
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

Team Number 30
January 31, 2023
Counsel for Respondent

STATEMENT OF THE ISSUES

I. Whether the extension of the *New York Times v. Sullivan* standard to limited-purpose public figures constitutional; and

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

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STATEMENT OF JURISDICTION

The United States District Court for the District of Delmont exercised original subject matter jurisdiction over this civil action arising under the Constitution and laws of the United States, pursuant to 28 U.S.C. § 1331. *See App'x. B*. Following an appeal of the District Court's entry of summary judgment, the United States Court of Appeals for the Fifteenth Circuit was vested with jurisdiction over this matter, pursuant to 28 U.S.C. § 1291. *See App'x C*. This Court granted Writ of Certiorari to review the final judgment rendered by the United States Court of Appeals for the Fifteenth Circuit, pursuant to 28 U.S.C. § 1254(1). *See App'x D.*

STATEMENT OF THE CASE

I. The Physical Autonomy of Minors Act (PAMA)

Enacted into Delmont law in 2021, the Physical Autonomy of Minors Act (PAMA) forbids "the procurement, donation, or harvesting of the bodily organs, fluids, or tissue," of minors under the age of 16, regardless of profit or a minor's consent. R. 6. Prior to PAMA, the state of Delmont prohibited minors under the age of 16 "from consenting to blood, organ, or tissue donations," but created exceptions for "autologous donations and . . . medical emergencies of consanguineous relatives[.]" R. 5. Proponents of PAMA contend it was passed because the state's prior, less restrictive policy failed to adequately protect the children of Delmont. R. 39-40.

II. Factual Background

Petitioner Emmanuella Richter is the head of The Church of the Kingdom ("Kingdom Church"). R. 7. On January 17, 2022, ten members of Kingdom Church were involved in a multi-car crash in Delmont's Beach Glass City. R. 6. One of the members required a major medical operation, and needed a blood donation from a donor with a matching blood type. R. 6. Adam Suarez, a fifteen-year-old Kingdom Church member and relative of the victim, was called

to donate blood for the first time in his life. R. 6. In the middle of the blood donation, Suarez experienced acute shock and was placed in the ICU. R. 6. While Suarez eventually recovered, he was advised against donating blood in the future. R. 7.

Respondent, Delmont Governor Constance Girardeau, is a major proponent of PAMA. R. 6. After expressing support for the legislation, she signed it into law in 2021. R. 6. During her gubernatorial reelection campaign in January of 2022, Respondent expressed concern over the "mental, emotional, and physical well-being" crisis facing the state's children. R. 7. She cited to federal statistics demonstrating significant increases in child abuse and neglect from 2016 to 2020, and data indicating that over a quarter of children who die by suicide are victims of abuse or neglect. R. 7. During Respondent's reelection campaign, a state-wide controversy surrounding improper blood donation practices–and the potential link between these practices and child exploitation and abuse–had generated considerable public debate over how investigations pursuant to PAMA should be conducted. R. 5, 7. In remarks delivered on the campaign trail on January 22, 2022, Respondent assured her constituents that PAMA would be enforced by a task force of state social workers investigating instances of child exploitation, abuse, or harm. R. 7.

On January 25, 2022, Petitioner filed suit against Respondent in the United States District Court for the District of Delmont, seeking injunctive relief. R. 7. Petitioner specifically sought to enjoin Respondent's task force from investigating Kingdom Church or enforcing PAMA, on the ground that PAMA violated the Free Exercise Clause of the First Amendment. R. 7-8. When asked about Petitioner's suit on January 27, 2022, Respondent stated she was "not surprised at anything Emmanuella Richter says or does," and asked, "what do you expect from a vampire who founded a cult that preys on its own children?" R. 8. On January 28, 2022, Petitioner amended her complaint to allege these statements made by Respondent were defamatory. R. 8.

III. Proceedings Below

Petitioner initially filed suit against Respondent in the United States District Court for the District of Delmont on January 25, 2022, seeking injunctive relief based upon the purported unconstitutionality of PAMA and its enforcement-related investigation. R. 2. On January 28, 2022, Petitioner amended her complaint to include a cause of action for defamation against Respondent. R. 8. Respondent moved for summary judgment on both claims pursuant to Federal Rule of Civil Procedure 56(a), and the District Court granted summary judgment in favor of Respondent on both causes of action on September 1, 2022. R.20. Petitioner appealed the District Court's decision to the United States Court of Appeals for the Fifteenth Circuit. R.27. On December 1, 2022, the Fifteenth Circuit affirmed both grants of summary judgment in favor of Respondent. R.38. Thereafter, Petitioner petitioned the Supreme Court of the United States for Writ of Certiorari, which this Court granted. R.45.

SUMMARY OF THE ARGUMENT

The Fifteen Circuit correctly affirmed the District Court's grant of summary judgment in favor of Respondent for two reasons.

