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 THE PETITIONER – WILL WALLACE

Team No. 23
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

ISSUES PRESENTED FOR REVIEW

I. Whether the United States Court of Appeals for the Fifteenth Circuit erred in concluding that the Delmont Common Carrier Law, Delmont Rev. Stat. § 9-1.120, is unconstitutional because it violated Poster's free speech rights.

II. Whether the United States Court of Appeals for the Fifteenth Circuit erred in finding that the Delmont Common Carrier Law, Delmont Rev. Stat. § 9-1.120, is neither neutral nor generally applicable, and is thus unconstitutional.

STATEMENT OF THE FACTS

Poster, Inc. ("Respondent" or "Poster") is a large digital platform that "holds [77%] of the artistic self-publication market." R. at 19. The popular internet site is headquartered in Capital City, Delmont and enables artists to jumpstart their careers by uploading their work to its website. *Id.* Artists pay a small fee for an account on the platform and then choose to allow downloads for free, for rent, or for purchase – Poster receives a percentage from any rents and purchases. *Id.* In its User Agreement, Poster disclaims that it does not endorse the viewpoints of published material and that it can remove material as it sees appropriate. *Id.*

In 1998, members of the American Peace Church ("APC") founded Poster which continues to be managed by APC members whose beliefs include non-aggression and pacifism. *Id.* Historically, the APC has supported all artistic and literary works by both religious and secular artists with varying ideological viewpoints. *Id.* However, Poster continues to provide a discount on its services to established and aspiring APC-member artists. *Id.* at 19. Fifteen percent of Poster's profits are directed toward philanthropic efforts aligned with the views of the APC. *Id.*

On June 1, 2020, the State of Delmont passed Delmont Rev. Stat. § 9-1.120, commonly referred to as the Delmont Common Carrier Law ("Delmont CC Law"), which classifies certain digital platforms as common carriers. *Id.* at 20. The law requires that platforms with a substantial market share "'serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint,' and requires that common carriers 'refrain from using corporate funds to contribute to political, religious, or philanthropic causes.'" *Id.* The law contains no exemptions and the purpose of the "no contribution provision" is to avoid running afoul of the Establishment Clause. *Id.* Violations of the Delmont CC Law result in a fine of up to 35% of daily business

profits until the violation is addressed and corrected. *Id.* at 20. Poster, being a large digital platform, lobbied heavily against the Delmont CC Law's enactment. *Id.*

Since November 2018, Ms. Katherine Thornberry ("Ms. Thornberry") has held an account with Poster while simultaneously trying to jumpstart her novel, *Animal Pharma*. *Id.* Although she has tried to launch her novel through traditional means, she has had no success and Poster continues to be her primary source of income. *Id.* at 20, 22.

After the enactment of the CC Law, Ms. Thornberry attended an animal rights rally in Capital City, Delmont, where PharmaGrande, Inc. a major animal experimenter, is located. *Id.* at 20-21. While at the rally's music venue, Ms. Thornberry was inspired by a musical performance and posted an update to her Poster account giving her novel an alternative title: "*Animal Pharma*" or "*Blood is Blood*." *Id.* at 21. Both before and after Ms. Thornberry's update, there were a series of violent altercations at the rally. *Id.* However, for the entirety of the rally, Ms. Thornberry remained at the music venue and did not participate in any altercations. *Id.*

As a result of media coverage and celebrity endorsement, the phrase "Blood is Blood" has become synonymous with AntiPharma's belief that all living beings are equal. *Id.* at 22. Despite AntiPharma's more pacificist members, there is a subgroup within AntiPharma that is more extreme. *Id.* The radicals of AntiPharma have damaged public spaces, assaulted officers and counter-protestors, and vandalized buildings with their coda, "Blood *is* Blood or Blood *for* Blood." *Id.*

After learning of Ms. Thornberry's alternative title through a revenue report, Poster suspended her account until she revised her post. *Id.* at 21-22. This was the second time since Poster's launch that it took a similar action against a work – the first time being against a work entitled "Murder Your Enemies: An Insurrectionist's Guide to Total War." *Id.* at 22.

On August 1, 2021, Ms. Thornberry publicly denounced Poster's actions on national television calling it "artistic suppression." *Id.* at 22. After hearing of Poster's actions, Delmont fined Poster for violating the Delmont CC Law and alleged that Poster was "discriminating against Delmont citizens based on their political viewpoints[.]" *Id.* at 23.

Poster now brings this suit against Delmont's Attorney General, Will Wallace, and contests its status as a common carrier, or in the alternative claims that the Delmont CC Law violates its First Amendment free speech and religious freedom rights. *Id.* The United States District Court for the District of Delmont granted Delmont's motion for summary judgment holding that Poster is a common carrier, and that the Delmont CC Law did not violate Poster's free speech or free exercise rights. *Id.* The United States Circuit Court for the Fifteenth Circuit reversed, and this appeal follows. *Id.* at 18, 23.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit entered final judgment on this matter in favor of Respondent, Poster. Thereafter, Petitioner timely filed a petition for writ of certiorari, which this Court granted. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1) (2012).

