No. 22-CV-7654

IN THE

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 THE RESPONDENT

COUNSEL OF THE RESPONDENT

TEAM NUMBER 22

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STATEMENT OF JURISDICTION

The District Court had jurisdiction of case C.A. No. 22-CV-7855 pursuant to 28 U.S.C. § 1331 because the CC Law affects a United States constitutional right. The Court of Appeals for the Fifteenth Circuit had jurisdiction of the appeal pursuant to 21 U.S.C. § 1291 because the District Court granted summary judgment, which is a final decision. The Supreme Court of the United States has jurisdiction over this case because they granted the petition for a Writ of Certiorari.

ISSUES PRESENTED

I. Under the Free Speech clause of the First Amendment to the Constitution does the Common Carrier Law violate the First Amendment right to freedom of speech when it designates a platform as a common carrier based solely on market share, and compels corporations by force of law to publish content that violates its sincerely held religious beliefs?

II. Under the Free Exercise clause of the First Amendment to the Constitution does the Common Carrier Law lack the requirements of neutrality and general applicability under the First Amendment Free Exercise clause, when it restricts more religious conduct than necessary and allows for secular activities that endanger the governmental interests the same, if not more than, the religious activities that the law has prohibited?

STATEMENT OF THE CASE

A. Statement of the Facts

Poster Inc. (Poster) is a closely held corporation that believes in adherence to the mission of furtherance of Jesus Christ's message of non-aggression and peace on earth. R. at 37. The state of Delmont passed the Common Carrier Law (CC Law) on June 1, 2020. R. at 20. The genesis

behind the law was a perceived stifling of viewpoints platforms like Poster disagree with by denying access to internet platform's forums and marketplaces. Delmont's Governor has stated before that sites like Poster are what the CC law is designed to address. R. at 35. The CC Law designates internet platforms with substantial market share, whose exact metric is never detailed, as common carriers. R. at 3. The CC law requires internet platforms to serve anyone who seeks or maintains an account regardless of a political, ideological, or religious viewpoint. R. at 20. Additionally, it mandates that common carriers refrain from using funds to contribute to any political, religious, or philanthropic causes. R. at 20. Violation of the CC law exacts heavy tolls of up to thirty-five percent of business daily profits, which compound daily until platforms conform.

Incorporated under the laws of Delmont in 1998, Poster is run by members of the American Peace Church (APC), which is a 100-year-old protestant denomination dedicated to furthering the message of Jesus Christ by promoting non-aggression and peace on earth. R. at 37. Poster provides a means for authors to publish their work by allowing self-publication and performance uploads by artists who want to jumpstart an audience for their work. R. at 2. All of the APC members are called to further this mission. R. at 37. The APC has a long history of supporting artists, poets, educators, and musicians to fulfill its mission and nurture the God-given talents of the community. R. at 37. Poster's mission is an extension of the APC, and its board tithes fifteen percent of its profits to support the furtherance of the message of Jesus Christ. R. at 37. Poster users can post whatever content they want if it does not violate Poster's values of non-aggression and peace on earth. R. at 2 Since its inception, Poster has hosted artists of diverse ideologies and, in its twenty-two-year history, has only removed content inconsistent with its sincerely held religious convictions one time. R. at 3, 22.

Katherine Thornberry has maintained a Poster account since November of 2018. R. at 20. While attending a rally that turned violent over the 4th of July weekend in 2020, Ms. Thornberry changed one of her novel's titles to "Blood is Blood." R. at 21. "Blood is Blood" is a widely known mantra of an extremist animal rights group named AntiPharma, which advocates civic violence in response to violence against animals. R. at 4.

Poster's User agreement allows it to block or remove accounts at any time and for any reason. R. 37. Before this controversy, Poster has only blocked or removed one account as it violated their sincerely held religious convictions of pacifism by promoting a book titled "Murder Your Enemies: An insurrectionist's Guide to Total War. R. at 5. Violation of Poster's sincerely held religious convictions has been Poster's consistent standard. When made aware of Ms. Thornberry's use of "Blood is Blood" for her book title, Poster suspended her account until she revised the title of her book, which had garnered significantly more attention since the animal rights rally that turned violent. R. at 5. After Ms. Thornberry protested her suspension, Delmont's Attorney General invoked the CC Law for the first time and fined Poster. R. at 6.

B. Procedural History

In response to Delmont's massive fine levied on Poster, Poster sued Delmont Attorney General Will Wallace in the United States District Court for the District of Delmont. R. at 6. Poster argued against its designation as a common carrier under the CC Law and that the CC law violated its constitutional rights to Freedom of Speech and religious freedom. R. at 6. Delmont moved for summary judgment because the CC law is constitutional. United States District Court for the District of Delmont granted Delmont's summary judgment motion holding that Poster is a common carrier under the CC Law, that common carrier status prevented Poster from prevailing in its

Freedom of Speech claim, and that the CC law is neutral and generally applicable and does not violate Poster's Free Exercise rights. R. at 23.

