Docket No. 22-CV-7654

IN THE

SUPREME COURT OF THE UNITED STATES

January 31, 2021

WILL WALACE,

Petitioner

-against-

POSTER, INC.,

Respondent

On Writ of Certiorari From the
United States Court of Appeals for the Fifteenth Circuit in 2021-3487
(Hon. Elizabeth K. Ruttledge, Circuit Judge)

Brief for Petitioner WILL WALLACE

Team 11

QUESTIONS PRESENTED

I. Whether Delmont's Common Carrier Law is an infringement of Poster's free speech rights when Poster, like traditional common carriers, serves as and profits from being a platform for the transmission of communications and ideas to the general public, controls a dominant market share, and where there are no feasible self-publication alternatives to consumers.

II. Whether the Common Carrier Law is constitutional under the First Amendment Free Exercise Clause when it does not reference a specific religion, prevents common carriers with a substantial market share from making donations to political, ideological, and religious organizations, and was specifically enacted to protect citizens' First Amendment speech.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Cases

Statutes

STATEMENT OF JURISDICTION

The United States Circuit Court for the Fifteenth Circuit rendered its decision in favor of Poster with respect to the free speech and free exercise claims. *Poster, Inc. v. Will Wallace*, no. 2021-3487 (15th Cir. 2021). A petition for Writ of Certiorari was filed and granted. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

STATEMENT OF THE CASE

On June 1, 2020, Delmont passed the Common Carrier Law (the "CC law"), which designates internet platforms with "substantial market share" as common carriers. (R. at 3). The CC law requires these internet platforms to "serve all those who seek or maintain an account, regardless of political, ideological, or religious viewpoint." (R. at 3). The law further requires that common carriers "refrain from using corporate funds to contribute to political, religious, or philanthropic causes." (R. at 3). The intent of "no contribution" provision was to avoid conflicts with the Establishment Clause and ensure that internet platforms did not engage in viewpoint discrimination through monetary contributions. (R. at 3, 34-35).

Poster, a popular internet site, is headquartered in Capital City, Delmont, and is incorporated under the laws of Delmont. (R. at 2, 34). Poster was founded and is run by a hundred-year-old Christian Protestant denomination, the American Peace Church (APC). (R. at 2, 36). It is an award winning and widely used self-publication platform; Poster is more affordable than its competitors and dominates the online self-publication market. (R. at 37). The CC law was written to ensure powerful public forums, like Poster, do not infringe on citizens' constitutional rights. (R. at 35).

The CC law was created by Governor Louis F. Trapp ("Governor Trapp"). (R. at 3). Governor Trapp is a strong advocate of the First Amendment as well as website accountability,

neutrality, and accessibility, and advocated for reforms during his re-election to the Governor's Office. (R. at 34-35). He called for legislation to prevent online platforms from restricting and denying access to their forums due to users' viewpoints that contrasted with the platform's ideas. (R. at 34). During Governor Trapp's campaign, he spoke with constituents who were concerned about large tech platforms, like Poster, having significant control over public expression. (R. at 35). The CC law was a manifestation of Governor Trapp's campaign promise. (R. at 34-35). The CC law was meticulously crafted to allow for more speech and sharing ideas in the online space by implementing limitations on online platform's ability to restrict speech. (R. at 35).

The CEO of Poster, John Michael Kane ("Kane"), and Poster's Board of Directors are all APC members. (R. at 36-37). APC members are dedicated to spreading the message of Christ through promoting the APC's beliefs of non-aggression and pacificism in all activities and calls on its followers to do the same. (R. at 36). The APC has a long history of supporting both religious and secular artists. (R. at 2). While Poster has promoted APC content and offers discounts to APC-member users, it consistently hosts artists of diverse ideological viewpoints who wish to jumpstart their career. (R. at 3). Poster charges a minor fee for an account. (R. at 2). Users can upload self-publications and performances and can choose whether to allow the download of their work for free, for rent, or for purchase. (R. at 3). Poster collects a percentage for rents and sales of materials. (R. at 3). Poster holds 77% of the artistic self-publication market. (R. at 2).

Under the Poster Inc., User Agreement, Poster's user agreement states: "Poster, Inc. retains the right to deny publication of any work and to terminate any account, with or without notice, for any reason that Poster, Inc, its agents, successors, or assigns, deems sufficient. Any such decision is final." (R. at 37). Additionally, the User Agreement disclaims Poster's

endorsement of any views expressed in the materials published. (R. at 19). Poster advocated against the CC law, asserting that it would have to choose between uploading material in contradiction to its religious faith or shutting down the business. (R. at 37).

Since joining Poster in November 2018, Katherine Thornberry (Thornberry) has been trying to jumpstart her novel, *Animal Pharma,* on the platform. (R. at 3). During this time, Thornberry also pursued publication through traditional means with little success. (R. at 4). Following the passage of the CC law, Thornberry attended a rally in protest of the international pharmaceutical company, and notorious animal experimenter, PharmaGrande, Inc. (R. at 3-4). Inspired by a musical performance at the rally, Thornberry updated her Poster account, giving her novel a new alternative title, "Animal Pharma" or "Blood is Blood." (R. at 4). The phrase has been used by a radical sect of AntiPharma, but is also widely known through media coverage, grassroots activist efforts, and celebrity endorsement as a tenet expressing the belief that all living beings are equal. (R. at 5).

