IN THE SUPREME COURT OF THE UNITED STATES

No. 22-CV-7654

EMMANUELLA RICHTER, Petitioner

v.

CONSTANCE GIRARDEAU, Respondent.

BRIEF FOR PETITIONER

APPEAL FROM ORDER OF FIFTEENTH CIRCUIT COURT OF APPEALS ENTERED ON DECEMBER 1, 2022

DATE: January 31, 2023

Team Number 27
Team Number 27
Attorneys for Petitioner

QUESTIONS PRESENTED

I. Under the United States Constitution, does the extension of the New York Times v. Sullivan actual malice standard from all-purpose public figures to limited purpose public figures violate an individual's right to their reputation when limited purpose public figures do not take advantage of publicity and are involuntarily thrust into the public eye.

II. Whether PAMA violates the neutrality and general applicability requirements of Smith by impermissibly targeting Kingdom Church's religious practices, and if Smith should be overturned considering the history and tradition of the First Amendment.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit entered its judgement on December 1, 2022. Petitioner filed a timely petition for a writ of certiorari, which this Court granted. This Court has jurisdiction pursuant to 28 U.S.C.A. § 1254.

STATEMENT OF THE CASE

Religious scholar Emmanuella Richter and her husband Vincent Richter founded The Church of the Kingdom (hereinafter "Kingdom Church") over thirty years ago in the nation of Pangea. R. at 2. In the face of religious persecution and a military coup, the growing church sought political asylum in the United States and settled in the port city of Delmont. R. at 3. As citizens of this country, the Kingdom Church live in communally designed compounds sequestered from the general population and independently sustain themselves through agricultural initiatives and commercial sale of Mr. Richter's "Kingdom Tea." R. at 4. While Mr. Richter exclusively oversees Kingdom Tea's operations, Ms. Richter dedicates herself solely to planning the church's religious seminars where church elders provide "information about the church's beliefs, history, and lifestyle." *Id.* She does not speak at these public seminars, nor does she participate in the church's door-to-door proselytization efforts. *Id.*

Kingdom Church's religious practices also involve raising the congregation's children in the faith. *Id.* Young members undergo confirmation to the church at the age of fifteen – the "state of reason" – and are expected to marry, raise, and homeschool their children according to Kingdom Church's belief system. *Id.* As Kingdom Church's beliefs forbid members from accepting blood transfusions from non-members of the church, all members are required to store their blood in the event of medical emergency. R. at 5. To foster a "servant's spirit" within the congregation, minor members of Kingdom Church make blood donations as part of their religious curriculum (under permissible American Red Cross guidelines) in addition to other acts of service like gardening, cleaning, and coordinating food drives. *Id.* The blood donation practices serve the purpose of providing for the member's own and families' medical needs as well as instilling fundamental values at an early age. *Id.*

In 2020, the Beach Glass Gazette published a salacious newspaper article harshly criticizing Kingdom Church's peaceful and private religious practices. *Id.* In response to the article's accusation that Kingdom Church officials were "procuring" minors for blood donation, the Delmont General Assembly passed the "Physical Autonomy of Minors Act" (hereinafter "PAMA") in 2021 which criminally prohibited the "procurement, donation, or harvesting of the bodily organs, fluids, or tissue of a minor" regardless of profit or that minor's consent. R. at 5-6. In fact, Ms. Girardeau "strongly advocated" for this legislation in consideration of a purported increase in child abuse rates between 2016 and 2020. R. at 5-7.

The effects of PAMA on Kingdom Church's religious exercise proved devastating when a vehicle accident on January 17, 2022, left ten church members dead and one in critical condition. R. at 6. Adam Suarez, a fifteen-year-old consanguineous relative of the lone survivor, was promptly transported to the hospital to make a typical blood donation that would have been legal prior to PAMA's enactment; however, he unexpectedly went into acute shock during the procedure. *Id.* The press and media bombarded Ms. Richter and members of the church with questions while visiting Adam in the hospital – who eventually made a full recovery. *Id.*

The following week on January 22nd, 2022, Ms. Girardeau attended a campaign fundraising event in her official capacity at Delmont University. R. at 7. When asked by the press to comment on the recent Adam Suarez incident, Ms. Girardeau remarked the "crisis" facing children's well-being and announced the commissioning of a task force to begin an investigation into the Kingdom Church's religious practices. R. at 7. As many celebrities and politicians were in attendance, these public comments garnered support for and donations to Ms. Girardeau's campaign, *Id.* In response to Ms. Richter's request for injunctive relief, Ms. Girardeau even added on January 27, 2022, that she is "not surprised at anything [Richter] does

or says. What do you expect from a vampire who founded a cult that preys on its own children?" R. at 8.

