234 (2012).
[66] 406 U.S. 205, 234 (2012).
[67] 406 U.S. 205, 220 (2012).
[68] *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).
[69] 142 S. Ct. 2228, 2265 (2022).

The *Dobbs* Court stated, "an erroneous interpretation of the Constitution is always important."[70] Just as *Roe v. Wade*[71] was "far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed,"[72] so, too, is *Smith* as the Constitution guarantees the free exercise of religion and does not create an exception for generally applicable or neutral laws. This conflict was compounded by *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[73] which perpetuated *Smith's* errors. Instead of invalidating *Smith*, *Lukumi* focused on the allowance of other forms of animal slaughter as evidence for a lack of neutrality.

Rather than cheers in celebration of having a clear format for applying the *Smith* test, Congress responded by passing the Religious Freedom Restoration Act (RFRA). RFRA expressly invoked *Sherbert* and restored strict scrutiny to federal laws that burden religion leading to 21 states enacting equivalents.[74] Sadly, RFRA left gaps for state law to burden religious liberty. Therefore, *Smith* should be held to be wrong from the moment it was decided due to the lack of any connection to the Constitution and its subsequent rejection by the People through Congress and state governments.

b. Quality of the Reasoning

The *Dobbs* Court stated, "*Roe*… failed to ground its decision in text, history, or precedent."[75] Rather than discerning what the words of the Free Exercise Clause meant at its adoption, *Smith* asked if it had a "permissible" reading.[76] This is inconsistent with *Smith's* drafter. Justice Scalia

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[70] 142 S. Ct. 2228, 2265 (2022).
[71] *Roe v. Wade*, 410 U.S. 113, 116 (1973).
[72] 142 S. Ct. 2228, 2265 (2022).
[73] 508 U.S. 520 (1993).
[74] 42 U.S.C. § 2000bb-1(a) (1993); State Religious Freedom Acts, https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx (last accessed Jan. 20, 2023).
[75] 142 S. Ct. 2228, 2266 (2022).
[76] 141 S. Ct. 1868, 1894 (2021) (Alito, J., concurring).

opined, "I look for in the Constitution is… the original meaning of the text."[77] The text of the Free Exercise Clause states, "Congress shall make no law... prohibiting the free exercise [of religion]."[78] The only words worth focus is "inhibiting" and the phrase "free exercise of religion."[79]

"To prohibit" meant to forbid at the time of the First Amendment's adoption.[80] "Exercise" was defined narrowly by this Court in *Cantwell v. Connecticut*,[81] as "an [a]ct of divine worship whether public or private."[82] And, "free" meant "unrestrained."[83] Thus, the meaning of the Free Exercise Clause, at the time of its adoption, meant "forbidding unrestrained religious practices or worship."[84] This simple definition is inconsistent with *Smith* and does not suggest an exception for neutral and general laws. Therefore, *Smith* has been a backdoor for state governments to burden religious freedom and would not be widely accepted if applied to any other Constitutional right.[85] Even the Fifteenth Circuit stated, "the *Smith* test is an unworkable outlier. It contrasts sharply with the standards used for free exercise claims before its release."[86] Thus, the quality of *Smith's* reasoning is subpar as it cannot be said to be rooted in any construction or text of the Constitution.

c. Workability of the Rule

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[77] Id. *See* A. Scalia, A Matter of Interpretation 38 (1997). See also *NLRB v. Noel Canning*, 573 U.S. 513, 575–583, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014) (SCALIA, J., concurring in judgment); *Maryland v. Craig,* 497 U.S. 836, 860–861, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (SCALIA, J., dissenting); *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 722, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010) (plurality opinion of SCALIA, J.).
[78] U.S. Const. amend. I.
[79] 141 S. Ct. 1868, 1896 (2021) (Alito, J., concurring).
[80] *Id*.
[81] *Cantwell v. Connecticut*, 310 U.S. 296, 303–304 (1940).
[82] 141 S. Ct. 1868, 1896 (2021) (Alito, J., concurring).
[83] *Id*.
[84] *Id*.
[85] *Id*. at 1897.
[86] R. at 36.

