No. 22-CV-7654

In The

Supreme Court of the United States

March 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 THE RESPONDENT

TEAM 12
Counsel for Respondent
January 31, 2022

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifteenth Circuit correctly concluded that the Delmont Common Carrier Law violates the Free Speech Clause by restricting Poster, Inc. to common carrier status and nullifying its editorial discretion.
2. Whether the United States Court of Appeals for the Fifteenth Circuit correctly concluded that the Delmont Common Carrier Law is unconstitutional by way of its underinclusive provisions, which are neither neutral nor generally applicable because it grants the government unfettered discretion.

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The opinion of the United States District Court for the District of Delmont is unpublished and may be found at *Poster, Inc. v. Wallace*, C.A. No. 21-CV-7855 (D. Delmont Sept. 1, 2021). The opinion of the United States Court of Appeals for the Fifteenth Circuit is unpublished and may be found at *Poster, Inc. v. Wallace,* C.A. No. 2021-3487 (15th Cir. 2021).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit entered final judgment on this matter. R. at 33. Petitioner then filed a writ of certiorari, which this Court granted. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Procedural History

The State of Delmont imposed a weighty fine on Respondent Poster, Inc., alleging that Poster violated the Delmont Common Carrier Law ("CC Law"). R. at 1. Thereafter, Poster brought suit against Petitioner Will Wallace in the United States District Court for the District of Delmont for injunctive and declaratory relief on the basis that the CC Law violates Poster's First Amendment rights to Free Speech and Free Exercise. R. at 1–2. In his official capacity as Delmont's Attorney General, Wallace moved for summary judgment. R. at 6. On September 1, 2021, the district court upheld the statute and granted summary judgment for Wallace. R. at 16.

The Fifteenth Circuit reversed the judgment of the district court on both Free Speech and Free Exercise grounds, holding that the CC Law is unconstitutionally violative of Poster's First Amendment rights. R. at 29, 33. Moreover, the circuit court held that the CC Law was neither neutral nor generally applicable under the *Smith* standard. R. at 33. Following Petitioner's appeal of the Fifteenth Circuit's ruling, this Court granted certiorari to address (1) whether the CC Law violates Poster's free speech rights and (2) whether the CC Law is neutral and generally applicable. R. at 39.

B. Statement of the Facts

Poster is a private corporation incorporated and headquartered in Delmont. R. at 1. Poster operates a digital publishing platform that "provides a mechanism for authors" and artists "to seek publication of their works." R. at 37. Poster's board holds the company to be "more than a business operation" but instead "an extension of their religious practices." R. at 37. In 1998, members of the American Peace Church ("APC") founded Poster; APC congregants make up the entirety of Poster's board of directors. R. at 2, 37. The APC is a hundred-year-old Protestant denomination, which holds pacifism and non-aggression at the center of its religious tenets. R. at 2. A pillar of the APC's faith is "the support of artists, poets, educators, and musicians" who promote peace by "nurtur[ing] the God-given talents of those in [their] communities." R. at 37.

Speaking only to the online, self-publication market, Poster is the largest of its kind, holding the majority of the market by virtue of its dedication to artists. R. at 2, 37. As such, Poster charges artists a small fee for maintaining their account and receives a portion of artists' profits. R. at 2. Poster is an award-winning platform recognized for its affordable prices and wide use. R. at 35. It is able to offer services at affordable rates due to its "dedication to the American Peace Church's mission" to promote peace through artistic and literary work. R. at 2, 37. Poster advances the APC's philanthropic and religious objectives in three ways. R. at 2–3. First, Poster, through its ever-dedicated APC-member board, operates to further its own religious tenets by promoting peacebuilding through educational and cultural developments. R. at 2, 37. Second, Poster donates fifteen percent of its revenue to the APC. R. at 2–3. Third, Poster provides its services at a discounted rate to "APC-member authors, poets, and composers in an effort to promote their members' works." R. at 3.

Poster disclaims the endorsement of any views that contravene the central tenets of its faith. R. at 2. Further, due to its strong relationship with the APC and its commitment to pacifist values,

Poster "retains editorial discretion to accept or reject any material submitted by an artist." R. at 2. Poster maintains that if the CC Law forces it to display any material which contravenes its religious beliefs, it would have to shut down its platform. R. at 37. To be sure, Poster welcomes diverse ideological viewpoints as the "APC has a long history of supporting both religious and secular artists." R. at 2–3. To avoid implicating its religious beliefs, Poster insulates itself through its User Agreement, which must be reviewed and accepted by all who wish to use the platform. R. at 2. Poster's Terms and Conditions maintain that "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 (quoting Poster, Inc., User Agreement (effective December 10, 2019)). Other than this action, Poster has exercised editorial discretion once before—when published material violated its commitment to pacifism and non-violence. R. at 5.

