No. 22-CV-7654

In the Supreme Court of the United States

WILL WALLACE,

Petitioner,

v.

POSTER, INC.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

TEAM 004

Counsel for Respondent

QUESTIONS PRESENTED

I. Whether the Delmont Common Carrier Law violates Poster's freedom of speech where it compels Poster to publish messages that Poster does not want to express and where Poster cannot stop users from self-publishing on other platforms.

II. Whether the Delmont Common Carrier Law violates the Free Exercise Clause where it prohibits Poster from tithing in accordance with its religious beliefs, requires Poster to promote ideas repugnant to its religious beliefs, gives the Delmont Attorney General discretion to consider the particular reasons for Poster's conduct, and is not narrowly tailored to advance Delmont's purpose.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Courts of Appeals Cases

English Cases

Other Sources

OPINIONS BELOW

The Fifteenth Circuit's opinion (R. at 18–33) is reported at [not included in the Record]. The District Court's opinion (R. at 1–17) is reported at [not included in the Record].

JURISDICTION

The Fifteenth Circuit entered final judgment. R. at 33. This Court granted Petitioner's Writ of Certiorari. R. at 39. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions are included in the appendix. App., *infra,* A-1.

STATEMENT OF THE CASE

I. Factual Background

A. Members of the American Peace Church founded Poster, Inc. as part of their religious duty to promote peace-building through cultural and educational development.

One hundred years ago, a group of Protestant poets, teachers, and musicians founded the American Peace Church ("APC"). R. at 2. The APC adopted non-aggression and pacifism as its tenets, and it pursued its mission to build peace through education and cultural development. *Id.* In its early days, the APC started lending libraries in poor communities as part of its mission. *Id.*

Taking inspiration from the APC's founders, APC members founded Poster, Inc. ("Poster") in 1998. *Id.* Poster offers artists an internet platform for self-publication and performance uploads. *Id.* Through their accounts, artists can upload material for customers to download for free, for rent, or for purchase. *Id.* In return, Poster receives a small fee for a new account and a percentage of any rents or sales of artistic material. *Id.* Because Poster considers its work to be an extension of its religious duty, Poster disclaims endorsement of any views expressed in artists' published material and retains editorial discretion to accept or reject artists' material. R. at 37.

Poster advances the APC's religious mission not only by promoting artistic works, but also by contributing to APC causes. For example, Poster dedicates fifteen percent of all profits to APC's ongoing educational and cultural efforts in poor communities. R. at 2–3. Poster also offers discounts to established and aspiring APC-member authors, poets, and composers. R. at 3. Nevertheless, Poster has always hosted artists of diverse ideological viewpoints. *Id.* Extremely popular, Poster holds 77% of the artistic self-publication market. R. at 37.

B. Delmont passed the Common Carrier Law despite Poster's concerns that the Law would require Poster to either violate the APC religious mandate or close its business.

On June 1, 2020, Delmont passed the Common Carrier Law ("CC Law"), which designated internet platforms with "substantial market share" as common carriers as defined at federal common law. R. at 3. Under the CC Law, these platforms "shall serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint" and must "refrain from using corporate funds to contribute to political, religious, or philanthropic causes." *Id.* Although the CC Law does not define "substantial market share," Petitioner categorized Poster as a common carrier. R. at 3, 32.

Prior to the CC Law's enactment, Poster heavily lobbied against the Law, concerned that the Law would require Poster to either violate its religious mandate or close its business. R. at 37. Nonetheless, Governor Louis F. Trapp pushed for the passage of the CC Law to "prevent online platforms from stifling viewpoints that they disagreed with." R. at 34. Although Poster has always hosted artists of diverse viewpoints, Governor Trapp asserted that "Poster . . . is the kind of website the law is designed to address." R. at 3, 35. Governor Trapp claimed that the CC Law includes the no-contribution provision to prevent platforms from favoring particular viewpoints through their monetary contributions" and includes the religious prohibition to avoid implicating the

Establishment Clause. R. at 35. The fines for noncompliance with the CC Law—up to 35% of daily profits compounding daily—are to disincentivize noncompliance. R. at 3, 35.

C. In keeping with its User Agreement, Poster suspended Katherine Thornberry's account because her work's title, "Blood is Blood," violates Poster's pacifist tenets.

Over the 2020 Fourth of July weekend, Capital City, Delmont, hosted a "Freedom for All" rally against animal experimentation. R. at 4. The rally organizers chose Capital City for the event because PharmaGrande, Inc., an international pharmaceutical developer that experiments on animals, has its headquarters in the city. *Id.* Unfortunately, the rally turned violent, with attendees fighting the public, burning and overturning cars, accosting passersby, and pelting police officers with gravel. *Id.* One officer lost sight in one eye and is at risk of losing sight in the other. *Id.*

Katherine Thornberry is an author who attended the "Freedom for All" rally. R. at 3–4. She posted her novel, *Animal Pharma*, on Poster, through which she has enjoyed a growing interest in her work and received many rents and purchases. R. at 4. However, she has thus far not found success in securing a literary agent or publishing through traditional means. *Id.*

At the rally, Thornberry remained at the music venue the entire time and did not participate in any violent altercations. *Id.* However, she updated her Poster account by giving her novel an alternative title: "Animal Pharma" or "Blood is Blood." *Id.* After sharing the update on social media, she generated increased rents and purchases in the days following the rally. *Id.*

