No. 22-CV-7654

IN THE

In the Supreme Court of the United States

EMMANUELLA RICHTER,

Petitioner,

v.

CONSTANCE GIRARDEAU

Respondent,

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

BRIEF FOR PETITIONERS

TEAM 11

STATEMENT OF ISSUES

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution

Supreme Court

Circuit Courts of Appeals

State Courts

Secondary Sources

STATEMENT OF THE CASE

Emmanuella Richter (hereinafter "Mrs. Richter") escaped religious persecution in South America in 2000 and now brings this action due to experiencing religious oppression in the state of Delmont. Mrs. Richter, a religious leader versed in numerous texts of world faith, started the Church of the Kingdom (hereinafter "Kingdom Church") in 1990 in South America. Kingdom Church synthesizes the archetypal essence of religious experience to allow its followers to connect with each other and the spiritual world. After a military coup in 2000, the couple have grown their church into a larger, but modest following in the state of Delmont, primarily in the city of Beach Glass. As a key tenet of their faith, members of Kingdom Church do not accept or donate blood to non-members. They instead choose, as their religious practices, to bank their blood in case of medical emergencies. This process imbues a "servant's spirit" through its members to develop communal bonds and spiritual growth.

However, this sacred tenet of faith has been under attack after an unfair characterization by a local newspaper. In the wake of the article, Delmont passed the "Physical Autonomy of Minors Act" (Hereinafter PAMA) which forbade anyone under 16 from participating in blood donations, regardless of consent. The defendant strongly advocated for this law specifically targeted at Kingdom Church. After a tragic accident, this sacred practice and the law targeting it came to the forefront of public consciousness. The defendant continued her targeting of Kingdom Church by stating she had commissioned a task force to investigate its practices. The defendant further flamed her fear mongering a few days later when she stated to the press that Mrs. Richter was a "…vampire who founded a cult that prays on its own children."

Mrs. Richter had no choice but to bring a defamatory action. However, the lower courts used the dubious Limited Purpose Public Figure standard to determine Mrs. Richter's actions in

defending her congregation made her a public figure. This meant that Mrs. Richter would have to clear the high bar of "actual malice" when it came to defamation. However, the actual malice standard has no roots in the nation's history, and its presence has proven confusing and unwieldy for courts and defamation plaintiffs and should be overturned.

Mrs. Richter also brought an action against PAMA and its violation of the Free Exercise Clause of the First Amendment by prohibiting confirmed minors from participating in their faith. Mrs. Richter attempted to show that PAMA fails any test of neutrality and general applicability by targeting a key tenet of Kingdom Church's faith.

As to the defamation claim, the Court of Appeals affirmed the lower court's determination that Mrs. Richter was a limited purpose public figure. However, the Court of Appeals opined that the actual malice standard may not be appropriate due to its absence in First Amendment and Constitutional history. Because of this, District Court was affirmed, but the Court of Appeals noted that applying actual malice to limited purpose public figures should be revisited.

As to the Free Exercise claim, the Court of Appeals found that there was no issue of material fact due to PAMA being neutral and generally applicable. The Court of Appeals wrote that the *Smith* test was unworkable and should be reexamined. However, they were still bound to it and affirmed the District Court's decision.

Mrs. Richter then filed for a Grant of Writ of Certiorari to this Court on the issues of whether the *Sullivan* standard should be extended to limited purpose public figures and whether the Court of Appeals erred in concluding that PAMA was neutral and generally applicable, paving the way for a potential overrule of *Smith*.

This Court then granted Cert on those issues.

STATEMENT OF FACTS

Emmanuella Richter has dedicated her life to the Church of the Kingdom (hereinafter "Kingdom Church"). Richter, Aff. ¶ 2. After years of devoted study to comparative religion, Mrs. Richter was able to synthesize the "core, archetypal essence of the religious experience." *Id.* In doing so, the Kingdom Church was founded. *Id.* And the Church's message has since resonated with many people, shown by the widespread success of proselytization efforts. *Id.*

To join the Kingdom Church, members partake in a rigorous doctrinal study to reach a "state of enlightenment," resulting in a private confirmation ritual to solidify one's place in the Church. *Id.* at ¶ 8. The Church has created a close-knit community with members only marrying within the Church and children being raised within the belief system. *Id.* Part of this practice involves children being homeschooled, so classes on religious instruction can be included with a standard curriculum. *Id.* Homeschooling allows children adhering to the faith to complete monthly "Service Projects" to help develop a "servant's spirit," which is vital to individual "spiritual growth" and achieves the objective of bettering the community at large. *Id.* at ¶ 9 (internal quotations omitted). Service Projects include gardening, community clean ups, food and clothing collections for local charities, recycling, and blood drives. *Id.* The blood drives serve the dual purpose of bettering the community and participating in a core tenet of the Kingdom Church faith. *Id.* Because confirmed church members cannot accept blood from or donate to a nonmember, the Church's practice of "blood banking" is dedicated to providing for each member's "own future medical needs" and "for those of their family." *Id.*

Though the Kingdom Church began in the country of Pangea, many members have had to flea their home country to escape religious persecution. *Id.* at ¶¶ 2, 13. Following a coup that toppled the democratically elected government of Pangea, the Kingdom Church was targeted by

the new government. *Id.* at ¶ 13. The animosity experienced by the Church ultimately required members to seek asylum in the United States. *Id.* at ¶ 14. Mrs. Richter, her husband, and a large portion of the congregation have settled in the State of Delmont and developed compounds outside the Beach Glass city limits, where they have since benefited the greater community. *Id.* at ¶¶ 3, 12-14.

Regrettably, the Church has once again become the target of scrutiny by members of the Beach Glass community and the greater state of Delmont. Memorandum Opinion and Order, ROA at 5. The animosity arose from a 2020 article published in *The Beach Glass Gazette*, a local paper, that described the popular tea business Mrs. Richter's husband conducts entirely separate from the Church yet still included portions on the Church's blood banking practices. *Id.* This information ignited public outcry against the Church. *Id.* Sections of the community denounced the religious practice for involving minors and went so far as to speculate whether "minors were being procured for blood-banking purposes." *Id.* In response to the outcry, Delmont officials passed the "Physical Autonomy of Minors Act" (hereinafter "PAMA") in 2021. *Id.* at 5-6. PAMA forbids "the procurement, donation, or harvesting of the bodily organs, fluids, or tissue, of a minor (an individual under the age of sixteen) regardless of profit and regardless of the minor's consent." *Id.* at 6. Previously, Delmont law only prohibited minors from "consenting to blood, organ, or tissue donations except for autologous donations and in the case of medical emergencies for consanguineous relatives." *Id.* at 5.

The Respondent, Constance Girardeau was a supporter of this legislation in her position as Governor of the State of Delmont. Girardeau, Aff. ¶¶ 2, 6. Her support for PAMA was solidified after she received a briefing on Kingdom Church's tenet of blood banking. *Id.* at ¶ 3. Ms. Girardeau, in addition, cited her campaign's focus on child safety as well as statistics on the

increased instances of child abuse and teenage suicide as further reasons for her support of PAMA. *Id.* at ¶¶ 4-5.

On January 17, 2022, members of the Kingdom Church were involved in a tragic car accident that resulted in the deaths of dozens of individuals. Memorandum Opinion and Order, ROA at 6. The lone surviving church member in the accident, Henry Romero, required a life-saving operation and therefore the necessary blood to perform it. *Id.* The blood donation was undergone by Adam Suarez, Mr. Romero's cousin and fellow church member. Id. For unknown reasons, Adam experienced issues with his blood pressure during the donation and had to be moved to the intensive care unit to treat his shock. *Id.* Adam has thankfully fully recovered. *Id.* at 7. However, the media attention of the story prompted Ms. Girardeau to compile a task force to investigate the Church for violations of PAMA, as Adam was fifteen years old at the time, or any other laws in what she referred to as the "exploitation" of children. *Id.*

Mrs. Richter, then on January 25, attempted to obtain injunctive relief to stop the task force's investigation in an effort to protect the Church from further persecution. *Id.* at 6-7. The marked parallels between the animosity experienced by the Church in Pangea and in Delmont caused Mrs. Richter to take this action. *Id.* When Ms. Girardeau was asked about the request for injunctive relief at a press event on January 27, she remarked "I'm not surprised at anything Emmanuella Richter does or says. What do you expect from a vampire who founded a cult that preys on its own children?" *Id.*

The appall experienced by Mrs. Richter from these statements as well as PAMA's continued impairment of the Church's religious practices gave rise to the preceding actions.

SUMMARY OF THE ARGUMENT

DEEFAMATION

When the Supreme Court created the Limited Purpose Public Figure, it attempted to bridge the gap between an obviously public person and someone who was "semi-famous." However, its creation and use of the actual malice standard muddied the waters even more and has led to confusing and inconsistent standards in defamation cases. It has also cast a wide net, grouping people with little public notoriety with those who land much closer to obviously public persons. The actual malice standard has created an extremely difficult bar for plaintiffs to clear to gain relief after their reputations have been attacked. Because of these confusing, inconsistent standards and the unfair bar it sets for plaintiffs, this Court should overturn the actual malice standard for Limited Purpose Public Figures and return to pre-*Sullivan* standards.

This argument is further bolstered by examining the shaky historical ground *Sullivan* was decided on. While a vital and necessary decision in the wake of the Civil Rights Movement, the actual malice standard has no roots in history or the founding of the nation. While the *Sullivan* court pointed to the Sedition Acts of 1798, there is no indication that the Founders or early Americans sought to protect libelous statements of private citizens. This is a fiction created by the *Sullivan* Court to justify policy masking as jurisprudence. It has made First Amendment jurisprudence shaky in its credibility and has created more impracticalities than solutions. *Sullivan* and the actual malice standard should be overturned, but in the alternative, the actual malice standard for Limited Purpose Public Figures could be overturned to restore stability and fairness to defamation cases.

FREE EXERCISE CLAUSE

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law...prohibiting the free exercise" of religion. U.S. CONST., amend. I. The Clause operates to protect individual religious liberties and, even more so, obligates government itself to unwavering religious tolerance. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). That is why the current test for free exercise claims requires that laws burdening religion, even incidentally so, be neutral and of general applicability. *Empl. Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990). Elsewise, the law must undergo the most rigorous scrutiny to survive. *Lukumi*, 508 U.S. at 547.

In the case at bar, PAMA's proscriptions forbid minors from donating blood, which, in effect, bars members of the Kingdom Church from performing a central tenet of their faith through blood banking as well as impedes the Church's larger ideal of raising children within the faith. Moreover, the circumstances surrounding the enactment of PAMA show that it held an underlying object of religious suppression, and thus should be relegated to a strict scrutiny review. However, the Fifteenth Circuit largely ignored the animus directed at the Kingdom Church and determined that the law was neutral and generally applicable. In so ruling, the Fifteenth Circuit undermined Mrs. Richter's free exercise rights and highlighted the deficiencies of the *Smith* test.

As PAMA is not neutral or generally applicable, the law should be analyzed under strict scrutiny, and even still, the decision in *Smith* should be overruled in favor of a strict scrutiny analysis to better protect free exercise liberties.

ARGUMENT

I. THE EXTENSION OF THE NEW YORK TIMES V. SULLIVAN STANDARD TO LIMITED-PURPOSE PUBLIC FIGURES IS NOT CONSTITUTIONAL

A. The *Sullivan* Standard for Limited-Purpose Public Figures is Unconstitutional and Should be Overturned

i. Lower Courts are Inconsistent About Simply Identifying Who is a Limited Purpose Public Figure

Since its creation in *Gertz*, lower courts have struggled with how to define a limited purpose public figure (LPPF). In *Gertz*, the Court distinguished two types of figures. One was the "all-purpose" public figure who attained clear persuasive power and influence such as well-known celebrities, and athletes. *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 345, 41 L. Ed. 2d 789 (1974). These were different from public figures who had "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id*. This is where the *Gertz* court attempted to flesh out the genesis of the LPPF. However, Courts have struggled to sharpen this definition and there is no consensus among the circuits on how to determine this. In cases post-*Gertz*, the Court tried to enforce using the actual malice standard for LPPF. In *Hutchinson v. Proxmire*, a professor sued United States Senator William Proxmire for defamation after Proxmire gave Hutchinson a "Golden Fleece" award for the wasting tax dollars. The Court found that Proxmire's speech was entitled to the actual malice standard because Hutchinson was a LPPF due to the fact he had received federal funds and the report of them in local newspapers, as well as his comments to the press after receiving the "Golden Fleece" award. *Hutchinson v. Proxmire*, 443 U.S. 111, 134, 99 S. Ct. 2675, 2688, 61 L. Ed. 2d 411 (1979). However, in *Time, Inc. v. Firestone*, the Court rejected an argument that the respondent, a wealthy divorcee, was a LPPF because her divorce had become a "cause celebre" and she had held several press conferences during her divorce proceedings. The Court rejected

this because it did not want to create a situation where privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest." *Time, Inc. v. Firestone*, 424 U.S. 448, 454, 96 S. Ct. 958, 965, 47 L. Ed. 2d 154 (1976). The Court also rejected any argument that Firestone's court divorce proceedings opened her up to being a LPPF. The Court reasoned that Firestone *had* to go court in order to receive her dissolution of marriage. To the Court, using the judicial process "is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court." *Id.* at 454. Even shortly after its own creation of the LPPF, the Court was struggling to determine who would fall under the category.

Lower courts have also struggled with how to classify the LPPF for the purposes of asserting the actual malice standard. In *Rosanova v. Playboy Enterprises*, the United States Southern District of Georgia remarked that drawing a line between public figures and private individuals was like trying to "nail a jellyfish to the wall." *Rosanova v. Playboy Enterprises*, Inc., 411 F. Supp. 440, 443 (S.D. Ga. 1976). When the 5th Circuit affirmed *Rosanova*, it noted that the public figure concept had eluded a truly working definition but that it "falls within that class of legal abstractions where 'I know it when I see it.'" *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859, 861 (5th Cir. 1978). Rather than clarifying who is a public figure, courts generally use an ad-hoc judgement, using such criteria as the friend of a former president (*Rebozo v. Washington Post Co.*, 637 F.2d 375, (5th Cir. 1981)), being the head of a large cooperative (*Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, (D.C. Cir. 1980)), and being the dean of a public university (*Byers v. Se. Newspaper Corp. Inc.*, 161 Ga. App. 717, 717, 288 S.E.2d 698, 699 (1982)) as criteria for being a LPPF. This has also led to different circuits fashioning their own multi-factor tests with no uniformity. These include the Fourth Circuit

which has fashioned a five-factor test,[1] a three-factor test in the Sixth Circuit,[2] and a four-part test in the Second Circuit.[3] All of the confusion among lower courts on how to define the LPPF, along with the extremely high bar of the actual malice standard suggests that, in the absence of overturning *Sullivan*, this Court should look to overturn the actual malice for the LPPF. Beyond this general confusion, the LPPF casts a wide net, bringing Mrs. Richter under the same banner as larger religious figures which do not equate to her.

ii. Attaching the Actual Malice Standard to Mrs. Richter goes Against Ideas of Justice.

While Mrs. Richter is a religious leader of local prominence, she does not fall under the same category as religious leaders who have been found to be LPPF. In *McManus v. Doubleday*, a Roman Catholic priest was found to be a LPPF due to his involvement in the Northern Irish conflict with Great Britain. There the priest was a national coordinator of the Irish National

[1] (1) the plaintiff has access to channels of effective communication, (2) the plaintiff voluntarily assumed a role of special prominence in the controversy, (3) the plaintiff sought to influence the resolution of the controversy, (4) the controversy existed prior to the publication of the defamatory statements, and (5) the plaintiff retained public figure status at the time of the alleged defamation. *Carr v. Forbes, Inc.*, 259 F.3d 273, 280 (4th Cir. 2001)

[2] "first, the extent to which participation in the controversy is voluntary; second, the extent to which there is access to channels of effective communication in order to counteract false statements; and third, the prominence of the role played in the public controversy." *Clark v. Am. Broad. Companies, Inc.*, 684 F.2d 1208, 1218 (6th Cir. 1982), disapproved of by Bichler v. Union Bank & Tr. Co. of Grand Rapids, 745 F.2d 1006 (6th Cir. 1984)

[3] A defendant must show the plaintiff has: (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media. Having ascertained what the basic test is, we apply it." *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136–37 (2d Cir. 1984).

Caucus, had appeared frequently on radio and TV broadcasts before large audiences in the United States, was "well known in England, Ireland, and Irish circles in the United States." *McManus v. Doubleday & Co.*, 513 F. Supp. 1383, 1387 (S.D.N.Y. 1981). In *Falwell v. Penthouse Intern., Ltd.*, Jerry Falwell, who at the time was one of the biggest religious leaders in the United States with sermons being heard by millions in Canada, the U.S. and the Caribbean was clearly found to be a public figure. *Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204, 1208 (W.D. Va. 1981). The Church of Scientology was found to be a public figure, due to its "large world-wide religious movement which claims to have over five million adherents." *Church of Scientology of California v. Siegelman*, 475 F. Supp. 950, 954 (S.D.N.Y. 1979). However, in *Haan v. Board of Publications*, a pastor who was president of two cooperations associated with his church was found to be a private figure in regard to a magazine article discussing the financial difficulties of a split-away church. *Haan v. Board of Publications*, 10 Media L. Rep. (BNA) 1671 (Colo. Dist. Ct. 1984). Even among supposed "prominent" religious figure, there is still a wide berth for courts to do their own analysis.

Subjecting Mrs. Richter, or any plaintiff in a similar position would go against the ideas of justice. While Mrs. Richter is the head of a church, it is a small congregation found only in areas of Delmont. Memorandum Opinion and Order, ROA at 4. It does not rival the five million of the church of scientology, nor does Mrs. Richter come anywhere close to the reach and influence of Jerry Falwell. Mrs. Richter does most of her work within the compound with church seminars, which she does not even lead. *Id*. Nor does Mrs. Richter participate in door-to-door proselytizing, as other members do. *Id*. Kingdom Church does have a larger reach through the sell and distribution of its "Kingdom Tea," but it is clear the Mrs. Richter has no part in. *Id*. The lower courts argued that because Mrs. Richter had inserted herself into the

controversy by initiating the two lawsuits and speaking on them. The lower court attempts to distinguish Mrs. Richter from the plaintiff in *Firestone* the plaintiff in *Firestone* was "compelled" and Mrs. Richter is "not opposed to "media coverage." *Id*. at 14. This is a misread of *Firestone*. As the Supreme Court noted, the plaintiff in *Firestone* did hold press conferences and did speak publicly on her "cause celebre" divorce. *Firestone* at 448. Even after that coverage, she was still found to be a private figure. The lower courts also treat filing lawsuits incorrectly. To seek the assistance of the court is a right all Americans have. It is the approach that must be taken to settle controversies in a society organized around laws and norms. To simply say that filing a lawsuit strips someone of their rights as a private citizen is harmful public policy. As the Supreme Court stated in *Firestone*, to go to court "is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court." *Id*. at 454. Mrs. Richter *had* to go court to defend her deeply held religious practices. To say that action thrusts upon her the same standard as Jerry Falwell and the Church of Scientology is misguided. The Court should instead overturn the actual malice standard for LPPF and take a new approach. This is furthered by bolstered examining the shaky historical foundation of *Sullivan*. If this Court decides to not overturn *Sullivan*, in the alternative, overturing the actual malice standard for LPPF would help restore a sense of stability in defamation jurisprudence.

B. *Sullivan's* Actual Malice Standard Has Been Impractical Since its Inception.

When the Warren Court originally handed down its *Sullivan* decision in 1964, the Court sought to achieve noble aims. At the height of the civil rights movement, northern newspapers had been critical and were under attack for their coverage of violent reactions to Black protestors. John Bruce Lewis & Bruce L. Ottley, New York Times v. Sullivan at 50: Despite

Criticism, the Actual Malice Standard Still Provides Breathing Space for Communications in the Public Interest, 64 DEPAUL L. REV. 1 (2014). The Court sought out to enhance protections for the press, noting in the opinion that the First Amendment as a constitutional safeguard "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269, 84 S. Ct. 710, 720, 11 L. Ed. 2d 686 (1964) (citing *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498.) While the Court had good intentions, its decision was a policy driven one that had no real foundation in the history or intention of First Amendment protections, creating problematic implications in defamation and libel cases.

Justice White vocalized the main issues with *Sullivans*'s implications in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* In his Concurrence, Justice White wrote that a defamation plaintiff would not receive a favorable verdict unless they make a case proving a reckless and knowing falsehood, even if the statement is admittedly false. Because of this high standard, "The lie will stand, and the public continue to be misinformed about public matters…because the putative plaintiff's burden is so exceedingly difficult to satisfy and can be discharged only by expensive litigation *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 768, 105 S. Ct. 2939, 2950, 86 L. Ed. 2d 593 (1985) (White, J., concurring). More recently, Justice Thomas has called to reexamine the actual malice standard found in *Sullivan* and subsequent decisions, stating these were "policy-driven decisions masquerading as constitutional law." *McKee v. Cosby*, 874 F.3d 54 (1st Cir. 2017), cert. denied, 139 S. Ct. 675, 676 (U.S. Feb. 19, 2019). In *McKee*, the Petitioner asked the Court to reexamine her classification as a limited-purpose public figure in a defamation case. Justice Thomas agreed

with the Court to deny her request, but instead states the Court should reconsider the precedents that require courts to ask it in the first place. *Id*.

Legal scholars have also noted the almost insurmountable bar that *Sullivan* has created for defamation plaintiffs. Thirty years after *Sullivan*, Professor Richard Epstein of the University of Chicago noted that "the law of defamation is far more controversial today than it was a decade ago." Richard A. Epstein, "Was New York Times v. Sullivan Wrong?," 53 University of Chicago Law Review 782, 783 (1986). Professor Epstein points out that defamation plaintiffs are often subject to massive frustration "because of the frequency with which the defendant avoids the only issue that matters to the plaintiff-falsehood, which could allow rehabilitation of the plaintiff's reputation." *Id*. at 814. Not only are plaintiffs done a disservice, the public is as well due to "systematic roadblocks against the correction of error." *Id*. To untangle the impractical web post-*Sullivan*, Professor Epstein suggests that a return to strict liability rules would solve many issues involved. *Id*. Even beyond monetary damages, a plaintiff would be able to find victory in determining the falsity of a statement. As Professor Epstein puts it, "the determination of falsehood, unclouded by any examination of the defendant's motive, is like the restitution of a thing taken by the defendant." *Id*.

At the time of its decision, *Sullivan* was a necessary move to protect journalists from retaliation while covering violent oppression to the civil rights movement. However, since in the proceeding decades, the actual malice standard has not been clarified, nor has a true workable framework emerged. Instead, it has created an almost insurmountable bar for defamation plaintiffs, while ensuring that false statements are rarely clarified for the benefit of the public. However, its impracticality is not the only reason this Court should consider overturning the

actual malice standard. There is very little historical support for the actual malice standard, and its reasoning cannot be located at the founding.

C. There is Little Historical and Constitutional Support for the Actual Malice Standard.

While *Sullivan* was necessary at a time of great historical upheaval, its historical foundation is dubious. The Court turned away from an honest historical analysis to craft a decision that moved its preferred policy forward. By looking at this historical record on the First Amendment, it becomes clear that beyond the impracticality of it, *Sullivan'*s absolute malice standard should be overturned.

Two decades before *Sullivan*, the Court pointed out certain classes of speech that could be prohibited and punished without raising any Constitutional issues. To the Court, these included "…the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words…" *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 769, 86 L. Ed. 1031 (1942). The Court considered these categories an affront to civil debate and conversation. The Court declared that resorting to these words is "not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Id*. (quoting Cantwell v. Connecticut, 310 U.S. 296, 309, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213, 128 A.L.R. 1352). Justice White opens his dissent in *Gertz* by pointing out the radical turn the Court had taken in the wake of *Sullivan*, saying that since America's founding, the law of defamation and right of the ordinary citizen to recover for false publication injurious to his reputation have been almost exclusively the business of state courts and legislatures. *Gertz* 369-70 (White, J., Dissenting). Short of completely overturning *Sullivan*, Justice White called for a greater delineation between protections for the press and rights of actions for other citizen who had been libeled. Justice

White writes that *Sullivan* and its progeny do not suggests that the First Amendment intended in all circumstances to deprive the private citizen of his historic recourse to redress published falsehoods damaging to reputation or that, contrary to history and precedent. *Id*. at 387. Justice White also looks at how the Founders viewed libelous speech by noting the works of Harvard law professor and First Amendment scholar Zechariah Chafee Jr. Justice White points out Professor Chafee's findings that while the Framers may have intended to protect criticism of the government, "the free speech clauses do not wipe out the common law as to obscenity, profanity, and defamation of individuals." *Id*. at 383. Justice White points out a possible middle ground after *Sullivan*. *Sullivan* went against centuries of historical practice allowing citizens the ability to gain redress from libelous accusations. While freedom and protection of the press is vital to a thriving democracy, Justice White points out that there can be both robust protections for the press and a system which allows citizens to take action if they are libeled.

Justice Thomas uses Justice White's argument as a springboard in his own attack on the a-historical grounds of *Sullivan* in his *McKee* dissent. Justice Thomas writes that "historical practice further suggests that protections for free speech and a free press—whether embodied in state constitutions, the First Amendment, or the Fourteenth Amendment—did not abrogate the common law of libel." *McKee* at 681. Justice Thomas then takes on the *Sullivan* Court's use of the Sedition Act as historical evidence to justify its reasoning. In 1798, John Adams' administration pushed to enact the Sedition Acts in the wake of an undeclared naval war between France and the United States. As part of these Acts, it was illegal to make false or malicious statements about the federal government. These Acts were then used to suppress many newspaper owners supported by Adams rival Thomas Jefferson. The Acts were roundly criticized and allowed to expire just two years later. The *Sullivan* Court pointed to their

enactment and criticism as justification for its ruling, but Justice Thomas takes issue with that. Justice Thomas argues that that direct opposition to the Sedition Acts does not necessarily support a constitutional actual-malice rule in all civil libel actions brought by public figures. *Id*. 682. Justice Thomas points out that James Madison, in his criticism of the Acts, certain officials must retain protections to their live and reputations. *Id*.

Even with its laudable intentions, the *Sullivan* Court ignored centuries of historical evidence when they created the actual malice standard. While protections for the press and other forms of speech were clearly considered by the Founders, there was never any idea of such a high standard when it came to libel and defamation action. It would be best to reevaluate the standard and allow for something with more historical support to guide future legal action.

I. PAMA'S RESTRICTIONS ON KINGDOM CHURCH'S BLOOD BANKING PRACTICES VIOLATES THE FREE EXERCISE CLAUSE.

Kingdom Church holds, as one of its main tenets, the practice of blood banking. Richter, Aff. ¶ 9. It is an integral part of developing a "servant's spirit," and what is more the practice is one of many ways church members fulfill their "Service Projects" that benefit the community. *Id.* Blood banking is a sincerely held religious belief by all practicing members of the Kingdom Church. PAMA, however, has restricted the ability of young church members from performing a central canon of their faith. Specifically, PAMA "forbids the procurement, donation, or harvesting of the bodily organs, fluids, or tissue, of a minor, regardless of profit or the minor's consent." Memorandum Opinion and Order, ROA at 34. The official action here invades the hallowed practice of the Kingdom Church in direct violation of the Free Exercise Clause.

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law…prohibiting the free exercise" of religion. U.S. CONST., amend. I. The Free Exercise Clause offers every citizen protection from governmental action that encumbers their religious

beliefs and practices. At a base level, these protections apply where the law at issue "discriminates against some or all religious beliefs" or "prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). Both these instances apply exactly to the present law, and therefore PAMA should be overturned to ensure the safeguards of the Free Exercise Clause are enjoyed by all citizens.

A. PAMA is neither neutral nor generally applicable and fails to satisfy strict scrutiny.

PAMA is not a neutral nor generally applicable law and was enacted under circumstances that display clear animus towards and targeting of the Kingdom Church. Therefore it "must undergo the most rigorous scrutiny." *Id.* at 546.

The operative test for Free Exercise Clause issues requires that laws burdening religion must be neutral and of general applicability. *See Empl. Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990). In regard to neutrality, "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia, Pennsylvania*, 141 S.Ct. 1868, 1877 (U.S., 2021). Next, laws are not generally applicable "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 1877. In short, a law that burdens religious conduct, even incidentally so, is subject to strict scrutiny if it is neither neutral nor generally applicable. *See Lukumi*, 508 U.S. at 531.

i. PAMA is not a neutral law.

The decision by the Fifteenth Circuit ignores the circumstances surrounding PAMA's enactment that weigh against the law's neutrality. True enough, this Court has instructed that the first place to look when determining a law's neutrality is the plain text of the statute. *Id.* at 533.

And, admittedly, the law here is facially neutral as it makes no specific reference to religion. However, "[o]fficial action that targets [specific] religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* at 534.

For that reason, this Court's decision in *Masterpiece Cakeshop* articulates multiple factors for courts to consider when assessing a law's neutrality. These factors include: (1) the historical background of the policy under challenge, (2) the specific series of event leading up to the enactment, and (3) the policy's legislative or administrative history, including contemporaneous statements made by members of the decision-making body. *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). Each of these factors cuts against the neutrality of PAMA and are almost wholly overlooked by the Fifteenth Circuit. The statements made and the events leading up to the enactment of PAMA raise many of the same issues with neutrality found in both *Lukumi* and *Masterpiece Cakeshop*.

1. To begin, although not much has come to light about the specific history of the policy at issue, a greater historical background of the Kingdom Church religion is relevant to the circumstances surrounding PAMA's passing. The historical background of the Kingdom Church speaks to the difficulties faced by people whose beliefs do not comport with mainstream religions and how America represents religious freedom to oppressed people. With that in mind, members of the Kingdom Church fled to the United States, seeking asylum from the violence and prejudice in their home country, Pangea. Richter, Aff. ¶¶ 13-14. This is because, in the upheaval resulting from a coup in Pangea, the Church became the targets of the country's new government. *Id.* at ¶ 13.

Likewise, in *Lukumi*, members of the Santeria religion had an unfortunate history of religious persecution akin to that of the Kingdom Church. *Lukumi*, 508 U.S. at 524. The

Santeria faith is based on the cultivating personal relationships with "orishas," which is primarily done by means of devout animal sacrifice. *Id.* Due to this practice, Santeria adherents, first, faced vast persecution in their country of origin, Cuba. *Id.* The religion was then brought to South Florida by those exiled during the Cuban Revolution. *Id.* at 525. There, they incurred further scrutiny from the community. *Id.* at 526. Ultimately, the community's misgivings led to the passing of the religiously charged ordinances at the heart of the *Lukumi* case. *Id.* In a similar manner, the enactment of PAMA was the result of further judgment by the community where Church members sought asylum. Residents of Beach Glass started an uproar, condemning the Church's core tenets. Memorandum Opinion and Order, ROA at 5. And, even more so, Mrs. Richter and the Church were subjected to the animosity of a state official. *Id.* at 8. Here, as in *Lukumi*, those seeking religious tolerance in the United States, instead encountered further persecution and felt the impact of prejudicial laws. Richter, Aff. ¶¶ 13.

2. Next, this Court allows for events preceding the enactment of the law at issue to evince an underlying motive of religious suppression. *Id.* at 540. In *Lukumi*, for example, city council meetings were held following the announcement that the Santeria religious practice would be opening a church. *Id.* at 526. Recall that the Santeria religion practiced animal sacrifice to the displeasure of the local community. It so follows that the meetings' records "evidence significant hostility…toward the Santeria religion and its practice of animal sacrifice." *Id.* at 541. In the end, the outcry vocalized at the meetings contributed to to a "pattern" that disclosed "animosity to Santeria adherents and their religious practices." *Id.* at 542.

Like *Lukumi*, the specific series on events leading up to PAMA's enactment demonstrate the lack of neutrality underlying the law. Here, in 2020, an article published by *The Beach Glass Gazette* reported details on the Kingdom Church's blood-banking beliefs. Memorandum

Opinion and Order, ROA at 5. The report triggered outcry from the surrounding community who lacked a full understanding of the Church's practices. *Id.* The tumult was centered around the involvement of minors in blood banking. *Id.* And, as in *Lukumi*, the community vilified the religious practices of the Church, making gross assumptions that "minors were procured for blood-banking purposes." *Id.* Consequently, the public's misgivings and disparagement of the Kingdom Church contribute to the non-neutral setting that caused the passing of PAMA.

3. Finally, this Court's prior opinions demonstrate the ability of statements made by members of the decision-making body to disprove the neutrality of the official action. *See Lukumi*, 508 U.S. at 540; *Masterpiece Cakeshop*, 138 S.Ct. at 1730. Take, *Masterpiece Cakeshop*, for example. There, a baker declined to craft a cake for the wedding of a gay couple in violation of the Colorado Anti-Discrimination Act. *Masterpiece Cakeshop,* 138 S. Ct. at 1723. The affected couple filed a charge with the Colorado Civil Rights Commission, and the Commission and later the Colorado state courts ruled in favor of the couple. *Id.* However, upon review of the statements made during the public meetings to adjudicate the initial matter, this Court determined that the statements did little but "disparage [plaintiff's] beliefs." *Id.* at 1729. In particular, the commissioner at one point compared the baker's sincere religious beliefs "to defenses of slavery and the Holocaust." *Id.* In view of these statements, this Court determined they "cast doubt on the fairness and impartiality" of the Commission's actions. *Id.* at 1730.

Similarly, in *Lukumi*, members of the city council and other city officials were noted to have made disparaging statements about the Santeria religion. *Lukumi*, 508 U.S. at 541. A councilman in support of the ordinance was on the record stating that people were put into jail for practicing this religion in Cuba and questioning why members would bring their religion to this country. *Id.* Other council members stated that the religion was "in violation of everything

this country stands for," and the chaplain of the police department called the religious practices a "sin" and "an abomination to the Lord." *Id.* (internal quotations omitted). Once again, this Court found these comments revealed the true "object" of the ordinances – to target certain practices because of their religious motivation. *Id.* at 542.

Here, the specific statements made against the Kingdom Church shed light on the animosity entangled with the decision to pass PAMA. Though an air of public aversion has already been established, specific statements by Ms. Girardeau contribute to a pattern of animus against the Church. In answering a question regarding the original request for injunctive relief, Ms. Girardeau stated: "I'm not surprised by anything Emmanuella Richter does or says. What do you expect from a vampire who founded a cult that preys on its own children?" Memorandum Opinion and Order, ROA at 26-27. Similar to the commissioners in *Masterpiece Cakeshop* and the council members in *Lukumi,* the comments made here are of especial concern because they were made by the Governor of Delmont, an individual with decision-making authority. Girardeau, Aff. ¶ 2. What is more, the comments name the Kingdom Church a "cult," and, like *Masterpiece Cakeshop*, this classification is a desecration of the sincerely held religious beliefs of the Kingdom Church. Granted, these comments were made after the enactment of PAMA. Memorandum Opinion and Order, ROA at 26. However, the outright hostility and the preformed opinions about the Church and its founder give rise to an inference that these beliefs were long-held and thus can be considered.

* * *

In sum, the persecution faced by the Kingdom Church, PAMA's enactment directly following public outcry, and the hostile remarks by decision-makers, when factored together, leave no doubt that the law at issue was passed targeting the religious practices of the Church.

ii. PAMA is not a law of general applicability.

In regard to the second requirement for laws under *Smith*, PAMA is not a law generally applicability based on the available record.[4] As per *Smith*, laws inhibiting religion must be of general applicability. In concept, this means government actions, even those in pursuit of noble ends, cannot "impose burdens only on conduct motivated by religious belief." *Lukumi*, 508 at 543. This Court has emphasized that "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Id.* at 542.

