No. 22-CV-7654

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

January Term 2023

EMMANUELLA RICHTER,

Petitioner,

v.

CONSTANCE GIRARDEAU,

Respondent.

On Writ of Certiorari to the United States

Court Of Appeals for the Fifteenth Circuit

BRIEF FOR PETITIONER

Team 9
Counsel for Petitioner
January 31, 2023

QUESTIONS PRESENTED

1. Does requiring a limited-purpose public figure to prove actual malice in a defamation action under the *New York Times Co. v. Sullivan* standard violate the First Amendment when limited-purpose public figures are most similar to private individuals and when the underlying rationale for the actual malice standard is inapplicable to limited-purpose public figures?
2. Under the First Amendment and the test articulated by this Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, is the Physical Autonomy of Minors Act neutral and generally applicable although it was enacted amid public controversy surrounding the challenger's religious and educational practices; and, if so, should this Court overrule *Smith*?

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STATEMENT OF JURISDICTION

The United States District Court for the District of Delmont had proper subject matter jurisdiction pursuant to 28 U.S.C. § 1331.[1] On appeal, the United States Court of Appeals for the Fifteenth Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Following the decision of the Court of Appeals for the Fifteenth Circuit, Petitioner filed for writ of certiorari, which this Court granted. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and has appellate jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. Emmanuella Richter and the Church of the Kingdom

Petitioner Emmanuella Richter founded the Church of the Kingdom (known as "Kingdom Church). R. at 3, 21, 41. The Church grew quickly through the proselytization and educational efforts of Mrs. Richter and her husband. *Id.* The Richters and a large group of Church members sought asylum in the United States on religious persecution grounds. R. at 3, 22, 44. They became U.S. citizens and settled in the state of Delmont with their congregation. R. at 3–4, 22, 44. For the past three decades, they have lived in compounds throughout southern Delmont, farming and producing tea (marketed as "Kingdom Tea"). R. at 3–4, 22, 42–44.

The Richters live in a compound outside Beach Glass, Delmont. R. at 41. Mrs. Richter dedicates herself solely to Church matters, directing none of Kingdom Tea's operations, though its proceeds support the Church. R. at 4, 22, 42. Her work largely consists of organizing seminars about Kingdom Church. R. at 4, 22–23, 42. All seminars are open to the public and are conducted by church elders, not by Mrs. Richter herself. R. at 4, 23, 42. The church continues to proselytize

[1] Both parties agreed that defamation is generally a state law matter; but where, as here, a constitutional claim is at issue, a federal court has appropriate jurisdiction. *See* R. at 9, n.1.

in the Delmont community, but Mrs. Richter no longer participates. *Id.* Mrs. Richter has rarely left the Beach Glass compound during the last few years. R. at 42.

Anyone fifteen years of age or older may become a confirmed member by completing a course in Church doctrine and a private confirmation ritual. R. at 4, 23, 42. Confirmed members marry within the Church, raise their children according to Church beliefs, and homeschool their children in a curriculum that combines traditional learning with religious instruction. R. at 4, 23, 43. According to the Church's beliefs, confirmed members only accept blood donations from other members, so they bank blood locally. R. at 5, 23, 43. Confirmed members in the homeschool curriculum sometimes donate blood as one of multiple activities that may constitute a "Service Project." *Id.* The curriculum seeks to improve the community and develop students' spiritual growth. *Id.* To those ends, service projects are completed monthly; blood donation cultivates a "servant's spirit" in confirmed students while ensuring that their own future medical needs—and those of their family members—can be met in case of medical emergencies. *Id.* Donations are scheduled, conform to American Red Cross guidelines, and allow confirmed donors to skip scheduled donations when unwell. R. at 5, 23–24, 43.

B. Public Outcry Against Kingdom Church—The Physical Autonomy of Minors Act

In 2020, a local newspaper raised public outcry with a story about Kingdom Church and its faith-based blood banking. R. at 5, 24. Critics accused the church of using minors to further its blood-banking practices without proper consent. *Id.* Historically, Delmont law excepted autologous donations and donations in response to medical emergencies for family members from its prohibition against minors consenting to blood, organ, and tissue donations. *Id.* That changed in 2021, when, amid the controversy surrounding the Church, the Delmont General Assembly passed the "Physical Autonomy of Minors Act" (hereinafter "PAMA"). R. at 5–6, 24. The statute

outlawed the procurement, donation, or harvesting of the bodily organs, fluids, or tissue of a minor[2] regardless of profit and regardless of the minor's consent. R. at 6, 24. Respondent, Governor Constance Girardeau, was a fierce advocate for PAMA and signed it into law. R. at 6, 24, 40. She stated in her affidavit that nothing related to Kingdom Church was the impetus for her support for PAMA. R. at 40.

C. Adam Suarez's Emergency Blood Donation

On January 17, 2022, a Kingdom Tea van was involved in a collision. R. at 6, 24. Henry Romero, the only surviving Church member; was left in critical condition. *Id.* When doctors determined that Romero needed an emergency blood donation to survive, his cousin, Adam Suarez, was identified as a blood type match. R. at 6, 25. Adam was fifteen years old and a recently confirmed member of Kingdom Church. *Id.* Adam, accompanied by his parents, began a one-time donation at the hospital to ensure that enough blood was available for his cousin to survive. *Id.* Prior to PAMA, Adam would have been able to legally make this lifesaving donation canto his cousin. *Id.* Under PAMA, however, even emergency blood donations to blood relatives are prohibited. *Id.* For undetermined reasons, Adam's blood pressure became elevated and he went into acute shock. *Id.* Adam recovered, and doctors advised against further blood donations while the cause of his symptoms remained undetermined. R. at 7, 25. Unfortunately, media refocused on Kingdom Church and its faith-based practices, even stopping and interviewing members who visited Adam at the hospital, including the Richters. R. at 6–7, 25, 43.

