C.A. 21-CV-7855

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 RESPONDENT

Counsel of Record

Team 026

QUESTION PRESENTED

1) Whether the Court of Appeals for the Fifteenth Circuit erred in concluding that Delmont's Common Carrier Law, § 9-1.120, was an unconstitutional restriction on Poster's First Amendment right to engage in editorializing and donate its money freely to philanthropic causes; and
2) Whether the Court of Appeals for the Fifteenth Circuit erred in finding that the Common Carrier Law, specifically targeting Poster and forcing the company to publish speech that violates its religious beliefs, is neither neutral nor generally applicable and is therefore unconstitutional.

Suggested answer: No.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

STATEMENT OF JURISDICTION

The Fifteenth Circuit Court issued a final judgement. This court has jurisdiction pursuant to 28 U.S.C. § 1254.

CITATIONS TO CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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

Internet platforms with "substantial market share" are common carriers and "shall serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint" and "refrain from using corporate funds to contribute to political, religious, or philanthropic causes." Delmont Rev. Stat. § 9-1.120(a)

STATEMENT OF THE CASE

Founded in 1998, the digital self-publishing platform Poster is run by members of the American Peace Church, a 100-year-old Protestant denomination. R. at 2. The American Peace Church (herein APC) believes in non-aggression and pacifism. Id. To diffuse these values to beyond of its followers, the APC supports secular and religious artistic and literary works, believing that through learning and cultural development, society can become more benevolent. Id. One of its earliest philanthropic efforts was the establishment of lending libraries in poor communities. Id. Consistent with the philanthropic traditions of the APC, the directors of Poster, members of APC themselves, donate fifteen percent (15%) of all its profits to continued educational and cultural efforts. R. at 3. All of Poster's board of directors see their work as extensions of their religious duties. Poster also provides discounted publication services to APC members who publish their work through Poster. Id. Although religiously affiliated, Poster is open to a host of different viewpoints. Its user interface and other features have led it to capture seventy-seven percent (77%) of the self-publishing market. R. at 2.

Poster has only ever banned a work twice and in both instances the titles went against APC's pacifistic beliefs. One of which is Mrs. Thornberry's novel, the work at issue in this case. R. at 5. Mrs. Thornberry has had an account with Poster since 2018 and used it to self-publish her novel *Animal Pharma*. R. at 3 Before anyone can create an account on Poster, they are required to agree to Poster's terms and conditions, which allow Poster to block or remove an account for anytime or for any reason, and Mrs. Thornberry is no exception to that requirement. R. at 2. Having consented to Poster's terms, Mrs. Thornberry decided to attend a three-day animal rights rally in Capital city. R. at 4. This rally at times degenerated into a riot, with cars burned, passersby assaulted, and police officers attacked. Id. TV footage of the rally shows

groups at the three-day rally shouting the mantra "blood is blood," a phrase used by radical animal rights groups whose other mantra is "blood is blood or blood *for* blood." R. at 5. During her time at the rally, on the same day as violent altercations between the rallygoers and the public, Mrs. Thornberry posted an update to Poster and other social media accounts. R. at 4. She changed the title of her novel from *Animal Pharma* to *Blood is blood*. Id. Poster considered this title violative of their pacifist values and consequently banned the account until Mrs. Thornberry changed it. Id.

This is where the State of Delmont steps in. The Governor of Delmont ran on a campaign promise of taking private social media platforms and turning them into digital public "town squares." R. at 34. As Governor, he led the passage of the law at issue in this case, Delmont statute §9-1,120(a), which designates digital internet platforms with "substantial market share" as common carriers and requires qualifying platforms to "serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint" and subjects them to daily fines if they fail to do so. R. at 35 The Delmont Attorney General has sole discretion when determining who to penalize under the Common Carrier Law (herein CC Law). The State of Delmont took action against Poster, asserting the platform was discriminating against Mrs. Thornberry based on her political viewpoints. This action amounted to the first, and only time on record, that the statute has been enforced. R. at 6.

Poster in turn sought a declaratory judgment in federal district court, contesting its status as a common carrier and asserting that the law violated Poster's First Amendment rights. Id. The district court granted the State of Delmont's summary judgment motion. R. at 16. The Fifteenth Circuit reversed, holding the statute violated Poster's First Amendment rights and was therefore unconstitutional. R. at 33. A writ of certiorari was filed and granted by this court.

SUMMARY OF ARGUMENT

The First Amendment, among other things, protects the peoples' right not to host speech with which they disagree. The right not to host speech is critical in ensuring that the promises, of the First Amendment, true freedom of the mind, can be fully realized. The concept of editorializing, making decisions on whether and what to publish, is similarly protected. The CC Law operates to infringe on these rights. It forces a private company to open up its private property and host speech it would otherwise not host. It prevents Poster from making editorial decisions on what to include on its site. Under the appellation "common carrier" it destroys any notion of the freedom of the mind. For Poster, this is especially damaging. Poster was founded by members of a church who believe that diffusing educational and cultural works can lead to a more benevolent and moral world. Under Delmont's new law, their hopes are dashed, and they must sit by, powerless to use their platform as a force for good.

