No. 22-CV-7654

IN THE
SUPREME COURT OF THE UNITED STATES

WILL WALLACE,
Petitioner,

v.

POSTER, INC.,
Respondent

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

BRIEF FOR THE PETITIONER

003
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QUESTIONS PRESENTED

1. 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; and

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

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The opinions of the court of appeals and the district court are unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifteenth Circuit was entered on Mon. DD, YYYY, and petitioner timely filed a petition for a writ of certiorari on Mon. DD, YYYY. The petition was granted by this Court. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth at App., infra, 1a.

STATEMENT

A. Legal Background

On June 1, 2020, the state of Delmont passed the Common Carrier Law. Poster, Inc. v. Wallace, C.A. No. 21-CV-7855, slip op. at 3 (D. Delmont Sept. 1, 2021). The law, designed to "prevent online platforms from stifling viewpoints that they disagreed with by denying access to their forums and marketplaces," Trapp Aff. ¶ 5, designates platforms with "substantial market share" as common carriers. Delmont Rev. Stat. § 9-1.120(a) (2020). Under the law, common carriers are required to "serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint," and prohibited "from using corporate funds to contribute to political, religious, or philanthropic causes." Id. These requirements are intended to "ensur[e] that public forums and [Delmont] citizens' constitutional rights are secure." Trapp Aff. ¶ 9. In its statement of intent, Delmont's legislature indicated that the "no contribution" provision of the Common Carrier Law was included to avoid violating the Establishment Clause. Delmont Rev. Stat. § 9-1.120(b) (2020).

The Common Carrier Law does not have any exceptions to its requirements, religious or otherwise. Poster, C.A. No. 21-CV-7855, slip op. at 3. Violations of the law result in fines of up to 35 percent of a platform's daily profits that compound daily until it changes its conduct to confirm with the law. Id. These fines are intended to incentivize compliance with the law's requirements. Trapp Aff. ¶ 9.

B. Facts and Proceedings Below

Poster, Inc., is an "extremely popular" online platform for self-publication and performance uploads by artists seeking to expand their audiences. Poster, C.A. No. 21-CV-7855, slip op. at 2. It was founded and is still run by members of the American Peace Church ("APC"), a Protestant denomination with a long history of supporting "both religious and secular artists and both artistic and literary works." Id. The APC was founded by "poets, educators, and musicians who sought to promote peace-building through education and cultural development" in support of one of the church's central tenets of non-aggression and pacifism. Id. Members of the church are expected to do the same, and one of the church's earliest philanthropic efforts was establishing lending libraries as educational resources for poor communities. Id. at 2, 3.

Poster is a part of these philanthropic efforts, with 15 percent of its profits going to support the APC's continued educational and cultural efforts. Id. at 3. Additionally, it provides discounted publication services to artists, both established and aspiring, who are members of the APC to promote their work. Id. Beyond its promotion of work by APC members, however, since its founding in 1998, "the platform has hosted artists of diverse ideological viewpoints." Id. Since then, Poster has grown to control 77 percent of the online artistic self-publication market. Id. For a small fee, artists can create an account and upload their work to Poster's platform, which allows them to choose whether their audience can download their work for free, for rent, or for purchase.

Id. Poster receives a percentage of all rents and sales of the artistic work hosted on their platform. Id.

While rarely exercised, Poster's terms of service retain the right to accept or reject material submitted by a user "as it sees fit," "at any time or for any or no reason." Id. at 2, 5. These reasons have historically included "Poster's pacificist values," which were cited in the only time Poster has ever blocked or removed an account from its platform prior to its actions at issue in this case. Id. at 5. A few years after its founding, Poster removed a work entitled Murder Your Enemies: An Insurrectionist's Guide to Total War, for violating its corporate values, but it has never again taken that action, id.—until now.

Katherine Thornberry has had a paid Poster account since November 2018. Id. at 3. For the past three-and-a-half years, she has been working to promote her novel, Animal Pharma, on the platform. Id. While Ms. Thornberry has also pursued publication by traditional means, she has had much more success in building an audience through her use of Poster's platform, especially recently. See id. at 4 (describing the "respectable growing interest" in Animal Pharma and the "healthy number of rents and purchases"). Over the Fourth of July weekend of 2020, Ms. Thornberry attended the three-day animal rights "Freedom For All" rally in Capital City, Delmont, protesting animal experimentation outside the headquarters of the international pharmaceutical developer and "major animal experimenter" PharmaGrande, Inc. Id. The experience of attending a concert that was part of the rally inspired her to update her Poster account with a new alternate title for Animal Pharma: Blood Is Blood. Id. After the update and its new title, Animal Pharma received increased attention from the public, resulting in an increase in Ms. Thornberry's sales in the days after the rally. Id. at 5.

