No. 22-CV-7654

IN THE SUPREME COURT OF THE UNITED STATES

Spring Term 2022

WILL WALLACE, Attorney General for the State of Delmont,

Petitioner,

v.

POSTER, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTEENTH CIRCUIT

No. 2021-3487

BRIEF FOR RESPONDENT

Team 006

Attorneys for Respondent

ORAL ARGUMENT REQUESTED

QUESTIONS PRESENTED

I. Does the Common Carrier Law violate Poster's First Amendment free speech rights because Poster is a hybrid platform that engages in transmission and editorialization and the law compels Poster to host speech that it does not agree with?

II. Does the Common Carrier Law violate Poster's First Amendment free exercise rights because the law is not neutral, generally applicable, or the least restrictive means of achieving the government's stated interest?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Cases

Federal Circuit Court Cases

Federal District Court Cases

Constitutional Provisions

State Statutes

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES

Respondent Poster, Inc., Plaintiff in the United States District Court for the District of Delmont, and Appellant in the United States Court of Appeals for the Fifteenth Circuit, submits this brief in support of its request that this Court affirm the Fifteenth Circuit's ruling as to the State of Delmont's Common Carrier Law.

OPINIONS BELOW

The opinion of the United States District Court for the District of Delmont is available on pages 1–17 of the Record. The opinion of the United States Court of Appeals for the Fifteenth Circuit is available on pages 18–33 of the Record.

CONSTITUTIONAL PROVISIONS

This case involves the First Amendment of the United States Constitution, which states that "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." U.S. Const. amend. I.

STATEMENT OF THE CASE

Poster, Inc. was founded in 1998 and is run by the American Peace Church (APC). R. at 2. APC's central beliefs are non-aggression and pacifism. *Id.* APC seeks to promote peacebuilding through educational and cultural development. *Id.* Fifteen percent of Poster's profits go towards the APC's educational and cultural efforts. R. at 2–3. Poster is compelled, by its religious beliefs, to donate a percentage of its profits to religious causes. R. at 10, 12. Poster views its mission as an extension of the APC's religious practices. R. at 37.

Poster is a large online platform that hosts self-publications and performances by up-and-coming artists. R. at 2. Each artist has their own account, which holds their material. *Id.* Artists can choose to allow downloads of their work for free, for rent, or for purchase. *Id.* Poster charges a small fee for an account and receives a percentage of the rents and purchases. *Id.* Poster's User Agreement alerts the artists that Poster retains editorial discretion to accept or reject any material submitted to the platform by any artist at any time for any reason. *Id.* Poster includes these terms because of its adherence to the APC's religious beliefs. R. at 37. As such, Poster provides discounted publication services to APC member artists. R. at 3. Poster also hosts artists of diverse ideological viewpoints. *Id.*

While running for re-election, Governor Trapp advocated for reforms to prevent online platforms from stifling viewpoints that they disagreed with. R. at 34. As a result, on June 1, 2020, Delmont passed its Common Carrier Law (CC Law). R. at 3. Any internet platform with substantial market share is designated as a common carrier. Delmont Rev. Stat. § 9-1.120(a). A platform that qualifies as a common carrier is then required to serve anyone who seeks or maintains an account, regardless of religious, political, or ideological viewpoint. *Id.* Further, a common carrier is prohibited from using corporate funds to contribute to religious, political, or philanthropic causes. R. at 3. Heavy fines are imposed on platforms that violate the law, up to 35% of a business' daily profits. *Id.* These fines compound daily until the platform conforms with the law. *Id.* Delmont included the no contribution provision to avoid violating the Establishment Clause. Delmont Rev. Stat. § 9-1.120(b).

Katherine Thornberry has been on Poster since November of 2018. R. at 3. Since then, she has been trying to jumpstart her novel, *Animal Pharma*, which has garnered only a few rents and purchases. R. at 3–4. Ms. Thornberry has failed to gain any traction with publishing houses or

literary agents. *Id.* In July of 2020, Ms. Thornberry attended an animal rights rally in Capital City, the home of PharmaGrande, Inc., a major animal experimenter. *Id.* Ms. Thornberry posted updates from the rally on her Poster account and her other social media accounts. *Id.* In the update, Ms. Thornberry changed the title of her book from *Animal Pharma* to *Blood is Blood*. *Id.* The updates generated more traffic on her Poster account. *Id.* During the rally there were violent altercations between attendees and the public. *Id.* Cars were burned, pedestrians were accosted, and one police officer lost an eye. *Id.* Although Ms. Thornberry was not involved in the altercations, her new book title, *Blood is Blood*, is the mantra of AntiPharma, a nationally known pro-violence extremist group. *Id.* Additionally, AntiPharma has been involved in violent altercations with police and counter-protestors in the past. R. at 5.