Furthermore, the CC Law completely disregards Poster's free exercise rights. The CC Law does not survive the neutral and generally applicable standard. First, the law is not neutral because the elected official who created the law did so with Poster in mind. Second, the law is not generally applicable because the Attorney General has sole discretion to single Poster out and force the company to make the impossible decision between practicing its faith or being excessively fined. However, the neutral and generally applicable standard does not apply in the present case because the Delmont Law invokes multiple rights, i.e. hybrid rights, thus triggering a strict scrutiny analysis. Delmont fails to demonstrate how the law is narrowly tailored to satisfy a compelling interest. Finally, the present case demonstrates the unworkability and desperate need to overturn the neutral and generally applicable standard.

ARGUMENT

Introduction

In many ways, the Delmont Law is a remarkable reminder of why the Founders were right that fundamental liberties would be in jeopardy without a Bill of Rights. The Delmont law's express intent was to commandeer private digital platforms to create a 'public square' in the digital world. Its application to Poster has stripped a 100-year-old Protestant Denomination of a venerable tradition of promoting art and literature and bringing enlightening works to its members and the broader public. Poster, through its board of directors who see their work as an extension of these traditions and religious duties, is unconstitutionally limited by Delmont's interference with its basic and fundamental free exercise rights. Now, under the watchful eye of the State of Delmont, members of the APC must sit by and open their platform to individuals who speech they believe antithetical to their most fundamental religious values. Delmont's CC Law patently ignores American traditions and ideals that date back to the founding of the country. Just as the Founders travelled across the ocean in search of a space to practice their religion without targeted government intervention, Poster comes before this Court to do the same. The State of Delmont's attempt to foster a 'digital town square' where all citizens could speak freely has ironically trampled on Poster's First Amendment rights and kicked them out of the square entirely.

I. The First Amendment protects a private person's right not to host speech on their own property.

The First Amendment to the Constitution prohibits Congress from making any law abridging the freedom of speech. U.S. Const. amend. I. The Fourteenth Amendment applies the

First Amendment to the States. Gitlow v. New York, 268 U.S. 652, 666 (1925). Now, in a post-Gitlow world, both Congress and state governments are bound to honor the guarantees of liberty enshrined by the First Amendment.

But the First Amendment does more than protect our right to speak. As this court noted in Wooley v. Maynard, the First Amendment really protects freedom of the mind. Wooley, 430 U.S. 705, 714 (1977). As such, in order to truly guarantee the freedoms of the First Amendment, the First Amendment also protects a concomitant right to *not* speak. Id. It was this foundational principle which led this Court in Wooley to hold unconstitutional a New Hampshire state statute requiring individuals to carry the state motto on their license plate. Id. at 717. By forcing an individual to display on their private property a message they found antithetical to their religious and political beliefs, the State "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." Id. at 715 (quoting Board of Education v. Barnette, 319 U.S. 624, 633-634 (1943)).

A. Corporations have an equal right not to be forced to speak.

Just like the individuals in Maynard, corporations also have protected speech rights under the First Amendment. They have the right to speak just as an ordinary citizen does. First Nat'l Bank v. Bellotti, 433 U.S. 765, 783 (1978) ("We thus find no support in the First or Fourteenth Amendment [. . .] for the proposition that speech [. . .] within the protection of the First Amendment loses that protection simply because its source is a corporation [. . .]"). Corporations also have the right not speak. *See* Pacific Gas & Electric v. Cal. Pub. Util. Comm, 475 U.S. 1, 9 (1985) (holding unconstitutional a California PUC order compelling third-party access to PG&E's newsletter; forced access "[. . .] both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set.").

B. The same First Amendment protections apply to individuals and corporations on the internet.

This court has also made clear that the same level of First Amendment protection applies to speech online as it does in the physical world. In Reno v. ACLU, this court dealt with the constitutionality of two statutes of the Communications Decency Act which made it a felony to knowingly transmit obscene or indecent messages to any recipient under 18 years of age. Reno, 521 U.S. 844, 859 (1997). One argument advanced by the government for upholding the constitutionality of these statutes under the First Amendment was that other communication mediums, like broadcast media, had been subjected, constitutionally, to similar regulations. *See* Id. at 866-67. The court, however, refused to qualify the level of First Amendment protection afforded to speech in the digital medium, finding that no characteristics of the internet justified a heightened level of government regulation. Id. at 870. ("We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.").