SUMMARY OF THE ARGUMENT

I.

The Fifteenth Circuit erred in finding that the Delmont CC Law is unconstitutional because it violated Respondent's First Amendment rights. As a traditional common carrier, Respondent's platform is not entitled to the same level of First Amendment protections as a private entity that does not classify as a common carrier. The Fifteenth Circuit reasoned that because Respondent possesses "editorial discretion", Respondent is entitled to a higher degree of First Amendment protection – yet, this reasoning is misguided. Respondent's seldom-used editorial discretion does not cleanse Respondent of its status as a common carrier. As a result, Respondent rightfully qualifies as a traditional common carrier with lessened First Amendment protections.

Further, the Delmont CC Law does not infringe on the First Amendment protections Respondent is entitled to as a common carrier. Conversely, Respondent infringed on the First Amendment rights of Ms. Thornberry's work by disguising their artistic censorship as an exercise of their "editorial discretion." The Delmont CC Law was created to allow the projection of all voices, not the censorship of them. Respondent cannot enjoy the luxuries of being a common carrier, while attempting to shield itself to avoid the Delmont CC Law.

II.

This Court should uphold the Delmont CC Law because it is both neutral and generally applicable and thus passes the free exercise test outlined in *Smith*. Although the statute mentions religion on its face, this is not determinative of neutrality. When the Court considers events leading to the enactment of the Delmont statute and the administrative or legislative history, it is clear that although APC's religion is incidentally burdened, the statute is neutral. The Delmont CC Law is also generally applicable because there are no exemptions, religious or otherwise, and there is no method for allowing the creation of exemptions in the future.

In the alternative, if the Delmont statute is found to fail the *Smith* test, it can still pass strict scrutiny. Delmont has a compelling interest in safeguarding the First Amendment rights of individuals in the digital world who use large platforms, like Respondent's. Moreover, the daily business profit fine is the least restrictive means to protect these rights because it strongly discourages platforms from violating their users' rights. Additionally, the financial penalty is both easy to avoid and quick to correct which allows platforms to avoid serious economic loss if they conform to the law. For these reasons, this Court should uphold the Delmont statute and grant summary judgment in favor of the Petitioner.

ARGUMENT

I. THE FIFTEENTH CIRCUIT ERRED IN CONCLUDING THAT THE DELMONT CC LAW WAS UNCONSTITUTIONAL BECAUSE IT DOES NOT VIOLATE RESPONDENT'S FREE SPEECH RIGHTS UNDER FIRST AMENDMENT JURISPRUDENCE.

The First Amendment to the United States Constitution is a bedrock principle of this country that has become part of the very fabric of our nation – stating that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const., amend. I. The protections and guarantees of the First Amendment are made applicable to the states through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). These First Amendment freedoms of speech extend not only to individuals, but to corporate entities as well. *See Pac. Gas & Elec. Co. v. Pub. Util.*, 475 U.S. 1, 16 (1986) (citing *First Nat'l Bank v. Bellotti,* 435 U.S. 765) (noting that "speech does not lose its protections because of the corporate identity of the speaker").

However, the protections afforded by the First Amendment may be reduced or limited for a corporation if that corporation falls under the category of a common carrier. *See FCC v. League of Women Voters*, 468 U.S. 364, 366 (1984) (stating "[u]nlike common carriers, broadcasters are entitled under the First Amendment **to exercise the widest journalistic freedom consistent with their public duties**.") (emphasis added). Simply put, a common carrier is a business that holds itself as serving the public at large and, thus, does not enjoy the same free speech liberties as any other private business. *See Brass v. North Dakota*, 153 U.S. 391, 404 (1894). Here, the Court is faced with a unique dilemma considering the hybrid nature of Respondent's business and the novelty of an Internet-based corporation and its status as a common carrier. First, under the Delmont CC Law, Delmont Rev. Stat. § 9-1.120, Respondent is not offered the same First

Amendment protections as a regular corporation because Respondent qualifies as a common carrier. Second, Respondent's free speech rights were not violated by the Delmont CC Law because, despite the hybrid nature of Respondent's business, Respondent has consistently acted more as a traditional common carrier than that of a platform with editorial control. Lastly, by censoring Ms. Thornberry's work on its platform, Respondent violated the free speech rights of Ms. Thornberry given the manner in which Respondent operates its platform. Therefore, the CC Law is not unconstitutional, and the Fifteenth Circuit erred in ruling otherwise.