Poster appealed the District Court's decision to the United States Circuit Court of Appeals for the Fifteenth Circuit, seeking immediate injunctive and declaratory relief. Poster argued that the court below failed to consider Poster's Free Speech rights and argued the lower court erred in finding the CC Law was neutral and generally applicable. The Court of Appeals agreed with Poster and reversed the lower court, holding that the District Court erred in its determination that Posters' Free Speech rights were not violated and erred in holding that the CC Law was neutral and generally applicable. Delmont appealed the Circuit Court's Decision, and this court granted a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The CC Law's designation of Poster as a common carrier and its compelling speech is an unconstitutional violation of Poster's right to freedom of speech under the First Amendment. To be labeled a common carrier, a corporation must make a public offering to provide communication facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their design and choosing. Corporations will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal. Poster does not qualify as a common carrier as Poster only furnishes its resources to exclusive Users who maintain accounts in exchange for a fee. Poster reserves the right to make decisions based on the content individuals post violates its core principles. Therefore, the CC Law violates Poster's freedom of speech rights as the constitution does not revoke a private entity from exercising editorial discretion over speech or speakers. Any compulsion to publish content that an organization does not want to publish is unconstitutional. The CC law compels

Poster to publish content that violates their core beliefs. Laws that compel speakers to endorse a particular message they do not believe in are analyzed under strict scrutiny, which Delmont's Law fails to clear.

Furthermore, because the CC Law is not neutral and generally applicable, this Court should affirm the ruling of the Court of Appeals for the grant of summary judgment in favor of Poster. This Law lacks neutrality because it restricts more religious conduct than is necessary and the legislature never considered religious objections when enacting the law. Furthermore, this Law lacks general applicability because it allowed secular activities that endangered the governmental interests the same, if not more than, the religious activities, and it allowed the Attorney General to use discretion to determine which reasons were worthy of preferable treatment. Therefore, this Court should find that the CC Law is neither neutral nor generally applicable and should affirm the ruling of the Court of Appeals.

ARGUMENT

This Court reviews the grant of summary judgment de novo. *Gross v. Hale-Halsell Co.*, 554 F.3d 870, 875 (10th Cir. 2009). When a case is reviewed de novo, the court must give reasonable inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment can only be granted when "there is no genuine dispute to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

The following sections will cover how the government (1) violated Poster's Free Speech and (2) violated Poster's Free Exercise.

A. The United States Court of Appeals for the Fifteenth circuit was correct in finding that the CC law, in denying Poster's editorial discretion by requiring by force of law to promote content that violates its sincerely held religious beliefs, is an unconstitutional compulsion of speech and violates the First Amendment.

The Delmont Law violates the Free Speech clause of the First Amendment. The law creates, without a verifiable metric for substantial market share, a common carrier designation to cleave First Amendment protections away from internet platforms so Delmont's CC law can force them to publish content that violates Poster's core beliefs. Common carrier designations have never been applied to platforms such as Poster, as they are not conduits for the public at large to communicate, but instead content platforms that publish material in keeping with its religious identity. *FCC v. Midwest Video Corp.*, 440 US 689, 701 (1979). As Poster is not a common carrier all rights under the First Amendment extends poster as a corporation. *Burwell v. Hobby Lobby Stores, Inc.*, 573 US 682 (2014), *Citizens United v. FEC*, 558 US 310, 342 (2010). As such, any compulsion to publish content that an organization does not want to publish is unconstitutional. *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 US 241, 263 (1974). Laws that compel speakers to endorse a particular message they do not believe in are analyzed under strict scrutiny. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994). As the CC law would not survive strict scrutiny analysis the Court must find Delmont's law is an unconstitutional violation of Poster's First Amendment rights.

1. The Delmont common carrier law is unconstitutional as it violates the First Amendment by compelling Poster to publish content that violates its sincerely held religious beliefs**.**

For a business to be labeled a common carrier, it must make a public offering to provide communication facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their design and choosing. *Midwest Video Corp.*, 440 US at 701. Businesses will not be a common carrier where its practice is to make individualized

decisions, in particular cases, whether and on what terms to deal. *National Asso. of Regulatory Utility Comm'rs v. Federal Communications Com.*, 525 F.2d 630, 641 (D.C. Cir. 1976). The measure of Market Share is merely a factor and not dispositive in determining common carrier status. Louis Kaplow, *Market Share Thresholds: On the Conflation of Empirical Assessments and Legal Policy Judgments* Jnl of Competition Law & Economics (2011) 7(2): 243-276.

In *Midwest Video Corp* the Federal Communications Commission (FCC) issued rules mandating cable television systems with 3,500 or more subscribers who also carried broadcast signals to have a twenty-channel capacity so third parties could access certain channels. 440 US at 691. The Court reasoned the motivation of the FCC was to designate cable providers as common carriers and questioned if the FCC had the authority to promulgate such a rule. *Id*. at 699. While addressing the main issue, the Court defined a common carrier. *Id.* at 700. The Court stated, "A common carrier service . . . . is one that 'makes a public offering to provide [communication facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their design or choosing.'" *Id*. at 701. The Court stated the regulation would take control of the content out of the hands of cable operators and required cable operators to air content produced by any member of the public who wished to use the cable medium to communicate their content. *Id.* at 700. The Court reasoned this would have made cable operators into common carriers. *Id*.