The CC Law was "carefully crafted to bolster free speech by placing limits on the ability of platforms to restrict speech." R. at 34. Two years ago, during his gubernatorial campaign, Governor Louis F. Trapp (the "Governor") promised voters that he would remedy any concern regarding the free flow of information on the internet by regulating online platforms. R. at 34. The Governor wanted the online space to be a "town square" and stated explicitly that Poster was "the kind of website the law was designed to address." R. at 34–35. The CC Law was passed—as promised by the Governor—on June 1, 2020. R. at 3.

The Governor, disregarding Poster's commitment to Delmont's artistic population, enacted the CC Law in spite of Poster's strong opposition. R. at 3, 37. The CC Law designates internet platforms, which the government determines have "substantial market share," as common carriers. R. at 3. The term "substantial market share" is never defined in the CC Law. R. at 3. Once designated as a common carrier, "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 efforts.'" R. at 3 (quoting Delmont Rev. Stat. § 9-1.120(a)). On its face, the CC Law contains no explicit exceptions. R. at 3. The government purports that the no contribution provision exists solely to "avoid running afoul of the Establishment Clause." R. at 3.

Since November 2018, Katherine Thornberry ("Thornberry"), an author, attempted to jumpstart her novel, *Animal Pharma*, on Poster because she has not been able to publish her novel through traditional means. R. at 3–4. In 2020, after attending the Freedom for All rally, Thornberry changed the title of her novel to *Blood is Blood*. R. at 4. The rally gained notoriety following the violent attack on police officers—one of whom lost an eye—by rally attendees. R. at 4–5. Her new title, *Blood is Blood*, is the mantra of Anti-Pharma—an extremist and violent animal rights group. R. at 4. In furtherance of Poster's pacifist religious beliefs, Poster's CEO publicly condemned the violence at the rally. R. at 4–5.

After the enactment of the CC Law and the rally, Poster discovered the increase in Thornberry's profits following her rally-inspired account updates, social media posts, and title change to *Blood is Blood*. R. at 5. Consequently, and consistent with its terms, Poster suspended Thornberry's account pending revisions to her title only. R. at 5. At this point, the government took no action against Poster under the CC Law. R. at 5–6. The government did not act until one year later when Thornberry publicly protested Poster's suspension of her account for failing to change the title. R. at 6. Only then did the Attorney General of Delmont bring an enforcement action against Poster in violation of the CC Law and impose a compounding fine that eclipses up to thirty-five percent of Poster's daily profits. R. at 3, 6. This is the first time the government enforced the CC Law. R. at 6.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Fifteenth Circuit because the Delmont Common Carrier Law is unconstitutionally violative of Poster's rights under the Free Speech Clause of the First Amendment. This Court may affirm in judgment only and find that the CC Law improperly binds Poster as a common carrier because Poster is uniquely affiliated with the APC and does not exercise substantial control over the flow of information on the internet. Alternatively, this Court may affirm and conclude that the Fifteenth Circuit properly appreciated Poster's free speech rights as a common carrier and correctly reasoned that the CC Law violates Poster's rights by revoking any of Poster's editorial discretion and ability to cultivate a peaceful environment on its site.

This Court should affirm the decision of the Fifteenth Circuit regarding Poster's right to Free Exercise because the CC Law is neither neutral nor generally applicable by virtue of its underinclusive provisions, which award the government unfettered discretion. The CC Law is not neutral because its burden on Poster is far from incidental due to the law's specific mention of religion and proscription of conduct vital to Poster's religious practice. The CC Law is not generally applicable because its enforceability is based solely upon the government's definition of "substantial market share," which creates a mechanism for granting individual exceptions. Because the CC Law is neither neutral nor generally applicable, it is subject to strict scrutiny. The CC Law fails strict scrutiny because the law's underinclusive provisions have arbitrarily left all other online platforms unregulated.

