No. 22-CV-7654

IN THE

SUPREME COURT OF THE UNITED STATES

POSTER, INC.,
Respondent,

v.

WILL WALLACE,
Petitioner.

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

BRIEF FOR PETITIONER

Team No. 9
Counsel for Petitioner
January 28, 2022

QUESTIONS PRESENTED

1. Whether, under the First Amendment, the Fifteenth Circuit erred in concluding that Poster's free speech rights were violated, when the Delmont Common Carrier Law is a valid and permissible state regulation that does not limit or infringe upon the free speech rights of common carriers?

2. Whether, under the First Amendment, the Fifteenth Circuit erred in concluding the Delmont Common Carrier Law is neither neutral, nor generally applicable, when the statute focuses on preserving the public's constitutional rights without specifically targeting religious practices and applies to all common carriers without any exemptions?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page(s)

STATUTES AND COURT RULES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit has entered a final judgment in this matter. R. at 33. Petitioner filed a timely petition for writ of certiorari, which this Court granted. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Factual Background

Poster, Inc. is an extremely popular internet site that holds seventy-seven percent of the artistic self-publication market.[1] R. at 2, 19. The platform allows for self-publication and performance uploads by artists who wish to jumpstart an audience for their work. R. at 2. Poster's headquarters are located in Capital City, Delmont. R. at 2, 19. All artists have their own accounts from which they upload their own material for the public to download their work for free, rent, or for purchase. R. at 2. Poster charges a fee to each artist who owns an account and receives a percentage of any rents and sales of the artists' material. R. at 2, 19. Poster's User Agreement, effective December 10, 2019, disclaims the endorsement of any views expressed in its published material and states the platform retains editorial discretion to accept or reject material submitted by an artist as it sees fit. R. at 2, 19.

Poster was founded in 1998 and is run by members of The American Peace Church ("APC"), a hundred-year-old Protestant denomination. R. at 2, 19. One of the APC's central tenets is non-aggression and pacifism. R. at 2, 19. APC has long supported religious and secular

[1] Though the parties dispute the exact scope of Poster's market share at the outset, after motions and a separate hearing on this point, the parties stipulated below and we accept the seventy-seven percent as an agreeable compromise.

artists and both artistic and literary works. R. at 2, 19. APC's founders were poets, educators, and musicians who sought to promote peacebuilding. R. at 2, 19. Fifteen percent of all Poster profits support APC's educational and cultural efforts R. at 2-3, 19. Poster provides discounted publication services to APC-member authors, poets, and composers. R. at 3, 19. Although Poster promotes APC-member content, it hosts artists of diverse ideological viewpoints. R. at 3, 19. John Michael Kane, Poster, Inc.'s CEO, testified that the online platform provides "a variety of resources and tools that are simply unavailable or unaffordable on other platforms." R. at 37.

On June 1, 2020, the State of Delmont enacted the Common Carrier Law ("CC Law"). Delmont Rev. Stat. § 9-1.120(a). R. at 3, 20. The CC Law, championed by Governor Louis F. Trapp, designates large digital platforms with "substantial market share" as common carriers. R. at 3, 20. All platforms designated as common carriers are required to "serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint, and are required to "refrain from using corporate funds to contribute to political, religious, or philanthropic causes." R. at 3, 20. Delmont has not enacted its state equivalent of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, et seq. R. at 3, 20.

Under § 9-1.120(b), the law's statement of intent indicates that the "no contribution provision" was included to avoid running afoul of the Establishment Clause and to prevent favoritism of particular viewpoints through monetary contributions. R. at 3, 20, 35. Any violations of the CC Law result in heavy fines. R. at 3, 20. Governor Trapp stated constituent groups expressed concern over the large technology platform's substantial control over public expression. R. at 35. Poster lobbied heavily against the law's enactment. R. at 3, 20.

Katherine Thornberry had an account on Poster since November 2018 and was attempting to jumpstart her novel, *Animal Pharma*. R. at 3. After the CC Law's passage, Ms.