In response to the rally, local business leaders, including Poster's CEO John Michael Kane, condemned the violence in a newspaper op-ed. *Id.* Sometime after the rally, Poster became aware that Ms. Thornberry had an account on Poster. *Id.* Poster decided that the title *Blood is Blood* was in violation of its pacifist values. *Id.* As such, Poster suspended Ms. Thornberry's account until she agreed to change the title. R. at 5. On a separate occasion, Poster took a similar stance on a work titled *Murder Your Enemies: An Insurrectionist's Guide to Total War. Id.*

Because Ms. Thornberry's book lost its revenue stream, she protested her treatment by Poster on national television. R. at 6. As a result, Delmont fined Poster for violating the CC law. *Id.* The Attorney General stated in a press conference that "[t]he APC-founded Poster platform is discriminating against Delmont citizens based on their political viewpoints." *Id.*

Poster filed a lawsuit challenging the CC law. R. at 6. Poster contested its characterization as a common carrier, or in the alternative, challenged the law as a violation of its First Amendment freedoms of speech and religion. *Id.* Delmont moved for summary judgment. *Id.* The District Court

granted Delmont's motion for summary judgment as to Poster's common carrier status and the CC law's constitutionality on both the free speech and free exercise claims. R. at 16, 23. Poster appealed to the Fifteenth Circuit. R. at 23. The Fifteenth Circuit reversed the District Court's findings as to the free speech and free exercise claims. R. at 33. This Court granted certiorari. R. at 39.

SUMMARY OF THE ARGUMENT

The first issue for this Court to decide is whether the CC law is unconstitutional because it violates Poster's free speech rights. To begin, this Court must determine Poster's status as a social media platform. Poster is a dual-function platform. Poster provides a place for users to transmit their publications and performances to other users while retaining the right to accept or reject any publication or performance for any reason. Additionally, Poster uses its platform to express its own ideas. Poster is an APC owned and operated platform. As such, Poster ensures that its religious ideals are respected by its users. Poster also supports APC artists and contributes 15% of its profits to religious charities. Because Poster does not function solely as a common carrier, it is entitled to its own free speech protections.

The Free Speech Clause is well understood as a protection against government interference with speech. The Free Speech Clause also protects against government compelled speech. The CC law functions as a tool for the government to force Poster to support religious, political, and ideological stances contrary to its religious tenets. A law that compels a platform to host speech based on the content of the speech is a violation of the First Amendment subject to the highest constitutional scrutiny provided by this Court. Therefore, the CC law must be struck down as unconstitutional for violating the Free Speech Clause.

The second issue for this Court to decide is whether the CC law is unconstitutional because it violates Poster's free exercise rights. The Free Exercise Clause prohibits the government from infringing on one's religious beliefs. The Free Exercise Clause also prohibits the government from requiring performance or abstention in contradiction of religious beliefs. A law that infringes on the free exercise of religion must be neutral and generally applicable. The CC law is neither. The law is not neutral because it refers to religion on its face, and in operation, the entire burden of the law falls on Poster. The law is not generally applicable because it is underinclusive and allows for the government to make subjective assessments about which platforms are subject to the law's jurisdiction. Because the law is neither neutral nor generally applicable, the law must pass strict scrutiny. The law does not. First, the government's interest in preventing platforms from stifling or favoring speech in favor of others' speech is not a compelling interest. Even if this Court were to find the interest compelling, the law is not narrowly tailored because it is not the least restrictive means to achieve the government's interest. Therefore, the CC law must be struck down as unconstitutional for violating the Free Exercise Clause.

ARGUMENT

Standard of Review

The District Court granted Delmont's motion for summary judgment on both the free speech and free exercise issues; these decisions were reversed by the Fifteenth Circuit. R. at 33. Summary judgment is proper if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Courts of appeal review district courts' summary judgment orders *de novo*. *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). Under this standard, this Court does not have to

give any deference to a district court's decision. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 226 (1991).

I. DELMONT'S COMMON CARRIER LAW IS UNCONSTITUTIONAL BECAUSE IT VIOLATES POSTER'S FIRST AMENDMENT FREE SPEECH RIGHTS.

The Free Speech Clause of the First Amendment asserts that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This restriction on abridging speech is applicable to the States through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("[F]reedom of speech . . . [is] among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States."). The First Amendment protects the speech of both natural persons and corporations. *See Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n of California*, 475 U.S. 1, 8 (1986). In addition to its prohibition on improper governmental restraints on speech, the First Amendment also prohibits governmental compulsion to speak. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985).

Freedom from totalitarian prohibitions on speech and from being compelled to speak are cornerstones of American democracy. So much so, that this Court has extended those freedoms from natural persons to corporations. *Pacific Gas & Elec.*, 475 U.S. at 8. First Amendment jurisprudence aims to provide as many protections for speakers as possible. In following with that tradition, this Court should protect Poster from an intrusion on its First Amendment free speech rights by the State of Delmont. Thus, this Court should affirm the Fifteenth Circuit's finding that the CC Law is unconstitutional.