In examining a judgment implicating First Amendment concerns, issues of law are reviewed *de novo*, but interpretations of fact merit greater deference. See *Bose Corp. v Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). The *Bose* Court elaborated that independent review does not equate with *de novo* review. *Id.* at 514, n. 31.

A. IN ACCORDANCE WITH THE FINDINGS OF THE FIFTEENTH CIRCUIT, RESPONDENT QUALIFIES AS A COMMON CARRIER.

Since 1876, this Court has recognized the state's power to regulate common carriers by statute, yet the ability to define what a common carrier is has never been solidified and has become more fluid in today's ever-changing electronic world. *See Munn v. Illinois*, 94 U.S. 113 (1876). Despite the lack of a singular balancing test or concrete elements to determine whether a business classifies as a common carrier, this Court, along with numerous lower courts, have set out factors to consider when determining if a business fits the common carrier mold. First, courts have looked at the market control of a corporation or the monopolization of the market as a factor when attempting to classify a business as a common carrier. Courts have used a multitude of percentages when attempting to define what control of the market entails. In *Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am.*, the Tenth Circuit noted that "lower courts generally require a minimum

market share of between 70% and 80%." 885 F.2d 683, 694 n.18 (10th Cir. 1989) (citation omitted). Similarly, in *United States v. Dentsply Int'l, Inc.*, the Third Circuit stated that "a share significantly larger than 55% has been required to establish prima facie market power." 399 F.3d 181, 187 (3d Cir. 2005).

Here, both parties have stipulated that Respondent holds 77% of the entire artistic self-publication market. R. at 19. When applying the definitions of market power in the previously cited lower court cases, Respondent certainly falls into the category of a business that has established market power in their field by holding 77% of the market. Even when applying Judge Learned Hand's more rigid classifying test where 90% market power constitutes a monopoly, 60% and 64% are "doubtful" to suffice, and 33% "certainly" does not constitute a monopoly, Respondent still tips the scale in favor of being a business that holds a majority of the market power. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945). Respondent is in control of the artistic self-publication world by holding a majority of the market share.

Second, when identifying common carriers, courts have looked to whether a company "holds [itself] out to carry goods for everyone as a business." *Ingate v. Christie*, 175 Eng. Rep. 463, 464 (N.P. 1850). The determination of what it means for a company to hold itself out for everyone has been defined by many courts – the company must offer its services to the public without discrimination.[1]

[1] The Supreme Court of Missouri held that "[h]olding out can be accomplished by advertising or soliciting by agents, or may result from a course of business or conduct, but essentially must be a public offering of the service that communicates that it is available to those who wish to use it." *Cook Tractor Co. v. Dir. of Rev.*, 187 S.W.3d 870, 871 (Mo. 2006). The D.C. Circuit Court of Appeals stated that "[t]he sine qua non of a common carrier is some type of holding out to the public." *Flytenow, Inc. v. FAA*, 808 F.3d 882, 884 (2015).

Since its inception, Respondent has offered discounted publication services to APC-member artists, authors, and composers. However, Respondent did not only host APC member creators – throughout Respondent's existence, Respondent has hosted artists of diverse ideological viewpoints. R. at 19. Furthermore, Respondent's CEO, stated that Respondent is the "premier means of artistic self-publication" – providing "resources and tools that are simply unavailable or unaffordable on other platforms." Kane Aff. ¶ 11. Respondent has proudly advertised itself as the heavyweight champion of the artistic self-publication field and has hosted creators from all walks of life. Ms. Thornberry herself is a non-APC creator. "But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal." *Nat'l Asso. of Reg. Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (1976). Here, Respondent does not make decisions on a case-by-case basis. Respondent opened its doors to the public and decided to suppress a singular artist because Respondent's CEO's views did not align with Ms. Thornberry's. Despite the rarely-used creative discretion in Respondent's Terms and Conditions, Respondent has demonstrated that its services are available to any and all creators that wish to self-publish with them.

Lastly, when looking at the public's alternative choices in self-publication services, it is evident that a comparable alternative does not exist. With a 77% control of the market and resources that are "simply unavailable or unaffordable on other platforms," Respondent has created a household name that is synonymous with artistic self-publication. Kane Aff. ¶ 11. "Some scholars have argued that common-carrier regulations are justified only when a carrier possesses substantial market power. Others have said that no substantial market power is needed so long as the company holds itself out as open to the public." *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1222-23 (2021) (Thomas, J., concurring). Possessing both

substantial market power and the nature of holding itself out to the public, Respondent's status as a common carrier cannot be disputed. "In many ways, digital platforms that hold themselves out to the public resemble traditional common carriers. Though digital instead of physical, they are at bottom communications networks, and they 'carry' information from one user to another." *Id.*

Both, the District Court and the Fifteenth Circuit, concluded and agreed that Respondent ultimately classifies as a common carrier given the nature in which Respondent operates its business. By following the findings of the lower courts or using the factors found in our country's jurisprudence, it is evident that Respondent classifies as a common carrier.