Here, the facts are dissimilar from *Midwest Video Corp*. *Id*. Unlike in *Midwest Video Corp.*, where a common carrier's facilities would be required to have access by the public to communicate their ideas or intelligence, Poster only furnishes its resources to exclusive Users who maintain accounts in exchange for a fee. Poster does not make a public offering of its accounts to provide communication facilities to all members of the public. *Id.* at 701. Poster is a subscription-based

service. R. at 2. All users have their own account, which Users can then upload different types of material to their accounts. R. at 2. User material can be downloaded for free, for purchase, or rent, depending on each user's choice. R. at 2.. In return for access to exclusive User content, Poster charges a fee to its Users who seek to establish and maintain an account and a percentage of any proceeds from rents and purchases. R. at 2.. Applying the standard from *Midwest Video Corp*, the Court must find that Poster is an exclusive service and does not readily make its accounts available to the public. 440 US 689.

Additionally, in *National Asso. of Regulatory Utility Comm'rs v. Federal Communications Com.*, the DC Circuit court of appeals held that businesses would not be considered a common carrier where its practice is to make individualized decisions, particularly in particular cases, whether and on what terms to deal. 525 F.2d at 641. In the *National Asso. of Regulatory Utility Comm'rs*, the Court confronted the problem of how to define Specialized Mobile Radio Systems (SMRS) operators either as common carriers or as typical corporations. *Id*. at 642. The difference the Court was trying to draw was a clear line between companies that hold themselves out as serving the public indiscriminately and those who serve a specific clientele or if they could select future clients on a highly individualized basis. *Id*. The Court held that SMRS were not likely to hold themselves out indifferently to the public and thus were not common carriers. *Id.* at 644.

Here Poster's case is analogous to the *National Asso. of Regulatory Utility Comm'rs* case. It details in its terms and conditions language the right to block or remove an account at any time for any reason. R. at 22. The decision to block or terminate an account is highly individualized at Poster. So much so that only two users in Poster's history have been removed or blocked. R. at 22. These actions speak directly to the definition established in *the National Asso. of Regulatory Utility Comm'rs*. 525 F.2d at 641. While it may give all users the same terms and conditions, it decides to

remove or block users on an individual case-by-case basis. R. at 22. As the facts in *National Asso. of Regulatory Utility Comm'rs* are analogous to the case here, the Court must hold that Poster does not meet this definition of a common carrier. 525 F.2d at 641.

Furthermore, Poster and its board of directors have never held themselves out as a platform where users can communicate anything and everything like a telecommunications network or mobile radio systems. Every member of Poster's board of directors is a member of the APC. R. at 37. Poster's board of directors consider their work as "an extension of its religious duty" to further the message of Christ by promoting non-aggression, peace on Earth in all they do, and by supporting artists, poets, educators, and musicians R. at 37. Poster takes steps to block content that violates their sincerely held religious beliefs consistently. R. at 37. Every user must agree to Posters terms and conditions of use, including Posters right to deny publication of any work and terminate any account for any reason Poster deems sufficient. R. at 37. Poster does not wield this power lightly as they have only exercised their right to deny publication two times in its history. In both cases, the works advocated for violent causes. R. at 37. Poster has at no point held itself out as a conduit for all speech to freely flow through, such as a phone line or a mobile radio system. They instead communicate only content that does not violate their deeply held religious convictions.

The Delmont law at issue irresponsibly treats market share as an additional diving rod in determining common carrier status. It presents the "substantial market share" test as an element and not a factor in the law's application. Delmont Rev. Stat. 9-1.120(a). The test is a crude metric for any law to measure a company buy and punish businesses for being successful even in the absence of abuses of Posters terms and conditions to unjustly silence speakers. In *Market Share Thresholds: On the Conflation of Empirical Assessments and Legal Policy Judgments*, Louis Kaplow makes the point that the Market Share threshold test is not the most accurate test to be

judging companies by but is instead a factor with other factors, including barriers of entry or the way businesses use their market power. Jnl of Competition Law & Economics (2011) 7(2): 243-276. For such a law to be upheld would be to punish the successful without cause while erroneously attaching common carrier labels to corporations, resulting in a depletion of First Amendment rights. The Court must find Poster is not a Common Carrier and invalidate the CC law.

2. The Delmont common carrier law is unconstitutional as it violates the First Amendment by compelling Poster to publish content that violates its sincerely held religious beliefs**.**

Under the Court's precedent, Poster is entitled to all First Amendment protections. The foundation of the First Amendment can be summarized as "each person should decide for themselves the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys.*, 512 U.S. at 641. The constitution does not revoke a private entity from exercising editorial discretion over speech or speakers. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1931 (2019). Any compulsion to publish content that an organization does not want to publish is unconstitutional. *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 US 241, 263 (1974). Laws that compel speakers to endorse a particular message they do not believe in are analyzed under strict scrutiny. *Turner Broad. Sys.*, 512 US at 642.