A. Poster Functions as a Hybrid Carrier Because the Platform Transmits Speech and Retains Editorial Control.

The degree of protection that is afforded to media corporations may differ depending on their characteristics. *See Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 386 (1969). Media corporations that primarily exercise editorial discretion of content, such as newspapers, broadcast, and cable companies, are entitled to the highest protections. *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 375–76 (1984). In contrast, media corporations that solely engage in neutral transmission of content, such as telecommunication and broadband internet companies, are entitled to more limited protections. *U.S. Telecom. Assoc. v. F.C.C.*, 825 F.3d 674, 743 (D.C. Cir. 2016) (noting that telecommunication and broadband companies are subject to common carrier regulations).

In this case, Poster floats in the ether between common carrier, cable, broadcasting, and newspaper. Poster does not strictly function as a newspaper publisher that exercises editorial discretion on every publication or performance that an artist uploads. But at the same time, Poster does not strictly function as a telecommunication company by solely providing transmission of information without any editing or messaging. Accordingly, Poster's classification as a common carrier requires qualification and comparison to other media outlets.

1. *Poster Does Not Hold Itself Out as a Common Carrier Because It Openly Notifies Users of its Editorial Powers.*

A basic feature of common carriers is the requirement that the business hold itself out as serving the public indiscriminately. *U.S. Telecom. Assoc.*, 825 F.3d at 740. In *United States Telecommunication Association*, broadband service providers were challenging their F.C.C. classification as telecommunication services. *Id.* at 689. This classification would subject

broadband providers to common carrier regulations in an attempt to provide for a more open internet. *Id.* Broadband providers connect internet users to backbone networks, which are fiber-optic links and high-speed internet routers. *Id.* at 690. This connection allows users to access content providers, services, and applications, like Netflix. *Id.* Alamo Broadband, an appellant in the case, brought a First Amendment challenge to the F.C.C. classification. *Id.* at 739. Alamo argued that the open internet rules violated the First Amendment by forcing broadband providers to transmit speech that they disagree with. *Id.* The court disagreed. *Id.* at 741. Broadband providers exercise little control over content and allow access to essentially all content on the internet. *Id.* The court noted that when a "subscriber uses her broadband service to access internet content of her own choosing, she does not understand the accessed content to reflect her broadband provider's editorial judgment or viewpoint." *Id.* at 743.

Poster does not hold itself out to the public solely as a neutral conduit for others' speech. Poster's User Agreement explicitly states that the platform retains editorial discretion to accept or reject material submitted by an artist as it sees fit. R. at 2, 26. A Poster user would therefore understand that the content downloaded from the website reflects Poster's "editorial judgment or viewpoint." *U.S. Telecom. Assoc.*, 825 F.3d at 743. The infrequent use of editorial discretion is not relevant to Poster's retention of that right. There is no "use-it-or-lose-it" clause attached to the First Amendment. When users first establish a relationship with Poster, they are aware that the platform retains the right to edit the content it puts forth. Further, Poster's platform is distinguishable from the broadband providers' services in *United States Telecommunication Association*. *See U.S. Telecom. Assoc.*, 825 F.3d at 690. That court explained that when an individual accesses online content, she will not assume that the accessed content conveys the views

or editorial judgment of her broadband provider. *Id.* at 743. Conversely, when users access Poster's platform, they are made aware of its strong affiliation with the APC. R. at 26.

2. *Poster Engages in Both Transmission and Editorialization.*

Media corporations that serve as conduits for speech can also communicate messages of their own. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 636 (1994). In *Turner Broadcasting*, the issue was whether requiring cable television systems to devote a portion of their channels to local broadcast television stations abridged their freedoms of speech. *Id.* at 626. Cable operators own cable networks, select programming channels to provide to their viewers, and transmit the cable signals to the viewers. *Id.* at 628–29. Through "original programming or by exercising editorial discretion over which stations or programs to include in its repertoire [they] seek to communicate messages on a wide variety of topics in a wide variety of formats." *Id.* at 636 (quoting *Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986)). The provisions would interfere with cable operators' editorial discretion by reducing the number of channels over which cable operators could exercise control. *Id.* at 637. This Court vacated the opinion below, permitting the restrictions, and remanded the case for further proceedings. *Id.* at 668.

Poster operates in a similar manner to the cable systems in *Turner Broadcasting*. *See* 512 U.S. at 636. Poster transmits the speech of others while also conveying ideas and viewpoints of its own. Poster allows self-publication and performance uploads for burgeoning artists. R. at 2. In this way, Poster is simply acting as a conduit for others to convey messaging, like transmitting a cable signal to a viewer. *Turner Broad.*, 512 U.S. at 626. However, Poster also engages in messaging of its own. Poster provides discounted services for APC members, promotes APC-member content, and widely publicizes its donations to the APC. R. at 3, 26. Poster intends to present a message to others that it believes in and practices the APC's philanthropic, educational, and cultural tenets.

This action is comparable to cable systems deciding which stations or programs to include. *Turner Broad.*, 512 U.S. at 636.

