No. 22-CV-7654 In The

# Supreme Court of the United States

October Term 2022

**WILL WALLACE,**

*Petitioner,*

v.

**POSTER, INC.,**

*Respondent.*

*On Writ of Certiorari to the United States*

*Court of Appeals for the Fifteenth Circuit*

## BRIEF FOR RESPONDENT

Team 008

Counsel for Respondent

## I. QUESTIONS PRESENTED

A. Under the First Amendment to the United States Constitution, does a State violate a company's right to free speech when it re-designates the company's online platform as a common carrier in order to eliminate the company's ability to exercise editorial discretion? and

B. Under the First Amendment to the United States Constitution, does a State violate a company's right to free exercise of religion when it implements religious restrictions through the designation of the company as a common carrier?

## II. TABLE OF CONTENTS

## III. TABLE OF AUTHORITIES

**Supreme Court Cases**



**Circuit Court Cases**



**District Court Cases**



**Statutes**

**Legal Periodicals**



**Books and Treatises**



**Constitutional Provisions**

## IV. STATEMENT OF JURISDICTION

The United States District Court for the District of Delmont possessed subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331, entering a final judgment on September 1, 2021. The United States Court of Appeals for the Fifteenth Circuit possessed jurisdiction over this case pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C § 1254.

## V. CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I

Delmont Rev. Stat. § 9-1.120

## VI. STATEMENT OF THE CASE

### A. Statement Of The Facts

Founded in 1998, Poster is a popular internet site with seventy-seven percent of the "artistic self-publication market." Record 2. Artists choose the payment structure for accessing their art—for free, for rent, or for purchase. Record 2. Poster charges a small fee for each account and receives a small percentage of all rents or purchases. Record 2. Through its User Agreement, Poster disclaims endorsement of any views posted on its site and retains editorial discretion over every account. Record 2. Poster was founded, and is currently run, by members of The American Peace Church ("APC"), a one-hundred-year-old Protestant denomination with a central tenet of non-aggression/pacifism. Record 2. Although Poster is unapologetically religious, it has always hosted artists with diverse ideological viewpoints. Record 3. The APC attempts to promote peace through education and artistic cultural development. Record 2. Fifteen percent of all Poster's profits support these efforts in poor communities. Record 2–3.

On June 1, 2020, the State of Delmont passed a common carrier law ("CC Law") that was the fulfillment of campaign promises made by Governor Louis F. Trapp. Record 3. The law

designates all internet platforms holding "substantial market share[s]" as common carriers. Record 3. Organizations designated common carriers "shall serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint[.]" Record 3. The law also mandates common carriers "refrain from using corporate funds to contribute to political, religious, or philanthropic causes." Record 3. The stated purpose for this provision was to "avoid running afoul of the Establishment Clause." Record 3. The penalty for violations is a heavy fine—up to 35 percent of profits, compounding daily until the organization conforms to the CC Law. Record 3. The statute provides no exemptions. Record 3.

Katherine Thornberry opened an account on Poster in November 2018. Record 3. Thornberry tried to jumpstart her novel, *Animal Pharma*, on Poster. Record 3. This is the only success she had in her efforts to publish her book—traditional publishing avenues failed her. Record 3–4. In 2020, after the CC Law was passed, Thornberry attended an animal rights rally against animal experimentation. Record 4. During this rally, Thornberry posted an alternative title of her work on Poster, "Animal Pharma" or "Blood is Blood." Record 4. This rally turned violent, though Thornberry did not participate in the violence. Record 4. The violence was attributed to the extremist animal rights group AntiPharma, who uses "Blood is Blood" as a catchphrase. Record 4. AntiPharma promotes civic violence in response to violence against animals. Record 4.

Following the protests, local business owners, including the head of Poster, spearheaded a public outcry and condemned the violence. Record 4–5. Poster learned of Thornberry's new book title after reviewing a revenue report showing a slight increase in her sales. Record 5. Citing the power reserved in its User Agreement, the organization deemed the new title violative of its pacifist values and informed Thornberry that her account was suspended until she revised her title. Record 5. Poster had only ever removed one other work from its site, a work about total war. Record 5.

On August 1, 2021, Thornberry attacked Poster's decision on national television, claiming that Poster was suppressing artists. Record 6. Delmont thereafter fined Poster for violating the CC Law. At a press conference, the State Attorney General, Will Wallace, said: "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 . . . ." Record 6.

### B. Procedural History

Following Wallace's decision to deem the "APC-founded Poster platform" a common carrier, Poster brought an action against him in his official capacity. Record 6. Poster contested its status as a common carrier and challenged the CC Law under the First Amendment. Record 6.

On the government's motion for summary judgment, the district court held that Poster qualified as a common carrier. Record 10. As such, under the State statute, the organization was barred from censoring works and donating proceeds. Record 10. The court also held that Poster's free speech and free exercise rights were not violated. Record 11, 16. Poster appealed to the Fifteenth Circuit Court of Appeals. Record 18.

The Fifteenth Circuit reviewed the second and third issues argued by Poster—that the organization's free speech and free exercise rights were violated. Record 18. The Fifteenth Circuit held that the district court erred in its determination that Poster's free speech rights were not violated. Record 23–29. It also held that the district court erred in finding the CC Law neutral and generally applicable. Record 29–33. As such, the Fifteenth Circuit reversed on both issues. Record 33. The Supreme Court granted Wallace a writ of certiorari to evaluate both issues. Record 39.

## VII. SUMMARY OF THE ARGUMENT

The CC Law infringes on Poster's right to free speech. Poster is not a common carrier, but a corporation with First Amendment rights. The CC Law is a content-based restriction on free

speech, so its application to Poster is subject to strict scrutiny, which it cannot survive. Furthermore, even if Poster were a common carrier, it would still possess the right to free speech, as this Court's precedent suggests. Thus, the CC Law is unconstitutional as applied to Poster.

The CC Law violates the Free Exercise Clause of the First Amendment to the United States Constitution because it is neither neutral nor generally applicable. The CC Law is not facially neutral because it bans religious practices explicitly. It is not neutral in object because Delmont's actions were intolerant of Poster's religious beliefs, based on the totality of the circumstances. The CC Law is not generally applicable because it allows individual exemptions and permits secular conduct that undermines state interests while banning similar religious conduct.

## VIII. ARGUMENT

### A. The Common Carrier Law Violates The First Amendment's Free Speech Clause.

The First Amendment to the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech . . . ." This Court long ago recognized that the "Bill of Rights which guards the individual's right to speak his own mind" does not leave "it open to public authorities to compel him to utter what is not in his mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). In *Barnette*, this Court noted that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion *or force citizens to confess by word or act their faith therein*." *Id.* at 642 (emphasis added).

Poster has the right to free speech protected by the First Amendment because Poster is not a common carrier but rather a publishing platform that has reserved editorial discretion over its content. But the CC Law would be unconstitutional as applied to Poster even if Poster were a common carrier. The right to free speech—and the included right not to speak—belongs not only

to individuals, but also to corporations. *Pac. Gas & Elec. Co. v. Publ. Utils. Comm'n*, 475 U.S. 1, 8 (1986) (plurality opinion). And because common carriers cannot justifiably be excluded from the scope of the First Amendment based on the text of the Amendment or this Court's precedent, common carriers have free speech rights, too. Thus, the CC Law violates the First Amendment.

**1. Poster's use of editorial discretion is protected speech.**

Poster's exercise of editorial discretion is speech within the protection of the First Amendment. As a threshold matter, editorial control generally is a form of speech and is protected by the Free Speech Clause. *Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494–95 (1986); U.S. Const. amend. I. Furthermore, a company's free speech rights are implicated when it is forced to publish another's message that is likely to be understood as the company's own. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 655 (1994); *see also* John Blevins, *The New Scarcity: A First Amendment Framework for Regulating Access to Digital Media Platforms*, 79 Tenn. L. Rev. 353, 387 (2012). But the government can also violate a company's speech rights by forcing the company to fund another private speaker's speech, because "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001); Calvin Massey & Brannon P. Denning, *American Constitutional Law: Powers and Liberties* 1073 (6th ed. 2019). Because of the First Amendment's protection for editorial discretion, two district courts have recently issued preliminary injunctions against regulations aimed at making online platforms—like Poster—neutral. *NetChoice, LLC v. Moody*, No. 4:21cv220-RH-MAF, 2021 WL 2690876, at *7–8, *12 (N.D. Fla. June 30, 2021); *NetChoice, LLC v. Paxton*, No. 1:21-CV-840-RP, 2021 WL 5755120, at *1, *6 (W.D. Tex. Dec. 1, 2021).

Poster has a long history as a company with ties to the American Peace Church, a church with strong pacifist beliefs and beneficence towards the arts. Record 2. Poster specifically stated in its user agreement that it "retain[ed] editorial discretion to accept or reject material submitted by an artist as it sees fit." Record 2. It previously exercised this discretion to avoid publishing a work about total war, and it sought to avoid publishing Thornberry's work *as currently* titled *Animal Pharma* or *Blood is Blood*, the latter title a mantra used in a wave of violence. Record 4–5. The fact that Poster has only exercised its discretion twice is a tribute to the broadmindedness of Poster's directors in "supporting both religious and secular artists," not something for which Poster should now be penalized. Record at 2. The audience who visits Poster's platform might well assume that Poster endorses the art displayed there, particularly when the audience members have also published through Poster and have read the user agreement. Furthermore, the government is trying to force Poster to use its property to support the speech of another person. Thus, Poster's activities constitute speech protected by the First Amendment.

**2. <u>The CC Law is unconstitutional as applied to Poster because Poster is not a common carrier and has First Amendment rights.</u>**

Poster is not a common carrier. The State has attempted to redefine Poster as a common carrier under the CC Law. But the State cannot simply skirt the First Amendment by redefining companies as common carriers and then stripping common carriers of the right to free speech. *See generally Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 559 (1995) (holding unconstitutional the application of a public accommodations law to a private parade organizer). If states could do so that easily, then speech restrictions targeting broadcasters and public utilities that have been held unconstitutional could have survived if the government had only included the words "common carrier" in the regulations. *See FCC v. League of Women Voters*,

468 U.S. 364, 402 (1984); *Pac. Gas*, 475 U.S. at 20–21 (plurality opinion). It does not seem likely that the Supreme Court's careful analysis of the First Amendment rights of the parties in those cases could have been avoided if only the government had named the parties "common carriers" when regulating them. Poster has the First Amendment rights of any other corporation.

a. Poster is not a common carrier.

A state may not constitutionally strip a corporation of its free speech rights by using a broad brush to sweep that corporation into its definition of a common carrier. Because Poster is not a common carrier, the application of the CC Law to Poster violates Poster's right to free speech by stripping the company of its editorial powers.

*i. Poster retained editorial discretion and never held itself out as willing to publish everything.*

Common carriers are those who hold themselves out as willing to serve the public. *Black's Law Dictionary* defines common carrier as "[a] commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee." *Carrier – Common Carrier*, *Black's Law Dictionary* (11th ed. 2019). As a nineteenth-century treatise stated:

> "A common or public carrier is one who undertakes as a business, for hire or reward, to carry from one place to another, the goods of all persons who may apply for such carriage, *provided the goods be of the kind which he professes to carry*, and the person so applying *will agree to have them carried upon the lawful terms prescribed by the carrier*; . . . ."

Robert Hutchinson, *A Treatise on the Law of Carriers* 30–31 (1880) (emphasis added). Another nineteenth-century jurist noted that "[a]ccording to English law, a 'common carrier' is bound to take all goods *of the kind which he usually carries* . . . ." Thomas Erskine Holland, *The Elements*

*of Jurisprudence* 250 (W. Publ'g Co., 1st Am. ed. 1896) (1880) (emphasis added). Thus, common carriers were not historically required to take all goods merely because they held themselves out as willing to take *some types* of goods.

Today, communication common carriers are likewise those who hold themselves out as willing to serve the public. *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016). In upholding the FCC's net neutrality rule for broadband providers[1] against a First Amendment challenge, the D.C. Circuit noted that "indiscriminate, neutral transmission of any and all users' speech . . . is characteristic of common carriage." *Id.* at 742. The court said that "[i]f a broadband provider nonetheless were to choose to exercise editorial discretion . . . it might then qualify as a First Amendment speaker." *Id.* at 743.

Here, Poster retained the right to exercise editorial control over its platform. Record at 2. This statement was akin to a common carrier holding itself out as willing to carry any goods that it, *in its sole discretion*, should choose to. This statement shows that the company is not a common carrier, as to be a common carrier one must profess to carry some type of good for persons generally. Poster limited the type of content it was willing to publish to content that it accepted in its discretion. Record at 2. Poster is not a common carrier because it never held itself out as such.

This is not the case of a company holding itself out as a common carrier and then balking at publishing a particular work at the behest of an author and the state. In fact, precisely the opposite happened. Poster's foundation is the rich, 100-year history of a religious group dedicated to peace and promotion of the arts. Record at 2. Poster has been consistent in its ties to the church, its views on pacifism, and its reservation of editorial control over the content on its platform. *See*

[1] Net neutrality is "the principle that broadband providers must treat all internet traffic the same regardless of source." *Telecom*, 825 F.3d at 689.

record 2–3, 36–37. It is the state who has changed its law in an attempt to hijack Poster's platform for its own purposes. *See* record 3. Governor Trapp even admitted that the CC Law "was meant to allow the online space to be a 'town square' in the truest sense, where all ideas are free to be shared and considered." Record 34. It may be noble for the state to want to create an online town-square-like platform, but only if the State is willing to take on the expense of creating and maintaining it. The state cannot seize *Poster's* platform and mold it into a town square.

*ii. Poster's level of market power does not make it a common carrier because potential customers have feasible alternatives.*

A company's market power is also an important factor to examine in determining whether a company is a common carrier. *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1222–23 (2021) (Thomas, J., concurring). The CC Law itself only applies to online platforms with "substantial market share." Record 3. But the key question in determining a company's market power is whether the potential customers have comparable alternatives. *Knight*, 141 S. Ct. at 1225 (Thomas J., concurring).

Here, the public *does* have alternatives. Poster has seventy-seven percent of the market for self-publication. Record 2 n.3. But this means twenty-three percent belongs to others. And this is not a scenario in which residents of one town have only one option, even though residents of another may have two or three. Everyone with access to Poster also has access to the online platforms that make up the rest of the market, price and other publication requirements allowing. Poster has what many consider to be the most attractive package for self-publishers. Record 2. But Poster does not become a common carrier because it happens to be the best bargain online.

Furthermore, new internet applications, including "search engines and social networking sites," "can be introduced so easily and cheaply that these application markets remain inherently

contestable even when dominant platforms emerge." Blevins, *supra*, at 393. Poster has experienced marked success. Record 2. But like all online platforms, Poster is not beyond the reach of creative individuals wishing to start their own platforms. *See* Blevins, *supra*, at 395.

b. The CC Law fails as a content-based restriction on corporations' speech.

A state cannot constitutionally compel an organization to make room for a third party's expression in the organization's own speech, even in the name of nondiscrimination. *Hurley*, 515 U.S. at 559, 561, 573. In *Hurley*, this Court unanimously held that the state could not force a parade organizer to allow the Gay, Lesbian & Bisexual Group of Boston (GLIB) to march in a parade. *Id.* at 559, 561. The parade organizer had First Amendment rights even though the record suggested the organizer may have excluded only two other groups. *Id.* at 562. Notably, the organizer had sought to exclude the message, not the speakers. *Id.* at 572. Furthermore, this Court said that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message." *Id.* at 569. The choice of who to include in the parade was akin to an exercise of editorial discretion. *Id.* at 569–70. And this Court noted that a state cannot apply a public accommodations law to a private organization in such a way as to make the organization's "speech itself to be the public accommodation." *Id.* at 573. This Court did not find even a legitimate interest in the state's application of the law to the organizer and held that the organizer could not constitutionally be forced to admit GLIB. *Id.* at 577–79, 581.

Like the organizer in *Hurley*, here Poster has previously limited its exercise of editorial discretion. *See* record 5. But the fact that Poster has only prohibited two works from being published does not mean that Poster has lost its right to editorial discretion; as demonstrated by *Hurley*, a history of broad-mindedness does not strip an organization of its First Amendment rights. *See* record 5. Also, like the organization in *Hurley*, Poster still has editorial discretion even though

it has never tried to present one unified message through the many artistic expressions it has allowed on its platform. Furthermore, just as in *Hurley* the state could not use a law designed to prevent discrimination to turn speech into a public accommodation, here the state cannot use a law designed to promote diversity to turn an online platform into a common carrier. In fact, Poster and the organizer in *Hurley* both rejected a specific *message*, not a speaker, from being included in their expressions, so their conduct was not properly the subject of an anti-discrimination law. Poster initially suspended Thornberry's account "until she revised her title" and will presumably allow Thornberry to publish once the title is changed, demonstrating that it is the message, not Thornberry, that Poster finds objectionable. *See* record 5.

When a state forces a private company to disseminate views to which the company is opposed, the state action is a content-based restriction on speech and will withstand constitutional scrutiny only if it is "narrowly tailored" to serve "a compelling state interest." *Pac. Gas*, 475 U.S. at 13–14, 19 (plurality opinion). In *Pacific Gas*, this Court held that the state could not compel a utility company to send its customers materials chosen by another private organization with competing views about utility rates. *Id.* at 4–6, 20–21. A four-justice plurality said that Pacific Gas had "the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents." *Id.* at 14 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976)). The state's order required Pacific Gas "to use its property" to "spread[] a message with which it disagrees," and the company would "feel compelled to respond" to the message. *Id.* at 16–17. And the order was content-based, rather than a content-neutral "time, place, or manner restriction," because the state was specifically granting access to a speaker with views opposed to those of Pacific Gas—indeed, that was the point of the rule. *Id.* at 12–13, 16–17, 19–20.

Thus, notwithstanding Pacific Gas's status as a utility, the plurality applied strict scrutiny to the state action, looking for "a narrowly tailored means of serving a compelling state interest." *Id.* at 19. The state suggested two interests, "fair and effective utility regulation" and "promoting speech by making a variety of views available." *Id.* at 19–20. But the plurality said the first interest could be served by imposing costs on Pacific Gas, rather than compelling speech. *Id.* at 19. And the second interest, that of promoting a variety of views, was not served by a content-based order. *Id.* at 20. Thus, the state's order failed strict scrutiny, and this Court struck it down. *Id.* at 20–21.

Here, like in *Pacific Gas*, the state is attempting to force a private company to use its own property to convey a message with which it disagrees. If forced to allow the publication of Thornberry's views through its platform, Poster, like Pacific Gas, could feel compelled to respond to those views—either to protect its reputation or to ensure that its platform has a positive net impact on the public exchange of ideas. And like in *Pacific Gas*, here the state's action is content-based. Like the order in *Pacific Gas*, the CC Law, by its very nature, only applies to require Poster to publish viewpoints with which Poster fundamentally disagrees—otherwise there would be no need for government coercion, as Poster has accepted almost all art submitted in the past. *See* record 3, 5. Governor Trapp said that Poster "is the kind of website the law is designed to address," which suggests the CC Law targeted Poster. *See* record 35. For the state to enact a law targeting Poster and stripping Poster of its editorial discretion, when Poster had previously published *everything* submitted except one violently-titled work, was tantamount to ordering Poster to allow publication of anti-pacifist works. The CC Law's focus may be veiled, but it is content-based.

And like in *Pacific Gas*, here the law fails strict scrutiny. The state's only possible interests in forced access are prohibiting discrimination and increasing the diversity of expression. Under *Hurley*, the former interest might support a measure aimed at protecting a *speaker* from

discrimination, but it cannot support a measure requiring publication of all viewpoints. And under *Pacific Gas*, the state cannot use a content-based restriction as a means of increasing the diversity of expression. Thus, the CC Law, as applied to Poster, is unconstitutional.

### 3. Even if Poster were a common carrier, the CC Law, as applied to Poster, would violate the First Amendment.

On its face, the First Amendment prohibits Congress from making any law abridging free speech. U.S. Const. amend. I. It does not exclude common carriers from its protection, or allow the government to abridge the speech of common carriers. Justice Thomas has suggested that online platforms could be regulated as common carriers if such regulations "would have been permissible at the time of the founding." *Knight*, 141 S. Ct. at 1223–24 (Thomas, J., concurring). But founding-era common carrier regulations did not apply to speech-transmitters—in fact, newspapers had a distinct First Amendment protection. *See generally* James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 Fed. Commc'ns L.J. 225, 227 (2002).

Furthermore, this Court has long held that the First Amendment protects editorial discretion. *Preferred Commc'ns*, 476 U.S. at 494–95. While its decisions respecting First Amendment rights have not dealt with official common carriers, they have applied to regulated and market-dominating communications companies. *Turner*, 512 U.S. at 633; *League of Women Voters*, 468 U.S. at 367, 402. These attributes have affected this Court's analysis but have not prohibited this Court from applying the First Amendment. *Turner*, 512 U.S. 622.

For example, a content-neutral law that burdens even a market-dominating company's editorial discretion must be subjected to heightened scrutiny. *Turner*, 512 U.S. at 640–41, 662. In *Turner*, this Court considered a challenge to a law requiring cable television providers to carry local broadcasting *Id.* at 630. In enacting the law, Congress had determined that "the overwhelming

majority of cable operators exercise a monopoly." *Id.* at 633. While this Court was willing to consider "unique physical characteristics of cable transmission," these characteristics did "not require the alteration of settled principles of . . . First Amendment jurisprudence." *Id.* at 639. The regulation was content-neutral, so it could only be "sustained if 'it further[ed] an important or substantial governmental interest . . . unrelated to the suppression of free expression; and if the incidental restriction on" free speech was "no greater than is essential to the furtherance of that interest.'" *Id.* at 647, 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). Notwithstanding the cable companies' monopoly status and competitive advantage over struggling local broadcasters, this Court applied the same standard of review applicable to other content-neutral regulations *except* that this Court looked to see if "Congress ha[d] drawn reasonable inferences based on substantial evidence"—a standard some scholars have called "intermediate plus," an even stricter standard of review. *Id.* at 666; Blevins, *supra*, at 407 & n.309.[2]

Here, like the cable company in *Turner*, Poster has a First Amendment right to exercise editorial discretion, even if it does have a large share of a particular market. If the presence of a monopoly was insufficient to deprive the *Turner* cable companies of the right to free speech, then Poster's seventy-seven percent market share is insufficient to deprive Poster of its right to free speech. Of course, as noted above, here the appropriate standard of review is strict scrutiny, which the CC Law fails. But the CC Law would fail even under the intermediate scrutiny outlined in *Turner*, because the State cannot bear its burden of showing that its "important interest" in promoting diversity of views is unrelated to the suppression of Poster's editorial discretion. Nor has the State presented substantial evidence of the State's need for the CC Law.

[2] On remand, the government was able to bear this burden, and the law was upheld. *See Turner Broad. Sys. v. FCC* (*Turner II*), 520 U.S. 180, 185 (1997).

Thus, Poster is not a common carrier, and its First Amendment rights are being infringed by a content-based restriction on its speech. But even if Poster were a common carrier, it would still have the right to free speech. Since the CC Law, as applied to Poster, cannot survive even intermediate scrutiny, this Court should hold that the law is unconstitutional.

**B. <u>The Common Carrier Law Violates The First Amendment's Free Exercise Clause.</u>**

The Delmont CC Law is not valid under the Free Exercise Clause of the First Amendment because it is neither neutral nor generally applicable. Since this law is neither neutral nor generally applicable, strict scrutiny judicial review must be applied. *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990). Under strict scrutiny, the government must show that it has a compelling state interest in substantially burdening religiously motivated conduct, and that the law is narrowly tailored to achieve that interest. *Id.* at 894. Delmont failed to show a compelling state interest, as Delmont's only asserted interest was the fear of *possibly* violating the Establishment Clause. Record 3. And the law was not narrowly tailored, as a provision prohibiting government subsidies from being donated to religious organizations might have been. Thus, under strict scrutiny, the CC Law fails.

In *Employment Division v. Smith*, the plaintiffs filed an action against the state after being denied unemployment benefits. *Id.* at 874. The plaintiffs were fired for ingesting the illegal substance of peyote during a religious ceremony. *Id.* The only exception to Oregon's law against the possession of a controlled substance was for substances that were prescribed by medical professionals. *See id.* Because of this, when the plaintiffs filed for unemployment benefits at the Department of Human Resources of Oregon, they were denied. *Id.* The Department justified this decision by saying that the plaintiffs were fired for "work-related misconduct." *Id.* The plaintiffs challenged the denial, claiming that their religious free exercise rights were violated through the denial of unemployment benefits. *See id.* at 876. This Court held that the government need not

show a compelling interest for the law to be valid, and the statute did not violate the plaintiffs' constitutional rights under the Free Exercise Clause. *Id.* at 890. It reasoned that the law in question was neutral toward religion and generally applicable to all groups. *See id.* at 889. Therefore, a rational-basis review of the claim was appropriate, and the Oregon law was constitutional. *Id*.

Following *Smith*, this Court found itself in a position to determine what is considered "neutral" and "generally applicable." This Court has addressed those two issues in numerous opinions. In the present case, the Delmont CC Law designates internet platforms with "substantial market share" as common carriers but fails to define "substantial market share." Record 3. This statute fails the test from *Smith* because it is neither neutral nor generally applicable. Therefore, Delmont's statute violates Poster's constitutional rights under the Free Exercise Clause.

**1. <u>The CC Law is not facially neutral nor neutral in object because the law restricts religious actions solely due to those actions' religious nature.</u>**

A government fails to act neutrally when it enacts a law "intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). There are two levels of neutrality: facial neutrality and neutrality in object.

a. <u>The CC Law is not neutral on its face because the statutory text bans religious practices explicitly.</u>

"A law lacks facial neutrality if it refers to a religious practice without a secular meaning that is discernable from the language or context." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). This is the lowest bar for a law to meet in the context of a Free Exercise Clause challenge to neutrality. *Id.* at 533–34.

In *Lukumi*, the City adopted numerous ordinances that barred animal sacrifice, which was a crucial part of the Santeria faith. *Id.* at 527. The church contended that at least three of the city

ordinances failed the "minimum requirement" of facial neutrality because the ordinances used two words that possessed significant religious connotations: "sacrifice" and "ritual." *Id.* at 533–34. This Court held that the city ordinances were not facially invalid, reasoning that these words were no longer exclusively religious in nature—specifically, the word "sacrifice" had current "secular meanings." *Id.* at 534. However, this Court also held that facial neutrality was not determinative. *Id.* Therefore, despite this holding on facial neutrality, this Court found that the City's object was not neutral and failed under the Free Exercise Clause of the First Amendment. *Id.* at 540.

The CC Law implemented by the State of Delmont is not facially neutral because it explicitly bans religious free exercise. Unlike the city ordinances in *Lukumi*, the Delmont CC Law is explicit that it targets religion. The key here is that the text of the statute explicitly refers to two religious practices that are being restricted—namely the promotion of religious beliefs and donation to religious charities. First, the statute states that common carriers "shall serve all who seek or maintain an account, regardless of political or *religious* viewpoint." Record 29 (emphasis added). Second, the text also states that designated common carriers "shall refrain from using corporate funds to contribute to political, *religious*, or philanthropic causes." Record 29 (emphasis added). Both clauses facially attack the religious free exercise of any organization designated a common carrier. Unlike the ordinances in *Lukumi*, there is no ambiguity in these statutes. The government wanted to find a way to avoid "running afoul of the Establishment Clause."[3] Record 3. But by doing this, the government explicitly violated the religious rights of the organization.

[3] This fear is questionable. Although the State and common carriers both service the general public, nowhere in the statute is it found that deeming an organization to be a "common carrier" also makes that organization an arm of the State. *See* record 3. Because of this, an organization's donations to religious charities would not evince the State's preference for or favoritism towards any particular religion. Therefore, the Establishment Clause concern appears superficial at best.

b. The CC Law is not neutral in object because the government's actions were intolerant of Poster's religious beliefs, indicating the purpose of the law was anti-religious in nature.

Much like the holding in *Lukumi*, even if this Court finds that the CC Law is facially neutral, the *object* of the CC Law is still *not* neutral. In *Lukumi*, this Court not only evaluated the text of the city ordinances, but also evaluated the totality of the circumstances.

This Court evaluated the city ordinances very meticulously, finding a multitude of indications that showed the City's central objective was to systemically suppress the Santeria's religious practices. *See Lukumi*, 508 U.S. at 534. This Court held that the Free Exercise Clause "forbids subtle departures from neutrality" and "covert suppression of particular religious beliefs." *Id.* (internal citations omitted). This Court, again, began its reasoning by using the text of the statute. Although this text failed to provide the church with sufficient evidence to show a violation of facial neutrality, this Court found the text to be a strong indication of the City's true goal—barring religious practices. *See id.* at 535. This Court then looked to statements that were made by city officials, which showed the ordinances were proposed and passed because particular citizens were concerned that certain religions did not align with "public morals, peace, or safety." *Id.* at 535. This Court finally reasoned that the ordinances worked together in a way that made it obvious the City was targeting the Santeria's religious sacrifices of animals. *See id.* at 535–38. Therefore, using all available information to determine the object of the ordinances, this Court found that this law was not neutral in object and that religion was targeted for discrimination. *Id.* at 538.

Recently, in the 2018 case of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, this Court further exemplified that the totality of the circumstances must be considered during a neutrality challenge to the Free Exercise Clause. A same-sex couple visited a

bakery and requested a cake for their same-sex wedding. *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1723 (2018). The owner of the shop told the couple that he would not bake a cake celebrating their wedding because of his religious opposition to same-sex marriage. *Id.* The couple then filed a complaint with the Colorado Civil Rights Commission, claiming a violation of the Colorado Anti-Discrimination Act. *Id.* The Commission concluded that Masterpiece Cakeshop violated the Act, and a state lower court affirmed the ruling to enforce it. *Id.* The decision was affirmed through Colorado state courts, and this Court granted certiorari. *Id.*

This Court held that, although the baker must yield his religious beliefs to laws that were neutral and generally applicable, in this case, the Commission clearly failed to evaluate the baker's actions through a lens of religious neutrality. *Id.* at 1724. Therefore, the Commission's determination violated the Free Exercise Clause of the First Amendment.

This Court's reasoning addressed the difficult position in which the baker found himself. It noted a long line of cases holding that store owners may not deny all goods and services to homosexual couples. *Id.* at 1728. However, the narrower issue was whether the Commission was allowed to compel a certain kind of speech—the custom creation of a wedding cake that endorsed a homosexual marriage—through the enforcement of its civil rights laws. *Id.* This Court cited specific instances in which the Commission found that bakers had the discretion to decline to place certain messages on products. *Id.* In fact, "while enforcement proceedings against Phillips were ongoing, the Colorado Civil Rights Division itself endorsed this proposition in cases involving other bakers' creation of cakes, concluding on at least three occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages." *Id.* This was just some of the evidence presented to show that Masterpiece Cakeshop was not afforded fair and religiously neutral consideration by the Commission. *Id.* The rest of the evidence stemmed

from comments made by members of the Commission during public hearings on the matter. *Id.* at 1729. "At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community." *Id.* This Court used the totality of this evidence to ultimately conclude that the Commission disparaged the baker's religious beliefs and failed to evaluate the discrimination claim using a religiously neutral application of the law. *Id.*

The State of Delmont's CC Law fails to possess a religiously neutral object based on the totality of the circumstances. Facial neutrality is a much lower bar than neutrality in application or object. Here, the state of Delmont crafted a law that will specifically burden Poster in a "covert suppression" of its religious free exercise. In addition to using the text from the CC Law to evaluate religious neutrality, which is appropriately considered under both *Lukumi* and *Masterpiece Cakeshop*, the Fifteenth Circuit rightly considered that the CC Law had not been used against any other organization until it was used against the religiously-affiliated Poster. Record 31. Additionally, Wallace found it of note to state that the government was "stop[ping]" the "APC-founded" organization. This shows that the enforcement action of the CC Law was brought with a specific emphasis on the organization's religious nature. The totality of the circumstances indicate that the CC Law was neither written, nor applied, in a way that was neutral towards the organization's religious beliefs. Therefore, this Court should hold that the CC Law is not neutral.

**2. <u>The CC Law is not generally applicable because it allows individual exemptions and permits secular conduct that undermines state interests.</u>**

A law is not generally applicable when 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 (internal citations omitted). A law also fails in its general applicability when the law prohibits religious conduct but allows secular conduct that undermines the government's asserted interests. *Id*. If a law fails to be applicable generally, then strict scrutiny judicial review is applied to the law. *Smith*, 494 U.S. at 879.

a. The CC Law is not valid because it allows individualized exemptions.

A government may not consider the reason for particular conduct if there is a mechanism for implementing individualized exceptions. *Fulton*, 141 S. Ct. at 1877. In *Fulton*, this Court considered the Free Exercise challenge of Catholic Social Services (CSS), a foster care agency that refused to certify both same-sex married couples and unmarried couples as foster parents. *Id.* at 1875. CSS believed that marriage was a sacred bond exclusively between one man and one woman. *Id.* As such, the organization was willing to certify homosexual individuals as single foster parents but would not approve same-sex or unmarried couples because the organization believed certification would signify approval of the practice. *Id.* Although the organization was never put in a position to deny a same-sex couple, in 2018 a newspaper ran a story that CSS would not certify couples in same-sex relationships. *Id.* The city council, having read the story, launched an investigation into CSS and immediately ceased sending foster children to the organization. *Id.* The City was adamant that it had "laws in place to protect its people from discrimination that occurs under the guise of religious freedom." *Id.* The City claimed that CSS's failure to certify same-sex couples amounted to a breach of the non-discrimination clause in the City's contract with CSS. *Id.* This Court cited the specific contract provision, which was crucial to this Court's reasoning. In relevant part, the provision stated:

> Rejection of Referral: Provider shall not reject a child or family including, but not limited to, . . . prospective foster or adoptive parents, for Services based upon . . .

> their . . . sexual orientation . . . unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion.

*Id.* at 1878. The City then stated that it would not enter another contract with CSS unless it would certify same-sex couples. *Id.* at 1875–76. This led CSS to file suit against the City, asserting that the organization's constitutional rights under the First Amendment's Free Exercise and Free Speech clauses were violated when the referral freeze was enacted by the City. *Id.* at 1876. On certiorari, this Court held that the City burdened the free exercise of CSS by enacting policies that were neither neutral nor generally applicable. *Id.* at 1877. Therefore, the highest level of scrutiny was appropriate when evaluating Philadelphia's law. *Id.* at 1881. Although this Court addressed neutrality, this Court reasoned exclusively through an analysis of general applicability. *Id.* at 1877. This Court determined that the contractual provision created a type of "individualized exception" that made the law generally *inapplicable*. *Id.* at 1878. This Court stated that, because the Commissioner had sole discretion to provide an exception to the contractual provision, the City "may not refuse to extend that [exemption] system to cases of 'religious hardship' without compelling reason." *Id.* (citing *Smith*, 494 U.S. at 884) (internal citations omitted).

Here, Will Wallace had similar discretion to provide a type of exemption to Poster, which makes the law fail in general applicability. Record 32. The language of the statute shows that it only applies to internet platforms with "substantial market share." Record 3. But the statute fails to specify what is considered a "substantial market share." Record 3 n.4. This means that the enforcement of the CC Law is, in actuality, at the sole discretion of the state's Attorney General. Implementing an individualized exception in this manner runs afoul of the general applicability standard set forth in *Smith* and *Fulton*. Seemingly on a whim, the Attorney General may deem an organization's market share "substantial" and bring an action under the CC Law. Some may argue

that any reasonable court of review would strike down any such inappropriate action. However, no court would have that opportunity should Delmont's Attorney General decide against bringing an action in the first place, even if a corporation has an apparently obvious "substantial market share." In this way, the statute provides a mechanism for individualized exceptions that was not afforded to Poster, and for that reason, the statute fails to meet the general applicability standard.

b. The CC Law is not valid because it prohibits religious conduct but allows secular conduct that undermines the government's interests.

A law lacks general applicability when it prohibits religious conduct but permits secular conduct that undermines the government's asserted interests in some similar manner. *Fulton*, 141 S. Ct. at 1877. This rule stems from numerous cases, including again, *Lukumi*.

In *Lukumi*, the City of Hialeah's ordinances not only failed in neutrality, but this Court also found the ordinances failed in their general applicability. The ordinances were put in place, in part, to protect public health, which was "threatened by the disposal of animal carcasses in open public places and the consumption of uninspected meat." *Lukumi*, 508 U.S. at 544. This Court held that these ordinances failed to be generally applicable, as they were underinclusive. *Id.* It reasoned that because the ordinances exclusively prohibited religious sacrifices but did not regulate hunters' disposal of animal carcasses or restaurants' garbage disposal, the city ordinances should be evaluated under (and fail) strict scrutiny. *Id.* at 544–46.

Here, the second clause of the CC Law fails in general applicability because it prohibits religious conduct but allows secular conduct that undermines the government's interests. In relevant part, the second clause of the CC Law prohibits common carriers from donating funds to "religious, political, or philanthropic" causes. Record 3. The government's object of the CC Law was to "bolster free speech by placing limits on the ability of platforms to restrict speech." Record

34. Although thought to be "carefully crafted," this law is anything but. Record 33. The second clause merely restricts donating to three types of causes: religious, political, or philanthropic. However, if Poster lacked its religious ties, and was instead a much more conniving—even evil—organization, then it would be able to donate funds to interests that undermined the government's proclaimed object. For instance, such an organization could theoretically donate to international groups that promote the restriction of speech based on sex, race, or ethnicity. By no means would those types of donations fall into the categories of "religious, political, or philanthropic." The CC Law does not restrict those types of payments, even though an organization promoting those ideologies would certainly run afoul of the government's asserted interest of bolstering free speech. However, since Poster is religious in nature, the organization is not allowed to make donations, or even tithe (a common religious practice mandated in numerous religions), to charities the organization sees as beneficial to the community.

Therefore, the CC Law applied to Poster fails under the Free Exercise Clause. The law is not religiously neutral on its face or in its application to Poster. The law also fails in being generally applicable. It was not crafted narrowly enough to avoid mechanisms for individual exceptions. Additionally, at least the second clause of the law prohibits religious conduct, while allowing secular conduct that contradicts the government's asserted interests. Because the law is neither neutral nor generally applicable, the government fails under the required strict scrutiny standard.

## IX. CONCLUSION

The CC Law unconstitutionally infringes on Poster's right to free speech. The law also violates Poster's right to Free Exercise. Therefore, Poster urges this Court to affirm the Fifteenth Circuit's opinion and hold that the Delmont CC Law violates the First Amendment.

Team 008

# APPENDIX

## Relevant Constitutional and Statutory 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."

**28 U.S.C. § 1254**: 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;
>
> **(2)** By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

**28 U.S.C. § 1291**: The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

**28 U.S.C. § 1331**: The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

**Delmont Rev. Stat. § 9-1.120 (Summary)**:

**(a)**: This law designates internet platforms with "substantial market share" as common carriers. The law requires, in pertinent part, that such platforms "shall serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint," and requires that common carriers "refrain from using corporate funds to contribute to political, religious, or philanthropic causes."

**(b)**: The statement of intent indicates that the no contribution provision was included to avoid running afoul of the Establishment Clause.

## CERTIFICATE

The work product contained in all copies of Team 008's brief is in fact the work product of only the team members. Team 008 has complied fully with its school's governing honor code. Team 008 acknowledges that it has complied with all Rules of the Competition.

Team 008