First, the Fifteenth Circuit's decision was proper because the extension of the actual malice standard to limited-purpose public figures (LPPF) is constitutional under the First and Fourteenth Amendments. Applying the actual malice standard to LPPF finds ample support in founding-era documents describing the First Amendment's speech and press freedoms, and does not depart from the common law approach to defamation. Moreover, extending the actual malice standard to LPPF strikes an optimal balance by promoting First Amendment guarantees while simultaneously providing potential recourse to those who suffer reputational injury from defamatory falsehoods. This balance is achieved because the LPPF classification applies only when alleged defamatory statements pertain to matters of public concern, and does not

encompass individuals who are merely drawn into public controversies. Furthermore, even where the LPPF classification does apply, case law evinces that the actual malice standard does not preclude recovery for defamation claimants in all instances. Finally, bedrock principles of stare decisis compel reaffirming this Court's actual malice decisions.

Second, the Fifteenth Circuit's decision was proper because PAMA does not violate Petitioner's free exercise rights under the First and Fourteenth Amendments. PAMA is neutral in its text and objective, and constitutes an across-the-board, general prohibition of specified conduct. Thus, PAMA is neutral and generally applicable under *Smith* and its progeny, and as such, it is subject to rational basis review–which it can easily withstand. Furthermore, because *Smith*'s approach reflects an optimal balancing of the competing state and individual interests implicated by free exercise claims, this Court should uphold its decades-long free exercise jurisprudence under *Smith* and its progeny.

ARGUMENT

I. Application of the Actual Malice Standard to Limited-Purpose Public Figures is Constitutional Under the First and Fourteenth Amendments.

The free speech and free press clauses of the First Amendment–applicable to the states through the Fourteenth Amendment under *Gitlow v. New York*, 268 U.S. 652, 666 (1925)–provide that "Congress shall make no law… abridging the freedom of speech, or of the press." U.S. Const. amend. I. These protections reflect the "fundamental principle of our constitutional system," that "maintenance of the opportunity for free political discussion… [is] essential to the security of the Republic[.]" *Stromberg v. California*, 283 U.S. 359, 369 (1931).

Laws regulating defamation inherently implicate First Amendment concerns by imposing liability upon parties who express or disseminate certain speech. Historically, this Court generally reserved the authority to "strik[e] an acceptable balance between encouraging robust

public discourse and providing a meaningful remedy for reputation harm[,]" to the respective states. *McKee v. Cosby*, 139 S.Ct. 675, 682 (2019) (Thomas, J., concurring). However, in response to concerning developments in certain state libel laws, this Court intervened in *New York Times Co v. Sullivan*, 376 U.S. 254, 256 (1964) to safeguard the First Amendment rights of defamation defendants.

In *Sullivan*, this Court held that an Alabama law "compelling… critic[s] of official conduct to guarantee the truth of all his factual assertions," to avoid liability in a libel action was "constitutionally deficient for failure to provide safeguards for freedom of speech and the press required by the First and Fourteenth Amendments[.]" *Id.* at 279, 264. Because such defects in libel actions frustrate the First Amendment guarantee that "debate on public issues should be uninhibited, robust and wide-open," the *Sullivan* Court held that public officials could not recover damages in actions for "defamatory falsehood[s] relating to . . . official conduct" without demonstrating that the statement was made with actual malice–to wit, "knowledge that it was false[,] or with reckless disregard of whether it was false or not." *Id.* at 270, 279-80..

This Court's adoption of the actual malice standard in *Sullivan*, and subsequent application of the standard to public and LPPF defamation claimants in *Curtis Publ'g Co v. Butts*, 388 U.S. 130 (1967) and *Gertz v. Robert Welch, Inc*., 418 U.S. 323 (1974), is constitutional, thus warranting affirmance by this Court, for three reasons. First, extension of the actual malice standard to LPPF is rooted in the history and tradition of the First Amendment; second, applying the actual malice standard to LPPF strikes the appropriate balance between ensuring vigorous public debate and providing redress for reputational injury; and finally, principles of stare decisis compel upholding *Sullivan* and its progeny.

A. Extension of the actual malice standard created in *Sullivan* to limited-purpose public figures is rooted in the history and tradition of the First Amendment.

Examination of founding-era documents and the common law of defamation in the United States reveals that the extension of the actual malice standard to LPPF is rooted in the history and tradition of the First Amendment, and is not a mere "product of the time in which it was created." R.32.

i. The actual malice standard comports with the founders' understanding of the First Amendment guarantees of free speech and free press.

The notion that speech and press freedoms were "fashioned to assure unfettered interchange of ideas… to [facilitate] political and social changes desired by the people," and thus necessarily encompassed the right to criticize public officials and figures, can be traced back to the earliest days of the United States. *Roth v. United States*, 354 U.S. 476, 484 (1957). The Declaration of Independence regarded "[t]he dissemination of the individual's opinions on matters of public interest" to be "an 'unalienable right' that 'governments are instituted… to secure.'" *Curtis*, 388 U.S. at 149-50. Similarly, in remarks condemning the Sedition Act of 1789–a law criminalizing "any false, scandalous and malicious statements against the federal government–the General Assembly of Virginia observed that "the right of freely examining public characters and . . . free communication" on public matters was "the only effectual guardian of every other right." 4 *Debates on the Federal Constitution* 553-54 (ed. Jonathan Elliot 1876).