ARGUMENT

I. THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT DID NOT ERR WHEN IT RULED THE DELMONT COMMON CARRIER LAW VIOLATED POSTER'S RIGHTS UNDER THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

The First Amendment protects companies' right to speak freely without the government's abridgment of that speech. U.S. Const., amend. I. Corporations have free speech rights, regardless of whether they are media companies. *See Citizens United v. Fed. Election Comm'n*, 588 U.S. 310, 365–66 (2010). In this case, "[n]o sufficient governmental interest justifies limits on the…speech of nonprofit or for-profit corporations;" thus, the CC Law's curtailment of Poster's free speech rights violates the First Amendment. *Id.* at 365.

A. Poster is improperly considered a common carrier.

Internet platforms may be properly considered common carriers if they "hold themselves out as organizations that focus on distributing the speech of the broader public." *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring). Poster does not hold itself out as a public forum akin to a common carrier for two reasons. First, Poster is not representative of the speech of the broader public because Poster staunchly aligns itself with the American Peace Church. Second, Poster's network is not so dominant in the larger internet space, such that there are no comparable competitors for Delmont's citizens.

1. *Poster's unique character as a publishing platform renders it distinct from other large digital platforms.*

Traditionally, a common carrier "holds [itself] out to carry goods for everyone as a business." *Ingate v. Christie*, 3 Car. & K. 61, 63 (N. P. 1850). However, Poster is not for "everyone" and has never claimed to be. Poster has promoted itself as an APC-associated organization for its twenty-

three years of existence, has discounted services to APC members, and has widely publicized its generous and consistent profit donations to the APC. *See* R. at 2–3, 36–37. Unlike other internet platforms, Poster clearly expresses through these actions that it has close ties and strong views affiliated with pacifism. R. at 26. Poster's characteristics, such as its entirely APC-member board and commitment to its religious beliefs, render it more like a newspaper column that takes promotional submissions than like a social media network that broadcasts billions of users' thoughts and feelings. *See Biden*, 141 S. Ct. at 1224 (Thomas, J., concurring) (The Facebook suite of apps has 3 billion users). Therefore, the government cannot prohibit Poster from using its "journalistic judgment" to align its content with its publicly expressed views. *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 650 (1994).

Further, Poster is a privately-held corporation. The legislature may not "evade First Amendment constraints by selectively choosing which speech should be excepted from *private* control." *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 770 (1996) (Stevens, J., concurring) (emphasis added). Furthermore, "[t]he Free Speech Clause does not prohibit *private* abridgment of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). At its core, the aim of the CC Law is unsupported by the underlying protection of the First Amendment: while statutes may extend First Amendment protection or "provide redress against a private corporation[,] no such protection or redress is provided by the Constitution itself." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976).

The history of common carrier law reveals a tradeoff between the government regulation of private companies furthering a public service in exchange for those companies receiving special liability breaks. *See Munn v. Illinois*, 94 U.S. 113, 134–35 (1876). The CC Law has no such reciprocal advantage for private media companies and thus, strips Poster of its private character. The CC Law enlarges "Government control over the content of broadcast discussion of public issues" – a problem

of "critical importance to…the First Amendment." *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 126 (1973). Poster's private character and unique religious affiliation negate the traditional definition of common carrier and the common law rationale for common carrier regulation.

2. Poster's market power does not reach the level of control of market-dominant, traditional common carriers.

The primary argument for regulating internet providers as common carriers is maintaining the public's free speech guarantees in a world where "the internet is now the primary global platform to exchange ideas." Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 Yale J.L. & Tech. 391, 393 (2020). This concern regarding the public's free speech rights arises when a company acquires enough market share to dominate the flow of information across the internet. *Id.* For example, as a massive search engine and tech conglomerate, Google can warp the public's access to information by altering its search results because of its vast number of users.[1] This concern does not translate to Poster's reasonable discretion over accounts because Poster is not a communications conglomerate without comparable alternatives. Poster does not use its market share to limit the spread of information.

"[I]n assessing whether a company exercises substantial market power, what matters is whether the alternatives are comparable." *Biden*, 141 S. Ct. at 1225 (Thomas, J., concurring). Other digital self-publication platforms comprise twenty-five percent of that narrowly-defined market collectively. R. at 10. Compared to Facebook with three billion users or Google with ninety percent of the market share, Poster's seventy-seven percent market share does not render it a media conglomerate with widespread control over information. *See Biden*, 141 S. Ct. at 1224 (Thomas, J.,

[1] Kirsten Grind, Sam Schechner, Robert McMillan, & John West, *How Google Interferes With Its Search Algorithms and Changes Your Results*, Wall St. J. (Nov. 15, 2019, 8:15 AM), https://www.cnbc.com/2019/11/15/google-tweaks-its-algorithm-to-change-search-results-wsj.html.

concurring). Although Poster's value is dependent on its popularity because it profits from the download of material by website visitors, its network does not shape the internet in the way massive social media and internet platforms do. *See* R. at 19; *Biden*, 141 S. Ct. at 1224 (Thomas, J., concurring). Since its inception, Poster has continuously promoted diverse ideological viewpoints and supported secular and religious artists. R. at 2–3.

