No. 22-CV-7654

SUPREME COURT OF THE UNITED STATES

WILL WALLACE,

Petitioner,

v.

POSTER, INC.,

Respondent.

On Writ of Certiorari to the

United States Court of Appeals

for the Fifteenth Circuit

BRIEF FOR PETITIONER

TEAM 015

Counsel of Record

State of Delmont Department of Justice

Office of the Attorney General

123 Street Road

Capital City, DT 12345

team015@delmont.doj.gov

(555) 832-6015

January 31, 2022

QUESTIONS PRESENTED

1. The First Amendment's Free Speech Clause affords less protection to common carriers than to traditional businesses. Delmont's governor won election campaigning on the promise to prevent internet platforms from exerting undue control over their users' content, and he sought to do so by designating certain platforms as common carriers under Delmont's Common Carrier Law (CC Law). Did Delmont have a rational basis for passing the CC Law, thus satisfying the Free Speech Clause?

2. Laws that incidentally burden religious exercise satisfy the First Amendment's Free Exercise Clause if they are both neutral (i.e., show no hostility toward a particular religious practice) and generally applicable (i.e., contain no individualized exceptions and cover similar secular conduct). The CC Law applies to all common carriers regardless of religion, allows no exceptions, and forbids similar secular conduct. Is the CC Law neutral and generally applicable, thus satisfying the Free Exercise Clause?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

OPINIONS BELOW

The opinion of the court of appeals is unreported. *Poster, Inc. v. Wallace*, No. 2021-3487 (15th Cir. 2021); R. at 18–33. The opinion of the district court is also unreported. *Poster, Inc. v. Wallace*, No. 21-CV-7855 (D. Delmont Sept. 1, 2021); R. at 1–17.

JURISDICTION

The court of appeals entered judgment in 2021, after which this Court issued a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Delmont Governor Louis F. Trapp has always been a strong advocate of both the First Amendment and website accountability. R. at 34. During Trapp's reelection campaign, concerned citizens of Delmont expressed worry to him about the control that large technology platforms have over public expression. R. at 35. Addressing this potential for abuse became a core tenet of Trapp's campaign. R. at 34. Upon winning reelection on this platform, and armed with the people's mandate, Governor Trapp and Delmont's duly elected legislature passed the Common Carrier Law (CC Law) in order to "bolster free speech." *Id.* The purpose of the CC Law is to "prevent online platforms from stifling viewpoints that they disagree with by denying access to their forums and marketplaces." *Id.* The law is intended to maintain an online "town square," where ideas are freely shared. *Id.*

The CC Law designates internet platforms with a "substantial market share" as common carriers and places extra burdens on them because of this special status. *See* Delmont Rev. Stat. § 9-1.120(a). In pursuit of website accountability, neutrality, and accessibility, the CC Law requires common carriers to "serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint," and to "refrain from using corporate funds to contribute to political,

religious, or philanthropic causes." *Id.*

The CC Law makes every attempt to uphold First Amendment rights. As common carriers are public in nature, the religious contribution restriction is intended to avoid violating the First Amendment's Establishment Clause. *See* § 9-1.120(b); R. at 35. The bill's sponsors sought to prevent online forums of a public nature from favoring one particular viewpoint over another through their monetary contributions. R. at 35. Governor Trapp stated that Poster, the Respondent in this case, "is the kind of website the law is designed to address." *Id.*

Poster is a popular internet site headquartered in Capital City, Delmont. Poster has won "awards as the most affordable and widely-used artist self-publication platform" based on its vast market share and comparatively low prices. *Id.* Seventy-seven percent of artists self-publishing their work use Poster, making it a common carrier under the CC Law. R. at 2. Artists upload their work to Poster and allow the public to download it for free, for rent, or for purchase. *Id.* The platform allows artists to jumpstart their careers and connects them to a limitless audience for their work. R. at 9. "Poster has hosted artists and writers on its platform numbering in the hundreds-of-thousands for more than twenty years." *Id.* Since its founding in 1998, the platform has hosted diverse artists with "diverse ideological viewpoints." R. at 3.

Though artists agree to pay Poster a portion of any profit made, the company otherwise takes a hands-off approach to running the platform. Poster enables the voices of its artists to flourish, without considering their views. Artists have their own accounts and make their own business decisions. R. at 2. Poster's content is not a product of the company—it is purely the product of the artists using the platform. Poster's own terms disclaim endorsement of any views expressed in the material published. *Id.*

Poster's board of directors is comprised of members of the American Peace Church (APC),

which supports nonaggression and pacifism. R. at 37. The board directs fifteen percent of company profits to APC charities and provides discounted publication services to current and aspiring APC members. R. at 2–3. Poster maintains that it can reject submitted material, but since its founding in 1998, Poster has seldom exercised this power. R. at 37. In the twenty-four years of Poster's existence, the company has only rejected material twice—including this case. R. at 5.

This case arose when Poster suspended the account of Katherine Thornberry. *Id.* Thornberry is an animal rights activist who had a respectable growing interest in her novel *Animal Pharma*, which she had self-published via Poster. R. at 4. In July 2020, Thornberry attended a rally against animal experimentation. *Id.* Also present at that rally was an extremist faction of the animal-rights group AntiPharma, whose rallying cry "Blood is Blood"—"a tenet expressing AntiPharma's belief that all living beings are equal"—has drawn considerable attention. R. at 4–5. The rally turned violent, but no one disputes that Thornberry was not part of the violence and was instead in the music venue the whole time. R. at 4. Yet the rally did inspire Thornberry to give her book an alternative title: *Animal Pharma* or *Blood is Blood*. *Id.* Poster learned of the new name after reviewing a revenue report and, after deciding that the phrase called for violence and violated the board's pacifist values, suspended Thornberry's account. R. at 4–5. In addition to this suspension, Poster's CEO in a major newspaper op-ed condemned the violence associated with the extremist AnimalPharma faction. *Id.* Thornberry netted zero revenue for her novel after the suspension. R. at 5.

After learning of Poster's decision regarding Thornberry's animal-rights novel, Delmont fined Poster for violating the CC Law. R. at 6. Delmont determined that Poster was "discriminating against Delmont citizens based on their political viewpoints." *Id.* At a press conference, Delmont Attorney General Will Wallace, the Petitioner here, stated that "the APC-founded Poster platform

is discriminating against Delmont citizens based on their political viewpoints . . . and we bring this action for the first time today to stop that practice." *Id.* Poster then sued Delmont's Attorney General in federal court for injunctive and declaratory relief, contesting its status as a common carrier under the CC Law and challenging the Law as violating Poster's First Amendment rights. *Id.*

The United States District Court for the District of Delmont held that Poster qualifies as a common carrier subject to the CC Law. R. at 10. The court also held that the CC Law did not violate the First Amendment. R. at 11–16. Accordingly, Poster was "prohibited from censoring the works of anyone who maintains an account, irrespective of Poster's religious view regarding a particular individual's work." R. at 10. Poster was also barred from donating any of its proceeds to political, religious, or philanthropic causes. *Id.* Poster appealed to the United States Court of Appeals for the Fifteenth Circuit. The court of appeals agreed with the district court that Poster is a common carrier, since it acts primarily as a "promotional conduit for any artist who has sought to publicize his or her work." R. at 26. But the court of appeals also found that the CC Law violated Poster's First Amendment rights, because the law could force Poster to endorse speech it might wish to disclaim, has the effect of targeting religion, and is open for discretionary abuse. R. at 29, 31–32.

SUMMARY OF THE ARGUMENT

Common carriers are entitled to a lesser degree of First Amendment protection than ordinary businesses, and for two reasons, the court of appeals erred by holding that the CC Law violates the First Amendment. First, the CC Law complies with the Free Speech Clause because it is rationally related to a legitimate government interest and does not classify speech based on the speech's content. Second, the CC Law complies with the Free Exercise Clause because it is both neutral and generally applicable. This Court should reverse the Fifteenth Circuit's holding.

First, the CC Law complies with the Free Speech Clause. Because of their quasi-public

nature, common carriers receive relatively weak First Amendment speech protections, especially when they do not act as editors. This Court should thus apply rational-basis scrutiny to the CC Law. A statute survives rational-basis scrutiny if it is rationally related to a legitimate government interest and does not classify speech based on the speech's content. The CC Law checks both boxes. Poster is a common carrier and is best classified as a "traditional" common carrier. The platform does not act as an editor but rather enables users to edit their own content exclusively. Given this characteristic, this Court should evaluate the CC Law under rational-basis scrutiny. The CC Law does not distinguish between favored and disfavored speech, instead requiring common carriers to let all users publish content. The purpose of the CC Law is to ensure that online platforms cannot suppress viewpoints they disagree with from being posted to their websites. The CC Law is rationally related to this important purpose and should be upheld under rational-basis scrutiny.

Second, the CC Law also complies with the Free Exercise Clause. Laws may permissibly burden religious exercise if they are neutral and generally applicable—and the CC Law is both. The CC Law is neutral because it targets *all* monetary contributions, not just contributions specific to a particular religion. And it is generally applicable because it does not target Poster's pacificist religious beliefs, instead prohibiting all common carriers from contributing to political, religious, or philanthropic causes. Since the CC Law is neutral and generally applicable, it thus passes First Amendment muster. The Court should reverse the court of appeals and affirm the district court.

ARGUMENT

I. The court of appeals erred by holding that the CC Law violates the Free Speech Clause because the CC Law is content-neutral and rationally related to a legitimate state interest.