While extension of these rights can entail "vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials," *Sullivan*, 376 U.S. at 270, the founders understood that "some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press[.]" Elliot, at p. 571. Imposition of the actual

malice requirement upon public official, public figure, and LPPF defamation claimants comports with this founding-era consensus.

ii. Application of the actual malice standard does not depart from the common law.

Citing favorably to Justice Thomas' concurrence in *McKee*, the Fifteenth Circuit contends that the extension of the actual malice standard to public figures sharply contradicts the common law understanding of libel. R.30. However, this critique inappropriately emphasizes English laws predating the First Amendment's ratification and, consequently, ignores the reality that "one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press." Schofield, *Freedom of the Press in the United States. 9. Publications Amer. Sociol. Soc.* p. 67, 76 (1914). In *McKee*, Justice Thomas notes that, at English common law, defaming a public figure was "even more serious and injurious than ordinary libel" *McKee,*139 S. Ct. at 679. The persuasive value of this observation is diminished, however, by the fact that such libel laws, dating back to 1275, "had fallen into disuse by the 19th century" in England, and were "not employed in the United States." *Id.* at fn. 2.

Furthermore, the founders of the United States sought to depart from English legal customs concerning speech and the press. This is evinced by James Madison's assertions that "the state of the press under the common law[] cannot be the standard of its freedom in the United States, " 6 James Madison, *Writings of James Madison* 387 (Gaillard Hunt ed., 1906) and that the founding-era press "ha[d] exerted a freedom . . . which has not been confined to the strict limits of the common law." Elliot, p. 570. Madison's statements demonstrate the American approach to the press had departed from the English common law as early as 1798. These statements also reinforce the notion that the First Amendment was ratified "while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, and "cannot

reasonably be taken as approving prevalent English practices." *Bridges v. California*, 314 U.S. 252, 265 (1941). Consequently, "the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society." *Id.*

Moreover, the common law doctrine of fair comment–which provided enhanced protection to the press for comments regarding matters of public concern–offers an additional historical basis for applying the actual malice standard to LPPF. *See* Martin L. Newell, *Defamation, Libel and Slander in Civil and Criminal Cases as Administered in the Courts of the United States of America* 567 (1890). Dating back to the 19th century, this fair comment protection extended beyond government affairs, and encompassed commentary regarding public institutions, artists, writers, and lecturers, and public entertainment. Matthew Schafer, *In Defense: New York Times v. Sullivan*, 82 La. L. Rev. 81, 127 (2021). The rationale underlying the doctrine was virtually identical to the one advanced by this Court in *Gertz*–namely, that those who situate themselves in the public eye invite public scrutiny, and accordingly, are less deserving of judicial protection. *See Gertz*, 418 U.S. at 344, 345.

Furthermore, in a series of 19th century cases, courts employing the fair comment doctrine contemplated the need for heightened scrutiny in actions where alleged defamatory comments arose from matters of public concern. *See, e.g.*, *Lewis v. Few,* 5 Johns. 1 (N.Y. Sup. Ct. 1809) (Contending the actual malice standard adopted in the context of the servant-master privilege should apply to public officials because "the people must be regarded as the master, and the persons elected as their agents… it is essential in an elective government that the people should be at liberty to express their opinions of any public officer."); *Press Co. v. Stewart*, 119 Pa. 584, 603 (1888) (requiring an individual to demonstrate "actual malice" in a defamation claim against

the press because he was a "quasi-public character" and the subject "was a matter of importance to the public"); *Crane v. Waters,* 10 F. 619 (C.C.D. Mass. 1882) (holding a plaintiff had to prove actual malice because his role as a constructor and manager of railroads "was a matter of public discussion and affected many interests."). These cases clearly reflect that this Court's decision to extend the "actual malice" rule to those who voluntarily inject themselves into public affairs finds ample historical and precedential support.

B. Application of the actual malice standard to limited-purpose public figures strikes the appropriate balance between safeguarding fundamental First Amendment interests while simultaneously permitting litigants alleging reputational injury to seek redress.

The First Amendment's guarantees "must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Curtis*, 388 U.S. at 147 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). LPPF, who "assume special prominence in the resolution of public questions," implicate these First Amendment concerns by "voluntarily injecting themselves" into particular controversies. *Gertz*, 418 U.S. at 351. Accordingly, LPPF defamation claimants warrant the imposition of the heightened actual malice standard. *Id.* By contrast, private persons do nothing to invite public scrutiny or influence public debate, and are substantially less capable of rebutting defamatory falsehoods via self-help mechanisms like access to the press or "channels of effective communication." *Id*. at 344. Consequently, private persons do not implicate the same First Amendment concerns as LPPF, and thus, warrant a distinct approach.

The extension of the actual malice standard to claimants designated as LPPF reflects the optimal balancing of the competing interests involved in defamation claims for three reasons: first, the designation only attaches in circumstances implicating core First Amendment concerns; second, the designation does not encompass individuals who are merely "drawn into a

controversy," and third, even where the designation applies, the actual malice standard does not bar litigants from obtaining relief in all instances.

i. The limited-purpose public figure classification does not apply where alleged defamatory comments do not relate to matters of public concern.

