Brief on the Merits

No. 22-CV-7654

IN THE SUPREME COURT OF THE UNITED STATES

WILL WALLACE,

Petitioner,

v.

POSTER, INC.,

Respondent.

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

BRIEF FOR RESPONDENT

TEAM 016
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether Delmont's Common Carrier Law, Delmont Rev. Stat. § 9-1.120, which removes editorial discretion and compels Respondent to carry a message offensive to its pacifist beliefs, violates Respondent's rights under the Free Speech Clause of the First Amendment; and
2. Whether Delmont's Common Carrier Law, Delmont Rev. Stat. § 9-1.120, violates Respondent's rights under the Free Exercise Clause of the First Amendment by being neither neutral nor generally applicable, and not being narrowly tailored to advance a compelling state interest.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

OTHER CASES

CONSTITUTIONAL PROVISIONS

STATUTORY PROVISIONS

SECONDARY AUTHORITIES

OPINIONS BELOW

The opinion and order of the United States District Court for the District of Delmont is reported at *Poster, Inc. v. Wallace*, C.A. No. 21-CV-7855 (D. Del. Sept. 1, 2021) and is reprinted in the Record at 1-17.

The opinion of the United States Court of Appeals for the Fifteenth Circuit, reversing the lower court, is unreported but available at *Poster, Inc. v. Wallace*, No. 2021-3487 (15th Cir. 2021) and can be found in the Record at 18-33.

JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit reversed the United States District Court for the District of Delmont's order of summary judgment. This Court granted a petition for writ of certiorari to the Court of Appeals. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution is relevant to this appeal and is reprinted in Appendix A. Additionally, Delmont's Common Carrier Law, Delmont Rev. Stat. § 9-1.120, is relevant to this appeal and is reprinted, in relevant part, in Appendix B.

STATEMENT OF THE CASE

I. Factual Background

Respondent Poster, Inc. ("Respondent" or "Poster") is a closely held corporation that operates an online self-publication platform where artists can upload and share their work. R. at 19, 36-37. Poster is operated by members of the American Peace Church ("APC"). R. at 19, 37. Pacifism is a central tenet of the APC. R. at 19. APC members are charged with spreading the message of Christ by promoting non-aggression and peace. R. at 36. Supporting artists is vital to

the APC's mission, and APC members are called to tithe in support of poets, educators, musicians, and other artists. R. at 36-37.

Poster charges users a small fee for an account and collects a percentage of any rents or sales an artist generates through Poster's website. R. at 2. Respondent's dedication to the APC's call to foster the arts has allowed Poster to provide artists unique self-publication resources and services at affordable prices. R. at 37. Poster's popularity has resulted in Respondent obtaining a majority share of the artistic self-publication market. R. at 2. However, nearly one-quarter of the market is currently held by other digital self-publication platforms. R. at 10. Poster provides special discounts and promotional services to APC-member artists. R. at 19. Fifteen percent of Respondent's net revenues are given to APC philanthropies. R. at 37. Because Poster serves as an extension of its directors' religious practices and duties, Respondent's Terms of Service explicitly include a right to deny publication of any work submitted to its website, and to block or terminate accounts with or without notice and for any reason Respondent deems sufficient. R. at 5, 37.

Consistent with its Terms of Service, Respondent suspended the account of Ms. Katherine Thornberry after she added the alternate title, *Blood is Blood*, to her story hosted on the Poster website. R. at 5. Respondent suspended the account because it found the title violative of its pacifist values. R. at 22. Previously, Respondent had been obliged to suspend another user under similar circumstances. R. at 22. "Blood is Blood" is the mantra of the well-known activist group, AntiPharma, which advocates for civic violence in response to animal cruelty. R. at 4. The group is most notorious for its involvement in protests against PharmaGrande, Inc. *Id*. An especially radical sect of AntiPharma incorporated the phrase "Blood is Blood" into a coda used to vandalize buildings. R. at 22. Ms. Thornberry retitled her story while attending a highly

publicized anti-animal experimentation rally in the same city as PharmaGrande's headquarters. R. at 4. The rally Ms. Thornberry attended was plagued with violent altercations resulting in injury, assaults, and property damage. R. at 4-5. Television coverage captured "Blood is Blood" and the extremist coda being shouted during the protest. R. at 5.

After Ms. Thornberry publicly protested her suspension on national television, the State of Delmont fined Poster for violating Delmont's Common Carrier Law ("CCL"). R. at 6. The CCL designates internet platforms with "substantial market share" as common carriers and requires such platforms to serve all users regardless of political, ideological, or religious viewpoint. Delmont Rev. Stat. § 9-1.120. The CCL also prohibits such platforms from contributing corporate funds to political, religious, or philanthropic causes. *Id*. The CCL's statement of intent purports that the "no contribution provision" was included to avoid violating the Establishment Clause. R. at 3. The CCL contains no exemptions, religious or otherwise, and violations result in fines of up to thirty-five percent of daily profits, which compound daily until the violations cease. *Id*. Respondent's fine marked the first time Delmont brought action under the CCL, which was enacted over one year prior. R. at 6, 20.