B. RESPONDENT CONTINUOUSLY ACTS AS A TRADITIONAL COMMON CARRIER AS OPPOSED TO A PLATFORM WITH EDITORIAL CONTROL.

The Fifteenth Circuit's crux in its analysis of Respondent's First Amendment protections rests on whether Respondent acts more in an editorial fashion or is more akin to a traditional common carrier in the manner in which they operate. Throughout Respondent's 24-year history of operation, Respondent has proved to take the role of a traditional common carrier despite its contention that it holds discretionary editorial power over its platform.

"The principles for determining what constitutes a common carrier or a public accommodation and the level of First Amendment protection both turn on whether the actor holds itself out as serving all members of the public or whether it asserts editorial discretion over whom to carry or host." Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms and Privacy*, 1 J. OF FREE SPEECH LAW 463 (2021). First Amendment protections for a company are relatively weak when a company acts more like a common carrier than as an entity with editorial control. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 739 (1996).

As the Fifteenth Circuit stated, Respondent's business functions as a so-called "hybrid carrier" – giving a voice to each individual artist, yet possessing editorial discretion to maintain its own voice. However, throughout Respondent's existence, Respondent has not exercised nor seemed to enforce the editorial discretion that it rests this whole claim on. Prior to the issue at hand, Respondent has only used its editorial discretion once in its 24-year history to bar a work promoting murder, insurrection, and "total war." R. at 22. In no other instance has Respondent exercised its editorial control. Instead, Respondent chooses to allude to its ability to "exercise" editorial control as a way to circumvent Delmont's CC Law. Respondent cannot, both, use its power and control of the market as a sword when it so chooses and hide behind an "editorial discretion" shield in order to be exempt from Delmont's CC Law.

Further, although Respondent's platform was founded by APC members and promotes itself as an APC-associated organization, Respondent's platform has never solely published APC material. Respondent has hosted work from APC and non-APC artists alike – demonstrating the Respondent's main purpose is not the publishing of APC material, but rather the growth and success of the platform. "The absence of any First Amendment concern in the context of common carriers rests on the understanding that such entities . . . merely facilitate the transmission of the speech of others rather than engage in speech in their own right." *United States Telecomms. Ass'n v. FCC*, 825 F.3d 674, 689 (2016).

Here, Respondent acts like "[a] mere conduit for the messages of others, not as [an] agent exercising editorial discretion subject to First Amendment protections." *Id.* at 749. If Respondent held itself out as an APC publishing site exclusively for APC creators, Respondent could possibly be entitled to the First Amendment protections of any other private corporation because the platform was created for the purpose of spreading the message and principles of the APC.

However, Respondent's monopolization of the self-publication market has categorized the platform as a common carrier that is entitled to a lesser degree of First Amendment protections. Respondent can choose to align with APC views, but the business and financial growth of their corporation has become the priority of the platform. The platform itself does not publish material or artwork from within the company and does not solely operate to disseminate the principles of the APC – the platform is an open market for all and simply provides discounts to APC creators who wish to self-publish their work. Respondent's lack of a true "voice" in regard to the First Amendment further tips the Respondent's scale of acting more as traditional common carrier than a platform with editorial control.

C. AS A TRADITIONAL COMMON CARRIER, RESPONDENT'S FREE SPEECH RIGHTS WERE NOT VIOLATED BY THE DELMONT CC LAW.

As a traditional common carrier, Respondent is not afforded the same First Amendment rights as any other private corporation because of the way in which it serves the public. The Fifteenth Circuit erred in reasoning that because Respondent's Terms and Conditions state that they possess editorial discretion, Respondent is entitled to a higher degree of First Amendment protection – a practice they have only used once prior to this matter. Respondent clearly possesses the qualities of a common carrier and has shown throughout its 24-year existence that it functions as a traditional common carrier – sharing the message of whoever wants an account with the platform. A company's speech interests are weighed by discerning whether the company functions more as an editor or as a common carrier. *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 739. Because of the nature in which Respondent runs their business, Delmont's CC Law did not violate the First Amendment rights that Respondent is entitled to.

This Court, through its precedent, has established that a state regulation regarding common carriers is "valid if [it] would have been permissible at the time of the founding," or so long as it "would not prohibit the company from speaking *or* force the company to endorse the speech." *Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring) (emphasis added) (citing *United States v. Stevens*, 559 U.S. 460, 468 (2010) and *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 684 (1994) (O'Connor, J., concurring)). The Delmont CC Law states that a platform deemed as a common carrier "shall serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint." Delmont Rev. Stat. § 9-1.120(a).