This Court implemented the actual malice standard to uphold the bedrock First Amendment principle that "speech concerning public affairs is more than self-expression; it is the essence of self-governance[.]" *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Holding LPPF–who are inextricably involved in public affairs due to their involvement in public controversies–to a heightened standard of proof in defamation actions provides the First Amendment right to unrestricted public discourse the "breathing space" it needs to survive. *See NAACP v. Button*, 371 U.S. 415, 433 (1963). However, since "speech on matters of purely private concern" do not implicate the same First Amendment interests, the LPPF designation does not attach to individuals when alleged defamatory comments are not related to matters of public concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 760 (1985).

For instance, in *Dun & Bradstreet*, a construction contractor sued a credit reporting agency for defamation after the agency disseminated a false credit report to five of its subscribers. *Id.* This Court declined to designate the contractor as a LPPF, and thus require a showing of actual malice, because "no credible argument" existed that "speech solely in the individual interest of the speaker" and "made available to only five subscribers," would impermissibly chill public debate. *Id.* By contrast, the present case does not present a similar situation. Here, the allegedly defamatory comments concerning Petitioner arose out of a matter of public concern–namely, a state-wide controversy surrounding improper blood donation practices and possible link to rising child abuse rates. R.5. This controversy resulted in the enactment of state-wide legislation and arose during Respondent's campaign for re-election, a

period in which debate on public issues is particularly vital. R.7. Allowing Petitioner to prevail on less than a showing of actual malice would substantially frustrate not only Respondent's ability to comment on matters of public concern, but would also chill the ability of her constituents to discuss matters of self-governance–a core First Amendment concern.

ii. Proper application of the limited-purpose public figure classification does not encompass individuals who are merely "drawn into" a controversy.

The Fifteenth Circuit's contention that the "actual malice" standard inordinately harms those "unfortunate enough to be drawn into a public controversy" is plainly inconsistent with the standard articulated in *Gertz* and how this Court has applied it. R.31. As the Court explained in *Wolston v. Reader's Dig. Ass'n*, 443 U.S. 157, 167 (1979), "a private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." Rather, LPPF are, by definition, those who *voluntarily "*thrust [themselves] into the vortex of [a] public issue" and purposefully "engage the public's attention in an attempt to influence its outcome." *Gertz,* 418 U.S. at 351. Moreover, under *Gertz*, the scope of the Court's inquiry into whether an individual is a LPPF is limited "to the nature and extent of [the] individual's participation in the particular controversy giving rise to the defamation." *Id.* at 352. Thus, *Gertz* imposes a limitation ensuring that an individual who is truly "drawn" into a controversy will not be deemed a LPPF, because the LPPF designation hinges on the extent of *voluntary* participation in a given controversy.

For example, in *Wolston*, this Court declined to designate a claimant as a LPPF on the ground that, by being compelled by subpoena to appear in a court case that happened to be of public interest, the claimant was "dragged unwillingly into the controversy." *Wolston*, 443 U.S. at 166. *See also Times, Inc. v. Firestone*, 424 U.S. 448, 455 (1976) (holding a claimant whose divorce became a subject of public interest was not a LPPF, because she did not voluntarily

insert herself into a public controversy merely by filing for divorce, and did not choose "to publicize issues relating to her married life.") Here, Petitioner is clearly distinguishable from the claimants in *Wolston* and *Times* because she has voluntarily inserted herself into the controversy giving rise to the allegedly defamatory comments made against her, and directly engaged the public in an attempt to influence the controversy's outcome. Specifically, Petitioner spoke to the press about her religion's blood-donating practices following the highly publicized Adam Suarez story, and further engaged the public's attention by attempting to interfere in the passage of PAMA. R.6, 8. In sum, Petitioner's conduct clearly warrants designating her as a LPPF because, rather than being "dragged" into it, she willingly and purposely engaged in the public controversy surrounding PAMA.

iii. *The actual malice standard merely imposes a heightened standard of proof and does not bar litigants from obtaining relief in all instances.*

Moreover, the notion that the actual malice standard is a "legal fiction," R.31., is blatantly contradicted by case law where public figures and LPPF have prevailed under the actual malice standard. *See, e.g. Depp v. Heard*, Civil Action No. 2019-0002911, 2022 Va. Cir. LEXIS 84 (D. Va. June 24, 2022) (jury verdict granting $10 million and $2 million dollars, respectively, to all-purpose public figures Johnny Depp and Amber Heard on their defamation claims against one another); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657 (1989) (affirming jury verdict that newspaper acted with actual malice by acting in a way that "constituted an extreme departure from professional standards."); *Masson v. New Yorker Mag., Inc.,* 501 U.S. 496 (1991) (reversing grant of summary judgment for failure to show actual malice when reporter deliberately fabricated and altered quotations made by defamation claimant).

C. Principles of stare decisis compel upholding the extension of the "actual malice" standard to limited-purpose public figures.

