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

TEAM 005
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Delmont Common Carrier Law, DELMONT REV. STAT. § 9-1.120, which neither compels nor restricts speech, but requires common carriers to serve all who seek access to their service, is constitutional because it does not violate common carriers' free speech rights; and

2. Whether the Delmont Common Carrier Law, DELMONT REV. STAT. § 9-1.120, which treats all religions equally, is neutral and generally applicable, and thus constitutional.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Delmont is unreported, but it may be found at *Poster, Inc. v. Wallace*, No. 21-CV-7855 (D. Delmont 2021).

The opinion of the United States Court of Appeals for the Fifteenth Circuit is unreported, but it may be found at *Poster, Inc. v. Wallace*, 2021-3487 (15th Cir. 2021).

JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit entered final judgment on this matter by granting summary judgment. Petitioner filed a timely Petition for Writ of Certiorari, which this Court granted. Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Statement of Facts

On June 1, 2020, to promote website accountability, Delmont passed DELMONT REV. STAT. § 9-1.120 ("CC Law") which designates internet platforms with a "substantial market share" as common carriers. DELMONT REV. STAT. § 9-1.120(a). The CC Law provides that such platforms "shall serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint," and "refrain from using corporate funds to contribute to political, religious, or philanthropic causes," *Id.*, with the intent to avoid violation of the Establishment Clause. DELMONT REV. STAT. § 9-1.120(b). Compliance with these provisions is maintained without exception by assessing compounding fines up to thirty-five percent of daily profits. *Poster, Inc. v. Wallace*, No. 21-CV-7855, 3 (D. Delmont 2021).

The Governor promoted this policy in his election campaign to bolster speech by making online platforms free for all ideas to be shared and considered. Trapp Aff. ¶7. Additionally, the

law is meant to address public concern over "large tech platforms' substantial control over expression" because "when large digital platforms … take hold of a particular market … their counterparts cannot practically compete." *Id.* at ¶8. Further, the CC Law intends to prevent "online forums from favoring one particular viewpoint over another through their monetary contributions." *Id.* at ¶9.

This action arose from an incident in which an aspiring author and Poster User, Katherine Thornberry, had her account suspended by Poster. *Poster, Inc. v. Wallace*, No. 21-CV-7855 at 5 (D. Delmont 2021). Since November 2018, Ms. Thornberry maintained an account with Poster and attempted to jumpstart her novel, *Animal Pharma*. *Id.* at 3. In addition to using Poster, Ms. Thornberry also pursued publication by traditional means, including, publishing houses and literary agents. *Id.* at 3-4.

Founded in 1998 by members of the American Peace Church ("APC"),[1] Poster is an extremely popular internet site that holds seventy-seven percent of the artistic self-publication market. *Id.* at 2. Poster provides services, functionality, and cost effectiveness that makes it more popular than its competition, allowing artists to upload their work to jumpstart an audience. *Id.* at 2, 10. When artists post their work for sale or rent on their individual account, Poster takes a fee and a percentage of any rents or sales, of which fifteen percent is donated in support of APC's continued educational and cultural efforts. *Id.* at 2-3. In addition, Poster provides discounted publication services to APC members but has hosted artists from diverse ideological viewpoints numbering in the hundreds-of-thousands for more than twenty years, only taking a stance on a

[1] The American Peace Church has a long history of supporting artists, authors, poets, and musicians who promote peacebuilding through education and cultural development. The Church encourages its members to do the same. In addition, APC provides educational resources to poor communities.

user's content once. *Id.* at 3, 9. In fact, Poster's terms disclaim endorsement of any views expressed in the material published and retain editorial discretion to accept or reject material submitted by an artist as it sees fit. Poster, Inc., User Agreement (effective December 10, 2019).

On the weekend of July 4, 2020, Ms. Thornberry attended "Freedom for All," a three-day animal rights rally against animal experimentation held in Capital City, Delmont. *Poster, Inc. v. Wallace*, No. 21-CV-7855 at 4 (D. Delmont 2021). On the day of the rally, violence broke out among attendees and the public. *Id.* Cars were burned and overturned, passersby were accosted, and police officers were pelted with street gravel. *Id.* One officer lost sight in one eye and is presently in danger of losing the other. *Id.* A week after the event, a group of local business leaders, including Poster's CEO, John Michael Kane, condemned the violence in a major newspaper op-ed. *Id.* at 5. While violence such as this is admittedly condemnable, Ms. Thornberry was not part of the altercations. *Id.* at 4. Instead, she remained at the music venue the entire time listening to the band that was performing. *Id.*

Inspired by a musical performance at the rally, Ms. Thornberry updated the title of her novel on all her social media outlets, including Poster, providing the alternative title "Blood is Blood." *Id.* "Blood is Blood" has been used by an animal rights group AntiPharma,[2] which advocates reciprocal civic response to violence against animals. *Id.* It is widely known that the phrase "Blood is Blood" is meant to express AntiPharma's belief that all living beings are equal. *Id.* at 5.