However, Ms. Thornberry's newfound success on Poster was not the only result of the rally. During the rally itself, protestors caused property damage, attacked passersby, and threw gravel at law enforcement officers, resulting in one officer losing sight in one eye. Id. at 4. Television footage of these altercations shows that, during the violence, the phrase "Blood *is* Blood or Blood *for* Blood" was chanted by some of the protestors. Id. at 5. By itself, "Blood is Blood" is a mantra associated with the animal rights activist group AntiPharma, expressing its belief that "all living beings are equal." Id. at 5. The full phrase is used by a "more radical" segment of the group that has previously been involved in altercations between law enforcement and counter protestors such as those which marred the "Freedom For All" rally. Id. After public outcry, this violence was condemned by a group of local Capital City business leaders, including Poster's CEO, John Michael Kane. Id. at 4–5.

Poster also took action against Ms. Thornberry, informing her that it had suspended her account until she revised the title of her novel to something that it found to be less "violative" of the company's religious beliefs. Id. at 5. Ms. Thornberry was thus denied a platform to share her artistic expression with the world, and as a result the revenue from Animal Pharma dropped to zero—in stark contrast with the increase in attention it had received immediately following the rally. Id. Poster, as the only online platform with the tools and features necessary for Ms. Thornberry to reach her audience, had been the novel's only source of income. Id. To protest the blacklisting of her self-expression, Ms. Thornberry took to national television, passionately describing Poster's actions as "artistic suppression." Id. at 6. Her brave stance in the face of censorship brought Poster's unlawful conduct to the attention of Delmont Attorney General Will Wallace, who promptly moved to enforce the nondiscrimination provision of the Common Carrier Law against the platform. Id.

In response to the fines levied against it, Poster filed suit against the Attorney General in the United States District Court for the District of Delmont to challenge the Common Carrier Law. See Pl.'s Compl., ECF 1. The district court granted the Government's motion for summary judgment, Poster, Inc. v. Wallace, C.A. No. 21-CV-7855, slip op. at 1 (D. Delmont Sept. 1, 2021), and Poster appealed to the United States Court of Appeals for the Fifteenth Circuit. The Fifteenth Circuit reversed the district court, Poster, Inc. v. Wallace, No. 2021-3487, slip op. at 1 (15th Cir. Mm. DD, 202Y), and Delmont has appealed to this Court.

This Court granted cert.

SUMMARY OF THE ARGUMENT

The Fifteenth Circuit erred when it concluded that Delmont Rev. Stat. § 9-1.120 violates Poster's free speech rights. In pursuit of the principle to choose one's own medium of self-expression, this Court has endorsed the ability of the Government to prevent private interests such as Poster from "restricting, through . . . control of a critical pathway of communication" such as the Internet's preeminent platform for artistic self-expression, "the free flow of information and ideas." Turner Broad. Sys. v. FCC, 512 U.S. 622, 657 (1994). Poster is a common carrier with limited free speech rights and like its fellow common carriers, Poster "holds itself out as open to the public." Biden v. Knight First Amendment Inst. at Columbia Univ., 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring). As such, the government may regulate the speech of one party to protect the free speech rights of others and that Poster uses its self-publication platform to promote its views does not permit it to disregard the nondiscrimination obligations imposed on it by Delmont law.

The Common Carrier Law permissibly prevents companies with large market shares from using their power to restrict the free speech of its citizens. Any incidental burden on Poster's

speech resulting from the Common Carrier Law is in pursuit of "bolster[ing] free speech by placing limits on the ability of platforms to restrict speech" and "ensuring that public forms and [Delmonters'] constitutional rights are secure." Trapp Aff. ¶ 7, 8. It is the government's duty to protect its citizens from censorship by companies that control markets of self-expression, and this should be consistent when considering online platforms like Poster, which "take hold of a particular market" where "their counterparts cannot practically compete to provide comparable services." Trapp Aff. ¶ 8.