The Delmont CC Law does not seek to force Respondent to endorse a message or silence its own – the law aims to give a voice to the voiceless and regulate platforms who have the ability to control that very voice. The Fifteenth Circuit stated that a denial of Respondent's editorial discretion "forces Poster to endorse, via promotion, messages it may wish to disclaim, and also prohibits the organization's own speech." R at 14. Yet, this Court, in *Rumsfeld v. Forum for Acad. and Inst. Rts., Inc.*, stated that a speaker cannot "erect a shield" against a law that would allow others to speak on its platform by simply asserting that association with the other speech would "impair [the] message" of the platform. 547 U.S. 47, 69 (2006). By allowing Ms. Thornberry's publication to remain on its platform, Respondent is unable to show that the First Amendment protections it is afforded as a traditional common carrier were violated.

The allegation that the changed title of Ms. Thornberry's novel, "Blood is Blood", violated Respondent's pacificist views was Respondent's best attempt at changing a title of its own – from artistic suppression to editorial discretion. The content of the novel was never changed and the coda that inspired the alternative title is rooted in the pacificist belief that all living beings are equal. R. at 22. The novel existed on Respondent's platform for almost two years with no

opposition from Respondent's platform. R. at 20. It was not until Ms. Thornberry changed the title of her novel that Respondent decided to take action and censor her work. *Id.*

So, what was Respondent's true motive behind the censorship? The censorship of Ms. Thornberry's works can be traced back to Respondent's CEO's disdain for the rally and those that attended it regardless of their actions. Mr. Kane stated his opposition to the rally in the newspaper and publicly displayed his feelings towards the attendees of the "Freedom for All" rally. *Id.* at 21. It was not until the novel changed its name to the pacificist-inspired coda that the platform felt it was necessary to exercise its editorial discretion for the second time in over its two-decade existence. "In the area of freedom of speech . . . the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression." *Miller v. California*, 413 U.S. 15, 16 (1973).

The Delmont CC Law does not force Respondent to align itself with Ms. Thornberry's view or even endorse her message – the law simply creates a platform where all voices and messages can be expressed in accordance with the First Amendment. As a common carrier, Respondent is not afforded the same First Amendment freedoms as any other private entity. As a result, Respondent cannot infringe on Ms. Thornberry's First Amendment right by censoring her work as a result of the CEO's conflicting belief. Conversely, Respondent's First Amendment rights, albeit reduced, are not hindered by the Delmont CC Law. The law was created to stop the silencing of many and the projection of few – Respondent's platform is a vehicle for these voices and these voices must be heard. "The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent." *Id.*

II. THE FIFTEENTH CIRCUIT IMPROPERLY FOUND THAT DELMONT'S CC LAW VIOLATES THE FIRST AMENDMENT BECAUSE THE LAW PASSES THE FREE EXERCISE TESTS, AND JUSTICE REQUIRES IT BE UPHELD.

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*…." U.S. Const., amend. I (emphasis added). The clause protects "the right to believe and profess whatever religious doctrine one desires." *Emp't Div, Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). The Court has no authority to question the "truth or falsity of the religious beliefs or doctrines[,]" *United States v. Ballard*, 322 U.S. 78, 86 (1944), no matter how unacceptable, illogical, or incomprehensible they may be, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (holding that all religious beliefs merit First Amendment protection) (citation omitted).

Although the freedom to believe is absolute, the freedom to act on those beliefs is not. *Ballard*, 322 U.S. at 86. The Court has never excused an individual from compliance with a "valid and neutral law of general applicability," *Smith*, 494 U.S. at 879 (citation omitted), solely because the law incidentally burdened a particular religious practice, *Lukumi*, 508 U.S. at 531. The concepts of neutrality and general applicability are interrelated and usually, "the failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* If a law is found to be both neutral and generally applicable, the law is subject to rational basis review. *See Id* However, where a law burdens a religious practice and is neither neutral nor generally applicable, the law is subject to a strict scrutiny. *Lukumi*, 508 U.S. at 531-32.

The Delmont CC Law passes the *Smith* test because it is both neutral and generally applicable, but in the alternative, it will still pass a strict scrutiny analysis. But if the Court finds

that the law fails both tests, the interest in justice requires that it be upheld. Therefore, the Fifteenth Circuit improperly held that the Delmont CC Law violated Respondent's religious freedom rights.

A. DELMONT'S CC LAW SATISFIES THE NEUTRALITY PRONG IN THE *SMITH* TEST AS IT DOES NOT TARGET APC NOR REFER TO RESPONDENT'S RELIGIOUS BELIEFS.