On January 25, 2022, Ms. Richter requested injunctive relief from the Beach Glass Division of the Delmont Superior Court to stop Ms. Girardeau's investigatory task force and claimed that the state violated the Free Exercise Clause of the First Amendment. R. at 7. On January 28, 2022, Ms. Richter amended the complaint to include a defamation claim in response to statements made by Ms. Girardeau. R. at 8. On September 2, 2022, the United States District Court for the District of Delmont, Beach Glass Division, granted Ms. Girardeau's motion for summary judgment under Rule 56(a) of the Federal Rules of Civil Procedure. R. at 20. Ms. Richter filed a timely appeal of the District Court's decision, which the United States Circuit Court of Appeals for the Fifteenth Circuit affirmed on December 1, 2022. R. at 38. The case then came before this Court on a petition for writ of certiorari that this Court granted. R. at 45-46.

SUMMARY OF THE ARGUMENT

A strict reading of the First Amendment to the United States Constitution reveals no basis for treating classes of individuals differently in defamation cases. Under the current framework of *New York Times v. Sullivan*, all-purpose public figures and limited purpose public figures must show that published defamatory statements were made with actual malice, while a negligence standard applies to private individuals' claims. Since the actual malice standard does not originate from the Constitution, the standard as applied to limited purpose public figures is unconstitutional. Accordingly, this Court should reverse the decision of the United States Court of Appeals for the Fifteenth Circuit.

The Court decided *New York Times v. Sullivan* at a time when print newspapers dominated the media, a form of communication that pales in comparison to the speed and prevalence of today's internet and social media. The internet permits information sharing at a speed unforeseen by the Court when it created the actual malice standard, as now anyone could become an all-purpose or limited purpose public figure overnight. Here, a short interview with media outlets transformed Ms. Richter into a limited purpose public figure in a matter of hours and thus subjected the individual to the actual malice standard in a defamation proceeding. The *New York Times v. Sullivan* actual malice standard has not adapted to meet the changing technologies of current times.

Using a negligence standard in the defamation claims of both limited purpose public figures and private individuals would treat similarly situated individuals alike, thus bringing fairness to private citizens forced into the public eye. Treating all-purpose public figures and limited purpose public figures alike harms limited purpose public figures and allows the press to spread lies with impunity. The negligence standard for defamatory speech is more attainable than

the actual malice standard, and would allow those thrust into the public sphere a chance to recover for defamation.

Treating limited purpose public figures like private individuals in defamation matters would better protect an individual's reputation since the actual malice standard is a high bar to recovery. Sufficing the actual malice standard requires proof of the speaker's intent, a difficult showing to make when a limited purpose public figure was thrust into the public eye. Moreover, retractions on false stories rarely reach the notoriety of the first defamatory story, such that the individual's reputation is harmed and the American public is fed incorrect information. Utilizing a negligence standard for the defamation claims of limited purpose public figures strikes a better balance between the rights of the freedom of speech and the right to a reputation.

This Court should also reverse the Fifteenth Circuit's decision that PAMA is a neutral and generally applicable under *Smith*. Instead, PAMA violates Ms. Richter's right to free exercise of religion and substantive due process rights to parental upbringing by impermissibly targeting Kingdom Church's religious practices. Moreover, this Court should overturn its decision in *Smith* considering the history and tradition of the Free Exercise Clause.

Evaluation of PAMA's enactment and operation reveal its unconstitutionality. According to *Smith,* a law burdening religious practices that applies neutrally and is generally applicable need only meet rational basis review; however, the law is subjected to strict scrutiny if it is found to target religious practice by failing *Smith*'s requirements. Here, PAMA fails to apply neutrally because its legislative history reveals a discriminatory intent and effect of Ms. Girardeau and the Delmont Legislature to burden Kingdom Church's blood donation practices. Like the disparaging statements of council members in *Lukumi*, Ms. Girardeau's comments to the press referring to Kingdom Church members as "vampires" demonstrate a discriminatory intent to

target religious practices. In operation, PAMA bears the discriminatory effect of disproportionally targeting Kingdom Church for enforcement. Moreover, PAMA fails to apply in a generally appliable manner because it under-inclusively regulates Kingdom Church's religious conduct for broad and unrelated purpose of preventing child abuse and neglect. Therefore, PAMA is a product of Ms. Girardeau and the Delmont Legislature's impermissible animus towards religion and therefore fails to withstand strict scrutiny.

Not only does PAMA violate Ms. Richter's right to religious exercise, but the statute also burdens her concomitant substantive due process rights to parental upbringing affirmed in *Wisconsin v. Yoder*. Contrary to the Fifteenth Circuit's finding, this Court has never purported or inferred that *Yoder* is foreclosed to cases involving hybrid educational rights. Even if it has, blood donations are a "central tenet" Kingdom Church's religion and part of its curricular instruction to instill a "servant's spirit" directly comparable to the goals of the Amish in *Yoder*.

Finally, this Court should overturn *Smith* in light of the history and tradition of the Free Exercise Clause. Its rule announced *sua sponte* and without "full-dress" argument to the Court, Justices and scholars alike have questioned *Smith*'s inattention to the plain meaning and history of the Free Exercise Clause at the time of the founding. *Smith* also obfuscated this Court's uncontroversial use of the compelling-interest test for nearly a century in protecting free exercise of religion and related First Amendment rights. In relying on overturned decisions and distinguishing itself from cases similarly situated, *Smith* prompted federal and state legislatures to secure religious exercise rights unvindicated by the judiciary. Even this Court has found *Smith* inapposite in a breadth of cases where a law is found to "target" religious practices and requires application of strict scrutiny. Therefore, this Court should overturn *Smith* because the right to free exercise of religion is worth more than its rule can afford.