Dobbs stated another factor is, "whether the rule… can be understood and applied in a consistent and predictable manner."[87] *Smith* has failed consistently when applied because of two main factors, the "hybrid rights," and "targeting" religion.

The hybrid rights exception to *Smith* was essential in distinguishing *Yoder* and has baffled lower courts.[88] This tension is evident in the Sixth Circuit's blunt comments, deeming the hybrid exception "completely illogical."[89] The Second and Third Circuits have taken a similar approach.[90] Another camp believes a second viable claim is required.[91] This essentially makes the free exercise claim irrelevant. A third group believes that the non-free exercise claim must be "colorable." But what the means in application is ambiguous.[92] These three different interpretations demonstrate that lower courts are still unclear on how to apply the *Smith* decision.

Moreover, lower courts are unsure of how to find a law targets religion. *Lukumi* did not give a clear framework for finding that restriction on religious exercise as a law's "object."[93] The most immediate question is whether a court should apply an objective or subjective inquiry. Should targeting be determined based on the terms of the relevant rule, the motivations of lawmakers, or the nature of the decision, whether it is an adjudication, rulemaking, or enactment of legislation?[94] Do people of influence matter to this determination or only the legislators themselves?

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[87] 142 S. Ct. 2228, 2272 (2022).
[88] 141 S. Ct. 1868, 1896 (2021) (Alito, J., concurring); *See Combs v. Homer-Center School Dist.*, 540 F.3d 231, 244–247 (C.A.3 2008) (describing Circuit split).
[89] *Kissinger v. Board of Trustees of Ohio State Univ.*, 5 F.3d 177, 180 (1993).
[90] 141 S. Ct. 1868, 1917 (2021) (Alito, J., concurring).
[91] 141 S. Ct. 1868, 1918 (2021) (Alito, J., concurring).
[92] *Id*.
[93] 508 U.S. at 534.
[94] 141 S. Ct. at 1919 (Alito, J., concurring).

In *Lukumi*, the Justices took different positions concerning finding prohibition of religious exercise as a law's "object."[95] Justice Scalia and Chief Justice Rehnquist took the position that subjective motivations of the rule makers should not have been considered.[96] This conflict has never been resolved by subsequent cases and this Court should use this opportunity to clarify a workable bright-line rule that can be applied easily and consistently. By applying strict scrutiny and restoring the *Sherbert* standard, the lower courts can begin apply workable rules to free-exercise cases.

d. Disruptive Effect on Other Areas of the Law

This *Dobbs* Court stated, abortion cases have "disregarded the rule that statutes should be read where possible to avoid unconstitutionality."[97] Therefore, precedent being used to override constitutional doctrine is a factor to consider. Here, *Smith* has ignored the rule that a statute should be read, where possible, to avoid unconstitutionality by requiring that a law not have the "object" of prohibiting religious practice. This tension is evident in the conflict between *Lukumi* and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*.[98] In *Masterpiece Cakeshop*, the Court held that the disparaging remarks of an adjudicatory body can indicate a lack of neutrality.[99] In *Lukumi*, the Court looked at multiple ordinances from the city council to find a lack of neutrality and hostility towards the Santeria church.[100] Thus, there has been no guiding principle on where to stop when analyzing a statute for unconstitutionality in free exercise claims.

e. Lack of Concrete Reliance

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[95] *Id*.
[96] 508 U.S. at 537.
[97] 142 S. Ct. 2228, 2275 (2022).
[98] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n.,* 137 S. Ct. 2290 (2018).
[99] 141 S. Ct. at 1877.
[100] 508 U.S. 520, 538 (1993).

Lastly, the *Dobbs* decision relied upon Stare Decisis stating, "stare decisis… protects the interests of those who have taken action in reliance on a past decision."[101] No one has maintained a reliance interest in *Smith*, as Congress and 21 States have rejected the neutral and generally applicable standard and applied the compelling interest test through RFRA or a state equivalent, restoring the *Sherbert* standard.[102]

Therefore, this Court should use the framework outlined in *Dobbs* to overturn *Smith*. Specifically, the nature of the error was heavy, relied on questionable reasoning, provided an unworkable standard that has confused lower courts, disrupted other areas of law, and engendered little to no reliance.

III. PAMA Was Not the Product of Neutral Legislating

When this Court analyzes a law for neutrality under *Smith*, they "must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face."[103] However, the District and Circuit Court misapplied the holding of *Lukumi* as they failed to consider that "facial neutrality is not determinative."[104] Moreover, the Free Exercise Clause forbids subtle departures from neutrality and "covert suppression of particular religious beliefs."[105] Thus, the lower court was required to look at, "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the

[101] 142 S. Ct. 2228, 2261 (2022).
[102] *See* 42 U.S.C. § 2000bb-1(a) (1993); State Religious Freedom Acts, https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx (last accessed Jan. 20, 2023).
[103] 508 U.S. 520, 534 (1993).
[104] *Id*.
[105] *Id*. (quoting Gillette v. United States, 401 U.S. 437, 452 (1971); Bowen v. Roy, 476 U.S. 693, 703 (1986)).

legislative or administrative history, including contemporaneous statements made by members of the decision making body."[106]

When applied to the facts of this case, no decision maker could find that PAMA was made without the intent to target the Kingdom Church. In 2020, *The Beach Glass Gazette* ran a story about Kingdom Church's popular tea which caused an outcry over their blood-banking practices.[107] This directly led to the passage of PAMA the following year, analogous to the Hialeah community's reaction to the opening of a Santeria church.[108] Before the public outcry, there is no evidence of concern for minor consent to blood donations. Additionally, polling and focus group results found that public officials disparaging the Kingdom faith was popular, with Respondent going so far as to include statements about Kingdom Church in fundraising efforts.[109]

In *Lukumi*, this Court stated, "though use of the words 'sacrifice' and 'ritual' does not compel a finding of improper targeting of the Santeria religion, the choice of these words is support for our conclusion."[110] The court, communicated that even though the specific words used in the statute do not definitely prove that lawmakers were targeting religion, they tend to show an inference of targeting when analyzed with other relevant factors.

Therefore, the exact wording of PAMA should be scrutinized as a factor of neutrality. It follows that the elimination of words in an amendment is equally conclusive as the inclusion of specific words. Pre-PAMA, minors were permitted to consent to the donation of blood for autologous donations.[111] Additionally, PAMA made it a crime to "procure" blood from a minor,[112]

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[106] *Id*. at 540.
[107] R. at 5, 24.
[108] 508 U.S. 520, 526 (1993).
[109] R. at 7.
[110] 508 U.S. 520, 521 (1993).
[111] R. at 6, 25.
[112] *Id*.

whereas the pre-PAMA law was solely focused on consent.[113] The change in Delmont law shows that the legislature is targeting Kingdom Church from administering their homeschooling practices. It was not until the outcry over Kingdom Church's schooling practices that the Delmont General Assembly decided to eliminate the exception and criminalize procurement.

Moreover, this Court should look at the enforcement of PAMA in operation as another factor of neutrality. *Lukumi* stated, "law in its real operation is strong evidence of its object."[114] *Lukumi* Court intended that the effects of a law can demonstrate its lack of neutrality. Since its enactment, PAMA has primarily been enforced through the Respondent's task force which was commissioned with the express purpose of investigating the Kingdom Church's homeschooling practices.[115] Petitioner has experienced the signs of religious persecution, and this was the leading cause of their request for injunctive relief.[116] The Kingdom Church should not be forced to suffer more burdens on their religious exercise due to the decisions of government actors. Thus, the enforcement of PAMA on the Petitioner through the actions of the Respondent, and Delmont lawmakers, show a bias against Kingdom Church's beliefs. This is shown through the Respondent's reaction to, and appreciation for, the public anger at Kingdom Church's blood banking practices evidenced by her advertisements and polling efforts concerning the Church.[117]

As neutrality and general applicability are interrelated, "failure to satisfy one requirement is a likely indication that the other has not been satisfied."[118] Therefore, the Court must find that PAMA is not generally applicable if it is held that PAMA is not neutral due to the timing of the

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[113] R. at 6.
[114] 508 U.S. 520, 535 (1993).
[115] R. at 7, 8, 26
[116] R. at 22, 26.
[117] R.at 24-27.
[118] 508 U.S. 520, 531 (1993).

legislation in relation to public outcry, and the express targeting of Kingdom Church by the task force.

IV. This Case Is Within the Hybrid Right Exception

In *Smith*, Justice Scalia stated that the First Amendment bars general and neutral burdens on religion "have involved… the Free Exercise Clause in conjunction with other constitutional protections."[119] *Smith* distinguished *Yoder* as involving the rights of parents to direct the education of their children.[120]

Blood donation is part of Kingdom's homeschooling activities as part of students' "Service Projects" and is meant to establish a "servant's spirit" which is one of their curriculum's objectives to develop spiritual growth.[121] The lower court mistakenly held that education was not involved here.[122] Kingdom Church members must engage in doctrinal study, making education and faith intertwined.[123] Therefore, PAMA interferes with the ability of parents to direct the education of their child alongside burdening the free exercise of religion. Just as, "compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today," Kingdom Church students "must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region."[124]

V. PAMA Cannot Pass Strict Scrutiny

[119] 494 U.S. 872, 881 (1990).
[120] *Id*.
[121] R. at 23.
[122] R. at 19.
[123] R. at 4.
[124] 406 U.S. 205, 215 (1972).

This Court has stated that it will find a violation unless the government can demonstrate "its course was justified by a compelling state interest and was narrowly tailored."[125] PAMA was passed with only one goal in mind: to prevent children from becoming victims of child abuse and neglect.[126] Respondent specifically cited HHS and CDC data following the passage of PAMA.[127]

This is an honorable goal but is disconnected from the enforcement and language of the legislation. The Respondent can point to no statistics that shows a correlation between blood banking and child abuse or neglect. The Kingdom Church is fostering philanthropic sensibilities to create more compassionate and dutiful students, while complying with all guidelines issued by the Red Cross.[128] If a confirmed student is sick or has fallen ill, they are excused from the donation.[129] Therefore, Kingdom Church is not targeting children or mistreating minors who consent to blood donations. Instead, the Respondent simply hopes to obtain political capital through public disdain for a marginalized religious community. Therefore, the state's interest in protecting Delmont's children through PAMA is strenuous, at best.

Concerning the least restrictive means, PAMA has no exceptions regardless of nonprofit purposes or the minor's consent and criminalizes the procurement. *Burwell v. Hobby Lobby Stores Inc.*[130] held, *"*the least-restrictive-means standard is exceptionally demanding."[131] In that case, HHS had not shown that it lacks other means of implementing the contraceptive mandate of the

[125] *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022).
[126] R. at 25-26.
[127] *Id*.
[128] R. at 5.
[129] R. at 23-24.
[130] 573 U.S. 682 (2014).
[131] 573 U.S. 682, 728 (2014).

Affordable Care Act without imposing a substantial burden on the exercise of religion.[132] Creating a new system was expressly endorsed in RFRA contexts and can be imported into strict scrutiny. There, the Court saw nothing that stopped RFRA from requiring the creation of entirely new programs.[133] If RFRA was intended to restore *Sherbert*,[134] then this rule can be applied here. Therefore, this Court can validly create a system for Delmont that requires religious exceptions through strict scrutiny as PAMA does not currently supply the "least restrictive means."

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully Submitted,

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Dated: January 31, 2023

[132] 573 U.S. 682, 686 (2014) (stating "HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases").
[133] 573 U.S. 682, 729–30 (2014).
[134] 42 U.S.C. § 2000bb-2(b)(1) (1993).

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