**No. 22-CV-7654**

IN THE

SUPREME COURT OF THE UNITED STATES

**POSTER INC.**,

*Respondent*

**v.**

**WILL WALLACE**,

*Petitioner*

**On Writ of Certiorari to the**

**United States Court of Appeals**

**for the Fifteenth District**

# BRIEF FOR THE RESPONDENT

**Counsel for the Respondent**

Team 002

Seigenthaler-Sutherland
Moot Court Competition

Spring 2022

## QUESTIONS PRESENTED

**1. Whether the United States Court of Appeals for the Fifteenth Circuit erred in concluding that the Delmont Carrier Law, Delmont Rev. Stat. § 9-1.120, is unconstitutional because it violated Poster's right to freedom of speech; and**

**2. Whether the United States Court of Appeals for the Fifteenth Circuit erred in finding that the Delmont Common Carrier Law, Delmont Rev. Stat. § 9-1.120, is neither neutral, nor generally applicable, and is thus unconstitutional when the statute facially discriminates against religion, the statute's history evidences impermissible targeting of Poster due to its religious beliefs, and infringes on citizen's free exercise rights without any compelling reason.**

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## STATEMENT OF THE CASE

In August of 2021, Poster, Inc. a digital self-publishing platform headquartered in Delmont, was fined under Delmont's recently enacted Common Carrier Law ("CC Law"), Delmont Rev. Stat. § 9-1.120, for suspending Katherine Thornberry's account which offended Poster's pacifist religious beliefs. R. at 1. On her account, Thornberry had alternatively titled her novel "Blood is Blood," which is the mantra of AntiPharma, an extremist animal rights group that advocates civil violence and has participated in violent altercations in Delmont. R at 4. Poster's board is run entirely by members of The American Peace Church. (APC) R. at 2. The APC is "a hundred-year-old Christian denomination dedicated to furthering the message of Christ by promoting non-aggression and peace." R. at 36. Members of the APC are particularly called to support the literary and musical arts through tithing. R. at 37. In accordance with this belief, Poster donates fifteen percent of profits to support the APC's continued educational and cultural efforts. R. at 19. Due to this, Poster's board views Poster's mission "as more than a business operation but rather an extension of their religious practices." R. at 37.

The CC Law, under which Poster was fined, designates certain large digital platforms as common carriers and subjects them certain to regulations. These regulations specifically require designated platforms to "serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint," and to "refrain from using corporate funds to contribute to political, religious, or philanthropic causes." Delmont Rev. Stat. § 9-1.120. Violations of these regulations result in heavy fines. R at 3. The CC law does not contain any religious exemptions. R. at 29. The designation of a platform as a common carrier depends on whether the platform has a significant market share, but whether the share is significant enough is left to the discretion

of the Attorney General. R. at 32. In his enforcement of the law against Poster, the Attorney General inquired into Poster's particular reasons for its conduct before he made a decision. Additionally, at a press conference regarding the action, the Attorney General, Will Wallace, stated: "The APC-founded Poster platform is discriminating against Delmont citizens based on their political viewpoints." R. at 6.

The CC Law is an admitted product of Governor Louis Trapp's campaign promises and a response to Trapp's "constituent groups who were concerned about large tech platforms' substantial control over public expression." R. at 34. Trapp has specifically expressed that "Poster . . . is the kind of website the law is designed to address." R. at 35. Poster had "strongly advocated against the Common Carrier Law" explaining it would require the company "to post material contradictory to our faith and any such compulsion would require us either to violate our religious mandate or close our business operation." R. at 37.

After being fined, Poster sued Will Wallace, in his official capacity as the Attorney General of Delmont, for injunctive and declaratory relief challenging its classification as a common carrier and noting that the statute unconstitutionally violates its First Amendment rights to free speech and free exercise. R. at 6. The Delmont District Court granted summary judgment to Wallace, finding that: Poster was a common carrier, R. at 11, that its free speech was not violated, R. At 12, and that the law was neutral, generally applicable, and passed the required constitutional scrutiny. R. at 16.