The existence of comparable alternatives limits Poster's public service to authors. Artists and authors may choose where to publish their works with the knowledge of Poster's public affiliations with the APC and the editorial discretion in its user agreement. R. at 19. There is no indication that the self-publication network has substantial barriers to entry. Just because Poster has only exercised its editorial discretion once before, it does not follow that there were unchecked violent listings on the platform during that time. R. at 26. Poster does not considerably narrow a user's access to information; in fact, it gives publishing users access to Poster's firm beliefs to choose whether to use Poster or another alternative publishing platform, which will still reach a quarter of the market. R. at 10. *Compare Biden*, 141 S. Ct. at 1225 (Thomas, J., concurring) ("Amazon can impose cataclysmic consequences on authors by, among other things, blocking a listing."). Poster seeks to promote its APC values and maintain its free speech rights because consumers, like Thornberry, maintain a choice, rather than a right, to publish.

B. The decision below is correct; even if Poster is a common carrier, the Delmont Common Carrier Law is unconstitutional because it violates Poster's free speech rights.

1. The Delmont Common Carrier Law unconstitutionally prohibits Poster from exercising discretion by forcing it to serve all who seek or maintain an account in violation of Poster's free speech rights.

Common carriers that "engage in and transmit speech" are nevertheless "entitled to the

protection of the speech and press provisions of the First Amendment." *Turner Broadcasting Sys., Inc.*, 512 U.S. at 636; *see FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984). A duty of nondiscrimination, consistent with the public interest, merely limits a common carrier's First Amendment rights. James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 Fed. Comm. L.J. 225, 228–29 (2002). The CC Law, however, transforms this duty into the blanket abolition of media companies' editorial discretion, and thus, the erosion of the guaranteed corporate free speech rights. *See, e.g.*, *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975).

The CC Law undermines Poster's First Amendment interests because it rids Poster of editorial control over its platform: a condition which users agree to when seeking to publish their content. *See Turner Broadcasting System, Inc.*, 512 U.S. at 623–24; R. at 28–29. In fact, the underlying common carrier regulation rationale seeks to promote the public good; the legislature should protect internet platforms that choose to create family-friendly, peaceful environments on the internet. Candeub, *supra*, at 418–19. At common law, a media distributor, such as a bookstore, newsstand, or library—upon notice that material was libelous or impermissible under other law—had a duty to pull that material from their shelves. *Id.* (discussing *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991)). Corporations, especially media companies with strong religious principles like Poster, "contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 8 (1986).

Furthermore, "if the public's interest in receiving a balanced presentation of views is to be fully served, [the government] must necessarily rely in large part upon the editorial initiative and judgment" of media distributors trusted with that public distribution. *League of Women Voters of Cal.*, 468 U.S. at 378 (1984). Here, the government creates a paradox by regulating Poster as one holding itself out to distribute the speech of the broader public, yet simultaneously curbing Poster's

discretionary free speech rights to curate peaceful content appropriate for the broader public. *See id.*; *Biden*, 141 S. Ct. at 1221 (Thomas, J., concurring).

Because Delmont has only enforced the CC Law against Poster, all other internet platforms and media companies retain the right to limit content to some extent. *See* R. at 6; *Biden*, 141 S. Ct. at 1226 (Thomas, J., concurring) (discussing digital platform's right to exclude users). Unlike the broadly sweeping CC Law, Poster did not ask Thornberry to delete her book or change the content. All Poster requested was an updated title, such that the new title did not conflict with Poster's peaceful values. Although Thornberry's specific post does not incite imminent violence and Poster does not raise the issue of unprotected speech, the CC Law prohibits Poster from exercising the proper discretion to limit what Poster believes to be harmful content through unfettered and untailored regulation. R. at 5; *see Turner Broadcasting Sys., Inc.*, 512 U.S. at 624. There is no reason why Delmont could not "impose a mild anti-discrimination requirement while encouraging platforms to enable users to block objectionable content." *Id.* at 397. Therefore, the CC Law goes beyond the traditionally acceptable statutory duties of common carriers by impeding upon Poster's right to speak against content contrary to its widely-known views.