[2] AntiPharma is the most widely known group protesting PharmaGrande's experimentation and has developed a national reputation for such rallies. While there exists a more radical and violent wing of AntiPharma, the parties stipulate that "Blood is Blood" or "Blood for Blood" does not incite imminent violence and neither party raises the issue of unprotected speech; however, Poster still objects to the content based on its pacifist values. *Poster, Inc. v. Wallace*, No. 21-CV-7855 at 5 n.6 (D. Delmont 2021).

Following the rally and Ms. Thornberry's update, Poster became aware of the updated title when the novel experienced an increase in sales. *Id.* Citing Poster's User Agreement, which provides that it may block or remove an account "at any time for any or no reason," Poster interpreted the title "Blood is Blood" to be violative of its pacifist values instilled by its founders' affiliation with the American Peace Church. *Id.* At 5; *see also* Poster Inc., User Agreement (effective December 10, 2019). At that point, Poster informed Ms. Thornberry that her account had been suspended until she revised her title. *Id.* In only one instance before has Poster employed their User Agreement for this purpose, deeming a work entitled "Murder Your Enemies: An Insurrectionist's Guide to Total War" violative of the User Agreement. *Id.*

After Poster's suspension of Ms. Thornberry's account, Animal Pharma netted zero revenues on Poster, and traditional publishing methods were not successful. *Id.* at 5-6. On August 1, 2020, Ms. Thornberry protested her suspension and artistic suppression by making an appearance on national TV. *Id.* at 6. Learning of Poster's censorship through Ms. Thornberry's protest, the Attorney General for the State of Delmont brought an enforcement action fining Poster for violating the CC Law. *Id.* He later stated at a press conference: "The APC-founded Poster platform is discriminating against Delmont citizens based on their political viewpoints… and we bring this action for the first time today to stop that practice …." *Id.*

II. Nature of Proceedings

In response to being fined, Poster brought suit contesting its classification as a common carrier or, in the alternative, challenging the CC Law as violative of its constitutional rights to free speech and religious freedom. *See* ECF 1, Poster Compl. On September 1, 2021, and upon Delmont's motion, the United States District Court for the District of Delmont granted summary judgment in favor of Petitioner finding that (1) Poster was a common carrier; (2) Poster's

classification as a common carrier prevents it from succeeding in its free speech claim; and (3) that the CC Law is neutral and generally applicable and is therefore not violative of Poster's free exercise rights.

The United States Court of Appeals for the Fifteenth Circuit reversed all findings of the District Court except Poster's classification as a common carrier, and Will Wallace, in his official capacity as Attorney General of the State of Delmont, now appeals that decision.

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the United States Court of Appeals for the Fifteenth Circuit and hold the Delmont CC Law is both applicable to Poster and its application does not violate the First Amendment.

Poster, having a stipulated market share of seventy-seven percent, is a common carrier within the meaning of the CC Law because it makes up a substantial market share such that users, like Ms. Thornberry, have no other realistic options to self-publish their work. By requiring Poster, as a common carrier, to serve all users equally, regardless of religious or political ideology, the State of Delmont bolsters the First Amendment protection of individual speech on private platforms that hold themselves out to the public.

The CC Law does not violate Poster's rights under the First Amendment, because the requirement provision does not prevent Poster from speaking, nor does it force Poster to adopt the speech of any customers, and it is not likely that anyone would attribute Ms. Thornberry's speech to Poster. Because Poster disclaims support for any content posted on its platform and has demonstrated that its CEO can take significant public stances against speech which appears on the platform, there is no question, in law or in fact, that Poster is not prevented from speaking,

forced to adopt the speech of another, or likely to have the speech of Ms. Thornberry attributed to them.

Additionally, the Fifteenth Circuit Court did not address the question of severability. The Supreme Court can either remand the case to a state court for a decision on how state law should be applied. Alternatively, the Supreme Court could address the question of severability because there is no state law precedent. If the Supreme Court decides to address the severability question, the no contribution provision should be severed because the requirement provision is valid.