The State of Delmont then, through its newly enacted law designating social media platforms as common carriers is doing what the First Amendment prohibits: the CC Law is forcing Poster to host speech it would otherwise not have on their property. That this forced access is done through an online platform rather than through a newspaper or newsletter, does not matter. The First Amendment prohibits such coercion absent a compelling government reason, just as it prohibits the State of New Hampshire from requiring citizens to bear the state motto on their license plate, and just as it prohibits rules requiring PG&E's newsletter to include unwanted speech from third parties.

C. Poster also has a protected First Amendment right to engage in editorializing

The Delmont statute does not just unconstitutionally force Poster to host speech it would otherwise choose not to host, it also unconstitutionally restricts their right to engage in editorializing. This court established editorializing as a key freedom of the First Amendment when it held in Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo that a Florida Statute requiring a right-of-reply for political candidates whose personal character or record was attacked by any newspaper was unconstitutional. Tornillo, 418 U.S. 241, 244 (1974).[1]

The solution, enforced access statutes that impose "fiduciary obligations" on newspapers which in turn act as "surrogates for the public." Id. Whatever validity these concerns may have held, however, any governmental coercion to create an enforceable right of access brings about a confrontation with the First Amendment. Id. at 254. The right-of-reply statute simply went too far, operating as a command in the same way a statute would that forbid a newspaper from publishing certain material. Id. at 256. The choice of material to go into a newspaper and its treatment of candidates for public office, whether fair or unfair, constituted exercises in editorial judgment, and the First Amendment protects such judgment. Id. at 258.

But Poster is not a newspaper. Poster is an internet platform that allows individuals, in exchange for a fee, to self-publish their works. All true, but under this court's jurisprudence,

[1] Before the court, the electoral candidate and other defenders of the law argued that fundamental technological changes in the communications network justified governmental obligations to ensure newspaper access to all individuals. Id. at 250-251. They argued that consolidation of the newspaper industry into huge media empires meant the power to influence public opinion was in the hands of a concentrated few and that the consequence was a homogenizing of editorial opinion, commentary, and analysis. Id. ("The First Amendment interest of the public in being informed is said to be in peril because the "marketplace of ideas" is today a monopoly controlled by the owners of the market."). Even worse, the means available to dissatisfied citizens in 1791, to start a new newspaper, was now economically impossible. Id.

editorial discretion applies to more than only newspapers. In FCC v. League of Women Voters, this court struck down a rule forbidding any noncommercial education broadcasting station which received a grant from the Corporation for Public Broadcasting from engaging in editorializing. League of Women Voters, 468 U.S. 364, 402 (1984) In the context of cable television, this court determined that cable programmers engaging in the selection of speech were exercising editorial discretion over which stations and programs to include in its repertoire. Turner Broad. Sys. v. FCC, 512 U.S. 622, 636 (1994). ("There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."). More broadly, this court recognized that something analogous to editorial discretion was present in Hurley v. Irish-American Gay when it held that organizers of a parade are engaging in protected expressive speech when they determine who may and may not participate. Hurley, 515 U.S. 557, 569-570 (1995).

D. Poster, like other digital media platforms, exercises protected editorial discretion by providing a personalized user experience.

In the context of digital media platforms, multiple courts have noted that these platforms are engaged in protected editorial discretion when they act to provide a personalized user experience. *See* NetChoice, LLC v. Moody, 2021 U.S. Dist. LEXIS 121951 at *27-29 (acknowledging that a social media platform exercise editorial judgment in providing personalized content management, thus subjecting a statute dictating how platforms may arrange speech on their sites to strict scrutiny); Isaac v. Twitter, 2021 U.S. Dist. LEXIS 163399, at *17 (S.D. Fla. Aug. 30, 2021) (Twitter has "First Amendment right to decide what to publish and

what not to publish on its platform") (citation omitted); Davison v. Facebook, Inc., 370 F. Supp. 3d 621, 629 (E.D. Va. 2019) ("Facebook has, as a private entity, the right to regulate the content of its platforms as it sees fit."), aff'd, 774 F. App'x 162 (4th Cir. 2019); La'Tiejira v. Facebook, Inc., 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017) (Facebook has "First Amendment right to decide what to publish and what not to publish on its platform"); *see also* Publius v. Boyer-Vine, 237 F. Supp. 3d 997, 1008 (E.D. Cal. 2017) ("Hoskins has a First Amendment right to distribute and facilitate protected speech on [his] site.").

Poster, like other social media platforms, engages in editorializing to provides its users with an experience which makes the platform so popular. One important component of its user experience is its promotion of APC-affiliated messages and works. These promotional works reflect Poster's editorial judgment to make their platform a place to practice and spread the central tenets of the American Peace Church. Like other digital platforms, it only allows users on the platform after agreeing to its terms and conditions. Those would-be authors that refuse to agree or whose works violate the terms and conditions are removed. Its terms expressly reserve Poster's right to engage in editorial discretion. R. at 2. Although it is true, as the District Court below pointed out, Poster has not taken a similar action except in one other instance, there is no "use-it-or-lose-it" theory of constitutional rights which makes this point relevant

Further, the notion that social media platforms do not exercise editorial judgment is undercut by the stated motivation of the Governor in passing the law. In his deposition, the Governor of Delmont stated: "While campaigning [. . .] I advocated for reforms to prevent online platforms from stifling viewpoints that they disagreed with by denying access to their forums and marketplaces." R. 34. Delmont cannot seriously argue digital media platforms do not engage in

editorializing when its stated intent for the passing the law was to stop what they believe was biased editorializing.

Under Delmont's new law, Poster is required to serve all "regardless of their ideological, political, and religious viewpoint." Let us take a moment to understand what obligation that imposes upon a platform founded, owned, and run by members who believe their religion compels them to pacifism. What about a work that plainly denigrates the APC, mocks their values, and laughs at the notion of a peaceful God? Arguably that expresses a religious and political viewpoint. What about a work that advocates for the immediate extermination of all or some ethnic or political group? There is a political and ideological viewpoint in that as well. The list of works this law would require Poster to host is only limited by mankind's collective ability to express evilness, which, if there's a limit to that list, it has yet been found.

E. The CC law is content-based and fails under a strict scrutiny analysis.

Moreover, any editorial action Poster does take will be scrutinized by government censors to determine whether the action was motivated the work's religious, ideological, or political viewpoint. This requirement amounts to a content-based restriction which the State of Delmont simply cannot justify.

A law is content based when it targets speech based on its communicative content. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018). Content-based laws are presumptively unconstitutional and are justified only when they are narrowly tailored to serve compelling state interests. Id. This court just a few years ago struck down municipal ordinances which subjected the types of signs people may display outdoors to different restrictions based on the content of the type of information they convey. Reed v. Town of Gilbert, 576 U.S. 155, 159 (2015). The Town of Gilbert subjected "ideological signs" "political

signs" and "Temporary Directional Signals relating to a qualifying event" to more stringent requirements than other signs. Id. at 159-60. These laws were content based on their face because the laws application depended upon entirely the communicative content of the sign. Id. at 164. Laws that are content based on their face must survive strict scrutiny. Id.

The CC Law requires platforms to serve individuals regardless of their ideological, political, or religious viewpoint. Delmont Rev. Stat. § 9-1.120(a). To determine whether the statute has been violated, the State of Delmont must first determine whether Poster's editorial decision was done because of a political, ideological, or religious viewpoint. Just like the ordinances in Gilbert, the CC law depends entirely on the communicative content of the work. To comply with the law, Poster must first ask whether the work expresses a political, ideological, or religious viewpoint. Thus, the law is facially content-based and must survive strict scrutiny.

Strict scrutiny requires that a law can only stand if the "restriction furthers a compelling interest and is narrowly tailored to achieve that interest." Id. at 171. In the first place, the State of Delmont has advanced no compelling interest for the law. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 749 (2011) (noting that it is not a legitimate government interest to "level the playing field" by restricting the speech of some in order to enhance the speech of others.). Secondly, this law is simply not narrowly tailored. One element of the deciding whether a law is narrowly tailored is to ask whether there are less restrictive means that will accomplish the same end. Ashcroft v. ACLU, 542 U.S. 656, 666 (2004). In this instance, the answer to that question is an easy yes. Just as the State of Delmont has built physical parks and town squares for the free, and constitutionally protected, expression of ideas, so could it build a digital town square, an online, government platform which all citizens are free to use and use

with First Amendment protection. Instead turning private property into public squares, the State of Delmont ought to make the public square themselves.

F. Designating Poster as a 'common carrier' does not significantly change the First Amendment Protections afforded to it.

The State of Delmont, in an effort to circumvent the constitutional protections afforded digital media platforms like Poster, and knowing that the law cannot survive strict scrutiny, labels them a common carrier. What that precisely does to Poster's First Amendment rights has not yet been answered by this court, but several cases suggest that the appellation 'common carrier' is not determinative of speech rights, but rather the definitive question is whether the particular actor so designated could be seen as engaging in speech rather than merely transmitting it. Before the First Amendment even comes into play, there must be an intent to display a particularized message. Texas v. Johnson, 491 U.S. 397, 404 (1989). This principle is critical to understanding why First Amendment jurisprudence as it relates to common carriers is unclear.