ARGUMENT

I. THIS COURT SHOULD HOLD THE EXTENSION OF THE *NEW YORK TIMES V. SULLIVAN* STANDARD TO LIMITED PURPOSE PUBLIC FIGURES IS UNCONSTITUTIONAL AS THE DISTINCTION PLACES A HIGHER BURDEN ON INDIVIDUALS AKIN TO PRIVATE CITIZENS.

Although the United States Court of Appeals for the Fifteenth Circuit erred in using the actual malice standard for a limited purpose public figure's defamation claim, the court's dicta reveals that expanding the *New York Times v. Sullivan* standard to cases involving limited purpose public figures is unconstitutional because the standard does not originate from the Constitution, nor does it treat similarly situated individuals fairly. In *New York Times v. Sullivan*, the Court found in order to prevail in defamation cases, public officials must show that the statements were made with actual malice. *New York Times v. Sullivan*, 376 U.S. 254 (1964). The Court then extended the actual malice standard from public officials to all-purpose public figures regardless of government involvement, and later to limited purpose public figures, those who "have thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc.*, 388 U.S. 130 (1967). However, private individuals are not subject to the actual malice standard. *Id.* The actual malice standard's extension from all-purpose public figures to limited purpose public figures is unconstitutional because the standard treats two differently situated individuals identically.

Here, while the appellate court appreciated that the *New York Times v. Sullivan* court tried to remedy the tension between the freedom of the press and the right to a reputation, the court expressed doubt as to whether the actual malice is the right way to do so. R. at 32-33. The actual malice standard as applied to limited purpose public figures is a higher bar than the negligence standard as applied to private citizens, even though the difference between the classes of people is negligible. Moreover, the court noted that there is no Constitutional support for the

actual malice standard. R. at 33. Therefore, this Court should reverse the appellate court's decision to reapply impractical precedent since extending the actual malice standard from *New York Times v. Sullivan* to limited purpose public figures is unconstitutional as the higher burden treats all-purpose public figures and limited purpose public figures the same.

A. The internet rendered the media discussed in *New York Times v. Sullivan* unrecognizable today such that anyone could be transformed from a private individual into an all-purpose public figure.

With the advent of the internet and the prevalence of social media, the instantaneous nature of the news can turn any private individual into a limited purpose public figure or an all-purpose public figure with little to no effort required. Changes to the print news media and the implementation of social media sites since the *New York Times v. Sullivan* decision provide private individuals with "greater access to... channels of effective communication." *Gertz v. Robert Welch, Inc.*, 418 U.S. 344. After acknowledging the shift in the media landscape, Justice Gorsuch determined that "voluntarily or not, we are all public figures to some degree." *Berisha v. Lawson,*141 S. Ct. 2424 (2021) (Thomas, J., dissenting); The ease and pervasiveness of social media, combined with the actual malice standard's high bar to recovery, allows the press to spread lies about limited purpose public figures without recourse. *See Berisha v. Lawson,* 141 S. Ct. 2424; *see McKee v. Cosby,* 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring).

The media as analyzed in the *New York Times v. Sullivan* decision is nearly nonexistent today, and the Court could not have foreseen the development of the 24-hour news channels on television, the internet, or social media. *Berisha v. Lawson,* 141 S. Ct. 2427 (citing David Logan, *Rescuing Our Democracy by Rethinking New York Times Co. V. Sullivan,* 81 Ohio St. L. J. 759, 794 (2020)). In the 1960s, newspapers and periodicals dominated the media, and broadcast television was a highly regulated and specialized field that employed fact checkers and story editors. *Id.* The smartphone did not exist, nor did social media applications that allow individuals

to publish stories at any time for anyone in the world to see. The *New York Times v. Sullivan* court's decision hinged on the freedom of the press, but the press as it existed at that time is arcane in comparison to today's technologies. 376 U.S. 275. For example, in *McKee v. Cosby,* a woman alleged that her opposing party's attorney released a defamatory letter on the internet that spread to several news outlets worldwide. 139 S. Ct. 675. While the Court denied certiorari to evaluate whether the appellate court properly categorized the woman as a limited purpose public figure merely because she accused the actor Bill Cosby of sexual assault, nonetheless the defamatory letter travelled across continents overnight. *Id.* The changes in the media since *New York Times v. Sullivan* suggest that the actual malice standard be reconsidered to better protect the reputation and dignity of those thrust into the public eye by filing a lawsuit.