The CC Law is valid because it is generally applicable and neutral. It serves a valid governmental interest in providing a "space where all ideas are free to be shared and considered," Trapp Aff. ¶7, and the petitioner has not provided a valid reason for why the statute prevents a religious conduct or specifically limits the ability of their specific religion. The statute's legislative history and intent supplements the CC Law's valid governmental interest.

Even if this Court finds that the CC Law is not generally applicable and neutral, the CC Law passes the strict scrutiny test, because the statute was created for a compelling governmental purpose and was also narrowly tailored to achieve its purpose while using the least burdensome method.

ARGUMENT

I. Legal Standard

This is an appeal from an order granting summary judgment and is therefore under *de novo* review by this Court. "The court shall grant summary judgment" where the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). In ruling on a motion for summary judgment, the Court views the case in a light most favorable to the nonmoving party. *Plumhoff v. Rickard*,

572 U.S. 765, 768-69, (2014). However, when the movant properly supports their motion, the burden will shift. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[A] party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleading, but…must set forth specific facts showing that there is a genuine issue for trial.'" *Id. See also* FED. R. CIV. P. 56(e).

Here, the State has properly supported their motion for summary judgment, and with an incomplete record, Respondent is unable to point to a genuine issue of material fact sufficient to overcome their shifted burden. This Court, having no genuine issue of material fact before it, should decide the issue of law in favor of Petitioner and reverse the Fifteenth Circuit, upholding the District Court's grant of summary judgment.

II. The Common Carrier Law Does Not Violate Poster's Free Speech Rights as a Common Carrier

To determine whether the CC Law violates Poster's free speech rights, the Court must first decide that Poster is a common carrier and therefore subject to the CC Law. Because Poster is a common carrier, the Court should then determine whether the Delmont Legislature, by statute, has restricted Poster's ability to speak freely, compelled Poster to adopt speech against their will, or made it likely that a user's speech would be attributed to Poster. Because the CC Law does none of the above, the CC Law does not violate Poster's free speech rights.

a. The Common Carrier Law applies to Poster because it makes up a substantial market share of the self-publication market

Poster, as ultimately agreed upon by both the District Court and Court of Appeals, is properly classified as a common carrier under DELMONT REV. STAT. § 9.120(a), because Poster maintains a substantial market share of the self-publication market, an astounding seventy-seven

percent. *See Poster, Inc. v. Wallace*, 2021-3487 at 26 (15th Cir. 2021) ("[W]e agree with the ultimate conclusion below that Poster *is* appropriately considered a common carrier…."). Nevertheless, the power of a legislature to designate common carriers rests upon whether the entity is truly a common carrier. *U.S. v. Brooklyn Eastern District Terminal*, 249 U.S. 296, 304 (1919).

The law surrounding common carriers developed over the past few centuries, both in the United States and England, but the notion of internet platforms serving as common carriers is admittedly a new development. *See generally*, Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J. L. & TECH. 391 (2020). Because of this recent technological development, private businesses not designated before as common carriers may be when, "by circumstance and its nature, [it] rise[s] from private to…public concern and be subject, in consequence, to governmental regulation." *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 411 (1914). "At that point, a company's 'property is but its instrument, the means of rendering the service which has become of public interest.'" *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S.Ct. 1220, 1223 (2021) (Thomas, J. concurring) (quoting *German All.*, 233 U.S. at 408). Additionally, digital platforms are "at bottom communications networks, and they 'carry' information from one user to another." *Id.* at 1224.

Digital platforms draw nearer to being common carriers when they "have a dominant market share." *Id.* Though not necessary, an explicit finding that a business constitutes a monopoly bolsters a claim that it is a common carrier. *See* James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 264 (2002). And the fact that market alternatives might exist does not change the analysis. *Biden*, 141 S.Ct. at 1225 (Thomas,

J., concurring). Indeed, when assessing "whether a company exercises substantial market power, what matters is whether the alternatives are comparable. For many of today's digital platforms, nothing is." *Id.*

The parties stipulate that Poster has a seventy-seven percent market share of the self-publication market which seemingly comports with the CC Law's term "substantial market share." DELMONT REV. STAT. § 9-1.120(a); see also *Poster, Inc. v. Wallace*, No. 21-CV-7855 at 5 n.6 (D. Delmont 2021). By constituting seventy-seven percent of the self-publishing market and being so widely available and accessible to many artists, Poster sets itself apart from any potential alternatives. *Id.* at 2. As the District Court noted, "[t]hough there are undoubtedly other digital self-publication platforms that exist, and comprise 25% of that market collectively, the available consumer alternatives are more theoretical than real." *Id.* at 10. Indeed, Poster is the only method by which Ms. Thornberry was able to make any profit on her work as an author despite being involved with other alternatives to publication, none of which were comparable to Poster. *Poster, Inc. v. Wallace,* 2021-3487 at 22 (15th Cir. 2021). Poster's wide reach and established market share make it a platform with which no other might realistically compete.