D. Governor Girardeau's Defamatory Statements

On January 22, 2022, Governor Girardeau attended a fundraiser for Delmont University. R. at 7, 25. Speaking about her plans if re-elected, Governor Girardeau expressed concern about a

[2] Under PAMA, a minor is defined as a person under the age of sixteen.

crisis to the well-being of Delmont's children. *Id.* She discussed the apparent increase in child abuse and neglect, also highlighting the tragic correlation between abuse and child suicide and the reportedly disparate rates of harm to children of immigrants. R. at 7, 25–26. Reporters then asked her about Adam Suarez, to which she responded that she had commissioned a task force to investigate Kingdom Church for its religious blood-banking practices. R. at 7, 26. Governor Girardeau characterized the Church's religious conduct as "the exploitation of [its] children," which garnered support from her constituents and which she repeated in her campaign efforts. *Id.*

On January 25, 2022, Mrs. Richter, as head of Kingdom Church, requested injunctive relief to stop the task force investigation because the state's action was a violation of the Free Exercise Clause of the First Amendment. R. at 7–8, 26. The complaint called attention to the similarities between the Church's persecution in Pangea and the Governor's threat to prevent the Church from freely exercising its faith and raising its children according to its religious beliefs. R. at 8, 26.

Governor Girardeau responded to the complaint by dismissing comparison between her action and the Church's past persecution. *Id.* She attacked Mrs. Richter, saying, "I'm not surprised at anything Emmanuella Richter does or says. What do you expect from a vampire who founded a cult that preys upon its own children?" R. at 8, 26–27. Mrs. Richter amended her complaint to include an action for defamation on January 28, 2022. R. at 8, 27.

II. PROCEDURAL HISTORY

Petitioner sought injunctive relief immediately after the Governor launched the task force investigation, challenging both the investigation and PAMA (upon which the investigation was founded) as a violation of her right to freely exercise her religion. R. at 7–8, 26–27. She also brought a defamation action against Respondent based on Respondent's statements at her rally. R. at 8, 27. Respondent moved for summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure on the basis that the task force is constitutional without dispute as to any material

fact or law and that the defamation action failed to meet the actual malice standard applicable to limited-purpose public figures. R. at 8–9, 27. The United States District Court for the District of Delmont granted Respondent's motion and held that Petitioner is a limited-purpose public figure and that this Court's precedent in *New York Times Co. v. Sullivan* required application of the actual malice standard. R. at 19–20. It also determined that PAMA is neutral and generally applicable, that it did not merit strict scrutiny as a hybrid case, and that this Court's precedent in *Employment Division, Department of Human Resources of Oregon v. Smith* thus left no question as to PAMA's constitutionality. *Id.* Petitioner appealed to the United States Court of Appeals for the Fifteenth Circuit, which affirmed the District Court's grant of Respondent's motion for summary judgment and its holdings on both issues. R. at 28–38. Petitioner appealed to this Court, which granted certiorari. R. at 45–46.

SUMMARY OF THE ARGUMENT

This Court's extension of the *New York Times Co. v. Sullivan* standard of actual malice to limited-purpose public figures is unconstitutional. First, such extension is not rooted in this Court's original intent and rationale for creating the actual malice standard, which focused on public officials. Limited-purpose public figures do not function in the same societal role as government officials. Extending actual malice to limited-purpose public figures also deviates from the common law of defamation, which provided greater, not lesser, protection for individuals in the public eye. Second, the Court's extension fails to recognize the inherent similarities between private individuals and limited-purpose public figures, neither of which intend to occupy the public square like public officials. Lastly, even if the actual malice standard is embedded in the *Sullivan* Court's original intent and rationale and in the common law of defamation, the media has shifted unforeseeably since *Sullivan*, making the actual malice requirement unjustifiable. The modern ease

with which an individual can become a limited-purpose public figure has swollen *Sullivan*'s scope, and that application is no longer appropriate.

Under the standard established in *Smith*, PAMA should receive strict scrutiny; in the alternative, this Court should overrule *Smith*. PAMA is not neutral or generally applicable because it targets Kingdom Church, and it also falls within the hybrid exception *Smith* established because Kingdom Church's religious practices are intertwined with the right of Church parents to direct their children's education. In the alternative, even if this Court determines that PAMA is neutral and generally applicable and does not fall within the hybrid exception, it should overrule *Smith*. *Smith* contradicts the text, structure, and purpose of the First Amendment, which was originally meant to provide robust protections for the right to engage in faith-based conduct. It creates undesirable policy incentives by favoring broad, vague state regulation. Finally, *Smith* does not merit adherence based on stare decisis because it created an unworkable rule, disrupted free exercise jurisprudence, and is not supported by reliance or integrity interests.