In the years since *Sullivan*, this Court has consistently reaffirmed the "actual malice" standard as a tenet of First Amendment jurisprudence–not only in the realm of defamation actions, but in other areas of the law as well. *See*, *e.g., Hustler Mag. v. Falwell*, 485 U.S. 46, 56 (1988) (unanimously holding that public officials and public figures may not recover tort damages for intentional infliction of emotional distress for defamatory statements without showing of "actual malice"); *Bose Corp.,* 466 U.S. at 513 (product disparagement actions*); Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966) (defamation suits arising from labor disputes); *Brown v. Hartlage* 456 U.S. 45, 61 (1982) (statutes pertaining to false campaign speech). This far-reaching line of authority spanning 58 years significantly undermines any question of whether extending the actual malice standard to LPPF was merely "a product of the time in which it was created." R.32.

Moreover, the tradition of this Court has always recognized that "overruling precedent is never a small matter" and has displayed a profound respect for the bedrock principle of stare decisis. *Kimble v. Marvel Ent., L.L.C.*, 576 U.S. 446 (2015). This doctrine, which demands that "today's Court should stand by yesterday's decisions" is the "preferred course because it promotes the evenhanded, predictable and consistent development of legal principles, fosters reliance on judicial decision and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 501 U.S. 808, 828 (1991). In determining whether to abide by the strong preference in favor of stare decisis, the Court looks to whether "the prior decision is not just wrong but is egregiously wrong; the prior decision has caused significant negative jurisprudential or real-world consequences; and overruling the decision would not unduly upset

legitimate reliance interests." *Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2228, 2307 (2022) (Kavanaugh, J., concurring).

Here, these factors weigh strongly in favor of upholding this Court's precedents established in *Sullivan*, *Curtis,* and *Gertz*. In light of the sizable amount of evidence to the contrary, the concern that applying the "actual malice" standard to LPPF is not contained in the history and text of the First Amendment hardly warrants the conclusion that the decision was egregiously wrong. R.32. Moreover, this Court's consistent reapplication and extension of the principles articulated in *Sullivan* throughout the last half-century plainly indicate that the decision has not caused negative jurisprudential consequences, and further reveals how overruling the decision would unduly disrupt legitimate reliance interests in multiple areas of law. Therefore, as it has so many times before, this Court should adhere to its tradition of stare decisis and reaffirm the holdings in *Sullivan, Curtis,* and *Gertz*.

II. The Fifteenth Circuit properly concluded that PAMA is a neutral law of general applicability, and is thus constitutional.

The Free Exercise Clause of the First Amendment–applicable to the states through the Fourteenth Amendment under *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)–provides that "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*[.]" U.S. Const. amend I. (Emphasis added). This clause reflects the fundamental principle that respect for varying religious beliefs is "indispensable to life in a free and diverse Republic[.]" *Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2432-33 (2022).

In *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990), this Court recognized that the standard adopted in *Sherbert v. Verner*, 374 U.S. 398 (1963) could not be applied to "across-the-board . . . prohibition[s] o[f] a particular form of conduct" without "creat[ing] an extraordinary right to ignore [all] generally applicable laws that are not supported by a

compelling governmental interest on the basis of religious belief." *Smith*, 494 U.S. at 873. Accordingly, in *Smith* and its subsequent decisions, this Court has established that laws "burden[ing] religious practice" are not subject to strict scrutiny where they are "neutral and of general applicability." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521(1993).

Applying the standard set by *Smith* and its progeny, the courts below correctly determined that PAMA is a neutral law of general applicability, and is thus constitutional. Accordingly, this Court should affirm the conclusion of the courts below, and in so doing, uphold *Smith* and its progeny.

A. PAMA is neutral because both its text and object are secular in nature.

"[T]he minimum requirement of neutrality is that the law not discriminate on its face." *Id.* at 533. A law that "refers to a religious practice without a secular meaning discernible from the language or context" fails to satisfy this requirement. *Id.*

i. PAMA is neutral, because its text is facially neutral.

A law that makes no reference to religion or religious practices is facially neutral. *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 709 (1981). For example, in *Thomas,* a statute providing that "individual[s] who . . . voluntarily left . . . employment without good cause" would be "ineligible for [unemployment] benefits," 450 U.S. 709, n. 1, was "neutral on its face" because its text was entirely secular in nature. *Id.* at 717, Similarly, in *M.A. ex rel. A.R. v. Rockland Cnty. Dep't of Health*, 54 F.4th 29, 35-37 (2d Cir. 2022), the Second Circuit concluded an emergency declaration "barring unvaccinated children . . . except for those with a medical exemption or documented serological immunity, from places of public assembly" was "facially neutral." *See also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1130 (9th Cir. 2009)

(Concluding agency rules that made "no reference to any religious practice, conduct, or motivation" were "facially neutral."); *Trump v. Hawaii*, 138 S.Ct. 2392, 2419 (2018).

By contrast, in *Roman Cath. Diocese of Brooklyn v. Cuomo,* 141 S.Ct. 63, 66 (2020), this Court concluded COVID-19 regulations limiting "attendance at houses of worship . . . to 25 persons" while allowing "non-essential businesses . . . [to] decide for themselves how many persons to admit" lacked facial neutrality, "because they single[d] out houses of worship for especially harsh treatment." *See also Espinoza v. Mont. Dep't. of Revenue*, 140 S.Ct. 2246, 2255 (2020) (concluding provision barring government aid to schools controlled by "any church, sect, or denomination," lacked neutrality.); *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S.Ct. 2012, 2021 (2017).