"Blood is Blood" is the mantra of AntiPharma, an extremist animal-rights group famous for protesting PharmaGrande. *Id.* AntiPharma advocates civic violence in response to violence against animals. *Id.* "Blood is Blood" expresses AntiPharma's belief that all living beings are equal. R. at 5. However, the credo, along with its coda—"Blood *is* Blood or Blood *for* Blood"—

carries a radical connotation. *Id.* Members have started fistfights and stoned police and others. *Id.* People shouted the phrase and coda on the violent day of the "Freedom for All" rally. *Id.*

After reviewing a revenue report, Poster learned that Thornberry's rally-inspired name change and social media posts increased sales of her novel. *Id.* Because the new title violated Poster's pacifist values, Poster told Thornberry that pursuant to the User Agreement, her account would remain suspended until she changed her title. *Id.* Poster took a similar step only once before with another work, "Murder Your Enemies: An Insurrectionist's Guide to Total War." *Id.*

On August 1, 2021, Thornberry went on national television to protest Poster's decision as artistic suppression. R. at 6. Delmont then fined Poster for allegedly violating the CC Law. *Id.*

II. Procedural History

Poster sought relief in the United States District Court for the District of Delmont. R. at 1. After the District Court granted summary judgment in favor of Attorney General Will Wallace, Poster appealed to the United States Circuit Court for the Fifteenth Circuit. R. at 1, 16, 18. The Fifteenth Circuit reversed the District Court's grant of summary judgment. R. at 33.

Agreeing with the District Court that Poster is a common carrier, the Fifteenth Circuit held that the CC Law violates Poster's free speech. R. at 28–29. The Fifteenth Circuit ruled that the Law forces Poster to endorse via promotion messages it may wish to disclaim and prohibits Poster from exercising its own speech by limiting its ability to curate content. R. at 25, 28–29.

Additionally, the Fifteenth Circuit held that the CC Law violates the Free Exercise Clause. R. at 33. According to the Fifteenth Circuit, the CC Law facially discriminates against religion and implicitly provides a mechanism for individualized exemptions based on the Attorney General's discretion in enforcing the CC Law. R. at 30, 32. Therefore, the CC Law is neither neutral nor generally applicable and is thus unconstitutional. This Court granted certiorari. R. at 39.

SUMMARY OF THE ARGUMENT

In a recent concurrence, Justice Clarence Thomas suggested that the common law of common carriers could justify governmental control over internet platforms. *See Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221–22 (2021) (Thomas, J., concurring). But "applying old doctrines to new digital platforms is rarely straightforward." *Id.* at 1221.

Under common law, governments can require common carriers to "serve all comers." *See id.* at 1222.[1] Designating certain internet platforms as common carriers, the CC Law requires them to "serve all who seek or maintain an account." R. at 3. This case, however, is not as straightforward as Petitioner would have it; "[i]nternet platforms of course have their own First Amendment interests." *Knight*, 141 S. Ct. at 1223. In trying to apply an old doctrine to a new digital platform, the CC Law violates Poster rights under the First Amendment.

To begin, the premise of the CC Law is unfounded: Poster is not a common carrier. Next, the CC Law fails intermediate scrutiny because it compels Poster to express unwanted messages on its platform. If this Court accepts that Poster is a common carrier, this Court should affirm the Fifteenth Circuit's ruling that the First Amendment nonetheless protects the right of a common carrier of an editorial nature, like Poster, to curate the content on its platform.

This Court should also affirm the Fifteenth Circuit's holding that the CC Law violates Poster's right to free exercise because the CC Law (1) is either not neutral or not generally applicable, and (2) is not narrowly tailored to advance a compelling government interest. The CC

[1] The common law also allowed governments to set the rates that common carriers could charge for their services. *See Munn v. Illinois*, 94 U.S. 113, 125 (1876). Historically, governments imposed licensing requirements and strict liability on common carriers. *See* Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 **Yale J.L. & Tech** 391, 402 (2020). The Fifteenth Circuit's misclassification of Poster as a common carrier matters not only for the CC Law, but also for a host of other potential restrictions.

Law is not neutral because it forbids Poster from fulfilling its religious duty to tithe or because it forces Poster to promote beliefs repugnant to its religion. Neither is the CC Law generally applicable; it invites Delmont to consider Poster's reasons behind editorial discretion by giving the Attorney General discretion to apply and enforce the CC Law. Finally, the CC Law is not narrowly tailored to achieve any interest Delmont may have in preventing a website from denying access to its platform because Delmont can advance this interest without burdening religion. Thus, this Court should hold that the CC Law in unconstitutional under the First Amendment.

ARGUMENT

I. The CC Law violates Poster's freedom of speech because compels Poster, which is not a common carrier, to publish messages that Poster does not want to express.

The First Amendment, applicable to the states through the Fourteenth Amendment, protects the freedom of speech. *See* U.S. CONST., amends. I, XIV; *Gitlow v. New York*, 268 U.S. 652, 666 (1925). A law requiring platforms to publish messages that they do not want to express violates the freedom of speech. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569, 574, 578 (1995); *Turner Broad. Sys., Inc. v. Fed. Commc'n Comm'n*, 512 U.S. 622, 643–44, 655–56, 661–63, 665, 667–68 (1994). The CC Law is unconstitutional because it strips Poster of editorial control over its own platform, which constitutes Poster's expressive speech.

To defend the constitutionality of the CC Law, Petitioner makes two novel claims: First, that an internet platform like Poster is a common carrier; and second, that an entity's status as a common carrier deprives it of its freedom of speech. This Court should reject these arguments.