First, the court of appeals incorrectly held that the CC Law violates Poster's free speech

rights. The Free Speech Clause of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech," and it applies to the states via the Fourteenth Amendment. U.S. Const. amend. I; *Gitlow v. New York*, 268 U.S. 652 (1925). But this right is not absolute, meaning that some groups—such as common carriers—are accorded a lower freedom-of-speech interest. *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525, 535 (1959). This Court should adopt rational-basis scrutiny when considering state statutes regulating common carriers. *See Nat'l Ass'n of Regul. Util. Comm'rs v. FCC Comm'rs*, 525 F.2d 630, 641 (D.C. Cir. 1976). When a statute is content-neutral and created to serve a legitimate governmental interest, it passes rational-basis scrutiny. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

Poster has a dominant market share and has taken on the business of the public at large. The district court held that no genuine dispute of material fact remains as to Poster's common-carrier status, and the court of appeals agreed. R. at 10, 26. Hence Poster is accorded the relatively low free-speech interest adopted for common carriers. The CC Law's purpose is to prevent internet platforms from restricting viewpoints that they disagree with, and it does not distinguish between permissible and impermissible speech, thus satisfying rational-basis scrutiny. Accordingly, the CC Law does not violate Poster's First Amendment free-speech rights.[1]

---

1 Neither court below considered whether the portion of the CC Law forbidding common carriers from "using corporate funds to contribute to political, religious, or philanthropic causes" violates the Free Speech Clause. R. at 20. "[W]ithout the benefit of thorough lower court opinions to guide [the Court's] analysis of the merits," this Court should not reach that question here either. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012). After all, "[o]urs is a court of final review and not first review." *Id.* (internal quotation marks omitted).

A. Poster is entitled to less First Amendment protections as a "traditional" common carrier, so this Court should evaluate the CC Law using rational-basis scrutiny.

By availing themselves of the business of the public at large, common carriers have taken on a quasi-public nature, increasing the state's interest in regulating their behavior to prevent abuses. *See Regul. Util. Comm'rs*, 525 F.2d at 640–41. The Court indicated in *Farmers* that the level of scrutiny applicable to common carriers is relatively low. *See* 360 U.S. at 535. These protections are especially weak when the carrier acts more like a traditional common carrier and less like an editor. *See Denver Area Educ. Telecoms. Consortium v. FCC*, 518 U.S. 727, 739 (1996). Prior caselaw indicates that this Court should follow rational-basis scrutiny in determining whether a law regulating a noneditorial common carrier is constitutionally valid. *Id.*

Poster has hosted artists and writers numbering in the hundreds of thousands on its platform for more than twenty years. R. at 9. It neither creates content nor acts as an editor of its users' content. R. at 11. Because Poster is a traditional common carrier, the CC Law is subject to a low degree of scrutiny. Considering Poster's noneditorial nature, the Delmont CC Law should be considered under rational-basis scrutiny.

1. Poster is best classified as a "traditional" common carrier due to its practice of serving all artists indiscriminately since its founding over two decades ago.

While platforms that function like newspapers by editing content are entitled to greater First Amendment protections, companies that merely transmit information are traditional common carriers and receive less protection. *Denver*, 518 U.S. at 739. Labeling companies that are more traditional in nature as common carriers with reasonably restricted speech rights comports with the way they present themselves to the world as platforms for others to speak. "[T]here is clear

historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers." *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring). Justice Thomas illustrates the difficulty of applying this rationale to emerging technologies:

> [D]igital platforms that hold themselves out to the public resemble traditional common carriers. Though digital instead of physical, they are at bottom communications networks, and they "carry" information from one user to another. A traditional telephone company laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way.

Id. at 1224. Neutral, indiscriminate platforms for transmission of speech of any and all users play a role "analogous to that of telephone companies." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 743 (D.C. Cir. 2016). Thus "[t]hose obligations affect a common carrier's neutral transmission of others' speech, not a carrier's communication of its own message." *Id.* at 740.

The analogy of websites to common carriers "is even clearer for digital platforms that have dominant market share." *Knight*, 141 S. Ct. at 1224. In *Knight*, this Court considered Amazon's control over both the e-book and physical book markets, stating that the company could "impose cataclysmic consequences on authors by, among other things, blocking a listing." *Id.* at 1225. The fear of large tech companies' control over digital platforms is only alleviated if the consumer has a choice between comparable alternatives. *Id.*

Though it might be difficult to always determine what platform falls into the traditional common carrier category, Poster fits neatly into this mold. As a communication service and digital platform, Poster holds its information infrastructure open to every member of the public. R. at 11. The court of appeals thus incorrectly determined that Poster exercises editorial discretion over its users' artistic content. The court found that "such unequivocal denial of the platform's editorial

discretion" would force Poster to endorse messages it may wish to disclaim and would limit its ability to curate its users' content—all while ignoring Poster's own terms of service disclaiming endorsement of any views expressed in the material published. R. at 28–29.

Nor did the court of appeals explain what makes Poster so editorial in nature. Poster takes a hands-off approach to running the platform—until this lawsuit, Poster had only once in its twenty-four years exercised the editorial discretion it seeks to have upheld in this suit. R. at 5. But like a broadcasting service or telephone company, Poster operates as a platform that posts the content of the voices and ideas of its artists, without taking into consideration their political or religious views. Artists have their own accounts and make their own business decisions. R. at 2. Poster disclaims endorsement of any views expressed in the material published. *Id.* Poster's content is not edited by the company—it is purely the product of the artists utilizing the platform. In this way, Poster neutrally transmits the messages of the artists using its platform and is not acting as a carrier of its own message.

Thornberry's experience with Poster fits *Knight*'s description of Amazon. Her animal-rights novel was receiving respectable and growing interest on Poster. R. at 21. But after the suspension, Thornberry netted zero revenue for the novel. R. at 22. Because of our society's reliance on technology—especially since the start of the COVID-19 pandemic—no comparable alternatives to digital platforms exist. Hence Poster fits neatly into the category of a traditional common carrier.

2. Traditional common carriers are entitled to a low degree of First Amendment protections.

Since Poster fits into the category of a traditional common carrier, it is thus subject to regulation and a lower degree of First Amendment protections. States may use their police power to regulate common carriers by statute. *Munn v. Illinois*, 94 U.S. 113 (1876). Being subject to

statutory constraints does not itself compel a company to serve the public openly, but a duty arises when the company chooses to enter into a business for profit. *Brass v. North Dakota*, 153 U.S. 391, 404 (1894). Although the Court has never clearly articulated a universal level of First Amendment protection accorded to common carriers, it has clearly indicated that the level is relatively low. *See Farmers*, 360 U.S. at 535. The court of appeals agreed that common carriers are entitled to a lesser degree of First Amendment protection because of the nature of the public services they provide. R. at 28. Common carriers are inherently different from purely private companies. They take on "a quasi-public character" by accepting "a sort of public trust by availing themselves of the business of the public at large." *Regul. Util. Comm'rs*, 525 F.2d at 640–41.

Not every interference with speech triggers the same degree of scrutiny under the First Amendment. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637 (1994). The standard for determining the extent of the First Amendment free-speech protection depends on the kind of carrier a company is and on the regulation itself. Regulations of cable television providers are usually reviewed using a lower and more flexible standard, balancing First Amendment concerns with important government interests. *U.S. Telecom*, 825 F.3d at 740. Broadband providers, for instance, are afforded a lower First Amendment standard unless they furnish viewers with the providers' own original content. *Id.* at 741–42. Speech protections for leased channels are "relatively weak because they act less like editors, such as newspapers or television broadcasters, than like common carriers, such as telephone companies." *Denver*, 518 U.S. at 739.

Statutes requiring common carriers to afford each person the right of equal access to the marketplace are entitled to a lesser degree of scrutiny than other kinds of regulations. "[O]ur legal system and its British predecessor have long subjected certain businesses, known as common carriers, to special regulations, including a general requirement to serve all comers." *Knight*, 141 S. Ct.

at 1222. The equal-access obligation and nondiscrimination obligation have been codified into federal law. *See* 47 U.S.C. § 202(a). These obligations were imposed when technology advances included telephone companies as common carriers "without raising any First Amendment issue." *U.S. Telecom*, 825 F.3d at 740. This lower standard of scrutiny is justified by the ideals of the First Amendment, which acts as a shield under which "many types of life, character, opinion, and belief can develop unmolested and unobstructed." *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

Poster is the kind of carrier subject to relatively weak First Amendment speech protections. For twenty-four years, Poster has availed itself of the business of the public at large, providing self-publication services to virtually every artist wanting to post their work. R. at 11. This platform comes at an economic cost to Delmont's citizens, and that cost is transferred into a financial gain for Poster. R. at 2. No content on Poster's website is theirs—according to their own terms of use. *Id.* The content on the site rather is a product of the creative and expressive artists of Delmont. In contrast, newspapers have direct editorial control over the content they publish, often pointing writers in the direction of stories to tell. Poster is not akin to a newspaper, and as *Denver* explains, it should be accorded a relatively low standard of review. *See* 518 U.S. at 739.

The CC Law is a classic regulation on common carriers, requiring that they provide equal access to the public they serve. It functions as the First Amendment intended, enabling opinions and beliefs to develop unobstructed. *Cantwell*, 310 U.S. at 310. Especially considering that Poster is the dominant market power in artistic self-publication, a statute obligating Poster to provide equal access to its customers deserves a low level of scrutiny. The citizens of Delmont are entitled equal access to Poster's services.

3. This Court's jurisprudence compels the conclusion that the proper standard for evaluating the CC Law is rational-basis scrutiny.

Though this Court has not explicitly stated the proper standard of review for cases involving statutory constraints on common carriers' speech, considering the kind of carrier Poster is and the equal-access services the law provides, the proper test should be rational-basis scrutiny. The history of restricting the exclusion rights of common carriers saves similar regulations from triggering heightened scrutiny, especially when a restriction would neither prohibit the company from speaking nor force the company to endorse speech. *Knight*, 141 S. Ct. at 1224. Considering that this Court explicitly enumerated the "weak" First Amendment free-speech interest of traditional common carriers, the standard should be rational-basis scrutiny. *Denver*, 518 U.S. at 739.

The CC Law neither prohibits Poster from speaking nor forces it to endorse any speech. Poster can freely support its opinions and beliefs when it chooses to do so. Poster's CEO, for instance, joined a major newspaper op-ed condemning the violence wrought by AnimalPharma's extremist faction. R. at 5. Poster's own terms disclaim endorsement of any views expressed in the material published on its site. R. at 19. When an individual uploads their work to Poster, the company is in no way forced to endorse speech. In this way, Poster functions similarly to Amazon: it is a marketplace of goods that doesn't take into consideration the uploader's views. *See Knight*, 141 S. Ct. at 1225. The court of appeals incorrectly held that Poster is forced to promote and endorse the speech. Since heightened scrutiny is not warranted, and Poster's speech protections are "weak," rational-basis scrutiny is the appropriate standard to apply to the CC Law. *Denver*, 518 U.S. at 739.

B. The CC Law satisfies rational-basis scrutiny because it is content-neutral and rationally related to Delmont's legitimate interest in defending its citizens' freedom of speech online.

Applying rational-basis scrutiny, the Court should uphold the CC Law because it does not distinguish between types of speech, and it is carefully crafted to further a legitimate government interest in preventing online platforms from stifling unpopular viewpoints. Laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based. *See Burson v. Freeman*, 504 U.S. 191, 197 (1992) ("Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign."). By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are content-neutral. *See Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981) (finding that a regulation requiring sales take place at designated locations "applies evenhandedly to all . . . who wish to distribute and sell written materials"). *O'Brien* articulated the legal standard for content-natural statutes: "[G]overnment regulation is . . . justified . . . if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377. In *Turner*, a regulation requiring cable television to devote a portion of their channels to local broadcast was deemed content-neutral because "an operator cannot avoid or mitigate its obligations under the Act by altering the programming it offers to subscribers." 512 U.S. at 644.

This Court has found a variety of objectives to satisfy the rationally-related-to-a-legitimate-government-interest requirement. *Turner* noted that "Congress' overriding objective in enacting

must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programing." *Id.* at 646. And in 1992, Congress created a law allowing cable companies to refuse to show content they thought was sexually explicit. *Denver*, 518 U.S. at 734–36. The Court upheld the statute because the government had a compelling interest in protecting children from this content. *Id.* at 779.

Government action that "stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government," contravenes the essential First Amendment right. *Turner*, 512 U.S. at 641. Some courts, including the court below, take issue with these law because they pose a risk that the Government seeks to suppress unpopular ideas rather than advance a legitimate free-speech goal. *See id.*; R. at 32. But the Free Speech Clause does not "disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Turner*, 512 U.S. at 657.

The CC Law satisfies rational-basis scrutiny. At the outset, the CC Law is content-neutral. It does not distinguish between favored and disfavored speech, instead requiring common carriers like Poster not to distinguish between favored and disfavored speech. Indeed, the CC Law itself contains no reference to the views contained in the uploads to Poster's site. This information is immaterial to the application of the CC Law, making it content-neutral.

Moreover, the CC Law furthers an important and substantial governmental interest: "prevent[ing] online platforms from stifling viewpoints that they disagree with by denying access to their forums and marketplaces." R. at 34. The CC Law responds to concerns about the control that large tech platforms have over public expression. R. at 35. The CC Law's enactment ensures that public forums and citizens' constitutional rights are secure. *Id.* Despite entitlement to some First

Amendment protections, Poster's interest cannot outweigh the significant free-speech rights that Governor Trapp and the Delmont legislature sought to protect.

As *O'Brien* requires, the restrictions on alleged First Amendment freedoms are no greater than that essential to further the legitimate interest of website accountability and neutrality. 391 U.S. at 377. Governor Trapp carefully crafted this law together with Delmont's legislature to bolster free speech by placing limits only on internet platforms with a "substantial market share." R. at 3. The CC Law applies to a limited group of companies—namely, those with an internet platform and a substantial market share. Most internet websites are not platforms, and only a few companies obtain substantial market shares. The legislature calculated these two requirements to achieve the purpose of the CC Law, which was to target large platforms that have a great deal of control over public expression. Since Delmont's CC Law is content-neutral, furthers an important government interest, and is targeted towards achieving this interest, it survives rational-basis scrutiny and complies with the First Amendment.

II. The court of appeals erred by holding that the CC Law violates the Free Exercise Clause because in deeming the CC Law neither neutral nor generally applicable, the court of appeals misapplied this Court's precedents.

Additionally, the court of appeals incorrectly held that the CC Law violates Poster's First Amendment right to religious exercise. The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise" of religion, and it applies to the states via the Fourteenth Amendment. U.S. Const. amend. I; *Cantwell*, 310 U.S. at 303.

Under this Court's jurisprudence, laws that are both neutral and generally applicable are immune from strict scrutiny under the First Amendment. *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990). The respondents in *Smith*, members of the Native American Church, ingested

peyote during a religious ceremony and lost their jobs after failing drug tests. *Id.* at 874. Because Oregon law prohibited possessing controlled substances, including peyote, the Employment Division found that the respondents had been fired for misconduct and denied their applications for unemployment benefits. *Id.* This Court held that despite lacking religious exemptions, Oregon's law permissibly burdened the respondents' religious exercise. *Id.* at 890. Justice Scalia stressed that "[a]s a textual matter," the Court has "consistently held that 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 878–79 (emphasis added) (internal quotation marks and citations omitted).

The court of appeals here erred by finding that the CC Law is neither neutral nor generally applicable. After affirming Poster's status as a common carrier (albeit one of a hybrid nature), the court correctly recognized that "[c]ommon carriers are entitled to a lesser degree of First Amendment protection due to the nature of the public services they provide." R. at 26, 28. But its recognition of this core distinction ended there, the court instead having treated Poster like any other private actor. The court also incorrectly applied this Court's jurisprudence by failing to recognize that *hostility* toward a particular religious practice, not mere reference to religion, is the key to determining whether a law is neutral. Moreover, the court mistakenly read into the CC Law a mechanism for individualized exemptions—a mechanism nowhere to be found in the CC Law's text—that the court then used to deem the CC Law not generally applicable. Proper consideration of Poster's common-carrier status, together with correct analysis of this Court's caselaw, compels the conclusion that the CC Law is both neutral and generally applicable, thus complying with the

Free Exercise Clause.[2]

A. The CC Law is neutral because Delmont has shown no hostility toward a particular religious practice, since Delmont restricts censoring political speech due to that practice's discriminatory nature, not its religious nature.

First, the CC Law is neutral because it targets only discriminatory practices, not practices specific to any particular religion, and Delmont has shown no hostility toward any particular religious practice. In general, "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (citing *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1730–32 (2018)). In enacting the CC Law, Delmont has neither proceeded in a manner intolerant of religious beliefs nor restricted practices because of their religious nature. On the contrary, the record shows that Delmont is restricting certain practices solely because of their *discriminatory* nature. R. at 6. And unlike this Court's prior cases, nothing in the record here suggests religious intolerance on the part of Wallace, Trapp, or any other Delmont official.

This Court's cases regarding neutrality focus not on whether a law somehow references religion—as was the court of appeals's worry here—but instead on whether the law treats particular religious practices with hostility. *See* R. at 30–31. In *Church of the Lukumi Babalou Aye, Inc. v. City of Hialeah*, for instance, the Court held void four ordinances targeting the Santeria religion. 508 U.S. 520 (1993). The City of Hialeah enacted the ordinances, which forbade ritual animal sacrifice, after a Santeria group announced plans to establish a house of worship there. *Id.* at 525–

---

2 If the Court disagrees that the CC Law is neutral and generally applicable, it should not reach the question whether the CC Law survives strict scrutiny and instead let the lower courts answer that question in the first instance. *See Zivotofsky*, 566 U.S. at 201.

26. That the ordinances targeted Santeria in particular was beyond question: "The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; [and] the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings." *Id.* at 542. The Court also found that though the ordinances' references to "'sacrifice' and 'ritual' . . . are consistent with the claim of facial discrimination, . . . current use admits also of secular meanings." *Id.* at 534. Hence "[f]acial neutrality is not determinative." *Id.* Instead, the question is whether "suppression of" a particular religious practice "was the object of" the challenged law or government action. *Id.*

More recently, *Masterpiece Cakeshop* vacated an order of the Colorado Civil Rights Commission because the commissioners had shown hostility toward particular religious beliefs during hearings. 138 S. Ct. at 1719. The owner of Masterpiece Cakeshop had refused, because of his Christian objection to same-sex marriage, to bake a wedding cake for a same-sex couple. *Id.* at 1724. After the couple filed a discrimination complaint, the Commission held two hearings at which commissioners expressed hostility toward the baker's religious practice—one commissioner suggested that business owners lose the right to "act on [their] religious beliefs" in exchange for the privilege of conducting business, while another accused the baker of invoking religious freedom merely to excuse malicious discrimination. *Id.* at 1725–26, 1729. Adding that these comments "were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order," the Court held that "the Commission's treatment of [the baker's] case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Id.* at 1731–32 (emphasis added).

Starting from the unremarkable proposition that government may not target particular

religious practices, the court of appeals took quite the leap to reach its holding that *any* reference to religion per se defeats neutrality. Hostility—not mere reference to religion in general—is the common thread tethering *Smith*, *Lukumi*, and *Masterpiece Cakeshop*. Hence the court of appeals incorrectly applied these cases by holding that the CC Law's prohibition against contributions to religious causes "directly and expressly" targets religion. R. at 30. The CC Law instead directly and expressly targets common carriers, a small and precisely defined group unique in nature and having less First Amendment protection than average businesses—as the court of appeals rightly acknowledged. R at 28.

In fact, the CC Law shows none of the hostility toward religion central to this doctrinal line. In *Smith*, for instance, no one argued that the Oregon statute criminalizing peyote possession was "specifically directed at [the respondents'] religious practice"—in other words, that Oregon had banned peyote possession because of hostility toward the Native American Church—and the Court thus upheld the State's reliance on that statute in denying the respondents' unemployment benefits. 494 U.S. at 878, 890. On the other hand, the Hialeah City Council in *Lukumi* had flagrantly expressed hostility toward Santeria when it enacted the ordinances challenged there. 508 U.S. at 542. So too in *Masterpiece Cakeshop*, where the commissioners went so far as questioning—indeed, attacking—the sincerity of the baker's religious convictions. 138 S. Ct. at 1729.

In contrast, the CC Law is not hostile toward any religion, let alone a particular religious practice. It applies equally to all common carriers, whatever their religious affiliation. Nor does the CC Law discriminate against all religious beliefs uniformly, because it restricts only two practices—serving "all who seek or maintain an account, regardless of . . . religious viewpoint," and "using corporate funds to contribute to . . . religious . . . causes"—not particular to any single religion. R. at 20. The Court should reject the court of appeals's rigid holding that any reference to

religion per se defeats neutrality and instead focus on whether government has shown hostility toward a particular religious practice. Delmont has not.

B. The CC Law is generally applicable because it contains no mechanism for exceptions and forbids similar secular conduct, and the court of appeals arbitrarily ascribed malice to Wallace's press-conference statement.

Second, the CC Law is generally applicable because it does not target any particular religion. This Court clarified in *Fulton* that "[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.'" 141 S. Ct. at 1877 (second alteration in original) (quoting *Smith*, 494 U.S. at 884). Nor is a law generally applicable "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* (citing *Lukumi*, 508 U.S. at 542–46). The court of appeals held that the phrase "substantial market share" in the CC Law is "a formal mechanism for granting exceptions" because it grants the Delmont Attorney General unfettered enforcement discretion, rendering the CC Law not generally applicable. R. at 32. The CC Law does no such thing.

Under *Fulton*, a law containing "a formal mechanism for granting exceptions" is not generally applicable. 141 S. Ct. at 1879. The City of Philadelphia had contracted for years with Catholic Social Services (CSS) to find foster homes for children in the City's care, a centuries-old mission of the Catholic Church. *Id.* at 1874–75. But the City informed CSS in 2018 that it would not renew that contract unless CSS agreed to consider same-sex couples for certification as foster parents—the City's Health Commissioner even suggested that CSS "follow[] the teachings of Pope Francis," implying that CSS had strayed from the teachings of its own religion by refusing to certify same-sex couples as foster parents. *Id.* at 1875–76. The Court first held that the City had burdened CSS's

religious exercise by "putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs." *Id.* at 1876. That burden offended *Smith* because it arose under a policy that was not generally applicable. *Id.* at 1877. The City's standard foster-care agency contract forbade agencies' discriminating on the basis of sexual orientation, but it also gave the City's Health Commissioner sole discretion to grant exceptions to that policy. *Id.* at 1878. The Court held that "the inclusion of a formal system of entirely discretionary exceptions . . . renders the contractual non-discrimination requirement not generally applicable." *Id.* Justice Alito captured how important that contractual exception was to the majority's reasoning: "[I]f the City wants to get around today's decision, it can simply eliminate the . . . exemption power." *Id.* at 1887 (Alito, J., concurring in judgment). But this is not to say the Court would have held for the City had the contract not contained that mechanism for exceptions, since *Fulton* did not address neutrality or whether the contract might have failed general applicability on other grounds.