Turning to the first requirement under *Smith,* the Court found that a law is not neutral if it directly targets a religious practice. *Smith*, 494 U.S. at 878. Although the Court has not plainly defined what constitutes a neutral law, *Lukumi* provided several definitions as to what laws are **not** neutral. 508 U.S. at 533, 534, 536, 537, 538. A law is not neutral if it is facially discriminatory; if there is even "slight suspicion" that it is the result of government hostility towards religion; if "the burden of the [law], in practical terms, falls on [religious followers] but almost no others; if a law forbids "more religious conduct than is necessary to achieve [its] stated ends." *Id.*

To begin its analysis, the Court looks to the text of the statute because "the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at 533. Moreover, in *Lukumi,* the Court found that words with "strong religious connotations," like "sacrifice" and "ritual," may be evidence of facial discrimination. *Id.* at 534. However, "[f]acial neutrality is not determinative" because the Free Exercise Clause is designed to protect against "governmental hostility, which is masked, as well as overt." *Id.*

The Fifteenth Circuit overlooked the fundamental differences between the words used in the text of the *Lukumi* statute and those included in Delmont's CC Law. The Church of the Lukumi Babalu Aye, Inc. practices the Santeria religion, which in part includes the sacrifice of animals. *Id.* at 525-26. Shortly after the Church announced its plan to establish a house of worship in the City of Hialeah, the city passed an ordinance prohibiting ritualistic animal sacrifices. *Id.* at 526-27.

The ordinance passed in *Lukumi* was anything but neutral and concluding that the words "shall" and "religious" from the Delmont CC Law are analogous to "sacrifice" and "ritual" from *Lukumi* is misguided and irrational. These cases do not merit the same outcome because unlike in *Lukumi* where lawmakers targeted Santeria, Delmont's CC Law is not targeting any specific religion or religious practice. Here, the Delmont CC Law prohibits common carriers from contributing to **any** religious cause, not just the one supported by Respondent.

Additionally, the purpose of the "no contribution" provision is to avoid running afoul of the Establishment Clause and to ensure that large digital platforms are not using corporate funds to favor "one particular viewpoint over another[.]" R. at 20, 35. So, even though the Delmont CC Law restricts part of Respondent's religious belief that compels it to donate to certain causes, it still does not violate the neutrality requirement in the *Smith* test because APC was not targeted.

In determining whether a facially discriminatory law is neutral, courts look for guidance in equal protection cases. *Lukumi,* 508 U.S. at 540. Considering both direct and circumstantial evidence, the courts review "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." *Id.*

While campaigning, Delmont's Governor "spoke with many constituent groups who expressed concerns over large tech platforms' substantial control over public expression." Trapp Aff. ¶ 8. The creation and later enactment of Delmont's CC Law is merely a product of that growing concern as Delmont tried to stay ahead of foreseeable constitutional rights violations.

Also, the legislative history, including statements made by Delmont's Governor, show that the Delmont CC Law was enacted not to target Respondent's religious beliefs, but rather to hold

all common carriers accountable for their actions. In his affidavit, the Governor identified that the goal of the law was to prevent large platforms from restricting the speech of its users and from favoring certain viewpoints over others. Trapp Aff. ¶ 7. A strong advocate of the First Amendment, the Governor wanted these online spaces to be "'town square[s]' in the truest sense, where all ideas are free to be shared and considered." *Id*.

Delmont's CC Law is facially neutral, but if this Court finds it not to be, this is not outcome determinative. The language used in the law shows that it was not intended to burden Respondent's religious practices, even if it did so incidentally. And considering the series of events leading to the enactment of the law and its legislative history, the Delmont CC Law will likely be found to be neutral and satisfy this prong of the *Smith* test.

B. DELMONT'S CC LAW SATISFIES THE GENERALLY APPLICABILITY PRONG IN THE *SMITH* TEST BECAUSE DOES NOT ALLOW FOR EXEMPTIONS.

A law is not generally applicable if it gives the government discretion "to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (quoting *Smith*, 494 U.S. at 884) (internal quotation marks omitted). Where the state provides a formal system of exemptions, it "may not refuse to extend that system to cases of 'religious hardship' without a compelling reason." *Smith*, 494 U.S. at 884 (citation omitted). Furthermore, if a law "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way[,]" the law does not apply generally. *Fulton*, 141 S. Ct. at 1877. Finally, the government may not place burdens in a selective manner that only affects religiously motivated conduct. *Lukumi*, 508 U.S. at 543.

As enacted, Delmont's CC Law is generally applicable because the government is not imposing burdens in a selective manner that would only affect conduct motivated by religious beliefs. The law is devoid of any exemptions, religious or otherwise, which is strong evidence that Delmont's CC Law is one of general applicability. R. at 3, 29. Because the law was enacted just shy of two years ago, this is the first time that it has been enforced against a common carrier. R. at 31, 32. Accordingly, there is no evidence that indicates that Delmont's actions were targeting APC or Respondent's religion. Because the CC Law is both neutral and generally applicable, it passes the *Smith* test and does not violate the Free Exercise Clause of the First Amendment.