Moreover, the Fifteenth Circuit erred when it concluded that the Common Carrier Law violates Poster's free exercise rights. Where a given law impedes on the free exercise of religion, it may nonetheless be sustained since "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability . . . .'" Employment Div., Dep't of Hum. Res. of Ore. v. Smith, 494 U.S. 872, 879 (1990). The Common Carrier Law is neutral on its face since it does not superficially restrict solely religious organizations, and neutral in effect because its burden is shared equally among those Internet platforms with sufficient market share to be considered common carriers under the law. Further, the Common Carrier Law is generally applicable because it neither provides a mechanism for individualized exemptions nor permits secular conduct which is otherwise proscribed to religious organizations. Under Smith, a government regulation burdening religious beliefs or practice requires little justification so long as the law is one of general applicability. Smith, 494 U.S. at 878. Conduct prohibited by the Common Carrier Law applies to common carriers regardless of whether they are religious or secular, and no Delmont interests are undermined in the Law's enforcement.

Even if the Common Carrier Law is not neutral or generally applicable, it is nonetheless narrowly tailored to achieve a compelling state interest. Such a broad interest is not present here;

the Delmont legislature's professed interests in safeguarding the state's public forum, defending the constitutional rights of Delmonters, and deterring public platforms from favoring one particular viewpoint of its users are all undoubtedly compelling government interests which should surpass strict scrutiny.

ARGUMENT

I. The Fifteenth Circuit Erred When It Concluded That Delmont Rev. Stat. § 9-1.120 Violates Poster's Free Speech Rights

As applied to the states through the due process clause of the Fourteenth Amendment, the First Amendment prohibits the Government from "abridging the freedom of speech." Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943) (quoting U.S. Const. amend I). What it does not do, however, is provide "private individuals or institutions the right to engage in discrimination." Grove City College v. Bell, 687 F.2d 684, 702 (3d Cir. 1982), aff'd, 465 U.S. 555 (1982). The Fifteenth Circuit erred when it concluded that the First Amendment gives Poster, Inc., the right to censor the accounts of its users based on the artists' religious, ideological, or political viewpoints—and all under the guise of "free speech."

A. The Government May Regulate Speech in the Public Interest

"At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence" rather than having those ideas filtered by a third party. Turner Broad. Sys. v. FCC, 512 U.S. 622, 641 (1994). In pursuit of that principle, this Court has endorsed the ability of the Government to prevent private interests such as Poster from "restricting, through . . . control of a critical pathway of communication" such as the Internet's preeminent platform for artistic self-expression, "the free flow of information and ideas." Id. at 657.

1. Poster Is a Common Carrier with Limited Free Speech Rights

This Court has recognized the power of the Government to regulate common carriers since at least the nineteenth century. See Munn v. Illinois, 94 U.S. 113, 130 (1876) ("[W]hen private property is devoted to a public use, it is subject to public regulation."). For centuries, these rules and regulations have helped to resolve "the disputed issues of duty to serve, nondiscrimination, and interconnection." James B. Speta, A Common Carrier Approach to Internet Interconnection, 54 Fed. Comm. L.J. 225, 227 (2002). It is precisely these issues which arise from Poster's discriminatory censorship of its users' accounts. As both lower courts correctly found, Poster is a common carrier under Delmont. Rev. Stat. § 9-1.120. See Poster v. Wallace, C.A. No. 21-CV-7855, slip op. at 10 (D. Delmont Sept. 1, 2021) (finding that Poster is a common carrier); Poster v. Wallace, No. 2021-3487, slip op. at 9 (15th Cir. Mm. DD, 202Y) (same). There is no single definition of what makes a common carrier; however, one of the most widely recognized characteristics of a common carrier is that it "undertakes to carry for all people indifferently." Nat'l Ass'n of Regul. Util. Comm'rs v. FCC (NARUC I), 525 F.2d 630, 641 (D.C. Cir. 1976) (citations omitted). This Court has built upon the D.C. Circuit's description, noting additionally that a common carrier "does not 'make individualized decisions, in particular cases, whether and on what terms to deal.'" FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979) (quoting NARUC I, 525 F.2d at 641).

Like its fellow common carriers, Poster "holds itself out as open to the public." Biden v. Knight First Amendment Inst. at Columbia Univ., 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring) (citations omitted). Poster has hosted hundreds of thousands of artists "of diverse ideological viewpoints" on its self-publishing platform for over twenty years, without making the kind of individualized hosting decisions that would distinguish it from common carriers. Poster,

No. 21-CV-7855, slip op. at 3, 9. By portraying itself as "a promotional conduit for any artist who has sought to publicize his or her work," id. at 11, Poster has taken on the duties and obligations of the common carrier—including the obligation "to accept whatever is tendered by members of the public." Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 116 (1973). Poster's censorship of its users' speech based on the religious beliefs of its Board of Directors, see Kane Aff. ¶ 13 (noting that Poster's Terms and Conditions are based on the Board's religious beliefs), is in direct conflict with the common carrier's responsibilities of duty to serve, nondiscrimination, and interconnection.