The rally received a large amount of press because of altercations between rally attendees and the public. (R. at 4). An increase in Ms. Thornberry's sales occurred after the rally. (R. at 4). Kane subsequently condemned the actions taken by protesters at the rally. (R. at 5). Poster determined Thornberry's new title violated the User Agreement and the APC's pacifist views. (R. at 2, 5). Poster suspended Thornberry's account until she changed her title. (R. at 5). This caused *Animal Pharma* to net zero revenue as it has no other source of income. (R. at 5-6). Poster's actions were consistent with only one other instance, where a work was entitled "Murder Your Enemies: An Insurrectionist's Guide to Total War." (R. at 5).

On national television, Thornberry asserted Poster's actions constituted artistic suppression, and Delmont subsequently fined Poster for violation of the CC law. (R. at 6). The

Attorney General for the State of Delmont, Will Wallace ("Wallace"), for the first time, commenced an enforcement action against Poster, noting in a press conference that the APC-founded platform discriminated against a Delmont citizen due to their political viewpoints. (R. at 6, 32).

Poster then commenced this suit against Wallace, in his official capacity as the Chief Law Enforcement Officer. (R. at 6). Poster not only contested its status as a common carrier under the CC law, but even if it was considered a common carrier, challenged the law as a violation of its First Amendment rights to free speech and religious freedom. (R. at 6); *see also* EFC 1, Poster Compl. Delmont then moved for summary judgment, claiming that the CC law was constitutional. (R. at 6). The United States District Court for the District of Delmont held that Poster was a common carrier, Poster's common carrier status prevented the platform from prevailing on the free speech claim, and the CC law was neutral and generally applicable and therefore was not a violation of the free exercise clause. (R. at 23). The United States Circuit Court for the Fifteenth Circuit upheld the lower court's determination regarding Poster's common carrier status but reversed the decision regarding the free speech and free exercise claims. (R. at 27, 33). This Court granted the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifteenth Circuit.

SUMMARY OF THE ARGUMENT

The Delmont CC law does not violate Poster's speech rights because Poster is more like a traditional common carrier than editorial in nature. The degree of speech protection afforded to Poster turns on whether the platform is more editorial in nature or merely transmits information like traditional common carriers. *See Denver Area Educational Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727, 739 (1996). Poster dominates the self-publication

market, leaving no meaningful alternatives to consumers. Users—not Poster—exercise journalistic discretion to attract readers and, accordingly, profits. Further, the CC law would have been permissible at the time of the United States' founding, does not prohibit or force Poster to speak, and is content neutral. For these reasons, the CC law is a permissible restriction on Poster's speech rights.

Additionally, the CC law does not violate the Free Exercise Clause. Neutral laws of general applicability which incidentally burden religion are constitutional. *See Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872, 879 (1990). The CC law is facially neutral and generally applicable because it regulates all internet platforms with a substantial market share and does not target religion, rather it aims to bolster internet user speech. Even if found to lack neutrality, the CC law is nonetheless constitutional because it is narrowly tailored to serve the important government interest of protecting citizens' First Amendment Rights. For these reasons, the CC law does not violate the Free Exercise Clause.

ARGUMENT

I. THE US COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT ERRED IN CONCLUDING THAT THE COMMON CARRIER LAW VIOLATES POSTER'S FREE SPEECH RIGHTS WHEN POSTER PROFITS FROM AND SERVES AS A PLATFORM FOR PUBLIC COMMUNICATION, CONTROLS A DOMINANT MARKET SHARE, AND WHERE THERE ARE NO FEASIBLE ALTERNATIVES TO CONSUMERS

The U.S. Court of Appeals for the Fifteenth Circuit erred in concluding that Poster is editorial in nature, unlike a traditional common carrier. Digital platforms are similar to traditional common carriers, especially when they hold substantial market power. *See Biden v. Knight First Amendment Inst. at Columbia Univ.,* 141 S. Ct. 1220, 1224 (2021) (Thomas, J. concurring) ("In many ways, digital platforms that hold themselves out to the public resemble traditional common carriers…[t]he analogy to common carriers is even clever for digital

platforms that have dominant market share."). Poster consistently markets itself as a self-publication service for artists of diverse ideological viewpoints, offering its services at unbeatable prices. (R. at 3). Poster holds itself out to the public by allowing both secular and religious artists to publish on the platform, and Poster profits from the downloads of these works. (R. at 2). Currently, Poster controls seventy-seven percent of the self-publication market. (R. at 2). In the last twenty years, Poster only once invoked its User Agreement to take down a work inconsistent with APC beliefs. (R. at 5). Therefore, Poster is like traditional common carriers.