The CCL is a product of Delmont Governor Louis F. Trapp's most recent election campaign. R. at 34. Governor Trapp claims that the CCL was designed to transform certain online spaces into "town squares." *Id*. Respondent vigorously advocated against the CCL, recognizing the law would require it to host material contradictory to the APC faith and force its directors to choose between violating their religious mandates or closing Poster altogether. R. at 37. During a press conference following Delmont's fining of Respondent, Delmont Attorney General, Will Wallace, publicly accused the "APC-founded Poster platform" of discriminating

against Delmont citizens based on political viewpoints, and admitted this alleged political discrimination was the reason for bringing the CCL action against Respondent. R. at 22.

II. Proceedings Below

In response to Delmont's exorbitant fine, Respondent brought this suit against Attorney General Wallace in his official capacity as Chief Law Enforcement Officer of Delmont. R. at 6. Respondent challenged its designation as a common carrier under the CCL, and in the alternative, challenged the CCL as violating Respondent's free speech and free exercise rights under the First Amendment. *Id*. Delmont moved for summary judgment, which the U.S. District Court for the District of Delmont granted, finding Respondent a common carrier and the CCL constitutional. R. at 16. Respondent appealed, and the United States Court of Appeals for the Fifteenth Circuit reversed the grant of summary judgment with respect to the free speech and free exercise claims. R. at 33. Petitioner petitioned for a writ of certiorari, which this Court granted.

SUMMARY OF THE ARGUMENT

The Fifteenth Circuit correctly held that the CCL violates Respondent's free speech and free exercise rights guaranteed under the First Amendment. The First Amendment prohibits the creation of laws that abridge the freedom of speech or prohibit the free exercise of religion. By infringing on these constitutional guarantees, the CCL violates Respondent's constitutional rights.

The CCL burdens Respondent's free speech rights in two ways. First, it strips Respondent of editorial discretion, which is speech protected by the First Amendment. Second, by removing editorial discretion, the CCL forces Respondent to promote speech offensive to its sincerely held religious beliefs. By interfering with Respondent's editorial discretion and

imposing a content-based speech burden on Respondent, the CCL is subject to strict scrutiny. Intermediate scrutiny is not warranted because Respondent's online platform lacks resource scarcity and bottleneck concerns. However, even if intermediate scrutiny were applied, the CCL would still fail because it is not narrowly tailored to serve a substantial state interest.

The CCL also unconstitutionally burdens Respondent's free exercise of religion. Such laws are subject to review under strict scrutiny unless they are neutral and generally applicable. The CCL is neither facially neutral in its text nor neutral as applied to Respondent. The CCL is also not generally applicable because its language leaves the enforcement of the law open to impermissible acts of discretion. Accordingly, the CCL is subject to strict scrutiny. Because the Delmont government cannot demonstrate that the CCL advances a compelling state interest or that the law is narrowly tailored to achieve that interest, the CCL fails strict scrutiny and should be held unconstitutional.

ARGUMENT

I. DELMONT'S COMMON CARRIER LAW ("CCL") VIOLATES THE FIRST AMENDMENT BY REMOVING EDITORIAL DISCRETION AND COMPELLING RESPONDENT TO CARRY A MESSAGE OFFENSIVE TO ITS RELIGIOUS BELIEFS WHILE FAILING TO SATISFY EVEN INTERMEDIATE SCRUTINY.

The First Amendment bars the government from making laws abridging the freedom of speech. U.S. CONST. amend. I.; *see also Gitlow v. New York*, 268 U.S. 652, 666 (1925) (finding freedom of speech applicable to the states under the Fourteenth Amendment). Like individuals, corporations enjoy free speech protections, including the right to decide both what to say and what not to say. *Pac. Gas & Elec. Co. v. Pub. Utils. Com.*, 475 U.S. 1, 16 (1986). Respondent is not outside the reach of the First Amendment, even as a common carrier. By imposing a content-

based restriction that burdens Respondent's speech rights, the CCL is subject to strict scrutiny. However, the law fails even intermediate scrutiny because it is not narrowly tailored to further a substantial governmental interest. For these reasons, the Fifteenth Circuit's finding that the CCL violates Respondent's free speech rights should be affirmed.

A. Respondent's exercise of editorial discretion to curate its platform is speech protected by the First Amendment.

Exercising editorial discretion is a form of speech protected by the First Amendment. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994). Entities exercising editorial discretion engage in some of the same aspects of speech as book publishers, public speakers, and pamphleteers. *Los Angeles v. Preferred Commc'ns, Inc*., 476 U.S. 488, 494-95 (1986). Be it the newspaper editor selecting what stories to print, the cable programmer deciding what television shows to air, or parade organizers choosing what groups will join their march, each of these parties is engaging in a form of speech entitled to First Amendment protection. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, *Inc.*, 515 U.S. 557, 569-70 (1995).