Lukumi also addressed general applicability, noting that "government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." 508 U.S. at 543. Holding that the ordinances prohibiting animal sacrifice were not generally applicable, the Court focused its analysis on the ordinances' being "underinclusive" for the City of Hialeah's claimed interests in "protecting the public health and preventing cruelty to animals." *Id.* They specifically "fail[ed] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does." *Id.* The ordinances did not forbid "fishing" or "extermination of mice and rats within a home," for instance. *Id.* Instead, the City "drafted [the ordinances] with care to forbid few killings but those occasioned by religious sacrifice." *Id.*

Additionally, though the City contended that "the disposal of animal carcasses in open

public places and the consumption of uninspected meat" threatened public health, the Court responded that those "health risks . . . are the same whether Santeria sacrifice or some nonreligious killing preceded it. The city does not . . . prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after their activity. . . . [And] restaurants are outside the scope of the ordinances." *Id.* at 544–45. In essence, "[t]he ordinances ha[d] every appearance of a prohibition that society is prepared to impose upon Santeria worshippers but not upon itself." *Id.* (internal quotation marks and modifications omitted). The Court acknowledged that "[i]mproper disposal is a general problem that causes substantial health risks," but the City "addresses [that problem] only when it results from religious exercise." *Id.* at 545 (emphasis added). That discriminatory treatment rendered the ordinances not generally applicable. *Id.*

In contrast, the CC Law addresses important problems regardless of whether they result from religious exercise, and it applies to all common carriers equally—regardless of religious affiliation. Unlike the contract in *Fulton*, the CC Law contains no mechanism for individualized exceptions and thus creates no occasion for the government to consider the reasons for a common carrier's actions. *See* 141 S. Ct. at 1874. The court of appeals's holding—that the term "substantial market share" in the CC Law constitutes a formal mechanism for exemptions—is indeed puzzling. R. at 32. It assumes that the term "substantial" has a static meaning untouchable by common-law interpretation of the statute by Delmont's courts. In tort law, for instance, the "reasonable person" is a flexible concept, but far from a wholly discretionary one—courts have been interpreting the term for centuries, and those interpretations bind future cases. So too with "substantial market share." The court of appeals implies that Wallace would be free going forward to deem seventy-five, sixty, or forty percent market share insubstantial merely because he felt like doing so. That conclusion ignores the role of state courts in enforcing state legislation—and answers in a

conclusory manner, without citing to authority, the state-law question of what that role is.

Moreover, the court of appeals then anchored its focus on Attorney General Wallace's press-conference statement identifying Poster with the APC, distracting the court from considering all the circumstances and leading it to the mistaken conclusion that the CC Law is not generally applicable. *Id.* In doing so, the court again—as it did with neutrality—created a per se rule that *any* reference to religion, regardless of its motivation, automatically defeats general applicability. This Court's jurisprudence stands for no such proposition.

The court of appeals never even considered whether Wallace's statement might have an innocent meaning. A state's attorney general is a public figure, the most powerful and visible enforcer of state law, responsible for communicating matters of public import to a diverse community. Wallace's audience comprises every person in Delmont, each with different knowledge and experiences. Unlike the Health Commissioner in *Fulton*, who showed hostility by suggesting that CSS was practicing its own religion incorrectly,[3] Wallace merely mentioned the APC by name—nothing more. *See Fulton*, 141 S. Ct. at 1875. The court of appeals did not ask whether so public a figure might have good reason to include as much context as possible in statements made to such a large and varied group of his constituents. The court instead made an assumption—just as Poster made an assumption that Thornberry's title *Blood on Blood* called for violence—and reached a conclusion at odds with the one that this Court's jurisprudence compels.

---

3 Though hostility is more pertinent to the neutrality analysis, it remains useful here to illuminate how the court of appeals mistakenly concluded that Wallace "did indeed inquire into Poster's particular reasons for conduct before he made a decision to bring the enforcement action." R. at 32. Reading hostility into Wallace's statement led the court to incorrectly conclude that he had considered Poster's motives for suspending Thornberry's account.

CONCLUSION

Delmont's elected officials commend the APC's pacifist mission and hope that the APC and Poster will remain pillars of Delmont's artistic community for years to come. But common carriers are not ordinary businesses. And because the CC Law only regulates common carriers—a group with low First Amendment protections—it violates neither the Free Speech Clause nor the Free Exercise Clause. The Court should reverse the court of appeals and affirm the district court.

Respectfully,

TEAM 015

Counsel of Record

January 31, 2022

CERTIFICATE

We certify that:

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

2. The team has complied fully with our school's governing honor code.

3. The team has complied fully with all Rules of the Competition.

s/ *Team 015*

January 31, 2022