ARGUMENT

The application of the *Sullivan* standard to limited-purpose public figures is unconstitutional because it is not rooted in the original intent of the *Sullivan* opinion or the common law of defamation and it ignores similarities between limited-purpose public figures and private citizens. Even if that standard is embedded in *Sullivan*'s original intent and the common law, modern shifts in the media have made application of the standard to limited-purpose public figures inappropriate today. PAMA should receive strict scrutiny because it is neutral and generally applicable and falls within *Smith*'s hybrid exception. Should this Court disagree, it should overrule *Smith* because it distorted the First Amendment and stare decisis does not require adhering to it. Thus, this Court should reverse the United States Court of Appeals for the Fifteenth Circuit.

I. THE EXTENSION OF THE *NEW YORK TIMES CO. V. SULLIVAN* STANDARD TO LIMITED-PURPOSE PUBLIC FIGURES IS UNCONSTITUTIONAL.

In 1964, this Court in *New York Times Co. v. Sullivan* deviated from the common law of defamation and held for the first time that in order for a public official to recover damages for a "defamatory falsehood relating to his official conduct," he must prove "that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false." *New York Times Co. v. Sullivan*, 376 U.S. 254, 255 (1964). Thus, the actual malice standard was born. *New York Times Co. v. Sullivan* arose during the Civil Rights Movement when segregationists intimidated the media by filing libel suits. David A. Logan, *Rescuing Our Democracy by Rethinking* New York Times Co. v. Sullivan, 81 Ohio St. L.J. 759, 762 (2020). The actual malice standard was "seen as a triumph for civil rights and racial equality" by making it difficult for segregationists to "deter[] the northern press from covering civil rights abuses." *Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 253 (2021) (Silberman, J., dissenting). The *Sullivan* standard originally applied "only to a small number of prominent governmental officials whose names were always in the news and whose actions involved the administration of public affairs." *Berisha v. Lawson*, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting). But in the decades that followed, this Court extended the actual malice standard to public figures, as well. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155 (1967). This Court reached even further by categorizing public figures as "all-purpose" or "limited-purpose," both of which must prove actual malice to recover for defamation. *Gertz v. Welch*, 418 U.S. 323, 342, 351 (1974).

While Justice Thomas argues that "[i]f the Constitution does not require public figures to satisfy an actual malice standard in state-law defamation suits, then neither should this court," Petitioner does not go so far. Rather, Petitioner argues that the actual malice standard is unconstitutional when applied to limited-purpose public figures. This is because the application to

limited-purpose public figures is not embedded in the original intent and rationale of the 1964 Court or in the common law of defamation. Additionally, that standard fails to recognize the inherent similarities between private individuals, who must prove only ordinary negligence, and limited-purpose public figures. Lastly, even if the actual malice standard is embedded in the Court's original intent and the common law of defamation, the media has shifted unforeseeably since *Sullivan*, and thus, actual malice is no longer justified. Therefore, *Sullivan's* actual malice standard should not apply to limited-purpose public figures, and this Court should reverse the Fifteenth Circuit.

A. Extending The *Sullivan* Standard To Limited-Purpose Public Figures Is Not Embedded In The Original Intent And Rationale Of The *Sullivan* Court Or The Common Law Of Defamation.

In 1964, the Court formulated the actual malice standard with the intent to avoid the harms perpetrated by the Sedition Act of 1798. The Act referred to public officials, and thus *Sullivan* was tailored specifically to the defamation of public officials. Extending actual malice to limited-purpose public figures who occupy a vastly different role in society than public government officials reaches beyond this Court's rationale for evoking its judge-made standard. Such extension also lacks a historical basis in the common law of libel which provided increased protection for defamed public individuals rather than depriving such individuals of a remedy by requiring an almost insurmountable standard. The common law successfully operated for decades after the ratification of the First Amendment and thus this Court should not supersede such holdings.

1. Requiring limited-purpose public figures to prove actual malice is not embedded in the original intent and rationale of the *Sullivan* Court.

The *New York Times Co. v. Sullivan* standard of actual malice as applied to limited-purpose public figures is not rooted in the Court's original intent when deciding *Sullivan*. The *Sullivan* Court focused its original analysis in part on the harms caused by the Sedition Act of 1798, which

made it a crime to "write, print, utter or publish" a false statement against the government. Justice Brennan recognized that the Act was unconstitutional as determined by Jefferson, Madison, and public opinion as it "levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." *Sullivan*, 376 U.S. at 273–74. The *Sullivan* Court thus acknowledged that the Sedition Act violated the First Amendment because of its restrictions of government criticism. *Id.* at 276. To counter that issue and avoid violating the First Amendment, the *Sullivan* Court ruled in favor of free speech by allowing individuals to comment on matters regarding public officials, even if through defamatory statements. *Id.* at 279–80. To provide a semblance of protection for public officials, the Court created the actual malice standard, allowing the First Amendment to flourish while also recognizing that public officials should not be completely without recourse when defamed. *Id.* at 255.

The very essence of *Sullivan* was thus to whom actual malice applied—public *officials* in government, who were the focus of the Sedition Act. As stated by Justice Thomas in his concurrence denying certiorari in *McKee v. Cosby*, "the Court's decisions extending [*Sullivan's* actual malice standard] were policy-driven decisions masquerading as constitutional law." *McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring). Such policy extensions to public *figures*, and then to *limited-purpose* public figures, are a far-reaching stretch from the Court's original intent to avoid a Sedition Act-like controversy because public figures—and especially limited-purpose public figures—do not function in the same societal role as government officials. Justice Thomas distilled this principle for the majority, noting that "[c]onstitutional opposition to the Sedition Act . . . does not necessarily support a constitutional actual-malice rule in all civil libel actions brought by public figures." *Id.* The New York courts acknowledge this notion by holding

that "the *New York Times* case was limited to its specific facts, to wit, criticism of the official conduct of public officials, and did not adopt an 'absolutist view of the rights safeguarded by the First Amendment.'" *Dempsey v. Time, Inc.*, 252 N.Y.S.2d 186, 188–89 (Sup. Ct. 1964) (quoting *Spahn v. Julian Messner, Inc.*, 250 N.Y.S.2d 529, 535 (Sup. Ct. 1964)). Additionally, the Illinois Appellate Courts hold that "[t]here is not the slightest implication in the opinion [*Sullivan*] that the rule there espoused should be extended to persons who are not public officials. This rule is confined to public officials." *Lorillard v. Field Enterprises, Inc.*, 213 N.E.2d 1, 7 (Ill. App. Ct. 1965). The United States Supreme Court itself recognized the slippery slope of "specify[ing] categories of persons who would or would not be included" in the public official designation and conceded that it had "no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule." *Sullivan*, 376 U.S. at 283 n.23. Because the 1964 Court was not prepared to determine how far to extend its standard to lower ranked officials, surely it did not contemplate extending the standard beyond government officials to public figures—and now to limited-purpose public figures—whose role in society fundamentally differs from that of public officials.

2. Requiring limited-purpose public figures to prove actual malice is not embedded in the common law of libel.

The common law of libel prior to 1964 did not mandate that public figures satisfy any heightened standard to recover damages for defamation. *McKee v. Cosby*, 139 S. Ct. 675, 678 (2019) (Thomas, J., concurring). Rather, a defamed public figure needed only to prove that a false, written publication subjected him to "hatred, contempt, or ridicule." *Id.* If the publication was indeed false, the defamed individual could at least recover nominal damages, even if he was unable to prove a reputational injury. *Id.* (citing Restatement of Torts § 569, Comment b). Even at the time of Blackstone, the common law considered libel against public figures *more* harmful than

libel to ordinary individuals. *Id.* at 679 (citing 3 Blackstone *124). The common law of defamation in the 19th century demonstrates that defaming a public official was "most dangerous to the people, and deserving of punishment, because the people may be deceived and reject the best citizens to their great injury, and it may be to the loss of their liberties." *Id.* (citing *Commonwealth v. Clap*, 4 Mass. 163, 169–70 (1808)) (internal brackets omitted). But *Sullivan* completely changed the view of defamation against public officials by requiring these individuals to meet a higher standard for recovery even when faced with more significant damage to their reputations. Changing the common law standard to actual malice for public *officials* is in part justified because public officials accept the consequences of their involvement in public affairs. However, deviating from the common law as to *all* public figures, including *limited-purpose* public figures whose involvement in public affairs is drastically different from that of public officials, removes far too many individuals from the protection of the common law and functions as a replacement for the common law of libel. *Gertz*, 418 U.S. at 344.

Prior to *Sullivan*, this Court recognized that "the First Amendment did not displace the common law of libel." *McKee*, 139 S. Ct. at 680. In fact, this Court "did not begin meddling" with common law defamation until nearly 175 years after the ratification of the First Amendment. *Id.* at 682. This indicates that the "[s]tates are [and have been] perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm." *Id*. Justice White, who joined the *Sullivan* majority, later joined Justice Thomas's rationale against *Sullivan* after researching historical common law practices, concluding that "[s]cant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers." *Gertz*, 418 U. S., at 381.

By "discarding history" to "refashion defamation law," the Court now "makes innocent persons bear the harms that have been inflicted upon them by other persons, including those who have acted with negligence or even gross negligence." *Id.* at 380; Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong*, 53 U. Chi. L. Rev. 782, 801 (1986). The Court does this even when a limited-purpose public figure, someone akin to an "ordinary citizen," is faced with "what any fair observer must agree is egregious conduct on the part of the media." *Coughlin Et Ux. v. Westinghouse Broadcasting & Cable, Inc.*, 476 U.S. 1187, 1188 (1986) (Burger, C.J., dissenting). Departing from decades of common law by roping in limited-purpose public figures is simply too broad and deprives citizens like Petitioner of a meaningful remedy.

B. Extending The *Sullivan* Standard To Limited-Purpose Public Figures Fails To Recognize The Inherent Similarities Between Private Individuals And Limited-Purpose Public Figures.

Private individuals "generally have more protection from defamatory statements than public figures do, since society is interested 'in protecting private individuals from being thrust into the public eye by the distorting light of defamation.'" *Gertz*, 418 U.S. at 339. As recognized by the Court of Appeals for the Fifteenth Circuit, however, the demarcation between private individuals and limited-purpose public figures would make sense in a "historical vacuum," meaning if Petitioner's case was heard in 1964. R. at 32. At the time of *Sullivan*, actual malice applied solely to public officials. Those in government are "stark[ly] divided" from private figures as government officials choose to be involved in public affairs. *Gertz*, 418 U.S. at 339. Yet the rise of the media produces a "plethora of individuals who are somewhat in the public eye, or . . . in a public controversy." *Id.* Limited-purpose public figures are not so starkly different from private individuals as are government officials. A limited-purpose public figure often does not voluntarily thrust herself into a public controversy. Rather, like Petitioner, a person can become a limited-purpose public figure merely by being pulled into the public square because of a lawsuit or a

particular stance on a controversial issue. *Id.* Such individuals do not seek fame or a government position; instead, like Petitioner, they may privately conduct meetings, refrain from holding public seminars, and live in closed communities separate from mainstream society. R. at 4.