Like a newspaper editor or cable programmer, Respondent engages in protected editorial discretion. Editorial judgments involve choices about what content to include and how to treat public issues. *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974). Through its Terms of Service, Respondent has always expressly retained the discretion to exclude any material submitted to its platform. R. at 37. Respondent has exercised its editorial discretion by promoting the work of Poster members based on religious affiliation and by removing or requiring edits to content offensive to Respondent's pacifist values. R. at 3, 22. "Blood is Blood" is a phrase well known for its affiliation with a violent activist group. R. at 5. Television stations recently broadcast the phrase being chanted at a public protest plagued by

violent altercations. *Id.* By choosing not to associate with this highly charged slogan, Respondent is exercising editorial discretion on how to treat a polarizing public issue.

State imposition on publishing need not fall into "familiar or traditional patterns to be subject to constitutional limitations." *Tornillo*, 418 U.S. at 256 (citation omitted). Website curation, even if nontraditional, is a form of editorial discretion subject to First Amendment protection. *See e.g.*, *Zhang v. Baidu. Com, Inc.*, 10 F. Supp. 3d 433, 443 (S.D.N.Y. 2014) (holding that the editorial judgments and curated results of an online search engine qualified as protected speech); *NetChoice, LLC v. Moody*, No. 4:21cv220-RH-MAF, 2021 U.S. Dist. LEXIS 121951, at *20-21, 28-29 (N.D. Fla. June 30, 2021) (noting that when curating platforms, social media providers engage in speech and use editorial judgment similar to traditional media providers). Moderating website content allows platform operators to communicate norms and promote their chosen values.[1]

Editorial discretion is also part of what distinguishes entities like Respondent from traditional common carriers. *See e.g.*, *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 379 (1984) (citing *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 123-25 (1973)) (noting that requiring broadcasters to accept all paid political advertisements would intrude upon broadcasters' editorial discretion and transform them into common carriers). As this Court has recognized, "[f]or better or worse, editing is what editors are for." *Columbia Broad. Sys.,* 412 U.S. at 124. Editorial discretion involves the risk that such discretion may be abused, but these risks must be accepted to preserve higher values. *Id.* at 124-25.

The Delmont District Court erred in inferring any "use it or lose it" quality to editorial discretion. First Amendment protections are not relinquished when a speaker fails to exercise

[1] James Grimmelmann, *The Virtues of Moderation*, 17 YALE J. L. & TECH. 42, 61-63 (2015).

them frequently. *Hurley*, 515 U.S. at 569-70 (noting that a parade organizer's prior leniency in admitting participants, practice of combining "multifarious voices," and failure to isolate a single message did not forfeit the group's constitutional protections). Finding any such waiver exists here would punish Respondent for its past efforts to provide an inclusive environment for artists and could encourage smaller platforms to be more exclusive in the future.

B. By removing editorial discretion, the CCL forces Respondent to promote speech offensive to its pacifist beliefs.

The First Amendment protects both the right to speak and the right to refrain from speaking. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The constitutional right not to speak is especially potent when the compelled message is offensive to or inconsistent with a party's own beliefs or message, and this Court has repeatedly struck down attempts to force the ideological message of one party onto another. *See Wooley*, 430 U.S. at 713-15 (holding that compelling the Maynards to display a state motto they found "morally, ethically, religiously and politically abhorrent" was unconstitutional); *Hurley*, 515 U.S. at 572-75, 581 (1995) (finding that compelling one expressive group to accept another expressive group into its parade would violate the First Amendment principle that speakers have autonomy in choosing the content of their messages).

Like individuals, corporations enjoy the right not to disseminate speech they disagree with. *See Pac. Gas & Elec. Co.,* 475 U.S. at 20-21 (plurality opinion) (holding that an order requiring a public utility company to disseminate speech the utility disagreed with on envelopes bearing the utility's address violated the First Amendment). Forced association with a message the corporation disagrees with risks compelling the company to speak out in response. *Id.* at 18. Respondent's objection to the message conveyed by "Blood is Blood" distinguishes this case

from those where this Court has held that dissemination of another's message did not violate the First Amendment. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980). In *Pruneyard*, this Court found that a state law granting individuals access to a private shopping center to distribute pamphlets did not violate the shopping center's First Amendment rights. *Id.* at 76-77, 88. However, the center had no noted objection to the message of the pamphleteers. *Id.* at 101 (Powell, J., concurring).

As applied, the CCL compels Respondent to promote a phrase affiliated with practices antithetical to Respondent's religious beliefs. Like the Maynards in *Wooley*, Respondent has a moral and religious objection to the message being foist upon it. "Blood is Blood" is the well-known mantra of an activist group notorious for advocating violence. R. at 4. The phrase has been chanted at violent protests and used to vandalize buildings. R. at 5. In contrast, Respondent's platform is run by members of the APC, a religion dedicated to "promoting non-aggression and peace." R. at 2, 36-37. Members of Respondent's Board of Directors view the platform as an extension of their religious practices and duties. R. at 37. The CCL also imposes the precise risk of a compelled response identified by this Court in *Pacific Gas*. Forcing Respondent to host *Blood is Blood* on the platform that Respondent owns and bears its name risks compelling Poster to respond and thus continue to speak out on this highly public matter.