2. *The Common Carrier Law is unconstitutional because it forbids Poster from using its private funds to contribute to religious and philanthropic causes in violation of Poster's free speech rights.*

In this case, there is "no basis for allowing the Government to limit corporate independent expenditures" in violation of Poster's right to Free Speech. *Citizens United*, 558 U.S. at 365; *see Am. Tradition P'ship v. Bullock*, 567 U.S. 516, 516–517 (2012) (per curiam). The common carrier duty to serve is unaffected by Poster's choice to speak with its religious and philanthropic donations, and there is no legislative justification to curtail Poster's free speech rights in this way. *See Hudgens*, 424 U.S. at 513. This provision ostensibly transformed Poster into a public entity. *See id.; Bigelow*, 421

U.S. at 809.

This provision is also inapposite to the justification for common carrier regulation: the government should regulate common carriers that hold themselves out to everyone to promote the public good. *E.g., Ingate*, 3 Car. & K. at 63. By including political contributions, the law is directly contrary to the Supreme Court's decision in *Citizens United*. 558 U.S. at 365 (upheld by *Am. Tradition P'ship*, 567 U.S. at 516–517). Although the government may designate privately-held companies as common carriers, the government cannot assert an interest in protecting public shareholders from being compelled to sponsor and support Poster's views. *See Citizens United*, 558 U.S. at 361 (disallowing the government's ban on media companies' free speech). Therefore, the CC Law abandons the mutual tradeoff associated with regulating common carriers by including this provision that distorts how private companies may use their funds to promote their own causes. The CC Law's definition and regulation of common carriers are so overbroad that it reaches further than anything this Supreme Court has ever upheld.

II. THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT DID NOT ERR WHEN IT DECLARED THE DELMONT COMMON CARRIER LAW NEITHER NEUTRAL NOR GENERALLY APPLICABLE IN VIOLATION OF THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

This Court should affirm the Fifteenth Circuit's decision because the Delmont Common Carrier Law forces Poster to comply with its unconstitutional requirements or close its business to avoid violating its religious mandate. This Court has long maintained that "Congress shall make no law…prohibiting the free exercise…of religion." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). In *Employment Division of Human Resources of Oregon v. Smith*, this Court held that a law burdening religious practice which is neither neutral nor generally applicable is subject to strict scrutiny to determine its validity. 494 U.S. 872, 878–82 (1990). *Smith* established the threshold

inquiry for evaluating Free Exercise claims. Once the Court determines that a law is neither neutral nor generally applicable, strict scrutiny applies. *See Fulton*, 141 S. Ct. at 1871; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993) (holding that a law failing the requirements of neutrality and general applicability must be narrowly tailored to advance the government interest). That said, the Court in *Smith* held that a law that incidentally burdens religion is valid so long as it is both neutral and generally applicable. *Smith*, 494 U.S. at 879.

Holding with the Free Exercise Clause in mind, the Court cannot reverse the Fifteenth Circuit and find the CC Law's provisions constitutional for three reasons. First, the CC Law is not neutral because the government set out to specifically regulate Poster. Second, the CC Law is not generally applicable because its applicability is determined solely by the government's arbitrary definition of "substantial market share." Third, the CC Law fails strict scrutiny because it is substantially underinclusive in achieving the government's proffered interest.

As recognized by this Court, neutrality and general applicability "are interrelated, and…as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. Although the CC Law violates both neutrality and general applicability, the Court may satisfy *Smith*'s threshold inquiry under only one of the two prongs, so long as evidence of a failure to satisfy both prongs is found in the record. *See Fulton*, 141 S. Ct. at 1877 (deciding that although the Respondent pointed to evidence in the record that the law is also not neutral, the Court found it "more straightforward to resolve this case under the rubric of general applicability").

A. The Delmont Common Carrier Law is not neutral because the government enacted the law specifically to regulate Poster's religious practice.

The CC Law is not neutral—neither on its face nor in its effect. This Court held that the "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or

restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877 (citing *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1731–32 (2018)). When evaluating neutrality, the minimum requirement "is that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533. Whether a law is facially neutral is not determinative because neutrality extends beyond facial discrimination. *Id.* at 534. The Court should consider whether the object of the law was the suppression of a specific religious practice. *Id.* at 542.

