Case No. 21-CV-7855

IN THE
Supreme Court of the United States

WILL WALLACE,

Plaintiff-Petitioner.

v.

POSTER, INC.

Defendant-Respondent.

ON WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF
APPEALS FOR THE FIFTEENTH CIRCUIT

BRIEF OF PETITIONER
WILL WALLACE

Team Number 001
January 30, 2022
Attorneys for Will Wallace

QUESTIONS PRESENTED

1. Whether the CC Law violates the First Amendment's Free Speech Clause by requiring an online platform to host—but not endorse—speech on equal terms.
2. Whether the CC Law is neutral and generally applicable, and therefore constitutional under the First Amendment's Free Exercise Clause.

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STATEMENT OF FACTS

Poster is a large technology company that provides a website for members of the public to publish content. R. at 1. Poster holds a "substantial share" in the artistic self-expression market. R. at 2. With few current alternatives, online users depend on Poster for artistic expression. *Id.* One of these online users, Ms. Katherine Thornberry, published on the platform to promote her novel "Blood is Blood." R. at 3. Unfortunately, the novel's title is also the slogan of animal rights group AntiPharma. R. at 4. Poster officially disclaims endorsement of content expressed on its website. R. at 2. However, because "Blood is Blood" offended Poster's board members, Poster suspended Ms. Thornberry's account. R. at 1, 5. Board members affiliate with the American Peace Church ("APC") and disagree with AntiPharma's propositions. R. at 1. Suspending Ms. Thornberry's account and removing her artistic content from the website was the board members' response to a contrary viewpoint. R. At 1, 5.

In this context, Delmont's Attorney General brought an action against Poster to protect public expression, specifically Ms. Thornberry's artistic expression. R. at 6, 22-23. The Attorney General stated at a press conference that, "The APC-founded Poster platform is discriminating against Delmont citizens based on their political viewpoints… and we bring this action for the first time today to stop that practice." *Id.* The Attorney General evoked Delmont's Common Carrier Law ("CC Law"). *Id.*

The CC Law mandates that online platforms with a "substantial market share" "*shall* serve all who seek or maintain an account, regardless of *political*, *ideological*, or religious viewpoint." Delmont Rev. Stat. § 9-1.120(a) (emphasis added). Moreover, common carriers "*shall* refrain from using corporate funds to contribute to *political*, religious, or *philanthropic* causes." *Id.* (emphasis added). The law contains zero exemptions, religious or otherwise. When common carriers violate

the CC Law, the Court may impose monetary penalties of up to thirty-five percent of daily profits, compounded daily until the offender conforms with the law. *Id.*

The Delmont Legislature enacted the CC Law for two reasons. First, the Law protects Delmont citizens from online platforms, such as Poster, with substantial control over public expression. R. at 35. Responding to constituent concerns, the Governor advocated for the CC Law to ensure "that public forms and our citizens' constitutional [free expression] rights are secure." *Id.* Second, the CC Law prevents online platforms from favoring a particular viewpoint over another viewpoint via donations or denying access to the marketplace. *Id.*

Poster's CEO, Mr. John Kane, contends that the CC Law requires Poster to publish content contradictory to APC tenets so that Poster must either violate its religious mission or shut down operations. R. at 37. While Poster may be "the kind of website the law is designed to address," the CC Law does not apply to Poster alone. R. at 35. Poster is a singular example of a company with overwhelming control over the public forum; the CC Law applies to *all* common carriers. *Id.*

PROCEDURAL HISTORY

On appeal, the Court of Appeals for the Fifteenth Circuit reversed the District Court's judgment, which denied the government's motion for summary judgment on the free speech and free exercise issues. R. at 16–17, 33. Petitioner thereafter filed a writ of certiorari to the Fifteenth Circuit, which this Court granted. R. at 38.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit has entered a final judgment in this matter. *Wallace v. Poster, Inc.*, C.A. No. 21-CV-7855 at *33 (15th Cir. 2021). Petitioner filed a timely petition for writ of certiorari, which this Court granted. This Court has jurisdiction in this case pursuant to 28 U.S.C. § 1254(1) (2020).