C. The CCL is subject to strict scrutiny because the law is a content-based restriction on speech, and Respondent is sufficiently distinguishable from broadcasters and cable operators to render intermediate scrutiny unjustified.

The CCL is a content-based restriction that interferes with editorial discretion and reflects a legislative preference for certain speakers over others, and is therefore subject to strict scrutiny. First, the expression of editorial opinion on matters of public importance is entitled to "the most

exacting degree of First Amendment protection." *League of Women Voters*, 468 U.S. at 375-76. Content-based restrictions also always warrant strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 166 (2015). A regulation prohibiting an online platform from making decisions based on content can qualify as a content-based restriction. *See NetChoice,* 2021 U.S. Dist. LEXIS 121951 at *30. Even content-based burdens are subject to the same "rigorous scrutiny" as content-based bans. *United States v. Playboy Entm't Grp*., 529 U.S. 803, 812 (2000). Moreover, regulations based on the identity of the speaker are "all too often simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Finally, as this Court has noted, restrictions that favor some speakers over others require strict scrutiny when speaker preferences by lawmakers reflect a content preference. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 658, (1994).

The CCL imposes a direct burden on editorial discretion by stripping Respondent of the ability to make certain content-based decisions. Under the CCL, Respondent is also subject to hefty, compounding fines based on a refusal to allow Ms. Thornberry to post specific content, *Blood is Blood*, on its platform. R. at 3. The decision to suspend Ms. Thornberry and her story was based on the content of the story's title. R. at 5. In addition, the CCL favors the speech of Poster users and non-common carriers over the speech of Respondent by limiting only the speech rights of large media platforms. The record shows that the CCL reflects the government of Delmont's distrust for, and is specifically "designed to address," the editorial discretion of "large tech platforms." R. at 34-35. Since the CCL removes editorial discretion and imposes content and speaker-based speech burdens upon Respondent, strict scrutiny is warranted.

Respondent's status as a common carrier does not change the applicability of strict scrutiny. First, a speaker's identity does not determine free speech protections. *Pac. Gas,* 475

U.S. at 8 (plurality opinion). This Court has repeatedly found that regulated entities can enjoy free speech interests and free speech protections. *See Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 532, 533-34 (1980) (finding a privately owned utility company enjoys free speech protections); *Los Angeles v. Preferred Commc'ns, Inc*., 476 U.S. 488, 494-95 (1986) (noting a cable provider has First Amendment interests in selecting programming); *Citizens United v. FEC*, 558 U.S. 310, 353 (2010) (noting media corporations have a First Amendment right to engage in political speech); *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1223-24 (2021) (Thomas, J., concurring) (noting online platforms have First Amendment interests).

Second, the conditions under which Respondent operates are sufficiently distinguished from cable operators and broadcasters, where this Court has applied intermediate scrutiny in reviewing limitations on speech. *See, e.g.*, *Turner Broad. System, Inc. v. FCC*, 512 U.S. 622 (1994); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969). In *Turner*, while evaluating a must-carry provision for cable operators using intermediate scrutiny, this Court noted the significant difference in the editorial limitations of cable operators versus newspapers. 512 U.S. at 661-62, 656. While both entities can enjoy a monopoly, only cable operators possess the technology to create a bottleneck that prevents subscribers from accessing programs an operator chooses not to carry. *Id.* at 656. Cable operators have the ability to effectively block the public from accessing material, serving as gatekeepers in a way not seen in other mediums. *Id.* Since the must-carry regulations under review in *Turner* applied "to almost all cable systems in the country, rather than just a select few," the regulations also did not pose the type of dangers that risk "undermining First Amendment interests" and thus justify strict scrutiny. *Id.* at 661. The broad

applicability of the restrictions did not pose "the same dangers of suppression and manipulation" posed by more narrow regulations. *Id.*

In *Red Lion,* the justification for using a lower level of scrutiny for broadcasters rested largely on the scarcity of broadcaster frequencies. 395 U.S. at 390. Scarcity necessitates licensing choices, which in turn makes the advantages enjoyed by existing broadcasters "the fruit of a preferred position conferred by the Government." *Id.* at 400-01. Scarcity and government-preferred positioning justify regulations that impinge on the speech rights of broadcasters when they would not be justified for other media corporations. *Id.*

Unlike cable operators, Respondent possesses no gatekeeper abilities that allow Poster to physically block access to other publishing platforms. Like some newspapers, Respondent may have become popular enough to have monopoly-like status in a very narrow market. However, there is no evidence that Respondent possesses the technological capabilities to effectively prevent readers from using other platforms to access the limited amount of material Respondent may choose to exclude from its platform. Removing *Blood is Blood* from Respondent's platform does not prevent readers from accessing the story through any other means Ms. Thornberry may choose to make her work available. Respondent cannot prevent readers from accessing Ms. Thornberry's work should she choose to host it on her own website or blog, self-publish the story, read the story aloud at public gatherings, or find a traditional publisher to distribute her work. By defining common carriers based on market share, the CCL also cannot apply equally to all self-publishing platforms. Smaller platforms retain editorial discretion while a single larger platform does not. This serves to suppress the speech of only certain platforms and thus creates the exact danger *Turner* identified as warranting strict scrutiny.