Today's social media and news stations broadcast stories instantly, and private individuals become public figures in a matter of hours. *Berisha v. Lawson,* 141 S. Ct. 2427. Here, the media pushed Ms. Richter into the spotlight when, during a trip to the hospital to visit a sick congregant, news outlets bombarded the Church officials and Ms. Richter felt forced to defend her religion. R. at 43. Prior to this incident, Ms. Richter lived separate from the world in a compound and never took advantage of any opportunities that would render her a public figure. R. at 4. Ms. Richter is a private citizen who conducted one interview about her religious beliefs with the local news media and thus became a limited purpose public figure subject to the actual malice standard. R. at 32, 43. Just like the woman who accused Bill Cosby of sexual assault after leading a low-profile lifestyle, the media thrust Ms. Richter into the public eye after living a private life and had defamatory statements spread about her in the press by Ms. Girardeau. *McKee v. Cosby,* 139 S. Ct. 675; R. at 26. Therefore, today's internet, in contrast with the print

media discussed in *New York Times v. Sullivan,* can convert any private individual into a limited purpose public figure with the click of a button.

B. If the *New York Times v. Sullivan* decision stands, a negligence standard for limited purpose public figures in defamation cases is required to ensure fairness to the individual, the media, and the American public.

If *New York Times v. Sullivan* is to persist, this Court should rework the ruling and adopt a negligence standard in defamation cases regarding limited purpose public figures since the actual malice standard promotes haphazard journalism and fails to hold the media accountable for its statements. Currently, limited purpose public figures, or those voluntarily or involuntarily thrust into the media spotlight, are subject to the same actual malice standard applicable to all-purpose public figures. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323. However, when private individuals bring defamation suits, they must show that the false statements were made with negligence as to the truth of the statement. *Fla. Star v. B.J.F.,* 491 U.S. 524, 539 (1989). While private individuals have greater protection from defamatory statements than limited purpose public figures, the distinction between the two classes of people is slight. Moreover, the negligence standard would better protect a limited purpose public figure's reputation since the actual malice standard allows an individual's reputation to be "destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 769 (1985) (White, J., concurring).

Here, while the appellate court determined that Ms. Richter is a limited purpose public figure in her role as a leader in the Kingdom Church, limited purpose public figures are akin to private individuals and should be treated as such in defamation cases. R. at 32. Treating Ms. Richter, who remained in the background of the Church's success for many years, like an all-purpose public figure subject to the actual malice standard is unfair to Ms. Richter, the media, and consumers alike; the actual malice standard allows the media to act with impunity since the

high bar to recovery insulates them from liability. Therefore, Ms. Richter respectfully requests that this Court find that limited purpose public figures receive a negligence standard in defamation cases to promote truthful journalism and fairness to similarly situated individuals.

1. Treating individuals who step into the public eye for limited purposes differently than the private individual creates inequalities among those similarly situated.

Using a negligence standard for both limited purpose public figures and private individuals would treat similarly situated individuals alike, thus bringing fairness to those forced into the public sphere. Currently, individuals deemed either all-purpose public figures or limited purpose public figures are subject to the actual malice standard in defamation cases. *New York Times v. Sullivan,* 376 U.S. 254; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323. However, private citizens' defamation claims are analyzed under a negligence standard, a lower bar that is more attainable for plaintiffs. *Time, Inc. v. Firestone,* 424 U.S. 448, 464 (1976). The distinction between public and private individuals as articulated in *New York Times v. Sullivan* is increasingly blurred, such that treating a limited public purpose like an all-purpose public figure is unsound. *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 46 (1971).

Aside from just illustrating the high burden of the actual malice standard, examples from caselaw show that limited public purpose public figures and private individuals are similarly situated. When considering prior cases, the Court should appraise how much freedom the individual had to engage in the controversy in the first place and decide whether they were forced into the public eye. *Wolston v. Reader's Digest Association,* 443 U.S. 157 (1979). For instance, the Eighth Circuit held that a professor of chemistry at the California Institute of Technology, whose opposition of the nation's use of nuclear tests thrust him into the public eye, became a limited purpose public figure that failed to meet the actual malice standard in a defamation suit. *Pauling v. Globe-Democrat Publ'g Co.,* 362 F.2d 188 (8th Cir. 1966). There, an

article alleged that Congress cited the professor for contempt, a falsity that could have been easily checked but was not, and the court found that the professor failed to meet the actual malice standard. *Id.* at 191. Even though the professor was a limited purpose public figure, his defamation claims would have been successful under a negligence standard since the article's writers failed to closely read the court docket. Matters concerning a limited purpose public figure coerced into the public eye regularly result in failed defamation claims since the actual malice standard is nearly impenetrable. *See James v. Gannet Co.,* 353 N.E.2d 834 (N.Y. 1976); *but see Curtis Publ'g Co. v. Butts,* 388 U.S. 130 (1967) (finding that the actual malice standard can be met when there is evidence that an author published a false story without conducting any independent corroboration of the facts alleged).