Poster appealed the decision to the Fifteenth Circuit Court, maintaining that the statute violated its First Amendment rights. The Fifteenth Circuit Court found in favor of Poster and reversed the District Court's decision concerning the First Amendment claims, finding that

Poster's Free Speech rights were violated, R. at 27-29, and that the law was not neutral and generally applicable in regard to religion, and that it was unconstitutional. R. 29-33.

## SUMMARY OF THE ARGUMENT

This Court should affirm the Fifteenth Circuit Court's holding that the Delmont Common Carrier law is unconstitutional because it impermissibly violates Poster, Inc.'s First Amendment right to freedom of speech. The protections provided in the First Amendment have been held by this Court to extend not only to individuals, but to corporations and businesses as well. Additionally, even when such a business is deemed to be a common carrier, and subject to regulation by the State under its police power, this Court has noted that these businesses continue to be entitled to certain First Amendment protections. This limited, but continuing protection includes the right to be free from being forced to adopt or endorse the speech of a third party. This is exactly what Delmont's Common Carrier Law mandates Poster, Inc. to do. In an attempt to secure and bolster freedom of speech and expression, Delmont's CC Law does the exact opposite. It forces Poster to adopt, endorse, and publish speech that directly conflicts with its central tenet of non-aggression/pacifism. Thus, Delmont's Common Carrier Law is an impermissible restriction on Poster's right to freedom of speech, and is unconstitutional.

The Court should additionally affirm the Fifteenth Circuit's holding that the CC Law is not neutral or generally applicable and is thus unconstitutional. Laws that burden one's free exercise of religion and are not neutral or generally applicable are subject to the highest constitutional scrutiny. These laws can only be upheld if they are justified by a compelling government interest and the law is narrowly tailored to that interest; Delmont's statute fails to meet this strict standard and manifestly lacks neutrality and general applicability. The CC Law

does not even feign impartiality, it facially discriminates against religious conduct and its statute's legislative history and selective enforcement evidences a strong discriminatory bias against religion and Poster's religious-affiliation. Further, Delmont's statute is not generally applicable, but applies only if the corporation is deemed by the Attorney General to have enough of a market share to qualify as a common carrier. The Attorney General also has exhibited a focus on Poster's religious affiliation. The CC Law is not neutral or generally applicable nor is its blatant targeting of religion justified by any compelling government interest. For this reason, the law is invalid, and the Fifteenth Circuit's decision should be upheld.

## ARGUMENT

### I. The United States Court of Appeals for the Fifteenth Circuit did not err in concluding that the Delmont Common Carrier Law, Delmont Rev. Stat. § 9-1.120, is unconstitutional because, irrespective of its classification as a common carrier, the law violates Poster's protected First Amendment right to freedom of speech.

#### A. Corporations Possess the Right to Freedom of Speech and are Entitled to Protection Under the 1st Amendment.

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const., amend. I. Standing alone, the express language of this First Amendment only limits Congress's power to curtail citizen's right to free speech. However, the protections provided in the Frist Amendment are expanded, and made applicable to the states, through the due process clause of the Fourteenth Amendment. *See* U.S. Const., amend. XIV, § 1; *see also Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (noting that the Fourteenth Amendment makes the First applicable to the states).