SUMMARY OF THE ARGUMENT

Delmont's CC Law does not violate Poster's First Amendment right to free speech for two reasons. First, the CC Law is constitutional because Delmont may compel Poster to host speech without Poster endorsing the speech. This Court's precedent indicates that the government may compel a private owner to host speech on equal terms. In other words, a government may require a website to afford all internet users equal access to the public forum, even if the website disagrees with some of the content that users publish online. Second, even though the CC Law requires Poster to host speech on its platform, hosting speech is distinct from endorsing or promoting it. The CC Law requires Poster only to host speech, not endorse speech. Therefore, Delmont's CC law is constitutional. The Fifteenth Circuit erred by concluding otherwise.

Likewise, Delmont's CC Law does not violate Poster's First Amendment right to free exercise for two reasons. First, the CC Law is neutral because the Legislature designed the law to promote public expression on the online forum, not to restrict Poster and APC from performing religious acts. Second, the CC Law is generally applicable and does not target Poster. Rather, the CC Law evokes general language to bar *all* common carriers from favoring some online content over other content, and some financial causes over other causes. Delmont's CC Law creates an equal playing field for internet users. Therefore, the Law is constitutional. This Court should reverse the Fifteenth Circuit's decision to the contrary.

ARGUMENT

I. THE CC LAW DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE DELMONT'S LEGISLATURE CAN COMPEL POSTER TO HOST SPEECH WITHOUT POSTER ENDORSING IT.

This case is about the ability to be heard on equal terms. In an overly noisy and competitive world, everyday citizens should not have their creative futures determined by the whims of an otherwise unaccountable corporation. The Fifteenth Circuit's reasoning boils down to two points. First, the CC Law prohibits Poster from speaking. Second, the Law compels Poster to endorse speech that it does not wish to endorse. The Fifteenth Circuit misunderstood the importance of the first point and mishandled the second. This Court's precedent indicates that Delmont may require Poster to host speech without violating the First Amendment. Likewise, requiring Poster to *host* does not require Poster to *endorse* speech. Therefore, the CC Law is constitutional. This Court should reverse the Fifteenth Circuit's decision to the contrary.

A. How to think about Poster: the digital equivalent of a flea market bookseller.

The lower court construed Poster as a digital conductor, guiding the melody of authors with the wave of its digital baton. The lower court misunderstood Poster's role in this evolving industry. Instead, Poster is better understood as the digital equivalent of a flea market bookseller. Imagine strolling through a flea market and coming across a stand offering authors' self-published works. Approaching the stand, you notice "POSTER***" atop the stand, indicating to all that Poster owns the *stand*, but does not itself write the *books*. Faint writing follows the asterisks: "This book stand disclaims any endorsement of any views expressed in the material published. We don't write. We just sell." This is a popular stand. In fact, nearly four out of every five self-published works read in your city are purchased from Poster.

Poster's success is attributable to its extensive book selection. Any self-published author who wishes to sell their creative work can count on Poster to display their work at the market. Authors and customers alike may rely on Poster because the city passed an ordinance requiring booksellers with a "substantial market share" to carry and sell books authored by individuals from all backgrounds and ideologies. A book cannot be removed from Poster's shelves simply because Poster disagrees with the book's content. Therefore, the Poster stand displays books without demonstrable preference, even if Poster privately favors books written by members of the local church.

You peruse the wide-ranging books and purchase one. The bottom of your receipt contains the same message on the stand's sign: Poster disclaims endorsement of any views expressed in the books for sale. You further learn that authors contracting with Poster to sell their works find the exact same terms in their contracts. Consequently, everyone involved—self-publishers, Poster, and customers—recognizes that Poster is solely a means for flea market visitors to purchase books. The Fifteenth Circuit misunderstood Poster's purpose. Poster is a means of connecting self-published works with willing customers, not a publishing entity. Relying on this model, the Fifteenth Circuit's error becomes readily apparent.

B. Even though Poster cannot refrain from hosting speech, it never had the right to do so under the First Amendment.

Incorporated under the Fourteenth Amendment, the First Amendment prohibits abridgement of citizens' freedom of speech. U.S. Const. amend. I, XIV. That freedom extends to corporations. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010). Meanwhile, this Court recognizes, "Requiring someone to host another person's speech is often a perfectly legitimate thing for the Government to do." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l,*

Inc., 140 S. Ct. 2082 (2020) (Breyer, J., dissenting). Poster cannot assert a First Amendment right to refrain from hosting user speech. Poster cannot assert such a First Amendment right because it does not exist. Thus, Delmont may require Poster to host speech without running afoul of the First Amendment. The Fifteenth Circuit erred in holding that the First Amendment protected Poster's decision to refuse hosting user speech. This Court should reverse.

1. *Provisions like the CC Law that require access on equal terms that impact editorial discretion are evaluated under intermediate scrutiny.*

Must-carry provisions, functionally akin to common carrier designations, are compatible with the First Amendment. *Turner Broadcasting System, Inc. v. F.C.C.*, upheld a statute requiring cable systems to carry over-the-air broadcasters. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994). This Court rejected the cable operator's argument that because the access mandate impacted their "editorial control," the statute required strict scrutiny. *Id.* at 653–57. Instead, the Court applied intermediate scrutiny. *Id.* at 662. A speech regulation will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* In *Turner*, two of the interests the Court recognized were "promoting the widespread dissemination of information from a multiplicity of sources" and "promoting fair competition in the market for television programming." *Id.* Additionally, the government has a compelling interest in the marketplace of ideas. *See Walker v. Texas Div., Sons of Confederate Veterans*, 576 U.S. 200, 207 (2015). While this case involves self-published works, the principle of promoting fair competition in the market On that understanding, this Court permits the government to require private corporations to host content on its digital property and evaluates such laws under intermediate scrutiny.

2. *State legislatures can compel a private owner to share its "virtual estate" with others—to host speech—on the same terms it offers other users because private owners lack a First Amendment right to refrain from hosting speech.*

Delmont's legislature may compel Poster to share its virtual property—allow users to self-publish—on the same terms offered to other platform users. Delmont's CC Law is grounded in constitutional precedent requiring private entities to share their property among users on equal terms. This precedent began with intellectual property in newspapers, shifted into the realm of real property, and graduated to digital property. Thus, the CC Law is constitutional because it extends legislative requirements that this Court has already deemed permissible. The Fifteenth Circuit erred by concluding otherwise. This Court should reverse.

A legislature may require a right of access to another's intellectual property. In *Associated Press v. U.S.*, this Court held that First Amendment protection from governmental interference does not sanction repression of that freedom by private interests. 326 U.S. 1, 20 (1945).

> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society . . .
>
> Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.

326 U.S. 1, 20 (1945) (paragraph breaks added); *see also* Genevieve Lakier & Nelson Tebbe, *After the "Great Deplatforming": Reconsidering the Shape of the First Amendment*, LAW & POLITICAL ECONOMY PROJECT (Mar. 1. 2021), https://perma.cc/56F3-KMBE. While the Court applied this

rule to an alliance of newspapers, its reasoning applies with equal force to a market-dominating corporation. *Associated Press*, 326 U.S. at 4–5, 21. Under *Associated Press*, the legislature cannot instruct an information-gathering organization about what content it may or may not publish. However, the legislature may require an organization to share its intellectual property with the general public.

Without violating the First Amendment, a legislature may require private property owners holding themselves out to the public to share their property with others on equal terms. *PruneYard Shopping Center v. Robins* upheld a state law that prevented large shopping malls from casting out leafleteers and signature gatherers from private property. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1979). The law obliged a mall to hold open its premises to members of the general public, even if those members of the public advertised ideas that offended the mall's owners. *Id. PruneYard* expressly rejected the claim "that a private property owner has a First Amendment right not to be forced by the State to use his property as a *forum* for the speech of others." *Id.* at 86 (emphasis added). Additionally, the government can require private entities to provide space on the same terms that it offers others visitors. *Rumsfeld v. FAIR* held that the government may require private universities to provide space to military recruiters, alongside other recruiters. *Rumsfeld v. FAIR*, 547 U.S. 47, 70 (2006). Under *PruneYard* and *Rumsfeld*, private property owners who hold open their property to the public—or some segment thereof, such as military recruiters—may be required to share their real estate on equal terms. An owner cannot bar some members of the public, but not others, from entering and speaking on the premises when it is available for public use.

Since social media has become the "modern public square," a law may analogize social media platforms to physical public squares. *Packingham v. N.C.*, 137 S. Ct. 1730, 1737 (2017). Lower courts have already begun to do so. Striking down a statute concerning social media access,

the district court noted that "*FAIR* and *PruneYard* establish that compelling a person to allow a visitor access to the person's property, for the purpose of speaking, is not a First Amendment violation." *NetChoice, LLC v. Moody*, No. 4:21CV220-RH-MAF, 2021 WL 2690876, *9 (N.D. Fla. June 30, 2021).

This Court's precedent indicates two principles applicable to this case. First, this Court should evaluate the CC Law under intermediate scrutiny. Second, states may require private property owners holding themselves out to the public to share their property with others on equal terms, even when that property is virtual. In other words, Delmont can compel Poster to host speech on its platform without violating the First Amendment.

3. *Delmont's CC Law survives intermediate scrutiny and is a logical extension of this Court's precedent.*

The CC Law passes intermediate scrutiny. First, it furthers two of the substantial government interests recognized in *Turner*. As Delmont's governor indicated, the CC Law prevents online platforms from stifling viewpoints by denying access to the marketplace. R. at 34. Thus, the CC Law promotes widespread dissemination of information from a multiplicity of sources and promotes fair competition in the market for self-published works. The CC Law is designed to protect the free expression of authors—the exact opposite of suppressing their voices. Third, incidental restriction is essential to the furtherance of governmental and public interests. Without the CC Law, as evidenced by its own behavior, Poster would be free to arbitrarily withhold access to its vast market share and potential customers. Thus, while the CC Law incidentally restricts Poster's ability to curate the content posted on its platform, such a restriction is essential. The restriction is essential to ensure that the Law promotes dissemination of information from a multiplicity of sources and promotes fair competition in the market for self-published works. On

those grounds, Delmont's CC Law survives intermediate scrutiny. The question becomes whether the Law is a logical extension of other provisions that this Court approved. It is.

The CC Law is not a revolutionary mechanism for regulating the speech of large entities. Further, the Law is not a means of punishing bigness or success. The Delmont legislature is not reinventing the wheel. Rather, the CC Law is the logical extension of previous laws that this Court has already condoned. Pointing to *Associated Press*, the government may compel information-based entities to share their intellectual property with other visitors. Under *PruneYard* and *FAIR*, the Delmont legislature may require private property owners who hold themselves out for public use to provide access to their property on the same terms offered to other visitors. Finally, under *Tuner*, the property that the government may require access to does not have to be physical, tangible property. Rather, the government can mandate access to intangible property. By requiring common carriers to host speech on equal terms, Delmont's CC Law quite simply embraces prior case law. The CC Law applies an old rule to a new entity, an online platform with "substantial market share."

Returning to the flea market analogy—the proper model to view this case—the CC Law instructs Poster that because it holds itself out to the public, Poster must display all books similarly, regardless of content. For example, the Poster stand may not hide the book in the back room, away from customers. It may not take the dustcover off a book so that no one can read the title. Poster may not refuse to sell the book when an interested customer seeks to purchase it. Poster may not scratch out the book's title or author to prevent its identification. Poster is obligated to display the book, just as it displays the self-published works of others. Though Poster does not wish to display the unwanted book with other merchandise, under *PruneYard* and *FAIR*, it must do so on the same terms offered to all others who rely on Poster to sell their books. That is, Poster is required simply

to host the unwanted book. Therefore, Posters' contention that the CC Law eliminates its First Amendment *right* to curate its selection—that it can decide whether or not to host speech based on its content—flies in the face of this Court's precedent.

This Court recognizes that the state may compel Poster to host speech (display the book) that it does not wish to host. Therefore, the right that Poster attempts to assert is one that can and will be superseded by substantial and compelling government interests. On that understanding, two points are apparent. First, the CC Law survives intermediate scrutiny. Second, the CC Law complies with the First Amendment. Therefore, the Fifteenth Circuit erred by holding that the Law violates the First Amendment by "forcing" Poster to host speech. The Fifteenth Circuit missed the point. Precedent indicates that Delmont can compel Poster to host speech without running afoul of the First Amendment. Therefore, this Court should reverse the Fifteenth Circuit's decision.

C. The Fifteenth Circuit erroneously concluded that hosting equates to endorsement.

Poster would have this Court believe that it is in the proselytizing business, protected under the First Amendment. It is not. Rather, Poster is in the publication business. Under the CC Law, as a for-profit corporation designated as a common carrier, Poster cannot discriminate against authors seeking to self-publish on its platform. The Fifteenth Circuit erroneously concluded that Poster is compelled to endorse speech that it wishes not to endorse. That is not the case. As previously established, the CC Law obligates Poster to host speech. Hosting speech is not the same as endorsing it. Therefore, this Court should reverse.

1. Hosting speech is not the same as endorsing speech.

The CC Law does not force Poster to endorse speech. Imposing free speech limitations on a common carrier is valid so long as it "would not . . . force the company to endorse the speech." *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas,

J., concurring) (emphasis added) (citing *U.S. v. Stevens*, 559 U.S. 460, 468 (2010) and *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 684 (1994) (O'Connor, J., concurring)). A property owner's ability to "expressly disavow any connection with the message" prevents misattribution. Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. OF FREE SPEECH L. 1, 52 (2021) (citing *PruneYard*, 447 U.S. at 87). When a property owner has opportunity to repudiate the message, the First Amendment is not violated. *Id.* The *PruneYard* Court stated that for observers who draw the "not likely" inference that the mall endorsed the speech, "appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law." *PruneYard*, 447 U.S. at 87. Therefore, even if someone mistakenly attributes the presence of works on a platform as the platform's tacit endorsement of the work's content, the platform can still disavow endorsement, just as Poster has done.

2. *The CC Law simply requires Poster to host speech, not to endorse it.*

While this Court's precedent indicates that the CC Law *constitutionally* allows Delmont's legislature to require Poster to host speech, Poster is not endorsing that speech in at least three different ways. First, Poster is not endorsing the speech the CC Law demands because it has already disclaimed endorsement. Poster's terms and conditions explicitly disclaim endorsement of any views expressed in the material published. Poster Inc., User Agreement (effective December 10, 2019). Returning to the flea market model, the message following the asterisks on "POSTER***" clearly indicates to all readers that Poster is simply a means of purchasing the self-published works of others. After all, "We don't write. We just sell." The CC Law does not require

Poster to endorse the content of the works it is legally obligated to sell because Poster already disclaims endorsement of *any* content.

Second, Poster can additionally rely on the law itself to refrain from endorsing the speech. Just as the court is *PruneYard* indicated that the mall could disclaim sponsorship of the message by explaining that the speakers were communicating their own messages by virtue of state law, the Poster stand could add a brief addendum to its message: "We don't write. We just sell. It's the law (City Ordinance 9-1.120(a))." Doing so makes it clear to all who pass by that not only is the Poster stand refraining from endorsing the content of the works it sells, Poster has a legal explanation for why it refrains from endorsement.

Third, while the CC Law requires Poster to refrain from removing works that it disagrees with, the Law does *not* require Poster to offer the same promotions it offers APC-affiliated creators. Returning to the flea market bookstand model, the CC Law simply requires that if the Poster stand holds itself out to the public and sells all works brought to it, then it must display the book on the same terms offered to all others. However, nothing about the ordinance requires Poster to offer the same discounted services that it offers to both established and aspiring affiliated authors, poets, and composers. In other words, if an author brings their book to the Poster stand in the hopes that such a large market will result in her book being sold, the CC Law prevents the stand from refusing to sell it based on the book's content.

Yet, the CC Law does not require the Poster stand to offer the author a greater cut of the proceeds, as it would if the author were a member of the APC church. If the Law did require the stand to offer discounted services to all, *that* might constitute endorsing the content of the book. Therefore, since the CC Law merely requires hosting without the attendant discount, while Poster is required to host speech, it is not required to endorse that speech. Thus, in at least three different

ways, the CC Law does not require Poster to endorse the speech that it is legally obligated to host. First, Poster expressly disavows endorsement in its terms and conditions. Second, the Law itself provides a reason for Poster to not endorse the speech: since Poster must host the speech, it does not necessarily have to endorse it. Third, the Law only requires Poster to host the speech, but does not require Poster to promote it in the form of discounted services. Therefore, the Fifteenth Circuit erred in concluding that the CC Law's requirement to host speech constitutes a requirement to endorse the speech. As such, this Court should reverse.

II. DELMONT'S CC LAW IS A NEUTRAL AND GENERALLY APPLICABLE LAW WITH WHICH POSTER MUST COMPLY, DESPITE RELIGIOUS OBJECITONS.

Incorporated under the Fourteenth Amendment, the First Amendment's Free Exercise Clause stipulates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…" U.S. CONST., amend. I, XIV. Compelling governmental interests may limit free exercise rights. *See Employment Division v. Smith*, 494, U.S. 872, 880–88 (1990) (holding that the First Amendment's protection of free exercise is not unlimited, e.g., persons cannot choose not to pay taxes, take several wives, or hire child laborers).

The United States Court of Appeals for the Fifteenth Circuit erred in holding that the Delmont CC Law violated the First Amendment's Free Exercise Clause. Permitting a common carrier's religious beliefs to insulate it from penalties would allow the common carrier to suspend online accounts and remove content whenever it pleased. The common carrier could cite religious justifications and remove content from the public forum, effectively defeating the free exchange of information online. The CC Law must prevail because there is a compelling governmental

interest in this exchange of information. Any incidental interference with Poster's religious practices does not amount to violation of a constitutional right.

Moreover, the CC Law is neutral because the legislative purpose is secular. The law protects public expression by mandating that common carriers serve online users. A common carrier may not suspend online accounts or remove content, even if the common carrier finds those accounts or content disagreeable on political, ideological, or religious grounds. The CC Law's express purpose is not a pretense for religious discrimination because it requires assent from all common carriers, not only Poster. Common carriers with secular ("political" and "ideological") objections, not only religious objections, must serve online users. The CC Law is also generally applicable because it does not contain exemptions. The Delmont Legislature did not include exemptions, though it was aware of its power to do so, to promote public expression broadly among constituents, many if not most of whom are internet users.

Delmont has a compelling governmental interest in the marketplace of ideas. *See Walker*, 576 U.S. at 207 (2015) (employing phraseology "marketplace of ideas" to describe what the First Amendment is designed to protect). Public expression is crucial for democracy, intellectual diversity, and innovation. The people's voices must be heard. Therefore, the government requests that this Court reverse the Fifteenth Circuit's decision regarding the free exercise claims.

A. Any interference with Poster's religious practice is incidental to the CC Law's secular objective to promote public expression on the online forum.

The First Amendment bars the government from regulating "religious beliefs." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). Since *Sherbert*, this Court interpreted the "free exercise of religion" to govern more than belief; "free exercise" includes "the performance of (or abstention from) acts that a religious belief requires." *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 877,

872 (1990). Incidental interferences with religious acts are allowable when a law is not selectively directed at religious practices. *Id.* at 872.

Here, any interference with Poster's religious practice is incidental to the CC Law's secular objective to promote public expression on the online forum. The CC Law does not target Poster and APC-affiliates. Instead, the CC Law evokes general language to prevent all common carriers from favoring some online content over other content, and from favoring some philanthropic causes over other causes. The CC Law helps to ensure an equal playing field for online users. Although the CC Law employs generalized language, the law is not so impermissibly vague that it would invite the Attorney General to abuse his discretion. The Attorney General may only apply the law to entities with a "substantial market share." R. at 3.

The Court cannot consider the veracity of Poster's religious beliefs; however, this Court must now decide whether any burden on Poster's religious practices is constitutional. *States v. Ballard*, 322 U.S. 78, 86 (1944) (maintaining that the judiciary should not engage in discussion over the sincerity of religious beliefs); *see also Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U. S. 707, 714 (1981). CEO of Poster Mr. John Kane contends that the CC Law requires Poster to publish content contradictory to APC tenets so that Poster must either violate its religious mission or shut down operations. R. at 37. By itself, this choice does not violate the First Amendment. Any interference with Poster's religious practices is incidental.

Under *Fulton v. City of Philadelphia*, neutral and generally applicable laws that "incidentally" burden religious practices are not subject to strict scrutiny. *Fulton v. City of Phila., Pa.*, 141 S.Ct. 1868, 1876 (2021). For the reasons set forth below, this Court should determine that the CC Law is neutral and generally applicable. Therefore, under *Fulton*, the CC Law is not subject to strict scrutiny.

B. The CC Law is a neutral law because it was designed to promote public expression and not restrict Poster's religious practices.

A law fulfills the "minimum requirement of neutrality" when its language is facially neutral. *Church of the Lukumi v. Hialeah*, 508 U.S. 520, 534 (1993). A law is facially neutral when religion is not the target. *Id.* A law with a discernable secular meaning passes the "facial neutrality test" and does not violate the First Amendment's Free Exercise Clause. Here, the CC Law is facially neutral because it does not target religion and has a discernable secular meaning.

The CC Law does not call out Poster or APC-affiliates. Rather, the law obligates *all* common carries with a substantial market share to serve online users, regardless of "political, ideological, or religious viewpoint," and refrain from using corporate funds for "political, religious, or philanthropic causes." Delmont Rev. Stat. § 9-1.120(a). The Whole Act Rule of statutory construction implores the Court to read a law in its textual and legislative contexts. *See U.S. v. Kozeny*, 541 F.3d 166, 171 (2d Cir. 2008). The Court must read the whole law, considering its objective and policy. *Id.* Per the Whole Act Rule, the Court must interpret "religious" alongside "political," "ideological," and "philanthropic."

When the CC Law refers to a "religious" viewpoint or "religious" cause, it addresses a secular concern articulated by the Governor of Delmont, forerunner of the CC Law. Delmont's concern is that technology companies with dominant market power will filter public expression, and promote certain causes, as they please. R. at 35. Using "religion" as a facial justification (or pretext), companies will promote agreeable voices and diminish dissenters. Thus, Delmont's CC Law protects public expression. There exists a compelling governmental interest in public expression, a marketplace of ideas, which is necessary for the well-being of democratic society. According to *Associated Press v. United States*:

> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society . . .
>
> Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

326 U.S. 1, 20 (1945); *see also* Lakier & Tebbe, *supra.* Public expression allows people to be heard. If this Court rules that the CC Law is unconstitutional, technology companies will control the public forum and constrict democracy. The essence of "public expression" depends on the preservation of antagonistic viewpoints. Religion is merely an example of a type of antagonist viewpoint. Religion is a point on the CC Law's list, but not *the* point. Other antagonist viewpoints are "political" or "ideological." Delmont Rev. Stat. § 9-1.120(a). And so, the CC Law does not target religion. Delmont's Legislature carefully penned the CC Law to ensure that large technology companies did not censor antagonistic viewpoints, or favor certain causes with monetary contributions, for the meager reason, "We disagree." Disagreement is the hallmark of a healthy democratic society. The people's voices must be heard. With a discernable secular purpose, the CC Law is facially neutral and does not violate the Free Exercise Clause.

While facial neutrality means that the CC Law is almost certainly constitutional, the Court's inquiry cannot conclude at this juncture as "facial neutrality is not determinative." *Church of the Lukumi*, 508 U.S. at 534. The Court must also consider whether the law restricts religious practices "because of their religious nature." *Fulton*, 141 S.Ct. at 1877. *See also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S.Ct. 1917, 1730-1732 (2018). Relevant factors include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." *Church of the Lukumi*, 508 U.S. at 540.

Considering these factors, this case demonstrates that the Attorney General for the State of Delmont gave "every appearance," *Id.*, at 545, 113 S.Ct. 2217, of bringing the enforcement action to protect public expression, principally Ms. Thornberry's artistic expression. R. at 6, 22–23. The Attorney General stated at a press conference that, "The APC-founded Poster platform is discriminating against Delmont citizens based on their political viewpoints… and we bring this action for the first time today to stop that practice." *Id.* Just because this action represents the first time that Delmont enforced the CC Law does not insinuate that the CC Law applies only to Poster. On the contrary, the CC Law protects against any common carrier that would undermine democratic values by filtering online content. A compelling governmental interest would have the Attorney General protect all antagonistic viewpoints within the public forum. The Attorney General's comments at the press conference illustrate this argument.

Opposing counsel may argue that when the Attorney General referred to Poster as "APC-founded," he presented more than a "slight suspicion" that this action stemmed from "animosity to religion or distrust of its practices." *Church of the Lukumi,* 508 U.S. at 547. However, referring

to Poster's religious affiliation was entirely appropriate given the situation. Responding to continuants' concerns and enacting the CC Law, Delmont's Legislature sought to prohibit common carriers from eliminating antagonist opinions from the public forum, thereby hindering public expression. R. at 35. The fact that Poster affiliates with APC is crucial because it explains *why* Poster disagrees with Ms. Thornberry. Although Poster disagrees with Ms. Thornberry, because Poster is a common carrier, the law allows Ms. Thornberry's voice to be heard. The CC Law protects the integrity of the public forum.

Finally, the Court considers the law's effect in evaluating neutrality. *See Church of the Lukumi*, 508 U.S. at 535 (holding that "the effect of a law in its real operation is strong evidence of its object"). A law's operation evidences its object. The CC law provides a public forum for Ms. Thornberry to publish online content without being censored by a technology company with invested interests. The effect of the CC Law is to allow artistic expression. The CC Law welcomes controversy so that our democratic society may flourish. Thus, the law's purpose is both secular and neutral.

The technological market is rapidly evolving. With low barriers to entry, new companies are emerging as technological leaders in the marketplace. Today, Poster holds a substantial market share over the online forum. Tomorrow, a novel technological leader will emerge. Take for example the rise and decline of Yahoo. Yahoo once controlled the online market. Like other companies in the industry, Yahoo's success was impermanent. Its business lost popular support in areas where the technology environment was competitive. Sen Soo, *Yahoo Pulls Out of China, Citing 'Challenging' Environment*, ASSOCIATED PRESS, https://apnews.com/article/yahoo-inc-leaving-china-f3b589754224bc663d5e83ec385eb49a (last visited January 22, 2022). Since the late 2000s, Americans moved away from Yahoo and towards platforms such as TikTok. 100 million

Americans used TikTok monthly in August 2020. Brian Dean, *TikTok User Statistics (2022)*, BACKLINKO, https://backlinko.com/tiktok-users (last visited January 22, 2022). An evolving industry means that laws must be adaptable. We cannot anticipate who or what the CC Law will govern next. Delmont's Legislature specifically drafted the CC Law with an extensive reach to accommodate the modern marketplace and its challenges.

To summarize, the CC Law is neutral and does not violate the First Amendment's Free Exercise Clause. The law's secular purpose is to promote public expression. While Poster may be "the *kind* of website the law is designed to address," the CC Law does not apply to Poster alone. Poster is an example of a large technology company with overwhelming control over the public forum. R. at 35. Tomorrow, a new company will emerge to replace Poster as the dominant power. Unchecked power is dangerous for free expression. Legislation is appropriate to protect the public in our modern marketplace.

C. The CC Law is a generally applicable law because it contains no exceptions and promotes public expression broadly among online users, which serves compelling governmental interests.

A law lacks "general applicability" when it encourages the government to consider "particular reasons for a person's conduct." *Fulton*, 141 S.Ct. at 1877. The *Fulton* Court determined that "creation of a formal mechanism for granting exceptions renders a policy not generally applicable." *Id.* at 1879. Additionally, a law lacks general applicability when it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 1877.

The CC Law contains no exceptions, religious or otherwise. The law promotes public expression, which serves a compelling governmental interest in the well-being of democratic

society. Also, the law does not pose a selective burden on Poster's religious practices. The law has equivalent effect on secular practices. Had Poster or another common carrier suspended Ms. Thornberry's online account and deleted her content on "political" or "ideological" grounds, the CC Law would have the same effect. Had Poster or another common carrier donated to "philanthropic" causes unaffiliated with the APC, the CC Law would have the same effect. In the first instance, the law mandates that common carriers serve online users. In the second instance, the law prohibits common carriers from contributing corporate funds. Religion is not the direct target in either case.

In enforcing the CC Law, the Attorney General did not need to consider "particular reasons" for Poster's conduct. The Attorney General evoked the CC Law when Poster suspended Ms. Thornberry's online account without justification beyond a bare disagreement. Large technology companies may not manipulate their market power to suppress public expression. The CC Law allows people's voices to be heard. Whether Poster was motivated by religion, ideology, or politics was inconsequential because the law's primary purpose was to protect public expression from corporate censorship. Therefore, Delmont's CC Law is a generally applicable law.

In summary, the CC Law is constitutional because it is both neutral and generally applicable. Since Poster is a common carrier with a substantial market share over the online forum, it falls under the ambit of the CC Law.

CONCLUSION

The Fifteenth Circuit concluded that Delmont's CC Law violated the First Amendment's Free Speech and Free Exercise Clauses. The Fifteenth Circuit was wrong. The CC Law is constitutional for two reasons. First, the CC Law is constitutional because this Court's precedent establishes that a legislature may compel a technology company with a substantial market share,

such as Poster, to host speech. While the CC Law requires Poster to *host* speech on equal terms among internet users, the CC Law does not force Poster to *endorse* speech. Second, the CC Law is constitutional because it is a neutral and generally applicable law designed to promote public expression without exception. Therefore, the CC Law is constitutional under the First Amendment. This Court should reverse.

CERTIFICATE OF COMPLIANCE

Pursuant to the Seigenthaler-Sutherland Official Rules, we, the under-signed counsel, certify that:

(i) this brief is entirely the work product of competition team members,

(ii) the team has complied fully with its school's governing honor code; and

(iii) the team has complied with all Rules of the Competition.

/s/ Team 001
Dated: January 30, 2022

APPENDIX A: STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I.

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

U.S. Const. amend. XIV, § 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1254(1): Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case,before or after rendition of judgment or decree.