None of the factors identified in *Red Lion* apply to Respondent either. While the internet is not limitless, it is not a "scarce expressive commodity." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). The internet allows anyone to become a town crier or a pamphleteer. *Id.* Authors like Ms. Thornberry are not prevented from sharing their work online just because they are excluded from a single online platform. Nor are such authors in need of governmental assistance in gaining access to other platforms or publishers. Alternate online self-publication platforms remain available to Ms. Thornberry. R. at 10. Respondent's popularity compared to these other alternatives results from Poster's superior functionality and competitive prices, not preferential treatment by the government. *Id*. If anything, Respondent's success is the product of religious, not government, affiliation. R. at 37.

D. Even if intermediate scrutiny is applied, the CCL fails because it is not narrowly tailored to further a substantial governmental interest.

Even if this Court found Respondent sufficiently akin to a broadcaster or cable operator to justify intermediate scrutiny, the CCL is still unconstitutional as applied. A law must be narrowly tailored to further a substantial governmental interest to survive intermediate scrutiny. *League of Women Voters*, 468 U.S. at 380. The CCL does not further a substantial governmental interest. While the government may have a general interest in promoting free speech, the "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam). However noble the goal of expanding the speech of some, the "right and privilege to determine for itself what speech and speakers are worthy of consideration" belongs to the public, not the government. *Citizens United*, 558 U.S. at 341.

Petitioner also has provided no evidence that Respondent or any other online platform meeting the definition of a common carrier have negaged in a pattern of "stifling viewpoints" with which the platforms disagree. Instead, the record shows that except for Ms. Thornberry's account, Respondent has removed content it found objectionable from its platform on only one other occasion. R. at 5. The record also shows that in the year since the CCL was enacted, Petitioner has not been compelled to take any other similar enforcement action against other platforms. R. at 3, 6.

Petitioner would no doubt like this Court to adopt the views of Delmont's Governor and treat Respondent as a de facto public forum, thus increasing the government's interest. However, Respondent is not the "town square" Governor Trapp envisions. First, Respondent is not a state actor engaging in a traditional, exclusive public function and hence cannot create a true public forum. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019) (holding that hosting the speech of others is not a traditional, exclusive public function and alone cannot make a private entity a state actor subject to constraints of the First Amendment); *Prager Univ. v. Google LLC*, 951 F.3d 991, 998 (9th Cir. 2020) (finding that YouTube, despite its ubiquity, was not a state actor). Second, this Court has previously declined to find that "exclusion from common carriage must for all purposes be treated like exclusion from a public forum." *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 742-43 (1996). Finally, some online platforms may provide a unique public service, such as allowing government officials to communicate with the public. *See Knight First Amendment*, 141 S. Ct. at 1221-22 (noting former-President Trump's frequent use of Twitter to speak in his official capacity). Respondent's platform serves no such purpose. Poster is a space for supporting and promoting artistic expression, consistent with the practices of the APC. R. at 37. This distinction between Poster

and a platform like Twitter not only lessens Respondent's resemblance to a public forum, but it also distinguishes Respondent from the type of platform where the government interest in limiting speech may be more substantial and more apt to survive intermediate scrutiny.

The CCL is also not narrowly tailored. Regulatory precision is a "touchstone" in matters of free expression, and broad preventive rules should be treated with suspicion. *NAACP v. Button*, 371 U.S. 415, 438 (1963). Not only does the CCL fail to distinguish between platforms that do and do not serve as a means of communicating with government officials, but the law also leaves no room to distinguish between platforms with an objection to the message forced upon them and those with no message or objection. The CCL further fails to distinguish between entities that hold themselves out as serving all comers and those, like Respondent, who make no promises of neutral, indiscriminate access.

II. DELMONT'S COMMON CARRIER LAW VIOLATES RESPONDENT'S RIGHT TO FREE EXERCISE OF RELIGION, AS IT IS NEITHER A NEUTRAL NOR GENERALLY APPLICABLE LAW.

The Fifteenth Circuit correctly held that Delmont's CCL violates the Free Exercise Clause. The First Amendment bars the government from prohibiting the free exercise of religion. U.S. CONST. amend. I. The exercise of religion not only involves belief, but also the performance or abstention of physical acts. *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). A state consequently prohibits the free exercise of religion when it seeks to ban such acts or abstentions only when they are engaged in for religious reasons. *Id.*

Laws incidentally burdening religion must be neutral and generally applicable to avoid strict scrutiny. *Fulton v. City of Phila., Pa.*, 141 S. Ct. 1868, 1876 (2021). Moreover, because "[n]eutrality and general applicability are interrelated . . . failure to satisfy one requirement is a

likely indication that the other has not been satisfied." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). In this case, the CCL is neither facially neutral towards religion in its text, nor neutral towards the APC as applied by the Delmont government to Respondent. The CCL also fails to define what constitutes a "substantial market share," making enforcement of the law an impermissibly discretionary act devoid of general applicability. Accordingly, the CCL is subject to and fails strict scrutiny, rendering it unconstitutional. The Fifteenth Circuit's finding on free exercise should be affirmed.