C. IN THE ALTERNATIVE, IF THE DELMONT CC LAW IS FOUND TO FAIL THE *SMITH* TEST, IT STILL PASSES A STRICT SCRUTINY ANALYSIS.

If a law burdens religion and is not neutral nor generally applicable, the Court applies a strict scrutiny analysis to determine whether it violates the Free Exercise Clause. *Lukumi*, 508 U.S. at 531-32. To survive strict scrutiny, Delmont's CC Law "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Id.* at 546 (internal quotation marks omitted).

1. *Delmont's compelling interest is making sure that common carriers are not stifling viewpoints they disagree with nor favoring viewpoints over others.*

The Court in *Lukumi* held that "[w]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is **not** compelling." *Id.* at 546–47 (emphasis added).

Here, Delmont advances two compelling state interests. First, the law seeks to prevent online platforms with a substantial market share "from stifling viewpoints that they disagree[ ]

with by denying access to their forums and marketplaces." Trapp Aff. ¶ 5. Second, the "no contribution provision" attempts to "prevent online forums from favoring one particular viewpoint over another through their monetary contributions." *Id.*

Respondent has become the "premier means of artistic self-publication" and provides several resources that, in the words of Respondent's CEO, are "simply unavailable or unaffordable on other platforms." Kane Aff. ¶ 11. Because Respondent is only 13% away from being categorized as a "monopoly", it is important to treat it like the "tech giant" it has become. *See Aluminum Co. of Am.*, 148 F.2d at 424 (alluding to Judge Hand's monopolization "formula"). Although it claims to endorse varying viewpoints and support diverse groups of artists, the actions Respondent took against Ms. Thornberry prove otherwise. And so, the government has an interest in making sure that common carriers are unable to suspend accounts when they oppose the content published,

The need to regulate these platforms grows with every year that they continue to dominate the digital world. With 85% of Americans going online daily,[2] and around 70% using some type of media to connect with others, share content, and entertain themselves,[3] the government has a significant interest in taking action **before** common carriers censor their users.

2. ***Delmont's CC Law is narrowly tailored because it uses the least restrictive means to achieve the two compelling state interests.***

A law is narrowly tailored if it is the least restrictive means to accomplish the government's compelling interests. *Lukumi* 508 U.S. at 546. When the government's stated interests "could be

[2] Pew Research Center, *About three-in-ten U.S. adults say they are 'almost constantly' online*, https://www.pewresearch.org/internet/ fact-sheet/internet-broadband/ (last visited January 8, 2022). According to a survey conducted from January 25 to February 8, 2021.
[3] Pew Research Center, *Social Media Fact Sheet*, https://www.pewresearch.org/internet/fact-sheet/ social-media/ (last visited January 10, 2022). This article was published April 7, 2021.

achieved by narrower [laws] that burden[ ] religion to a far lesser degree[,]" the law does not use the least restrictive means. *Id.* And similarly, where the means to achieve the objectives do not affect "analogous non-religious conduct," the law has not been narrowly tailored. *Id.*

In the case before this Court, it is important to remember who the Delmont CC Law governs: internet platforms classified as common carriers. Unquestionably, the most effective way to grab the attention of a company that holds 77% of a specific market is through considerable financial penalties. Even though the law describes what common carriers cannot do, this alone would be insufficient to disincentivize common carriers from violating the law. Delmont correctly included the potentially heavy fine, so these large companies are less inclined to dismiss the law. Also, the fine outlined in Delmont's CC Law is the least restrictive means because it can be both easily avoided and quickly corrected before the offender suffers any major economic loss.

Moreover, violations of the Delmont CC Law do not automatically result in a 35% fine. The statute states that "violations result in heavy fines—**up to** [35%] of business daily profits[.]" R. at 20 (emphasis added). The record is absent as to what percentage the Respondent was actually fined. So, Delmont's choice to compound the daily business profits "until the offender conforms to the law" supports the view that it is narrowly tailored because once the common carrier stops censoring users or favoring viewpoints, the fine is lifted. R. at 20.

Again, Delmont's objective is to prevent platforms from endorsing one viewpoint over another. Although Respondent's religious practice is burdened, the Delmont CC Law does not singly target it. Instead, the law forbids the contribution of corporate funds to political, religious, or philanthropic causes. So, even though contributing is part of Respondent's religious beliefs, all similar acts of donations by common carriers are also proscribed by the law.

The Delmont CC Law is narrowly tailored because the substantial penalty motivates common carriers to avoid violations. However, if the law is violated, the common carriers are only punished for as long as it takes to correct the violation. Accordingly, the quicker these internet platforms conform with the law, the less they suffer economic harm.