Thus, like the provisions in *Thomas, Rockland Cnty.,* and *Stormans*—and unlike those in *Cuomo* and *Espinoza*—PAMA is facially neutral because its plain text makes no reference to religion or religious conduct.

ii. PAMA's underlying legislative history and enactment does not negate its facial neutrality.

However, this Court has made clear that "[f]acial neutrality is not determinative," as the Free Exercise Clause also "forbids subtle departures from neutrality," *Lukumi*, 508 U.S. at 534 (quoting *Gillette v. United States,* 401 U.S. 437, 452 (1971)), and "covert suppression of religious beliefs." *Id.* (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986)). Accordingly, this Court's neutrality assessment also considers the "historical background[,] . . . the series of events leading to the enactment[,] and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S.Ct. 1719, 1722 (2018).

Where legislative history evinces hostility towards a particular religion, a law lacks neutrality. *Masterpiece,* 138 S.Ct. at 1721; *see also Lukumi,* 508 U.S. at 534. For example, in *Masterpiece,* 138 S.Ct. at 1721, this Court held that a Civil Rights Commission's actions violated the Free Exercise Clause because review of historical background, legislative history, and other circumstances demonstrated that the Commission was not neutral in its actions towards a religious business owner. *Id.* at 1731-32. Specifically, members of the Commission openly made statements which were "impermissibl[y] hostile towards…religious beliefs," including calling religious speech "despicable," and likening the business owner's religious beliefs to defending slavery or the Holocaust. *Id.* at 1729. Due to this evidence demonstrating the government was motivated by religious animus, this Court held that the Commission's enforcement of the law lacked neutrality, and was thus invalid. *Id.* at 1731-32.

However, a few comments made by a single politician will not suffice to render a facially neutral law invalid. *Trump*, 138 S.Ct. at 2392; *see also Kane v. De Blasio*, 19 F.4th 152, 165 (2d Cir. 2021). For example, in *Trump*, this Court rejected an Establishment Clause challenge to a facially neutral Presidential Proclamation, which opponents had argued was a "religious gerrymander" that singled "out Muslims for disfavored treatment." *Trump*, 138 S.Ct. at 2392. Although then-President Trump made comments conceivably reflecting religious animus–including his desire to enact a "Muslim ban"–this Court held that, notwithstanding these politicized comments, the policy itself was not inappropriately motivated by animus. *Id.* at 2417-21. Similarly, in *Kane*, the Second Circuit considered a free exercise challenge to a facially neutral vaccine mandate. *Kane*, 19 F.4th at 164. The plaintiffs challenging the mandate asserted that, because comments made by a city's mayor regarding the vaccine mandate reflected religious animus, the mandate itself was not neutral. *Id.* at 164-65. The court observed that the

mayor did not have a meaningful role in establishing or effectuating the mandate, and consequently, his comments were little more than "personal belief[s]" and political rhetoric. *Id.* As a result, the court determined the mandate was neutral. *Id.*

The legislative history behind PAMA's enactment does not negate its neutrality. There is a distinct lack of record evidence indicating that any of the legislators who passed PAMA did so for a discriminatory reason. These circumstances are in sharp contrast to those in *Masterpiece,* where the Commission's blatant hostility towards religion rendered the governmental action non-neutral. *Masterpiece,* 138 S.Ct. at 1732. The only comments at issue in the present case are not those of legislators, but those of Governor Girardeau–who does not play a comparably active role in enforcing PAMA or determining the outcomes of investigations. R. 6-8. The Governor's comments were made after PAMA's enactment, and therefore did not influence the state's legislative body who devised the law. R. 26. While the Commission in *Masterpiece* assumed a direct role in applying the law and determining the outcome, and singled out religion using highly disparaging language, the Delmont legislature has not been accused by Petitioner of making any similar comments. Just as the remarks made by the President in *Trump* and the mayor in *Kane,* the comments made by Respondent are merely political rhetoric, which does not evince any animus on the part of the body responsible for enacting the challenged legislation, and thus, does not render PAMA non-neutral under *Smith. See Trump*, 138 S.Ct. 2392; *Kane,* 19 F.4th 152.

For the aforementioned reasons, further inquiry into the circumstances underlying PAMA's enactment do not negate the law's facial neutrality.

B. <u>PAMA is generally applicable, as an across-the-board prohibition of conduct, which does not rely on the exercise of official discretion.</u>

It is constitutionally permissible for a law of general applicability to incidentally burden a religious practice. *Lukumi,* 508 U.S. at 542. Laws that constitute an across-the-board prohibition of "socially harmful conduct" are generally applicable. *Smith*, 494 U.S. 872, 884-85. However, where a law's application is overly reliant on the exercise of official discretion, it fails to satisfy general applicability. *Fulton v. City of Philadelphia,* 141 S.Ct. 1868 (2021).

i. PAMA is an across-the-board prohibition of specified conduct because its application does not turn on underlying motivation.