In gaining such reach and market share, Poster has always hosted artists of diverse backgrounds and ideologies, numbering in the hundreds of thousands. *Poster, Inc. v. Wallace,* No. 21-CV-7855 at 9 (D. Delmont 2021). This success is likely attributable to Poster's opening itself up to the public on such a large scale. Only after achieving this success, Poster chose to employ its User Agreement to exclude Ms. Thornberry. This cuts to the core of original policy reasons for common carrier regulations, namely, once businesses achieve such success and control of a market, they may treat customers in any manner they so choose.

b. The requirement provision does not violate Poster's free speech rights because Poster is neither prevented from speaking nor compelled to speak, and Ms. Thornberry's speech is not likely to be attributed to Poster

Though Poster is a common carrier, Poster still has free speech interests under First Amendment law; however, those interests are not absolute. *Munn v. Illinois*, 94 U.S. 113, 130 (1876). Instead, common carriers "exercise a sort of public office, and have duties to perform in which the public is interested." *Id.* But they are, in limited instances, allowed to exercise control over their customers' speech. *See, e.g.*, *Biden*, 141 S.Ct. at 1222 (2021) (Thomas, J., concurring). However, common carriers' editorial discretion over users' speech is regulated in a number of ways in furtherance of a free speech ideal which goes beyond the First Amendment. *See* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2316-31 (2021) (describing the various areas where legislatures have extended free speech protections for users of common carriers beyond the First Amendment).

These protections for individuals seeking to speak in private forums are not only limited to common carriers. Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH LAW 377, 416 (2021). Indeed, without disagreement from the Majority, Justice Breyer wrote that "[r]equiring someone to host another's speech is often a perfectly legitimate thing for the Government to do." *Id.* (quoting *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082 (2020) (Breyer, J., dissenting)). Further, this Court has held that a private property owner does not have "a First Amendment right not to be forced by the State to use his property as a forum for the speech of others." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85-87 (1980). "*FAIR* and *PruneYard* establish that compelling a person to allow a visitor access to the person's property, for the purpose of speaking, is not a First Amendment violation, so long

as the person is not compelled to speak, the person is not restricted from speaking, and the message of the visitor is not likely to be attributed to the person." *NetChoice, LLC v. Moody*, No. 4:21cv220-RH-MAF, 2021 WL 2690876, *9 (N.D. Fla. June 30, 2021)

i. Poster is not prevented from speaking

The First Amendment provides that the government "shall make no law…abridging the freedom of speech…." U.S. CONST. amend. I. But hosting speech by others does not, in and of itself, subject private entities to the constraints of the First Amendment. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1930-31 (2019). Indeed, "the Constitution does not disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property." *Id.* However, state legislatures may regulate private businesses' editorial discretion to broaden access to the private platform which seeks to serve the general public. *See Halleck*, 139 S.Ct. at 1932 (discussing a state legislature's regulation of private television company channels such that it very closely resembled a common carrier).

Here, the Delmont Legislature has made no law abridging Poster's free speech rights. Instead, they have regulated by statute the editorial discretion of Poster, expanding the free speech protections of its users. Poster is neither compelled to speak or prevented from speaking in a certain manner. In fact, Poster does speak by disclaiming endorsement of any views expressed by content posted by its users, and its CEO possesses the ability to publicly speak on behalf of Poster to disavow certain conduct. *Compare Poster, Inc. v. Wallace*, 2021-3487 at 21 (15th Cir. 2021) *and* Poster, Inc., User Agreement (effective December 10, 2019) *with PruneYard*, 447 U.S. at 85-87 (reasoning that the shopping center had the ability to put up signs to disclaim any speech).