State regulation of common carriers' speech is valid "if [it] would have been at the time of founding" or "so long as it does not prohibit the company from speaking or force the company to endorse the speech." *Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring) (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010) and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 684 (1994) (O'Connor, J., concurring)). If a law applies to particular speech because of the topic, idea, or message expressed, it is considered content based and subject to strict scrutiny. *See Reed v. Town of Gilbert,* 567 U.S. 155, 163 (2015). Here, Poster dominates the industry's market and makes its competitors essentially ineffective. (R. at 35). Poster's control over artists' speech, and the high market concentration, generate the same problems that underlie the rationales used to support restrictions on traditional common carriers. (R. at 35). Poster retains its ability to speak and is not forced to endorse speech that conflicts with its views. Additionally, the CC law is neutral because it seeks to bolster free speech, not target content. The law makes no exceptions or categorizations—it applies to all internet platforms with a substantial market share. Accordingly, the CC law is a constitutionally permissible restriction of Poster's speech rights.

A. Poster is similar to a traditional common carrier because it is not editorial in nature.

Poster's role as a platform that values users opinions resembles that of a common carrier. The degree of speech protection afforded to Poster turns on whether the platform is editorial in nature or merely transmits information, like traditional common carriers. *See Denver Area Educational Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727, 739 (1996). This Court has refused to apply common carrier regulations to companies where editorial discretion is the very essence of the entity's function. *See Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241, 258 (1974) (striking down right-to-reply scheme in part because editorial discretion is a "crucial process" for newspaper entities); *see also Columbia System Broadcasting, Inc. v. Democratic Nat. Committee,* 412 U.S. 94, 118 (1973) (striking down regulations on broadcasting because editorial ads are based on journalistic judgment). Traditional common carriers, such as telephone and railroad companies, all serve as conduits for information. (R. at 25). The traditional definition of common carrier is difficult to apply to recent technological advancements, but this Court has applied common carrier regulations to industries that bear similarities to traditional common carriers. *See Primrose v. Western Union Telegraph Co.,* 154 U.S. 1, 14 (1894) (recognizing telegraphs were analogous enough to common carriers to be regulated similarly). Digital platforms are distinct from journalistic entities, like newspapers, because digital platforms, like common carriers, function as communication networks for the public rather than speakers in their own right. *See Knight,* 141 S. Ct. at 1224 (Thomas, J., concurring) ("And unlike newspapers, digital platforms hold themselves out as organizations that focus on distributing the speech of the broader public.").

Here, finding that Poster is editorial in nature is inconsistent with the standard set by this court for editorial categorizations and Poster is better characterized as a common carrier. Though

Poster stipulates that it "retains the right to deny publication of any work and to terminate any account… for any reason that Poster, Inc…deems sufficient," the platform's popularity and success is not dependent upon this journalistic discretion. (R. at 37). Different from newspapers, whose consistent exercise of journalistic discretion directly impacts its readership and monetary success, Poster has amassed a following and profits from hosting all types of artists and their works. *See Columbia System Broadcasting, Inc.,* 412 U.S. at 117 ("the power of privately owned newspapers…is bounded by only two factors…second[is] the journalistic integrity of its editors and publishers"). In the last twenty years, Poster has consistently held itself out to artists of diverse ideological viewpoints who want to jumpstart an audience for their work. (R. at 3). Throughout this time, users—not Poster—exercised journalistic discretion to attract downloads and profits. (R. at 2). Poster charges a fee for an account and receives a percentage of any rents or sales of artistic material. (R. at 2). Poster is extremely popular and holds substantial control of the self-publication market, a key factor in common carrier analysis. (R. at 10); *See Knight,* 141 S. Ct. at 1224 (Thomas, J., concurring) ("The analogy to common carriers is even clearer for digital platforms that have dominant market share."). Although Poster once invoked its User Agreement to take down a work, that does not mean that Poster uses editorial discretion to "curate its users' content to create a holistic symphony of artistic expression." (R. at 29).

Additionally, Poster is a common carrier because it's dominant market share renders no meaningful alternatives to artists whose work is barred from the platform. The remaining services in the self-publication market offer dramatically inferior services, provide less functionality, charge substantially higher rates, or are simply unknown to the general public. (R. at 10). After Thornberry's Poster account was suspended, her work netted zero revenues. (R. at 5); *See Knight,* 141 S. Ct. at 1225 (Thomas, J., concurring) ("as the distributor of the clear

majority of e-books and about half of all physical books, Amazon can impose cataclysmic consequences on authors by, among other things, blocking a listing."). Poster is so dominant over the market that consumers are left with no feasible self-publishing alternatives, similar to other traditional common carriers.

Like other traditional common carriers, Poster has a long history of holding itself out to the public. Though at times APC members have been given preference, Poster has only once excluded or silenced those who do not fit within their ideology. Since its founding, the APC has supported both religious and secular artists and has called on its followers to do the same. (R. at 2). While Poster provides discounted publication services to APC-member artists, the platform has hosted artists of diverse ideological viewpoints since its founding. (R. at 3). Poster is therefore like traditional common carriers because it has consistently held itself out to the public.

B. Providing Poster with a lesser degree of speech protection is constitutionally permissible because the CC law would have been constitutional at the time of founding, does not prohibit or force Poster to speak, and is content neutral.

The CC law is valid as applied to Poster. While Poster is a corporation subject to commercial speech protection, Poster's common carrier status allows greater government regulation of its speech. This Court has indicated that state regulations which may affect speech are permissible if they would have been at the time of founding. *See Stevens,* 559 U.S. at 486 (2010). Further, these burdens are valid so long as they "would not prohibit the company from speaking or force the company to endorse the speech." *See Turner Broadcasting,* 512 U.S. at 684 (1994) (O'Connor, J., concurring). The forced inclusion of an unwanted person in a group infringes upon the group's freedom of expressive association if that person's presence significantly affects the group's ability to advocate public or private viewpoints. *See Boy Scouts of America v. Dale,* 530 U.S. 640, 648 (2010). Groups are not afforded constitutional protection

for decisions to exclude when groups lack distinctive characteristics to support such exclusions. *See Roberts v. United States Jaycees,* 486 U.S. 609, 621 (1984) (striking down Jaycees' exclusion of female members in part because local chapters were neither small nor selective in membership). Government restrictions on speech are content based when a law targets the topic, idea, or type of message. *See Reed,* 567 U.S. at 163. Content neutral laws which restrict the time, place, or manner of speech are generally valid if the law is narrowly tailored, serves a significant government interest, and leaves open ample alternative channels of communication. *See Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989).

Even if the CC law burdens Poster's speech rights, the restriction is constitutionally permissible because speech restrictions on common carriers, like Poster, were permissible at the time of founding. Both the District court and Circuit court acknowledged the long history of Common Carrier laws and the permissible use of such laws to restrict common carriers' right to exclude. *See Poster v. Wallace,* C.A. No. 21-CV-7855, at 7 (Sept. 1, 2021); *Poster v. Wallace,* 2021-3487 at 25. Though Poster is associated with the APC, it has consistently held itself out to anyone who seeks to garner an audience for their work. (R. at 3). Further, Poster profits from all types of works, allowing it to dominate the self-publication market. (R. at 2). Poster's control over so much speech raises concerns about concentrated control that are analogous to those which have historically been invoked to justify common carrier restrictions. *See Knight,* 141 S. Ct. at 1222 (Thomas, J., concurring) ("Where…private parties control the avenues for speech, our law has typically addressed concerns about stifled speech…which may have a secondary effect on the application of the First Amendment.").

Requiring the inclusion of artistic works in contravention with APC beliefs neither prohibits Poster from speaking nor forces Poster to endorse the speech. Since its founding, Poster

has been run by APC members and has consistently hosted artists of diverse ideological viewpoints. (R. at 2-3). Poster's User Agreement explicitly disclaims endorsement of any views expressed in the materials published. (R. at 19). The CC law does not negate this disclaimer, nor does it force Poster to exclude APC members as artists on the platform or as corporate actors. Under the CC law, inclusion of speech on the open platform does not equate to Poster's endorsement. Further, Poster does not have categorical exclusions. As in *Roberts,* where local chapters were neither selective nor small in membership to justify the exclusion of women, Poster has not held its platform out selectively to APC members to justify the exclusion of non-APC work. *See Roberts,* 489 U.S. at 621. Rather, the APC has a long history of supporting both religious and secular artists and has called on its followers to do the same. (R. at 2). Moreover, the title "Blood is Blood'' does not significantly burden the pacifist beliefs Poster wishes to promote. Though this phrase is used by a radical subset of AntiPharma, it is also widely known through media coverage, grassroots activist efforts, and celebrity endorsement as a tenet expressing the belief that all living beings are equal. (R. at 5). Different from *Dale,* where this court determined the Boy Scout value of acting "morally straight" would be significantly burdened by a gay scoutmaster's inclusion, "Blood is Blood" does not equate to the same burden, given its widely known and non-violent alternative meaning. *See Dale,* 530 U.S. at 651.

The CC law is content neutral because it is narrowly tailored to serve an important government interest and leaves open ample alternative means of communication for Poster. Unlike the ordinance at issue in *Reed,* which treated signs advertising a church service and other temporary events differently than ideological and political messages, the CC Law does not categorize or make exceptions; it applies to all internet platforms with dominant market shares. *See Reed,* 567 U.S. at 164. The restriction is narrowly tailored because a total ban on viewpoint

discrimination is necessary to fulfill Delmont's interest in bolstering user speech. *See City Council v. Vincent,* 466 U.S. 789, 816 (1984) (upholding ordinance as narrowly tailored because total sign ban was necessary to fulfill city's interest in limiting visual clutter). Protecting the speech rights of the public from dominant corporations is an important government interest. *See Knight,* 141 S. Ct. at 1221 (Thomas, J., concurring) ("Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties."). Further, Poster is left with ample alternative means to spread their message through counter speech. *See Lorillard v. Reilly,* 533 U.S. 525, 586 (2001)(Thomas, J. concurring) (citing *Whitney v. California,* 247 U.S. 357, 377 (1927)) ("And, if the concern is that tobacco advertising communicates a message with which it disagrees, it could seek to counteract that message with 'more speech, not enforced silence'"). Poster retains the ability to boost APC content through its algorithm or communicate messages through the press to engage in counter speech. For these reasons, providing Poster with a lesser degree of speech protection is permissible.

II. THE UNITED STATES DISTRICT COURT PROPERLY FOUND THAT THE CC LAW DID NOT VIOLATE THE FREE EXERCISE CLAUSE BECAUSE THE LAW REGULATES ALL INTERNET PLATFORMS WITH A SUBSTANTIAL MARKET SHARE AND IS NARROWLY TAILORED TO PROTECT CITIZENS' FIRST AMENDMENT RIGHTS.

The CC law does not violate Poster's First Amendment rights under the Free Exercise Clause. The "right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability' on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 (1982)). Only where a law lacks neutrality or generally applicability, does it need to "be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521 (1993). Here, Delmont's CC law is valid under the Free Exercise Clause because it is both facially neutral and generally applicable. It regulates internet platforms with a substantial market share to ensure that the platform does not infringe on the political, ideological, or religious viewpoints of Delmont citizens. (R. at 3). Even if the law is found to lack facial neutrality or general applicability, it is nonetheless narrowly tailored to serve the compelling government interest of protecting Delmont citizens' First Amendment rights and it was specifically drafted to not conflict with the Establishment Clause. (R. at 3, 34-35). Therefore, the CC law does not violate the First Amendment.

A. The CC law is facially neutral because it regulates all internet platforms with a substantial market share.

This Court held that a law does not violate the Free Exercise Clause when it is a "valid and neutral law with generally applicability." *Smith*, 494 U.S. at 879 (quoting *Lee*, 455 U.S. at 263); *see also Church of the Lukumi Babalu Aye, Inc*. 508 U.S. at 531 (where "neutrality and general applicability are interrelated"). In *Church of the Lukumi Babalu Aye v. City of Hialeah*, this Court struck down an animal cruelty law that lacked neither facial neutrality and general applicability. *See Church of the Lukumi Babalu Aye, Inc*. 508 U.S. at 520, 532, 535. The ordinance specifically targeted the Santeria religion, and punished individuals who unnecessarily killed animals, including ritual animal sacrifice. *See id*. The ordinance, however, exempted "any licensed [food] establishment" where the killing was otherwise permitted by law, as well as for a "small numbers of hogs and/or cattle." *Id*. Here, the CC law is both facially neutral and generally applicable because it does not target a specific religion, applies to all internet platforms with a substantial market share, has no exemptions, and was enacted to encourage, not discourage, the exercise of free speech. (R. at 3, 34); Delmont Rev. Stat. § 9-1.120.

A law is not neutral when it is discriminatory on its face and its object is to restrict religious practices. *See Church of the Lukumi Babalu Aye, Inc*. 508 U.S. at 533; *see also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (finding that a COVID-19 ordinance was not neutral under *Lukumi* as it "[singled] out houses of worship for especially harsh treatment"); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (holding a church was denied a public benefit solely due to its religious character). In addition, if the law specifically references a religion "without secular meaning discernable from the language or context," then it is not neutral. *Id*. However, in *Lukumi*, this Court stated that the use of words "sacrifice" and "ritual" in the ordinance, not only have a "strong religious connotation," but also have secular meanings. *Id*. at 534.

Here, the CC law is facially neutral under the *Smith*. This law is neutral because it designates all internet platforms with a "substantial market share" as a common carrier, without mentioning a specific religion. (R. at 3); Delmont Rev. Stat. § 9-1.120. Unlike *Lukumi*, the object and purpose of the law is not to discriminate against any religion, as it does not mention the APC religion, nor any specific religion. *See id*. There is also no language in the statute that may have a secular meaning, but still has strong religious connotations. *See id*. Poster holds hold 77% of the artistic self-public market and it falls within the parameters of the statute not because of its religious affiliation, but because of its market control. (R. at 2).

The CC law was specifically designed to protect the First Amendment rights of all Delmont citizens and provide an open forum for discussion, without restrictions by internet platforms: the law states that internet platforms are to serve those "regardless of political, ideological, or religious viewpoint." (R. at 3, 35); Delmont Rev. Stat. § 9-1.120. The no-contribution provision was intended to ensure that online platforms could not engage in broad

viewpoint discrimination through monetary discrimination. (R. at 35); Delmont Rev. Stat. § 9-1.120(b). Notably, this provision encourages inclusivity and limits the use of corporate funds for not just religious causes, but also political and philanthropic ones. *See id*. Given the context in which religion is specifically mentioned, Delmont clearly intended to protect speech from encroachment of a variety of viewpoints, not just religious views.

B. The CC law is neutral in practice because the law was specifically enacted to protect the First Amendment rights of Delmont citizens, not to target Poster's religious beliefs.

In addition to the requirement of facial neutrality, the law must not be discriminatory in practice. *Church of the Lukumi Babalu Aye, Inc*., 508 U.S. at 533 (explaining that the Free Exercise Clause protects against government action that is "masked, as well as overt"). In *Lukumi*, this Court analyzed direct and circumstantial evidence to determine that the counsel enacted the animal sacrifice ordinance with object of religious discrimination against the Santeria. *See id*. at 535, 540. This evidence included "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." *Id*. at 540; (citing *Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252, 267-268 (1977); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, n. 24, (1979)).

This Court applied the above factors and held that the ordinance had a "discriminatory object" because it specifically targeted Santeria sacrifice by worshippers. *See id*. at 540, 542. Likewise, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, this Court held that the Colorado Commission was "neither tolerant nor respectful" of the Cakeshop owner's religious beliefs and that his religious object "was not considered with the neutrality that the Free Exercise Clause Requires." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138

S.Ct. 1719, 1730–1731 (2018). This Court stated that the Commission was obligated, under the Free Exercise Clause, to act in a neutral manner that was tolerant of the cakeshop owner's beliefs. *See id*. at 1730–1731; *see also Cantwell v. Connecticut,* 310 U.S. 296, 303-304 (1940) (explaining that the First Amendment "embraces two concepts—freedom to believe and freedom to act;" the freedom to believe is absolute, but the freedom to act is not); *Church of the Lukumi Babalu Aye, Inc*., 508 U.S. at 532 (holding that the Free Exercise Clause does protect religious beliefs where a law regulates or prohibits conduct that is undertaken for religious reasons).

Here, in addition to its facial neutrality, there is no evidence that suggests the CC law has a religious discriminatory object. *See* Delmont Rev. (R. at 34-25); Delmont Rev. Stat. § 9-1.120. Unlike *Lukumi,* the CC law does not specifically target Poster or the APC but seeks to ensure that all online platforms cannot restrict an individual's speech based on the platform's political, religious, or ideological beliefs. *See* Delmont Rev. *See* Stat. § 9-1.120. Governor Trapp, a strong advocate for the First Amendment, also emphasized that the purpose of the no contribution provision was to ensure that online platforms could not engage in viewpoint discrimination, based on political, religious, and ideological beliefs through monetary contributions. (R. at 34-35); Delmont Rev. Stat. § 9-1.120(b).

Governor Trapp is a strong advocate of website accountability, neutrality, and accessibility. (R. at 34). He advocated for reforms during his campaign for re-election to the Governor's Office—calling for legislation to prevent online platforms from restricting or denying access to their forums based on a users' viewpoints. *See id*. During his campaign, he spoke with constituents who were concerned about large tech platforms gaining significant control over public expression. (R. at 35). Notably, he stated that the CC law was designed to ensure that public forums like Poster, which is a widely used self-publication platform with a

dominant market share, do not infringe on citizens' constitutional rights. *See id*. This demonstrates that the CC law was intended to prevent large platforms, which happens to include Poster because of their large market share, from infringing on individual's First Amendment rights. *See* Delmont Rev. Stat. § 9-1.120.

Unlike *Masterpiece Cakeshop*, Delmont is not intolerant of Poster and the APC's religious beliefs but fosters a platform where individuals can engage in the free exchange of ideas. (R. at 34). No overt or underlying language in the CC law prevents Poster from practicing its religion. *See* Delmont Rev. Stat. § 9-1.120. Given the substantial market share of the platform, and Delmont's compelling interest in protecting the First Amendment rights of its citizens, the CC law is a neutral law that ensures that any large platform cannot encroach on individuals' constitutional rights by using their own political, religious, or ideological viewpoints to control the language of its users. (R. at 3, 34); Delmont Rev. Stat. § 9-1.120.

C. The CC law is generally applicable because it broadly applies to internet platforms and was not created to specifically target Poster nor the APC.

A law is generally applicable where it is not selectively applicable based on religious beliefs. *See Church of Lukumi Babalu Aye, Inc*, 508 U.S. at 543. Recently, this Court held in *Fulton v. City of Philadelphia*, that a law is not generally applicable where it "invite[s]" the government to consider the particular reasons for a person's conduct by providing "a mechanism for individualized exemptions." *Fulton v. City of Philadelphia,* 141 S. Ct. 1868, 1887 (2021) (quoting *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872, 884 (1990)). In *Fulton,* this Court found that Philadelphia violated the Free Exercise Clause when it refused to allow Catholic Social Services to participate in the public foster care system unless they acted in conflict with their homophobic religious beliefs and certified same-sex couples as foster parents. *See generally id*. Here, the formation of the CC law was in response to all internet platforms

control over individuals' speech and does not include exemptions that disfavor Poster. (R. at 3, 34-35).

This Court recognized that even where the government has a legitimate interest, it cannot selectively "impose burdens only on conduct motivated by religious belief." *Church of Lukumi Babalu Aye, Inc*, 508 U.S. at 543. In *Lukumi,* this Court held that the ordinances were "gerrymandered" to specifically suppress the Santeria religion by prohibiting some religious animal killings, but excluding others, like kosher slaughter. *Id*. at 535, 542. The city council contended that they enacted the ordinances due to concern with the practices as inconsistent with public moral, peace, and safety, but council records revealed that residents were specifically concerned with the Santeria practices. *See id*. at 520, 535. Finally, this Court does not question the truth of religious beliefs. *United States v. Ballard*, 322 U.S. 78, 86 (1944); *see also Fulton v. City of Philadelphia,* 141 S. Ct. 1868, 1876 (2021) *(*quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div*., 450 U. S. 707, 714 (1981)) (where "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").

Here, the CC law is generally applicable under the *Smith*. Unlike *Fulton,* the object of the CC law is not to carve out exceptions that favor certain political, religious, and ideological views at the expense of those with different views. *See* Delmont Rev. Stat. § 9-1.120. There are no exceptions to the CC law, only parameters to include internet companies based on their market share. (R. at 3); Delmont Rev. Stat. § 9-1.120. The purpose of the CC law is to ensure that online platforms with a substantial market share do not engage in any type of viewpoint discrimination, including political, religious, and ideological, through monetary contributions. (R. at 37); Delmont Rev. Stat. § 9-1.120(b).

Additionally, unlike in *Lukumi,* the CC law is not gerrymandered to specifically suppress the APC religion. (R. at 36-37). As noted above, Governor Trapp's testimony demonstrates that the CC law not enacted to specifically target the APC. (R. at 34-35); Delmont Rev. Stat. § 9-1.120. First, there are no exceptions that allow other platforms with other religious, political, or ideological views to restrict the speech of its users. Delmont Rev. Stat. § 9-1.120. Second, in contrast *Lukumi*, where the ordinance was enacted in response to Santeria religious practices, Poster has only enforced its User Agreement in one instance prior to the enactment of the CC law. (R. at 2, 22). Therefore, the CC law was likely not enacted in response to these previous actions by Poster.

Delmont's compelling interest to protect the First Amendment rights of its citizens is not limited to enforcement specifically against Poster and the APC. (R. at 34); Delmont Rev. Stat. § 9-1.120. The CC law was designed to ensure that public forums with a substantial market share, do not infringe on citizens' constitutional rights. (R. at 34-35). This is the first time that the Attorney General (AG) has enforced the CC law. (R. at 32). Identifying Poster as an APC founded platform, the AG stated that the platform discriminated against a Delmont citizen's political views. *See id*. Given that this is the first instance of enforcement, there is no comparator evidence as to whether he engaged religious discrimination. *See id*. In identifying the APC in his statement, the AG simply demonstrated that the body behind the platform is viewpoint motivated. *See id*.

Finally, Delmont is not questioning Poster and the APC's right to believe, instead it seeks to protect against the encroachment on Delmont citizens' political viewpoints, like Thornberry, given that it controls 77% of the artistic self-publication market. (R. at 2). Where the APC has historically supported both religious and secular artists, APC members are dedicated to spreading

the message of Christ through promoting beliefs of non-aggression and pacificism. (R. at 2, 36). Today, APC members support artists, poets, educators, and musicians, as these occupations advance the APC's mission. (R. at 37). Poster's Board, composed entirely of APC members, views the platform as not only a tool for publication and a business, but a mechanism to extend their religious practice. (R. at 36-37). While Poster does host artists with a variety of ideological viewpoints, it has promoted APC-member content. (R. at 3). Poster, which has a substantial market share, has clear religious viewpoints. (R. at 2-3). Delmont's actions are consistent with the *Ballard* line of cases because they do not question the APC's religious beliefs, but solely generally apply a neutral statute to protect the First Amendment rights of its citizens. (R. at 34-35); Delmont Rev. Stat. § 9-1.120; *Ballard*, 322 U.S. at 86. Given that the CC law is neutral on its face, neutral in practice, and generally applicable, it is constitutional under the First Amendment and does not violate Poster's right under the Free Exercise Clause.

D. Although the Act is facially neutral and generally applicable, assuming arguendo that it was found facially invalid, it would nonetheless survive strict scrutiny as it is narrowly tailored to further a compelling government interest because the "no contribution provision" was constructed to avoid running afoul of the Establishment Clause.