The intent to communicate a message was important to the D.C. Circuit when it upheld an FCC order reclassifying broadband service as common carriage and requiring that broadband providers treat all internet traffic the same regardless of source. *See* United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016). A broadband provider, Alamo, argued that the FCC's order violated its First Amendment rights. Id. at 739. In rejecting their argument, the D.C. Circuit highlighted multiple reasons why their First Amendment argument was unpersuasive. First, the order itself only applied to broadband providers which held themselves out holding themselves as neutral indiscriminate providers of content, i.e., they promised users that they provided no

editorial filtering. Id. at 743. (The court also noted that "If a broadband provider nonetheless were to choose to exercise editorial discretion—for instance, by picking a limited set of websites to carry and offering that service as a curated internet experience—it might then qualify as a First Amendment speaker."). Second, the very nature of indiscriminate access means that a user of the service was unlikely to believe the content provider is intending to communicate any expressive message when it provided neutral access to the content the user accessed. Id. at 743-44. (Again the D.C. Circuit noted, "if it were otherwise—if the accessed content were somehow imputed to the broadband provider—the provider would have First Amendment interests more centrally at stake.").

Thus, in order to determine whether a common carrier could be required to serve as a neutral and equal provider of speech, one must first answer determine whether a) the entity is intending to communicate any message, and b) whether the end user would understand the content provider to be expressing a communicative message. These principles underscore the lower Circuit Court's ruling that Poster's decision to suspend Mrs. Thornberry's work is entitled to First Amendment protection. Record at 28 (Poster's exercise of editorial discretion to promote its own and other APC member content means "Poster functions as a speaker in its own right."). It also underpins much of the case law upholding digital media platform's First Amendment rights. *See* NetChoice, LLC v. Moody, 2021 U.S. Dist. LEXIS 121951 at *20 (noting that digital media platforms arrange content in ways intending to make it useful or desirable and also add their own content); E-ventures Worldwide, LLC v. Google, Inc., 2017 U.S. Dist. LEXIS 88650 at *11-12 (M.D. Fla. Feb. 8, 2017) (Google's actions in formulating rankings for search engines are the same as those made by a newspaper editor regarding which content to publish). While it is true that a digital media platform like Poster exercises its editorial discretion differently than a

newspaper or cable broadcaster, that doesn't mean Poster isn't trying to express any message. *See* Hurley v. Irish-American Gay, 515 U.S. 557, 569 (1995) ("[. . .] the Constitution looks beyond written or spoken words as mediums of expression.").

Additionally, although certain communication mediums have been subjected to greater government regulation regarding compelled access, these rules were upheld because of the medium's unique physical characteristics that limited how much speech it could physically hold. As noted by this court in Reno v. ACLU, broadcast media, for example, had certain characteristics which justified greater regulation of speech on that medium. Reno, 521 U.S. 844, 868 (1997) (citing broadcasting's history of extensive regulation, the physical scarcity of available channels, and its invasive nature.). No such physical characteristics justify similar regulation in the cyberworld. Id. at 870.

II. The CC Law unconstitutionally prevents private companies like Poster from participating in the free exercise of religious beliefs and violates the First Amendment.

Even if this Court does not find that the statute unconstitutionally restrict Poster's freedom of speech rights, the CC Law still violates the free exercise clause of the First Amendment. The Religious Freedom and Restoration Act of 1993 (herein "RFRA") only applies to federal statutes, not state statues. 42 U.S.C. §§ 2000bb, et seq. The State of Delmont has not adopted an equivalent to RFRA. R. 3. Therefore, an analysis under the Free Exercise Clause is appropriate. The First Amendment, incorporated through the Fourteenth Amendment, states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST., amend. I; *see* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

Under a Free Exercise analysis, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876 (2021) (*quoting* Thomas v. Rev. Bd. Of Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981). Current free exercise analysis begins with the neutral and generally applicable test developed in Unemployment Division v. Smith where the Court upheld the government's denial of unemployment benefits to Native Americans after they were fired for smoking peyote during a religious ceremony. Smith, 450 U.S. 707 (1981). The CC Law does not survive a neutral and generally applicable analysis. However, this analysis would be completely inappropriate because the Smith case triggers hybrid rights through the First Amendment's free exercise clause, freedom of speech clause, and establishment clause. Id. at 882. Even though Smith remains good law, recent precedent demonstrates that the neutral and generally applicable test is unworkable and should be overturned.

A. The CC Law is not neutral and generally applicable because the statute targets Poster's religious beliefs.

The Circuit Court correctly held that the CC Law does not satisfy the Smith test and its lineage. Under the facially neutral and generally applicable standard, the first step is to look at whether the law is facially neutral. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993). Language can be more discrete and still violate the facially neutral test. A "subtle departure from neutrality" and "covert suppression of particular religious beliefs" violate the First Amendment's free exercise clause. Lukumi, 508 U.S. at 534.

The CC Law mandates that a platform with significant market share "shall serve all who seek or maintain an account, regardless of political or religious viewpoint." Delmont Rev. Stat. § 9-1.120(a). Once designated as a common carrier, a privately owned, large digital platform "shall refrain from using corporate funds to contribute to political, religious, or philanthropic causes." Delmont Rev. Stat. § 9-1.120(a). At a cursory glance, the CC Law may seem facially neutral. However, a closer analysis of the actual language in the law, the legislative intent, and the law's application demonstrates how the CC Law targeted Poster for its religious beliefs. In Lukumi, the Court determined that a city council's ordinance forbidding a Santeria Church from using animals in religious sacrifices. *See* Id. The Court looked at direct and circumstantial evidence to determine the city council's objectives while writing the law and held that the ordinance did not survive the neutral and generally applicable test. Id. The Court determined that the "historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and legislative or administrative history, including contemporaneous statements made by members of the decision-making body." Id.

Historically, APC supported both religious and secular artistic and literary works. APC's founders were poets, educators, and musicians who sought to promote peacebuilding through education and cultural development. All of Poster's Board members are also APC members. R. 37. Each Board member considers Poster's work as an extension of their religious duties. Id. The District Court not only ignores Poster's relevant history, but also the CC Law's history. Governor Louis F. Trapp explained that the CC Law stemmed from "carefully crafted" language meant to bolster free speech. R. 34. Governor Trapp stated that the CC Law specifically targets Poster. R. 35.

Hostility towards religious individuals violates the First Amendment, fails the neutral and generally applicable standard, and triggers the Lukumi factors. (*See* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S.Ct. 1719 (2018); (Meriwether v. Hartop, 992 F.3d 492, 513 (6th Cir. 2021) (a professor's free exercise rights were violated when an administrator targeted him and his beliefs during a hearing)). In the present case, the District Court opinion did not properly consider any of the Lukumi factors. R 15. However, Poster cannot be separated from APC. All of Poster's board members are also members of APC and see their work as extensions of their religious duties. R. 37. The CC Law did more than target a specific practice, the law targeted a specific individual by name in a contemporaneous statement from the politician that pushed the law. Therefore, the CC Law is not neutral.

The next step in the standard is to determine whether the CC Law is generally applicable. Laws that "invite" the government to consider particular aspects of conduct and allow for mechanisms that create individualized exemptions are not generally applicable. Fulton, 141 S. Ct. at 1877 (*quoting* Smith, 494 U.S. at 884). In Fulton, the Court considered whether a Philadelphia commissioner violated the generally applicable standard. Id. at 1879. The court reasoned that the issue arises because the Commissioner had sole discretion. Id. In the present case, not only did the Attorney General exhibit sole discretion, but the law has only been enforced once. R. 6 and 32. The CC Law did more than incidentally burden Poster. The CC Law's limited enforcement alongside the Attorney General's unchecked discretion creates a standard that invites the government to scrutinize Poster as they choose. There are no clear standards articulated in the CC Law other than what behaviors the government finds tolerable and intolerable. The CC Law violates the Smith standard and thus violates Poster's free exercise rights.

B. The CC Law creates a hybrid situation, and a strict scrutiny analysis is more appropriate than the neutral and generally applicable standard.

The neutral and generally applicable test has a narrow application to only apply to cases when there is not a "hybrid situation." Smith at 882. A hybrid situation occurs when more than one right is triggered. Id. The neutral and generally applicable test applied in Smith because Oregon's drug law did not represent "an attempt to regulate religious beliefs, **the communication of religious beliefs**, or the raising of one's children in those beliefs [. . .]" Id. (emphasis added). When a law only impacts the free exercise clause, then the neutral and generally applicable standard controls. Id. However, the CC Law does not solely infringe on Poster's free exercise rights. The CC Law blatantly disregards the First Amendment's free speech clause and establishment clause.

The CC Law invokes a hybrid of rights. Smith does not control, and strict scrutiny applies. Lukumi at 546. The government must show that the CC Law advances an interest "of the highest order" that is narrowly tailored "in pursuit of those interests." Id. For a law to be narrowly tailored, it must be the least restrictive means of accomplishing the government's goal. Reed v. Town of Gilbert, 576 U.S. 155, 172 (2015). The government bears the burden to show that the CC Law is narrowly tailored to advance the government's interest of protecting citizens from "large tech platforms" involved in public expression. R. 35. The CC Law uses overinclusive language to discretely target Poster and no other technological platforms. The CC Law is not narrowly tailored and unconstitutionally infringes on Poster's rights.

1. The CC Law violates Poster's freedom of speech by compelling publication of views that contradict APC beliefs.

Religiously motivated speech that is suppressed by government action triggers the hybrid-rights discussion from Smith. Telescope Media Grp. v. Lucero, 936 F.3d 740, 759 (8th Cir. 2019). The CC Law robs Poster of its freedom of speech by supplanting the government's own standards over Poster's religious beliefs and traditions. The CC Law compels speech in violation similar to compulsory flag statutes. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). When a hybrid of free speech and free exercise claims arise, the principals of the Bill of Rights control. Id. at 638. The individual, not the government, sits at the "center of society" where government restraint should only have the "mildest supervision over men's affairs." Id. at 639-40. The CC Law does not extend the same "mild supervision" to Poster. Rather the law imposes disincentives to prevent Poster following core religious beliefs in favor of compelled speech using targeted and daily economic penalties. R. 35.