The Court in Tornillo found a Florida law requiring newspapers to give political candidates a right to reply to criticism espoused in its pages. *Tornillo*, 418 US at 244. The Florida Supreme Court had upheld the law as it "furthered the 'broad societal interest in the free flow of information to the public." *Id*. at 245. The Court found Florida's High Court's reasoning unconvincing. The Court found the politician's articles responding to criticism was a form of speech and requiring a newspaper to publish that which it "would not otherwise print" constituted government compulsion. *Id*. at 256. Such compulsion, the Court reasoned, would have negative effects on discourse as editors would instead steer clear of controversy to avoid the penalties. *Id*. at 257. The

Court also noted that the newspaper in question "is more than a passive receptacle or conduit for news, comment, and advertising." *Id*. at 258. The content the paper allows to publish or not constitutes editorial control which controls what the paper chooses to give its voice. *Id*. The compulsion of that voice to speak words it disagrees with violates the First Amendment's right to Freedom of Speech. *Id*.

Here Poster is being compelled to publish content that violates their core beliefs. R. at 19. Ms. Thornberry's book invokes a message that advocates for civic violence. R. at 21. The promotion of civic violence, much the political candidate speech in *Tornillo,* runs completely averse to Poster's belief in non-aggression. 418 US 241. Poster exercised its editorial discretion and banned the content from its website, which it had every right to do under the user terms and conditions. R. at 19. Delmont's common carrier law requires Poster to publish the offending content which it would not otherwise publish or face financial penalties. R. at 20. Compelling Poster to publish content it fervently disagrees with is forcing them to endorse a view it finds intolerable with its voice. Such a law violates the First Amendment under *Tornillo* and is subject to strict scrutiny review.

Laws that compel speakers to endorse a particular message they do not believe in are subject to strict scrutiny. Therefore, they must promote a compelling government interest, be narrowly tailored to further the government interest and be the least restrictive means to further the compelling government interest. *Turner Broad. Sys.*, 512 US at 642. Compelling government interest is "interests of the highest order or vital interests." Major (Ret.) David E. Fitzkee & Captain Linell A. Letendre, *Religion in the Military: Navigating the channel between the Religion clauses,* 59 AFL Rev. 1, 16 (2007).

Here, the Court must find no interest in the highest order or vital interest. Petitioners contend the Delmont common carrier law bolsters Freedom of Speech by placing limits on the ability of platforms to restrict speech to allow a "town square" approach to the online space. R. at 34. The law's passage was motivated by perceived reports of online platforms indiscriminately stifling viewpoints they disagree with. R. at 34. However, Delmont law is looking for wrongs that are not occurring. Nowhere in the record is the law justified by instances of indiscriminate, unjustified, or biased user bans from social media platforms. The only user or content bans the record points to are Ms. Thornberry's "Blood is Blood" book and the book titled "Murder Your Enemies: An Insurrectionists guide to Total War." R. at 21-22. Both of these works were removed as they violated the core beliefs of Poster, its board of directors, and APC. R. at 22. Poster was founded in 1998. R. at 19. Petitioners advocate for the compulsion of speech in contravention of the APC's religious convictions and limiting First Amendment rights over two justified user bans in twenty-two years. This is hardly a compelling enough interest to allow a violation of the freedom of speech.

Neither is the Delmont law narrowly tailored. The Delmont law designates platforms with substantial market share as common carriers. R. at 20. The motivation behind such a standard is based on the concern of Delmont's Governor that sites like Poster are in effect constructing barriers of entry to the market and such regulations are necessary to enable other companies to compete. R. at 35. There is nothing in the record that Poster uses any such barriers to entry or stifles competition in any way. Poster has only ever referred to the values of the APC as the formula for Poster's success. There is nothing in the record that points to this law having the desired effects it hopes to achieve. Furthermore, the statute provides no detail about the percentage of market share a company must attain for the law to kick in. The best reading of the record is that substantial

market share is whatever the governor thinks it should be when looking at competitors in the marketplace. R. 35. If a statute is narrowly tailored, it should have far more definiteness than whatever Delmont's Governor decides is a big enough number.

Therefore, since Delmont cannot point to a compelling government interest or that the law is narrowly tailored to achieve that interest, the Court must find for Poster in this case.

B. The United States Court of Appeals was correct in finding the CC Law, in requiring a corporation to promote material which is against their religion and refrain from action which their religion requires, is neither neutral nor generally applicable.

This Court should affirm the Court of Appeals' decision because the law prescribes a religious organization to promote violent material when the religious organization proscribes such material and the law proscribes using corporate funds for religious causes, which the religious organization prescribes. R. at 1-3. The First Amendment's Free Exercise Clause states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST., amend. I, XIV. The First Amendment guarantees "the right to believe and profess whatever religious doctrine one desires." *Emp. Div. Dept. of Hum. Res. v. Smith*, 494 U.S. 872, 877. (1990). Therefore, the First Amendment forbids the government from regulating religious beliefs. *Id.* Furthermore, this Court does not question the wisdom or sincerity of religious beliefs. *United States v. Ballard*, 322 U.S. 78, 86 (1944). The First Amendment gives protections to persons as well as religious organizations. *Masterpiece Cakeshop, Ltd. V. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). An individual is not relieved of complying with a neutral and generally applicable law by virtue of the right of Free Exercise. *Smith*, 494 U.S. at 879. Laws that incidentally burden religion are not required to pass strict scrutiny so long as they are neutral and generally applicable. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). A law violates the Free Exercise Clause if it proscribes conduct that a religion prescribes or if it prescribes conduct that a religion proscribes. *Smith*, 494 U.S. at 879. A law may be unconstitutional

if it is not neutral or general applicable. *Id.* If a law is not neutral or general applicable, then the law must be narrowly tailored to a compelling governmental interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-532 (1993).