ii. Poster is not compelled to speak nor adopt another's speech as their own

Further, this Court has previously dealt with Respondent's argument that "a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others." *Pruneyard,* 447 U.S. at 85. The Court decided that no such right exists. *Id.* In *Pruneyard*, a state statute protected an individual's speech on the property of a shopping mall which belonged to another. *Id.* This Court reasoned that the business was "open to the public to come and go as they please," and "views expressed by members of the public…will not likely be identified with those of the owner." *Id.* Further, "no specific message [was] dictated by the State to be displayed on [the] property," and the property owner is perfectly able to expressly disavow the speaker's message by posting signs in the area to communicate their lack of endorsement. *Id.*

Poster itself disclaims endorsement of any views expressed by artists using the platform or the material posted, Poster, Inc., User Agreement (effective December 10, 2019), and Poster's ability to disavow ideologies, groups, and artwork has not been impeded by this law. *Poster, Inc. v. Wallace*, 2021-3487 at 21 (15th Cir. 2021). For example, this law in no way prevented Poster's CEO from publicly signing an op-ed disavowing AntiPharma's violence and support for violence. *Id.* Much like the shopping mall in *PruneYard,* Poster is free to express their views or their disapproval of a User's views on their platform, but they may not exclude the user altogether for expressing a view with which Poster disagrees.

iii. The speech by Ms. Thornberry is not likely to be attributed to Poster

The right to associate is also protected under the First Amendment. *Boy Scouts of Am. v. Dale,* 530 U.S. 640, 644 (2000). But that protection applies to members of an expressive association. *Rumsfeld v. F. for Acad. and Institutional Rts., Inc.*, 547 U.S. 47, 69 (2006)

(distinguishing between military recruiters "com[ing] onto campus for the limited purpose of trying to hire students" and coming onto campus "to become members of the school's expressive association."). In *Rumsfeld*, law schools advocated that they would be viewed as approving of the military's policies by allowing them equal access and treatment in recruiting their students, but this Court rejected that argument as it has done on prior occasions. *Id.* at 64-65 (citing *PruneYard*, 447 U.S. at 100). The Court pointed to their prior holding that even high school students can distinguish between school sponsored speech and speech which the school tolerates because they are "legally required to do so." *Id.* at 65 (citing *Bd. of Ed. of Westside Cmty Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990)).

Further, Poster's users act in an individual capacity, without communicating as a whole. In *Hurley v. Irish-American Gay*, this Court held that parade organizers could exclude a group from their parade because a parade acts as a whole, made up of single units, to convey a single message. *Hurley v. Irish-American Gay*, 515 U.S. 557, 568-71 (1995). The facts in this case are distinguishable from those in *Hurley* because when users speak on Poster, their speech has been disclaimed by Poster and each user speaks for themselves. They do not speak as individuals promoting a collective message as in *Hurley*. *See also*, *Rumsfeld*, 547 U.S. at 64-65 (reaffirming the holding in *PruneYard* reasoning that hosting military recruiters to a law school in no way suggests the school agrees with the military's policies). Instead, users on Poster are free to post contradictory material, and such speech will be associated only with the user who posted it.

While Poster may not be forced to allow someone to become a member of their expressive association as in *Hurley*, users like Ms. Thornberry, do not seek to express views on behalf of Poster. Instead, users seek to sell or display their own artistic product, and it is clear that Poster does not sponsor or adopt any views expressed by users as its own. Similar to the

military recruiters in *Rumsfeld*, the users on Poster utilize the platform for a limited purpose, to sell their products. They do not employ Poster's platform to promote an expressive message, let alone promote Poster's owners' sense of pacifism. If high school students can appreciate the difference in school sponsored and school tolerated speech, surely Poster users can appreciate when Poster speaks and when Poster allows people access to the platform because it is legally required to do so.

iv. The requirement provision falls outside First Amendment review because it neither compels nor prohibits Poster's speech

The First Amendment is inapplicable here because the CC Law neither compels Poster to speak nor prohibits Poster from speaking. The First Amendment prohibits the *government* from passing laws which abridge the freedom of speech. U.S. CONST. amend. I. Under the First Amendment, the government, in some instances, may not restrict a party from speaking, but the government is also prohibited from compelling parties to speak. *U.S. v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) ("Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views…." (citations omitted)). While the First Amendment deals with these two majors concerns of free speech, it does not prohibit regulations broadening that freedom. *See* Lakier, *supra* p. 9.

In the instant case, Poster challenges governmental action which neither infringes upon Poster's speech nor compels Poster to speak. Instead, the statute in question broadens the ability and freedom of users to speak on the platform. Poster is not required to speak nor are they required to endorse speech by others. Instead, Poster is simply required by the CC Law to "serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint."