A law that singles out religious conduct for disparate treatment is not generally applicable. *Lukumi*, 508 U.S. at 542; *see also Fulton,* 141 S.Ct. at 1879.

For example, in *Lukumi*, this Court held that a city's animal cruelty ordinances were not generally applicable, because rather than serving as an across-the-board prohibition of animal cruelty, they specifically targeted the Santeria religion's practice of animal sacrifice. 508 U.S. at 543. The Court observed that the ordinances were narrowly crafted to prohibit religiously-motivated conduct, while allowing similar secular conduct to go unregulated. *Id.* This Court recognized that this unequal outcome is the "precise evil . . . general applicability is designed to prevent." *Id.* at 543-46.

By contrast, a law that provides an across-the-board "prohibition of socially harmful conduct," that encompasses behavior regardless of whether it is religiously-motivated or not, is generally applicable. *Smith*, 494 U.S. at 885-6. In *Smith*, two members of the Native American Church challenged a state's denial to grant them unemployment benefits due to their use of the drug peyote, arguing that their use of peyote was religiously-motivated, and accordingly, the denial of benefits violated the Free Exercise Clause. *Id.* at 874-5. This Court declined to find a free exercise violation, concluding that the state's law–an across-the-board criminal prohibition

of peyote use that encompassed use of the drug regardless of one's underlying motivation–was generally applicable. *Id.* at 884-6.

Unlike the ordinances in *Lukumi*–which specifically targeted conduct that was undertaken for religious reasons–PAMA applies uniformly to all minors under the age of 16 in Delmont, regulates conduct regardless of its underlying motivation, and does not single out religiously-motivated conduct for disparate treatment. Accordingly, like the across-the-board criminal prohibition of peyote in *Smith*, PAMA is generally applicable.

ii. PAMA is generally applicable because its enforcement does not rely on the exercise of official discretion.

A law is not generally applicable if it "invite[s] the government to consider the particular reasons for a person's conduct" by providing individualized exemptions. *Fulton,* 141 S.Ct. at 1877. For example, in *Fulton*, this Court considered whether a city's refusal to contract with a Catholic foster care agency violated the Free Exercise Clause. *Id.* at 1874, 1878-9. Since the challenged policy empowered the city Commissioner with the sole discretion to grant individualized exemptions, this Court concluded it was not generally applicable. *Id.*

Distinguishable from the policy in *Fulton*, which empowered a government official with the complete and unfettered discretion to determine the policy's applicability in a given situation, *Fulton*, 141 S.Ct. 1868, PAMA's application is not reliant upon the exercise of unfettered official discretion. Instead, the conduct prohibited by PAMA is listed in unequivocal terms, and the law's enforcement turns only upon the investigatory findings of a task force of social workers. R. 2, 6, 7, 26. Thus, unlike the policy invalidated by this Court in *Fulton*, PAMA is generally applicable because its application and enforcement do not turn upon an official's exercise of discretion.

C. PAMA can easily withstand the applicable standard of rational basis review, and can even survive more exacting scrutiny.

Whereas laws that fail to satisfy the dual requirements of neutrality and general applicability are subject to strict scrutiny under *Smith*, *see Kennedy*, 142 S.Ct. at 2421-2, laws of neutral and general applicability are subject only to rational basis review–under which law is assumed to be constitutional, and enjoys a "strong presumption of validity." *See Heller v. Doe*, 509 U.S. 312, 320 (1993); *see also Keeton v. Anderson-Wiley*, 664 F.3d 865, 880 (11th Cir. 2011)-Under rational basis review, a law is presumed to be valid, and the law's challenger bears the burden of demonstrating that it lacks a legitimate state interest and a relational relationship between that interest and the means undertaken by a law to achieve it. *See Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *see also Keeton,* 664 F.3d at 880.

i. PAMA can easily survive rational basis review.

Neutral laws of general applicability are subject to the rational basis review, which has been referred to as the "barest level of minimum scrutiny." *Smith*, 494 U.S. at 893. Where a law challenged under the Free Exercise Clause is subject to rational basis review, the "government meets its burden when it demonstrates that a challenged [law], neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest." *Bowen v. Roy*, 476 U.S. 693, at 707-8.

Here, PAMA regulates child welfare, and ensures the health and safety of minors. This Court has repeatedly recognized that child welfare falls within the broad police powers of the respective states. *See, e..g, Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, at 591 (2001) (Stevens, J., concurring) ("[T]he power to protect the health and safety of minors" lies "at the heart of the States' traditional police power."); *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944) ("[T]he state has a wide range of power for limiting parental freedom and authority in

things affecting the child's welfare."). PAMA's means of prohibiting children from undergoing invasive medical procedures–including having their blood and organs harvested–is certainly rationally related to its objective of protecting the health and welfare of the children of Delmont, as the regulated procedures are dangerous, and leave children vulnerable to exploitation and harm. As a result, Petitioner cannot satisfy its burden of overcoming PAMA's presumptive constitutionality.

ii. *As a regulation that is narrowly tailored to serve compelling interest, PAMA can withstand even the most exacting scrutiny.*

Even if this Court were to conclude that PAMA fails to satisfy *Smith*'s dual requirements of neutrality and general applicability, and thus is subject to strict scrutiny, PAMA should nevertheless be upheld as constitutional, because it is narrowly tailored to achieve a compelling government interest. *Kennedy,* 142 S.Ct. at 2421-2.