The Fifteenth Circuit incorrectly asserts that common carriers have free speech rights comparable to the protected interests of other corporations. See Poster, No. 2021-3487, slip op. at 10 (interpreting FCC v. League of Women Voters, 468 U.S. 364 (1984), as providing common carriers with First Amendment protections). This is only possible through the appellate court's blatant disregard for this Court's own words, which directly contrast the expansive rights of entities such as broadcasters with the limited ones of common carriers. See League of Women Voters, 468 U.S. at 378 ("*Unlike common carriers*, broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties." (emphasis added) (internal quotations omitted)); Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 739 (1996) (noting that the speech interests of common carriers are "relatively weak"). Even the Fifteenth Circuit eventually acknowledges this, conceding in its opinion that common carriers like Poster "are entitled to a lesser degree of First Amendment protection due to the nature of the public services they provide." Poster, No. 2021-3487, slip op. at 11.

2. The Government May Regulate the Speech of One Party to Protect the Free Speech Rights of Others

The fact that Poster uses its self-publication platform to promote its own views does not allow it to disregard the nondiscrimination obligations imposed on it by Delmont law. In this Court's cases where it has limited the power of the government to require "one speaker to host or accommodate another speaker's message," it has only been because "the complaining speaker's message was affected by the speech it was forced to accommodate." Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 63 (2006) (citations omitted). Where a statute "neither limits what" a company "may say nor requires them to say anything," this Court has permitted the Government to regulate speech in pursuit of an important interest. Id. at 61.

In Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47 (2006), the Court found that a Congressional mandate requiring law schools to permit military recruiters to recruit on their campuses "affect[ed] what law schools must *do* . . . not what they may or may not *say*." Id. at 60 (emphasis in original). The Court noted that the schools "remain[ed] free under the statute to express whatever views they may have" regarding the military's policies toward gay soldiers, and that "accommodating the military's message [did] not affect the law schools' speech, because the schools [were] not speaking when they host interviews and recruiting receptions." Id. at 60, 64. Similarly, in Pruneyard Shopping Center v. Robins, 477 U.S. 74 (1980) the Court held that a public shopping center's First Amendment rights were not infringed by California's decision to "recogniz[e] a right . . . to exercise state-protected rights of expression" on private property. Id. at 88. The Court found that the shopping center was not "being compelled to affirm [its] belief in any governmentally prescribed position or view, and [it was] free to publicly dissociate [itself] from the views of the speakers or handbillers." Id.

Just as in Rumsfeld and Pruneyard, the Common Carrier Law's nondiscrimination requirements affect what Poster must do—here, serving all user accounts equally regardless of the user's viewpoint—and not what Poster must say. Delmont Rev. Stat. § 9-1.120(a) (2020). It does not require Poster to endorse the viewpoints of its users, merely to provide them access to "the premier means of artistic self-publication" on the Internet. Kane Aff. ¶ 11. Poster is not "being compelled to affirm [a] belief in any governmentally prescribed position or view." Pruneyard, 477 U.S. at 88. There is nothing in the law that requires Poster to modify its terms of use "disclaim[ing] endorsement of any views expressed in the material published," Poster, Inc. v. Wallace, No. 2021-3487, slip op. at 19, or preventing it from modifying its terms of use to explain that its users "are communicating their own messages by virtue of state law," Pruneyard, 477 U.S. at 87. As in Rumsfeld, there is "little likelihood that the views of those engaging in expressive activities" on Poster's platform would be attributed to Poster, "who remain[s] free to disassociate [itself] from those views." 547 U.S. at 65.

B. The Common Carrier Law Permissibly Prevents Companies with Large Market Shares from Using Their Power to Restrict the Free Speech of Delmonters

Content-neutral regulations "that impose an incidental burden on speech" are considered under immediate scrutiny. Turner Broad. Sys. v. FCC, 512 U.S. 622, 662 (1994). A content-neutral regulation will be upheld if "it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." United States v. O'Brien, 391 U.S. 367, 377 (1968). This standard does not require "the least speech-restrictive means of advancing the Government's interests." Turner, 512 U.S. at