DELMONT REV. STAT. § 9.120(a). As noted above, Poster's service to users is in no way indicative of their support of their users' speech, and this provision does not compel Poster to speak in any way. It only requires that Poster, as a common carrier, serve all who seek to maintain an account. That question does not implicate the First Amendment.

c. The no contribution provision was not analyzed by the Court of Appeals for the Fifteenth Circuit in regard to Poster's free speech rights; therefore, it is presumed to fall outside the first question presented

The District Court's finding that the no contribution provision did not violate Poster's free speech rights was not discussed by the United States Court of Appeals for the Fifteenth Circuit, nor is the issue of the no contribution provision mentioned in the questions presented; therefore, presumably, the question of whether the no contribution provision violates Poster's free speech rights is not before the Court.[3]

Further, if the Court reviews the no contribution provision, there has been no enforcement of the statute under this clause. Delmont sought to enforce the requirement provision of the statute when it became aware of Ms. Thornberry's account suspension. Delmont did not issue a fine to Poster for its contributions, thus review of that provision is not ripe for review. *See Poe v. Ullman*, 367 U.S. 497 (1961) ("It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the state's prosecuting officials if real threat of enforcement is wanting.").

[3] The Court only addressed the "no contribution clause" in its *Smith* analysis, beginning on Page 29 of the Opinion below. Because we do not have the luxury of a record in this proceeding, the issue is presumed to be resolved in regard to Poster's free speech rights. Without abandoning the stance that the question is not ripe for review, should the Court choose to address this issue, it certainly should consider the clauses separately and independently.

III. This Court Should Consider the Requirement Provision Independent of the "No Contribution" Provision

a. The Court should grant, vacate, and remand to the Court of Appeals with instructions to certify the question to the Delmont Supreme Court or make an Erie guess

"Severability is of course a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). "[A]ny issue of severability is a question of state law to be addressed upon remand." *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 510 (1993). Whether the requirement provision and contribution provision may be severed is not a question that should be reviewed by this Court because it is an unresolved question for the state courts of Delmont. To accurately apply state law, the Court should vacate and remand to the Fifteenth Court of Appeals with instructions to either certify the question to the Delmont Supreme Court or make an "*Erie* guess."

Per the record, the Fifteenth Circuit did not address the question of severability. In the Fifteenth Circuit's decision, the no contribution provision of the CC Law issue was dispositive. *Poster, Inc. v. Wallace*, 2021-3487 at 31-32 (15th Cir. 2021). The court decided that the clause was neither neutral nor generally applicable. *Id.* at 33. This decision ignores the fundamental state law process of severability. The Fifteenth Circuit decided the entire CC Law was polluted by the no contribution provision and failed to address the Constitutionality of the individual clauses. But the Delmont Supreme Court should decide this question of state law; therefore, this Court should vacate and remand to the Fifteenth Circuit with instructions to certify the question to the Delmont Supreme Court or make an *Erie* guess.

b. The Delmont Common Carrier Law provisions should be severed

Alternatively, this Court may address the severability of a state statute. "In cases coming from the state courts, this Court, in the absence of a controlling state decision, may, in passing upon the claim under the federal law, decide, also, the question of severability." *Dorchy v. Kansas*, 264 U.S. 286, 291 (1924). Per the record, the question of severability has not been addressed and no controlling interpretation by the Supreme Court of Delmont exists. The traditional test employed by this Court is, "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999).

In this case, the statute was "carefully crafted to bolster free speech by placing limits on the ability of platforms to restrict speech." Trapp Aff. ¶ 7. "The law's statement of intent indicates that the "no contribution provision" was included to avoid running afoul of the Establishment Clause." *Poster, Inc. v. Wallace*, No. 21-CV-7855 at 4 (D. Delmont 2021). The no contribution provision requires common carriers to "refrain from using corporate funds to contribute to political, religious, or philanthropic causes." DELMONT REV. STAT. § 9-1.120(b). It restricts the common carrier's contributions but does not enhance a user's free speech rights. This clause was implemented as a failsafe to the requirement clause of the CC Law. If this Court severs the no contribution provision, the requirement provision remains, which states, common carriers internet platforms "shall serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint." DELMONT REV. STAT. § 9-1.120(a). This provision is congruent with the legislative history because it shields user's constitutional rights by placing limits on a platform's ability to restrict speech. Additionally, the requirement clause if "left is

fully operative as a law", and therefore, should be severed from the no contribution provision. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. at 191.