Delmont has a compelling interest in protecting its children from exploitation and harm. Similar interests have been recognized by courts as compelling in nature. *See, e.g., Prince,* 321 U.S. at 165-67 (upholding child labor laws based upon the government's paramount interest in protecting the health and welfare of children); *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (recognizing the government's compelling interest in public health and safety); *Clark v. Stone*, 998 F.3d 287, 305 (6th Cir. 2021) (finding a compelling interest in "protecting children from physical abuse.").

PAMA's regulation is narrowly tailored by implementing the least restrictive means to achieve its compelling objective. R. 5-7. Unlike laws that lack narrow tailoring for overinclusivity in their regulatory reach–*see, e.g. Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, at 232-33 (1987); *Lukumi*, 508 U.S. at 546-7–PAMA regulates no more conduct than is necessary to achieve its goal of protecting children from harm and exploitation. R. 5-6, 39-40. In

fact, PAMA was implemented precisely because a previous, less restrictive policy had proven to be an inadequate safeguard in protecting children from harm, evinced by rising rates of child abuse and exploitation. R. 5-6, 39-40. Thus, PAMA was enacted as a legislative response to the failures of a less restrictive policy, and regulates no more conduct than is necessary to achieve its ends.

In sum, as a law that is narrowly tailored to achieve Delmont's compelling interest in protecting children from exploitation and harm, PAMA can withstand even the most exacting scrutiny.

III. *Smith* and its progeny reflect an optimal balancing of the competing interests implicated by free exercise claims, thus warranting affirmance by this Court.

This Court's free exercise jurisprudence under *Smith* and its progeny reflect an ideal balancing of the competing individual and state interests implicated by free exercise claims. The standard set in *Smith* should be affirmed by this Court because: the prior approach under *Sherbert* generated unreasonable and impractical results, *Smith'*s emphasis on neutrality and general applicability can be traced back to its earliest Free Exercise decisions, and finally, the *Smith* approach has resulted in numerous victories for Free Exercise claimants.

Returning to the compelling government interest requirement imposed by *Sherbert* would have unreasonable and impractical results by mandating that places placing even the most incidental burden on religious exercise be supported by a compelling government interest. For this very reason, this Court has repeatedly declined to apply *Sherbert* outside of a narrow subset of cases involving unemployment compensation. *See, e.g., Smith*, 494 U.S. at 883; *Bowen*, 476 U.S. 693 at 699-701; *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 at 451 (1988) *Goldman v. Weinberger*, 475 U.S. 503, 506 (1986); *O'Lone v. Shabazz* (*In re* Estate of Shabazz), 482 U.S. 342 (1987). The *Sherbert* standard is particularly impractical in light of the states'

constitutionally-vested authority to implement a variety of laws of general applicability, such as health and safety regulations, child neglect laws, tax laws, and traffic laws. *Smith*, 494 U.S. at 888-9. Thus, the approach adopted by this Court in *Smith* was necessary to avoid "courting anarchy." *Id.* at 888.

Furthermore, the *Smith* approach's emphasis on neutrality and general applicability can also be traced to its earliest decisions. *See, e.g.*, *Reynolds v. U.S.*, 98 U.S. 145, at 166-67 (1878) (holding that religious beliefs would not allow individuals to be exempted from a general "law of the land[.]"); *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594-95 (1940) (noting "conscientious scruple" does not "relieve[e] the individual from obedience to a general law.").

Additionally, numerous victories for free exercise claimants evince that the approach of *Smith* and its progeny does not compromise or undermine the Constitution's guarantee of religious liberty. *See, e.g., Kennedy*, 142 S.Ct. 2407; *Cuomo,* 141 S.Ct. 63; *Espinoza*, 140 S.Ct. 2246; *Trinity Lutheran Church,* 137 S.Ct. 2012; *Masterpiece,* 138 S.Ct. at 1721; *Lukumi*, 508 U.S. 520; *Fulton,* 141 S.Ct. 1868.

Thus, as an optimal balance between the competing interests implicated by Free Exercise claims, *Smith* and its progeny should be upheld by this Court.

CONCLUSION

For the foregoing reasons, Respondent Constance Girardeau requests that this Court affirm the Fifteenth Circuit's grant of summary judgment and remand for entry in favor of Respondent.

CERTIFICATE OF COMPLIANCE

Pursuant to the Seigenthaler-Sutherland Rules, we, counsel for respondent, certify the following: i) the work product contained herein is the product of the team members; ii) this competition team has fully complied with its law school honor code; iii) this competition team has complied with all competition rules.

Dated: January 29, 2023

/s/ Team 30

APPENDIX

A. U.S. Const., amend. I, XIV

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

B. 28 USC § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

C. 28 USC § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in

the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

D. 28 USC § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods…[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.