It is undisputed that the Delmont legislature has not enacted a state equivalent of the Religious Freedom Restoration Act. R. at 3. Therefore, what remains to be discussed is the neutrality and general applicability of the law as well as whether the law is narrowly tailored to a compelling governmental interest.

1. The United States Court of Appeals was correct in finding that the CC Law lacked neutrality because it targeted religion and did not consider religious objections.

If a law lacks neutrality, it may be unconstitutional as against the First Amendment. *Smith*, 494 U.S. at 879. A law lacks neutrality if it is discriminatory on its face. *Lukumi*, 508 U.S. at 534. A law is discriminatory on its face if it refers to the religious practice. *Id.* A law lacks neutrality if it is carried out "in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877. Furthermore, the law cannot covertly suppress a particular religious belief. *Lukumi*, 508 U.S. at 534. If the administration of the law is done "in a selective manner that only affects conduct motivated by religious belief", the law will be found lacking neutrality. *Id.* If the government does not consider religious exemptions to the law, it is likely not neutral. *Masterpiece Cakeshop*, 138 S. Ct. at 1732. Other factors towards neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." *Id.*

If a regulation is carried out in a selective manner that affects conduct motivated by religious belief, it lacks neutrality. *Lukumi*, 508 U.S. at 534. In *Lukumi*, the state enacted a criminal

punishment for "whoever . . . unnecessarily or cruelly . . . kills any animal." *Id.* at 527. Further, the state deemed the sacrifice of animals for religious rituals as unnecessary. *Id.* This directly conflicted with the Church of Lukumi Babalu Aye's faith because ritual animal sacrifice was a sacred exercise of their religion. *Id.* at 524. This Court found that the regulation was discriminately enforced against the church because the definition made such a narrow scope that religious rituals were one of the only types of conduct prohibited. *Id.* at 535-37. Also, in *Lukumi*, this Court found that when words are used such as "sacrifice" and "ritual" in the regulation, that it points lacking facial neutrality. *Id.* at 534.The state's purpose for the regulation was to promote public health and prevent animal cruelty. *Id.* at 538. This Court found that where the regulation "proscribes more religious conduct than is necessary to achieve their stated ends" that it is impermissibly targeting religion. *Id.* Because the regulation was discriminately enforced, it referenced "ritual" and "sacrifice" in the regulation, and proscribed more religious conduct than necessary, this Court found that regulation to lack neutrality. *Id.* at 540.

The First Amendment requires full and fair consideration of religious objections when regulations conflict with religious objections. *Masterpiece Cakeshop*, 138 S. Ct. at. 1732. When determining neutrality, and whether full and fair consideration was given, this Court looks at (1) "the historical background of the decision under challenge," (2) "the specific series of events leading to the enactment or official policy in question," (3) "and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." *Id.* at 1731. In *Masterpiece Cakeshop*, the state enacted a law that prohibited a business from denying service to an individual on the basis of sexual orientation. *Id.* at 1725. Masterpiece Cakeshop honored God through their creative works. *Id.* at 1724. Because of their religion, Masterpiece Cakeshop refused to create a wedding cake for a same-sex couple, since it was against

their religion. *Id.* This Court decided that Masterpiece Cakeshop was entitled to neutral consideration of their religious objections. *Id.* at 1729. In *Masterpiece Cakeshop*, the Commission was found to have made statements during the proceeding that were hostile towards religion, by stating that a business cannot act on its religious beliefs. *Id.* at 1729. This Court ruled that because of the hostile statement towards religion in the proceeding and lack of consideration for religious objections, that the regulation lacked neutrality. *Id.* at 1732.

Here, the CC law lacks neutrality because it referenced religion, it was only enforced against Poster, and it burdened more religion than necessary. R. at 30-31. In *Lukumi* the state enacted an ordinance that referenced "ritual" and "spiritual". *Lukumi*, 508 U.S. at 527. Here, the CC law states that common carriers "shall refrain from using corporate funds to contribute to political, *religious*, or philanthropic causes" and requires the business to "serve all who seek or maintain an account, regardless of political or *religious* viewpoint." R. at 30 (emphasis added). In *Lukumi*, this Court found that the reference to "ritual" and "spiritual" pointed towards the lack of facial neutrality, *Lukumi*, 508 U.S. at 534. Likewise, this Court should find that the reference to religion indicates the lack of facial neutrality. Furthermore, in *Lukumi*, this Court found that the ordinance was being discriminately enforced against the church because it created such a narrow scope that the only conduct being punished was religious conduct. *Id.* at 535-37. Here, the CC law not only requires Poster to serve all regardless of religious viewpoint, but also prohibits Poster from using their own funds to contribute to religious causes. R. at 29. Poster is founded and ran by the APC. R. at 2. APC's religion prohibits violent conduct and requires contributing to religious causes. R. at 1-2. Like in *Lukumi*, this Court should find that taken together, the CC law is narrow in scope to punish Poster because, it not only proscribes conduct that Poster prescribes, but also prescribes conduct that Poster proscribes. 508 U.S. at 538. Because the CC law is narrow in scope

to punish Poster, it points towards non-neutrality. Further, in *Lukumi*, the interest of the state was to promote public health and prevent animal cruelty. *Id.* Here, the legislature enacted the CC law in order to promote freedom of speech and prevent online forums from favoring a particular view through monetary contributions. R. at 34-35. In *Lukumi*, this Court found that the ordinance prohibited more religious conduct than was necessary to meet the state's expressed concerns. *Lukumi*, 508 U.S. at 538. Likewise, here, this Court should find that more religious conduct is being prohibited than necessary to promote the legislature's concern of promoting speech in platforms. R. at 31-32. In doing so, the legislature prohibited corporate funding to religious causes and requires platforms to allow all speech, R. at 29. Therefore, Poster is required to promote views that violate their religion and prohibits Poster from contributing to religious causes, which is required by Poster's religion. R. at 1-2. Since, the CC law references religion, is discriminately enforced against Poster, and restricts more religious conduct than necessary to meet the legislature's concern, it is likely the CC law is non-neutral.

Furthermore, the CC law lacks neutrality because the legislature did not consider religious objections to the regulation, and the regulation was enacted to be used against Poster after Poster lobbied against the enactment of the law. R. at 3. In *Masterpiece Cakeshop*, the business refused to serve a same-sex couple because it was against the business's religion. 138 S. Ct. at. 1725. This act was in violation of a law enacted by the state. *Id.* at 1726-27. This Court ruled that Masterpiece Cakeshop was entitled to the consideration of their religious objections when the law was being enacted. *Id.* at 1729. Here, the CC Law requires Poster to promote views that are against their religion while prohibiting Poster from donating corporate funds to religious causes, which their religion requires. R. at 1-2. In *Masterpiece Cakeshop*, the legislature never considered religious objections to the act. *Masterpiece Cakeshop*, 138 S. Ct. at. 1729. Here, there is nothing in the

record that shows the legislature considered religious objections to the CC law. Therefore, like in *Masterpiece Cakeshop*, this lack of consideration points towards non-neutrality. *Id.* Furthermore, when determining neutrality, this Court considers: (1) "the historical background of the decision under challenge, (2) "the specific series of events leading to the enactment or official policy in question", and (3) the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." *Id.* at 1731. In *Masterpiece Cakeshop*, when the Commission was reviewing the case, the Commissioner made comments that were hostile towards religion by stating that a business could not act on its religious beliefs. *Id.* at 1729. Here, the Attorney General specifically identifies APC as the founder of Poster, when the Attorney General was deciding to bring an action against Poster. R. at 23. Furthermore, before the CC Law was enacted, Poster heavily lobbied against it. R. at 3. Moreover, the CC Law was first enforced against Poster. R. at 31. In *Masterpiece Cakeshop*, this Court found that the hostile comments showed that the act lacked neutrality. 138 S. Ct. at. 1732. Likewise, here, this Court should find that because the law was used to punish Poster first, after Poster heavily lobbied against, and because the Attorney General specifically identified APC when deciding to bring action against Poster that the CC Law lacks neutrality.

Therefore, this Court should find that the CC Law lacks neutrality because it references religion, is discriminately enforced against Poster, restricts more religious conduct than necessary, religious objections were never considered, and was used to punish Poster after Poster heavily lobbied against it.

2. The United States Court of Appeals was correct in finding that the CC Law lacked general applicability because the law gives the Attorney General discretionary power that can be used to negatively impact religion**.**

If the law is not generally applicable, then it must pass strict scrutiny. *Lukumi,* 508 U.S. at 531-32. If the government uses the law to selectively impose burdens on religious conduct, then it lacks general applicability. *Id.* at 542-43. A law lacks general applicability if it burdens religious conduct while allowing other comparative secular conduct. *Id.* at 543. If a law allows "the government to consider the particular reasons for a person's conduct by providing individualized exemptions", it lacks general applicability. *Fulton,* 141 S. Ct. at 1877. If the government is granted the authority to determine which reasons do not have to comply with a policy, then, regardless of whether exceptions have been granted, the regulation is not generally applicable. *Id.* at 1879.

A law lacks general applicability if it burdens religious conduct while allowing other comparative secular conduct. *Lukumi,* 508 U.S. at 543. In *Lukumi,* the government prohibited the unnecessary kill of animals. *Id.* at 527. This regulation directly conflicted with the church's view because ritual animal sacrifice was a sacred practice in their religion. *Id.* at 524. During a review, the Commissioner stated that religious rituals constituted unnecessary conduct. *Id.* at 527. However, the ordinance provided for many activities which constituted necessary conduct. *Id.* at 537. The regulation was enacted to promote public health and prevent animal cruelty. *Id.* at 538. This Court found the regulation was substantially underinclusive because it allowed non-religious conduct that endangered the government's interests. *Id.* at 543. This Court ruled that the regulation was not generally applicable because it allowed conduct that was contrary to the governmental interest while imposing restrictions on religion to promote the interests. *Id.* at 545.

If the regulation allows for the government to determine which reasons do not have to comply with the regulation, then the regulation is not general applicability, regardless of whether any exceptions are issued. *Fulton*, 141 S. Ct. at 1879. *Fulton* involved a foster care agency that was conducted by the Catholic Church. *Id.* at 1874. The foster care agency refused to certify same-sex couples as foster parents because of their religious objections. *Id.* at 1875. Because of the non-discrimination laws in place, the government decided to no longer refer children to the Catholic foster care agency unless the agency agreed to certify same-sex couples. *Id.* at 1875-76. The regulation required that services not be prohibited to families based on sexual orientation. *Id.* at 1878. The regulation gave the Commissioner the sole discretion to grant exceptions to the regulation. *Id.* This Court found that because the Commissioner was given sole discretion to grant exceptions, it allowed the government to decide which reasons were worthy of exception and lacks general applicability, regardless of whether any exceptions were allowed. *Id.* at 1879.

Here, the regulation allowed for secular conduct that harmed the governmental interest, while prohibiting religious conduct. When a law is used to burden religious conduct while allowing comparative secular conduct, it lacks general applicability. *Lukumi*, 508 U.S. at 543. In *Lukumi*, the regulation prohibited the unnecessary killing of animals. *Id.* at 527. Upon review, the Commissioner ruled that religious rituals constituted unnecessary conduct. *Id.* The regulation directly conflicted with the church's religious beliefs because ritual animal sacrifice was a sacred practice in their religion. *Id.* at 524. Here, the CC Law requires platforms that are deemed common carriers to "serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint". R. at 3. Also, the CC Law prohibits such platforms from contributing to "political, religious, or philanthropic causes." R. at 3. Like in *Lukumi*, this regulation directly conflicted with religious beliefs. Here, the APC's religious belief prohibits violence and requires

supporting artists, poets, educators, and musicians in order to promote peace. R. at 1, 37. In *Lukumi*, the governmental interests were to promote health and prevent animal cruelty. *Lukumi*, 508 U.S. at 538. Here, the governmental interest is to allow Freedom Of across the platforms and prevent the platforms from favoring one viewpoint over another through monetary contributions. R. at 34-35. In *Lukumi*, the government allowed many secular activities that constituted necessary conduct. *Lukumi*, 508 U.S. at 537. Here, the CC law only applies to political, ideological, and religious viewpoints for their freedom of speech concern, and only applies to political, religious and philanthropic causes for their donation concerns. R. at 3. In *Lukumi*, this Court found the great number of exceptions to the regulation made the regulation underinclusive because the non-religious conduct endangered the government's goals the same as the religious conduct. *Lukumi*, 508 U.S. at 543. Here, the regulation only applies to discrimination based on political, ideological, and religious viewpoints, as well as contributing to political, religious and philanthropic causes. R. at 3. Only applying the regulation to these categories of viewpoints and causes permits discrimination of other viewpoints and causes. Because the regulation permits a broad range of discrimination, it is likely that the governmental interests of promoting free speech and preventing the favoring of viewpoints will not be met. Therefore, like in *Lukumi*, this Court should find that the regulation is underinclusive, and lacking general applicability, because it does not prohibit secular activities that would endanger the governmental interests the same as the religious activities.

Furthermore, the regulation lacks general applicability because it grants the Attorney General the sole discretion to determine what a significant market share is and allowed the Attorney General to inquire into the reasons behind Poster's conduct. R. at 32. When the regulation grants the government sole discretion on creating exceptions, and grants those exceptions or

disallows them, after considering the reasons for particular conduct, then regardless of whether any exceptions were allowed, the regulation lacks general applicability. *Fulton*, 141 S. Ct. at 1879. In *Fulton*, the foster care agency was managed by the Catholic Church. *Id.* at 1874. The regulation required the foster care agency to refrain from denying services to families based on sexual orientation. *Id.* at 1878. This directly conflicted with the agency's religion, and when the religion refused to certify same-sex couples, the government sought sanctions. *Id.* at 1875-76. Here, the regulation prohibits omitting viewpoints from platforms based on political, ideological, or religious viewpoints. R. at 3. It further prohibits contributing funds to political, religious, or philanthropic causes. R. at 3. The APC, who founded Poster, prohibits violence and requires contributing to the community in order to promote peace. R. at 1, 37. Therefore, like in *Fulton*, the regulation directly conflicts with the religious beliefs of the organization. In *Fulton*, the regulation granted the Commissioner sole authority to grant exceptions to the regulation. *Fulton*, 141 S. Ct. at 1878. Here, the Attorney General was granted discretion to determine when an organization falls under the control of the CC Law. R. at 32. In *Fulton*, this Court found that by granting sole discretion in the Commissioner to grant exceptions, the government was allowed to decide which reasons were worthy of exception, therefore making the regulation lacking general applicability, even when an exception was never granted. *Fulton*, 141 S. Ct. at 1879. Here, before deciding that Poster fell within the scope of the CC Law, the Attorney General 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 . . . ." R. at 32. This shows that the Attorney General considered the religious reasons of Poster when deciding that Poster was under the scope of the CC Law. Like in *Fulton*, this Court should find that because the Attorney

General was using his discretion to determine which reasons were worthy, even though no exceptions were rendered, such as in *Fulton*, this discretion amounted to non-general applicability.