IV. The Common Carrier Law is Constitutional

Respondent argues that despite any free speech violations, the CC Law is unconstitutional under *Smith*. In *Smith*, this Court held "that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Emp. Div., Dep't of Hum. Ress. of Oregon v. Smith*, 494 U.S. 872, 878-82 (1990)). However, the CC Law is neutral and generally applicable and therefore constitutional.

a. The Common Carrier Law is Neutral

The CC Law is neutral under the standards set forward by this Court in *Smith* and its progeny. "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because *of* their religious nature." *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1876 (2021). The "'neutrality' inquiry can be broken down into three questions." Carol M. Kaplan, Note, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045 (2000).

"First, does the law target religion on its face?" *Id.* "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993). The CC Law in neither provision references a specific religious practice. The first clause of the statute states common carriers "shall serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint." DELMONT REV. STAT. § 9-1.120(a). This portion of the statute has a secular meaning and purpose to provide equal access for all citizens. The second

clause states common carriers must "refrain from using corporate funds to contribute to political, religious, or philanthropic causes." DELMONT REV. STAT. § 9-1.120(b). On its face, this statute is neutral because it requires all common carriers to refrain from contributing to any religious organization, but this does not prevent employees of Poster from exercising their religious beliefs. Therefore, the CC Law survives this first question.

Second, "[i]s the law discriminatory in its object or purpose?" Kaplan, *supra* at 1077. To address this question, the Court must analyze "whether there is evidence in the legislative record that is suggestive of a discriminatory intent on the part of lawmakers. *Id.* Louis F. Trapp, Governor of Delmont, asserts in his affidavit "the Common Carrier Law, a product of my campaign promises, was carefully crafted to bolster free speech by placing limits on the ability of platforms to restrict speech." Trapp Aff. ¶ 7. This was meant to allow the online space to be a "town square" in the truest sense, where all ideas are free to be shared and considered." *Id.* Further, "the law's statement of intent indicates that the "no contribution provision" was included to avoid running afoul of the Establishment Clause." *Poster, Inc. v. Wallace,* No. 21-CV-7855 at 4 (D. Delmont 2021); DELMONT REV. STAT. § 9-1.120(b). This statement of intent shows that the CC Law's purpose was to bolster the free speech of all Delmont citizens, and therefore, the CC Law survives the second question.

Third, "[d]oes the law discriminate in its actual operation or effect?" Kaplan, *supra* at 1077. By applying indiscriminately to all common carriers in Delmont regardless of religious, ideological, or political stance, this statute does not discriminate in its actual operation.

Additionally, the respondent emphasizes that contributions are not allowed to be made by common carriers. This argument fails to show how the restriction of contributions forces Poster to endorse a belief outside of its faith or prevents employees of Poster from contributing on an

individual capacity. Poster could raise the salaries of its employees and allow them to donate on an individual capacity allowing the organization to still maintain its mission. The CC Law does not prevent Respondent's employees from promoting its core values of "peace-building through education and cultural development." *Poster, Inc. v. Wallace*, No. 21-CV-7855 at 2 (D. Delmont 2021). Based on these facts the third question is satisfied and the statute should be deemed neutral.

b. The Common Carrier Law is Generally Applicable

For a statute to be generally applicable, it must 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 1876 (quoting *Smith*, 494 U.S. at 884). The CC Law passes this test because it does not allow for any individualized exemptions. Instead, it requires all platforms to adhere to its specific rules regarding consumer participation. Additionally, the statute prevents individualized exceptions by preventing all common carriers from being able to contribute to political, religious, and even philanthropic activities.

The Fifteenth Circuit decided that the statute provided for individualized exemptions by allowing the Attorney General of Delmont the discretion to investigate why Poster enforced its user agreement. *Poster, Inc. v. Wallace*, 2021-3487 at 32 (15th Cir. 2021). The Court of Appeals misapplied the analysis in *Fulton*. In *Fulton*, the Supreme Court held that the "creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given." *Fulton*, 141 S.Ct. at 1876. In *Fulton*, the Court addressed the Government's argument that the exception clause was irrelevant because no exceptions had been given. However, this rule is dependent upon the presence of a formal mechanism through which an exception may been given. The correct interpretation of *Fulton*

hinges on the presence of a formal mechanism included in the statute in the form of an exception clause. Per the record, the CC Law does not have an exception clause. In this case, the Attorney General was not acting under the powers of the CC Law's statutory provision but according to his ordinary duties as an executive officer. Thus, the Court should disregard the Fifteenth Circuit's analysis under *Fulton*.