Thornberry attended an animal rights rally in July 2020, in Capital City—headquarters of PharmaGrande Inc., an international pharmaceutical developer and animal experimenter. R. at 4, 20–21. During the rally, Ms. Thornberry was inspired by a musical performance and posted an update to her Poster account and other social media outlets. R. at 4, 21. In the update, she gave her novel an alternative title: *Blood is Blood*. R. at 4, 21. It is widely known that the phrase "Blood is Blood" is a tenet expressing AntiPharma's belief that all living beings are equal. R. at 5, 22. Prior to her update, Ms. Thornberry had growing interest in her work via Poster, with numerous rents and purchases. R. at 4, 21. The updated title generated more traffic to her Poster account. R. at 4, 21. The updated title "Blood is Blood" is the mantra of an animal rights group, AntiPharma, who protested PharmaGrande's experimentation. R. at 4, 21.

A week after the rally, local business leaders, including Mr. Kane, condemned the violence in a major newspaper. R. at 5, 21. Poster learned of Ms. Thornberry's updated title after reviewing its revenue report. R. at 5, 21–22. Poster's User Agreement allows it to block or remove an account "at any time for any or no reason." R. at 5, 22. Poster interpreted Ms. Thornberry's updated title as violative of Poster's pacifist values and suspended her account unless she chose to revise her title. R. at 5, 22. Poster had taken similar action with another work, entitled "Murder Your Enemies: An Insurrectionist's Guide to Total War," but not in any other instance. R. at 5, 20.

After Poster suspended Ms. Thornberry's account, *Animal Pharma* netted zero revenues since Poster was the only source of income for the work and traditional publication was not successful. R. at 3–4, 22. On August 1, 2021, Ms. Thornberry protested her treatment by Poster on national television, calling it artistic suppression. R. at 6, 22. Delmont fined Poster for violating its CC Law and the Attorney General stated: "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 . . ." R. at 6, 22–23.

II. Procedural Background

This case was brought before the District Court for the District of Delmont by Poster against Delmont's Attorney General, Will Wallace, in his official capacity as Chief Law Enforcement Officer. R. at 6, 23. Poster contested its status as a common carrier under the CC Law, or in the alternative, challenged the law as violative of its constitutional rights to free speech and religious freedom.[2] R. at 6, 23. Delmont contends that the CC Law is constitutional and moved for summary judgment. R. at 6, 23. The District Court found that the CC Law was constitutional and granted the government's motion for summary judgment as to Poster's common carrier status. R. at 16. The United States Court of Appeals for the Fifteenth Circuit found that Delmont's CC Law was unconstitutional and reversed the District Court's judgment in regard to the free speech and free exercise claims. R. at 33.

SUMMARY OF THE ARGUMENT

This case is about the protection of citizens' Constitutional rights from the imposition of an online platform's restrictive limitations on free expression. The evidence sufficiently shows the Fifteenth Circuit erred in reversing the District Court's decision in granting Petitioner Will Wallace's Motion for Summary Judgment.

First, the CC Law does not violate the respondent Poster's free speech rights through their common carrier status. In order to determine the extent of constitutional protection of common carriers, the Court must weigh its speech interests based on the platform's public

[2] Delmont does not contest this Court's jurisdiction given that Poster has sued Attorney General Will Wallace in his official capacity, *Ex Parte Young*, 209 U.S. 123, 154 (1908), and because Poster's common carrier claim turns in part on the statute's constitutionality.

service, market share, and lack of comparative alternatives. Here, the respondent is subject to regulation due to the nature of its vast number of services it has provided to the public for twenty-three years. Additionally, the respondent's market share value of seventy-seven percent exceeds the qualification for common carrier status under a majority of circuit standards. Although market share values are nondeterminative, the respondent's amount of de facto control of the market threatens the vital nature of its public services and justifies the need to preserve individual free speech interests. Furthermore, the respondent's platform leaves consumers without feasible alternatives when engaging with digital platforms. The respondent's platform is the most affordable and available for the public amongst other digital platforms.

Additionally, the CC Law is both a valid and permissible state regulation that does not violate the respondent's free speech rights. Under the First Amendment, Congress may not enact a law abridging the free speech rights. Common carriers' free speech rights can be restricted through state regulation so long as the imposition is valid and permissible, while still allowing for the common carrier to exercise its free speech. Here, the respondent is free to express its APC-religious views without being compelled to favor the platform users' different viewpoints. The respondent is entitled to some degree of First Amendment protection as a common carrier and cannot rely on its editorial discretion while operating as an indiscriminate self-publication platform.

Second, the CC Law is both neutral and generally applicable towards the respondent's religious beliefs and practices of the APC under the *Smith* test. Under *Smith*, a law is not subject to strict scrutiny so long as it is neutral and generally applicable towards religion. Although the CC Law refers to religious viewpoints and contributions, the law is inclusive towards other political, ideological, and philanthropic viewpoints, which allows the law to remain neutral.