D. IF DELMONT'S CC LAW FAILS THE *SMITH* TEST AND STRICT SCRUTINY, THE INTEREST IN JUSTICE REQUIRES THAT IT BE UPHELD.

In a time where 93% of American adults use the internet,[4] it is more important, now than ever, to make sure that individuals' rights are protected in the virtual world as much as in the physical. Because of their nature, common carriers are entitled to less First Amendment protection to ensure that users, like Ms. Thornberry, are not stripped of their rights merely because they hold an account with the platform. The Delmont CC Law is a sincere attempt by the Governor, to prevent massive online platforms from banning viewpoints they disagree with by suspending accounts and "denying access to their forums and marketplaces." Trapp Aff. ¶ 5. Respondent's conduct is precisely what the Governor sought to avoid through the enactment of the law.

Whether intentionally or not, Respondent has turned into the virtual equivalent of a public square where people share their thoughts through artistic works. R. at 19. Because of its size and influence, it is only fair that Respondent be subjected to the same level of scrutiny as any other public forum in the non-digital world would be. In addition to holding 77% of the self-publication market, Respondent's CEO also declared that the platform provides resources and tools that are unrivaled in the market. Kane Aff. ¶ 11. This emphasizes the potential growth of Respondent and the urgency for regulation to guard individuals' rights from these developing technology giants.

[4] Pew Research Center, *Internet/Broadband Fact Sheet*, https://www.pewresearch.org/internet/fact-sheet/internet-broadband/ (last visited January 8, 2022). According to Pew Research Center, as of 2021, 93% of American adults use the internet.

1. ***The phrase "Blood is Blood" does not violate APC's pacifist beliefs, and Ms. Thornberry's account should never have been suspended.***

Respondent should not be able to suspend Ms. Thornberry's account solely because it assumed that her post violated APC's beliefs. Respondent's CEO made a baseless conclusion that the title went against pacifism and non-aggression when in fact, Ms. Thornberry's alternative title was in accordance with the APC values. The phrase "Blood is Blood" is widely known due to media coverage and stands for the belief that all beings are equal. R. at 22. By definition, pacifism is "the principled opposition to war and violence as a means of settling disputes."[5] The first known pacifist movement "came from Buddhism, whose founder (the Buddha) demanded from his followers absolute **abstention from any act of violence against their fellow creatures**."[6] (emphasis added). Thus, contrary to Respondent's allegations, Ms. Thornberry's updated title is directly in alignment with these traditional pacifist beliefs as she advocates and rallies against animal experimentation and cruelty.

On the same note, it is impossible to ignore the similarities between the phrase "Blood *is* Blood" and its more controversial sister phrase, "Blood *for* Blood." Had Ms. Thornberry used the latter, Respondent may be able to justify her account suspension based on the phrase's association with the violent altercations at the rallies; however, not because it violates APC's religious beliefs. It is stipulated that neither phrase incited violence, but in this case, Respondent removed Ms. Thornberry's account solely because it allegedly violated its pacifist beliefs which is exactly what the Delmont CC Law seeks to prohibit.

[5] Britannica, https://www.britannica.com/topic/pacifism (last visited January 10, 2022).
[6] *Id.*

2. ***The "no contribution provision" enforces the goals of Delmont's CC Law.***

The "no contribution provision" in the Delmont CC Law was added to "prevent online forums from favoring one particular viewpoint over another through their monetary contributions." Trapp Aff. ¶ 9. Respondent objects to this because one of the APC's central tenets is donating to the educational and cultural efforts in the community. R. at 19. Respondent may be run by APC members, but since its formation, it has evolved into a "tech giant."

Although the Court cannot question the sincerity of the APC's religious practices, Respondent's status as a common carrier subjects it to less First Amendment protection. Common carriers do not exist to push their views on their accountholders, but rather, they exist to serve individuals as a public forum in the rapidly evolving digital world and to foster a marketplace of ideas. It is thus contradictory for Respondent to claim to support a diverse artist-base when in fact, it only financially supports one religious group, the APC. So long as Respondent has substantial control of the market, it must be an impartial entity that does not contribute corporate funds to support **any** cause.

The trial court properly found that Ms. Thornberry was a victim of Respondent's suppression. As the digital world continues to expand exponentially, legislative pressure is necessary now, before the rights to free speech and exercise fall in the hands of common carriers instead of the people.

CONCLUSION

For the foregoing reasons, this Court should reverse the Fifteenth Circuit's order denying Respondent's motion for summary judgment.

Respectfully submitted this 31st day of January, 2022.

/s/ *TEAM 23*
Counsel for Petitioner

APPENDIX A

Amend. I, U.S. Const.

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

28 U.S.C. § 1254(1)

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

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

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

CERTIFICATE OF COMPLIANCE

Pursuant to the Seigenthaler-Sutherland Official Rules, we, the under-signed counsel, certify that (i) this brief is entirely the work product of competition team members; (ii) the team has complied fully with its school's governing honor code; and (iii) the team has complied with all Rules of the Competition.

/s/ *TEAM 23*

Dated: January 31, 2022