If limited purpose public figures faced the negligence standard in defamation suits, then they would be properly protected from lies spread about them. Ms. Richter, a limited purpose public figure, fell into the public light after years spent in the Kingdom Church's background. R. at 7-8. Prior to Ms. Girardeau's statement calling Ms. Richter a "vampire," Ms. Richter had no interaction with the media, never left the Church's compound, and did not participate in the Church's tea business or seminars. R. at 4-5. Moreover, there is no evidence in the record to suggest that Ms. Girardeau conducted any research into the Kingdom Church's practices or into Ms. Richter, nor is there evidence of independent fact checkers to corroborate the "vampire" comment. Just like the claims alleged against the professor in *Pauling v. Globe-Democrat Publ'g Co.*, Ms. Girardeau's claims are false and could have been proven so with an indicium of research. 362 F.2d 188. Under a negligence standard, Ms. Richter would have succeeded in her defamation claim because the statements were made carelessly. Therefore, utilizing a negligence

standard in defamation cases brought by limited purpose public figures eliminates inequalities between similarly situated individuals.

2. An individual's right to a reputation should be protected from thoughtless journalism.

Utilizing the negligence standard for limited purpose public figures would strike a more appropriate balance between an individual's right to their reputation and the freedoms of the press and speech. "The dearest property which a man has, is often his good name and character" and the freedom of the press does not permit "malicious and injurious defamation." *Dexter v. Spear,* 7 F. Cas. 624 (No. 3,867) (CC RI 1825). Protecting one's reputation "'reflects no more than our basic concept of the essential dignity and worth of every human being,'" and recognizes that once one's reputation is damaged, restoration is difficult. *Keohane v. Stewart,* 822 P.2d 1293, 1297 (Colo. 1994) (quoting ***Rosenblatt v. Baer,*** 383 U.S. 75, 92-93 (1966) (Stewart, J., concurring)); s*ee also In the Interest of J.B.,* 107 A.3d 1 (Pa. 2014) (striking down a Pennsylvania state law mandating that juvenile sex offenders be listed on the sex offenders' registry for life based on the right to an individual's reputation). While not absolute, the right to one's reputation is one that must be weighed against the freedom of speech. *McIntyre v. Jones,* 194 P.3d 519, 524 (Colo. App. 2008). One's reputation is vital to information sharing because strangers learn more about other strangers via an internet search, a social media video, or word of mouth. *see* Lawrence M. Friedman, *Guarding Life's Dark Secrets: Legal and Social Controls over Reputation, Propriety, and Privacy.* 49–53 (2007).

Once slandered, an individual's reputation is difficult to rebuild since news stories retracting or correcting previous statements are not "hot news" and rarely receive the notoriety of the original story. *Rosenbloom v. Metromedia,* 403 U.S. 46. In defamation cases brought by all-purpose or limited purpose public figures, a statement made by the defamed individual to

rehabilitate or defend their reputation will only gain traction if the media is interested in the story. *Id.* For example, a nudist magazine distributor sued a newspaper for libel when the newspaper called him a "smut distributor" and a "girlie-book peddler" after officials began an investigation into the magazines. *Id.* at 36. Ultimately, the Court found that the distributor did not meet *New York Times v. Sullivan'*s heightened standard for defamation cases involving public controversies. *Id.* at 40. Regardless of any media retraction or correction, the damage to the distributor's reputation occurred when the newspaper first ran the "smut" story since the actual malice standard does not adequately balance free speech and the vindication of one's reputation. *see Tah v. Glob. Witness Publ'g, Inc.,* 991 F.3d 231, 246, cert. denied, 142 S. Ct. 427 (2021) (Silberman, J., dissenting).

Widely publicized false statements can prove costly since retractions of defamatory statements are rarely as popular as the original news story. Here, Ms. Girardeau's defamatory statement, made at a "large press event" in the town where the Kingdom Church's compound is located, dismantled Ms. Richter's right to her reputation. R. at 8. Ms. Girardeau, the Governor of Delmont running a high-profile re-election campaign, called Ms. Richter "a vampire who founded a cult that preys upon its own children." *Id.* Like the magazine distributor in *Rosenbloom,* circulated statements made without research into their factual bases affected Ms. Richter's reputation, personal dignity, and privacy. 403 U.S. 36, 46; *Griswold v. Connecticut,* 381 U.S. 479 (1965) (protecting the right to privacy by upholding a married couple's right to access contraception). Even though no retraction of the statement would have reached the notoriety of Ms. Girardeau's original statement, Ms. Richter's right to her reputation would have been better protected under a negligence standard. Under a negligence standard, Ms. Richter retains a chance of pleading a successful defamation case. Therefore, allowing the press to

publish stories and statements with impunity refutes an individual's right to their reputation and dignity.

II. THIS COURT SHOULD REVERSE THE FIFTEENTH CIRCUIT'S DECISION BECAUSE PAMA IMPERMISSIBLY TARGETS KINGDOM CHURCH'S RELIGIOUS PRACTICES WHILE VIOLATING CONCOMMITTANT RIGHTS TO FREE EXERCISE OF RELIGION AND PARENTAL UPBRINING.