There is no indication the CC Law or Petitioner Wallace specifically directed any hostility towards the respondent or their religious practices on its platform. Additionally, the CC Law is generally applicable towards the respondent's religious practices on its platform. The law contains no exemptions that allow any common carrier or platform in Delmont to disobey the valid statute. The CC Law leaves no room for any discretionary abuse on behalf of Attorney General Wallace, who must validly enforce the statute against classified common carriers.

Therefore, this Court should reverse the Fifteenth Circuit's judgment in denying Petitioner's Motion for Summary Judgment.

STANDARD OF REVIEW

Summary judgment is properly granted if "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); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "The standard of review of an order granting a motion of summary judgment is de novo." *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014). Under this standard, the Court gives no deference to the lower court and views issues as if they are being raised for the first time. *Highmark Inc.*, 572 U.S. at 562.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE FIFTEENTH CIRCUIT'S HOLDING BECAUSE THE CC LAW DOES NOT VIOLATE RESPONDENT'S FREE SPEECH RIGHTS THROUGH ITS COMMON CARRIER STATUS.

Delmont's Common Carrier law is both a valid and permissible regulation that does not violate respondent Poster, Inc.'s free speech rights through its common carrier status. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST., amend. I. The Fourteenth Amendment extends those protections against state

action. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("[F]reedom of speech–which [is] protected by the First Amendment from abridgement by Congress–[is] among the fundamental personal rights and 'liberties' protected by . . . the Fourteenth Amendment").

This Court should find the Fifteenth Circuit erred in ruling that the CC Law violates the free speech clause for the following reasons: (A) Respondent Poster, Inc. qualifies as a common carrier in light of its public services, market share, and the lack of alternative choices for self-publication, and (B) the CC law is a valid and permissible state regulation that does not prohibit the respondent from exercising its free speech rights and does not force the platform to endorse its users' speech.

A. Poster qualifies as a common carrier in light of its public services, market share, and the lack of alternative choices for self-publication.

The respondent qualifies as a common carrier based on the public nature of its services, superior market share, and the lack of alternative choices for artists and writers to successfully self-publish. Since the late 1800s, it has been within the state's police power to regulate common carriers by statute. *See generally, Munn v. Illinois*, 94 U.S. 113 (1876). Common carriers act as a public office and perform duties in which the public is interested, thereby making them subject to public regulation. *Munn*, 94 U.S. at 113. One makes the conscious decision to enter upon a business for profit and venture into the public domain. *Id.* at 130. Statutory regulations do not compel anyone to serve the public openly, but "a duty only arises when he chooses to enter upon the business . . . for profit." *Brass v. North Dakota*, 153 U.S. 391, 404 (1894). The respondent has continuously provided services to the public through its platform openly, dominates the self-publication market, and maintains its superiority over other digital platforms, thereby making it subject to Delmont's Common Carrier Law.

1. *Respondent serves the public openly through its self-publishing platform.*

The respondent qualifies as a common carrier based on its main business objective of facilitating self-publication for artists and writers which directly serves the public. Businesses that have not been historically qualified as common carriers can qualify as such when "by circumstances and [the company's] nature, . . . [it] rise[s] from private to public concern." *See German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914). Businesses, like digital platforms, hold a peculiar relation to the public interest. *German Alliance Ins. Co.*, 233 U.S. at 411. Digital platforms function similarly to telecommunication providers and are common carriers subject to regulation, due to technological advances. James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 Fed. Comm. L.J. 225, 227, 251–52 (2002). Digital platforms resemble traditional common carriers as "they are at bottom communication networks and they carry information from one user to another." *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1224 (2021). Digital platforms lay information infrastructure to create a network and hold themselves as organizations that distribute speech to the broader public. *Id.* at 1224.

Here, the respondent Poster is subject to regulation due to the open and public services it provides to the Delmont community through its platform. It has hosted thousands of artists and writers with diverse viewpoints on its platform for over twenty-three years. R. at 9. Only on two occasions throughout its existence has the respondent ever denied a user access to its platform. R. at 9. The respondent has maintained an openness to the public, despite its promotion and publicization as an APC organization. R. at 9. Modern technological advances allowing for near universal access to the internet qualifies digital platforms such as the respondent, common carriers. R. at 9.