1. *The Delmont Common Carrier Law is not facially neutral because its provisions reference religion as a whole and lawmakers specifically reference Poster's religious practice.*

"[T]he minimum requirement [for] neutrality is that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533. By extension, "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning [discernable] from…language or context." *Id.* In *Lukumi*, the city passed ordinances that prohibited the unnecessary or cruel ritual sacrifice of animals "for purposes other than food consumption." *Id.* at 527. This Court found that the city ordinances failed the test for facial neutrality because the ordinance used words with "strong religious connotations." *Id.* at 534. The Court then stated that the record supports the conclusion that the city ordinances attempt to suppress a central element of a religious practice. *Id.* Consequently, because the words chosen by the council were so central to the religious practice, "it cannot be maintained, that city officials had in mind a religion other than Santeria." *Id.*

Here, the CC Law's text contains the same fatal flaw as the city ordinance in *Lukumi*. Both the CC Law and the city ordinance mention religious practice. The ordinance proscribed the ritual sacrifice of animals—a practice central to the Santeria religion. *Id.* And here, the CC Law requires Poster to "serve all who seek or maintain an account, regardless of political, ideological, or *religious* viewpoint," and requires Poster to "refrain from using corporate funds to contribute to political,

religious, or *philanthropic* causes." R. at 3 (emphasis added). Every year, Poster—in furtherance of its religious objectives—makes a sizable contribution of fifteen percent of its net revenue to the American Peace Church's philanthropic mission to foster artistic and cultural talent and bring forward peace on Earth. *See* R. at 37. The CC Law specifically prohibits a practice central to Poster's religion, contributing to "political, religious, or philanthropic causes." R. at 3. In turn, Poster and the Church faced a law that bludgeons a practice central to their religious belief. *See Lukumi*, 508 U.S. at 523 (holding that the city ordinance regulated a practice central to the religious practice). Poster is being forced to either "violate [its] religious mandate or close [its] business operation." R. at 37. *See Cent. Rabbinical Cong. of U.S. & Canada v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 194 (2d Cir. 2014) (holding that the regulation lacked neutrality because it purposefully targeted specific conduct performed by a specific religious group). Explicit language in the CC Law not only mentions religion but also targets conduct central to Poster's religious practice. R. at 3. Thus, the CC Law lacks facial neutrality.

2. In effect, the Delmont Common Carrier Law burdens Poster and the American Peace Church far more than any other religious or political group.

Even if the Court holds that the CC Law is facially neutral, the CC Law still fails neutrality because the Free Exercise Clause protects Poster against "governmental hostility which is masked[,] as well as overt." *Lukumi*, 508 U.S. at 534. When determining whether a law is neutral, the "effect of [the] law in its real operation is strong evidence of its object." *Id.* at 535–56. In fact, the Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1731. A law is not neutral if it is "specifically directed at [a] religious practice." *Smith*, 494 U.S. at 878. This Court has a duty to evaluate governmental action to "eliminate, as it were, religious gerrymanders." *Lukumi*, 508 U.S. at 534 (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

When determining whether a law is neutral, the Court should use an equal protection mode of analysis. *Lukumi*, 508 U.S. at 540. The Court must consider both direct and circumstantial evidence such as "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 decisionmaking body." *Id.*

In *Lukumi*, this Court held that the city ordinance failed the neutrality prong for three reasons: (1) the lawmakers anti-Santeria language prior to the ordinance's enactment; (2) the gerrymandering of the ordinance's text to prevent conduct specific to the Santeria religion while excluding similar secular conduct; and (3) the ordinance suppressed more religious conduct than necessary to achieve the government's stated interest. 508 U.S. at 542; R. at 34. The CC Law fails neutrality for the same three reasons.

First, the statements by the Governor about "neutrality" were directed at Poster and its religious practices. In *Lukumi*, the Court determined that the words of the city council regarding citizen concern with Santeria practices coupled with the mention of words central to the Santeria faith suggested that the city officials had Santeria in mind when enacting the ordinances. 508 U.S. at 535. Here, the Governor ran his campaign two years ago on the promise that he would address the citizen's concern and place limits on online platform's—like Poster—ability to restrict speech. R. at 34. The Governor stated explicitly that Poster "is the kind of website the law is designed to address." R. at 35. *See Cent. Rabbinical Cong.*, 763 F.3d at 194 (holding that a department's regulation lacked neutrality because the department which issued the regulation admitted the specific religious conduct prompted the regulation). The Governor's own words have made it clear that the CC Law is aimed directly at Poster.