If a law is found not to be neutral and generally applicable, it is only constitutional if it satisfies strict scrutiny. *See Church of the Lukumi Babalu Aye, Inc*., 508 U.S at 521 (where this Court stated that where a law is not neutral or generally applicable, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest"). If a law of neutrality and general applicability only incidentally burdens religion, it does not need to be justified by a compelling interest. *Id*. at 531; *see also Fulton,* 141 S. Ct. at 1876, 1878 (explaining that, under the *Smith* test, "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are both neutral and generally applicable"). In *Lukumi*, even where the city had a valid interest in ensuring public

health and preventing cruelty to animals, this Court held that the ordinance was underinclusive because it prohibited Santeria sacrifice but did not prohibit other, non-religious killings. *Id*. at 543-545; *see also Braunfeld v. Brown,* 366 U.S. 599, 607 (1961) (citing *Cantwell*, 310 U.S. at 304-305) (holding a law that regulates conduct is valid despite incidental burdens on religion, where the law is general, within the state's power, where the purpose and effect is to advance the state's secular goals, unless the state can accomplish the purpose of the state by less burdensome or restrictive means). Here, while the CC law is neutral and general applicable, so any burden may be incidental and therefore constitutional, even if it were not neutral and general applicable, it would still satisfy strict scrutiny.

This Court has "[played] the joints" where government action is permitted by the Establishment Clause, but not required by the Free Exercise Clause. *Locke v. Davey*, 540 U.S. 712, 712 (US 2004) (citing *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970)). In addition, to comply with the Establishment Clause, the ordinance must: "have a secular legislative purpose;" "its principal or primary effect must be one that neither advances nor inhibits religion;" and "the statute must not foster 'an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971); *but see Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 588 (2014) (holding that the practice of asking clergy to offer prayers at a town meeting was not a violation of the Establishment Clause because the town board members did not compel the public to participate in the prayer); *Zelman v. Simmons-Harris*, 536 U.S. 639, 639-640 (2002) (upholding a scholarship program, under the Establishment Clause, that was designed to provide educational choices to families, which the majority of schools participating were religious and the majority of the students participating went to religious schools, as it was at the discretion of the parents how to use the funds and where to send their

children). Under the "play the joints" doctrine, where neither government establishment nor interference with religion is permitted, "[short] of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz*, 397 U.S. at 669. Neutrality is key; both clauses prevent "involvement that would tip the balance toward government control of churches or governmental restraint on religious practice." *Id*. at 669-670.

Here, given that Poster has a substantial market share of the artistic self-publishing market, any burdens on its religious speech are solely incidental. (R. at 2). In addition, Poster regularly accepts a diversity of ideological viewpoints including works that contradict its religious beliefs. (R. at 3). Unlike *Lukumi*, Delmont's intervention does not stem from an animosity of the APC. (R. at 36-37). Delmont's government has a legitimate interest in protecting the speech rights of its citizens. (R. at 34-35). The incident with Thornberry, where Poster suspended her account under their User Agreement based on her political views, demonstrates the exact conduct which the CC law was intended to protect. *See id;* (R. at 3-6). The enforcement of the neutral and generally applicable law may have incidentally affected Poster's religious beliefs, but regardless, Delmont's has a compelling interest in protecting Thornberry's First Amendment rights.

The CC law was also narrowly tailored, as it was drafted to specifically regulate internet platforms with a substantial market share that could, therefore, interfere with citizens' free speech rights. (R. at 3, 34-35). In addition, the law was drafted to ensure it did not clash with the Establishment Clause. (R. at 3, 35). The CC law is constitutional under *Lemon* because (1) based on Governor Trapp's campaign promise, it aims to protect the First Amendment rights of Delmont citizens by ensuring that online platforms do not stifle viewpoints it disagrees with,

which is a secular purpose, therefore encouraging free speech; (2) its principal effect of covering internet platforms with substantial market shares, does not substantially inhibit religion given that it regulates political, religious, and ideological viewpoints to ensure that platforms do not encroach on the First Amendment rights of citizens; and (3) historically, there is no indication that the statute fosters excessive entanglement with religion given that this is the first instance of enforcement regarding restrictions on a citizens' political viewpoints that happened to be restricted by a platform with religions viewpoints. (R. at 3, 32, 34-35). As *Galloway* and *Zelman* demonstrate, under the Establishment Clause, this Court has emphasized individual's choices in exercising their religious freedoms, even with government interference. Here, the purpose of CC law is to ensure citizens have that First Amendment right and are not restricted by internet platforms with a substantial market share. (R. at 3, 34-35).

The CC law is an example of the Delmont government successfully playing the joints as it is narrowly tailored to balance the interests of protect citizens' First Amendment rights, not establishing a centralized religion, while not substantially interfering with the religious views of online platforms. *See* Delmont Rev. Stat. § 9-1.120. While the CC law is neutral and generally applicable, even if it were not, it is narrowly drawn to serve a compelling government interest, therefore, it is constitutional.

CONCLUSION

For the foregoing reasons, this Court should reverse the United States Court of Appeals, grant the petitioner's motion for summary judgment as Poster qualifies as a common carrier and the CC law clearly conforms with the First Amendment's Free Exercise Clause.

Dated: January 31, 2021

Respectfully submitted,
Team 11, *Attorneys for Petitioner*

APPENDIX A

Amendment I to the United States Constitution:

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

COMPETITION CERTIFICATE

Team 11 affirms the following:

1. All copies of the brief are the work product of the members of the team only;
2. The team has complied fully with its law school honor code; and
3. The team has complied with all the Rules of the Competition.

Sincerely, Team 11