A. The CCL is neither facially neutral nor neutral as applied.

A law is not neutral if its object is to restrict certain practices because of their religious motivation. *Church of the Lukumi*, 508 U.S. at 533. Both the CCL's text and application to Respondent show a lack of the "minimum requirement of neutrality" necessary to avoid strict scrutiny. *Id.* at 534. Even if the CCL is found to be facially neutral, the Free Exercise Clause extends beyond mere facial neutrality, forbidding even the covert suppression of particular religious beliefs. *Id.* Ultimately, however, the CCL is not neutral in either sense.

1. The CCL is not facially neutral because it targets religious rationales explicitly.

This Court has recognized that "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Church of the Lukumi*, 508 U.S. at 533. In *Church of the Lukumi*, this Court found the inclusion of the words "sacrifice" and "ritual" in the offending statute to have a sufficiently strong religious connotation to be consistent with a lack of facial neutrality. *Id.* at 534. In Respondent's case, the CCL goes even further. The CCL requires that common carriers "serve all who seek or maintain an account, regardless of political, ideological, or *religious* viewpoint," and further requires that common carriers "refrain from using corporate funds to contribute to political, *religious*, or

philanthropic causes." Delmont Rev. Stat. § 9-1.120(a) (emphasis added). By using the term "religious" in both provisions, common carriers are explicitly barred from certain conduct if said conduct has any underlying religious motivation. The broad language of the first provision ("regardless of . . . religious viewpoint") not only obviates consideration of users' religious viewpoints but also bars any sort of religious objections to users' conduct that a common carrier may have. The second provision ("no contribution") explicitly discriminates against religious donations solely because they are religiously motivated.

The federal system does not prize state experimentation in the suppression of the free exercise of religion. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020). In *Espinoza*, a Department rule expressly excluding religiously affiliated private schools from a state scholarship program was found to violate the Free Exercise Clause. *Id.* at 2261. This Court rejected the Department's assertions that the no-aid provision enhanced the religious freedoms of taxpayers, and reasoned that a state's infringement of First Amendment rights could not be justified on the grounds it advanced religious liberty. *Id.* at 2260. Similarly, Delmont aims to infringe the free exercise of religion by citing free speech justifications. R. at 34-35. Like the Department's invocation of total religious separation, Delmont's interest in promoting the viewpoint neutrality of websites deemed "common carriers" is an insufficient justification for this facial violation of free exercise.

Additionally, Delmont's rationale for invoking the Establishment Clause is even more attenuated than the rejected rationale in *Espinoza*. The Free Exercise Clause limits a state's interest in achieving separation of church and state beyond what the Establishment Clause commands. *Espinoza*, 140 S. Ct. at 2260. In *Espinoza*, the government scholarship support would only make its way to religious schools through the independent choices of private citizens.

Id. at 2254; *accord Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). For this reason, this Court noted that the Department's Establishment Clause rationale for excluding religiously affiliated private schools was "particularly unavailing." *Espinoza*, 140 S. Ct. at 2254. Delmont's Establishment Clause defense is even more unavailing than the defense offered in *Espinoza*. The State claims the CCL's "no contribution provision" was specifically included to avoid violating the Establishment Clause. R. at 35; Delmont Rev. Stat. § 9-1.120(b). However, common carriers' independent donation choices would attenuate any causal nexus between Delmont and the contributions that religious organizations could receive. The funds in question would stem directly from the common carriers, not the Delmont government. The CCL's total ban on religious contributions therefore proscribes far more religious conduct than is necessary to achieve the government's proffered goal of creating a town square. It is reasonable to infer that a law imposing gratuitous restrictions on religious conduct seeks to suppress the conduct, not further stated governmental interests, because of the conduct's religious motivation. *Church of the Lukumi*, 508 U.S. at 538. In Respondent's case, such inference would suggest that the CCL impermissibly suppresses religious contributions simply because of the contributors' religious motivation, not because of Establishment Clause concerns.

2. Delmont failed to neutrally enforce the CCL against Respondent.

The circumstances surrounding the enforcement of the CCL against Respondent reveal a plain departure from neutrality. Neutrality is not met when the government "proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877. The Free Exercise Clause protects against even masked governmental hostility towards religion by examining "the effect of a law in its real operation." *Church of the Lukumi*, 508 U.S. at 535. As in equal protection jurisprudence, the offending government policy

or law must be enacted because of, not merely in spite of, a discriminatory effect to show improper motive. *Church of the Lukumi*, 508 U.S. at 540 (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). Direct and circumstantial evidence such as "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 decisionmaking body" are relevant to determining a decisionmaking body's objective. *Id*. (citation omitted). In *Church of the Lukumi*, Hialeah's ordinance only affected the practice of the Santeria faith, thus targeting the Santeria in the law's operation. Additionally, the events and comments made preceding the law's enactment revealed the ordinance's true intent. *See id.* at 540-41.