3. *Poster's Majority Control Does Not Inhibit the Marketplace of Ideas Because Other Publication Alternatives Exist.*

The valuation and limitation of a media resource impacts the balance between private and public control. *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101, 104 (1973). In *CBS*, the issue was whether a broadcast licensee's general policy of not selling ad time to those wishing to speak out on certain issues violated the First Amendment. *Id.* at 97. Broadcast media poses a unique issue in comparison to other outlets, like cable or newspaper, because of the inherent physical limitations. *Id.* at 101. Everyone who has the resources to communicate over broadcast television or radio cannot be accommodated. *Id.* There are only so many frequencies to go around. *Id.* This Court concluded that due to the scarcity of the resource, the rights of the viewers and listeners to hear ads were paramount to the broadcaster's policy. *Id.* at 102.

Government control over media corporations that exert substantial influence on the public is a greater threat to the First Amendment than the corporation's power. *See CBS*, 412 U.S. at 152–53 (Douglas, J., concurring). It is fair to conclude that Poster has secured a majority of the online self-publication market. R. at 2. However, an inability to publish on Poster does not deny an artist the ability for their work to be seen. Unlike broadcast television or radio, *CBS*, 412 U.S. at 101, the internet does not have inherent physical limitations. The District Court even conceded that there is "near universal public access to the internet." R. at 9. Thus, the risk that a social, political, moral, or artistic idea will go without publication because Poster exercises its editorial discretion is very minimal. Ms. Thornberry has other options to exercise her First Amendment right. She may post on other social media sites, submit portions of her book to print or online newspaper op-eds,

continue to use traditional publishing routes, or use other internet publications available to her. "[F]or one publisher who may suppress a fact, there are many who will print it. But if the government is the censor, administrative fiat, not freedom of choice, carries the day." *CBS*, 412 U.S. at 152 (Douglas, J., concurring). Thus, Poster should be treated as a hybrid carrier that is entitled to First Amendment protections.

B. Banning Editorial Discretion and Compelling Speech Based on Content is a Violation of Poster's Free Speech Rights as a Hybrid Carrier.

Generally, there are two types of regulations on speech: content-based and content-neutral. *See Turner Broad.*, 512 U.S. at 641–42. A law that restricts or requires speech based on the topic discussed or the message expressed is content based. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Laws that appear content neutral but cannot be justified without reference to content are also content based. *Id.* at 164. Additionally, justifications for restrictions based on the identity of the speaker also indicate that a regulation is content based. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). Content-based regulations are subject to strict scrutiny. *Reed*, 576 U.S. at 171. To survive strict scrutiny, a restriction must be narrowly tailored to achieve a compelling state interest. *Id.*

1. *The Common Carrier Law Compels Speech Based on Content.*

Restricting or requiring a newspaper publisher to print something under threat of penalty that it would not otherwise print violates the First Amendment. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256–57 (1974). In *Miami Herald*, the newspaper published editorials that were critical of a candidate for state office. *Id.* at 243. The candidate then demanded that the Miami Herald print his reply, which the paper refused to do. *Id.* at 244. Florida had a right-of-reply statute that required a newspaper to print the reply of any candidate whose personal character was attacked

in that newspaper in a similar manner to the attack ad. *Id.* The candidate argued that the "government has an obligation to ensure that a wide variety of views reach the public." *Id.* at 247–48. This Court acknowledged that those who look for forced access to media use the First Amendment as a sword. *Id.* at 251. However, when the sword is in the form of government compulsion, the First Amendment also becomes a shield. *Id.* at 254. This Court found the law to be unconstitutional. *Id.* at 258.

Laws that compel speech in violation of a social media platform's standards violate the platform's First Amendment rights. *See, e.g.*, *NetChoice, LLC v. Moody*, 2021 WL 2690876, at *9 (N.D. Fla. June 20, 2021). In *NetChoice*, social media providers challenged a Florida law that compelled large social media providers to host speech that violated their standards and that forbade providers from speaking as they normally would. *Id.* at *1. Social media platforms generally receive content from users and then make that content available to others. *Id.* at *2. However, "providers routinely manage the content, allowing most, banning some, arranging content in ways intended to make it more useful or desirable for users, sometimes adding the providers' own content." *Id.* at *7. The plaintiffs argued that they used editorial judgment in making these decisions. *Id.* The court noted that social media platforms do not editorialize as frequently as newspapers, but that does not prevent First Amendment protections from attaching. *Id.* at *8. The platforms would be compelled to host speech in violation of their terms and would lose control of curating content on their sites. *Id.* at *9. In summarizing Supreme Court precedent, the court stated, "a private party that creates or uses its editorial judgment to select content for publication cannot be required by the government to also publish other content in the same manner." *Id.* at *8; *see Miami Herald*, 418 U.S. at 258; *see also Pacific Gas & Elec.*, 475 U.S. at 14.