First, Poster is not a common carrier. Second, this Court should strike the CC Law under intermediate scrutiny applicable to content-neutral laws that compel speech. Third, if this Court

accepts that Poster is a common carrier, it should affirm the Fifteenth Circuit's preservation of the freedom of speech for common carriers that, like Poster, exercise editorial discretion.

A. Poster is not a common carrier because it does not have dominant market share as a monopoly, because its users have available alternatives to self-publish, and because Delmont has not given Poster any of the privileges of a common carrier.

This Court has never categorized internet platforms as common carriers. *See Knight*, 141 S. Ct. at 1221 (Thomas, J., concurring). At root, common carriers are businesses that serve the public interest. *See id.* at 1223 (citing *Ingate v. Christie*, 175 Eng. Rep. 463, 464 (N.P. 1850)). However, as Justice Thomas's concurrence noted, this "definition of course is hardly helpful, for most things can be described as 'of public interest.'" *Knight*, 141 S. Ct. at 1223.

No single test controls when an entity is a common carrier. *See Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring). The District Court properly recognized that the designation can turn on "whether the business holds itself out as serving the public, the business's actual market share, and the public's available comparable alternatives to engaging with that business." R. at 9. However, the lower courts erred in ruling that the latter two factors qualified Poster as a common carrier. R. at 10, 26. Both courts also failed to consider an additional factor for common carriers: whether the state has granted the businesses the privileges of a common carrier in return for imposing higher duties on it. *See Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring).

First, Poster is not a common carrier because its control of 77% of the self-publication market is not a monopoly. This Court "has refused to specify" a minimum percentage of market share that could constitute a monopoly. *Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989) (citation omitted). Although courts have identified monopoly power at market shares between 70% and 80%, *see id.*, the District Court recognized

that a "definitive monopoly" exists only at 90% under Judge Learned Hand's "often appl[ied]" test. R. at 10; *see also American Tobacco Co. v. United States*, 328 U.S. 781, 814 (1946); *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2nd Cir. 1945). In this case, Poster's market share of 77% falls below the only definitive threshold for monopoly power. R. at 2.

Poster's level of market share falls below that of other "digital platforms that have dominant market share." *Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring). In *Knight*, Justice Thomas suggested that Facebook and Google might qualify as common carriers because Facebook has three billion users and because Google has 90% of the market share. *See id.* Poster has hosted only hundreds of thousands of artists and writers over its entire history, and it controls only 77% of the self-publication market. R. at 9–10. Moreover, these other platforms are monopolies not only for the size of their market share, but also because of the power that their market share gives them. *See Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring). Google is the "gatekeeper" between users and other internet websites 90% of the time. *Id.* Poster relies on other digital platforms and is not the gatekeeper even for its own content. In this very case, Thornberry generated traffic to her Poster account *after* sharing her updated title on *other* social media outlets. R. at 4.

Second, Poster is not a common carrier because artists have other choices in self-publication services. Although the District Court relied on Justice Thomas's references to the Charles River and the Oregon Trail in ruling that Poster is "the only viable option" for self-publication, the proper analogy supports Poster. R. at 9–10 (citing *Knight*, 141 S. Ct. at 1225 ("A person always could choose to avoid the toll bridge or train and instead swim the Charles River or hike the Oregon Trail.")). Importantly, Justice Thomas did not say that one bridge would become a common carrier simply because Bostonians preferred it to another. Justice Thomas's comparison is properly between current and outdated technologies. In this case, the District Court recognized

that "undoubtedly other digital self-publication platforms . . . exist," comprising nearly a quarter of the market. R. at 10. Without Poster, authors wanting to self-publish are not forced to handwrite manuscripts. They can "undoubtedly" post on the available alternatives. *Id.*

Third, Poster is not a common carrier because Delmont has not provided Poster the privileges of a common carrier. *See Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring). Unlike other entities, common carriers take on higher duties in serving the public and receive needed benefits. *Id.*; *see also* Candeub, *supra*, at 406 ("[C]ommon carriage is a deal.").[2] Here, Petitioner has not pointed to any privilege it has given Poster. In contrast to common carriers, Delmont unilaterally imposes heightened duties on Poster. That is coercion, not common carriage.

Justice Thomas may be right that Facebook and Google are common carriers. *Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring). But this case is about Poster. With 77% percent market share and less than a million users, Poster is a far cry from Google's market share of 90% and Facebook's three billion users. Poster is not a common carrier.

B. The CC Law fails intermediate scrutiny because Delmont's interest in promoting multiple viewpoints does not require Delmont to compel Poster's speech.

The freedom of speech prohibits the government from compelling speech. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Laws that compel speech with designated content—"content-based" laws—warrant strict scrutiny. *See Wooley v. Maynard*, 430 U.S. 705, 715–16 (1977). Laws that compel speech without designated content—"content-neutral" laws—

[2] For example, governments relieved telegraphic companies from potential liability for retransmitting defamatory content in return for imposing duties of common carriage on them. *See Knight*, 141 S. Ct. at 1223 n.3 (Thomas, J., concurring). Other decisions classifying telecommunications providers as common carriers emphasized that the states provided them with franchises and uses of eminent domain. *See* James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 **Fed. Comm. L.J.** 225, 261 (2002).

warrant intermediate scrutiny. *See Turner Broad. Sys., Inc. v. Fed. Commc'n Comm'n*, 512 U.S. 622, 662 (1994). A law surpasses intermediate scrutiny when "it furthers an important or substantial government interest" and the "restriction on alleged First Amendment freedoms is no greater than is essential." *Id.* (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

Speech encompasses any expression, including an entity's curated presentation of others' viewpoints. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569, 574 (1995). In *Hurley*, a parade organizer approved or denied applications from groups that wanted to participate in the parade based on whether the groups would present messages that the organizer wanted to express. *See* 515 U.S. at 569. The parade constituted the organizer's speech because it represented its expression through the curated groups' messages. *Id.* This Court rejected the argument that the parade was not expressive on the ground that the organizer was "lenient in admitting participants." *Id.* Speech does not lose its quality as speech simply because it combines "multifarious voices" or because it does not have an "exclusive subject matter." *Id.*[3]

A law compels speech when it forces entities to express unwanted messages in its curated presentation of others' viewpoints —even when the speaker could disclaim any association. *See Turner*, 512 U.S. at 626, 643–44, 655, 661; *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980). In *Turner*, a law required cable operators to carry broadcast stations with their television channels. 512 U.S. at 626. The law compelled the operators' speech because it interfered with their editorial discretion over their channel offerings. *Id.* at 643–44. Viewers were not likely to

[3] In an analogy similar to the Fifteenth Circuit's, this Court reasoned that "like a composer, the [organizer] selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the [organizer's] eyes comports with what merits celebration." *Id.* at 574; *see also* R. at 27.

misattribute the views of the broadcast stations to those of the cable operators, especially through disclaimers. *Id.* at 655. Nevertheless, this Court reasoned that the possibility of a disclaimer reduced—but did not eliminate—any burden on the compelled speaker. *Id.* at 661. Petitioner may argue that in *PruneYard*, a law requiring a shopping center to allow students to distribute pamphlets did not compel speech because the owner could post disclaimers. 447 U.S. at 87. However, unlike the parade in *Hurley* and the television channels in *Turner*, this Court did not consider the shopping center to be the owner's curated presentation of others' viewpoints because the shopping center allowed members of the public to come and go as they pleased. *Id.*

A government's interest in promoting multiple viewpoints is important only when the compelled speaker has the technological ability to suppress those viewpoints. *See Hurley*, 515 U.S. at 578; *Turner*, 512 U.S. at 663, 656. In *Turner*, the government interest in compelling cable operators to carry broadcast stations was to "assur[e] that the public has access to a multiplicity of information sources." *Id.* at 663. This interest was only important, however, because cable technology made cable operators the "gatekeeper" over all programming into a subscriber's home, with the ability to "silence the voice of competing speakers with a mere flick of the switch." *Id.* at 656. In *Hurley*, the government interest in promoting multiple viewpoints was not important because the parade organizer had no ability, technological or otherwise, to stop other groups from organizing their own parades. *See* 515 U.S. at 578. This Court recognized that "the size and success of [the organizer's] parade makes it an enviable vehicle for the dissemination" of additional viewpoints, but the parade's popularity did not remove its freedom of speech. *Id.*

A law is not narrowly tailored if the government does not have facts that show that the law is needed and does not burden speech more than is necessary. *See Turner*, 512 U.S. at 665 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). In *Turner*, the government did not show

that cable operators were in fact imposing hardships on broadcasters. *Id.* at 667. In addition, the government had no evidence as to the hardships that its law would have on the cable operators. *Id.* at 668. Because the District Court in *Turner* had ruled for the government on summary judgment, this Court remanded to develop a more thorough factual record. *Id.*

In this case, the content-neutral CC Law fails to survive intermediate scrutiny. First, Poster's platform is speech because the platform expresses Poster's curated presentation of others' viewpoints. R. at 26. The very existence of Poster is an expression of its founders' beliefs in APC tenets. R. at 2. As in *Hurley*, Poster's platform is expressive even if Poster is "lenient" with allowing authors to self-publish. *See* 515 U.S. at 569. Second, the CC Law compels Poster's speech because it forces Poster to express unwanted messages. R. at 3. Even if Poster were to publish disclaimers for content such as Thornberry's, those disclaimers would merely reduce the burden on Poster's speech, as for the cable operators in *Turner*. *See* 512 U.S. at 655, 661. Third, Delmont's interest in promoting multiple viewpoints is not important in this case because Poster does not have any technological ability to stop authors from self-publishing elsewhere. R. at 34. Any person can self-publish on any website other than Poster's. In this sense, Poster is not like the cable operators in *Turner*, which could silence viewpoints entering a home "with a mere flick of the switch." *Id.* at 656. Poster is like the parade in *Hurley*, an "enviable vehicle" for self-publication for its "size and success," but hardly authors' only option. *See* R. at 10; 515 U.S. at 578. Finally, the CC Law is not narrowly tailored. The CC Law is not needed to promote viewpoints because Poster has only ever removed the works of two authors. R. at 5. At minimum, this Court should remand for further fact-finding as to the burden that the CC Law would impose on Poster, as in *Turner*. 512 U.S. at 668. For these reasons, the CC Law violates Poster's freedom of speech.

C. Even if Poster is a common carrier, the CC Law violates its freedom of speech because it removes Poster's editorial discretion over its own platform.

Even if Poster is a common carrier, the CC Law violates Poster's freedom of speech. As the Fifteenth Circuit properly recognized, common carriers do not have "second-class constitutional status" and are "entitled to *some* degree of First Amendment protection." R. at 27.

In his concurrence in *Knight,* Justice Thomas suggested that regulations affecting the speech of an internet platform "are valid if they would have been permissible at the time of the founding." 141 S. Ct. at 1223–24. No exception to the First Amendment for the speech of common carriers existed at the founding. *See United States v. Stevens*, 559 U.S. 460, 468 (2010) (cataloguing the "few limited areas" of speech unprotected by the First Amendment "[f]rom 1791 to the present") (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382–83 (1992)). Undeterred, Petitioner adopts the following syllogism: Under the common law, a government could limit a common carrier's right to exclude; Poster is a common carrier; Delmont can limit Poster's right to exclude. *See also Knight*, 141 S. Ct. at 1222. This logic, however, does not make Petitioner's case. In *Knight*, Justice Thomas was responding to Twitter's decision to "permanently remove[]" then-President Donald Trump's account. *Id.* at 1221. *Knight* was not about a decision by Twitter to remove a single tweet of Trump's. In this case, Poster has not permanently removed Thornberry's account. R. at 5. Poster only objects to her novel's title. *Id.* This difference reveals the distinction between an entity's right to exclude and an entity's right to the freedom of speech.

In deciding that "the 'common carrier' definition properly includes a website like Poster," the Fifteenth Circuit encountered a First Amendment quandary: Traditional common carriers "merely transmit another's message. They do not engage in any speech themselves." R. at 25. Recognizing "the important fact that Poster does not function *exclusively* as an expressive conduit

for others' artistic speech," the Fifteenth Circuit named Poster a "hybrid carrier" and set about identifying the degree to which Poster retained its freedom of speech. R. at 26.

The Fifteenth Circuit analyzed this Court's case law to make the following distinction: Common carriers of an editorial nature should receive a greater degree of protection from the freedom of speech than traditional common carriers such as telephone companies. *See* R. at 28; *see also Denver Area Educ. Telecomm. Consortium, Inc. v. Fed. Commc'n Comm'n*, 518 U.S. 727, 733, 739 (1996) (plurality opinion); *League of Women Voters of Cal. v. Fed. Commc'n Comm'n*, 468 U.S. 365, 366, 378 (1984). In *League*, this Court struck down a law prohibiting noncommercial educational broadcasters from engaging in editorializing. 468 U.S. at 366. This Court contrasted the freedom of speech of broadcasters, who "are engaged in a vital and independent form of communicative activity," with those of *traditional* common carriers. 468 U.S. at 378. Indeed, Petitioner may argue that the Fifteenth Circuit misread *League*, which states that "[u]nlike common carriers, broadcasters are entitled under the First Amendment." *Id.* (internal quotations omitted). What the Fifteenth Circuit recognized, however, was that with respect to Poster's editorial nature, Poster was more akin to the broadcasters in *League* than to the traditional common carriers. R. at 27. In *Denver*, this Court upheld a law allowing cable operators to decide not to broadcast programing depicting sexual or excretory activities or organs. 518 U.S. at 727 (plurality opinion). This Court rejected the claim that the operators were like traditional common carriers, emphasizing their editorial discretion over programming. *Id.* at 739. Again, the Fifteenth Circuit in this case recognized that Poster—with its editorial nature—was more akin to the operators than to the traditional common carriers, even if Poster was a common carrier in other respects. R. at 27.

Having reasoned that hybrid common carriers, unlike traditional common carriers, speak through their editorial discretion, the Fifteenth Circuit applied a test akin to intermediate scrutiny

for content-neutral compelled speech. Should this Court reach the question, this Court should affirm the Fifteenth Circuit's holding. The CC Law violates Poster's freedom of speech because it "forces Poster to endorse, via promotion, messages it may wish to disclaim" and it "prohibits the organization's own speech by limiting its ability to curate is users' content." R. at 29.

II. Because the CC Law is either not neutral or not generally applicable, and does not satisfy strict scrutiny, the CC Law violates the Free Exercise Clause by forcing Poster to promote material that conflicts with its pacifist tenets and by prohibiting Poster from fulfilling the APC's religious obligation to tithe.

This Court should affirm the Fifteenth Circuit's decision that the CC Law is unconstitutional under the Free Exercise Clause because the CC Law (1) is either not neutral or not generally applicable, and (2) is not narrowly tailored to advance a compelling government interest. Applicable to the States through the Fourteenth Amendment, the First Amendment dictates that government "shall make no law . . . prohibiting the free exercise [of religion] . . . ." U.S. CONST. amend. I; *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). To vigorously protect religious liberty as perhaps "the most inalienable and sacred of all human rights," courts take several steps in examining whether a law violates free exercise. THOMAS JEFFERSON, *Freedom of Religion at the University of Virginia*, *in* THE COMPLETE JEFFERSON, 957, 958 (Saul K. Padover ed., 1969). First, courts determine as a preliminary matter whether the law burdens the free exercise of religious practice. *See, e.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (holding that government burdened an organization's religious exercise by "putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs"). Courts next assess whether the law is neutral and generally applicable, for although a law that "target[s] religious beliefs as such is never permissible," laws that incidentally burden religion and are both

"neutral and generally applicable" are ordinarily constitutional. *Id.*; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). But where a law is either not neutral or not generally applicable, that policy is subject to strict scrutiny and must "advance[] 'interests of the highest order' and [be] narrowly tailored to achieve those interests." *Fulton*, 141 S. Ct. at 1881 (quoting *Church of the Lukumi*, 508 U.S. at 546); *Church of the Lukumi*, 508 U.S. at 531–32.

Here, because the CC Law is either not neutral or not generally applicable and is not narrowly tailored to advance a compelling government interest, the CC Law is unconstitutional under the Free Exercise Clause. Preliminarily, the CC Law burdens Poster's exercise of religion by putting it to the choice of violating its religious duties to promote peace and tithe or close its business. R. at 13, 37; *Fulton*, 141 S. Ct. at 1876. First, the CC Law is not neutral because it prohibits Poster from tithing in accordance with its religious beliefs or because it requires Poster to promote beliefs repugnant to its religion. R. at 13, 37; *Church of the Lukumi*, 508 U.S. at 534–38, 540–42. Second, the CC Law is not generally applicable because it creates a mechanism for individualized exemptions that invites the government to consider Poster's reasons for editorial discretion. R. at 32; *Fulton*, 141 S. Ct. at 1879, 1881. Finally, the CC Law does not meet strict scrutiny because Delmont could advance any interest it may have in preventing a website from denying access to its platform without burdening religion. R. at 5; *Church of the Lukumi*, 508 U.S. at 531–32; *Fulton*, 141 S. Ct. at 1881. Therefore, this Court should hold that the CC Law is unconstitutional under the First Amendment and uphold the Fifteenth Circuit's decision.

A. The CC Law is not neutral because it prohibits Poster from tithing in accordance with its religion or because the law requires it to promote beliefs repugnant to it.

This Court should conclude that the CC Law is not neutral because it (1) prohibits Poster from donating to APC causes because of religious motivation, or (2) requires Poster to promote

content violative of APC's pacifist values. R. at 3, 5, 36–37. A law that prohibits a closely held corporation owned by members with sincere religious beliefs from contributing funds to religious causes is not neutral because it restricts practices due to religious motivation. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 708 (2014) (explaining that closely held corporations owned by members with sincere religious beliefs have free exercise rights); *Church of the Lukumi*, 508 U.S. 520, 533 (1993). Similarly, a law that requires such a corporation to promote values in contravention of the owners' religious beliefs is not neutral because it infringes upon practices due to religious motivation. *See Church of the Lukumi,* 508 U.S. at 533.

A law is not neutral where the "object of a law is to infringe upon or restrict practices because of their religious motivation." *Church of the Lukumi,* 508 U.S. at 533 (citing *Emp. Div. v. Smith*, 494 U.S. 872, 878–79 (1990)). Finding guidance for assessing the neutrality of a law's object in equal protection cases, courts examine the law's text, the specific series of events leading to the enactment of the law, and the law's legislative or administrative history. *Id.* at 533–34, 540.

For assessing a law's facial neutrality, this Court has looked to the law's text, holding that a "law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* at 533–34. In *Church of the Lukumi,* this Court assessed the facial neutrality of three ordinances that together prohibited animal "sacrifice" for any "ritual." *Id.* at 527–28. Noting that the words "sacrifice" and "ritual" have religious origins and connotations, this Court agreed that these terms are "consistent with the claim of facial discrimination." *Id.* at 533–34. However, the claim of facial discrimination was inconclusive because the "current use [of the terms] admits also of secular meanings" and because the laws defined "sacrifice" in secular terms and did not refer to religious practices. *Id.* at 534 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1961, 1996 (1971)). Thus, because the Free

Exercise Clause also "forbids subtle departures from neutrality" and "covert suppression of particular religious beliefs," facial neutrality is not determinative of a law's neutrality. *Id.* at 534; *Gillette v. United States*, 401 U.S. 437, 452 (1971); *Bowen v. Roy*, 476 U.S. 693, 703 (1986).

Thus, in evaluating a law's neutrality, courts also examine the series of events that led to the law's enactment, and the law's legislative or administrative history. *Church of the Lukumi*, 508 U.S. at 540; *see also Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1731 (2018). In *Church of the Lukumi*, this Court analyzed the legislative history of three ordinances in deciding that they were not neutral. 508 U.S. at 534–38, 540–42. Next, explaining that "the effect of a law in its real operation is strong evidence of its object," this Court held the ordinances' operation specifically targeted petitioners and their religious practice of Santeria because the only conduct the ordinances prohibit is religious conduct. *Id.* at 535, 538.

Additionally, the fact that a law "proscribe[s] more religious conduct than is necessary to achieve their stated ends" can evidence a law's improper targeting of religion. *Id.* at 538. Because the government's legitimate interest in protecting public health and preventing animal cruelty could have been advanced by lesser restrictions that would not have prohibited the practices, the laws "visit[ed] 'gratuitous restrictions' on religious conduct." *Id.* (citing *McGowen v. Maryland*, 366 U.S. 420, 1186 (1961) (opinion of Frankfurter, J.)). The gratuitous nature of the ordinances thus indicated that the laws' object was to restrict religious practices. *Id.* at 539. Finally, the events preceding the ordinances' enactment also revealed the law's discriminatory object. *Id.* at 540–42. During a City Council session discussing the ordinances, the crowd cheered Council members critical of Santeria and taunted those who were not. *Id.* at 541. Other officials made negative comments, characterizing Santeria's practices as "abhorrent" to the city's residents. *Id.* at 542.

In this case, the CC Law's text, its operation, and the events that led to its enactment demonstrate that it is not neutral. The object of the CC Law is to restrict Poster's practices of maintaining editorial discretion and contributing to religious causes because of the religious nature of those practices. First, the CC Law is not facially neutral because it explicitly restricts religious practice. In prohibiting platforms from contributing "to political, religious, or philanthropic causes," the CC Law uses the term "religious" in a way that does not have a secular meaning discernable from its language or context. R. at 3. The definition of the term "religious" is "of or relating to religion"; therefore, the plain meaning of the CC Law limits contributions to religious causes, a practice that many religions—including the APC—mandate. *Religious*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/religious (last visited Jan. 25, 2022); R. at 37. The Fifteenth Circuit noted that *Church of the Lukumi* reinforces this conclusion; if terms with religious connotations such as "sacrifice" and "ritual" can constitute facial discrimination, then the term "religious" itself must also indicate facial discrimination. 508 U.S. at 534; R. at 30.

Additionally, the context in which the CC Law uses "religious" supports a non-secular reading. *Id.* The CC Law also includes "political" and "philanthropic"—which have secular meanings—to modify "causes." *Id.* Listing the term "religious" alongside secular terms indicates that "religious" is not referring to something secular; otherwise, the term would be redundant. Thus, because "religious" does not have a secular meaning discernable from its language and context, the CC Law restricts the religious practice of contributing to religious causes and is not facially neutral. At the very least—like the use of "sacrifice" and "ritual" in the laws in *Church of the Lukumi*—the use of "religious" in the CC Law bolsters a conclusion that it is not neutral.

The CC Law is also not neutral based on its operation and the events leading up to its enactment. Although the CC Law prohibits both religious and secular conduct—unlike the laws in

Church of the Lukumi—it still operates to discriminate against religious practices. Because the CC Law requires, on penalty of heavy fines, that Poster post material even when that content contradicts Poster's faith, it forces Poster to choose between violating its religion and closing its business. R. at 37. The events leading up to enactment bolster this conclusion. Governor Trapp promised to "prevent online platforms from stifling viewpoints that they disagreed with by denying access to their forums and marketplaces." R. at 34. This statement indicates that the conduct the CC Law seeks to address is a website's denying access to its platform. However, Governor Trapp admited that the CC Law's prohibition on donations to religious causes was "tailored to prevent online platforms from favoring one particular viewpoint over another through their monetary contributions." R. at 35. Preventing platforms from contributing to any causes—secular or religious—does nothing to address public access to those platforms.

Although the law's statement of intent—and Governor Trapp's affidavit—claims that the no-contribution provision was included to avoid violating the Establishment Clause, Governor Trapp's other comments and Establishment Clause case law make such a contention suspect. R. at 35. Governor Trapp noted in his affidavit that "Poster . . . is the kind of website the [CC] [L]aw is designed to address." R. at 35. While this statement could be read to support the need for free speech protections for people who post on internet platforms, this statement could also be read to condemn contributions on the basis of religious motivation. Considering this statement with the fact that Poster lobbied heavily against the CC Law reveals the Law's discriminatory object. Prior to the CC Law's enactment, Poster's lobbying made Delmont aware that Poster was a closely held corporation owned by members with sincere religious beliefs and was able to offer its services at such low rates because of Poster's dedication to the APC's mission. R. at 37. Poster also voiced its concern that the CC Law would require Poster to choose between posting material violative of

its faith and closing as a business. *Id.* Thus, Delmont knew that the very circumstance that enabled Poster to hold a substantial share of the market and fall under the CC Law—its dedication to its religious mission—would have been compromised by both the no-contribution provision and the requirement to promote all content regardless of whether it comported with Poster's religious beliefs. *Id.* Further, the no-contribution provision does nothing to ensure public access to Poster. Yet Delmont made no changes to the CC Law to address Poster's concerns, indicating that the purpose of the CC Law is more to restrict and infringe upon Poster's religious practices than to limit online platforms from restricting speech. Furthermore, the Law's statement of intent and Governor Trapp's claim that the no-contribution provision was included to "avoid implicating the Establishment Clause" is also suspect because including the provision does nothing to ensure the CC Law will not run afoul of the Establishment Clause under any of this Court's tests. R. at 3, 35; *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).[4] Thus, because the

[4] Under the *Lemon* test, a law does not violate the Establishment Clause where (1) it has a secular purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612–13 (1971). To determine whether the government entanglement with religion is excessive, this Court examines "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Id.* at 615. Here, including the no-contribution provision does nothing to ensure the CC Law has a secular purpose; rather, the inclusion of this provision is more indicative that the Law's object is to infringe upon and restrict religion. *Supra* Part II.A. The provision also has no influence on the CC Law's primary effect and does not foster an excessive government entanglement with religion, as Delmont is not benefitting platforms under the CC Law. The provision also does not ensure Delmont neither endorses nor disapproves of religion consistent with the endorsement test. *Lynch*, 465 U.S. at 688 (1984) (O'Connor, J., concurring). Rather, the inclusion of the provision more so indicates that Delmont disapproves of religion, as it prohibits contributions to religious causes. R. at 3. Also, the provision does not prevent Delmont from coercing anyone to support or participate in religion or its exercise, consistent with the coercion test. *Lee*, 505 U.S. at 587 (1992).

CC Law prohibits Poster from donating to APC causes because of religious motivation or requires Poster to promote content violative of APC's pacifist values, the Law is not neutral.