Therefore, because of the respondent's continued work as an indiscriminate communication service that is held open to the public, this Court should reverse the Fifteenth Circuit's judgment in denying Petitioner's Motion for Summary Judgment.

2. *Respondent's market share has led to de facto control of the self-publishing market.*

The respondent Poster's level of market share allows the platform to gain de facto control of the self-publication market. The status of a digital platform's market share helps to determine whether a business meets the qualification of a common carrier, but an explicit finding that a business is a monopoly is unnecessary. *See* James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 Fed. Comm. L.J. 225, 264 (2002) (discussing the Communications Act of 1934's lack of monopoly test). Courts often apply Judge Learned Hand's test to consider what qualifies as a monopoly where "[ninety] percent[] is enough to constitute monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

The majority of circuits would find that the respondent exceeds the qualifications to earn a monopoly status. Some "lower courts generally require a minimum market share of between 70% and 80%." *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F.2d 683, 694 (10th Cir. 1989). For some courts "a share significantly larger than 55% has been required to establish prima facie market power." *United States v. Dentsply Int'l, Inc*., 399 F.3d 181, 187 (3d Cir. 2005). The respondent's platform holds seventy-seven percent of the self-publication market share, qualifying it as a monopoly under the overwhelming majority of circuits around the country. R. at 2, 19.

Regardless of its qualification as a monopoly for certain circuits and falling slightly under the Learned Hand monopoly test, a monopoly is not required for a business to qualify as a

common carrier. R. at 10. The respondent's online platform functions as the only successful and viable self-publishing platform for the public. R. at 10. The respondent's substantial market power and its de facto control of the self-publication market threatens the vital nature of its public services and justifies the need to preserve individual free speech interests. For example, under the User Agreement, the respondent retains editorial discretion to accept or reject material submitted by an artist. R. at 2. This particular power can negatively affect the market when certain material is censored from the platform that could be profitable.

Therefore, because respondent's market share meets the qualification for common carrier status and threatens the nature of individual free speech interests through its de facto control, this Court should reverse the Fifteenth Circuit's judgment in denying Petitioner's Motion for Summary Judgment.

3. *The public has no available comparable alternatives to Poster*.

The Delmont community has no other comparable alternative to the respondent's online platform. A business that qualifies as a common carrier, leaves a consumer without feasible alternatives when engaging with the type of business. *Knight*, 141 S. Ct. at 1225 (Thomas, J., concurring) ("But in assessing whether a company exercises substantial market power, what matters is whether the alternatives are comparable.").

Here, although other digital self-publication platforms exist, the available consumer alternatives offer inferior service, less functionality, expensive rates, and are unknown to the general public. R. at 10. The respondent's platform is one that is open freely to the public and has hosted hundreds-of-thousands of different artists and writers. R. at 9. Other self-publication platforms have struggled to acquire enough exposure and notoriety to successfully achieve the self-promotion purposes the respondent has managed to provide. R. at 10. John Michael Kane,

CEO of the respondent, testified that the online platform provides "a variety of resources and tools that are simply unavailable or unaffordable on other platforms." R. at 37. If an artist wishes to self-publish, the respondent is the only viable option. R. at 10.

Therefore, based on all three factors stated above, the respondent qualifies as a common carrier subject to Delmont's Common Carrier Law, and this Court should reverse the Fifteenth Circuit's judgment in denying Petitioner's Motion for Summary Judgment.

B. Delmont's Common Carrier Law is a valid and permissible state regulation that does not prohibit platforms from exercising its free speech rights or force the respondent to endorse its users' speech.

The Common Carrier Law is both a valid and permissible statute because it neither prohibits the respondent from exercising its free speech rights or force it to endorse its users' speech. As stated above, the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST, amend. I. The free speech rights of a common carrier can be restricted through state regulation so long as the imposition is valid and permissible, while still allowing for the common carrier to exercise its free speech and ensuring the carrier is not forced to endorse the speech of others. *See Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring).

This Court will find the Fifteenth Circuit erred in holding that the CC Law violated the respondent's free speech rights under the First Amendment for the following reasons: (1) the CC Law is a valid and permissible state regulation; and (2) Poster has a lesser degree of First Amendment protection due to its broadcasting function as a common carrier.