662. "Rather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

1. Delmont Rev. Stat. § 9-1.120 Is Content-Neutral

The "principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward, 491 U.S. at 791. Far from regulating speech because of disagreement with its content, the Common Carrier Law does precisely the opposite: it requires that platforms such as Poster, who control vast portions of markets for artistic or other personal expression, "serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint." Delmont Rev. Stat. § 9-1.120(a) (2020). Laws such as Delmont's Common Carrier Law "that impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral." Turner, 512 U.S. at 643 (citations omitted). Any incidental burden on Poster's speech resulting from Delmont Rev. Stat. § 9-1.120 is in pursuit of "bolster[ing] free speech by placing limits on the ability of platforms to restrict speech" and "ensuring that public forms and [Delmonters'] constitutional rights are secure." Trapp Aff. ¶ 7, 8. The law provides no restrictions regarding the type of content that *must* remain available to the public; all it does is limit Poster's capacity to silence voices with which it disagrees. See Delmont Rev. Stat. § 9-1.120(a) (2020) (requiring platforms with substantial market share to serve the public without discrimination).

"Must-carry" provisions analogous to the Common Carrier Law's requirement of nondiscrimination have been found to be content-neutral. Compare Turner, 512 U.S. at 649 (finding that Congress's purpose in mandating cable operators to carry broadcast television

stations was to ensure "access to free television programming—whatever its content"), with Trapp Aff. ¶ 8 (noting that Delmont Rev. Stat. § 9-1.120 was passed in response to public "concerns over large tech platforms' substantial control over public expression"). In Turner Broadcasting System, the Court reasoned that the burdens imposed on cable operators by the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 were "unrelated to content" because they "extend[ed] to all cable programmers irrespective of the programming they [chose] to offer viewers." Id. at 644. The Common Carrier Law's prohibition against viewpoint discrimination applies to all large digital platforms, regardless of which viewpoints they choose to stifle. See Poster, Inc. v. Wallace, C.A. No. 21-CV-7855, slip op. at 16 (D. Delmont Sept. 1, 2021) (noting that Delmont Rev. Stat. § 9-1.120 "does not contain exemptions of any kind, religious or otherwise").

2. It is the Government's Duty to Protect Its Citizens from Censorship By Companies That Control Markets of Self-Expression

This Court has identified the governmental purpose of "ensuring public access to 'a multiplicity of information sources'" as one "of the highest order." Turner Broad. Sys. v. FCC, 520 U.S. 180, 190 (1997). In the field of television broadcasting, "[i]ncreasing the number of outlets for community self-expression" is a key regulatory goal. Id. at 192 (internal quotation and citation omitted). It should be the same in the field of online platforms, especially those like Poster, which "take hold of a particular market" where "their counterparts cannot practically compete to provide comparable services." Trapp Aff. ¶ 8.

This Court has itself expressed concern over the "enormous control over speech" that a concentration of market share gives to corporations like Poster. Biden v. Knight First Amendment Inst. at Columbia Univ., 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring). Poster itself has

admitted to the immense power that its 77 percent share of the self-publication market provides, describing itself as the "premier means of artistic self-publication" in a market where other options "are simply unavailable or unaffordable." Kane Aff. ¶ 11. The act of censoring Katherine Thornberry's account is a display of the power inherent in controlling such a substantial market share: after Ms. Thornberry's account was suspended, her novel "netted zero revenues" despite the growing interest in her work following the "Freedom For All" rally. Poster, No. 21-CV-7855, slip op. at 4, 6. This is exactly the type of censorship that Delmont Rev. Stat. § 9-1.120 is meant to prevent. See Trapp Aff. ¶ 8 (noting that the Common Carrier Law was passed in response to concern over online platforms' "substantial control over public expression"). It is also exactly the type of harm that the Government must show to defend a regulation on speech. See Turner, 512 U.S. at 664 ("[The Government] must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way").

II. The Fifteenth Circuit Erred When It Concluded That Delmont Rev. Stat. § 9-1.120 Violates Poster's Free Exercise Rights

A. Laws May Regulate Religious Conduct If They Are Neutral and Generally Applicable

While the First Amendment prevents the Government from prohibiting free exercise of religion, the "exercise of religion often involves not only belief . . . but the performance of . . . physical acts . . . ." Employment Div., Dep't of Hum. Res. of Ore. v. Smith, 494 U.S. 872, 877 (1990) (internal quotation marks omitted). If a State enacts a general law which has the purpose and effect of "advancing the State's secular goals," such a statute may be constitutional despite its burdensome effect on the religious activity. Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (quoting Cantwell v. Connecticut, 310 U.S. 296, 304–05 (1940)). Where a given law

impedes on the free exercise of religion, it may nonetheless be sustained since "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability . . . .'" Smith, 494 U.S. at 879; see also Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876 (2021) ("[L]aws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable."); see also Church of the Lukumi Bablu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993) ("[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest . . . ."). Delmont Rev. Stat. § 9-1.120 is both neutral and generally applicable and thus should not be held to violate the Free Exercise Clause of the First Amendment.