This Court should reverse the Fifteenth Circuit's decision because PAMA violates Kingdom Church's fundamental rights to free exercise of religion and parental upbringing. *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993). Responding to public outcry regarding the church's blood donation practices, the Delmont legislature targeted the Kingdom Church under the guise of regulating an important but unrelated interest child abuse and neglect. R. at 6-7. Doing so proved devastating: in a fatal scenario "such as we have here, a member may be forced to choose between abiding by PAMA and saving a fellow member's life." R. at 16. Thus, PAMA runs afoul of *Smith*'s requirements of neutrality and general applicability because it was written with the discriminatory intent and effect of criminalizing Kingdom Church's religious conduct. *Lukumi*, 508 U.S. 523. Moreover, enforcement of PAMA violates Kingdom Church members' concomitant rights to free exercise of religion *and* substantive due process rights to parental upbringing. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Accordingly, this Court should reverse because PAMA threatens more than mere suppression of an isolated religious practice - but the "destruction of the [Kingdom Church] as it exists in the United States." *Id.* at 212.

A. PAMA violates the Free Exercise Clause because it fails *Smith's* requirement of neutrality and general applicability by targeting the religious practices of Kingdom Church.

This Court should overturn the Fifteenth Circuit's decision that PAMA is neutral and generally applicable because the statute is a product of religious animus that targets Kingdom

Church for enforcement. In *Smith*, this Court held that a neutral and generally applicable statutory prohibition bearing "merely the incidental effect" of burdening a religious practice is subject to rational basis review. *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990). However, any statute that fails to meet the requirements of neutrality and general applicability necessarily "target" a religious practice triggers the "most exacting scrutiny." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017). PAMA lacks neutrality because the context surrounding its enactment demonstrates the discriminatory intent and effect of Ms. Girardeau and the Delmont Legislature to impermissibly target Kingdom Church's religious exercise. Further, PAMA also fails to apply in a generally applicable manner because it under-inclusively targets Kingdom Church for enforcement. Accordingly, PAMA fails the *Smith* test because it is the product of religious animus the Free Exercise Clause was designed to prevent.

1. PAMA fails to apply neutrally because its legislative history reveals a discriminatory intent and effect of burdening Kingdom Church's religious exercise.

PAMA lacks neutrality because its legislative history demonstrates a discriminatory intent to burden Kingdom Church's blood donation practices. In *Lukumi*, this Court struck down a local ordinance prohibiting ritualistic animal sacrifices where members of the council called Santeria religious practices an "abomination to the lord and worship of demons." *Lukumi*, 508 U.S. 541. In doing so, the Court reminded that legislative action targeting religious practices "cannot be shielded by mere compliance with the requirement of facial neutrality" and may be proven by the intent of the legislators and effects of the law in practice. *Id.* at 534. Like the council in *Lukumi*, PAMA's legislative history reveals a discriminatory intent and effect to burden a "central tenet" of Kingdom Church's belief system. R. at 5. In 2021, the Delmont legislature enacted PAMA "following the outcry" created by a local news article accusing the

Kingdom Church of "procuring" minors for blood donations. *Id.* Indeed, PAMA's legislators borrowed this language and prohibited "procurement" of minors for blood donations with or without parental consent. R. at 6. Moreover, the legislative intent to burden Kingdom Church's practices is supported by Ms. Girardeau's statements to the press. In response to a question regarding Adam Suarez's recovery, Girardeau referred to Kingdom Church as a vampiric cult that "preys on its own children." R. at 8. These statements contradict Girardeau's sworn affidavit to this Court that "nothing with respect to Kingdom Church … or Adam Suarez's blood donation served as the impetus for supporting PAMA" and undeniably warrant a finding of discriminatory intent to burden religious exercise. R. at 40.

Beyond discriminatory intent, "it becomes evident that these ordinances target [Kingdom Church] when the ordinance's operation is considered." *Lukumi*, 508 U.S. 535. Just as the prohibition in *Lukumi* had the effect of creating a "religious gerrymander" around Santeria conduct, PAMA has the impact of targeting Kingdom Church for enforcement. *Id.* at 534. In fact, Girardeau has "strongly advocated for PAMA" and "commissioned a task force to begin an investigation into the Kingdom Church's requirement for children." R. at 6-7. Enforcement of PAMA will force church members to choose between abiding by PAMA and "following the precepts of [their religion]" to save a life. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). This is the choice historically forbidden by this Court's Free Exercise jurisprudence and demonstrates PAMA's discriminatory effect on Kingdom Church's religious exercise. As in *Lukumi*, "no one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria." *Lukumi*, 508 U.S. 535.

2. PAMA is not generally applicable because it under-inclusively regulates religious conduct for the unrelated purpose of preventing child abuse.