Because the CC Law allows for many secular activities that endanger the governmental interests the same as the religious activities and because the Attorney General used his discretion in determining what reasons were worthy of exceptions, the CC Law lacks general applicability.

3. The CC Law does not pass strict scrutiny because it is not narrowly tailored since there are less restrictive means to accomplish the government's interests**.**

If the regulation is neither neutral nor general applicable, then it must pass strict scrutiny. *Agudath Isr. v. Cuomo*, 983 F.3d 620, 631 (2nd Cir. 2020). When strict scrutiny applies, the regulation is only constitutional if it is narrowly tailored to a compelling governmental interest. *Id.* at 633. A compelling governmental interest is one of the highest order. *Wis. v. Yoder*, 406 U.S. 205, 215 (1972). Narrow tailoring requires the government to prove that the means used are the "least restrictive" means. *Agudath Isr.*, 983 F.3d at 632. In order to meet the definition of narrow tailoring, the government must show that means that would impose a lesser burden upon religious liberty would not meet the governmental interest. *Id.* The fact that the means used are easier to achieve the compelling governmental interest is not enough to meet the narrowly tailored requirement. *Id.* It is not contested that the governmental interests, here, are compelling.

In order to meet the requirement of narrowly tailored, the government must use the least restrictive means available. *Id.* at 632. In *Agudath*, the regulation limited the number of people that could be assembled in "houses of worship", but did not impose such restrictions on places the government deemed essential. *Id.* at 624. The government decided that businesses that are required in order to "maintain health, welfare, and safety" are deemed essential. *Id.* at 626. The court found that the executive order was neither neutral nor general applicable, and thus strict scrutiny applied. *Id.* at 630. The court found that stopping the spread of COVID was a compelling interest. *Id.* at

633. The governor never contended that the executive order was narrowly tailored. *Id.* The court found the governor did not point to any outbreaks throughout the church, and did not show how restricting the limit of people in church endangered the governmental interest more than the activities which the government allows. *Id.* The court also found that the governor must show why generally applicable restrictions would not meet the governmental interests. *Id.* at 634. Because the government failed to show that less restrictive means that would burden religious liberty less would not meet the governmental interest, the court found it was not narrowly tailored. *Id.*

Here, the CC Law is not narrowly tailored to the governmental interest of prohibiting favoring a viewpoint because the government failed to provide how less restrictive means would endanger the governmental interest. R. at 34-35. In order to meet the requirement of being narrowly tailored, the government must use the least restrictive means. *Agudath*, 983 F.3d at 632. The government must show that imposing a lesser burden on religion would endanger the governmental interest. *Id.* In *Agudath*, the government enacted a regulation which limited the amount of people that could congregate in "houses of worship", but had no restrictions on what it deemed as essential businesses. *Id.* at 624. Here, the CC Law requires platforms to "serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint." R. at 3. The CC Law also requires the platforms to "refrain from using corporate funds to contribute to political, religious, or philanthropic causes." R. at 3. Like in *Agudath*, where the court found that strict scrutiny applied because the regulation was neither neutral nor generally applicable, *Agudath*, 983 F.3d at 630. Here, strict scrutiny applied because the CC Law is neither neutral nor generally applicable. In *Agudath*, the court found that the regulation was not narrowly tailored because the governor failed to show how means that imposed a lesser burden on religious liberty would fail to achieve the governmental interest. *Id.* at 634. Here, there is nothing in the record stating the government

considered means that are a lesser burden on religious liberty. Further, the regulations only apply to the categories of political, religious, philanthropic, and ideological viewpoints. R. at 3. Like in *Agudath*, here the government does not show why a regulation requiring the promotion of all viewpoints or not promoting viewpoints was not considered. Like in *Agudath*, it is likely that allowing discrimination on other viewpoints would endanger the governmental interests. Therefore, like in *Agudath*, this Court should find the CC Law is not narrowly tailored since it fails to show how a lesser burden on religious liberty would fail the governmental interest.

CONCLUSION

Therefore, the Court of Appeals was correct in determining Delmont's CC Law violated Poster's First Amendment rights under the Constitution. Additionally, the Court of Appeals was correct because the CC Law was neither neutral nor generally applicable. Furthermore, the CC law does not pass strict scrutiny. Therefore, this Court should affirm in part with regards to the freedom of religion issue.

CERTIFICATE OF COMPLIANCE

Team 22 certifies the following:

1. The work product contained in all copies of this team's brief is in fact the work product of the team members.
2. This team has complied with their school's governing honor code.
3. This team has complied with all Rules of the Competition.

Team 22

Counsel for Respondent