A statute that requires the examination of speech to determine if an editorial decision was based on content is a violation of the First Amendment. *See League of Women Voters*, 468 U.S. at 383. In *League of Women Voters*, Congress passed a program creating a non-profit organization authorized to disburse federal funds to noncommercial television and radio stations. *Id.* at 366. To receive funds from the nonprofit, the broadcasting stations were forbidden from engaging in editorializing on "controversial issues of public importance." *Id.* at 366, 381. This Court noted that the ban was problematic for two reasons. *Id.* at 381. First, the restriction was directed at a form of speech, editorial opinion on public issues, which is at the heart of the First Amendment. *Id.* Second, for the F.C.C. to determine whether a broadcasting statement has been edited, there must be an examination of the content of the message. *Id.* at 383. Thus, this Court found that the ban abridged the freedoms which the First Amendment protects. *Id.* at 402.

Like the statute in *Miami Herald*, 418 U.S. at 257, the CC law compels speech, which Poster may not agree with, under the threat of monetary penalty, R. at 3. This Court recognized that the threat of penalty may prevent a platform from discussing an issue to avoid responding or hosting speech with which it disagrees. *Miami Herald*, 418 U.S. at 257. The Governor's goal was to bolster free speech by limiting platforms' ability to restrict speech. R. at 34. However, in reaction to having to host messages in direct contradiction to its faith, Poster may close its business operations. R. at 37.

The CC law prohibits Poster from accepting or rejecting users' content in violation of Poster's User Agreement. The issue in *NetChoice*, is almost identical to the issue here. 2021 WL 2690876, at *1. In that case, large social media providers were subject to a law that compelled platforms to host speech that violated their standards, thus removing any editorial discretion the platforms held. *Id.* The CC law does just that. In *NetChoice*, the platforms were restricted from

using their editorial discretion over posts from candidates for political office. *Id.* at *3. Here, Poster would be restricted from using its discretion for posts related to religion, ideology, or politics. R. at 3. This law is directly regulating Poster's speech based on the messaging.

For Delmont to determine whether a publication by a Poster user has been edited or rejected, in violation of the CC Law, there must be an examination of the content of the speech. The CC law requires Poster to "serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint." Delmont Rev. Stat. § 9-1.120(a). Hypothetically, a post banned by Poster because the user talked about how they hate the beach, which Poster disagrees with, would not fall under the political, ideological, or religious viewpoint category. The only way for Delmont to determine if Poster is subjected to fines would be to look at the content of the post and decide. This decision-making process is like that of the F.C.C. in *League of Women Voters*. 468 U.S. at 383. If the editing was related to an issue of public importance, the station would lose its funding. *Id.* However, if the editing was not related to an issue of public importance, like someone's opinion on the beach, the station would not lose its funding. *Id.* Delmont's Attorney General specifically noted that Poster was being fined for "discriminating against Delmont citizens based on their political viewpoints." R. at 6. The content of the speech was specifically referenced as a reason for penalizing Poster. Thus, the CC law is an impermissible content-based regulation in violation of Poster's First Amendment rights.

2. *The Common Carrier Law Restricts Speech Based on the Identity of the Speaker.*

Targeting a small group of media platforms for differential treatment violates the First Amendment. *See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591 (1983). In *Minneapolis Star & Tribune*, the State created a special ink and paper tax for

newspapers. *Id.* at 578. However, the law only applied to certain large publications because the taxes were exempt up to $100,000. *Id.* at 581. Only eleven publishers producing fourteen out of nearly four-hundred newspapers were taxed. *Id.* at 578. This Court acknowledged that the First Amendment does not prohibit all regulation of the press. *Id*. However, the ink and paper tax did violate the First Amendment because it targeted a small group of newspapers. *Id.* at 591. This Court warned that "recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme." *Id.* at 592. This Court concluded that the tax violated the First Amendment. *Id.* at 593.

The CC Law restricts speech for platforms based on market value. Only platforms with "substantial market share" are subjected to the law. Delmont Rev. Stat. § 9-1.120(a). Just as the law in *Minneapolis Star & Tribune* targeted larger press organizations for ink and paper tax, 460 U.S. at 578, the CC law only applies to large social media platforms. In *Minneapolis Star & Tribune*, eleven publishers were subjected to the tax, and this Court struck down the law. 460 U.S. at 593. Here, Poster holds 77% of the market share. R. at 2. Based on that percentage, Poster is likely the only self-publication site obligated to follow the CC law. A law that only regulates one platform certainly presents a potential for abuse, especially when the monetary penalty is so severe.

3. *The Common Carrier Law Does Not Serve a Compelling State Interest.*

There is no compelling state interest in "leveling the playing field" that can justify undue burdens on speech. *Arizona Free Enter. Club v. Bennett*, 564 U.S. 721, 749 (2011). An Arizona law allowed for government financing of candidates for state office to match the "campaign activities of privately financed candidates and independent expenditure groups." *Id.* at 727–28. This Court found such a scheme to substantially burden speech in violation of the First

Amendment. *Id.* at 728. The guiding principle of the First Amendment is freedom, not "whatever the State may view as fair." *Id.* at 750.