B. The CC Law is not generally applicable because it gives the Delmont Attorney General discretion to enforce the CC Law and determine which businesses fall under it, thereby creating a mechanism for individualized exemptions that invites the government to consider the particular reasons for Poster's conduct.

The CC Law is not generally applicable because it allows for individualized exemptions by giving Petitioner the discretion to determine which businesses have "substantial market share." R. at 3. A law is not generally applicable where 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*, 141 S. Ct. 1868, 1877 (2021) (citing *Emp. Div. v. Smith*, 494 U.S. at 884) (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (Burger, C.J.)). This Court has noted that "the concepts of neutrality and general applicability are interrelated, and 'failure to satisfy one requirement is a likely indication that the other has not been satisfied.'" Jeffrey M. Shaman, *Rules of General Applicability*, 10 FIRST AMEND. L. REV. 419, 419 (2012) (quoting *Church of the Lukumi*, 508 U.S. at 531).

In *Fulton*, this Court held that a government contract provision was not generally applicable because it allowed for exceptions that invited the government to decide which reasons for exceptions are valid. *Fulton*, 141 S. Ct. at 1879. In *Fulton*, the City of Philadelphia acted in a managerial role when it contracted with Catholic Social Services ("CSS"), a foster agency in which Philadelphia places children needing a family. *Id.* at 1874–75, 1878. The contract's "rejection of referral" provision prohibited CSS from rejecting a prospective family willing to foster or adopt based upon sexual orientation and allowed exceptions at the Commissioner's discretion. *Id.* at

1878. Despite CSS's religious objections to placing a child with a same-sex couple, the City made clear that the Commissioner would not grant an exception. *Id.* at 1875–76, 1878. Noting that general applicability constrains the government as a manager, this Court held that the "system of entirely discretionary exceptions" rendered the provision not generally applicable. *Id.* at 1878.

In this case, the CC Law is not generally applicable because it allows for individualized exceptions that invite Delmont to "consider the particular reasons for a person's conduct" by giving the Attorney General discretion to determine which businesses fall under the CC Law. R. at 3, 32; *Fulton*, 141 S. Ct. at 1877. Because the CC Law applies only to businesses deemed to have "substantial market share," and because the Law does not define that term, Petitioner has the discretion in enforcing the CC Law to determine which businesses fall under it. R. at 3 n.4, 32. Such unbridled discretion enables Petitioner to consider Poster's particular reasons for removing posts and contributing to religious causes in deciding whether Poster is subject to the CC Law, like the Commission's discretion in *Fulton*. 141 S. Ct. at 1878. Indeed, Petitioner appears to have made such a consideration in stating that Poster "is discriminating against Delmont citizens based on their political viewpoints . . . and [Delmont] bring[s] this action for the first time today to stop that practice." R. at 32. This statement reveals that Petitioner used his discretion to conclude that the reason Poster removed Thornberry's post was political, demonstrating that Petitioner inquired into Poster's particular reasons for conduct before deciding to bring the action. R. at 32.

C. The CC Law does not meet strict scrutiny because it is not narrowly tailored to limit Poster's ability to restrict speech.

This Court should hold that the CC Law does not meet strict scrutiny because it is not narrowly tailored to advance Delmont's interest in protecting freedom of speech. If this Court finds that the CC Law is either not neutral or not generally applicable, the CC Law must meet strict

scrutiny, meaning the law must advance a compelling government interest and be narrowly tailored to advance that interest. *Church of the Lukumi*, 508 U.S. at 531–32; *Fulton*, 141 S. Ct. at 1881. Even if Delmont has a compelling interest in "prevent[ing] online platforms from stifling viewpoints that they disagreed with by denying access to their forums and marketplaces"[5]—the stated interest of the law—the CC Law is not narrowly tailored to advance that interest. R. at 34. This is because Delmont can advance this interest in a manner that does not burden religion. *Fulton*, 141 S. Ct. at 1881 (citing *Church of the Lukumi*, 508 U.S. at 546). For example, the CC Law could provide an exemption for editorial discretion based on religious objection or eliminate the no-contribution provision. Permitting editorial discretion based on religious objection would not burden religion while still preventing a website from denying access to its platform. Poster did not deny Thornberry access to its platform; Poster notified her that it would reinstate her account once she revised the title of her work. R. at 5. Eliminating the no-contribution provision would also not burden religion while not affecting a platform's ability to deny access. Thus, because Delmont can advance any interest it may or may not have in preventing a website from denying access to its platform without burdening religion, the CC Law fails to meet strict scrutiny.

CONCLUSION

For the foregoing reasons, the CC Law violates Poster's rights to the freedom of speech and to the free exercise of religion. This Court should reverse the Fifteenth Circuit's ruling that Poster is a common carrier and affirm its judgments on the CC Law's constitutionality.

[5] Poster argues that Delmont's interest is not important because Poster cannot prevent any speaker from sharing any viewpoint on any other website at any time. *See supra* Part I.B.

APPENDIX

In pertinent part, the First Amendment provides:

"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, ..." U.S. CONST. amend. I.

In pertinent part, the Fourteenth Amendment provides:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ." U.S. CONST. amend. XIV.

In pertinent part, the Delmont Common Carrier Law provides:

Internet platforms with "substantial market share" are common carriers that "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). According to its statement of intent, the law includes the "no contribution provision" to avoid violating the Establishment Clause. *Id.* § 9-1.120(b). Violations result in fines up to thirty-five percent of a business's daily profits, compounding daily until the offender conforms. R. at 3.