1. The Common Carrier Law is Neutral

a. Delmont Rev. Stat. § 9-1.120 Is Neutral on Its Face

"[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." Church of the Lukumi, 508 U.S. at 533. "The minimum requirement of neutrality is that a law not discriminate on its face." Id. With that in mind, this Court has provided that "to determine the object of a law," a court's analysis "must begin with its text." Id.

The appearance of words with "strong religious connotations" in statutes have been found to indicate that those statutes are not facially neutral. Church of the Lukumi, 508 U.S. at 534. In its opinion, the Fifteenth Circuit based its finding of facial discrimination solely on the presence of the word "religious" in the Common Carrier Law. See Poster v. Wallace, No. 2021-3487, slip op. at 30 (15th Cir. Mm. DD, 202Y) (finding that the presence of words with "strong religious connotations" was "consistent with the claim of facial discrimination" (quoting Church of the

Lukumi, 508 U.S. at 534)). However, the fact that a regulation deals with religion at all does not make it discriminatory on its face. See, e.g., S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (noting that California's COVID restrictions on places of worship "appear[ed] consistent" with the free exercise clause, as "similar or more severe" restrictions applied to "comparable secular gatherings"). The fact that Delmont Rev. Stat. § 9-1.120 mentions "religious" causes makes it indistinguishable from innumerable other statutes that step into the delicate balance between church and state, see, e.g., Roemer v. Bd. of Pub. Works, 426 U.S. 736, 766–76 (1976) (upholding a statute prohibiting the use of state funds for "sectarian purposes"), and that do not prohibit free exercise in doing so.

b. Delmont Rev. Stat. § 9-1.120 Is Neutral in Its Application

Facial neutrality alone is not determinative. See Gillette v. United States, 401 U.S. 437, 452 (1971) ("The question of governmental neutrality is not concluded by the observation that [the law] on its face makes no discrimination between religions . . . ."). "[T]he effect of a law in its real operation," especially if it burdens the exercise of religion, "is strong evidence of" any discriminatory intentions. Church of the Lukumi, 508 U.S. at 535. However, "not all burdens on religion are unconstitutional," and the Government may justify a burden on religious activity by showing its necessity to pursue an "overriding governmental interest." United States v. Lee, 455 U.S. 252, 257 (1982). The Common Carrier Law is neutral in effect because it mandates that all common carriers, not only those professing religious beliefs, "shall refrain from using corporate funds to contribute to political, religious, or philanthropic causes." Delmont Rev. Stat. § 9-1.120(a) (2020). Its burden is shared equally among those Internet platforms with sufficient market share to be considered common carriers under the law, thus preventing any prohibited "covert suppression of particular religious beliefs." Bowen v. Roy, 476 U.S. 693, 703 (1986).

To ensure that no covert suppression of the free exercise of religion is occurring under the Common Carrier Law, this Court should consider "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 [sic] body." Church of the Lukumi, 508 U.S. at 534; see also Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence as may be available."). In Church of the Lukumi Bablu Aye, this Court found that city ordinances specifically discriminated against a particular religious because city officials could not offer evidence otherwise and "almost the only conduct subject to the [o]rdinances [was] the religious exercise" of a specific church's members." Church of the Lukumi, 508 U.S. at 534–36. In contrast, Delmont legislators have strong evidence that the state's Common Carrier Law was not intended to limit only Poster's corporate contributions. See Trapp Aff. ¶ 9 (explaining that the Common Carrier Law was designed to "prevent online forums from favoring one particular view over another through their monetary contributions.").

Poster may argue that the Common Carrier Law's prohibition against using its corporate profits to make donations to the APC's philanthropic causes is "covert suppression of [its] particular religious beliefs," Bowen v. Roy, 476 U.S. at 703, but this is not the case. In fact, the proponents of Delmont Rev. Stat. § 9-1.120 were motivated by concern over the "stifling" of diverse viewpoints by online platforms with strong market shares. The Fifteenth Circuit's diminishment of Delmont's very real concern for the public harm that can be caused by common carriers who make decisions about carriage regarding their own religious or political beliefs, see Poster v. Wallace, No. 2021-3487, slip op at 32 (15th Cir. Mm. DD, 202Y) (finding evidence of

the legislature's concern to be "insufficient" to overcome what it deemed to be evidence of religious intolerance), is a mistake.