Further, Justice Thomas, in his dissent from the Court's denial of certiorari in *Berisha v. Lawson*, warned the majority of the "real world effects" of actual malice. *Berisha*, 141 S. Ct. at 2425. Events such as a shooting at a pizza shop, a racism allegation, or a rape accusation can all become temporary public controversies where "lies impose real harm." *Id.* Actual malice "insulate[s] those who perpetrate lies from traditional remedies like libel suits" by raising the standard unprecedently high for those who conduct their lifestyle in a manner so similar to private individuals. *Id.* Requiring actual malice for limited-purpose public figures reduces the significance of the "proliferation of falsehoods" which "is, and always has been, a serious matter" by requiring a showing of actual malice for an individual who is thrust into the public square because of involvement in a controversy. *Id.* Holding those whose actions display an intent to remain private, as do Petitioner's, to the same standard as those who willingly expose themselves to the public eye incorrectly expands *Sullivan* and unjustly deprives individuals of a remedy when limited-purpose public figures are most similar to private individuals—not public officials.

C. Even If The Actual Malice Standard Is Embedded In The *Sullivan* Court's Original Intent And Rationale And The Common Law Of Defamation, The Media Has Shifted In Ways Unforeseeable At The Time Of *Sullivan*'s Decision And Thus Actual Malice Is No Longer Justified.

Extending the actual malice standard to limited-purpose public figures creates substantial policy concerns with the continuing rise of the media. In 1964, this Court established the actual malice standard as applicable "only to a small number of prominent governmental officials whose names were always in the news and whose actions involved the administration of public affairs." *Berisha*, 141 S. Ct. at 2428 (Gorsuch, J., dissenting). Yet "[a]dvancements in the media after

Sullivan's decision in 1964 have altered "our Nation's media landscape . . . in ways few could have foreseen." *Id.* at 2427. In 1964, few platforms existed for speech. *Id.* Now, as recognized by Justice Gorsuch, "private citizens can become 'public figures' on social media overnight . . . because of their notoriety in certain channels of our [] media." *Id.* at 2429. Conversely, at the time of *Sullivan*, the existence of fewer media outlets likely caused the Court to see "the actual malice standard as necessary to ensure that dissenting or critical voices are not crowded out of public debate." *Id.* at 2427 (internal quotations omitted).

While the press may have needed "protection to cover the civil rights movement" in 1964, the actual malice standard is no longer justified in the wake of ever-increasing social technology. *Tah*, 991 F.3d at 254. Today's media would likely be "totally unrecognizable" to the *Sullivan* court. Logan, *supra*, at 803. Scholars recognize that "[t]he internet has become our public square, something beyond the imagination of the Supreme Court when it issued its groundbreaking 1964 decision in *New York Times Co. v. Sullivan*." *Id.* at 760–61 (internal quotations omitted). Today, almost four billion individuals use social media, creating a "world in which everyone carries a soapbox in their hands." *Berisha*, 141 S. Ct. at 2427.

Because individuals "can publish virtually anything for immediate consumption virtually anywhere in the world" and obtain a status of fame, applying *Sullivan's* actual malice standard to limited-purpose public figures reaches beyond this Court's original application to scarce, significant government officials. Logan, *supra*, at 803. Rather, such expansion significantly limits recovery for individuals like Petitioner, who become temporarily famous because of the growth of an overzealous media. Media growth propels defamation plaintiffs into the public eye as controversial stories garner significant attention with the pervasiveness of media in contemporary society. R. at 7–8. But such individuals have not "taken an affirmative step to attract public

attention" and should not be penalized with a higher standard simply because of a growing media beyond their control. *James v. Gannett Co.*, 353 N.E.2d 834, 839 (N.Y. 1976).

For these reasons, the Fifteenth Circuit has erred in its reflexive application of actual malice to Petitioner, and the standard should no longer apply to limited-purpose public figures.

II. UNDER THE CURRENT STANDARD SET FORTH IN *SMITH*, THE PHYSICAL AUTONOMY OF MINORS ACT SHOULD BE SUBJECT TO STRICT SCRUTINY; SHOULD THIS COURT DISAGREE, IT SHOULD OVERRULE *SMITH* AND CORRECT ITS FREE EXERCISE JURISPRUDENCE.

Under this Court's 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, PAMA should be subject to strict scrutiny. The Fifteenth Circuit erred in concluding that, under *Smith*, PAMA is not neutral and generally applicable. It also wrongly held that PAMA does not fall within the hybrid exception for free exercise challenges that also implicate parents' rights to direct the education and upbringing of their children. Moreover, even if this Court determines that the Fifteenth Circuit did not err in those holdings and *Smith* applies to PAMA, this Court should revisit and overrule *Smith*.

A. The Physical Autonomy Of Minors Act Is Not Neutral And Generally Applicable.

PAMA should receive strict scrutiny because it is not a neutral law of general applicability. In *Smith*, this Court held that the Free Exercise Clause of the First Amendment "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'" that "proscribes (or prescribes) conduct that [the individual's] religion prescribes (or proscribes)." *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (hereinafter "*Smith*"). This Court has stated that, under this standard, government action is not neutral and generally when it targets religious groups, excludes religious groups from government programs, or restricts religious groups while leaving the government discretion to grant exceptions. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533–34 (1993); *Trinity Lutheran Church*

of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). When assessing neutrality, this Court should consider the events and controversy leading to the enactment of the law. *See Hialeah*, 508 U.S. at 540.

Here, PAMA is not neutral and generally applicable because it targets Kingdom Church for its religious practices. While PAMA does not mention religion or expressly target Kingdom Church, it was passed amid public outcry against the Church and is designed to include Church practices in its prohibitions. *See* R. at 5–6, 24, 39–40. Concern and outrage arose after Kingdom Church's practices entered the public eye, and PAMA swiftly followed. *Id.* The District Court rejected Petitioner's argument that PAMA is not neutral simply because it considered "tenuous at best" the connection between the public controversy surrounding Kingdom Church and PAMA's enaction. R. at 18. It is true that Governor Girardeau stated in her affidavit that the law was meant to address the broader issue of child abuse in the state, but her words alone should not conclude the issue. R. at 39–40. This Court should consider the broader sequence of events leading to PAMA's passage and recognize the evidence that PAMA was designed to include Kingdom Church's conduct within its target. Otherwise, the government can restrict religious free exercise however it chooses, so long as it articulates a conceivable pretext that does not involve religion.

B. The Physical Autonomy Of Minors Act Falls Within The Hybrid Exception To The General Rule Promulgated By *Smith*.

If PAMA is neutral and generally applicable, it should still be subject to strict scrutiny because it implicates free exercise along with constitutional protections of parents' right "to direct the education of their children." *Smith*, 494 U.S. at 881. Where a free exercise claim is connected "with [a] communicative activity or parental right," the Court may bar application of even a neutral, generally applicable law to religious conduct under the *Smith* standard. *Id.* at 881–82. The

Smith Court created this "hybrid" exception to its general rule allowing neutral and generally applicable laws to inhibit religious free exercise. *Id.* at 882.

Wisconsin v. Yoder is the prototypical free exercise challenge implicating the right of parents to direct their children's education. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). There, this Court invalidated a Wisconsin law compelling school attendance as applied to Amish parents whose religious beliefs prevented compliance. *Id.* at 234. The Court reasoned that *Sherbert v. Verner* required the state to justify its burden on the parents' First Amendment right with a compelling interest. *Yoder*, 406 U.S. at 236; *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

In establishing the hybrid exception, the *Smith* Court distinguished *Yoder*, concluding that a compelling interest was required because of the multiple rights involved: religious free exercise and the parents' right to direct their children's education and upbringing. *Smith*, 494 U.S. at 881; *See Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). It considered the free exercise claim at issue "unconnected" with another constitutional right because the challengers did not contend that Oregon's prohibition "represent[ed] an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs." *Smith*, 494 U.S. at 882.

Here, however, Mrs. Richter's free exercise challenge to PAMA is connected with the right of Kingdom Church parents to direct the upbringing and education of their children. Kingdom Church's blood-banking practices are mandated by their faith, but those practices also implicate education. The Church's faith-based blood donations are implemented as service projects for confirmed members in the Church's prescribed homeschool curriculum. R. at 5, 23, 43. That curriculum combines traditional schooling with religious instruction and seeks to cultivate students' spiritual growth and academic excellence. R. at 4–5, 23, 43. The religious beliefs of Kingdom Church members, including the blood-banking practices PAMA prohibits, are

inseparable from those same members' right to direct the upbringing of their children. Thus, the District Court and the Fifteenth Circuit both erred in concluding that the *Smith* hybrid exception was inapplicable and that education was not involved. R. at 19, 37–38.

C. Even If This Court Determines That *Smith* Applies Here, *Smith* Is Ripe To Be Overruled.

Even if this Court determines that *Smith* applies because PAMA is neutral and generally applicable and does not fall within the exception for "hybrid" cases, *Smith* is ripe to be revisited and overruled. *Smith* distorted the religious freedom protections of the First Amendment by contradicting the Amendment's text and purpose, and it established backwards incentives. Though the Court does not exercise unbridled discretion when determining whether to overrule precedent, the considerations of stare decisis do not require adhering to *Smith*. Therefore, if *Smith* applies, this Court should take the opportunity to overrule it.

1. *Smith* was an egregious distortion of the First Amendment's protections for the free exercise of religion.

First, *Smith* contradicts the text and purpose of the First Amendment. The First Amendment expressly forbids congressional action "respecting the establishment of religion, or *prohibiting the free exercise thereof*." U.S. Const. amend. I (emphasis added). This prohibition against religious restrictions applies to the states through the Due Process Clause of the Fourteenth Amendment. *See* U.S. Const. amend. XIV; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The First Amendment "ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Obergefell v. Hodges*, 576 U.S. 644, 679–80 (2015). This Court's predominant focus when interpreting the religious freedom clauses of the First Amendment is on their original meaning. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182–85 (2012); *Town of*

Greece v. Galloway, 572 U.S. 565, 576 (2014); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019).

That original meaning guarantees that the government must justify any substantial burden on religious free exercise by showing that it has a compelling interest and that the burden is the least restrictive means of effecting that purpose. *Smith* is a step toward detaching belief from action. In effect, it tells citizens that their beliefs are protected, but their religious *conduct* is free only to the extent that it is not prohibited on some other grounds. *See Smith*, 494 U.S. at 884–85. But the First Amendment makes no such distinction; the Free Exercise Clause assumes religion requires action, not mere belief, which is already protected by the Free Speech Clause. *See* U.S. Const. amend. I; *W. Va. Bd. of Ed. v. Barnett*, 319 U.S. 624, 642 (1943). The Framers understood religion to be active and sought to protect it accordingly. *See* Office of Legal Policy, Dep't of Justice, Report to the Attorney General: Religious Liberty Under the Free Exercise Clause 19–27 (1986) (hereinafter "Report to the Attorney General"); *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1989). These protections arose from the Framers' understanding that religious individuals owe a duty to God with which the state should not interfere "unless and until that duty becomes an overt act against the rights of others." Report to the Attorney General at 26. That understanding was reflected across state constitutions from which the federal Constitution ultimately drew the language that forms the Free Exercise Clause, indicating that the Clause requires strong protections for religious conduct, even when that conduct is burdened by neutral and generally applicable laws. McConnell, *supra*, at 1490; *see, e.g.*, Va. Declaration of Rights of 1776, § 16.

Where the Constitution protects religious activity, it does not contemplate that such behavior should be "totally free from legislative restrictions." *Braunfeld v. Brown*, 366 U.S. 599,

603 (1961). When the state cannot advance a compelling interest without burdening religious conduct, it may. *See Verner*, 374 U.S. at 403; *Yoder*, 406 U.S. at 215. This strict scrutiny standard aligns with the founding-era understanding that Americans are free to exercise their religion without infringing on others' rights. *See* Report to the Attorney General at 26. *Smith*, however, indicates that First Amendment protection of religious free exercise is limited to prohibiting purposeful discrimination. *Smith*, 494 U.S. at 878. This grossly underestimates the extent to which the First Amendment was designed to protect religious Americans' right to conduct themselves in accord with their convictions.

Finally, *Smith* inverts policy-making incentives. Along with its progeny, it secures not the constitutional religious rights of American citizens, but the promise of litigation. Under *Smith*, the state is encouraged to pursue blanket policies that readily accept the label "neutral and generally applicable," even if that is not the state's intent. *Smith* subtly prompts government entities to regulate *more* behavior to avoid appearing non-neutral instead of directly attempting to avoid religious discrimination. This runs counter to "the very purpose of [the] Bill of Rights": denying Congress—and, through the Fourteenth Amendment, the states—the power to regulate inalienable rights, such as the free exercise of religion. *Barnette*, 319 U.S. at 638. *Smith*, conversely, held that those protected values should remain subject to the political process. *Smith*, 494 U.S. at 890.

This inversion is problematic; still more troubling is the plight of those who, like Kingdom Church, face burdens to their religious conduct under *Smith*. Even if a citizen challenges a state restriction of religion in court and prevails, *Smith* invites the state to revise its statute to meet the low bar of neutrality and general applicability without clearly targeting the challenger. The citizen's options then are to cease its religious conduct or anticipate further litigation, and the latter is possible only if the citizen can afford to fight in the courts rather than forfeiting its religious

freedom. *See Fulton*, 141 S. Ct. at 1929–31 (Gorsuch, J., concurring). This Court should rectify this dilemma and restore to American citizens the full protections of the Free Exercise Clause.

2. Stare decisis does not command continued deference to *Smith*.

The doctrine of stare decisis does not require this Court to retain *Smith*. Stare decisis ordinarily requires this Court to follow its precedent, which supports many valuable goals, including stability, consistency, judicial restraint, and the Court's legitimacy. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2261–62 (2022). However, this Court has been adamant that stare decisis is not an "inexorable command," and the doctrine is weakest when the Court interprets the Constitution. *Burnet v. Coronado Oil & Gas Co.*, 285 US. 393, 405 (1932) (Brandeis, J., dissenting); *Agostini v. Felton*, 521 U.S. 203, 235 (1997). The Court's recent decisions have emphasized the importance of overruling wrongful constitutional precedent. *See Dobbs*, 142 S. Ct. at 2265–72; *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478–86 (2018); *Citizens United v. FEC*, 558 U.S. 310, 363–65 (2010); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). Among the considerations relevant to any decision to overrule a prior decision are the nature of its error, the poor quality of its reasoning, the workability of the rule it imposed, its compatibility with surrounding law, legal and factual changes, and reliance interests. *Dobbs*, 142 S. Ct. at 2265. First, as Petitioner has argued, *Smith* was wrongly decided and poorly reasoned. *See supra* Section II.C.1. *Smith*'s contradiction of the First Amendment and the incentives *Smith* creates all favor overruling.

The rule *Smith* established is also unworkable, as the Fifteenth Circuit observed. R. at 36. Precedential rules should be useful and practically applicable, promoting judicial consistency, clarity, and efficiency. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992); *Dobbs*, 142 S. Ct. at 2272. When a rule resists precise delineation, involves excessive judgment, or is malleable, principled, or amorphous, it may be considered unworkable. *See Janus*, 138 S. Ct.

at 2481. As Justice Alito recently observed, *Smith* has created problems for courts seeking to apply it in four scenarios, including so-called "hybrid-rights" cases, cases where a law targets religion, cases involving exemptions, and cases where courts must compare a law's treatment of secular and religious conduct. *See Fulton*, 141 S. Ct. at 1917–22. *Smith*'s promised simplicity has not realized, instead causing myriad difficulties in the practical application of *Smith*'s rule. *Id.*

Further, *Smith* is anomalous in this Court's Free Exercise jurisprudence, and subsequent legal developments have undermined *Smith*. When a decision lacks coherence with prior and subsequent cases such that it distorts an area of law, overruling is more likely to be proper. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring); *Dobbs*, 142 S. Ct. at 2275. *Smith* grounded its "neutral and generally applicable" standard in language from *Minersville School District v. Gobitis*—but that case was overruled only three years after it was decided, a fact *Smith* conveniently omitted. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594 (1940), *overruled by Barnette*, 319 U.S. 624 (1943). *Smith* also disrupted a significant body of precedent, including *Verner*'s requirement of strict scrutiny for substantial burdens on religious free exercise and *Yoder*'s express rejection of the idea that neutral and generally applicable laws escape the First Amendment's protections. *Fulton*, 141 S. Ct. at 1889–90 (Alito, J., concurring). Even so, *Smith* did not overrule those cases, but mistakenly limited their application, creating a free exercise landscape that is "difficult to harmonize." *Id.* Since *Smith*, this Court has avoided applying it, similarly confusing its jurisprudential corpus. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018). *Smith*'s disruptive effect favors overruling it.

Reliance interests do not require this Court to retain *Smith*. Overruling may be improper if it would upset the legitimate expectations of third parties that have reasonably and concretely relied

on the precedent. *Janus*, 138 S. Ct. at 2484; *Ramos*, 140 S. Ct. at 1415 (2020) (Kavanaugh, J., concurring). But *Smith* has been widely condemned since it was handed down: scholars across the ideological spectrum criticized *Smith* from the outset, and Congress responded to the opinion by enacting the Religious Freedom Restoration Act to expressly undo *Smith* at the federal level. *See* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1409–10 (1992); *see also* 42 U.S.C. §§ 2000bb to 2000bb-4; *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997). Twenty-one states followed suit, enacting their own versions of RFRA. *Factsheet: Religious Freedom Restoration Act of 1993 (RFRA)*, Bridge: A Georgetown University Initiative (Mar. 16, 2021) https://bridge.georgetown.edu/research/religious-freedom-restoration-act-of-1993-rfra/. Although Delmont has not done so, the breadth and severity of the reaction against *Smith* indicates that its elimination is widely expected, if not desired. Thus, there is no reasonable basis for reliance interests in the precedential rule.

Similarly, overruling *Smith* does not threaten this Court's integrity or perceived legitimacy. This Court has occasionally raised concerns that overruling precedent can provoke negative public perception and inhibit the Court's efficacy. *See, e.g., Casey*, 505 U.S. at 864; *Dobbs*, 142 S. Ct. at 2348–50 (Breyer, Sotomayor, and Kagan, JJ., dissenting). Of late, however, this Court has been reluctant to consider "extraneous influences" such as public opinion, instead highlighting the need for independent adjudication. *See Dobbs*, 142 S. Ct. at 2278. This approach is consistent with the independent judiciary for which the Constitution provides. *See* U.S. Const. art. III, § 1; The Federalist No. 78 (Alexander Hamilton). Even if, however, this Court were to consider institutional integrity as a stare decisis factor, it would not weigh against overruling *Smith* for the same reasons that reasonable reliance interests in *Smith* are absent.

Because *Smith* was inconsistent with the text, structure, and purpose of the First Amendment, it was wrong when decided. Stare decisis does not compel this Court to retain *Smith*, which promulgated an unworkable rule that has disrupted its area of law and does not implicate significant reliance or integrity interests. This Court should return to applying strict scrutiny to state infringements on the right to free exercise of religion and require Respondent to demonstrate that PAMA is the least restrictive means of achieving a compelling state interest.

CONCLUSION

In sum, the extension of *Sullivan*'s actual malice standard to limited-purpose public figures is not rooted in the original intent of the *Sullivan* opinion itself, nor does it find support in the common law tradition. Applying that standard ignores the similarities between limited-purpose public figures and private citizens. Even if this Court concludes that application of the standard to limited-purpose public figures is embedded in *Sullivan* or the common law of defamation, unforeseeable media growth since *Sullivan* has rendered that application inappropriate today. Second, under *Smith*, this Court should apply strict scrutiny to PAMA. PAMA is not neutral or generally applicable and it falls within the hybrid exception *Smith* established. In the alternative, even if this Court determines that PAMA is neutral and generally applicable and does not fall within the hybrid exception, it should overrule *Smith*. *Smith* contradicts the text, structure, and purpose of the First Amendment, it creates undesirable policy incentives, and it does not merit adherence based on stare decisis. Therefore, Petitioner respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fifteenth Circuit.

Respectfully submitted,

Team 9
Counsel for Petitioner

APPENDIX A—CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I.

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part, that "[N]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

CERTIFICATE OF COMPLIANCE

The work product contained in all copies of Team 9's brief is the work product of the members of Team 9 only. Team 9 has complied fully with its law school honor code. Team 9 has complied with all the Rules of the Competition for the Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition.