No. 12345

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
of the Fifteenth Circuit

BRIEF OF PETITIONER

Attorneys for Petitioner #19

ISSUES PRESENTED

1. Whether the extension of the *New York Times v. Sullivan* standard to limited-purpose public figures is constitutional.
2. Whether the United States Court of Appeals for the Fifteenth Circuit erred in concluding that 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.

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JURISDICTION

The United States Circuit Court of Appeals for the Fifteenth Circuit issued its Opinion and Order on December 1, 2022. This Court has jurisdiction pursuant to 28 U.S.C §§ 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. I.

Delmont's Physical Autonomy of Minors Act.

STATEMENT OF THE CASE

Petitioner, Emmanuella Richter ("Emmanuella"), her husband Vincent ("Vincent"), and other Kingdom Church worshippers fled the South American Country of Pangea to escape persecution for their religious beliefs in 2000. (R. at 3). Even though Emmanuella, Vincent, and the congregation received asylum in the United States on grounds religious persecution, they have not been left alone; instead, they continue to endure challenges of religious oppression due to the enactment of the Physical Autonomy of Minors Act ("PAMA") and Governor Constance Girardeau's ("Governor") defamatory statements she made at a large press event. (R. at 3.)

Emmanuella founded The Church of the Kingdom ("Kingdom Church") in 1990 and amassed a following by financing door-to-door proselytization efforts as well as offering seminars. (R. at 3.) Since immigrating, Emmanuella, Vincent, and their congregation settled in the port city of Beach Glass in the state of Delmont, and for the past several decades their numbers have grown through converts and immigration. (R. at 3-4.) Kingdom Church adherents live in compounds separate from the rest of the state's population. (R. at 4.) These compounds provide for their own needs through agricultural initiatives and through the commercial sale of their tea which Vincent handles exclusively. (R. at 4.)

Emmanuella is not involved in the tea business and dedicates herself solely to church matters. (R. at 42.) She serves a behind-the-scenes roles in the management of Kingdom Church by developing church strategy, seminar planning, and overseeing compound operations, and meets with church elders who are the ones implementing changes throughout the compounds. (R. at 42.) The church seminars are led by the church's elders not Emmanuella, and she has not participated in any of the church's door-to-door proselytization since finding refuge. (R. at 42.)

Kingdom Church partakes in many religious practices, at issue here is their blood banking practice. (R. at 43.) Once an individual has become a confirmed church member, he or she may not accept blood or donate blood to a non-member. (R. at 43.) Members are required to bank their blood at blood banks in case of emergencies. (R. at 43.) Children are required to bank their blood and also partake in blood donations as a part of their homeschool activities (R. at 5.)

Until 2021, Delmont law never prohibited minors from consenting or in the cases of medical emergencies for consanguineous relatives from donating bodily organs, fluids, or tissues. (R. at 5-6.) However, in 2020, *The Beach Glass Gazette* featured Kingdom Church and discussed its blood-banking activities which invoked an outcry from other individuals in the community. (R. at 5.) In response to the outcry and encouragement from Governor, the General Assembly enacted PAMA forbidding the procurement, donation, or harvesting of the bodily organs, fluids, or tissue of a minor regardless of profit or consent. (R. at 5-6.)

After PAMA's enactment, ten Kingdom Church members were killed in a car crash only leaving the driver of the Kingdom Tea van Henry Romero ("Henry") in critical condition. (R. at 6.) Doctors determined that the only way to save Henry's life was to find a donor with a matching blood type. (R. at 6.) Henry's cousin Adam Suarez ("Adam"), a 15-year-old Kingdom Church member, was identified as the match and donated his blood pursuant to American Red

Cross's recommended amount. (R. at 6.) For undetermined reasons, Adam underwent acute shock and has successfully recovered; however, Adam's story was picked up by the media and became part of Governor's agenda for purposes of her re-election campaign. (R. at 7.)

Governor launched a task force of government social workers to investigate Kingdom Church's blood-bank requirements. (R. at 7.) When Governor discovered that Emmanuella requested injunctive relief from her task force, she stated at a large press event following her own campaign rally, "I'm not surprised at anything Emmanuella Richter does or says. What do you expect from a vampire who founded a cult that preys on its own children?" (R. at 8.)

On January 28, 2022, Emmanuella filed suit against Governor in the United States District Court for the District of Delmont Beach Glass Division requesting injunctive relief to prevent Governor's task force from gathering information about internal church activity arguing PAMA violates the First Amendment's Free Exercise Clause. (R. at 8.) She further amended her Complaint by adding an action for Governor's defamatory and false statement about Emmanuella at a large press event. (R. at 8.) Governor moved for summary judgement on both issues to which the District Court granted, ruling Emmanuella was a limited-purpose public figure and PAMA was neutral and generally applicable. (R. at 8, 15, 16, & 20.) This judgment was affirmed by the United States Circuit Court of Appeals for the Fifteenth Circuit. (R. at 38.)

SUMMARY OF ARGUMENT

The Fifteenth Circuit erred in concluding Emmanuella is a limited-purpose public figure and should not be subjected to the actual malice requirement. She is a private citizen who only brought forth this action to clear her name and her congregation from defamatory falsehoods of child abuse and is entitled to recover under the common law.

New York Times's extension to limited-purpose public figures is unconstitutional because its actual malice requirement is not constitutionally required because it (1) has no relation to the text, history, or structure of the Constitution; (2) is unworkable in the context of limited-purpose public figures; and (3) the transformed media renders it obsolete. This Court should adopt a standard permitting limited-purpose public figures to recover for less than actual malice.

The Fifteenth Circuit further erred in concluding PAMA does not violate Emmanuella's free exercise of religion. PAMA is not neutral and generally applicable. Further, the neutral and generally applicable standard outlined in *Emp't Div. v. Smith* should be overruled.

PAMA is not neutral or generally applicable. The law is not neutral as it was enacted in the wake of public outcry, and it's enacted with hostility toward Kingdom Church. PAMA is not generally applicable as it looks to solve a broad governmental interest by only targeting a specific practice of Kingdom Church. PAMA also violates other constitutional protections in conjunction with Emmanuella's free exercise claim. *Emp't Div. v. Smith* should be overruled. *Smith* uses poor reasoning hurting the groups the First Amendment was designed to protect. Its rule is difficult to apply, and it is inconsistent with prior case law, subsequent doctrine, and the text of the First Amendment. Subsequent developments in the law demonstrate *Smith's* faults. Finally, it is hardly relied on. PAMA is not neutral or generally applicable, and even if it is, this Court should return to the test applied before *Smith*. The Court of Appeals erred in affirming the District Court's grant of summary judgment.

I. THE *NEW YORK TIMES V. SULLIVAN* STANDARD AS APPLIED TO LIMITED-PURPOSE PUBLIC FIGURES IS UNCONSITUTIONAL.

This Court should reverse the appellate court's decision because Emmanuella is not a "limited-purpose" public figure and should not be subjected to the actual malice requirement.

She is a private citizen who only brought forth this action to clear her name and her congregation from defamatory falsehoods of child abuse and is entitled to recover under the common law.

Under Delmont law, a *prima facie* case of defamation requires a plaintiff to show that the defendant (1) published (2) an "actionable" statement with (3) the requisite intent about the Plaintiff. *Jordan v. Kollman*, 612 S.E.2d 203, 206 (Va. 2005) (citing *The Gazette, Inc. v. Harris*, S.E.2d 713 (Va. 1985)). Here, neither party disputes the defamatory and false nature of Governor's statement about Emmanuella nor that she published this statement to third parties. (R. at 10.) Since Emmanuella has met all three elements, she would prevail on her defamation claim against Governor under Delmont law; however, Governor asserts Emmanuella cannot prevail because Emmanuella is a limited-purpose public figure which triggers a federal requirement set by this Court that bars nearly any recovery for defamatory falsehoods.

In *New York Times*, this Court held the First and Fourteenth Amendments require a federal rule prohibiting a public official from recovering damages for defamation relating to official conduct without clear and convincing proof that the statement was made with "actual malice." *New York Times Co. v. Sullivan*, 376 U.S. 254, 284 (1964). This Court reasoned that it established this new rule because the traditional common law tort rules governing libel were inconsistent with many core free speech values; thus, as to why they had to be modified to conform with the requirements of the First Amendment. However, this Court got it wrong because defamation at common law offered protection of reputations, and states successfully struck the balance between the needs of freedom of speech and press and the individual's claim to compensation for wrongful injury.

A. *New York Times*'s actual malice standard does not apply to Emmanuella because she is a private person.

Under *New York Times v. Sullivan*, public figures must meet a higher standard for defamation claims than private individuals. *Id.* A public official, public figure, or limited-purpose public figure may recover for a defamatory falsehood only on a showing of "actual malice." *New York Times Co.*, 376 U.S. at 279-80; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). This Court adopted the "actual malice" standard requiring a public figure prove a defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.*, 376 U.S. at 280.

Gertz involved a libel action brought by a well-known Chicago attorney against Robert Welch, Inc., the publisher of a monthly magazine. *Gertz*, 418 U.S. at 325. The Nelson family hired Elmer Gertz to bring a civil suit against a Chicago police officer who also had been criminally prosecuted for killing their son. *Id.* at 326. During litigation, Gertz was featured in a magazine called the *American Opinion. Id.* Gertz had little to do with the police officer's criminal prosecution; however, the article accused him of masterminding the whole thing. *Id. American Opinion* claimed Gertz was a public figure, and that the magazine was entitled to the protection of the *New York Times* malice standard. *Id.* This Court disagreed, holding that Gertz was a private figure, and further holding in private figure cases, the actual malice standard was not required by the First Amendment. *Id.* at 347.

Gertz reasoned that the actual malice standard articulated in New York Times is too heavy a burden for private individuals. *Id.* Private individuals are generally unable to publicly rebut false statements because they lack access to channels of mass communication. *Id.* at 348. Thus, private parties are more vulnerable to published falsehoods than public figures with the resources to publicly refute them. *Id.* The court reasoned public officials understand and accept

the risk of public scrutiny when they take office. *Id.* The public commonly takes an interest in not only in the officials' performance of their duties but also in their private lives. *Id.*

Here, Emmanuella is a private figure like Gertz because Emmanuella has remained active in her community and professional affairs but only strictly within the confines of Kingdom Church's compounds. As Gertz served as an officer of local civic groups and of various organizations, Emmanuella is the head and founder of Kingdom Church. However, after Emmanuella and the congregation settled in the United States, Emmanuella has removed herself from the face of the church and has assumed a behind-the-scenes role allowing church elders to make decisions about the church's affairs. Like Gertz, Emmanuella is well known within her own circles but that does not give rise to her being a public figure. Most importantly, she has not achieved any considerable fame making her more than a private figure.

Gertz established two types of public figures in defamation cases: those who are "all-purpose" public figures, and those who are "limited-purpose" public figures. *Id*. at 342. "All-purpose" public figures consist of government officials and celebrities who command public attention "by reason of the notoriety of their achievements or the vigor or success with which they seek the public's attention[.]" *Id.* Most public figures, however, are "limited" public figures, who are subject to the *New York Times* standard only when they are defamed in connection with issues about which they have invited attention. *Id.* at 349.To constitute a limited-purpose public figure, the defendant in a defamation lawsuit must show by a preponderance of the evidence that: (1) the statement at issue dealt with a pre-existing public controversy; (2) the plaintiff voluntarily injected herself into the public controversy; and (3) the plaintiff played a role of special prominence in the controversy while seeking to resolve it. *Id*. at 351.

Here, it is plain to see that Emmanuella is not an all-purposes public figure because she is not a person that has achieved celebrity status. Even though she is the head of the Kingdom Church, Emmanuella has made clear that she operated this role behind-the-scenes while the elders make all the decisions, and she also does not lead the church's seminars. Emmanuella is also not a limited-purpose public figure because she did not voluntarily inject herself in the public controversy of Kingdom Church's blood banking practices.

Courts look at the amount of freedom the individual has in choosing to engage in the controversy in the first place or whether he or she was thrusted into the public light. *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976); *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 166 (1979). In *Fortich*, a person who has been publicly accused of committing an act of serious sexual misconduct would be punishable by imprisonment cannot be deemed a "limited-purpose public figure" merely because he or she makes reasonable replies to those accusations. *Fortich v. Capital Cities/ABC, Inc*., 37 F.3d 1541, 1558-89 (4th Cir. 1994). The *Fortich* Court concluded that the person being accused's public comments and appearances were reasonable replies to the accusations of child abuse. *Id.* at 1559.

Here, the only times Emmanuella "responded" to this controversy is when (1) she, Vincent, and many other church members were stopped and interrogated by reporters outside the hospital as they were trying to visit and check on Adam; (2) when she filed for injunctive relief against Governor's task force from targeting Kingdom Church and its members; and (3) after Governor made an accusation that Emmanuella endorses child abuse within her congregation. Emmanuella was compelled to bring this action to court because Governor was targeting Kingdom Church with her task force and she needed to stop this targeted attack.

Emmanuella is similar to the plaintiff in *Fortich*, Fortich and Emmanuella were both accused of accusations of serious abuse that would be punishable by imprisonment if the allegations were well-founded. To clear her name from Governor's unfounded allegations of child abuse to the press, Emmanuella needed to act, so that the Governor's unnecessary defamatory falsehood did not endanger Emmanuella's or her congregations' lives. Her responses were reasonable to the defamatory falsehood made against her; thus, she is not a limited purpose public figure and Governor should be held liable for the harm she has caused.

B. Even if Emmanuella is a "limited-purpose" public figure, this Court should no longer apply the *New York Times* standard to "limited-purpose" public figures.

1. The actual malice requirement of New York Times and its progeny is not constitutionally required and should be rejected once in for all.

Historically, state law nor the First Amendment required a plaintiff to prove actual malice in a defamation case. Under the then prevailing state libel law, the defamed individual had only to prove a false written publication that subjected him to hatred, contempt, or ridicule . . . ." *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 765 (1985) (White, J., concurring). *New York Times v. Sullivan* was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander." *Id.* at 766. Neither *New York Times* nor its progeny are anchored or have any basis in the First Amendment. As Justice Clarence Thomas observed, *New York Times* was a "policy-driven decision [] masquerading as constitutional law." *Mckee v. Cosby*, 139 S.Ct. 675, 676 (2019) (Thomas, J., concurring). From the time the United States was founded until 1964 when *New York Times* was decided, defamation law was "'almost exclusively the business of state courts and legislatures.'" *Id.* (quoting *Gertz,* 418 U.S. at 369 (White, J., dissenting)).

This Court based its decision in *New York Times* on the idea "public benefit from publicity [of public officials] is so great and the chance of injury to private character so small[.]" *New York Times*, 376 U.S. at 281 (citing *Coleman v. MacLennan*, 98 P.281, 286 (1908)). However, *New York Times* arose during the Civil Rights Era when African Americans were targeted by state court systems for their efforts to achieve equality which encouraged the Court to "fashion[] its own 'federal rule[s]' by balancing the 'competing values at stake in defamation suits" in order to meet the societal goals of the Civil Rights Era that consisted of thwarting racial discrimination, protecting press organizations from bankruptcy, and defeating frivolous suits. *Mckee*, 139 S.Ct. at 677 (Thomas, J., concurring). By adopting the actual malice standard, the Court sought to prevent "public servants [from retaining] an unjustified preference over the public they serve[.]" *Id.* at 282. Since this decision, courts have based subsequent decisions primarily on policy considerations, making "little effort to ground their holdings in the original meaning of the Constitution." *Id*. at 281. The Supreme Court has acknowledged that the actual malice rule in *New York Times* is "largely a judge-made rule of law." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 502 (1984).

If it were not for *New York Times* and its progeny, Emmanuella would be permitted to proceed successfully with her defamation claim because the First Amendment does not require such proof of actual malice. Since the *New York Times*'s requirement of actual malice does not bear any "relation to the text, history, or structure" of the Constitution [or to the First Amendment], Emmanuella should be permitted to proceed with her defamation claim. *Tah v. Global Witness Publishing, Inc*., 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting).

2. New York Times standard unworkable, particularly in the context of limited-purpose public figures.

The "fact that a decision has proved 'unworkable' is a traditional ground for overruling it." *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009).*New York Times's* actual malice standard has become unworkable, particularly in the context of public figures.

New York Times's actual malice standard incentivizes the likelihood that the press will publish injurious falsehoods. The actual malice standard does not encourage careful and thorough research before making statements regarding a public figure. To the contrary, actual malice standard discourages well-informed speech. For example, *New York Times* standard does not require a publisher to investigate and seek out corroborative facts beyond the minimum necessary. The more a reporter investigates, the more likely it is that the reporter will discover some information that casts the veracity of the story into doubt, which would increase the likelihood of liability. Simply, failing to fully investigate a story, however, constitutes mere negligence. Under the actual malice standard, publishers can take refuge in ignorance by disseminating information quickly without taking time to investigate and confirm its accuracy. §6:53. *New York Times v. Sullivan : bringing the First Amendment to bear on defamation law—Proving the existence of actual malice*, 1 Rights and Liabilities in Media Content § 6:53 (2d ed.)

"The Court extended its actual malice standard from 'public officials' in government to 'public figures' outside government." *Berisha v. Lawson*, 141 S.Ct. 2424, 2426 (2021) (Gorsuch, J., dissenting from denial of certiorari). In *Gertz*, "the Court cast the net even wider, applying its standard to those who have achieved pervasive fame or notoriety' and those 'limited' public figures who 'voluntarily inject' themselves or are 'drawn into a particular public controversy.'" *Id*. (quoting *Gertz*, 418 U.S. at 351). Speakers and publishers are free to publish false stories about many people who have no direct connection to public policy, solely because the targets happen to have a degree of notoriety, with no fear of liability because these people barely have

any access to channels or means to protect their reputations. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 154 (1967). It is unfair for this Court to allow "public figures," to suffer damages to their reputations with no chance of recovery for damages even when they get swept up in a matter of public interest involuntarily like Emmanuella. *McKee*, 139 S. Ct. at 676 (2019) (Thomas J., concurring in denial of a writ of certiorari).

3. The rapid and vast transformation of the media renders New York Times as obsolete.

Since the Court decided *New York Times* in 1964, the "media landscape has shifted in ways few could have foreseen." *Berisha*, 141 S.Ct. at 2427 (Gorsuch, J., dissenting from denial of certiorari). First, when *New York Times* was announced, relatively few publishers existed. They held an esteemed position in society and generally operated within a high-cost business environment that encouraged accuracy. Meanwhile, today's technology permits anyone to be a publisher at little cost and not much to lose should a factfinder determine certain speech is false. Second, the size of the audience any given publisher can reach is now greatly expanded. In the 1960s, most speech was local or at most, regional. Today, social media and internet sites allow nearly anyone to speak nationally or even internationally as speaking locally. As a result, defamatory speech may reach a broader audience and carries a greater potential to cause harm, that was true in the day of *New York Times*. Third, modern technology has dramatically increased the number of persons who qualify as public figures. It appears nearly anyone can become a public figure by utilizing various communication tools made possible by the Internet. David A. Logan, *Rescuing Democracy by Rethinking New York Times Co. v. Sullivan*, 81 Ohio St. L.J. 759 (2020).

C. Limited-purpose public figures should recover for less than actual malice.

Instead of requiring either "actual malice" or negligence, this Court could achieve a better balance by adopting a scienter requirement of "highly unreasonable conduct constituting an extreme departure from the standards of investigation[,] [commenting], and reporting ordinarily adhered to by the responsible [speaker] [or] publisher." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 63 (1971) (Harlan, J., concurring); *Butts*, 388 U.S. at 156. This Court should adopt Harlan's standard because it is a higher standard than a mere negligence standard that alters the "actual malice" standard to a more objective standard and strikes "a better balance between the competing interests at play and lessen[s] the flow of falsehoods into our public debate."

This Court should reverse the Fifteenth Circuit's decision and further declare the extension of *New York Times* to limited-purpose public figures is unconstitutional.

II. THE PHYSICAL AUTONOMY OF MINORS ACT IS NEITHER NEUTRAL NOR GENERALLY APPLICABLE, AND EVEN IF THE COURT FINDS IT IS, EMP. DIV., DEP'T OF HUMAN RES. V. SMITH SHOULD BE OVERRULED.

The Free Exercise Clause of the First Amendment states "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. CONST., amend. I, XIV. The First Amendment applies to the states through the Fourteenth Amendment. *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Congress has enacted the Religious Freedom and Restoration Act of 1993 ("RFRA") to address federal claims under the Free Exercise Clause. 42 U.S.C.S. § 2000bb-1 (West 2023). Delmont has not enacted an equivalent state law and the Court has refused to extend the RFRA to state actions. *City of Boerne v. Flores*, 521 U.S. 507 (1997). Therefore, whether a challenged claim is in violation of the First Amendment, must be looked at under the Free Exercise Clause.

This Court has held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability.'" *Emp't Div. v. Smith*,

494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263, n.3 (1982) (Justice Stevens, J., concurring in judgment)).

Emmanuella avers this Court should overrule the *Smith* decision and revert back to the test requiring if a state enacts a law that places a burden on the free exercise of religion, even if incidental, it may do so only if there is a compelling state interest in the regulation of a subject within the state's constitutional power to regulate. *Sherbet v. Verner*, 374 U.S. 398, 403 (1963) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). To overrule a case, the court will balance the interests in overruling the case against adhering it. *Janus v. American Fed'n, Cnty., & Mun. Emps. Council 31*, 138 S. Ct. 2248, 2478 (2018).

It was "'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). Just as the founders of this country journeyed here to escape an oppressive government in pursuit of religious liberty, Kingdom Church did the same. A coup toppled their former country's government leading to the targeting of their faith and their followers' lives in jeopardy by the new government's intolerance. Emmanuella and the Kingdom Church congregation fled to the United States to escape religious oppression. Not overruling *Smith* or applying it in a way which allows Governor to target Kingdom Church goes against the very fundamentals of the First Amendment.

A. The Physical Autonomy of Minors Act is not neutral or generally applicable.

In *Smith*, the court held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause unless they are neutral and generally applicable. *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021) (citing *Smith*, 494 U.S. at 878-882). "Neutrality and general applicability are interrelated" and "failure to satisfy one is a likely

indication that the other has not been satisfied. *Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 532. *Smith* also allows an exception for laws that are generally neutral and applicable but prohibit a Free Exercise claim coupled with some other constitutional right to also be evaluated under strict scrutiny. *Smith*, 494 U.S. at 881.

1. The Physical Autonomy of Minors Act is not neutral as it targets Kingdom Church.

If the purpose of a law is to restrict religious practices because of a religious motivation, the law is not neutral. *Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 533 (*see also Smith*, 494 U.S. at 878-879). A law lacks facial neutrality, if looking at its text it refers to a religious practice without a secular meaning. *Id.* Governor will argue that PAMA is facially neutral as the text prohibits all minors from donating blood. It does not mention any religion, nonsecular practices, or Kingdom Church.

However, facial neutrality is not determinative. The Free Exercise Clause extends beyond facial discrimination, forbidding "subtle departures from neutrality." *Id.* (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)). In determining whether the purpose of a law is to restrict religious practice, the court will look to the historical background of the decision under the challenge, the specific series of events leading to its enactment and the legislative or administrative history including contemporaneous statements made by members of the decision-making body. *Id.* at 540 (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

In *Church of Lukumi Babalu Aye*, the city passed an ordinance prohibiting animal sacrifice. *Church of Lukumi Babalu Aye, Inc*., 508 U.S. at 528. The law followed public concern noted by the city council at an emergency meeting that a Santeria church being built in the city would lead to practices which were inconsistent with public morals, peace, or safety. *Id.* at 526.

The court held the law was not neutral, as leading up to its enactment, city officials made direct comments showing animosity toward the Santeria religion and its practices revealing the text of the ordinances to be "religiously gerrymandered." *Id.* at 542.

In *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights, Comm'n*, a baker was held to be in violation of Colorado's anti-discrimination act because he refused to bake a wedding cake for a same-sex marriage. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights, Comm'n*, 138 S. Ct. 1719, 1723 (2018). In assessing the statute's neutrality, the court considered negative comments made by commissioners about the baker's religion. *Id.* at 1729. The court held the comments made by the Commissioner in enforcing the statute indicated a hostility toward the baker's religion which was not neutral. *Id.* at 1731.

Our case is analogous to both examples. Just as in *Church of Lukumi Babalu Aye*, the law was enacted after a city council meeting where citizens expressed their concern of a particular group's religious practices. Likewise, PAMA was enacted after a local newspaper ran a story about Kingdom Church and the blood donation practice. The report raised outcry and concern from those in the community and the enactment of the law immediately followed. Further, just as in *Masterpiece Cakeshop* officials made disparaging comments about a religious practice, Governor, in her capacity as a government official, referred to Kingdom Church as a "vampire cult" which "preys on its children." Also, the task force Governor commissioned was not enacted to investigate PAMA violations but rather only specifically to investigate Kingdom Church.

PAMA is not neutral. It was enacted in the wake of public outcry regarding Kingdom Church. Its enforcement also targets Kingdom Church specifically through Governor's commissioned task force while Governor made remarks showing hostility toward the group. Looking past PAMA's text, its purpose is to restrict the practices of Kingdom Church.

2. PAMA is not generally applicable as it is underinclusive.

"A law is not generally applicable if it 'invite[s]'the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'' *Fulton*, 141 S. Ct. at 1877 (citing *Smith*, 494 U.S. at 884). A law is also not generally applicable if it prohibits religious conduct while permitting secular conduct which contradicts the state's interest in enforcing the law. *Fulton*, 141 S. Ct. at 1877 (*see also Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 542-46). The court in *Church of Lukumi Babalu Aye* held law prohibiting the sacrifice of animals was not generally applicable as other killings of animals were exempt from the law. *Church of Lukumi Babalu Aye*, 508 U.S. at 536. Governor will argue our case is distinguishable as PAMA provides no exceptions to its prohibitions, applying equally to secular and nonsecular practices. However, forms of under inclusiveness mean a law is not generally applicable. *Fulton*, 141 S. Ct. at 1877.

In *Church of Lukumi Babalu Aye* the city imposed the law against sacrificial animal killings for two broad governmental purposes, to protect public health, and prevent cruelty to animals. *Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 542. The court held the law was not generally applicable as it was underinclusive for those ends. *Id.* It fails to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria does. *Id.*

Governor will argue the law's underinclusiveness in *Church of Lukumi Babalu Aye* stems from it allowing other forms of animal killing which contradicted their goals whereas PAMA applies to all minors equally. However, the two cases are similar. In that case, the city cited two governmental purposes, animal cruelty and public health, with a law which was focused only on a particular religious practice of Santeria. Here, Governor is citing to a rise in child abuse by focusing only on the practice of Kingdom Church. Although the law does not carve out

exceptions, the practice of having children supply their own blood is a practice which Kingdom Church is known for. The law was enacted after the legislature saw a rise from 2016-2020 in child abuse, but it is unapparent how the enactment of PAMA will help that goal. There is nothing in Governor's statistics regarding child abuse showing the rise in child abuse is in anyway related to children donating blood or organs. PAMA refuses to address more common ways children are typically abused while specifically targeting one possible way children might be abused. Governor's enforcement of PAMA also is certainly not generally applicable. She commissioned a task force not to investigate violations of PAMA generally but rather commissioned the task force specifically to investigate Kingdom Church.

Further, there is nothing to suggest that Kingdom Church's blood donation practices can be linked to the goals set by PAMA. Blood donations occur on a schedule, within the guidelines set out by the American Red Cross, and donations may be skipped if a student is ill. Kingdom Church's own policies regarding the blood donation show they provide a safe environment. Enforcing PAMA completely contradicts the goals set out by Governor.

PAMA and its enforcement are not generally applicable. Although there are no exceptions, PAMA looks to solve a societal problem while only targeting a specific area which is known to be a religious practice of Kingdom Church. PAMA is being enforced against Kingdom Church alone and no other possible violators. Meanwhile, Kingdom Church has taken the necessary steps to show that their policies align with the asserted government interests. PAMA fails to address its broad governmental purpose and was only enacted to target Kingdom Church.

3. Even if PAMA is neutral and generally applicable it falls under the hybrid-rights exception.

In *Smith*, the court carved out an exception for laws that were neutral and generally applicable but were still barred by the First Amendment if it presents a hybrid situation where the

Free Exercise Clause is "in conjunction with other constitutional protections." *Smith*, 494 U.S. at 881. Petitioner's Free Exercise rights are restricted by PAMA, and the rights of the parents in raising their children. In *Wisconsin v. Yoder*, parents were charged for violating a compulsory school attendance law for refusing to send children to school past the eighth grade. *Wisconsin v. Yoder*, 406 U.S. 205, 207-208 (1972). The groups felt that attendance at public high schools were contrary to their beliefs, and the law was in violation of the Free Exercise Clause to which the court agreed. *Id*. at 209, 234. *Smith* asserted the reasoning behind this decision was that the Free Exercise claim in *Yoder* was in conjunction with the parent's right "to direct the education of their children." *Smith*, 494 U.S. at 881.

Governor will argue the exception applied to *Yoder*, is inapplicable here as the Free Exercise claim was in conjunction with educational rights. *Smith* explicitly stated Free Exercise claims alongside other constitutional protections, not merely only the right to education. *Smith*, 494 U.S. at 881. In *Cantwell v. Connecticut,* the Court reversed a conviction because it violated a defendant's freedom to exercise religion and right to communicate demonstrating a clear intent for this exception to apply outside of only education. *Cantwell*, 310 U.S. at 307.

Further, the application of this exception in *Yoder*, was not cited as the right to "education." The court stated, "when the interests of parenthood are combined a free exercise claim." *Yoder*, 406 U.S. at 233. This case not only implicates the religious practice of the Kingdom Church but also the rights of parents in raising their children within the Church.

Even if the exception only applied to education, Kingdom Church could still make a claim. The blood banking is part of the student's monthly service projects in their homeschool activities. The blood donation activities are directly linked to the children's education. Even under this narrow view of the exception, Emmanuella and her congregation still have

constitutional protections which are being restricted. Emmanuella's First Amendment rights under the Free Exercise Clause have been violated by PAMA. Applying the current test, PAMA is not neutral or generally applicable, and she can assert multiple constitutional protections along with her free exercise claim.

B. Employment Division v. Smith should be overruled.

It is time the court overrules the Free Exercise test outlined in *Smith.* The principal of stare decisis provides for predictability, reliance, and integrity in the judicial process and strong grounds are required for overturning a prior case. *Janus*, 138 S. Ct. at 2478. However, stare decisis "is at its weakest when we interpret the Constitution" and the doctrine applies with even less force to wrongly decided First Amendment Cases. *Id.*The *Janus* court, which also overruled a wrongly decided a First Amendment case, applied a five-factor test in determining whether to overrule precedent. This included the quality of the precedent's reasoning, the workability the rule established, its consistency with other related decisions, developments since the case was handed down, and reliance on the decision. *Id.* at 2478-2479.

1. Smith's holding stems from poor reasoning.

Smith completely disregards the religious practices of less represented groups. In *West Va. State Bd. of Educ. v. Barnette,* parents of children who refused to salute the American Flag were prosecuted. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 627 (1943). The court held compelling the flag salute violated the First Amendment. *Id.* at 642. The decision made no reference to neutrality or general applicability but came to its conclusion in rejecting national unity as a strong enough interest in restricting the right to exercise religion. *Id.* at 641. The court reasoned "[i]f there is any fixed start in our constitutional constellation, it is that no official. . . can prescribe what shall be orthodox in politics, nationalism, or religion. *Id.* at 642. *Smith's* test

allowing neutral and generally applicable laws would allow these types of forced compulsion laws as they would apply neutrally to everyone. This impacts small groups such as Kingdom Church who have unorthodox religious practices. *Smith* acknowledges this by stating "[i]t may be fairly said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in." *Smith*, 494 U.S., at 890.

Smith's solution to protecting religious practices is contradictory. *Smith* states if society believes it is important to afford protections to religious beliefs, then it can be expected legislation will be passed to protect them. *Id.* If the individuals who are most likely to be harmed by *Smith* are those who are involved in non-widely engaged practices, how will majority-determined elections be any help to them? That is why the First Amendment was written and why the court in *Barnette* decided to protect that right. *Smith* uses poor reasoning which will ultimately harm these very groups.

2. Smith lacks workability.

Application of *Smith* has proved difficult. The first difficulty is knowing whether it applies. In federal cases the RFRA applies, and several states have adopted their own version of the act eliminating *Smith's* application in those cases. *See* § 2000bb-1. Therefore, the first hurdle in applying *Smith* is determining whether it applies.

In his concurrence to *Fulton. v. City of Phila.*, Justice Alito presented several reasons as to why *Smith* is unworkable. *Fulton*, 141 S. Ct. at 1917 (Alito, J., concurring). First, there is difficulty in determining a law's neutrality and whether courts should only consider the law facially or subjective motivations of lawmakers. *Id.* Although subjective motivations provide a better look into whether a particular group is being targeted, it also is difficult to determine the true motivations of an actor. *Id.*

Justice Alito also outlines another difficulty in applying *Smith*, the hybrid-rights exception. District Courts have differed as to what type of right and level of success a claim under that right would have to arise to. *Id.* at 1918. *Smith*'s unworkable doctrine becomes even more difficult to apply when considering the applicability of this exception.