1. *The CC Law allows for the respondent to express its free speech rights on the online platform, while ensuring the respondent is not forced to endorse its users' viewpoints.*

The CC Law allows for the platform to express its free speech rights, while also ensuring that the restrictions placed on common carriers do not force Poster to endorse its users' viewpoints. An imposition on a common carrier's free speech rights by way of state regulation is "valid if [it] would have been permissible at the time of the founding," or so long as it "would not prohibit the company from speaking *or* force the company to endorse the speech." *Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring) (emphasis added) (citing *United States v. Stevens*, 559 U.S. 460, 468 (2010) and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 684 (1994) (O'Connor, J., concurring)).

Here, the respondent acknowledges its status as a common carrier but believes it functions as a hybrid carrier—a conduit of expression and a promoter of its own expression as it relates to the APC. R. at 26. Individual artists that utilize the digital platform convey their own message, and the respondent seeks to exercise selective judgment over which artistic expressions can be seen and heard. R. at 27. The CC Law which states designated common carriers "shall serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint," and prohibits denial of access or editorial censorship does not force the respondent to endorse messages it may wish to disclaim. Delmont Rev. Stat. § 9-1.120(a); R. at 28–29. The CC Law, which restricts the respondent's right to exclude speech, does not impede the platform from broadcasting its own speech. *See Knight*, 141 S. Ct. at 1226. Federal law dictates that companies cannot be treated as the speaker of information that they distribute. 47 U.S.C. § 230(c); *Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring).

Unlike in *First Nat'l Bank v. Bellotti*, where the statute permitted "a corporation to communicate to the public its views on certain referendum subjects," the CC Law does not attempt to give the respondent an advantage in expressing a one-sided view towards the public. 435 U.S. 765, 784–85 (1978). The First Amendment does not protect attempts to disfavor certain subjects or viewpoints as a means to control content. *See Citizens United v. FEC*, 558 U.S. 310 (2010). The First Amendment confirms the freedom to think for ourselves. *Id*. at 356.

The public's access to constitutionally sacrosanct speech platforms provided via the respondent's self-publication platform must be protected. R. at 12. In attempting to invoke its own First Amendment rights, the respondent may not trample the First Amendment rights of others who seek to utilize its services. R. at 12. Therefore, because the respondent is free to express its religious views without being compelled to favor the users' different viewpoints, this Court should reverse the Fifteenth Circuit's judgment in denying the Petitioner's Motion for Summary Judgment.

2. The respondent's common carrier status and broadcasting function entitles it to a lesser degree of First Amendment protection.

The respondent Poster's function as a common carrier is to broadcast the self-expression of its users rather than act as an editor, which entitles it to a lesser degree of protection under the First Amendment. An individuals' free speech rights are protected by the First Amendment as well as the free speech rights of a corporation. *See Pacific Gas & Electric Co. v. Public Utilities Com.*, 475 U.S. 1, 16 (1986) (citing *First Nat'l Bank*, 435 U.S. at 777) (noting that "speech does not lose its protections because of the corporate identity of the speaker"). The degree of First Amendment protection afforded to the corporation depends on whether the platform truly exhibits an editorial nature. *See Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 739 (1996) (weighing a communication company's speech interests

based on whether they "act [more or] less like editors . . . than like common carriers). A corporation has a de minimis interest in not permitting the presentation of other distinct views. *Pacific Gas & Electric Co.*, 475 U.S. at 34 (Rehnquist, J., dissenting).

Here, despite the speech interests of corporate entities, the respondent is entitled to a lesser degree of First Amendment protection based on its common carrier status and the nature of the public services it provides. The respondent contends that its status as a corporation grants the platform greater First Amendment rights than provided by the CC Law. R. at 25. However, similar to how telephone lines function as conduits for all conversationalists and travelers who wish to utilize its services, the respondent functions as a self-promotional conduit for all artists who seek to publicize their work. R. at 11. Common carriers are entitled to *some* degree of First Amendment protection. *See FCC v. League of Women Voters of California*, 468 U.S. 364, 378 (1984) (holding that "broadcasters . . . engaged in a vital and independent form of communicative activity" are entitled to some degree of First Amendment protection.). However, the First Amendment right to free speech for "a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 387 (1969).

The respondent has not offered a plausible defense to claim that its self-publication services are anything other than communicative in nature. Historically, the respondent has retained an indiscriminate openness to the public. R. at 11. For twenty-three years, the respondent has operated as a "platform" in its truest sense, broadcasting the voices and ideas of its artists, not its own content. R. at 11. The respondent acts less like an editor, and most like a common carrier, making its speech interests relatively weak. *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 739 (1996). The respondent has

not actively or consistently exercised the editorial discretion on which it hangs its entire constitutional claim. R. at 11, 26. Only once before has the respondent actively exercised its discretion. R. at 5. Although the respondent attempts to rely on its editorial discretion to imply it functions as an editor, throughout its entire existence, the platform has functioned akin to a common carrier, as an indiscriminate communication service.

Therefore, because the respondent has a lesser degree of First Amendment protection as a corporation and common carrier, this Court should reverse the Fifteenth Circuit's in denying the petitioner's Motion for Summary Judgment.

II. THIS COURT SHOULD REVERSE THE FIFTEENTH'S CIRCUIT'S HOLDING BECAUSE THE CC LAW IS BOTH NEUTRAL AND GENERALLY APPLICABLE TOWARDS RESPONDENT'S RELIGIOUS BELIEFS AND PRACTICES.

Delmont's CC Law does not violate the Free Exercise Clause of the First Amendment because the statute is both neutral and generally applicable towards the respondent's religious beliefs and practices. The Free Exercise Clause, applicable to states under the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST., amend. I, XIV; *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 704, 714 (1981)). It is clear that the First Amendment does not permit "governmental regulation of religious *beliefs*." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (emphasis in original). However, an individual's sincerely held religious beliefs do not "excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 878–79.

The Fifteenth Circuit correctly held that, under the *Smith* test, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id*. at 879. Laws that incidentally burden religion are not subject to strict scrutiny under the Free Exercise Clause so long as they are *neutral* and *generally applicable*. *Fulton*, 141 S. Ct. at 1876 (emphasis added). Both factors are interrelated, and failure to satisfy one requirement is an indication that the other has not been satisfied. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993).

This Court should find the Fifteenth Circuit erred in ruling that the CC Law is unconstitutional for the following reasons: (A) the CC Law is neither hostile nor intolerant towards Poster's religious practices, (B) the CC Law does not contain any exemptions where Delmont approved non-religious activities, and (C) even if the Court did not satisfy the *Smith* test, the statute expresses the state's compelling interest to protect Delmont citizens First Amendment rights in a narrowly tailored fashion.

A. The CC law is neutral as the statute's language is neither hostile nor intolerant towards respondent's religious beliefs and practices.

Delmont's Common Carrier Law is neutral as the statute's language is neither hostile nor intolerant specifically towards the respondent's religious beliefs and practices of APC. The state fails to act neutrally when it proceeds in a manner intolerant of one's religious beliefs or restricts practices because of their religious nature. *Fulton*, 141 S. Ct. at 1877. The Court must look to the statute's text, to satisfy the minimum requirement of neutrality that a law does not discriminate on its face. *Church of Lukumi*, 508 U.S. at 533.

Here, there is no indication within the statute's language that specifically targets or diminishes the respondent's religious viewpoints or practices. In contrast to *Church of Lukumi*, where the city ordinance specifically targeted the Santeria religious practice of animal sacrifice by using the terms "sacrifice" and "ritual", the CC Law does not have any "strong connotation" to specifically target religious practices. *Id.* at 534. The CC Law refers to religion broadly and applies strictly to large digital platforms. R. at 3. Although the CC Law refers to "religious" viewpoints and contributions to "religious" causes, the statute also refers to "political," "ideological," and "philanthropic" viewpoints and causes. *Id.*; *See Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 389 (1990) (holding that California's sales and use tax was neutral because it was imposed even if the seller or purchaser was charitable, religious, nonprofit, or governmental in nature.). The CC Law's language applies to all common carriers and multiple viewpoints, not just religion, to ensure the security of the public's constitutional rights. For this reason, the CC Law is facially neutral because it not only imposes the statute towards religion, but also a vast range of viewpoints and practices.

Additionally, there is no indication of hostility towards the respondent or the practices of APC. Facial neutrality is not determinative. *Church of Lukumi*, 508 U.S. at 534. The Establishment Clause "forbids subtle departures from neutrality" and "[cover suppression] of [particular] religious beliefs." *Gillette v. United States*, 401 U.S. 437, 452 (1971); *Bowen v. Roy*, 476 U.S. 693, 703 (1986). The Free Exercise Clause protects against governmental hostility which is masked as well as overt. *Church of Lukumi*, 508 U.S. at 534.

In *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Com'n*, a same sex-couple visited the bakery, Masterpiece Cakeshop, to make inquiries about ordering a wedding cake. 138 S. Ct. 1719, 1723 (2018). The bakery owner refused to make the wedding cake due to his religious

beliefs and opposition against same-sex marriage. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1723. The Colorado Civil Rights Commission determined the owner's actions violated the Colorado Anti-Discrimination Act. *Id.* The Commission disparaged the bakery owner's religious beliefs publicly at two meetings and stated his religious beliefs should not be placed in the business setting. *Id.* at 1729. The Supreme Court found the Commission's consideration towards the bakery owner's religious beliefs were neither "tolerant nor respectful." *Id.* at 1731.

Conversely, there is no evidence that neither Delmont nor the Attorney General directly targeted any hostility towards the respondent or its religious beliefs. Governor Louise F. Trapp testified that the CC Law was carefully crafted to bolster free speech for all of the public on multiple online platforms. R. at 34. The statute was enacted to regulate online platforms, such as the respondent, from restricting people's free speech. *Id.* Governor Trapp's testimony further demonstrates that the CC Law applies to every common carrier within Delmont, regardless of religious viewpoints. There is no evidence to suggest that the Delmont had any issue or negative viewpoint towards the respondent's actions prior to the statute being enacted to direct the statute specifically towards the respondent.

While respondent Poster received the fine for the CC Law violation after Ms. Thornberry protested her treatment, Delmont's actions were not based on Poster's religious beliefs. The Attorney General stated: "The APC-founded Poster platform is discriminating against Delmont citizens based on their political viewpoints . . ." R. at 6. The decision was based on the respondent's discrimination of Ms. Thornberry's political viewpoint in regard to animal experimentation, not the platform's religious practice or beliefs. *Contra Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017–18, 2021–22 (2017) (holding a

Missouri state department violated the Free Exercise Clause when it rejected Trinity Lutheran Church for a state grant for the sole purpose of being a church organization.).

Therefore, because Delmont's CC Law does not directly target Poster's religious actions and the law was not specifically enacted in response to respondent's suspension of Ms. Thornberry's account, this Court should reverse the Fifteenth Circuit's judgment in denying Petitioner's Motion for Summary Judgment.

B. The CC Law contains no exemptions towards approving non-religious behavior that is similar to respondent's religious activities.

Delmont's CC Law does not contain any exemptions for common carriers that approve of non-religious activities and behavior similar to the respondent's religious activities and practices. A law is not generally applicable if it "invite[s]" the government to consider the particular reasons for a person's conduct by providing "a mechanism for individualized exemptions." *Smith*, 494 U.S. at 884 (quoting *Bowen*, 476 U.S. at 708). Additionally, a statute lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. *See Church of Lukumi*, 508 U.S. at 542–46.

In *Fulton*, the City of Philadelphia informed Catholic Social Services, a foster care agency, that DHS would no longer refer children to the agency due to its refusal to certify same-sex couples as foster parents. 141 S. Ct. at 1875. The refusal to certify these couples violated the non-discrimination requirement of the City's standard foster care contract. *Id.* at 1873, 1878. However, the Court found that § 3.21 of the contract was not generally applicable as required under *Smith* because it incorporated exemptions that were in the "'sole discretion' of the Commissioner." *Id.* at 1878.

Conversely, there is no indication the CC Law contains any exemptions where Delmont approved behavior for non-religious activities conducted by other common carriers. The CC law applies to each and every internet platform that might favor one particular viewpoint over another through their monetary contributions. R. at 35. In contrast to *Fulton*, where § 3.21 had the "Rejection of Referral" exception towards foster parents, § 9-1.120 does not contain any exemptions, religious or otherwise. R. at 3. The respondent is a common carrier under Delmont law and must cooperate with the laws since there are no valid exemptions towards any common carriers.

Additionally, the Fifteenth Circuit erred in determining that the CC Law is "impermissibly open" for discretionary abuse by the Attorney General. In *Fulton*, the Supreme Court found that "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless of whether any exceptions have been given, because it 'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude." 141 S. Ct. at 1879 (quoting *Smith*, 494 U.S. at 884). Although the Attorney General brought the enforcement action against the respondent, the statute's language does not explicitly grant the Attorney General any formal discretion to enforce the statute in an abusive fashion towards common carriers.