PAMA fails to apply in a generally applicable manner because it under-inclusively regulates religious conduct for the broad purpose of preventing child abuse and neglect. In *Lukumi*, the Court found that the statute failed *Smith's* general applicability requirement because "each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief." *Id.* at 545. The State argued that the statute protects public health from the unsanitary disposal of animal carcasses; however, the Court found the ordinance under-inclusive because it failed to regulate other conduct (like hunters or restaurants disposal of biological waste) that also undermined the stated interest. *Id.* Here, Ms. Girardeau argues that PAMA is justified by the interest of preventing child abuse and neglect. R. at 18. While Ms. Richter concedes that this is an important governmental interest, PAMA fails to regulate a wide variety of secular conduct that undoubtedly contributes to child abuse and neglect. For example, PAMA makes no reference to circumstances where parents refuse to seek medical care for their children; instead, it targets Kingdom Church's attempt to provide internal medical care considering their religious beliefs prohibiting blood transfusions. Further, minors voluntarily convert to the church at fifteen, "the state of reason," and follow all requisite American Red Cross guidelines for donation. R. at 4-5. Ultimately, the State attempts to justify its criminal prohibition of a unique religious practice under the guise of an overly broad interest and therefore fails to apply in a generally applicable way under *Smith*.

B. PAMA violates concomitant rights to free exercise of religion and parental upbringing established in *Wisconsin v. Yoder.*

This Court should reverse the Fifteenth Circuit's decision that *Wisconsin v. Yoder* is "cabined to cases involving education" because blood donations are an essential part of Kingdom

Church's religious curriculum and a central tenet in the church's belief system. R. at 19. In *Yoder,* the Court held that Wisconsin was required to exempt the Amish from compulsory education for 14-15 year-old minors because the "values of parental direction of religious upbringing and education of their children in their early formative years have a high place in our society." *Yoder*, 406 U.S. 214. The Amish plaintiffs argued that the compulsory education law violated their free exercise of religion and substantive due process rights to raise and educate their children to "acquire Amish attitudes favoring work and self-reliance" *Id.* at 211. For the Amish, the exemption for minors was required to prevent the "destruction of the Old Order Amish church community as it exists in the United States" and was thus subject to strict scrutiny. *Id.* at 212. Much like the Amish in *Yoder,* minors of Kingdom Church who have reached the "state of reason" make regular blood donations as part of their educational mission to instill a "servant's spirit" essential to the church's continued operation. R. at 5. Aside from its educational value, blood donations are a "central tenet" of Kingdom Church's faith and required for the purpose of personal and consanguineous blood transfusions in the event of emergencies. *Id.* Therefore, PAMA concurrently burdens Kingdom Church's rights to religious exercise and parental upbringing under *Yoder* and requires application of strict scrutiny.

III. THE COURT'S DECISION IN *SMITH* SHOULD BE OVERRULED IN LIGHT OF THE HISTORY AND TRADITION OF THE FREE EXERCISE CLAUSE.

This court should overrule its decision in *Smith* because it contravenes the history and tradition of the Free Exercise Clause. Decades ago in *Lukumi,* Justice Souter remarked the "intolerable tension in free exercise law, which may be resolved … in a case in which the tension is presented and its resolution pivotal." *Lukumi*, 508 U.S. 573 (Souter, J., concurring). As the Kingdom Church's free exercise challenge arises here, this Court should consider the following in deciding whether to overturn precedent: (1) the quality of reasoning (2) workability of the rule

(3) consistency with other related decisions and (4) reliance of subsequent decisions. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018). Indeed, *Smith* has been the subject of widespread criticism; notably, Justice Alito's recent concurrence to *Fulton v. City of Philadelphia* opined that "Smith was wrongly decided" considering its mischaracterization of history and subsequent negative treatment. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1923 (2021) (Alito, J., concurring). Accordingly, *Smith* should be reconsidered because the preceding factors demonstrate its incongruence with the history and tradition of the First Amendment's protection of religious exercise without demonstration of a compelling and narrowly tailored interest. *Sherbert*, 374 U.S. 408. Returning to the compelling-interest test would harmonize the contradictions internal to free exercise jurisprudence and vindicate the Kingdom Church's right to religious exercise as a "constitutional 'norm,' not an anomaly." *Smith*, 494 U.S. 901 (O'Connor, J., concurring).

A. *Smith*'s reasoning overlooked the history and tradition of the Free Exercise Clause.

This Court should question the reasoning of *Smith* because it failed to engage with the history and tradition of the Free Exercise Clause. Justices and scholars have remarked that *Smith* was decided without "full-dress argument" *sua sponte*. *Lukumi*, 508 U.S. 571 (Souter, J., concurring); *see also* Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that was Never Filed*, 8 J. L. & Religion 99 (1990). In doing so, the *Smith* majority misapprehended the plain meaning of the Free Exercise Clause's rejection of substantial burdens on religion, words which "had the same meaning in 1791 as they do today." *Fulton*, 141 S. Ct. 1896 (Alito, J., concurring). Instead of engaging in textual analysis, *Smith* considered its own rule a "permissible reading" of the First Amendment. *Smith*, 494 U.S. 878. Further, historians' analysis of early State Constitutions reveals that free exercise was "universally said to be an

unalienable right" less exceptions for conduct that would endanger public peace or safety. Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1118 (1990). Despite these exceptions, early state legislatures often granted exemptions to religious objectors where "conscription would do violence to their consciences." *Id*. at 1119-20. Thus, *Smith's* reasoning is flawed because its majority hastily "ignored the normal and ordinary meaning" of the First Amendment's text and history. *Fulton*, 141 S. Ct. 1911.