Second, the CC Law gerrymanders its text to include Poster and its religious practices through its prohibition on religious and philanthropic donations. Here, the CC Law operates in a similar way

to the gerrymandering in *Lukumi*, which restricted religious conduct, not secular conduct. 508 U.S. at 534. The no contribution provision burdens Poster only. Suppose the government enforced the CC Law again. In that case, it is unlikely that the no contribution provision would affect a secular online platform because a secular platform would not donate a sizable amount of its revenue to a religious or philanthropic cause. Of course, philanthropic or political donations are not unique to Poster; however, such secular platforms would likely not donate according to a religious practice. And so, for a secular platform, the CC Law would not implicate the same constitutional concerns.

Third, the CC Law suppresses more religious conduct than necessary to achieve its interest of protecting public expression in the public forum. Although Poster is not a traditional public forum, authors, poets, and musicians are free to use Poster so long as Poster retains editorial control. *See* discussion *supra* Section I.B.1. Even assuming that the CC Law's ban on exercising discretion toward online speech may relate to Poster as a publishing website for creatives, the no donation provision bears no relation to the government's proffered interest. The CC Law was "carefully crafted" and attempts to disguise the no donation provision as a preemptive measure to "avoid implicating the Establishment Clause." R. at 35. That is not the law. This Court has stated that the Establishment Clause is implicated where the government actions benefit a particular religion. *Lukumi*, 508 U.S. at 532. The opposite is true; the CC Law solely burdens Poster and its religious practices.

B. The Delmont Common Carrier Law is not generally applicable because its enforceability is tied directly to the government's discretion through the "substantial market share provision."

The CC Law attempts to avoid potential general applicability issues by not allowing for any exceptions to its mandates. Yet, the CC Law awards the government unfettered arbitrary discretion because the law never defines the term "substantial market share." R. at 3. In *Fulton*, this Court held that "[a] law is not generally applicable if it 'invite[s] the government to consider the particular

reasons for a person's conduct by providing…a mechanism for individualized exemptions.'" 141 S. Ct. at 1877 (quoting *Smith*, 494 U.S. at 884). Additionally, the Court stated that a "good cause" standard that grants the government discretion to grant exceptions based on certain circumstances is not generally applicable. *Fulton*, 141 S. Ct. at 1868.

In *Smith*, this Court determined that a law that criminalized the narcotic peyote was generally applicable even though it placed an incidental burden on a religious practice. *Smith*, 494 U.S. at 872. The law in *Smith* was generally applicable because it contained no exceptions whatsoever, and the criminal statute did not grant the government any discretion. *Id.* The *Smith* Court distinguished its facts from its prior decision in *Sherbert v. Verner. Id.* at 884 (distinguishing *Sherbert v. Verner*, 374 U.S. 398, 399 (1963).

The Court stated that the law in *Sherbert* was not generally applicable because the good cause "standard created a mechanism for individualized exemptions." *Id.* The *Smith* Court did invalidate the broader *Sherbert* test; however, *Smith* and its progeny have long maintained that a "good cause" standard is not generally applicable because government discretion creates a mechanism for granting exemptions. *See Smith*, 494 U.S. at 884; *see also Fulton*, 141 S. Ct. at 1877–78.

Here, the "substantial market share" provision of the CC Law functions much like the "good cause" provision in *Sherbert*. *See* 374 U.S. at 399. The Governor and the rest of the Delmont legislature attempt to wash their hands of potential wrongdoing by maintaining the position that the CC Law does not contain any exceptions, religious or otherwise. R. at 3. By leaving the definition of "substantial market share" to the government, the CC Law falters in the same way as *Sherbert*. *See* 374 U.S. at 406. The government here—as in *Sherbert*—is making a value judgment itself. *See id.*

One year after the enactment of the CC Law, Delmont enforced its unconstitutional provisions for the first time. R. at 6. The government's process is arbitrary and functions exactly like the "good cause" standard in *Sherbert*. *See* 374 U.S. at 399. Just last year, the Court upheld this principle again

when it found that exemptions left to the Commissioner's sole discretion resulted in a law not being generally applicable. *Fulton*, 141 S. Ct. at 1878 (holding that the city's provision was not generally applicable under *Smith* because the provision allowed the Commissioner to consider exceptions "at his/her sole discretion"). Here the definition of "substantial market share" wholly depends on the government's discretion. In the Free Exercise context, a grant of unfettered government discretion is dangerous because "[it] enables [the] government to prohibit the religious practice without fear of later having to apply the same rule to some analogous secular practice it would prefer to permit." Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under Smith and After Smith*, Cato Sup. Ct. Rev. 33, 36 (2020). Here, the government may cite the substantial market share provision when asked why it has only enforced the CC Law against Poster. Surely other platforms would have been regulated during a period of great "concerns over large tech platforms' substantial control over public expression." R. at 35. Despite such concern, Poster is the CC Law's first and only victim. R. at 6.