Both the Hialeah ordinance and the CCL share the striking qualities of applying to very specific entities and bearing troublesome histories. Indeed, the CCL lay dormant for over a year before ever being enforced. The record includes no evidence that the CCL has since been enforced against another entity besides Respondent. Additionally, Respondent had previously lobbied against the CCL's enactment, citing religious concerns and believing the law would force it to "either violate [its] religious mandate or close [its] business operation." R. at 37. Respondent was vocal in its self-advocacy of the harm that would result to it as a religious company; these concerns appeared to have been dismissed altogether as the law was passed. Governor Trapp has since even identified Respondent by name as "the kind of website the [CCL] was *designed* to address." R. at 35 (emphasis added). In its actual operation, the CCL targeted Respondent and was intolerant of Respondent's religious beliefs.

Furthermore, the Attorney General's contemporaneous comments regarding the CCL's enforcement reveal impermissible targeting of Respondent's APC faith. The government cannot

respect the constitutional guarantee of free exercise while imposing regulations hostile to religious beliefs or while passing judgment upon the legitimacy of religious beliefs and practices. *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (citing *Church of the Lukumi*, 508 U.S. at 534). In *Masterpiece Cakeshop*, the Court reasoned that the Colorado Civil Rights Commission denied a religious baker the "neutral and respectful consideration" that he was entitled to after members of the Commission made hostile, public comments about his religion following the denial of his services to a gay couple. *Id.* at 1729. Of significant importance to this Court was one commissioner's comment that "[r]eligion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust . . . to me it is one of the most despicable pieces of rhetoric . . . to use their religion to hurt others." *Id.* As the inappropriate remark was made in the context of an adjudicatory body deciding a particular case, the commissioners' statements cast doubt on the impartiality of their decision. *Id.* at 1730.

The Colorado adjudicatory body in *Masterpiece Cakeshop* is directly analogous to Delmont's Attorney General. Both governmental actors made comments that cast doubt on the neutrality of their judgment in deciding a specific matter. At a press conference, Attorney General Will Wallace commented that "[t]he *APC-founded* Respondent platform is *discriminating* against Delmont citizens based on their political viewpoints . . . and we bring this action for the first time today to stop that practice . . . ." R. at 6, 23 (emphasis added). Needlessly identifying Respondent's religious heritage while accusing Respondent of "discrimination"—a charged word that is not present in the CCL's text—indicates hostility, just as the comments about religion and discrimination did in *Masterpiece Cakeshop*. Highlighting Respondent's

religious heritage in this manner served no purpose that would further a neutral and permissible explanation of the CCL's enforcement.

The Free Exercise Clause also bars even "*subtle* departures from neutrality" on matters of religion. *Church of the Lukumi*, 508 U.S. at 534 (citation omitted) (emphasis added). Under the relevant components of the statute's text, it should not have mattered whether Respondent follows secular or religious goals. The CCL's purported purpose was to stop any form of "censorship" by those who the State deems to be a common carrier. At worst, the Attorney General's press statement demonstrated open hostility towards Respondent's practice of its APC beliefs. At best, it at least subtly departed from neutrality by needlessly referencing the APC. The record assessed in its totality demonstrates that the Delmont government singled out Respondent in the CCL enforcement because, at least in part, Respondent holds and practices APC beliefs.

B. The CCL is not generally applicable because it is left impermissibly open to abuses of discretion.

In addition to tasking the government with neutrality, Free Exercise Clause jurisprudence also demands that laws burdening religious exercise be generally applicable. *See Smith*, 494 U.S. at 878. All laws are undeniably selective to some extent, but categories of selection are of paramount concern when the law has the effect of burdening religious practice. *Church of the Lukumi*, 508 U.S. at 542. The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, as the availability of such exemptions invites the government to decide which rationales for nonconformity are permissible. *Fulton*, 141 S. Ct. at 1879. The District Court was correct in stating that the CCL did not explicitly list any exceptions. It erred, however, in stopping the inquiry there.

Both clear-cut exceptions and vague language that allows exceptions can render a law selective. In *Fulton*, the non-discrimination provision of a contract between the City of Philadelphia and a Catholic foster care agency required the agency to render its services without regard to potential foster parents' sexual orientation. 141 S. Ct. at 1875. This requirement, however, was selective because exceptions could be expressly granted at the "sole discretion" of the Commissioner of the Department of Human Services. *Id.* at 1878. This Court analogized the "sole discretion" provision to the "good cause" provision in *Sherbert v. Verner*. *Id.* (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)). In *Sherbert*, a Seventh Day Adventist was denied unemployment benefits because the Employment Security Commission viewed her inability to work on Saturday, her Sabbath Day, as her lacking good cause for failing to find available work. 374 U.S. at 401. This Court in *Smith* later explained that the inclusion of the "good cause" standard had created a mechanism for individualized exemptions. 494 U.S. at 884 (quotation marks omitted) (citation omitted). In both *Fulton* and *Sherbert*, a mere troubling phrase opened the door for selectivity and proved that the law in question lacked general applicability.