Unlike *Fulton*, where § 3.21 granted "sole discretion" to the Commissioner to consider exceptions towards prospective foster or adoptive parents, the CC Law does not directly or indirectly grant the Attorney General sole discretion to determine whether the statute has been violated. *Id*. at 1878. The decision to bring upon the enforcement action was based on the respondent's censorship of Ms. Thornberry's political viewpoints, not the respondent's religious viewpoint. R. at 6. The Attorney General's identification of the respondent's religious heritage

by name was essential to validate the enforcement of the statute when the respondent used corporate funds to contribute to a religious cause with deep connections to the platform. R. at 32.

Therefore, based on the nonexistence of exemptions within the CC Law and the lack of sole discretionary authority being appointed to the Attorney General, this Court should reverse the Fifteenth Circuit's judgment in denying Petitioner's Motion for Summary Judgment.

C. The CC Law expresses the state's compelling interest of free speech protection amongst the community and is narrowly tailored to achieve this interest without burdening the respondent's religious practices.

Even if the Common Carrier Law did not satisfy the *Smith* test, the statute is constitutional as it is narrowly tailored to achieve the state's compelling interest of protecting speech amongst the community. A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. *Church of Lukumi*, 508 U.S. at 546; *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). So long as the government can achieve its interests in a manner that does not burden religion, it must do so. *Fulton*, 141 S. Ct. at 1881. "[A] law cannot be regarded as protecting an interest 'of the highest order' . . .' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in judgment) (citation omitted).

Here, Delmont expresses the compelling interest of protecting the community's ability to speak freely in public. Governor Trapp testified that he spoke to many constituent groups who expressed concerns over the large technology platform's substantial control over public expression. R. at 35. The CC Law was created to address these legitimate issues amongst those in the community. The statute bolsters free speech and allows the online space to function as a

"town square" where all ideas are free to be shared and considered. R. at 34. The CC Law's prohibition on donations to religious organizations—which the respondent has violated, prevents online platforms from favoring certain viewpoints over others through monetary contributions. R. at 35. By establishing these restrictions, the state can protect the community's interest in speech equality without discrimination or limitation towards the respondent's religious beliefs. *Contra Church of Lukumi*, 508 U.S. at 546–47 (holding the state ordinances failed to enact feasible measures to restrict conduct producing substantial or alleged harm while the government restricts only First Amendment protected conduct.).

Furthermore, the state has sufficiently demonstrated that the statute is narrowly tailored to protect the free expression of Delmont's citizens. In contrast to *Church of Lukumi*, where the court found the four ordinances were not narrowly tailored and underinclusive towards nonreligious practices, there is no evidence the CC Law is underinclusive towards nonreligious practices. 508 U.S. at 546. The CC Law's objective is to have the statute apply to every platform with a significant market share, not to specifically target the respondent or other common carriers who have strong religious beliefs intertwined into its establishment. R. at 3, 20.

Although the state disfavors the respondent's practice of donating a percentage of its profits to religious causes, the CC Law does not prevent the respondent from continuing its religious practices and implementing those practices onto its platform. The respondent can still demonstrate its dedication towards APC to promote peacebuilding and provide an outlet for aspiring APC-member authors, poets, and composers. R. at 2, 19. The respondent can still provide discounted publication services to both established and aspiring APC-members and promote APC-member content. R. at 3. The narrow restriction on monetary donations

demonstrates the purpose of diminishing favoritism on the platforms to protect the public's constitutional right to free expression.

Therefore, because the state has a compelling interest to protect the public's constitutional right to free speech and the law is narrowly tailored to achieve this interest without burdening the respondent's religious practices, this Court should reverse the Fifteenth Circuit's judgment in denying Petitioner's Motion for Summary Judgment.

CONCLUSION

For the foregoing reasons, Petitioner requests this Court REVERSE the decision of the United States Court of Appeals for the Fifteenth Circuit in regard to both free speech and free exercise claims.

CERTIFICATE OF COMPLIANCE

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

/s/ Team 9

Dated: January 28, 2022

APPENDIX: STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

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 peaceable to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. XIV.

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 1254(1): Court of Appeals; certiorari; certified questions

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

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

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

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, et seq.

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Emp. Div., Dep't. of Hum. Res. v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

47 U.S.C. § 230(c). Protection for private blocking and screening of offensive material

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an No provider or user of an interactive computer service shall be held liable on account of-

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).