Just because the first application of the Common Carrier Law involves Poster does not mean the legislators who originally sponsored it were intent on applying the law exclusively to Poster. Poster may yet claim that the law arbitrarily forbids it from contributing to religious causes and tithing as APC members are called to do, Kane Aff. ¶ 37, but the law does not exclusively discriminate against Poster's interests any more than that it would against another powerful Internet platform seeking to contribute to the political or philanthropic causes that it favors. See Delmont Rev. Stat. § 9-1.120(a) (prohibiting common carriers from using corporate funds to contribute to political, religious, or philanthropic causes—not religious causes). Additionally, there is no burden imposed on individual members of Poster's Board of Directors from contributing to causes of their choosing in their individual capacities. Id.

2. The Common Carrier Law Is Generally Applicable

For a particular law to evade the rigors of strict scrutiny it must not only be neutral, but also generally applicable. See Church of the Lukumi, 508 U.S. at 531 (noting that if "a law is neutral and of general applicability," it "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice" (citing Employment Div., Dep't of Hum. Res. of Ore. v. Smith, 494 U.S. 872, 878 (1990)). Under Smith, a government regulation burdening religious beliefs or practice requires little justification so long as the law is one of general applicability. See Smith, 494 U.S. at 878 (noting that the First Amendment is not "offended" it a burden on the exercise of religion is merely the "incidental effect" of a generally applicable law). To be such, a law may not "invite[] the government to consider the particular reasons for a person's conduct by providing 'a mechanism for

individualized exemptions.'" Fulton, 141 S. Ct. at 1877 (quoting Smith, 393 U.S. at 883). Further, the law may also not "prohibit[] religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." Id. Despite the Fifteenth Circuit's erroneous finding to the contrary, the Common carrier Law neither provides a mechanism for individualized exemptions nor allows for similar, secular conduct which would undermine Delmont's interests in the law's effects.

a. The Common Carrier Law Provides No Mechanism for Individualized Exemptions

While the Fifteenth Circuit concluded that enforcement of the Common Carrier Law was discretionary, and thus not generally applicable, such a finding is misguided because the court correlated discretion in determining common carrier status with discretion in the enforcement of the Common Carrier Law. See Poster v. Wallace, No. 2021-3487, slip op at 32 (15th Cir. Mm. DD, 202Y) (calling Attorney General Wallace's designation of Poster as a common carrier a "discretionary decision"). Unlike Church of the Lukumi, where the city ordinances restricting the killing of animals provided exemptions for, among others, the slaughter of animals within areas zoned for slaughterhouses, see Church of the Lukumi, 507 U.S. at 545, the Common Carrier Law applies equally to all common carriers. There are no means of exemptions once an organization is determined to qualify as such. See Poster, No. 2021-3487, slip op. at 32 (noting the district court's finding that there are no exemptions to Delmont Rev. Stat. § 9-1.120). Determining an organization's status as a common carrier is purely a threshold question prior to ascertaining the applicability of the Common Carrier Law's restriction of contributions to political, religious, or philanthropic organizations. Cf. 8 U.S.C. § 1182(h) (2013) (requiring immigrants to meet certain criteria before the Attorney General may exercise discretion in granting a waiver).

Unlike the city contracts at issue in Fulton, which made individual exemptions available at the "sole discretion" of the commissioner, Fulton, 141 S. Ct. at 1878, the Common Carrier Law provides no such discretionary language, nor does the Attorney General have authority to decide whether certain common carriers may be exempt from the law's prohibition on donations. See Poster, No. 2021-3487, slip op. at 32 (noting the lack of exemptions to the law). Rather, the Attorney General simply assesses whether an organization qualifies as a common carrier, and thus, whether the law applies. Id. Instead of asking whether the law, as applied to common carriers, provides a mechanism of individualized exemptions, the Fifteenth Circuit inappropriately looked to the process by which common carrier status is determined, and concluded that since it may be discretionary, it fails the test for general applicability. Id. Such a conclusion is premised on a logical leap between status as a common carrier and the applicability of the Common Carrier Law to such organizations. Id. Since no common carriers may be exempt from the prohibition, it must be deemed that the law is generally applicable.