B. *Smith* remains inconsistent with this Court's free exercise jurisprudence.

The majority's decision in *Smith* contradicted decades of precedent applying the compelling-interest test to laws that substantially burden free exercise of religion. Prior to *Smith*, this Court routinely required the State to demonstrate a narrowly tailored and compelling state interest to justify any "substantial infringement" of appellant's right to religious freedom. *Sherbert*, 374 U.S. 406; *Gillette v. United States*, 401 U.S. 437, 452 (1971); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981). In fact, the court decided a free exercise challenge using the *Sherbert* test just one year prior to *Smith* in *Frazee. Frazee v. III. Dep't of Employment Sec.*, 489 U.S. 829 (1989). Rather than aligning with existing precedent, the *Smith* majority unsuccessfully attempted to distinguish itself from doctrine it was part of by foreclosing *Sherbert inter alia* the realm of "benefits cases" and *Yoder* and *Cantwell* as "hybrid rights" claims. *Smith*, 494 U.S. 882. Beyond the paradox that *Smith* involved denial of unemployment benefits (and arguably a "hybrid" expression claim), the majority cited *Gobitis* in support of its rule of neutrality and general applicability – a decision overruled three years later in *Barnette* and later deemed "erroneous" by Justice Scalia himself. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 500 (2007).

Indeed, this court should reconsider *Smith* because "its rough treatment of prior decisions diminishes its own status as precedent." *Fulton*, 141 S. Ct. 1915.

C. The *Smith* test has proven unworkable to apply in the lower courts.

Smith's principles of neutrality and "hybrid-rights" have proven unworkable to apply in the lower courts. While the *Smith* majority failed to define "discriminatory object," the justices in *Lukumi* took varying approaches to determining when a law "targets" religious conduct. *Lukumi*, 508 U.S. 535-39. This ambiguity provided lawmakers with a roadmap for subversively targeting minority religious practices under the guise of facial neutrality while putting courts "into the difficult business of ascertaining the subjective motivations of rulemakers." *Fulton*, 141 S. Ct. 1919 (Alito, J., concurring). This produced a variety of adverse burdens on religious exercise, including a lower court's rejection of a free exercise claim where parents objected to their son's autopsy pursuant to a neutral and generally applicable law. *Yung v. Sturner*, 750 F.Supp 558 (D.R.I. 1990). Furthermore, the Circuit Courts have struggled to apply the "hybrid rights exception" necessarily invented to distinguish *Smith* from *Yoder and Cantwell*. The First, Fifth, Ninth, and Tenth Circuits have required the attached constitutional claim to be "viable" or "colorable," while the Second, Third, and Sixth circuits have declined to apply the *Yoder* doctrine at all. *Fulton*, 141 S. Ct. 1918. Thus, *Smith's* arbitrary compartmentalization of free exercise claims created a variety of workability issues that undermine its precedential value.

D. Few have relied on *Smith* to protect rights guaranteed by the First Amendment.

A range of substantive developments in history and the law have rendered *Smith*'s narrow interpretation of the First Amendment unsatisfactory in protecting free exercise rights. Where *Smith* predicted "anarchy" in a world where each person is a "law unto themselves," legislatures promptly enacted RFRA, RLUIPA and state equivalents to "impose essentially the same

requirements as *Sherbert*" without controversy. *Smith*, 494 U.S. 879; *Fulton*, 141 S. Ct. at 1922 (Alito, J., concurring). Moreover, this Court has yet to apply *Smith* since its inception decades ago; rather, the Court has found *Smith* inapposite in cases where the law targets a religious institution through denial of publicly afforded benefits. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Trinity Lutheran*, 137 S. Ct. 2012; *Tandon v. Newson*, 141 S. Ct. 1294 (2021). Neither courts nor legislatures have relied on *Smith* to protect religious freedoms guaranteed by the First Amendment. As Justice Jackson reminds in *Barnette*, the purpose of the Bill of Rights "was to withdraw certain subjects from the vicissitudes of public controversy, to pace them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Barnette*, 319 U.S. at 638. The Kingdom Church and its religious practices, however "erratic" or unique, deserve the robust constitutional protection the Free Exercise Clause promises. Accordingly, the protection of religious freedom is worth more than *Smith* can afford.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the United States Court of Appeals for the Fifteenth Circuit and remand so that Ms. Richter's case can proceed without infringement on her First Amendment rights.

Respectfully Submitted,

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APPENDIX A

I. CONSTITUTIONAL PROVISIONS

The pertinent part of the First Amendment to the United States Constitution provides: "Congress shall make no law respecting the 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." U.S. CONST. Amend. I.

II. BRIEF CERTIFICATE

The work product contained in all copies of Team 27's brief is in fact the work product of the team members. Team 27 has complied fully with their law school's governing honor code. Team 27 has complied with all Competition Rules.