By further analysis, it "is possible to discern a set of questions that should be addressed as part of the general applicability inquiry, which focuses on the actual operation and effect of a law." Kaplan, *supra* at 1078. These questions are addressed in turn.

First, "is the law designed to achieve a general or a specific purpose?" *Id.* "The Common Carrier Law…was carefully crafted to bolster free speech by placing limits on the ability of platforms to restrict speech." Trapp Aff. ¶ 7. Additionally, "the law's statement of intent indicates that the "no contribution provision" was included to avoid running afoul of the Establishment Clause." *Poster, Inc. v. Wallace*, No. 21-CV-7855 at 20 (D. Delmont 2021). Both statements of intent indicate that the purpose of the statute was to give citizens more free speech and to prevent singling out religious organizations.

Additionally, "Where the number of secular exceptions in a law suggest excessive tailoring of the law's application, the likelihood increases that the law is structured to intentionally target religious conduct." Kaplan, *supra* at 1078-79. Neither of these intent show a motive of the state to advance a secular cause while restricting religious actions. Thus, the first question should be satisfied.

Second, "is the law constructed so that in its actual operation it targets only religious conduct or singles out a particular religion?" *Id.* at 1079. The Fifteenth Circuit's analysis of this question focuses solely on the no contribution provision. They reasoned "words with "strong

religious connotations," such as "sacrifice" and "ritual," were found to be "consistent with the claim of facial discrimination." *Poster, Inc. v. Wallace,* No. 21-CV-7855 at 30 (D. Delmont 2021). The court further elaborated saying, "there is more than a "strong connotation," as religion is targeted directly and explicitly." *Id.* This argument is flawed because the terms "sacrifice" and "ritual" are terms that have historical usages in specific religions. Furthermore, the term "religion" itself does not show a specific religion is being harm or a specific religious conduct. Further, the statute prohibits using corporate funds to contribute to political, religious, and philanthropic causes. DELMONT REV. STAT. § 9-1.120(a) The act of contributing cannot be deemed to have a strong religious connotation, because the act of contribution is historically secular. Based on this, the second question is satisfied, and the statute should be deemed generally applicable.

c. Even if the Common Carrier Law is not neutral and generally applicable, it survives strict scrutiny

"To satisfy strict scrutiny, the State must demonstrate that its…legislation is narrowly tailored to achieve a compelling interest" *Miller v. Johnson*, 515 U.S. 900, 920 (1995). Delmont has a compelling interest in regulating common carriers. The State's compelling interest is to allow the "online space to be a "town square" in the truest sense, where all ideas are free to be shared and considered." Trapp Aff. ¶ 7. "State's interest in protecting the "safety and convenience" of persons using a public forum is a valid governmental objective" *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 650 (1981). The State must enact regulations "when large digital platforms like Poster take hold of a particular market and their counterparts cannot practically compete to provide comparable services." Trapp Aff. ¶ 8. It is undisputed that Poster controls seventy seven percent "of the self-publication market." *Poster, Inc. v. Wallace,*

No. 21-CV-7855 at 5 n.6 (D. Delmont 2021). These services, which are essential to the promotion of public expression First Amendment rights, cannot be left to the regulation of corporate policies.

"A statute is narrowly tailored if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). Additionally, the law "must be the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). The CC Law is narrow and least restrictive because it was "tailored to prevent online forums from favoring one particular viewpoint over another through their monetary contributions." Trapp Aff. ¶ 9. The penalties for the statute "serve as added disincentive to comply with the law." *Id.* This statute does not force Poster to change substantially but only requires the common carrier to allow access to all citizens.

CONCLUSION

Because the CC Law does not violate Poster's free speech rights and it is otherwise a constitutional regulation of common carriers, this Court should reverse the Fifteenth Circuit and remand for further proceedings or uphold the district court's grant of summary judgment.

Respectfully submitted,

Dated: January 31, 2022

/s/ *Team 005*
Team 005

APPENDIX A

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I.

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

CERTIFICATE OF COMPLIANCE

1. Pursuant to Official Competition Rule III(C)(3)(i), the undersigned certifies the work product contained in all copies of the team's brief is in fact the work product of the team members.

2. Pursuant to Official Competition Rule III(C)(3)(ii), the undersigned certifies the team has fully complied with our school's governing honor code.

3. Pursuant to Official Competition Rule III(C)(3)(iii), the undersigned certifies and acknowledges that the team has complied with all Rules of the Competition.

Dated: January 31, 2022

/s/ *Team 005*
Team 005