Smith's unworkability is solved simply by returning to the test used by the RFRA and which was outlined in *Sherbert.* The *Sherbert* test makes the federal government, and all states uniform, while avoiding having to determine the motivations of lawmakers and trying to determine how to weigh other constitutional rights with Free Exercise claims.

3. Smith is inconsistent with other areas of First Amendment Law.

Smith's holding goes against line of cases which preceded it, Congress's heightened protections of the First Amendment following the case, and the language of the First Amendment. First *Smith* was a major departure from prior case law. In *Sherbert v. Verner*, the court required a law imposing a restriction on religion to be based a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate." *Sherbert*, 374 U.S. at 402. *Smith* does away with this standard merely requiring the law to be neutral and generally applicable going against decades of precedent. *Smith*, 494 U.S. at 879. Defenders of *Smith* will argue this departure is reconciled by cases that applied *Sherbert* were only unemployment compensation cases or were hybrid-right cases. However, none of these cases made these types of distinctions. *Fulton*, 141 S. Ct. at 1893 (Alito, J., concurring).

Smith is also inconsistent with the subsequent Free Exercise doctrine as in 1993 Congress enacted RFRA. § 2000bb-1. RFRA applies the same standard as *Sherbert* returning to the compelling interest-strict scrutiny standard. Several states have followed suit, adopting an

equivalent statute. Fla. Stat. Ann. § 761.01 (West 2023). Therefore, *Smith* is inconsistent with subsequent doctrine.

Third, *Smith* is inconsistent with the text of the First Amendment. The Free Exercise Clause of the First Amendment states, "Congress shall make no law. . . prohibiting the free exercise of religion." U.S. CONST., amend. I, XIV. Considering the meaning of these words, "'prohibiting the free exercise of religion' was [and still is] forbidding or hindering unrestrained religious practices or worship." *Fulton*, 141 S. Ct. at 1896 (Alito, J., concurring). The meaning of those words is inconsistent with *Smith's* neutral and generally applicable standard which allows these prohibitions. *Id.* Therefore, *Smith* is at odds with prior case law, subsequent reform, and the First Amendment itself.

4. Subsequent developments reveal Smith's inapplicability and favor Sherbert.

As stated, since *Smith* was handed down, the RFRA was enacted by the federal government, and many states followed suit. The creation of these laws not only demonstrates a dedication to religious protection by the government but also that a compelling interest standard is viable moving forward as that is what these statutes require. More recent developments include the wave of COVID-19 litigation which have put religious practices against government interests when protecting the public. The court applied *Smith* to New York's COVID-19 regulations which imposed restrictions on attendance in religious services in certain areas. *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63, 66 (2020). The law failed *Smith* as it was not neutral by distinguishing between houses of worship and essential business forcing the court to apply strict scrutiny regardless. *Id.* at 67. The COVID-19 litigation demonstrates the faults of *Smith* for both religious practitioners and even lawmakers. None of these laws restricting houses of worship are going to be neutral as they must differ between nonessential and essential

businesses, so *Sherbert* applies regardless. It is viable to immediately apply the test used by *Sherbert* and the RFRA.

5. Smith is not heavily relied on.

Governor will argue overturning *Smith* will be detrimental to decades of precedent and states that have followed it. However, *Smith* has no bearing on states which have applied their own form of the RFRA. Further, there is a line of cases where the law failed the *Smith* test and *Sherbert* was applied anyway. *Masterpiece Cakeshop,* 138 S. Ct. at 1719; *Church of Lukumi Babalu Aye, Inc*., 508 U.S. at 520. In *Fulton*, the city refused to work with a religious foster care center who did not certify same-sex couples. *Fulton*, 141 S. Ct. at 1874. The court ruled the law was not generally applicable because it allowed for exceptions based on the Commissioner's discretion and proceeded to apply strict scrutiny. *Id.* at 1877. This case is just one example of the many rulings that are untouched by overruling *Smith.* Overruling *Smith* simply requires returning to the original test which is still applied in a vast number of cases today.

Smith is based on poor reasoning, lacks workability, contradicts Free Exercise doctrine, is inapplicable to recent developments, and not heavily relied on. The court should apply *Sherbert*'*s* strict scrutiny standard in this case and future cases regarding Free Exercise claims.

The Fifteenth Circuit erred in concluding PAMA is neutral and generally applicable. Further, even if PAMA were to be neutral and generally applicable, *Smith* should be overruled.

CONCLUSION

This Court should reverse the Fifteenth Circuit's judgment in favor of Emmanuella Richter.

BRIEF CERTIFICATE

Attorneys for Petitioners certify that we have complied with the Rules of the Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition at The Catholic University of America Law School.

1. This brief is the work product solely of the Attorneys for Petitioners #19.
2. The Attorneys for Petitioners #19 have complied fully with our law school's governing honor code.
3. The Attorneys for Petitioners #19 have complied with all the Rules of the Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition.

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Date: 1/31/2023