No. 22-CV-7654

IN THE SUPREME COURT OF THE UNITED STATES

EMMANUELLA RICHTER,
Petitioner

v.

CONSTANCE GIRARDEAU,
Respondent.

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

Brief for Petitioner

Team 23
Attorneys for the Petitioner

Oral Argument Requested

QUESTIONS PRESENTED

I. Under the First Amendment, is the Court's extension of the "actual malice" standard to "limited-purpose public figures" constitutionally valid and, if not, does *stare decisis* justify retaining it when the founding-era common law of defamation and state constitutions did not require malice, the lower courts have diverged on how to apply it, and, since 1980, six years after the standard was extended, there has been a nine-fold decrease in defamation trials per year?

II. Under the Free Exercise Clause, should the neutral and generally applicable law standard be overruled when founding-era state constitutions required religious exemptions unless they endangered the public peace or safety, lower courts have diverged on the application of *Smith*, and it has been abrogated by twenty-one states and Congress, and did the Fifteenth Circuit err by holding that PAMA is neutral and generally applicable when it was enacted after public outcry against the Church, it criminalized the only blood donations minor members were giving, and the respondent, who enforces PAMA, called the Church a "cult" that "preys on its children," and the petitioner a "vampire"?

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STATEMENT OF THE CASE

Statement of Facts

Adherents of minority faiths like Emmanuella Richter fleeing persecution to find a land where they can freely practice their faith is the American origin story. Mrs. Richter, the petitioner, is a religious scholar from the country of Pangea. R. at 3. Through her spiritual studies, she found what she believed to be the singular religious truth. *Id.* This culminated in the petitioner's founding of the Kingdom Church in 1990. *Id.* Over the next decade, the Church blossomed, gaining many new adherents. *Id.* In 2000, the Church's bliss turned to hell on earth, as a military coup ushered in an oppressive government that targeted the Church for persecution. *Id.* To escape this persecution, the petitioner, her husband, and a large part of the congregation fled to the United States. *Id.* Shortly after their arrival in the United States, feeling they could now worship freely, the petitioner and her husband became American citizens. *Id.*

In Delmont, where the petitioner, and the congregation settled, the Church built Church residences to create tight-knit communities of faith. R. at 4. The Church pays for its expenses through the sale of its "Kingdom Tea." R. at 4-5. The tea business is overseen solely by the petitioner's husband, as the petitioner is preoccupied with Church matters. R. at 4. The petitioner does most of her work out of the public eye and does not oversee public-facing events. *Id.*

One of the Church's most sacred tenets is blood banking. R. at 5. The Church's faith prohibits accepting donations from or donating to non-members, so all members are required to participate for medical emergencies. *Id.* Blood banking drives are part of the Church's young students' "service projects," which help establish a "servant's spirit." *Id.* Other projects include "organic gardening, grounds cleaning, collecting for local food banks and clothes closets," and recycling. *Id.* Minor members *only* donate to serve their own future medical needs and that of

their families. *Id.* Only "confirmed" members can participate. R. at 4-5. Confirmation is only available to members who have attained the "state of reason," or fifteen years old. R. at 4. Blood-banking occurs "on a schedule and on terms permissible under American Red Cross guidelines." *Id.* Additionally, confirmed students are exempt from donating if they are ill on a drive day. *Id.*

In 2020, a local newspaper published a story about the Church and its blood banking practices. *Id.* The article led to public outcry and speculation whether the students were validly consenting to blood banking and whether the Church was recruiting students for it. *Id.* However, there is no evidence in the record of such wrongdoing by the Church. Following the outcry, in 2021 the Delmont General Assembly passed the "Physical Autonomy of Minors Act" or PAMA, which prohibited *per se* blood donations of minors. R. at 6. Curiously, the only aspects of Delmont law that PAMA changed was criminalizing the type of blood donations these students were participating in: autologous blood transfusions and donations to family. R. at 5-6.

While at a campaign fundraiser, the respondent Governor Constance Giradeau, told the press her reelection campaign would focus on the recent increase in child abuse. R. at 7. When asked about the hospitalization of a minor church member during an attempted blood donation, the cause of which was "undetermined," the respondent stated that she was commissioning a task force to investigate the "exploitation of the Kingdom Church's children." R. at 6-7. However, there is no evidence in the record for this claim. After polling data showed strong public support for the investigation, the respondent began fundraising off it. R. at 7.

On January 27, 2022, after the petitioner filed an injunction against the investigation, at a press event following a campaign rally, when asked about the injunction, the respondent said without evidence, "I'm not surprised at anything Emmanuella Richter does or says. What do you

expect from a vampire who founded a cult that preys on its own children?" R. at 8. Based on those remarks, the petitioner added a defamation claim to her complaint. R. at 8, 10.

Procedural History

The respondent moved for summary judgment of both the petitioner's claims. R. at 8. On September 1, 2022, the United States District Court for the District of Delmont granted the respondent's motion. R. at 3. The district court concluded that the petitioner was a limited-purpose public figure and could not prove the respondent published her statements with actual malice. R. at 14-15. The district court also concluded that PAMA was a neutral and generally applicable law and therefore did not violate the Free Exercise Clause. R. at 18-19. On December 1, 2022, the United States Court of Appeals for the Fifteenth Circuit affirmed the district court's decision on the same grounds. R. at 33, 37. The petitioner then filed a timely petition for a writ of certiorari which this Court granted. R. at 45-46.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Delmont had original jurisdiction over the petitioner's free exercise claim because it was a question of law under the United States Constitution. *See* R. at 2; 28 U.S.C. § 1331. The district court had supplemental jurisdiction over the petitioner's defamation claim because it and the petitioner's constitutional claim "are so "related . . . that they form part of the same case or controversy . . .." 28 U.S.C. § 1367(a). The United States Court of Appeals for the Fifteenth Circuit had appellate jurisdiction over the petitioner's first appeal because the petitioner appealed the district court's "final decision." *See* R. at 20; 28 U.S.C. § 1291. This Court has discretionary appellate jurisdiction to hear the petitioner's appeal of the Court of Appeals decision under 28 U.S.C. § 1254(1).