The CC Law's "carefully crafted" purpose is to create a "town square" for online speech and ideas to flow freely. R. 34. The government does not narrowly tailor this interest but rather broadly prohibits donations to political and religious organizations while compelling Poster to publish violent epitaphs. R. 35. Poster retains the right to deny publication to "any work and terminate any account [. . .] for any reason that Poster, Inc, its agents, successors, or assigns, deems sufficient." R. 37. Poster used its terms and conditions twice. The first occurred shortly after its launch and the second in the present case. R. 5. While "Blood is Blood" does not immediately incite violence, its connection to AntiPharma, known for its radical and violent protests, cannot be overlooked. R. 5. Apart from preventing violent speech on its platform, there is no evidence that Poster acted against the marketplace of ideas.

The government does not provide any evidence to demonstrate how this particular account being banned prevents Ms. Thornberry from participating in the marketplace of ideas.

The government does not achieve the CC Law's purported goal through coercive uniformity and the disenfranchisement of spiritual diversity. Barnette, 319 U.S. at 641. No official, regardless of governmental authority, "can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." Id. at 642. The CC Law is not narrowly tailored to advance its interests. The government fails to meet its burden under strict scrutiny and unconstitutionally prohibits Poster from participating in the "town square" the CC Law allegedly fosters.

1. The CC Law does not survive a strict scrutiny analysis because the CC Law's establishment clause concerns conflict with the free exercise clause.

Strict scrutiny applies when there is either direct or indirect coercion. Lyng v. Nw. Indian Cemetary Protective Ass'n, 485 U.S. 439, 450 (1988). An individual may not be treated differently by the government due to religious beliefs. *See* Everson v. Bd. of Educ. of Ewing, 330 U.S. 1 (1947) (held that a New Jersey law that reimbursed parents for public transportation costs applied equally to children who go to public schools, private schools and parochial schools); McDaniel v. Paty, 435 U.S. 618 (1978) (held that Ministers could not be prevented from serving as legislators)). A religious organization does not have to disavow its religious tenants and character to comply with a law. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S.Ct. 2012, 2022 (2017). Poster does not have to shed APC's central tenants of non-aggression/pacifism in its work to promote peacebuilding through education and cultural development. R. 2.

Furthermore, Governor Trapp is on record of saying that the CC Law's religious prohibition "was designed to avoid implicating the Establishment Clause." R. 35. Governor Trapp's statement demonstrates how the government does not have a compelling interest to justify the CC Law. When the state's interest rests solely on providing more protection for the

establishment clause that runs against free exercise, then the interest cannot be considered compelling. Espinoaz v. Montana Department of Revenue, 140 S.Ct. 2246, 2260 (2020). The government cannot possess an interest that is constrained by other constitutional rights. Id. The government cannot further constitutional rights by selectively applying the First Amendment's establishment clause and free exercise clause. Id. The establishment clause promotes non-preferential views, but not at the expense of the government favoring nonreligion over religion.

C. The Smith test is unworkable and does not adequately protect individual's First Amendment rights, the Court should overrule Smith in favor of Sherbert's compelling interest analysis.

The Smith decision leaves religious beliefs, particularly minority religious beliefs, vulnerable. Tom C. Rawlings, *Employment Division, Department of Human Resources v. Smith: The Supreme Court Deserts the Free Exercise Clause*, 25 Ga. L. Rev. 567, 575 (1991). Smith stands by the assertion that religious groups may turn to the political process, not the courts, to enact accommodations to laws that "disadvantage" minority religious practices. Smith at 890. Under this principle, "democratic government must be preferred to a system in which [. . .] judges weigh the social importance of all laws against the centrality of all religious beliefs." Id. Religious groups with significant representation do not have to be concerned as long as the legislative branch continues to carve out exceptions to accommodate practices in majority religions. Rawlings, 587. However, Smith does not account for when the legislative branch completely forbids individuals from participating in the political process. The CC Law requires that common carriers "refrain from using corporate funds to contribute to political, religious, or philanthropic causes." R. 3. Poster cannot participate in the system in which the courts abdicate

its responsibility. Under Smith, courts may inadvertently allow the legislative branch to create laws that create tremendous burdens using the guise of public welfare. Rawlings, 587.

Smith creates inconsistent rulings that leave courts with unworkable decisions. The Seventh Circuit used Smith to rationalize that prison officials did not violate a Muslim prisoner's free exercise rights by serving him pork. Hunafa v. Murphy, 907 F.2d 46 (7th Cir. 1990). The Ninth Circuit found that requiring pharmacies to dispense drugs despite religious objections did not violate the free exercise clause. Stormans, Inc. V. Wiesman, 794 F.3d 1064 (9th Cir. 2015). However, religious objections to gay marriages are regularly observed. (*See* Masterpiece and Telescope Media Grp. v. Lucero). Inconsistent rulings are to be expected from Smith because the decision itself relies on basic contradictions of the facts.

Smith declined to extend the long accepted Sherbert test on the claim that "We have never invalidated any governmental action on the basis of the Sherbert test except the denial of unemployment compensation." Smith at 883. However, the Court has used the compelling interest test from Sherbert to find that laws forcing Amish children to attend high school violated free exercise. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972). Specifically, the Smith Court disregards that "a regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it **unduly burdens** the free exercise of religion." Yoder, 406 U.S. at 219-20 (emphasis added). The Smith Court labelled these decisions as hybrid rights, indicating the inherent flaw within the hybrid rights scheme. The free exercise clause is not bolstered only if other constitutional rights are triggered. The innate defect within Smith is its inability to fully recognize and support the importance of free exercise and properly acknowledge the dangers of governmental overreach within the religious sphere.

The Supreme Court fully recognizes that Smith must be revisited but has declined to do so despite the compelling "textual and structural arguments against Smith." Fulton at 1833 (Barrett, J., concurring). Justice Barrett questioned what the Court would replace Smith with, yet as Justice Alito explains in his concurrence, the answer is to look to the First Amendment precedent Smith did not consider. Justice Alito looked to Sherbert v. Verner which was the governing rule for twenty-seven (27) years. Fulton at 1890 (Alito, J., concurring). Sherbert is more appropriate than Smith because the free exercise clause demands a stronger use of strict scrutiny. Id. at 1889.

Under Sherbert, the first question is whether the law imposes "any burden on free exercise" of Poster's religion. Sherbert v. Verner, 374 U.S. 398, 403 (1963). Government pressure to forego religious practices to receive benefits burdens the free exercise clause. Id. The CC Law puts Poster in the position of practicing its faith and being subject to fines or succumbing to governmental pressure and disregarding its religious duties. R. 37. The CC Law burdens Poster's religion. The next question is whether there is some compelling interest to justify the substantial infringement on Poster's First Amendment rights. Sherbert, 374 U.S. at 407. There must be a more than a basic showing of a rational relationship to some "colorable state interest would suffice" due to the "highly sensitive constitutional area." Id. at 407. The government does not show how Poster interferes with the "town square" the CC Law strives to create. R. 34. The government can only show that Ms. Thornberry has not had success in securing a literary agent to publish her work through traditional means. R. 4. This is not enough to overcome strict scrutiny. Adhering to Sherbert more closely aligns to the original understanding of free exercise. Fulton at 1893 (Alito, J., concurring).

The legislative branch's actions further demonstrate the need to overturn Smith. Specifically, RFRA's ratification indicates the need for the courts to depart from the neutral and generally applicable test. Any national statute passed must conform with RFRA. 42 U.S.C. §§ 2000bb. Congress provides that corporations are included in RFRA's definition of "persons." Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707 (2014). While Delmont has not adopted RFRA, twenty-one (21) other states have adopted versions of the federal act. NAT'L CONF. OF STATE LEGISLATURES, *State Religious Freedom Restoration Acts*, https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx. The legislative branch has taken the steps to depart from Smith and toward fully acknowledging the strength and importance of the free exercise clause. In the present case, if Poster were incorporated in an RFRA state, then this issue would not be before the Court. As a company that works in online publications, whose work transcends the borders of states, Poster demonstrates why stronger free exercise protections are necessary. A fundamental right should not turn on something as inconsequential as a company's incorporation. For these reasons, Smith should be overturned, and the Courts should analyze free exercise under the Sherbert test.

CONCLUSION

The CC Law disregards Poster's First Amendment rights. It disregards Poster's editorial discretion and improperly compels speech. Moreover, the CC Law violates free exercise. A law that specifically targets one group, and forces Poster to make a decision to either participate in its religion or incur fines fails the neutral and generally applicable standard. Even if Smith remains good law, Smith does not control the present case because the CC Law invokes hybrid rights. The CC Law does not survive strict scrutiny and is therefore unconstitutional.

For the foregoing reasons, Respondent respectfully requests that this Court upholds the Circuit Court's decision regarding Poster's free speech and free exercise claims.

Date: January 31, 2022

Respectfully submitted,

/s/ Team 026

CERTIFICATE OF COMPLIANCE

Pursuant to Rule III(C)(3) for the 2022 Seigenthaler-Sutherland Moot Court Competition we hereby certify and submit that:

(I) The following work product is a brief written by members of Team 026;

(II) Team 026 has complied fully with their school's governing honor code; and

(III) Team 026 has complied with all of the Rules of the Competition.