That is why, to avoid being subject to massive and potentially fatal fines of thirty-five percent of their daily profits, compounded daily, Poster must denounce their religious beliefs. R. at 3. This type of burden, which targets Poster and the APC's beliefs specifically, cannot possibly be considered generally applicable. In effect, the State of Delmont is conditioning the continuance of Poster's business upon its willingness to denounce its faith. *See* R. at 37; *Sherbert*, 374 U.S. at 406 (maintaining that the conditioning of benefits upon the violation of a cardinal principle of appellant's faith violated the free exercise of appellant's religious beliefs). The CC Law fails general applicability and is thus subject to strict scrutiny to determine its validity.

C. The Delmont Common Carrier Law fails under strict scrutiny because the law is underinclusive and not narrowly tailored to achieve the government's interest.

The CC Law is subject to and fails strict scrutiny because it is underinclusive to achieve the

government's interest. R. at 34. The CC Law can survive strict scrutiny only if it "advance[s] 'interests of the highest order' and [is] narrowly tailored in pursuit of those interests." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020) (quoting *Fulton*, 141 S. Ct. at 1881). A law fails strict scrutiny if it "is fatally underinclusive because its 'proffered objectives are not pursued with respect to analogous nonreligious conduct.'" *Id.* at 2261 (quoting *Lukumi*, 508 U.S. at 546).

Here, the CC Law was "carefully crafted to bolster free speech by placing limits on the ability of platforms to restrict speech." R. at 34. Further, the CC Law attempts to "prevent online platforms from stifling viewpoints they disagreed with by denying access to their forums and marketplaces." R. at 34. But as mentioned above, the government has only awarded Poster—the platform which the Governor enacted the CC Law to regulate—with the status of "substantial market share." R. at 6, 35. By requiring "substantial market share," the CC Law has allowed all other online platforms free reign to restrict speech. In effect, the CC Law aims to prevent the "stifling of viewpoints" by allowing platforms to restrict speech so long as it does not possess "substantial market share." R. at 34. The bottom line is that the CC Law cannot possibly "bolster free speech" online if it applies only to Poster. The CC law is underinclusive because it leaves other platforms unregulated and therefore cannot achieve its said interest.

The CC Law also fails strict scrutiny because the government did not narrowly tailor the "no contribution" provision to achieve its stated interest. The government proffers that the no contribution provision exists to "prevent online forums from favoring one particular viewpoint over another through their monetary contributions" and "avoid implicating the Establishment Clause." R. at 35. Even if the Establishment Clause did apply here, the CC Law exists to avoid limitations on speech. R. at 34. The no contribution provision in no way furthers said interest. In essence, the CC Law creates a paradox by eroding the First Amendment right that it so zealously claims to protect.

CONCLUSION

The Delmont Common Carrier Law violates the Free Speech Clause. The CC Law mangles the common law definition of common carriers as well as the justification for First Amendment regulation of common carriers. Further, the CC Law eradicates Poster's editorial discretion, leaving Poster with no autonomy over its platform.

The CC Law violates the Free Exercise Clause. First, the CC Law is not neutral because the government sought to regulate Poster only. Second, the CC Law is not generally applicable because its applicability is based solely on the government's discretion. Third, the CC Law fails strict scrutiny because it is underinclusive in achieving the government's purported interest.

For these reasons, Respondent respectfully requests that this Court uphold the Fifteenth Circuit's decision to deny summary judgment in favor of Poster, Inc. and find that the Delmont Common Carrier Law is unconstitutionally violative of both the Free Speech and Free Exercise Clause of the First Amendment.

Respectfully submitted,

TEAM 12

Counsel for Respondent

CONSTITUTIONAL PROVISION

U.S. Const. amend. I states in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."

STATUTORY PROVISION

28 U.S.C. § 1254(1) states: "Cases in the courts of appeals may be reviewed by the Supreme Court…[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

CERTIFICATE OF COMPLIANCE

Per Rule III.C.3 of the Official Rules of the 2022 Seigenthaler-Sutherland Moot Court Competition, we, Counsel for Respondent, certify that the work product contained in all copies of the team's brief is in fact the work product of the team members; the team has complied fully with our school's governing honor code, and the team has complied with all Rules of the Competition.

TEAM 12
Counsel for Respondent