Generally, this means that the law at issue cannot be underinclusive as to the government's asserted interest. *See Id.* at 543. To illustrate, the Second Circuit opinion in *Central Rabbinical Congress of the U.S. & Canada v. New York City Department of Health & Mental Hygiene* provides a clear example of this notion. 763 F.3d 183 (2d Cir. 2014). There, the religious practice of "metzitzah b'peh" was regulated through a provision that prohibited "any person from performing direct oral suction as part of a circumcision without first obtaining signed written consent from one of the child's parents." *Id.* at 186. The governmental interest was to stymie the spread of herpes simplex virus, particularly in neonatal cases. *Id.* at 185-86. But, the court was unable to discern the applicability of a regulation that applied to fewer than 10% of the relevant cases and simultaneously addressed no secular conduct. *Id.* at 197. The defendants argued that their officials lectured doctors about the intrapartum transmission from mother to infant, the most common form of transmission. *Id.* However, in light of the

[4] It should be noted that, because as shown above PAMA is not a neutral law, there is no need to disprove the general applicability for it to be subject to strict scrutiny. *See C. Rabbinical Cong. of U.S. & Canada v. New York City Dept. of Health & Mental Hygiene*, 763 F.3d 183, 196 (2d Cir. 2014) ("Although not necessary to our holding (because the Regulation is not neutral), we are also unable to conclude…that [the Regulation] is a generally applicable law.").

provisions against the religious practices, the court found that the record silent as to why the lectures were the most that could be done. *Id.*

Like *Central Rabbinical Congress*, the provisions of PAMA are vastly underinclusive to its purported goals. The Fifteenth Circuit stated the law's purpose was to confront the "broader dangers threatening minors." Memorandum Opinion and Order, ROA at 37. And, Respondent has affirmed her concern for the wellbeing of children prompted her support of PAMA, citing statistics about the increase in suicide rates as well as child abuse and neglect. Girardeau, Aff. ¶¶ 4-5. Albeit there is nothing in the record that validates the impact PAMA would have on any of these issues. At the very least, the provisions in *Central Rabbinical Congress* were backed up by statistical data to demonstrate their impact on the larger issue, whereas here the record is silent as to how prohibiting every instance of fluid, organ, and tissue procurement or donation meaningfully contributes to solving problems of child abuse or mental health. A "flat prohibition" on minor procurements and donations does not meet the government's stated interests and, all the while, prohibits more religious conduct than necessary. *Lukumi*, 508 at 538.

Thus, PAMA is not a generally applicable law because it does not adequately address its asserted interests and is both overinclusive and underinclusive on its face.

Finally, it should be noted that "[n]eutrality and general applicability are interrelated, and ... failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi* at 531. In their opinion, the Fifteenth Circuit incorrectly applies the assumption in the inverse and therefore failed to complete a proper analysis of PAMA's general applicability. Memorandum Opinion and Order, ROA at 37. Nonetheless, for the present purpose, PAMA's lack of neutrality is reflective of its failure to be generally applicable.

iii. Respondents cannot satisfy strict scrutiny.

Having established that PAMA is neither neutral nor generally applicable and since its proscriptions clearly burden the religious practices of the Kingdom Church, the law must undergo strict scrutiny, which PAMA must fail because its restrictions are not narrowly tailored.

To survive strict scrutiny, the law "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 *quoting McDaniel v. Paty*, 435 U.S. 618, 628 (1978).

Whether the government has a compelling interest is not at issue. Assuredly, the health and wellbeing of minors is an important concern. However, "Respondent has not demonstrated…that, in the context of the ordinances, its governmental interests are compelling." *Id.* at 546. In *Lukumi*, this Court took issue with the disputed ordinances prohibiting only religious conduct while leaving droves of secular conduct that would impact the stated interest untouched. *See id.* at 547. The same can be said here for the given interest in comparison to the undertaken action. The governmental interest behind PAMA is "to protect minors against the growing risk of abuse, neglect, and domestic violence." Memorandum Opinion and Order, ROA at 37. Yet, PAMA in no way addresses elements of child neglect nor does it make any further prohibitions to stop occurrences of domestic violence. It merely restricts one particular subset of practices that bars a paramount religious component of the Kingdom Church.

In addition, PAMA is not narrowly tailored to meet the governmental interest asserted. First, the legislation, as just put forth, is underinclusive. The governor states concerns about rising occurrences of child abuse as well as the "teenage suicide epidemic" as reasons for her support of PAMA. Girardeau, Aff. ¶¶ 4-5. But, in effect, there is no evidence cited as to the instances of child abuse PAMA would help prevent, and the legislation is void of elements that

address mental health concerns that lead to instances of suicide. Second, PAMA is overinclusive to meet the governmental interest. Prior to PAMA, the state of Delmont prohibited minors under the age of sixteen from consenting to blood, organ, or tissue donations unless in the instance of a close relative or medical emergency. Memorandum Opinion and Order, ROA at 5. Not only did PAMA cut out a life-saving exception, but it also greatly increased the scope of these limitations to the extent that the "procurement" of any bodily fluids is prohibited. Surely, this statute has barred legitimate reasons for procuring bodily fluids, like a doctor collecting urine to test for kidney disease or a volunteer taking saliva for Covid-19 testing. Given the restrictions of necessary health functions and the failure to address that stated health and safety concerns for minors, PAMA is both under and over inclusive, and therefore unconstitutional.

B. This Court should overrule the decision in *Empl. Div., Dept. of Human Resources v. Smith*.

Regardless of how this Court determines PAMA's neutrality and generally applicability, *Smith* should be overruled for its inadequacies protecting the liberties guaranteed by the Free Exercise Clause.

In the last five years alone, this Court has multiple times run up against conflict between official actions or legislations and the Free Exercise clause of the First Amendment. *See Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Fulton v. City of Philadelphia, Pennsylvania*, 141 S.Ct. 1868, 1877 (U.S., 2021). Each of which have begged the question of whether to overrule *Smith*, yet the cases have instead turned on narrow factual holdings, sidestepping the issue. But, this case provides the perfect vehicle to overrule the unworkable framework derived from *Smith* and return to a strict scrutiny standard that is in line with this Court's First Amendment jurisprudence.

i. The legal community at large is dissatisfied with Smith.