SUMMARY OF THE ARGUMENT

A person's interest in defending their reputation and the free exercise of religion are first-class legal interests, not second class. The extension of the actual malice standard to limited-purpose figures and *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), degraded these sacred interests to second-class status, and should be overruled. Also, because the Fifteenth Circuit incorrectly held that PAMA a neutral and generally applicable law, this Court should reverse the judgments below and remand this case for further proceedings.

First, the extension of the limited-purpose public figures in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1974), is not constitutional because it is neither firmly grounded in the constitutional text, nor is it grounded this nation's history and tradition. Second, *stare decisis* does not justify retaining the *Gertz* extension because it is unworkable since its rule is impossible to apply consistently and predictably. Third, *stare decisis* does not justify retaining the *Gertz* extension because its failure to deter defamatory internet disinformation and the drastic reduction in defamation claims show that *Gertz*'s factual and legal underpinnings have been eroded.

As to the second issue, first, *Smith* should be overruled and replaced with strict scrutiny since it is not firmly grounded in the constitution's text, this nation's history and tradition, and erroneously uses precedent. Second, *stare decisis* does not justify retaining *Smith* because its rule is unworkable since it cannot be applied in a consistent and predictable manner by courts. Third, reliance interests do not justify retaining *Smith* because it is not legitimately relied upon since it has been abrogated by Congress, many state legislatures, and this Court has made stakeholders aware by of its issues with *Smith* on numerous occasions. Fourth, if *Smith* stands, the Fifteenth Circuit's decision should be reversed because PAMA is not neutral since the events leading to its enaction shows that it proceeds intolerantly towards the Church. Finally, PAMA fails strict

scrutiny because it does not advance the interest of preventing child abuse and it is not narrowly tailored because granting the Church an exemption with appropriate oversight would not undermine Delmont's asserted interest and therefore is a less restrictive alternative.

ARGUMENT

I. THE EXTENSION OF THE ACTUAL MALICE STANDARD TO LIMITED-PURPOSE PUBLIC FIGURES IS NOT CONSTITUTIONAL BECAUSE IT IS BASED ON AN ERRONEOUS INTERPRETATION OF THE CONSTITUTION AND STARE DECISIS WEIGHS AGAINST RETAINING IT.

The First Amendment to the United States provides in relevant part, "Congress shall make no law . . . abridging the freedom of . . . the press." U.S. Const. amend I. Although "libelous publications" are usually not protected by the First Amendment, *New York Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964), there are *currently* limited protections for libel of limited-purpose public figures. *Gertz*, 418 U.S. at 351-52. A limited-purpose public figure is a person who "[T]hrust[s] themselves to the forefront of particular public controvers[y] . . . to influence [its outcome]," *id.* at 345, or "is drawn into a . . . public controversy [thus] . . . becom[ing] a public figure on a limited range of issues." *Id.* at 351. In addition, this Court asks whether a plaintiff "has regular and continuing access to the media" to determine whether a person is a limited-purpose public figure. *Hutchinson v. Proxmire*, 443 U.S. 111, 136 (1979). To prove defamation, limited-purpose public figures must prove that the libelous statement was published with "actual malice." *Id.* at 334-35 (quoting *New York Times Co.*, 376 U.S. at 279-80). A plaintiff establishes actual malice by proving the publisher knew the publication was false or published it with "reckless disregard" for its truth or falsity. *Id.* at 334. Private persons, however, need only prove the defendant acted with negligence. *Fla. Star v. B.J.F.*, 491 U.S. 524, 539 (1989) (citing *Gertz*, 418 U.S. at 323). When deciding whether to overturn a constitutional decision, this Court first determines whether that decision's interpretation of the Constitution

was correct. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2244 (2022). If the interpretation was erroneous, this Court considers whether other *stare decisis* factors weigh in favor of retaining the precedent. *See id.* at 2261.

This Court should abrogate the *Gertz* extension of the "actual malice" standard to limited-purpose public figures and remand this case for further proceedings for the following reasons. First, the *Gertz* extension is not constitutional because its reasoning is not firmly grounded in the text, history, or tradition of the First Amendment and is thus grievously weak. Second, *stare decisis* does not justify retaining the *Gertz* extension because the *stare decisis* factors weigh against retaining it.

A. Stare Decisis Does not Justify Retaining the *Gertz* Extension Because its Reasoning is Grievously Weak, it is Unworkable as a Legal Rule, and Changed Circumstances Have Eroded its Factual and Legal Underpinnings.

Stare decisis is the court-imposed rule that if there is "'special justification'" to overturn one of this Court's precedents, that precedent can be overturned or abrogated. *Michigan v. Bay Hills Indian Cmty.*, 572 U.S. 782, 798 (2014) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). However, *stare decisis* is not an "inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Moreover, it has the *least* force "when [the Court] interpret[s] the Constitution." *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996)). Therefore, where the *stare decisis* factors do not weigh in a decision's favor, it does not justify retaining it. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478-79 (2018). Among these factors are 1) the "quality of [the decision's] reasoning," 2) the "workability of [its] rule," 3) "its consistency with . . . related decisions," 4) any changed circumstances following the decision's issuance, and 5) "reliance on the decision." *Id. Stare decisis* does not support retaining the *Gertz* extension because its reasoning is weak, its rule is unworkable, and changed circumstances have undermined its factual underpinnings.

1. The *Gertz* Extension of the Actual Malice Standard to Limited-Purpose Public Figures is Poorly Reasoned Because it is not Grounded in the First Amendment's Text, History or Tradition.

Where the reasoning of a decision is "far outside the bounds of any reasonable interpretation of the . . . [C]onstitution[ ]," *stare decisis* cannot save it. *Dobbs*, 142 S. Ct. at 2265. The quality of a decision's reasoning is largely measured by how firmly it is "ground[ed]" in the "text [of the Constitution], [its] history, and [this Court's] precedent." *Id.* at 2266. The proper meaning of the constitutional text is its "original meaning," which is its "normal and ordinary meaning" as understood "by ordinary citizens in the founding generation." *D.C. v. Heller*, 554 U.S. 570, 576-77 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). Where a rule is not explicitly provided by or implicit from the constitutional text, the Court looks to whether it is "rooted in our [n]ation's history and tradition . . .." *Dobbs*, 142 S. Ct. at 2244. This determination entails a "careful analysis of the history of the [constitutional provision] at issue," by using sources from the era when the relevant constitutional provision was ratified. *Id.* at 2246-47 (internal citation omitted). Lastly, the Court considers whether the decision "is supported by other precedents." *Dobbs*, 142 S. Ct. at 2244.

Though the text of the Press Clause is without any qualifying language, *see* Const. amend. I, this Court's precedents caution that the freedom of the press is not absolute. *See Pell v. Procunier*, 417 U.S. 817, 833 (1974). Therefore, because the text of the Press Clause does not explicitly define its scope, the text alone is insufficient to determine whether the *Gertz* extension is consistent with the original meaning of the First Amendment.

Precedents that conflict with the common law are less likely to be rooted in the Constitution's history and tradition. In *Dobbs*, this Court found its prior holding that the Due Process Clause confers a right to an abortion, was unsupported by the Clause's history and tradition partly because abortion was a common law crime. *See* 142 S. Ct. at 2249-51. In *New York Times*

Co., however, this Court found that the history and tradition of the Press Clause that showed the press freedom was "not confined to the strict limits of the common law," 376 U.S. at 275 (quoting 4 *Elliot's Debates on the Federal Constitution* (1876), p. 570), and therefore required public officials to meet a higher standard in libel claims. *See id.* at 279-80.

Decisions that conflict with founding-era state constitutions are also likely not to be rooted in the Constitution's history and tradition. In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), this Court found that its prior holding that the Sixth Amendment did not require guilty verdicts of serious crimes to be unanimous, conflicted with the amendment's history and tradition partly because founding-era state constitutions required unanimous verdicts for such crimes. *See id.* at 1396-97.

In the present case, the quality of the reasoning of the *Gertz* extension is weak because it conflicts with the history and tradition of the First Amendment. First, like the overruled holding in *Dobbs*, which was found to conflict with the history and tradition of the Constitution partly because it was contrary to the common law, *see* 142 S. Ct. at 2249, the *Gertz* extension "broke sharply" from the common law of defamation which did not require public figures to prove "any heightened standard." *McKee v. Cosby*, 139 S. Ct. 675, 678 (2019) (cert. denied) (Thomas J., concurring). Second, *New York. Times Co.* does not ameliorate *Gertz's* conflict with the common law because that case's holding only distinguished the First Amendment from the common law as applied to defamation of public officials. *See* 376 U.S. at 275 (citing 4 *Elliot's Debates on the Federal Constitution* at 570). Third, like the overruled holding in *Ramos*, which conflicted with the history and tradition of the Constitution partly because it was antithetical to founding-era state constitutions, *see* 140 S. Ct. at 1396, the *Gertz* extension is similarly antithetical to founding-era state constitutions with respect to defamation law. Unlike the *Gertz* extension, most founding-era

state constitutions retained the common law rules of libel, which did not hold public figures to a higher standard. *See* 418 U.S. at 380-81 (White J., dissenting) (citing *Roth v. United States*, 354 U.S. 476, 482 (1957)). For the foregoing reasons, the *Gertz* extension is not grounded in the text of the First Amendment nor its history and tradition. Consequently, the quality of *Gertz*'s reasoning is weak.

2. The *Gertz* Rule for Limited-Purpose Public Figures is not Workable Because it Provides Insufficient Guidance for the Courts to Apply it Consistently and Predictably.

Workable rules are those that "can be understood and applied in a consistent and predictable manner." *Dobbs*, 142 S. Ct. at 2272 (citing *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009)). A rule is likely unworkable if it is "'altogether malleable'," *see Janus*, 138 S. Ct. at 2481 (quoting *Lehnert v. Ferris Fac. Ass'n*, 500 U.S. 507, 563 (1991) (Kennedy J., concurring)), and its application "impossible to [determine] with precision." *See* 138 S. Ct. at 2481. A rule is also likely unworkable if it has unintended consequences by "allowing what it should [not] allow" thereby undermining the legal interests of citizens. *Id.* at 2481-82 (internal quotation marks and citation omitted).

A rule that does not give clear guidance to courts on its operation is unlikely to be workable. In *Dobbs*, this Court found that a prior abortion precedent was unworkable because it provided insufficient guidance as to what an "undue burden" on a woman's right to an abortion was, what factors a court was to weigh, or what perspective an abortion regulation was to be viewed from. *See* 142 S. Ct. at 2272-73. In contrast, in *Dickerson v. United States*, 530 U.S. 428 (2000), this Court found that the warnings it required law enforcement to give suspects in a prior holding were workable because they had become "routine" for police and were easier to apply than any alternative. *See id.* at 443-44 (internal citations omitted).

A rule that inadequately balances the legal interests of stakeholders is also likely to be unworkable. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court found that its prior holding on state immunity was unworkable partly because by limiting the state's immunity from federal regulation to only "traditional . . . [state] governmental functions," it inadequately considered state sovereignty interests. *See id.* at 545-46 (internal quotation marks omitted).

The *Gertz* extension is unworkable because it cannot be applied consistently and predictably, and it inadequately balances a private person's interest in being compensated for reputational damage with the freedom of the press. First, like the unworkable "undue burden" standard which this Court found to provide insufficient guidance to courts, *see Dobbs*, 142 S. Ct. at 2272-73, how newsworthy a person must be and how someone voluntarily enters a public controversy under *Gertz* are similarly undefined, leading to a myriad of divergent and inconsistent approaches in the lower courts. *See* Jeff Kosseff, *Private or Public? Eliminating the Gertz Defamation Test*, 2011 U. Ill. J.L. Tech. & Pol'y 249, 257-63 (2011). *Gertz* also failed to provide clear guidance on the threshold for media access to be a limited-purpose public figure leading to similar results. *See* Ann E. O'Connor, Note, *Access to Media All-A Twitter: Revisiting the Gertz & the Access to the Media Test*, 63 Fed. Commc'ns L.J. 507, 515-21 (2011). Second, unlike the warnings reconsidered in *Dickerson*, which became "routine" for law enforcement to apply, *see* 530 U.S. at 443, the record of the *Gertz* extension in the lower courts shows its application has been highly erratic. *See* Kosseff, *supra*, at 257-63; *see also* O'Connor, *supra*, at 515-21. Third, like the state immunity precedent in *Garcia*, which was found to inadequately consider state sovereignty interests, *see* 469 U.S. at 545-46, the *Gertz* extension gives short shrift to an otherwise ordinary person's interest in being compensated for reputational damage by forcing otherwise

private citizens to meet the onerous "actual malice" standard despite having very limited access to means of reputational defense. *See* 418 U.S. at 338 (citing *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 70 (1971) (Harlan J., dissenting) *abrogated by Gertz*, 418 U.S. at 346). For the foregoing reasons, the *Gertz* extension is too malleable and cannot be consistently and predictably applied. Consequently, the *Gertz* extension is unworkable.

3. Changed Circumstances Weigh Against Retaining the *Gertz* Extension Because Changes in Technology and Mass Media Have Undermined its Factual and Legal Underpinnings by undermining the Promotion of Robust Journalism and its Purported Appropriate Balancing of Reputational and Press Interests.

A change in circumstances following a decision that "'erode[s]'" a decision's "'underpinnings'" both legal and factual, also weighs against upholding the decision on *stare decisis* grounds. *Janus*, 138 S. Ct. at 2482-83 (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995)).

A decision's factual underpinnings are more likely to be "eroded" where the assertions or predictions it was based on were found to be without merit. In *Janus*, the Court found the factual underpinnings of a prior public sector union free speech precedent were eroded in part because its predictions of discord in the public sector following the prohibition of unions charging non-members certain agency fees were "unfounded." 138 S. Ct. at 2465.

A decision's legal underpinning are more likely to be "eroded" when changed circumstances cause the decision to damage individual legal interests. In *Citizens United v. FEC*, 558 U.S. 310 (2010), this Court found the legal underpinnings of its prior holding that prohibiting corporations from using political advertisements was constitutionally permissible, *see id.* at 347, were eroded partly because prohibiting corporations from using modern media advertising would exclude them entirely from political discourse. *See id.* at 364.

Changed circumstances have undermined the factual and legal underpinnings of the *Gertz* extension because of how it has negatively impacted journalism and defamation victims. First, like the free speech precedent's predictions of union discord in the public sector that proved to be "unfounded" in *Janus*, 138 S. Ct. at 2465, the assertion in *Gertz* that extending the "actual malice" requirement to limited-purpose public figures would enhance the "fruitful exercise" of press freedom, *see* 418 U.S. at 342 (citing *NAACP V. Button*, 371 U.S. 415, 433 (1963)), has proven to be quite dubious. With the rise of the internet and social media, *Gertz*'s lack of deterrence for defamation has resulted in a deluge of disinformation in the modern public square that often drowns out reliable sources. David A. Logan, *Rescuing our Democracy by Rethinking New York Times v. Sullivan*, 81 Ohio St. L.J. 759, 800-07, 810 (2020). Second, like the rule overruled in *Citizens United*, which the Court found allowed the barring of access to media essential to exercising corporate free speech rights, *see* 558 U.S. at 364, the *Gertz* extension has prevented courts and juries from compensating defamed everyday Americans. Data shows that from 1980-2017, defamation victims lost forty percent of their trials, and the average of trials involving media publications decreased from twenty-seven annually in the 1980s to merely three in 2017. Logan, *supra.*, at 809. For the foregoing reasons, changed circumstances have eroded the factual and legal underpinnings of the *Gertz* extension. Therefore, *stare decisis* does not weigh in favor of retaining it.

II. *SMITH* SHOULD BE OVERRULED AND REPLACED WITH THE *SHERBERT* TEST BECAUSE IT INCORRECTLY INTERPRETED THE CONSTITUTION AND STARE DECISIS WEIGHS AGAINST RETAINING IT, BUT EVEN IF *SMITH* STANDS, THE RESPONDENT IS NOT ENTITLED TO SUMMARY JUDGMENT SINCE PAMA IS NOT NEUTRAL AND GENERALLY APPLICABLE AND FAILS STRICT SCRUTINY AS APPLIED TO THE PETITIONER.

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. Under current precedent, where the prohibition

or burdening of religious practice is an "incidental effect" of a "'neutral [*and*] . . . general[ly] applicab[le]'" law, it comports with the Free Exercise Clause. *Smith*, 494 U.S. at 878-79 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982) (Stevens J., concurring)). However, laws that are not neutral *and* generally applicable are subject to strict scrutiny. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Strict scrutiny requires that a law be "justified by a compelling interest and [be] . . . narrowly tailored to advance that interest." *Id.* at 531-32. A court only grants summary judgment if "the movant shows there is no genuine dispute [of] . . . material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Motions for summary judgement are reviewed *de novo* without deference to the lower court. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 465 n. 10 (1992) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

This Court should reverse the Fifteenth Circuit's decision because *Smith* should be overruled and replaced with the strict scrutiny test from *Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963), and even if *Smith* stands, PAMA is not neutral and generally applicable and fails strict scrutiny for the following reasons. First, *Smith* should be overruled because it is based on an erroneous interpretation of the Free Exercise Clause and the bulk of *stare decisis* factors weigh against retaining it. Second, even if *Smith* stands, the respondent is not entitled to judgment as a matter of law because PAMA is not a neutral *and* generally applicable law since it proceeds in a manner intolerant to the Church's religious blood banking practices. Third, PAMA fails strict scrutiny because it does not advance the interest of preventing child abuse and is not narrowly tailored to that interest since there are less restrictive alternatives available.

A. Stare Decisis Does not Justify Retaining the *Smith* Rule Because it's Reasoning is Grievously Weak, it is Unworkable, and it is Insufficiently Relied Upon.

Stare decisis, has the *least* force "when [the Court] interpret[s] the Constitution." *Agostini*, 521 U.S. at 235 (citing *Seminole Tribe of Fla.*, 517 U.S. at 63). This Court therefore balances the factors underpinning *stare decisis* to determine whether the challenged decision should stand. *See Janus*, 138 S. Ct. at 2478-79. Among these factors are 1) the "quality of [the decision's] reasoning," 2) the "workability of [its] rule," 3) its "consistency with . . . related decisions," 4) any changed circumstances following the decision's issuance, and 5) "reliance on the decision." *Id. Stare decisis* does not justify retaining the *Smith* because its reasoning is grievously weak, its rule impossible to apply consistently and predictably, and is insufficiently relied upon.

1. The Quality of *Smith's* Reasoning Weighs Against Retaining it Because it is not Firmly Grounded in the Text of the Free Exercise Clause, its History or Tradition, and or this Court's Precedents.

Where the reasoning of a decision is "far outside the bounds of any reasonable interpretation of the . . . [C]onstitution[ ]," *stare decisis* cannot save it. *Dobbs*, 142 S. Ct. at 2265. The quality of a decision's reasoning is largely measured by how firmly it is "ground[ed]" in the "text [of the Constitution], [its] history, and [this Court's] precedent." *Id.* at 2266. The proper meaning of the Constitution's text is its "original meaning," which is its "normal and ordinary meaning" as understood "by ordinary citizens in the founding generation." *Heller*, 554 U.S. at 576-77 (2008) (quoting *Sprague*, 282 U.S. at 731). Where the rule is not explicitly provided by or implicit from the constitutional text, the Court determines whether the rule is "rooted in our [n]ation's history and tradition . . .." *Dobbs*, 142 S. Ct. at 2244. This determination entails a "careful analysis of the history of the right at issue" using sources from shortly before and after

the ratification of the relevant constitutional provision. *Id.* at 2246-47 (internal citations omitted). Lastly, the Court considers whether the decision "is supported by other precedents." *Id.* at 2244.

As an initial matter, *Smith*'s rule is hardly grounded in the Constitutional text. The natural "original" reading of the clause is that it prohibits the "forbidding or hindering [of] unrestrained religious practices or worship." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1896 (2021) (Alito J., concurring). *Smith*, however, settled for a "'permissible'" reading of the clause rather than seeking its original one through an analysis of historical sources. *Id.* at 1894 (quoting *Smith*, 494 U.S. at 878). Concededly, the free exercise right is not absolute. *See Bowen v. Roy*, 476 U.S. 693, 702 (1986) (citing *Reynolds v. United States*, 98 U.S. 145 (1879)). Therefore, an examination of the history and tradition of the Free Exercise Clause and this Court's precedent is required to determine how consistent *Smith'*s reasoning is with the clause's original meaning.

Interpretations of the Constitution that are at odds with founding-era state constitutions are likely not consistent with its history and tradition. In *Dobbs*, this Court found that its prior holding that the Fourteenth Amendment's Due Process Clause conferred a right to an abortion, was at odds with its history and tradition partly because no state constitution recognized that right at the time the clause was ratified. *See* 142 S. Ct. at 2254.

Decisions that rely on precedent that have been overturned are another indicator of poor reasoning. In *Seminole Tribe of Florida*, this Court found its prior holding that Congress could abrogate the state's sovereign immunity, *see* 517 U.S. at 59, was poorly reasoned partly because it was not supported by the precedent it relied on. *See id.* at 65-66. In contrast, in *Dickerson*, the Court upheld its prior suspect warnings holding under *stare decisis*, *see* 530 U.S. at 444, despite arguably being unsupported by precedent, *see id.,* 530 U.S. at 447 (Scalia J., dissenting), because the factors weighed more in its favor. *Id.* at 443-44.

Smith's reasoning is deeply flawed because it is unsupported by the history of the Free Exercise Clause, and it relies on opinions that were overruled or discredited. First, like the abortion holding overruled in *Dobbs*, which was found to be poorly reasoned partly because it conflicted with founding-era state constitutions, *see* 142 S. Ct. at 2254, the *Smith* rule conflicts with most of founding-era state constitutions as well. *See Fulton*, 141 S. Ct. at 1901-02 (Alito J., concurring). These provided that religious exemptions were required unless "it would endanger the public peace or safety," *id.* (internal quotation marks omitted), even from neutral and generally applicable laws. *See id.* at 1905. Second, unlike the suspect warning holding in *Dickerson* which was upheld by factors other than the quality of its reasoning, *see* 530 U.S. at 443-44, *Smith* can find no such refuge as the other *stare decisis* factors weigh against it as well. *See Fulton*, 141 S. Ct. at 1912-24 (Alito, J. concurring). Third, like the overruled precedent in *Seminole Tribe of Fla.*, which improperly relied on a previous precedent, *see* 517 U.S. at 65-66, *Smith*'s rationale relies on overruled and discredited precedents. On the one hand, *Smith* relies on the overruled decision, *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) *overruled by West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), and on *Reynolds*, 98 U.S. at 145, despite its rationale being discredited by this Court. *See Fulton*, 141 S. Ct. at 1912-13 (Alito J., concurring). For the foregoing reasons, *Smith* is not firmly grounded in the Constitution's text, history, or this Court's precedents and is poorly reasoned.

2. The *Smith* Rule is not Workable Because it Provided Inadequate Guidance on its Operation to the Lower Courts and Therefore Cannot be Understood and Applied in a Consistent and Predictable Manner.

Workable rules are those that "can be understood and applied in a consistent and predictable manner." *Dobbs*, 142 S. Ct. at 2272 (citing *Montejo*, 556 U.S. at 792). A rule is likely unworkable if it is "'altogether malleable," *see Janus*, 138 S. Ct. at 2481 (quoting *Lehnert*, 500 U.S. at 563 (1991) (Kennedy J., concurring), and its application "impossible to [determine] with

precision." *Janus*, 138 S. Ct. at 2481. A rule is also likely unworkable if it has unintended consequences by "allowing what it should [not] allow" thereby undermining the legal interests of citizens. *Id.* (internal quotation marks and citations omitted).

A legal rule that inadequately balances the interests of stakeholders is likely to be unworkable. In *Garcia*, this Court found that a prior state immunity precedent was unworkable partly because by limiting the state's immunity from federal regulation to only "traditional . . . [state] governmental functions," it inadequately considered state sovereignty interests. 469 U.S. at 545-46. In contrast, in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), this Court found that its prior agency regulation precedent, which prescribes deference to agency interpretations of its regulations, *see* 139 S. Ct. at 2408, workable partly because Congress' acquiescence to it indicated that its interest having its statutory intent carried out was being served. *See id.* at 2423.

A rule that does not draw a clear line between where it applies and where it does not is likely unworkable. In *Janus*, this Court found that a prior union free speech rule was unworkable partly because it was so difficult to separate dues "germane to [the union's collective-bargaining] duties," and dues related to its political endeavors. 138 S. Ct. at 2460-61.

The *Smith* rule is unworkable because it inadequately considers free exercise rights, and it is impossible to *precisely* determine whether a law is neutral and generally applicable. First, like the rule state immunity overruled in *Garcia*, which was found unworkable partly because it inadequately considered state sovereignty interests, *see* 469 U.S. at 545-46, the *Smith* rule gives short shrift to free exercise rights by allowing "skillful [legislators] to target religious exercise by devising a facially neutral rule that applies to . . . the targeted religious conduct and a slice of secular conduct . . .." *Fulton*, 141 S. Ct. at 1919 (Alito J., concurring). Second, unlike the agency deference rule that was reconsidered in *Kisor*, which was found to affect Congressional intent, *see*

139 S. Ct. at 2423, the *Smith* rule is irreconcilable with the framers' intent to grant religious exemptions unless it was "repugnant to the [state's] peace and safety . . .." Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1117-18 (1990). Third, like the union free speech rule overruled in *Janus*, which was found unworkable partly because the line between collective-bargaining and political dues could not be precisely drawn, *see* 138 S. Ct. at 2460-61, *Smith* does not say whether determining a law's "object" is an objective or subjective test, nor specified the level of religious "disparagement" required to prove targeting, and the courts have been inconsistent in their approaches. *See Fulton*, 141 S. Ct. at 1919-21 (Alito J., concurring). For the foregoing reasons, the *Smith* rule cannot be applied consistently and predictably and is therefore unworkable.

3. Reliance Does not Support Retaining *Smith* Because Legislatures Have Been Well Aware of this Courts Issues with *Smith* and Overruling it Would not Cast Into Doubt a Large Body of Law.

Stakeholder reliance is sometimes a compelling reason to not overrule a decision, as those stakeholders often shape their conduct in reliance on a decision. *See Janus*, 138 S. Ct. at 2484 (citing *Hilton v. South Carolina Pub. Ry.'s Comm'n*, 502 U.S. 197, 202-03 (1991)). However, reliance is not always legitimate. *See Arizona v. Gant*, 556 U.S. 332, 349 (2009). Where stakeholders "have been on notice" by members of the Court about a precedent's shaky foundations, *See Janus*, 138 S. Ct. at 2484, or where overruling a precedent would not "cast into doubt," a larger body of law, *Kisor*, 139 S. Ct. at 2422, reliance interests are weak.

Where members of this Court have vociferously voiced their disagreement with a precedent, reliance interests are weaker. In *Janus*, this Court found that union reliance on its prior public sector union free speech precedent was weak partly because they "ha[d] been on notice" about the Court's issues with that precedent voiced in two previous opinions. 138 S. Ct. at 2484-

85 (citing *Knox v. Serv. Emp.'s Int'l Union, Local 1000*, 567 U.S. 298, 311 (2012); *Friedrichs v. Ca. Tchr.'s Ass'n,* 578 U.S. 1 (2016) (*per curiam*)).

Where overturning a precedent would call a large body of law into doubt, reliance interests weigh against overturning precedent. In *Kisor*, this Court found that reliance interests on its prior agency deference doctrine were strong because overturning it would "cast into doubt" a "whole corpus of administrative law." 139 S. Ct. at 2422.

Reliance interests cannot save *Smith*, because legislatures have been on notice of this Court's issues with it and overturning it would not cast free exercise law into doubt. First, like the overruled free speech rule in *Janus*, about which unions were put "on notice" of the Court's issues with it, 138 S. Ct. at 2484-85, *Smith* has been repeatedly criticized by members of this Court, including calling for its overruling. *See* 494 U.S. at 891-907 (O'Connor J., concurring); *see also Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 559-78 (Souter J., concurring); *id.* at 577-80 (Blackmun J., concurring); *Fulton*, 141 S. Ct. at 1883-1926 (Alito J., concurring); *id* at 1926-31 (Gorsuch J, concurring). Second, unlike the precedent upheld in *Kisor*, which constituted "a whole corpus of administrative law," *Kisor*, 139 S. Ct. at 2422, the Religious Freedom Restoration Act, *see* 42 U.S.C. §2000bb-1, and other similar state statutes have abrogated *Smith* making it far less relied upon. *See* Brief of *Amicus Curiae* Jewish Coal. for Religious Liberty in Support of Petitioners, at 9 n. 16-17, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), (No. 19-123). Moreover, even where RFRA or a RFRA-like statutes or rules do not exist, the *Smith* line of cases already require strict scrutiny for laws that are not neutral or generally applicable. *See Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 531-32. Therefore, the strict scrutiny review, which was the test for *any* laws burdening free exercise rights from 1963 until *Smith* was laid down in 1990, *see Sherbert,* 374 U.S. at 406-07, *see also Smith*, 494 U.S. 878-79, is a test very familiar to courts,

lawyers, legislatures, and other stakeholders. For the foregoing reasons, any reliance on *Smith* cannot justify retaining it.

B. Even if *Smith* stands, PAMA Violates the Free Exercise Clause Because it is not a Neutral and Generally Applicable Law Since it Proceeds in a Manner Intolerant of Religion and Fails Strict Scrutiny Because it Does not Advance the Prevention of Child Abuse by and Even if it Does, it is not Narrowly Tailored to that Interest Because There are Less Restrictive Alternatives.

Under current precedent, where the prohibition or burdening of religious practice is an "incidental effect" of a "neutral [*and*] . . . general[ly] applicab[le]" law, it comports with the Free Exercise Clause. *Smith*, 494 U.S. at 878-79 (quoting *Lee*, 455 U.S. at 263, n. 3 (Stevens J., concurring)). A law is not neutral if it "proceeds in a manner *intolerant* of religious belief . . .." *Fulton*, 141 S. Ct. at 1877 (emphasis added). Laws that are not neutral *and* generally applicable are subject to strict scrutiny. *See Church of the Lukumi Babalu Aye, Inc.* 508 U.S. at 546. This requires that the law be "justified by a compelling interest and . . . [be] narrowly tailored to that interest." *Id.* at 531-32.

PAMA is not a neutral and generally applicable law because it proceeds in a manner intolerant of religion. PAMA also fails strict scrutiny because it does not advance the interest of preventing child abuse, and even if it does, it is not narrowly tailored to serve that interest.

1. PAMA is not a Neutral Law Because it Proceeds in a way that is Intolerant of the Petitioner's Sincerely Held Religious Beliefs Since it Was Enacted in Response to Complaints About the Petitioner's Church and the Respondent's Allegations of Child Exploitation.

A law proceeds in a manner intolerant of religion if it "target[s] religious beliefs" or if its "object," is prohibiting religious exercise. *Id.* at 533-34. To ascertain the "object of a law, [a court] must begin with its text" to determine if it facially discriminates against religion. *Id.* at 533. A law facially discriminates if "it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* However, "facial neutrality is not determinative." *Id.* at 534.

The Free Exercise Clause also prohibits "*covert* suppression of particular religious beliefs." *Id.* (emphasis added). Consequently, a court "must survey meticulously the circumstances of governmental categories to eliminate . . . religious gerrymanders." *Id.* (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan J., concurring)). Pertinent to this inquiry is "[T]he specific series of events leading to the enactment or official policy in question, and . . . contemporaneous statements made by . . . [relevant] decision[-]mak[ers]." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 540. Also, the "effect of a law in its real operation is strong evidence of its object." *Id.* at 535.

A law or policy's enaction in the context of criticism of a religion by the public or government officials is strong evidence that its object is prohibiting religion or the religion is being targeted. In *Church of the Lukumi Babalu Aye, Inc.*, this Court found that the object of city ordinances proscribing the sacrifice of animals was prohibiting the Santeria religion partly because the ordinances were enacted shortly after local outcry against Santeria's animal sacrifices. *See* 508 U.S. at 540-41; *but see Dr. A. v. Hochul*, 142 S. Ct. 552, 553-56 (2021) (cert. denied) (Alito J., dissenting) (denying *certiorari* for free exercise claim despite governor's *arguably* anti-religious remarks towards petitioners). In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), this Court found that a state commission targeted a baker's religious beliefs against gay marriage based on the disparaging remarks of those beliefs by officials presiding over the discrimination claim against him. *Id.* at 1729.

Covert targeting of religion by a law is also likely to be found when it operates only to affect a particular religion. In *Church of the Lukumi Babalu Aye, Inc.*, this Court found that because a city ordinance prohibiting animal sacrifices operated only to prohibit the religious practices of Santeria, it covertly targeted Santeria. *See* 508 U.S. at 536-37.

PAMA proceeds in a manner intolerant of the Church because its object is prohibiting the Church's blood-banking, its enforcement targets the Church, and it only operates to affect the Church. First, like the ordinances in *Church of the Lukumi Babalu Aye, Inc.*, the object of which was prohibiting religious exercise partly because they were enacted following public outcry against Santeria's animal sacrifices, *see* 508 U.S. at 540-41, PAMA was not enacted until shortly after the public outcry against the Church's blood-banking. *See* R. at 5-6.

Second, like the official's remarks in *Masterpiece Cakeshop, Ltd.,* and unlike the governor's remarks in *Dr. A.*, the former of which evidenced targeting of religion and while the latter arguably did not, *see* 138 S. Ct. at 1729, *see also* 142 S. Ct. at 553-56 (cert. denied) (Alito J., dissenting), the respondent's remarks and behavior strongly indicate that her enforcement of PAMA against the Church is about targeting it. For one thing, the governor's focus on child abuse and her support for PAMA did not materialize until after she was briefed on the Kingdom Church's blood banking practices. *See* r. at 39-40. Additionally, while the respondent claims that only the increase in child abuse and suicide persuaded her to support for PAMA, there is no evidence in the record that blood donations and child abuse are connected. *See* r. at 1-40. All that exists are her unsupported allegations of child "exploitation" and predation against the Church, along with her smears of the petitioner as a "vampire" and the Church a "cult." R. at 7-8. And the respondent's campaign used the impending investigation into the Church to fundraise after polling that showed strong support for it. *See id.* Thus, the respondent's remarks and behavior indicate her support for PAMA is based on religious prejudice and political opportunism rather than protecting minors.

Third, like the biased ordinances in *Church of the Lukumi Babalu Aye, Inc.*, which operated only to effect Santeria, *see* 508 U.S. at 536-37, PAMA operates only to affect the Kingdom Church by making illegal the only methods by which minors under sixteen were donating blood:

autologous and familial donations. *See* r. at 5-6. For the foregoing reasons, PAMA proceeds in a manner that is intolerant of religion and is thus not neutral.

2. PAMA Fails Strict Scrutiny as Applied to the Petitioner Because it Does not Advance the Interest of Preventing Child Abuse Since there is no Evidence in the Record of a Link Between Child Abuse and Blood Donations, and Even if PAMA Does Advance that Interest, it is not Narrowly Tailored Because there are Less Restrictive Alternatives Since Granting the Church an Exemption Would not Undermine that Interest.

Prior to *Smith*, all laws, neutral and generally applicable or not, that burdened religious exercise, *Gillette v. United States*, 401 U.S. 437, 462 (1971) (citing *Braunfield v. Brown*, 366 U.S. 599, 607 (1961) (plurality opinion)), had to be supported by a "compelling state interest" narrowly tailored to that interest. *Sherbert*, 374 U.S. at 406-07. Narrow tailoring means that the regulation must be the least restrictive means available to serve the government's interest. *See id.* at 407. However, even after *Smith*, laws that are not neutral and generally applicable still have to meet strict scrutiny. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546. Moreover, any laws or regulations subject to federal jurisdiction must meet the test under RFRA or the Religious Land Use and Institutionalized Persons Act (RLUIPA) which mirrors *Sherbert*'s strict scrutiny test. *See* § 2000bb-1(a)-(b); *see also* 42 U.S.C. § 2000cc(a)(1)(A)-(B).

A law that refuses to grant religious exemptions is not the least restrictive means to advancing a compelling interest if granting exemptions does not undermine that interest. In *Gonzalez v. O. Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), this Court held that the government's refusal to grant an exemption for a religious sect's use of a tea made with hoasca was not the least restrictive method to advance its interest because it did not prove an exemption would be harmful to the "public health and safety." *Id.* at 432-33. In contrast, in *Lee*, this Court found the *per se* requirement to pay to social security taxes was the least

restrictive means of having "a sound tax system" because the "tax system could not function" if the innumerable requests for religious exemptions were granted. 455 U.S. at 259-60.

In the present case, PAMA is not the least restrictive means of preventing child abuse because the respondent has not proven it advances that interest, and even if it does, it has not proved that granting the Church and exemption would undermine that interest. First, like the requested exemption for the sacramental use of hoasca in *Gonzalez*, which the government had not proved would undermine the "public health and safety," 546 U.S. at 432-33, the respondent has not proved that granting an exemption for minor members of the Church to PAMA with oversight would undermine the prevention of child abuse. *See* R. 3-8. Moreover, the Church complies with the standards of the American Red Cross. *See* R. at 5. Second, unlike the federal tax system, which the Court would malfunction if innumerable exemptions to social security taxes were granted, *see Lee* 455 U.S. 259-60, PAMA or a similar law could function just fine by granting an exemption to the Church because it is the only religion requesting such an exemption. For the foregoing reasons, PAMA is not the least restrictive means of preventing child abuse and is not narrowly tailored. Therefore, PAMA fails strict scrutiny.

CONCLUSION

For the foregoing reasons, the petitioner asks this honorable court to **REVERSE** and **REMAND** the Fifteenth Circuit's decision to the district court for further proceedings.

Dated: January 31, 2023,

Respectfully Submitted,

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Team 23
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CONSTITUTIONAL AND STATUTORY APPENDIX

Constitutional Provisions

Statutory Provisions