Furthermore, there is no evidence to support the argument that the Attorney General's enforcement of the Law discretionarily targets Poster because of its association with the APC. See Church of the Lukumi, 508 U.S. at 558 (Scalia, J., concurring) ("[T]he defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment."). Rather, because of its status as a common carrier, Poster is required to comply with Delmont's Common Carrier Law, and the incidental burdening of its religious obligations is in no way attributable to anything but such a status.

b. The Conduct Prohibited by the Common Carrier Law Applies to Common Carriers Regardless of Whether They Are Religious or Secular

The Common Carrier Law is generally applicable because its prohibitions do not permit similar secular conduct which undermines Delmont's asserted interests. See Fulton, 141 S. Ct. at 1877 ("A law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."). In Church of the Lukumi, the city ordinances regulating religious animal sacrifices as practiced by a particular faith were claimed to be necessary to protect public health. Church of the Lukumi, 508 U.S .at 544–46. However, the ordinances did not prohibit similar conduct by other groups, such as hunters or butchers, displaying plainly that they were underinclusive and not actually generally applicable. Id. Importantly, by allowing other groups to engage in the proscribed conduct, the respondent city was undermining its own interests, evidencing that the laws were not those of general applicability, but instead targeting at a particular religious act. Id. at 545 (concluding that the city's ordinances "pursue[d] the city's governmental interests only against conduct motivated by religious belief"). Such an issue does not present itself in this current dispute: the Common Carrier Law's prohibition on donations, which is intended to "prevent online forums from favoring one particular viewpoint over another through their contributions," Trapp Aff. ¶ 9, does not permit non-religious common carriers to engage in the prohibited conduct any more than it does their religious counterparts. No secular activity is permitted which would effectively undermine Delmont's interests in enacting the law; rather, the Common Carrier Law applies to all Internet platforms with market shares large enough to be considered common carriers, regardless of their religious affiliations.

Further, in determining whether a law provides equal treatment for secular and religious conduct, this Court identified a two-step analysis, which requires (1) having a court "identify the secular conduct with which the religious conduct is to be compared," and (2) a determination by the court of "whether the State's reasons for regulating the religious conduct apply with equal force to the secular conduct with which it is compared." Fulton, 131 S. Ct. at 1921 (Alito, J., concurring) (citing Church of the Lukumi, 508 U.S. at 543). Here, the religious and secular conduct being prohibited by the Common Carrier Law—specifically the restriction of donations by common carriers to political, religious, or philanthropic organizations—is identical. Additionally, and as previously mentioned, Delmont's reasons for establishing such a prohibition are to ensure common carriers are unbiased in their handling of online forums, which must apply with equal force to religious organizations as to secular ones to be effective. That Poster is the first organization to face consequences for violation of the Law has no bearing on the conclusion that it is to apply generally.

2. Even if the Common Carrier Law is not Neutral or Generally Applicable, it is Nonetheless Narrowly Tailored to Achieve a Compelling State Interest

Even if this Court determines that the Common Carrier Law's restriction on contributions to political, religious, or philanthropic causes is neither neutral nor generally applicable, such a law may nonetheless overcome the high standard of strict scrutiny since it is narrowly tailored to further a compelling state interest. See Church of the Lukumi, 608 U.S at 533 (stating that a law burdening the free exercise of religion may nevertheless stand if it is justified by a compelling interest that cannot be served by less restrictive means). Specifically, Delmont's interest in ensuring that online platforms that control substantial portions of the markets in which they operate

maintain neutrality in their forum operations may only be achieved through a law like the Common Carrier Law. There is no other mechanism by which Delmont could ensure a free and open forum and marketplace than to restrict such common carriers from censoring the speech of some users and privileging the speech of others through contributions to partisan organizations. See Fulton, 141 S. Ct. at 1881 ("Rather than rely on 'broadly formulated interests,' courts must 'scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.'" (quoting Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 431 (2006))). In Fulton, this Court found that the city's speculation that it might be sued over a religious adoption service's certification practices was an insufficient governmental interest to justify denying the adoption service an exception to the city's referral freeze on their foster care services contracts. Fulton, 141 S. Ct. at 1882. Such a broad interest is not present here; the Delmont legislature's professed interests in safeguarding the state's public forum, defending the constitutional rights of Delmonters, and deterring public platforms from favoring one particular viewpoint of its users are all undoubtedly compelling government interests which should surpass strict scrutiny. See Trapp Aff. ¶ 8, 9.

CONCLUSION

For the foregoing reasons, the judgment of the Fifteenth Circuit should be reversed.

Respectfully submitted.

Team 003

APPENDIX

1. The First Amendment to the United States Constitution provides:

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.

2. Delmont Rev. Stat. § 9-1.120 provides:

The Common Carrier Law

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

(b) Statement of Intent. The "no contribution provision" was included to avoid running afoul of the Establishment Clause.

CERTIFICATE

The work product in all copies of this team's brief is the work product of this team's members. This team has fully complied with the honor code governing students at our university. This team has complied with all Rules of the Competition.