The sole purpose of the CC law is to level the playing field by bolstering speech on one side and restricting speech on the other. If citizens of Delmont have concerns over large tech platforms' control of public expression, they can use smaller platforms or create their own sites. As stated by this Court in *Arizona Free Enterprise Club*, the First Amendment is not a tool for the government to impose its own views of fairness. 564 U.S. at 750. The First Amendment was designed to prevent the government, not other private persons, from stifling viewpoints. U.S. Const. amend. I ("Congress shall make no law."). There is something contradictory about labeling Poster as "the most affordable and widely-used self-publication platform" while also working to stifle Poster's speech. R. at 35. Although some aspects of Poster may be seen as providing a town-square format, Poster, itself, uses the website to exercise its own First Amendment rights. In sum, this Court should affirm the Fifteenth Circuit's decision finding the CC law in violation of the Free Speech Clause.

II. DELMONT'S COMMON CARRIER LAW IS UNCONSTITUTIONAL BECAUSE IT VIOLATES POSTER'S FIRST AMENDMENT FREE EXERCISE RIGHTS.

The Free Exercise Clause of the First Amendment asserts that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. This restriction on prohibiting religious exercise is applicable to the States through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The free exercise of religion includes both the freedom to believe and profess as well as the freedom to perform or abstain from actions. *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872, 877 (1990). When a law that incidentally burdens religion is deemed neutral and generally applicable, the law is upheld if it is rationally related to a

legitimate government interest. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). Conversely, if a law is neither neutral nor generally applicable, the law is upheld if it is narrowly tailored to achieve a compelling government interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Narrow tailoring requires that no less restrictive means are available. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

Freedom to practice religion without government interference is a founding principle of this country. Notwithstanding this principle, the government is entitled to require citizens to follow laws of neutrality and general applicability. However, laws not meeting these requirement or laws with questionable motives are subject to rigorous scrutiny by the courts. In this case, Delmont's actions have burdened Poster's religious exercise by requiring the platform to either forego its religious beliefs and contributions or face steep monetary penalties from the State. This Court should protect Poster from an intrusion on its First Amendment free exercise rights by the State of Delmont. Thus, this Court should affirm the Fifteenth Circuit's finding that the CC Law is unconstitutional.

A. The Common Carrier Law is Not Neutral.

A law is not neutral when its object is "intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877. The minimum requirement of neutrality is that a law not discriminate on its face. *Lukumi Babalu Aye*, 508 U.S. at 533. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality." *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). Actions that target religious conduct for distinctive treatment cannot be spared.

Lukumi Babalu Aye, 508 U.S. at 534. "The Free Exercise Clause protects against governmental hostility, which is masked, as well as overt." *Id.*

1. *The Common Carrier Law Discriminates Against Religion on its Face.*

Laws that directly refer to religion in its text are not facially neutral. *See Lukumi Babalu Aye*, 508 U.S. at 533, 535. In *Lukumi Babalu Aye*, the Church sought to establish a presence in Hialeah, Florida. *Id.* at 526. The Church's practices include animal sacrifice. *Id.* The prospect of this new Church was concerning to the residents of Hialeah. *Id.* In response, the city enacted three ordinances. *Id.* at 527. Most relevant here was a ban on sacrificing animals for public or private ritual or ceremony with an exception for licensed establishments slaughtering animals for food purposes. *Id.* at 527–28. In response to the ordinances, the Church filed an action stating that the ordinances violated the Free Exercise Clause. *Id.* at 528. To start, this Court noted that one ordinance contained the words "sacrifice" and "ritual." *Id.* at 533. While those words do have strong religious connotations, the words also have secular meanings. *Id.* at 534. Thus, this Court looked to other areas in the text to discern intent. *Id.* The surrounding text referred to the citizens' concerns over religious practices inconsistent with public morals, peace, or safety. *Id.* at 535. This Court concluded that the city had no other entity in mind when drafting the ordinance. *Id.*

The CC law directly refers to religion stating that Poster "shall serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint," and that Poster shall "refrain from using corporate funds to contribute to political, religious, or philanthropic causes," thus lacking facial neutrality. Delmont Rev. Stat. § 9-1.120(a). First, Poster is restricted from removing posts that conflict with its religious beliefs. *Id.* Second, Poster is restricted from donating to religious, political, or philanthropic causes. *Id.* The text of the law has more than just

"strong religious connotations." *Lukumi Babalu Aye*, 508 U.S. at 534. Rather, the law directly restricts actions Poster considers as religious obligations to the APC.

2. *The Common Carrier Law Discriminates Against Religion in its Operation Because the Law's Burden Falls Squarely on Poster.*

Evidence that a law lacks neutrality can be established through the law's operation. *Lukumi Babalu Aye*, 508 U.S. at 535. After examining the text of the ordinances in *Lukumi Babalu Aye*, this Court examined the "effects of [the] law in its real operation." *Id.* Evidence of operation includes "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." *Id.* at 540. While the citizens of Hialeah's concerns were legitimate, the effect of the law also illuminated concerns related to the Church's religious exercise. *Id.* The ordinances were enacted shortly after the Church's announcement, and the ordinances referred to concerns about religious practices. *Id.* at 527, 535. In practical terms, the burden of the ordinance fell squarely on the Church and no one else. *Id.* at 536. Thus, this Court concluded that the ordinances were not neutral. *Id.* at 542.

The burden of the CC law falls directly on Poster. First, based on its market share, Poster is the only artistic self-publication site that would be subject to the CC law. Consequently, the requirement to host all publications regardless of viewpoint impacts Poster. Second, based on circumstantial evidence, it appears Poster and the APC are the target of the law. In his affidavit, Governor Trapp noted that Delmont citizens were concerned over large tech platforms' control of public expression. R. at 35. Governor Trapp then directly names Poster as "the kind of website the law is designed to address." *Id.* Additionally, the law prohibits Poster from donating to religious causes, which is an obligation under its APC faith. This series of events sounds awfully like the

citizens of Hialeah expressing concern about public safety only to have the city council draft an ordinance targeting ritual and sacrifice only. *Lukumi Babalu Aye*, 508 U.S. at 535. Further, when Poster was charged with violating the CC law, the Attorney General referred to Poster as the "APC founded Poster platform." R. at 6. He identified Poster's religious heritage by name. Therefore, this Court should hold that the CC law is not neutral on its face or in its operation.

B. The Common Carrier Law is Not Generally Applicable.

A law is not generally applicable if it "invites 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 *Emp. Div.*, 494 U.S. at 884). A law also lacks general applicability if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* The government cannot selectively impose burdens only on conduct motivated by religious beliefs. *Lukumi Babalu Aye*, 508 U.S. at 543.

1. *The Common Carrier Law is Underinclusive Because it Permits Secular Conduct that Undermines the State's Asserted Interest.*

A law that allows secular conduct to endanger state interests is underinclusive and not generally applicable. *See Does 1-6 v. Mills*, 16 F.4th 20, 30 (1st Cir. 2021) (citing *Fulton*, 141 S. Ct. at 1877). In *Does 1-6*, Maine's CDC promulgated a rule requiring vaccinations for all healthcare workers in licensed healthcare facilities. *Id.* at 24. Several healthcare workers sued, arguing that the vaccination requirement violated the Free Exercise Clause. *Id.* Maine had always required healthcare workers be vaccinated against infectious diseases. *Id.* Exemptions were allowed for medical reasons, and objections were permitted based on sincere religious or philosophical beliefs. *Id.* However, in response to a decline in vaccination rates prior to COVID-19, the law was revised to only allow exemptions for medical reasons. *Id.* at 24–25. The purpose

of reducing the exemptions were to protect the immunocompromised population and to protect Maine's large population of sixty-five and older. *Id.* at 25. The secular exemption in this case did not undermine the State's asserted interest in the health and safety of its citizens. *Id.* at 31. In fact, the medical exemption furthered the State's interest because forcing a person to get vaccinated who was medically advised not to would be hazardous to their health. *Id.* Because the court determined that the new law was not underinclusive, it held that the law was generally applicable. *Id.* at 30.

The CC law is underinclusive because it allows for the possibility of secular conduct to influence Poster's actions in defiance of the State's interest. *See Does 1*-6, 16 F.4th at 30. Delmont's asserted interest is to "prevent online platforms from stifling viewpoints that they disagreed with." R. at 34. In pursuit of that interest, the CC law prevents Poster from denying access to its platform based on religious viewpoints and from contributing to religious causes. *See* Delmont Rev. Stat. § 9-1.120(a). However, there are secular viewpoints Poster could censor without violating the law. Poster could ban all users who talk negatively about the beach. That censorship would not quell fears that Poster had control over public expression, but the suppression would comply with the CC law. Additionally, there are secular contributions that Poster could make that could lead them to favor certain viewpoints over others. Poster could donate to GoFundMe pages supporting trumpet players, but not saxophone players. Subsequently, Poster may start to favor publications of trumpet players over saxophone players on its site, without violating the law. What the CC law does not do is prevent Poster from espousing views on secular topics. What the CC law does do, however, is infringe on Poster free exercise of religion.

2. *The Common Carrier Law Allows for Individualized Exemptions at the Discretion of the State.*

Laws that allow the government to consider the reasons for a person's conduct are not generally applicable regardless of whether any exceptions have been given. *Fulton*, 141 S. Ct. at 1879. Upon learning that Catholic Social Services (CSS) would not certify same-sex couples as foster parents due to its religious beliefs, the City stopped referring children to CSS. *Id.* at 1874. The City would only renew its contract with CSS if the agency agreed to certify same-sex couples. *Id.* The issue presented to this Court was whether the City's actions violated the First Amendment. *Id.* This Court chose to evaluate the law under the general applicability prong. *Id.* at 1877. The provision that CSS violated included an exemption that could be granted by the Commissioner in his or her sole discretion. *Id.* at 1878. The City argued that the ability to grant exemptions was irrelevant because the City had never granted one. *Id.* at 1879. However, this Court stated that the mere possibility of the government being able to decide which reasons are worthy of non-compliance with the law was unconstitutional. *Id.*