The CCL suffers from a similar deficiency. The CCL designates internet platforms with "substantial market share" as common carriers, who then must heed the law's "serve all" and "no contribution" provisions because of that newfound status. Delmont Rev. Stat. § 9-1.120(a). However, the statute does not define the phrase "substantial market share." R. at 3 n.4; 20, n.10. The District Court introduced other noncontrolling circuits' tests for determining monopolies and assessing a corporation's market share, yet no such guidance is present in the statute's text itself. R. at 8-9. Like the "good cause" provision in *Sherbert*, the lack of any definition for "substantial market share" creates a de facto formal mechanism for potential individualized exemptions. The CCL lay dormant for over a year before the Attorney General made the discretionary decision

that Respondent's market share meets the nonexistent criteria for substantiality and thus falls within the law's control. The CCL's language is open to such a wide degree of discretion that it could empower the Attorney General to grant individualized exceptions to the CCL's prohibitions. Whether any individualized exceptions have been granted under the CCL is irrelevant to this analysis. The mere existence of such a mechanism renders a policy not generally applicable because it invites the government to decide which reasons for noncompliance are worthwhile. *See Fulton*, 141 S. Ct. at 1879.

Indeed, the CCL invited the Delmont government to consider the reasons motivating Respondent's conduct. This consideration is made evident in the Attorney General's press statement that "[t]he APC-founded Respondent platform is discriminating against Delmont citizens . . . ." R. at 6, 23. Respondent suspended Katherine Thornberry's account in accordance with its pacifist, APC-based beliefs. By referencing Respondent's APC beliefs in an official press statement, it is apparent that the Attorney General did consider the particular reasons for Respondent's suspension of Ms. Thornberry. In fact, it was not until Ms. Thornberry publicized her situation on national television that Delmont fined any entity under the CCL. Because the CCL invites scrutiny of common carriers' rationales for nonconformity and is particularly vulnerable to selective enforcement, it is not generally applicable.

C. The CCL cannot survive strict scrutiny and is thus unconstitutional.

A law that is neither neutral nor generally applicable "must undergo the most rigorous of scrutiny." *Church of the Lukumi*, 508 U.S. at 546. To survive strict scrutiny, the government must show that the law in question advances, and is narrowly tailored to advance, a compelling state interest. *Fulton*, 141 S. Ct. at 1881. The CCL cannot meet the rigorous standards that strict scrutiny demands.

Arguments that the CCL advances a compelling interest are tenuous at best. The exceedingly broad free speech goals that the CCL claims to champion are pursued directly at the expense of other First Amendment freedoms. An interest that relies on the infringement of free exercise cannot be found compelling. *Espinoza*, 140 S. Ct. at 2260 (quotation omitted) (citation omitted). The Delmont government also cannot circumvent the compelling interest question. In the past, the government has avoided providing compelling justification for its actions in cases involving neutral public programs that incidentally impacted religion. *See Bowen v. Roy,* 476 U.S. 693 (1986) (concerning the necessity of social security numbers in the administration of welfare benefits); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (concerning the government's right to build a public road through federally owned land). There is no colorable argument that the CCL is a neutral public program in the same sense.

Even if Delmont's proffered interests are deemed compelling, the CCL is not narrowly tailored because it virtually bars common carriers from suspending an account for any reason or donating to any cause. The "narrowly tailored" requirement, as explained in *Fulton*, notes that "so long as the government can achieve its interests in a manner that does not burden religion, it must do so." 141 S. Ct. at 1881. Delmont could have created legislation advancing the freedom of speech that did not unduly burden religious exercise or that included a religious exemption; the CCL does neither.

Finally, a law advancing legitimate governmental interests only against conduct with a religious motivation will rarely survive strict scrutiny. *Church of the Lukumi*, 508 U.S. at 546. The record only contains evidence of the CCL being enforced against Respondent, a company acting out of purely religious motivation. Considering these elements in their totality, the CCL cannot survive strict scrutiny and should be held unconstitutional.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court affirm the decisions of the United States Court of Appeals for the Fifteenth Circuit with respect to the free speech and free exercise issues.

CERTIFICATE OF COMPLIANCE

In accordance with Rule 33.1(h) of the Rules of the Supreme Court of the United States, we hereby submit this certificate of compliance to certify that this brief contains 8,205 words and complies with the required word limit.

In accordance with Rule III.C.3 of the Official Rules of the 2022 Seigenthaler-Sutherland Moot Court Competition, we hereby submit this certificate of compliance to further certify that:

(i) The work product contained in all copies of this team's brief is in fact the work product of the team members, and only the team members;

(ii) The team has complied fully with the governing honor code of our school; and

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

Respectfully submitted,

/s/ Team 016
Team 016
Counsel for Respondent
January 31, 2022

TABLE OF CONTENTS

APPENDIX A

Constitutional Provisions

U.S. Const. amend. I

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

APPENDIX B

Relevant Statutory Provisions

Delmont Rev. Stat. § 9-1.120

(a) [Internet platforms with substantial market share qualify as common carriers and] shall serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint, [and] refrain from using corporate funds to contribute to political, religious, or philanthropic causes.

(b) [The] no contribution provision [was included to avoid running afoul of the Establishment Clause].