Explicitly discussing the right to free speech, the Court in *Gitlow v. New York* stated that the "freedom of speech . . . which [is] protected by the First Amendment from abridgment by Congress – [is] among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states." 268 U.S. 652, 666 (1925). This First Amendment protection that is afforded to the citizens of the United Sates is also applied to corporations. *See Pacific Gas & Electric Co. v. Public Utilities Com.*, 475 U.S. 1, 16 (1986). Specifically, the Court in *Pacific Gas* stated that "[t]he identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the "discussion, debate, and the dissemination of information and ideas" that the First Amendment seeks to foster." *Pacific Gas & Electric Co. v. Public Utilities Com.*, 475 U.S. 1, 16 (1986) (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978)). Further, illustrating the point the First Amendment protections apply to corporations, the Court in *Bellotti* held that "speech does not lose its protection because of the corporate identity of the speaker." *Bellotti*, at 777. The cases noted above are just a small sample in a long line of examples where the Supreme Court has protected a corporation's right to free speech. *See Citizens United v. FEC*, 558, U.S. 310 (2010) (noting that a corporation's political speech is protected under the First Amendment); *see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (holding that a corporation's commercial speech is protected under the First Amendment); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (holding that closely held corporations enjoy First Amendment rights).

In the instant case, Poster is incorporated under Delmont law. R. at 24. Furthermore, Poster's headquarters are located in Capital City, Delmont. R. at 19. Poster's service allows

individuals using their platform to publish or upload content, and if that content is rented, purchased, or downloaded by a third-party, Poster charges the artist a small fee. R. at 2. These transactions provide exposure to aspiring artists, and allow Poster to turn a profit. Moreover, Poster is "treated as a corporation for taxation purposes at both the state and federal level." R. at 25. As the law above clearly explains, because Poster qualifies as a corporation, it is entitled to receive the maximum free speech protection afforded under the First Amendment.

**B. The First Amendment Forbids the State Government of Delmont from Compelling Poster to Adopt or Promote Speech with Which They Disagree**

In *Wooley v. Maynard*, the Court addressed the question of whether a state may constitutionally require participation in the "dissemination of an ideological message by displaying it . . . for the express purpose that it be observed and read by the public." 430 U.S. 705, 713 (1977). In *Wooley*, the Court noted that "the right of freedom and thought protected by the First Amendment against state action includes both the right to speak and the right to refrain from speaking at all. *Wooley*, at 714 (citing *West Virginia Bd. Education v. Barnette*, 319 U.S. 624, 633-34 (1943)). The Court went on to note that "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Wooley*, at 714. In accordance with these principles, the Court held that "[t]he First Amendment protects the right of individuals to hold a point of view different form the majority and to refuse to foster . . . an idea they find morally objectionable." *Id*. at 715. Similarly, in *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, the Court analyzed a Florida "right of reply" statute, which obligated newspapers to publish a political candidate's reply if an article was critical of that individual's candidacy. 418 U.S. 241,

243-44 (1974). In *Tornillo*, the Court held that a statute "[c]ompelling editors or publishers to publish that which reason tells them should not be published . . . operates as a command in the same sense as a statute or regulation forbidding appellant to publish in a specified manner." *Id*. at 256. The Court went on to state that "[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." *Id*. Ultimately, the Court held "the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into to function of editors." *Id*. at 258. The Court also held that "[a] newspaper is more than a passive receptacle or conduit for news, comment, or advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the . . . content of the paper . . . constitute the exercise of editorial control and judgment." *Id*. In *Pacific Gas*, the Court emphasized the balance between the First Amendment protection from compelled speech and encouraging debate. The Court stated that a party "does not have the right to be free from vigorous debate. But it does have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents." *Pacific Gas & Electric & Electric Co.*, at 14 (citing *Buckley v. Valeo*, 424 U.S. 1, 49, and n. 55 (1976)). The Court went on to hold that this type of statute or regulation fails the content-neutrality test required to survive First Amendment scrutiny because it "necessarily burdens the expression of the disfavored speaker." *Pacific Gas & Electric Co.*, at 15. The Court reached this holding because this type of government limitation on speech "identifies a favored speaker based on the identity of the interests that the speaker may represent, and forces the opponent . . . to assist in disseminating the speaker's message." *Id*. Notwithstanding the First Amendment violation, a government limitation may be upheld if "the State's countervailing

interest is sufficiently compelling [and narrowly tailored to serve that interest]." *See Wooley*, at 716-17.

In the instant case, Poster was founded by APC, a hundred-year-old Protestant denomination, that holds non-aggression/pacifism as one of its central tenets. R. at 2. APC's founders were poets, educators, and musicians who sought to promote peace through education and cultural development. R. at 19. To further this goal, APC created Poster, and has long promoted and published APC-member content on its platform. *Id*. However, Poster's platform is not limited to APC-members, as the platform also publishes content from artists of diverse ideological viewpoints. *Id*. Despite its inclusivity, artists who utilize Poster's platform are subject to Poster's editorial discretion. *Id*. Poster's User Agreement states that Poster retains "discretion to accept or reject material submitted by an artist as it sees fit." *Id*. Additionally, the user agreement allows Poster to remove an account "at any time for any reason or no reason." R. at 22. Pursuant to this discretion, Poster deactivated Ms. Thornberry's account after she revised the name of a novel she published on Poster's platform to "Animal Pharma" or "Blood is Blood." R. at 21. This change prompted action for Poster because "Blood is Blood" has been used as the mantra of an extremist animal rights group, AntiPharma, which advocates civic violence in response to violence against animals. *Id*. Naturally, this ideology is directly averse to APC's central tenet of non-aggression/pacifism, and one it unequivocally opposes.

Given these facts, Delmont's CC Law undoubtedly forces Poster to adopt speech that is not in accordance with its ideological views. Delmont's CC Law states that platforms shall "serve all who seek or maintain an account, regardless of political ideological, or religious viewpoint." R. at 20. Such a mandate or command is directly in conflict with the law forbidding

compelled speech discussed above. Specifically, the Court in *Wooley* noted that the First Amendment protects the refusal to foster an idea that the individual finds morally objectionable. *Wooley*, at 715. The civic violence supported by AntiPharma is in direct conflict with APC's tenet of non-aggression. Furthermore, the Court in *Tornillo* noted that importance of protecting the publisher's own expression by not disturbing its editorial functions. *Tornillo*, at 258. The Court in *Pacific Gas* went on to note that a statute that limits these functions is not content neutral because it necessarily favors a particular speaker and forces the opposing party to foster or promote a viewpoint they disagree with. *Pacific Gas & Electric Co.*, at 15. By obligating Poster to publish Ms. Thornberry's novel, Delmont is forcing Poster to support an ideology it does not support by removing the platform's editorial functions. Finally, the State of Delmont has not provided a reason to show that this limitation on Poster's speech furthers a compelling state interest, and that the CC Law is narrowly tailored to serve that interest. Despite the admirable attempt to bolster public expression, and limit censorship, this law sweeps far too broadly in trying to achieve that goal. Like *Wooley*, where the Court held there were alternative ways to further the State's interest, the State of Delmont cannot trample the First Amendment rights afforded to Poster by mandating that they disseminate and effectively co-sign an ideology that is fundamentally opposed to its central message. Thus, given the above law and facts, Delmont's CC law violates Poster's First Amendment right to freedom of speech. However, the lower Court's classification of Poster as a common carrier adds a layer of complexity to the analysis, which will now be addressed.

### C. Poster's Status as a Common Carrier is Not Analogous to the Traditional Businesses Previously Considered by the Court

While Poster does not concede that it is correctly classified as a common carrier, and argues that the above First Amendment analysis should control, the classification question was directly granted appellate review by this honorable Court and therefore Poster will omit that argument here.[1] Common carrier status has long been recognized in the American legal system. *See Munn v. Illinois*, 94 U.S. 113 (1876) (holding that the designation of businesses as common carriers falls within the state's police power). When attempting to classify what type of businesses qualified as common carriers, the Court in *Brass v. North Dakota* held that common carrier status is attained when they hold themselves out as serving the public at large. 153 U.S. 391 (1894). Based off this definition, the Court has generally found that common carriers typically include businesses such as hotels, railroads, and telecommunication providers. James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 Fed. Comm. L.J. 225,227, 251-52 (2002). Additionally, when attempting to identify common carriers, the Court has noted that common carrier status applies when "a business, by circumstances and its nature . . . rise[s] from private to be of public concern." See *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 411 (1914). The Court went on to state that a common carrier's property "is but its instrument, the means of rendering the service, which has become of public interest." *Id*. at 408. Regarding digital platforms, the Court in *Biden v. Knight First Amendment Institute at Columbia Univ.*, analogized them to common carriers by stating that "[t]hrough digital instead of physical, they

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[1] Poster will happily submit a supplemental brief at the request of the Court detailing this argument, and will reserve the right to argue the merits of the lower Court's holding on this issue should it arise in the oral argument phase of this appeal.

are at bottom communication networks, and they 'carry' information from one user to another." 141 S. Ct. 1220, 1224 (2021)(Thomas, J., concurring). The Court goes on to describe what type of digital platforms could be considered common carriers by analogizing them to traditional telephone companies that "laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way. And unlike newspapers, digital platforms hold themselves out as organizations that focus on distributing the speech of the broader public." *Id*. Thus, it is clear for these cases that the common element the Court clings to when classifying a business as a common carrier is that the business merely communicates another's message and does not participate in any speech themselves.

Even if Poster is correctly classified as a common carrier, it is not directly analogous to the types of businesses described above. Although Poster does serve as a platform for artists to publish their content, that is not its exclusive function. R. at 26. Since Poster was founded in 1998 by members of the APC, it has promoted itself as an APC-associated organization, has promoted APC-member content on its platform, has provided discounted publication services to APC-member authors, poets, and composers, and has widely publicized its generous donations to the APC church. R. at 19, 26. These actions clearly distinguish Poster from other digital platforms that just "distribute speech of the broader public." It is evident that Poster has a message it seeks to promote and strong views that are independent from many of its members. Additionally, Poster makes clear in its User Agreement that all its members are subject to its editorial discretion, and that Poster retains the right to remove content that violates its organizational values. R. at 26. Therefore, even if Poster is found to be a common carrier and subject to Delmont's CC Law, it is not directly analogous to traditional common carrier

businesses and retains certain free speech rights as a result of its editorial functions and the expression of its own speech. *See* R. at 27.

**D. Delmont's Common Carrier Law Violates Poster's First Amendment Rights as a Common Carrier**

As stated above, regardless of Poster's classification as a common carrier, it still retains constitutional protections under the First Amendment. This was evidenced in *FCC v. League of Women Voters of California*, when the Court held that "broadcasters . . . engaged in a vital and independent form of communicative activity are entitled to some degree of First Amendment protection." 468 U.S. 364, 378 (1984). In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, the Court reinforced this principle when it acknowledged that telecommunication companies have speech interests that are protected under the First Amendment. 518 U.S. 727, 739 (1996) (plurality). Additionally, when discussing what type of restrictions on common carrier speech would be permissible, the Court in *Knight* stated that a state regulation "would be valid if [it] would have been permissible at the time of the founding," or it "does not prohibit the company from speaking or force the company to endorse speech." 141 S. Ct. at 1223-4 (Thomas, J., concurring) (emphasis added) (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 684 (1994) (O'Connor, J., concurring in part and dissenting in part) (noting that cable operators are speakers, and therefore are entitled to First Amendment protection because they have editorial discretion). Thus, as noted in the above section, it is clear from these cases that the level of First Amendment protection afforded to common carriers hinges on whether the business is more editorial in nature or merely transmits information. *See*

*Denver*, at 739 (determining a company's speech interests based on whether they "act [more or] less like editors . . . than like common carriers").

Given the above stated law, it is clear that Poster is entitled to protection under the First Amendment. Poster's broad editorial discretion, its promotion of APC members' content on the platform, and the acknowledgement of generous donations to the APC church show that Poster functions as a speaker, and not merely as a conduit for third-party publishers. Therefore, even as a common carrier, Poster is entitled to First Amendment protection under Supreme Court precedent. Regarding the specific law at issue, as discussed above in section B, Delmont's CC Law forces Poster to endorse speech.[2] In short, the CC Law compels Poster to adopt speech that does not align with its ideological views or the message it seeks to promote on its platform. The law's mandate that the platform "serve all who seek to maintain an account" seeks to remove Poster's editorial function and force them to publish and condone speech that they indisputably oppose. This is the exact type of law Justice Thomas noted would be an impermissible limitation on common carrier's right to free speech in *Knight*. Therefore, Delmont's CC Law should be deemed unconstitutional because it impermissibly compels Poster to endorse speech on its platform, and as a result, directly violates the fundamental freedom of speech enshrined in the First Amendment.

**II. The United States Court of Appeals for the Fifteenth Circuit did not err in finding the Delmont Common Carrier Law, Delmont Rev. Stat. § 9-1.120 is neither neutral nor generally applicable, and is thus unconstitutional because the law targets religious conduct,**

[2] Poster will not reproduce the entire compelled speech discussion here, please see section B above.

**has a mechanism for individualized exceptions, and thus cannot pass the strict constitutional scrutiny required for such a law.**

**A. The Delmont Common Carrier Law is not neutral.**

The First Amendment, which has been made applicable to the states by the Fourteenth Amendment, dictates 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 bars the government from "regulation of religious beliefs," imposing "special disabilities on the basis of religious views or religious status," and banning "acts or abstentions only when they are engaged in for religious reasons." *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990). To have a free exercise claim against a law, the claim of violation must be based on a sincere religious belief.[3]

While an individual's religious beliefs do not "excuse [a person] from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate," *id.* at 878–79, laws implicating one's free exercise of religion are subject to different levels of scrutiny to determine their validity. If the law is not neutral and generally applicable, it is subject to strict scrutiny, that is: the government may substantially burden a person's free exercise of religion only if it is "justified by a compelling governmental interest and . . . narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521, (1993).

[3] Poster's sincere religious belief is not at issue here; the American Peace Church is a hundred year old Protestant denomination and Poster's board of directors follows the tenants of the church. *See also Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 14 450 U.S. 707, 714 (1981) (Holding "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.")

If the challenged law is neutral and generally applicable, usually it "need not be justified by a compelling governmental interest" *id.* at 521, and must simply pass the rational basis review. However, neutral and generally applicable laws may be subject to strict scrutiny if they involve a "hybrid situation" and implicate "other constitutional protections." *Smith*, 494 U.S. at 881–82.

Laws that specifically target "religious beliefs as such . . . or restrict practices because of their religious motivation" are not neutral. *Church of the Lukumi*, 508 U.S. at 533. To determine whether "the object or purpose of a law is the suppression of religion or religious conduct" the Court "begin[s] with [the law's] text, for the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Id.* The Court has made clear the significance of a statute's facial neutrality and has emphasized that "the Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018)(citing *Church of the Lukumi*, 508 U.S. at 534)). In *Church of the Lukumi*, for example, the Court found that the words "sacrifice" and "ritual" present in the statute had religious connotations and thus supported the fact that the statute was not facially neutral. *Church of the Lukumi*, 508 U.S. at 534.

However, mere compliance with "facial neutrality is not determinative" as "the Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.* Therefore, the Court also looks to "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the

decision-making body," *id.* at 540, to determine neutrality. Courts have frequently found a statute is not neutral when the historical background of the statute evidences lawmakers or adjudicators making derogatory remarks against religion, the targeting of a specific religion, or a coordinated effort to suppress a specific religious practice. *See Church of the Lukumi*, 508 U.S. at 540 (Finding that a variety of derogatory statements by city officials, as well as statements evidencing a coordinated effort to suppress Santeria practices, indicated the law was not neutral); *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (2018)(Finding that disparaging statements by the Colorado Civil Rights Commission about religious beliefs indicated a lack of neutrality in its decision).

In this case, the law is not facially neutral; the statute specifically targets religion, imposes disabilities based on religious status, and bans acts motivated by religious reasons. First, the statute mandates that common carrier platforms "shall serve all who seek or maintain an account, regardless . . . *religious* viewpoint." Delmont Rev. Stat. § 9-1.120(a)(emphasis added). This imposes a disability on religiously-affiliated entities like Poster; it mandates they serve accounts regardless of religious objections to those accounts that post content antithetical to these platforms' religious beliefs. It forces Poster to choose between violating its religious beliefs or not running its company at all. Second, the law mandates that the platforms designated as common carriers "refrain from using corporate funds to contribute to political, *religious*, or philanthropic causes." Delmont Rev. Stat. § 9-1.120(a)(emphasis added). This specifically bans an act motivated by religious reasons and targets Poster's religious tithing to the arts. R. at 37. Again, it puts Poster in the position of choosing between following the dictates of its Church and running its business.

The law, as evidenced, specifically targets religion in its language and orders. The fact that Poster's business model, an artistic self-publication platform run entirely by members of one church and inspired by the beliefs of that church, R. at 37, is not the norm, makes this language and imposition of these religious regulations even more suspect. Moreover, this Court has consistently held that statutes that facially discriminate against religion are unconstitutional even if the departure from neutrality is subtle. Here the statute is not subtle, but obvious in its targeting of religion, specifically mentioning "religious viewpoints" and "religious causes." The discriminatory language of the statute is even more blatant than that of the language in the statute in the *Church of the Lukumi*, and its discrimination against religion is even more flagrant.

Additionally, the "historical background of the decision" *Church of the Lukumi*, 508 U.S. at 540, indicates further targeting of religion. Delmont's Governor, Louis Trapp, admitted that this law is a product of his campaign promises and response to "constituent groups who were concerned about large tech platforms' substantial control over public expression." R. at 34. Additionally, he has expressed that "Poster . . . is the kind of website the law is designed to address." R. at 35. There is no doubt Poster, an obviously religiously-affiliated organization, was contemplated in the making of this statute. The statute explicitly uses the terms religion because of Poster. As noted, Poster is unique, no other comparable platform is an "extension of [the board's] religious duty" or makes its business decisions based on its religious beliefs. R. at 37. Poster's beliefs were even specifically made known to the legislature as it "strongly advocated against the Common Carrier Law" explaining it would require Poster"to violate [its] religious mandate or close [its] business operation. R. at 37. Additionally, the Attorney General when issuing the fine against Poster described Poster as "The APC-founded Poster platform" making

religion central to the enforcement against what he characterized as Poster's "discrimination." R. at 6. The statute is not neutral; it facially discriminates against religion in its language and its historical background evidences the specific targeting of Poster and its religious affiliation.

**B. The Law is not generally applicable.**

A law is generally applicable if it applies in generally the same way to everyone across the board. A law is not generally applicable if it "'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1877 (2021)(citing *Smith*, 494 U.S. at 884). This is true regardless of whether any exceptions have been given because it "invite[s] the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id.* at 1879.

This statute is not generally applicable as it provides "a mechanism for individualized exemptions." *Id.* In this case, this mechanism is the designation of a platform of a common carrier. There is not a pre-set criteria in the statute, but rather the Attorney General makes discretionary decisions whether a platform has a significant market share to qualify for as a common carrier and thus falls under the law. Further, in this case, evidence indicates that the Attorney General inquired into "Poster's particular reasons for conduct before he made a decision to bring the enforcement action" and, as mentioned previously, "identifie[d] Poster's religious heritage by name." R. at 32. The Attorney General's actions seriously imply he did not make a decision based solely on market share percentage, but rather targeted Poster for its religious motivation. The law is not generally applicable, but rather applicable to whomever the Attorney General chooses.

As exhibited, the Delmont Common Carrier Law is neither neutral nor generally applicable and is thus subject to strict scrutiny. Further, even if it was neutral and generally applicable, it would still be subject to strict scrutiny because this case is a "hybrid situation" implicating other constitutional protections. *Smith*, 494 U.S. at 881. This case implicates Poster's constitutional protection against compelled speech as the law forces Poster to maintain accounts that express ideas contradictory to the organization's religious beliefs. The Court has affirmed strict scrutiny for these situations and noted that "cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. *Wooley v. Maynard,* 430 U.S. 705 (1977)(invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education v. Barnette,* 319 U.S. 624 (1943) (invalidating compulsory flag salute statute challenged by religious objectors)." *Smith*, 494 U.S. at 881–82. Like in *Wooley*, where the law compelled the petitioners to display a slogan which the petitioners objected to on religious grounds, the law here compels Poster to maintain accounts and posts on their site to which they have religious objections. As this implicates Poster's board's free speech rights[4] and free exercise of religion, even if the law was not neutral and was generally applicable, it would still be subject to strict scrutiny.

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[4] The Court explains that "The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." Id., at 637, 63 S.Ct., at 1185. This is illustrated by . . . *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), where we held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized." *Wooley v. Maynard*, 430 U.S. 705, 714–15 (1977); see also the discussion of Poster's free speech rights *supra*.

**C. The Delmont Common Carrier Law is unconstitutional because it cannot pass the requisite strict scrutiny standard.**

As noted, the Delmont Common Carrier law is subject to strict scrutiny and must be justified by a compelling governmental interest and narrowly tailored to that interest. *Church of the Lukumi*, 508 U.S. at 521. The Supreme Court notes that "[t]he compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not water[ed] ... down but really means what it says." *Church of the Lukumi*, 508 U.S. at 546 (citing *Smith,* 494 U.S. at 888 (internal quotation marks omitted). Further, the Court notes that "a law that targets religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases," *id.*, and that if "the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 141 S. Ct. at 1881. This is a very high standard, one that the Delmont Carrier law cannot pass. Delmont can still achieve its interest in regulating common carriers without unduly burdening religion, especially given the fact that whether a platform becomes subject to the law is discretionary. While how this is done is left to the legislature, there is no doubt that a religious exemption for religiously-affiliated companies like Poster would be a permissible and preferred alternative. The Court, in fact, notes where a "system of individual exemptions exists, the government may not refuse to extend that system to cases of religious hardship without a compelling reason." *Id.* at 1871.

The Court has reminded lawmakers that "as a general rule, laws that discriminate against religion are, in the Court's words, odious to our Constitution," and the Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to

remember their own high duty to the Constitution and to the rights it secures." *Masterpiece Cakeshop*, 138 S. Ct. at 173. The free exercise of one's religion is a fundamental right granted to the people of the United States. Delmont's Common Carrier Law not only disrespects this freedom, but targets and attempts to restrict Poster's practice of it; the statute is unconstitutional and cannot stand.

## CONCLUSION

The Respondent, Poster, Inc., respectfully requests that this honorable Court affirm the decision of the Fifteenth Circuit on both issues by holding that Delmont's Common Carrier law violates respondent's First Amendment right to free speech and free exercise.

Respectfully Submitted,

Team 002

Attorneys for Respondent

## CERTIFICATE OF SERVICE

We hereby certify that on January 31, 2022, we, attorneys for the Respondent, have served Petitioner a complete, accurate copy of this Brief for Respondent, Poster, Inc., via United States Mail.

Team 002

Attorneys for Respondent

## CERTIFICATE OF COMPLIANCE

We hereby certify that:

1. All work contained within this brief is the work product of this team's members alone.
2. All work contained within this brief and all work performed during the formation of this brief complies with the governing code of professional conduct for this team's school.
3. All work contained within this brief and all work performed during the formation of this brief complies with the Rules of this competition.

Team 002

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