The CC law allows impermissible governmental discretion in two scenarios. First, the CC law only applies to entities deemed to have a significant market share. As demonstrated by the divergent classifications in the District Court and the Fifteenth Circuit, the qualities of a common carrier are subjective. Thus, there is an opening for the government to decide if a platform did or did not comply with the law. *Fulton*, 141 S. Ct. at 1879. Second, the law prohibits rejection of content based on religion. Delmont Rev. Stat. § 9-1.120(a). The government will be tasked with deciding whether a publication was removed for religious reasons. An inquiry will be made into Poster's APC values and into the religious aspects of the user. Finally, the law prohibits contributions of corporate funds to religious organizations. Delmont Rev. Stat. § 9-1.120(a). The

government will have to inquire into the affiliations of the organization Poster donates to and the reasons Poster donated to an organization. This law will permit the "government to grant exemptions based on the circumstances" of each alleged violation in contradiction to the general applicability requirement. *Fulton*, 141 S. Ct. at 1877, 1879.

C. The Common Carrier Law is Not Narrowly Tailored to Achieve a Compelling State Interest.

A law can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. *Fulton*, 141 S. Ct. at 1881 (quoting *Yoder*, 406 U.S. at 216). Narrow tailoring requires that no less restrictive alternatives are available. *Sherbert*, 374 U.S. at 403. If the "government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 141 S. Ct. at 1881.

"Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Sherbert*, 374 U.S. at 406. In *Sherbert*, a woman was fired by her employer for refusing to work on Saturdays in observance of her faith. *Id.* at 399. She was then denied for unemployment benefits because she was categorized as a worker who could not accept suitable work. *Id.* at 401. This classification was a result of her religious objection to working on Saturday. *Id.* The Court considered if the State had a compelling interest in this eligibility provision. *Id.* at 406. The State suggested that there was a possibility that there could be more fraudulent claims from individuals claiming religious exemptions to working on Saturday. *Id.* at 407. However, no proof of any instances had been provided. *Id.* This Court found that the provision infringed on the woman's free exercise rights. *Id.* at 410.

A total limitation on the free exercise of religion is not the least restrictive means to achieve an end. *See Int'l Soc. for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 443–44 (2d Cir.

1981). In *Krishna Consciousness*, the State passed an anti-solicitation law to prevent fraud at its annual state fair. *Id.* at 432. This law prevented members of the International Society for Krishna Consciousness from engaging in its religious ritual of sankirtan. *Id.* This ritual requires members to approach nonmembers to inform them about the religion and to solicit donations. *Id.* The court acknowledged that the State's interest in preventing fraud was a compelling interest aimed at protecting the public welfare. *Id.* at 444–45. However, the State was unable to prove that this was the least restrictive method. *Id.* Before enacting a solicitation prohibition, the State could have employed alternative measures. *Id.* at 446. The State could employ a strict regulatory system to sanction violations, could employ a liaison system to help fairgoers resolve complaints of fraud, or could utilize the penal system to punish fraudulent solicitations. *Id.* Because the State did not employ these methods or show that these methods were ineffective, the court concluded that the law unconstitutionally interfered with the Society's free exercise rights. *Id.* at 432.

The State of Delmont's asserted interest in leveling the playing field is not a compelling state interest that justifies passing the CC law. *See Arizona Free Enter. Club*, 564 U.S. at 749. This Court has stated that compelling interests infringing upon the free exercise of religion are typically "substantial threat[s] to public safety, peace or order." *Sherbert*, 374 U.S. at 403. The potential for Poster to regulate the content of speech on its platform or to use corporate funds for religious donations is not a substantial threat to safety, peace, or order. First, Poster is not blindly restricting access to its platform. Second, APC members are "called to tithe in support of artists, poets, educators, and musicians." R. at 27. The required religious donations benefit the users Poster attracts. Limiting Poster's ability to use corporate funds to make religious donations would reduce funding for those who contribute to public expression.

The CC law is not the least restrictive means of accomplishing Delmont's interest. Even if the concern with platforms impacting public expression was compelling, the methods used by the State of Delmont would not pass constitutional muster. First, the State has provided no indication that any other means were even considered, which strongly indicates that the CC law is not the least restrictive alternative. *See Krishna Consciousness*, 650 F.2d at 445. For example, the State could have enacted reporting requirements so that each corporate donation is public knowledge for the Delmont citizens. Then Poster would be able to comply with its religious obligation to donate to religious causes and the citizens would be aware of any potential bias Poster had in running the platform. Instead, the State decided to take the most extreme measure possible and infringe on Poster's free exercise rights. In sum, this Court should affirm the Fifteenth Circuit's decision finding the CC law in violation of the Free Exercise Clause.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the decision of the Fifteenth Circuit finding the State of Delmont's CC Law unconstitutional.

Respectfully submitted,

/s/ Team 006

Team 006

Counsel for Respondent

BRIEF CERTIFICATE

The work product contained in all copies of this team's brief is in fact the work product of the team members.

The members of Team 006 have fully complied with our school's governing honor code.

The members of this team have complied with all Rules of the Competition.

/s/ Team 006

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