Courts have long been displeased with *Smith's* rational basis test. For instance, many state supreme courts have rejected the test in favor of heightened scrutiny, and what is more several have adopted strict scrutiny standards. *See, e.g., Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000). Indeed, even Justices on this Court have on several occasions have criticized the holding in *Smith*. *See City of Boerne v. Flores*, 521 U.S. 507, 544-45 (1997) (O'Connor, J., dissenting) ("*Smith* was wrongly decided"); *Fulton*, 141 S.Ct. at 1931 (Gorsuch, J., concurring) ("No fewer than ten Justices…have questioned [*Smith's*] fidelity to the Constitution.").

Moreover, the sentiment that *Smith* is on its last leg is shared by the academic community at large. *See, e.g.*, Andrew Lavender, *Constitutional Law-Answering Justice Barrett's Fulton Prompt: The Case for A Narrow Reconsideration of Free Exercise*, 44 W. New Eng. L. Rev. 429, 431 (2022) ("This Article assumes that *Smith's* time as good law is limited"). There is a growing consensus that "the strain is showing." Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 Harv. L. Rev. 267, 268 (2021). And some have "pressed the case that *Smith* should be overruled," as the decision has distorted free exercise and can only lead to further distortions if still in operation. Christopher C. Lund, *Second-Best Free Exercise*, 91 Fordham L. Rev. 843, 846-47 (2022). In the wake of the *Fulton* decision, the academic sphere has renewed claims emphasizing "the need for the Court to overrule its current precedent" in *Smith*. David Beck, *Fulton v. City of Philadelphia: Religious Objectors, Historically Marginalized Communities, and A Missed Opportunity*, 68 Loy. L. Rev. 95, 97 (2021).

The case before this Court provides the opportunity to unify the courts and mollify the legal community as a whole by overruling its unpopular precedent.

ii. Returning to a strict scrutiny analysis adequately protects free exercise rights.

In overruling *Smith*, this court should return to a strict scrutiny analysis where free exercise rights are concerned to adequately protect citizens from laws that hamper their ability to enjoy their religious beliefs and practices. The main hesitation in overruling *Smith* was summed up in Justice Barrett's concurring opinion in *Fulton* by asking "what should replace *Smith*?" *Fulton*, 141 S.Ct. at 1882 (Barrett, J., concurring). And the answer to this question can be found in both Justice Alito's concurring opinion in *Fulton* as well as this Court's free exercise jurisprudence prior to the *Smith* decision.

This Court's opinion in *Sherbert v. Verner* properly acknowledged the importance of safeguarding an individual's religious beliefs. 374 U.S. 398, 402 (1963). In *Sherbert*, a member of the Seventh-day Adventist Church had their employment terminated because their faith precluded their ability to work on Saturday. *Id.* at 399. This unavailability for the observance of the Sabbath further prevented the plaintiff from finding new work, and ultimately the plaintiff was disqualified from receiving unemployment benefits because the commission deemed that the unavailability to work was "without good cause." *Id.* at 400-01. However, this Court established that "any incidental burden" of religious practices must be "justified by a compelling state interest of a subject within the State's constitutional power to regulate." *Id.* at 403 (internal quotation marks omitted). The decision of the commission was overturned as the eligibility provisions could not "constrain a worker to abandon his religious convictions respecting the day of rest." *Id.* at 410. This Court, then, operated under a strict scrutiny standard in assessing free exercise claims until *Smith* marked a dramatic shift in the level of scrutiny afforded to First

Amendment claims. *Fulton*, 141 S.Ct. at 1883 (Alito, J., concurring). On that basis, the best path forward is a revival of the standards set forth in *Sherbert*.

In fact, this sentiment is reinforced in Justice Alito's concurrence to this Court's opinion in *Fulton*. *See id.* In pointing out the potential "startling consequences" of *Smith's* interpretation, Justice Alito draws attention to the fact that laws satisfying *Smith* could carry the ability to quash religious practices. *Id.* at 1884. And calls upon the Court to revisit the *Smith* decision. *Id.* at 1887. The concurrence, further, states the test derived from *Sherbert* – "that a law that substantially burdens religion must be narrowly tailored to serve a compelling interest" – as the legal standard that should be returned to in place of *Smith*. *Id.* at 1924. The current interpretation of *Smith* "threatens fundamental freedom" and is based off a decision that eschewed decades of prior precedent. *Id.* at 1924. Per Justice Alito, *Smith* should be overturned and the strict scrutiny standard that governs other First Amendment claims needs to be put in place to protect the freedoms ensured by the Amendment. *Id.* at 1925.

* * *

Smith should be overturned in response to the resounding displeasure with the level of scrutiny it affords free exercise claims and the inconsistent results the analysis produces. As demonstrated here, *Smith* allows laws displaying religious animus to survive under a rational basis review. This is an unacceptable result that returning to a strict scrutiny standard, in line with decades of prior precedent and the protections of the First Amendment, could prevent. Finally, principles of stare decisis should not stop this Court from overruling *Smith* because it is not an inexorable demand. Due to the misgivings of the legal community and the availability of a heightened scrutiny standard to take the place of *Smith*, this Court should seize the opportunity to overrule *Smith* and accordingly relegate PAMA to strict scrutiny.

CONCLUSION

For the forgoing reasons, Ms. Richter respectfully requests that this Court reverse its decision in *Sullivan* and find the actual malice standard to be unconstitutional. In the alternative, Ms. Richter requests that applying the actual malice standard to limited purpose public figures to be unconstitutional and remand for further proceedings.

Furthermore, PAMA directly burdens the free exercise rights of Kingdom Church adherents, and thus must undergo a strict scrutiny review. Under the current *Smith* test, PAMA is neither neutral nor generally due to the public animus that led to its enactment and would further fail strict scrutiny for its inability to comply with its asserted interest. That said, this Court should overrule the problematic framework from *Smith*, and, in so ruling, still subject PAMA to a strict scrutiny review that is in line with standard afforded to First Amendment protections. In sum, this Court should overturn the Fifteenth Circuit's opinion.

CERTIFICATE OF SERVICE

The United States of America, by and through its Counsel, hereby certifies that a true and accurate copy of this document was served on Opposing Counsel on this 31st day of January 2021.

/s/ Team 11

BRIEF CERTIFICATION

The work product contained in this brief is in fact the work product of all team members. Team 11 has complied with our school's honor code and the rules of the Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition.