No. 22-CV-7654

In the

Supreme Court of the United States

WILL WALLACE, *Petitioner*

v.

POSTER, INC., *Respondent*

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

Team 019

Counsel for Petitioners

QUESTIONS PRESENTED

I. Whether a law that regulates common carrier online platforms is constitutional because it only requires those platforms to indiscriminately act in their hosting functions and does not burden the platforms' own speech.

II. Whether a law is constitutional when it does not impermissibly target religion, makes no exemptions, treats similarly-situated categories equally, and does not suffer from under inclusiveness.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Treatises:

Other Authorities:

STATEMENT OF JURISDICTION

The Fifteenth Circuit Court of Appeals entered a judgment in this case. Petitioner timely filed a Writ of Certiorari and this Court granted review. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2019).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST. amend. I.

DELMONT REV. STAT. § 9-1.120.

STATEMENT OF THE CASE

In 2020, Delmont passed DELMONT REV. STAT. § 9-1.120, "the CC Law," in an effort to "bolster" the free speech rights of Delmont citizens, and to prevent online platforms with substantial market share from discriminating against the public and various ideologies. R. at 3; 34–35. A "'no contribution provision' was included in order to avoid running afoul of the Establishment Clause." § 9-1.120(b); R. at 3. The CC Law contains no "exemptions, religious or otherwise." R. at 3. Before the CC Law was enacted, now-Governor Trapp campaigned with the idea for the law, and Poster lobbied against it. R. at 20, 35. Both Governor Trapp and the legislative sponsors described the law's object as being about "concern[] over large tech platforms' substantial control over public expression." R. at 35; *see* R. at 31–32.

Poster is an online platform that controls 77% of the online self-publication market for artists. R. at 2. It was founded in 1998. R. at 3. Poster does not depend upon the sales of its own products; rather, Poster charges a subscription for using its platform, and a percentage of any rents and sales artists make on its platform. *See* R. at 2. Additionally, all of Poster's board members belong to the American Peace Church ("APC"). R. at 37. APC-members "are called to

tithe in support of artists, poets, educators, and musicians." *Id.* Poster serves APC-users of its site by providing them discounted services. R. at 3. Poster's terms disclaim endorsement of publishers' views. R. at 19. Although Poster's terms of service state that it "retains editorial discretion," it has only exercised this discretion twice in twenty years. R. at 2; 9.

In November 2018, Katherine Thornberry published a novel on Poster's platform. R. at 3. Thornberry attended an animal rights rally in July 2020, where violence unconnected to her occurred. R. at 4. Poster's CEO signed a newspaper op-ed, condemning the violence. R. at 4–5. While at the rally, Thornberry changed the title of her novel to one that Poster disagrees with. R. at 5. Poster removed the novel, an action it has taken only once before. *Id.*

On August 1, 2021, the Delmont Attorney General, Will Wallace, enforced the CC Law after learning—through Thornberry's national televised broadcast—that Poster committed "artistic suppression." R. at 6. Wallace explained the decision to enforce, stating "[t]he APC-founded Poster platform is discriminating against Delmont citizens based on their political viewpoints . . . and we bring this action for the first time today to stop that practice." R. at 6. Poster then filed suit in the United States District for the District of Delmont requesting injunctive and declaratory relief, arguing that the CC Law is unconstitutional under the First Amendment. R. at 1. The District Court granted the government's motion for summary judgment, and the Fifteenth Circuit reversed. R. at 16; 33. This Court granted certiorari.

SUMMARY OF THE ARGUMENT

This Court should reverse the Fifteenth Circuit and hold that the CC Law does not violate Poster's free speech rights because it is within Delmont's police power to employ common carrier designations to subject certain entities to nondiscrimination regulation. Poster is a conduit; Poster does not sell its own message or product. Poster serves the public at large and

does not bargain or contract for customers on an individualized basis. Poster thus satisfies the common law definition of a common carrier. By holding that Poster is a "hybrid" carrier with the ability to commit viewpoint discrimination, the Fifteenth Circuit misapplied the common carrier doctrine and left the door open for other large online platforms to act as gatekeepers of speech.

Under this Court's precedents, Delmont can require Poster to host third-party speech as a common carrier because Poster's own speech is not affected by the requirement. Poster does not have the requisite intent to convey a particular message when it hosts third-party content on its self-publishing platform. Poster's hosting function is separate from its own speech, such as when it curates content or when its CEO speaks about current issues. Therefore, because Poster is a common carrier of third-party speech and the law does not burden Poster's own speech, this Court should adopt Justice Thomas's reasoning in *Biden v. Knight First Amendment Institute of Columbia University*, *and* not apply heightened scrutiny.

Alternatively, the CC Law is constitutional because under the balancing test established in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, Poster's desire to host only APC-friendly content, in light of its unbridled power in controlling a critical pathway of speech, fails against Delmont's competing interests in promoting free speech. The CC Law is also a content-neutral and only incidentally burdens speech because it requires Poster to treat all expressions equally, regardless of content or viewpoint.

This Court should also reverse the Fifteenth Circuit's holding that the CC Law violated the Free Exercise Clause and hold the law is constitutional because it is neutral and generally applicable under *Employment Division Department of Human Resources of Oregon v. Smith*.

The CC Law is neutral because its object is to promote free expression and not to impermissibly target religion. On the face of the law, the use of "religious," within lists of terms

including "political," "ideological," and "philanthropic" demonstrates that the object of the law is not to discriminate against APC's religious practices or religion in general. As applied to Poster, there is no history in Delmont (legislative or otherwise), and no pattern of acts leading up to the CC Law's passage, that suggest the object of the law is to target Poster, APC, or religion.

The CC Law is also generally applicable because it contains no exemptions and has no individualized mechanism for exemptions. Parties' particular reasons for exemptions from the CC Law are not considered. The CC Law treats ideological categories similarly, and it serves government interests effectively. Because the CC Law is both neutral and generally applicable, this Court should hold it constitutional under rational basis review.

ARGUMENT

I. THE CC LAW DOES NOT VIOLATE POSTER'S FREE SPEECH RIGHTS

The CC Law is a constitutional exercise of Delmont's authority and does not violate Poster's free speech rights under the First Amendment as incorporated against the states.

A. Poster is a common carrier under common law, and the CC Law does not violate Poster's free speech rights as a common carrier.

The First Amendment right to free speech is guaranteed to corporations as well as individuals. *See generally Citizens United v. FEC*, 558 U.S. 310 (2010). The Fourteenth Amendment protects against state violations of the First Amendment. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). Although Poster is a corporation, it is also a common carrier. Accordingly, Delmont does not violate Poster's free speech rights by requiring it to serve the public indiscriminately. The Fifteenth Circuit's decision should be reversed.[1]

[1] Poster does not dispute Delmont's ability to regulate common carriers, nor does Poster address the potential interstate nature of its activities, therefore this particular issue is not briefed by Petitioner. See also note 10 of R. at 20 regarding preemption by Telecommunications Act.

1. Poster is a common carrier because it sells a conduit rather than its own message and does not bargain individually.

The Fifteenth Circuit designated Poster a "hybrid" carrier with the ability to discriminate against users because it retains "editorial authority over user accounts on its platform." R. at 26. This holding leaves Poster, and other similarly situated social media platforms, room to skirt common carrier liabilities simply by disclaiming such status in their Terms and Conditions, even if it acts, in all respects, as a common carrier. *See* Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 475 (2021).

Accordingly, Petitioner advances a more precise definition of common carrier, supported by the common law, that disposes of the Fifteenth Circuit's "hybrid" approach: an entity engages in common carrier activities subject to regulation if it (1) *actually* proffers its subject service to the public at large and does not contract and bargain on an individualized basis, and (2) the essential nature of its subject activity is to sell a conduit rather than its own message or product.

Regarding the first requirement, the distinguishing feature of common carriers is that they do not contract with customers on an individualized basis (such as engaging in a selection or bargaining process), and *actually* serve the public.[2] *See e.g.*, 13 C.J.S. *Carriers* § 3 (2021); 13 Am. Jur. 2d Carriers § 2 (2021). "Whether a carrier is a common carrier . . . does not depend

[2] This is the most widely accepted definition of a common carrier under the common law. *E.g.*, *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976). Other definitions have been adopted and discarded over time. For example, whether a company is "affected with a public interest" was once dispositive as to common carrier status, *see generally Munn v. Illinois*, 94 U.S. 113 (1876), but was thrown aside by this Court in *Nebbia v. New York* for being too ill-defined, 291 U.S. 502, 536 (1934). Similarly, there is no consensus in legal scholarship, nor historical precedent, that common carrier status depends upon market power. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, *supra*, at 466–68.

upon whether its charter *declares* it to be such, . . . but upon what it *does*." *United States v. Brooklyn E. Dist. Terminal*, 249 U.S. 296, 304 (1919) (emphasis added). In order to determine if an entity truly satisfies the first requirement, a court may consider two factors.

First, a court can look to whether the entity has historically served the public on the same terms. *Compare Smitherman & McDonald v. Mansfield Hardwood Lumber Co*., 6 F.2d 29, 32 (W.D. Ark. 1925) (holding that a freight company could not disclaim common carrier liability simply by inserting a clause in its contracts when it historically carried all who asked) *and Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) ("[A] carrier cannot vitiate its common carrier status merely by entering into private contractual relationships with its customers."), *with Dawkins Lumber Co. v. L Carpenter & Co.*, 281 S.W. 1013, 1016–17 (Ky. 1926) (holding that an entity was not a common carrier because it *only* transported goods for specific companies it had prior business relations with). Second, a court can consider whether the entity selectively chooses its clients. *See Semon v. Royal Indem. Co.*, 279 F.2d 737 (5th Cir. 1960) (holding a boater to be a private carrier because he chose clients on an individualized basis and bargained separately each time).

Considering both factors, Poster's activities satisfy the first requirement. Although Poster retains the right to remove content unfriendly to its APC beliefs, R. at 37, in twenty years, Poster has "practically never" removed content despite serving "77% of the self-publication market." R. ,historically served the public on equal terms. Poster's business model also depends upon servicing the public at large because it is a social media platform that gains prominence, additional revenue, and higher usage rate with more diverse and voluminous content. As Justice Thomas pointed out in *Knight*, "[s]imlar to utilities, today's dominant digital platforms derive much of their value from network size." 141 S. Ct. at 1224. Additionally, unlike the boater in

Semon, Poster does not engage in selective bargaining with potential users prior to carrying their content; rather, it uses a form service agreement and does not selectively accept or decline accounts to users. *See generally* R. at 2–3.

Regarding the second requirement, the question is whether the entity is truly selling a conduit rather than its own message or product. *E.g.*, *Nat'l Ass'n of Regul. Util. Comm'rs*, 533 F.2d at 609; *U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002) (explaining that, under a test derived from common law, common carrier status turns on whether customers are transmitting "intelligence of their own design and choosing"). For example, newspapers are not common carriers because they are not "passive" conduits; their *business* is to sell the communications with which they are "intimately connected." *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos.* 515 U.S. 557, 575–76 (1995). Additionally, it has long been held that an entity may be a common carrier in some respects but not others. *E.g.*, *FCC v. AT&T Mobility LLC*, 883 F.3d 848, 858 (9th Cir. 2018) (explaining that "being a common carrier entity [is] not a unitary status for regulatory purposes" (citing *N.Y. Cent. R.R. Co. v. Lockwood*, 84 U.S. 357, 377 (1873)); *Sw. Bell Tel. Co.*, 19 F.3d at 1481 ("one can be a common carrier with regard to some activities but not others." (citations omitted)).

Poster is a common carrier because its primary function—and where it makes money—is to host *others'* content,[3] even if it occasionally promotes or endorses a specific type of content. Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 1, 32–33 (2021) (arguing that legislators may distinguish between a platform's hosting and curating functions, applying common carrier regulations to the former). The Fifteenth Circuit

[3] Poster describes itself as a "self-publication website" rather than an APC news forum or content-curator. R. at 36.

erred by concluding that simply because Poster itself may speak, or occasionally promote the speech of others, it is no longer a conduit.

2. The CC Law is constitutional because it neither compels nor restricts Poster's own speech.

Once an entity is properly designated as a common carrier, it may be subjected to nondiscrimination regulation without violating the constitution. *See*, *e.g.*, *W. Union Tel. Co. v. Call Publ'g Co.*, 181 U.S. 92, 98 (1901) (holding that as a common carrier, a telegraph company owes a duty of non-discrimination); *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 411 (1914). An entity's speech interests are weakest when it acts more like a common carrier, such as telephone companies, and less like editors, such as newspapers. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 739 (1996). When a state imposes obligations on common carriers to transmit *others'* speech, it does not affect the carrier's own message. *U. S. Telecomm. Ass'n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016). If the carrier's own speech is unaffected, state regulation of common carriers does not violate the First Amendment.[4] *Id.*

(a) Delmont can require Poster to host third-party speech because hosting does not affect Poster's own speech.

Requiring private entities to host third-party speech does not always violate those entities' First Amendment rights. *See Rumsfeld v. F. for Acad. & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47 (2006) (unanimous opinion) (requiring law schools to host military recruiters); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (requiring shopping mall,

[4] Poster alleged below that the Delmont CC statue infringed on its free speech rights by requiring Poster to host content it objected to. R. at 11. It did not allege that the CC Law burdened its speech in other ways, so only the requirement to host is addressed here.

open to the public, to host third-party speakers); *Turner Broad. Sys., Inc. v. FCC* (*Turner II*), 520 U.S. 180 (1997) (upholding must-carry provisions for cable operators). A state may constitutionally compel a private entity to host speech when the speech is not likely to be attributed to the entity, the entity is not required to speak, and the entity may disclaim the message conveyed. *PruneYard*, 447 U.S. at 87. Requiring a private entity to host speech it disagrees with is not the same as requiring the entity to speak. *See FAIR*, 547 U.S. at 60. This requirement to host speech is analogous to common carrier nondiscrimination regulation and thus is permissible under the First Amendment. *See Telecom.*, 825 F.3d at 740.

In *PruneYard*, a shopping center argued that a California law forcing it to host third-party speech was a violation of its own free speech rights. 447 U.S. at 85. The Court found that because the shopping center was open to the public, the third-party speech was not likely to be attributed to the shopping center itself. *Id.* at 87. The California law did not violate the shopping center's free speech rights because the law did not compel it to speak by dictating a message, and it left the shopping center free to dissociate itself from the third-party's message by posting signs disclaiming those messages. *Id.* at 88. In *FAIR*, Congress conditioned law schools' federal funding on hosting military recruiters. 547 U.S. at 52. The schools objected to hosting military recruiters because they disagreed with Congress' policy regarding "homosexuals in the military." *Id.* at 52.

Accommodating the military's message did not affect law schools' own speech because the schools were not speaking when they hosted military recruiters. *Id.* at 64. The Court further found that nothing in the law restricted what the law schools themselves could say and that the military's speech would not be confused for the schools' speech because the schools were free to disassociate themselves. *Id.* at 64–65. Accordingly, the Court found that the law was

constitutional because the schools' message was not affected by the speech the schools were required to host. *Id.* at 63–64.

Here, as with the law schools in *FAIR*, Poster is not itself speaking when it hosts Thornberry's work. There is nothing in the CC law that restricts what Poster may say. Poster, without hinderance from Delmont, spoke when its CEO published an editorial condemning the violence after the protest. R. at 5. And like the shopping center in *PruneYard*, Poster has held itself out to the public as a self-publishing platform, so it is unlikely that Thornberry's speech will be confused for Poster's own speech. *See* R. at 2. Furthermore, Poster is free to place disclaimers on Thornberry's page to further disaffiliate itself from her message.

(1) Editorial discretion requires intent to convey a particular message, which is not present here.

A speaker has the right to shape the messages it intends to convey. *Hurley*, 515 at 557, 574. Speech can include selecting the speech of others to include with one's own speech. *See id.* The use of editorial discretion to communicate a message is a form of speech. *Turner Broad. Sys., Inc. v. FCC* (*Turner I*), 512 U.S. 622, 636 (1994). However, to speak through the exercise of editorial discretion requires the speaker be more than a "passive receptacle or conduit for news, comment, and advertising." *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). While restricting editorial discretion may violate the First Amendment if the government forces the speaker to alter its message, s*ee Hurley*, 515 U.S. at 572–73, it is less an issue if those restrictions do not alter the speaker's message. *See Tornillo*, 418 U.S. at 655–56. Additionally, common carriers are not entitled to the same amount of editorial discretion as other entities, such as broadcasters. *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984).

In *Hurley*, parade organizers denied Irish-American Gay, Lesbian and Bisexual Group of Boston's ("GLIB") application to take part in the parade. 515 U.S. at 561. The Court found that the parade itself was the speech of the organizers because the intent of marchers in a parade is to make a "collective point." *Id.* at 568–69. It found that selection of parade entrants was part of the organizers' speech. *Id.* at 570. Requiring the parade organizers to include GLIB would violate the organizers' First Amendment rights because such inclusion would alter the message they wanted to convey. *Id.* at 572–73. In *Tornillo*, this Court found that a right-of-reply statute was an impermissible intrusion into newspapers' editorial discretion because of the likelihood that newspapers would alter their message to avoid triggering the statute. *See* 418 U.S. at 257. Similarly, by requiring a utility company to publish messages it disagreed with in its own newsletter, the government was forcing the company to alter its own message by responding. *Pacific Gas and Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 5–6, 16 (1986). The *Pacific Gas* decision is distinguishable from *FAIR*. There, accommodation of the military's message did not force schools to respond because recruiters' speech would not likely be confused as the law school's speech. *FAIR*, 547 U.S. at 64.

Must-carry provisions in *Turner I* interfered with cable operators' speech by restricting their editorial discretion in choosing what to carry. 512 U.S. at 636 (citing *Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986)). However, unlike in *Hurley*, *Pacific Gas*, and *Tornillo*, the Court found that the must-carry provisions would not alter the cable operators' speech because they would not be forced to respond to the speech that they were required to carry. 512 U.S. at 655. Because broadcasters disclaimed endorsement of the speech on their platform, there was no danger that listeners would attribute the messages to the cable operators themselves. *Id.* The Court also found that the must-carry provisions would not lead to self-

censorship because, unlike in *Tornillo*, there was nothing in the provisions to cause a cable operator to conclude self-censorship was the safer choice. *Id.* at 656.

The vast majority of speech on digital platforms is invisible to the platform host. *NetChoice, LLC, v. Moody*, No. 4:21cv220-RH-MAF, 2021 WL 2690876, at *8 (N.D. Fla. June 30, 2021). More than 99% of the content on digital platforms is never reviewed except by algorithms, which do not screen for viewpoint. *Id.* Digital platforms are also distinguishable from other speech hosts in other ways. Digital platforms are not limited by space. 141 S. Ct. at 1226. Therefore, requiring such platforms to host the speech of others as common carriers will not impede the platform itself from speaking. *Id.*

Unlike a parade or newsletter, Poster's hosting activities are not speech. Poster has historically allowed anyone to post any content on its platform without interference. The platform contains a cacophony of competing messages, rather than a single discernable message. Poster's general practice is not to select and direct other speakers' messages as a conductor would an orchestra. It does not "produce a curated and attractive result for the audience it is seeking to serve." R. at 27. Rather, it serves the *speakers* by charging them for access to a platform that the speakers use to reach their audiences. Like other social media platforms, it virtually never exercises editorial discretion over hosted content. R. at 11. Because Poster is not exercising editorial discretion, hosted content on the Poster platform is not Poster's speech. And, because Poster is a digital platform, there are no space constraints that would impede Poster itself from speaking on its platform. Furthermore, to the extent that Poster has, on only two occasions (R. at 5), exercised editorial discretion to remove content from its platform, Delmont's interference with that discretion is permissible under this Court's precedent in *Turner II.* As with must-carry provisions for cable operators, there is no danger that an audience will confuse

Thornberry's message with Poster's speech. As with broadcasters who disclaimed endorsement of others' speech, Poster disclaims endorsement of Thornberry's message. R. at 2. Thus, the Delmont law does not force Poster to speak. Accordingly, Delmont's law is permissible under the First Amendment.

(2) Poster's own speech is separate from its duty as a common carrier to host indiscriminately and is not burdened by the CC Law.

An entity may be a common carrier for some purposes but not for others. *FTC v. AT&T Mobility LLC*, 883 F.3d 848, 858 (9th Cir. 2018) (en banc) (citing *Lockwood*, 84 U.S. at 377). The circuit courts have generally agreed that common carrier regulations depend on the entity's activities, rather than its status as a common carrier. *Id.* at 860–61 (citing cases).

The Fifteenth Circuit inappropriately conflated Poster's activities as a common carrier with its own speech activity. When Poster is hosting the speech of others as a common carrier, it is not itself speaking. In the extremely limited circumstances where it exercises editorial discretion, Delmont's restrictions are permissible, as discussed above. The CC Law does not limit Poster from disclaiming its affiliation with Thornberry's views. Poster may continue to disclaim endorsement of any author's views in its Terms and Conditions. R. at 37. Poster may release statements disavowing the violence at the protest, which it did without interference from Delmont. R. at 5. And this law does not prevent Poster from continuing to promote content on its platform. *See* § 9-1.120(b). Accordingly, the CC Law's requirement that Poster host indiscriminately does not burden Poster's own expressive activity.

(b) Because Poster is a common carrier, the Court should not apply heightened scrutiny to the CC Law.

"The long history . . . of restricting the exclusion right of common carriers . . . may save similar regulations today from triggering heightened scrutiny—especially where a restriction would not prohibit the company from speaking or force the company to endorse the speech." *Knight*, 141 S. Ct. at 1224. "Not every interference with speech triggers the same degree of scrutiny under the First Amendment." 512 U.S. at 637. The *PruneYard* Court did not apply heightened scrutiny to the requirement for shopping malls to host speech. *See generally* 447 U.S. 74 (1980). There was no need to "strictly scrutinize" the requirement. *Id.* at 95 (Marshall, J., concurring). And when discussing compelled hosting of speech in *FAIR*, the Court did not mention any form of heightened scrutiny. 547 U.S. at 61–65.

The CC Law does not prohibit Poster from speaking. It does not force Poster to any Poster user's speech. Therefore, the Court should find that the restrictions on Poster's right to exclude content from its hosting platform do not merit heightened scrutiny and are permissible regulations of Poster as a common carrier under the First Amendment.

B. Alternatively, the CC Law is constitutional under the *Denver* balancing test.

If the ancient doctrine of common carriers cannot be applied to new technologies, this Court should instead apply the balancing test from *Denver*, and alluded to by the district court, to hold the CC Law constitutional. 518 U.S. at 743–44 (1996). This Court has, over the years, refined the First Amendment test, adapting and balancing the "competing interests and the special circumstances of each field of application." *Id.* at 740–41. In *Turner I*, the Court held that must-carry regulations on cable providers could be valid under intermediate scrutiny, without

explicitly finding cable companies to be common carriers.[5] 512 U.S. at 661–62. And, in the context of digital platforms, "there is clear historical precedent for regulating . . . communications networks in a similar manner as traditional common carriers." *Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring). Under this framework, Delmont may regulate Poster as a common carrier without violating the First Amendment.

As new forms of technology emerge, this Court balances the interests served by government access requirements against First Amendment disadvantages to regulated industries.[6] *Denver*, 518 U.S. at 743–44. The legitimate governmental interests this Court has recognized include (1) wide dissemination of diverse information (an interest of the "highest order"); *Turner I*, 512 U.S. at 663 (citations omitted); (2) protecting against communication monopolies by companies whocontrol the "critical pathway[s] of communication" (another "essential" interest); *id.* at 656–57; *Knight*, 141 S. Ct. at 1224–1225 (Thomas, J., concurring) (applying this interest in the context of social media platforms); and (3) increasing access to "avenues of expression"; *Denver*, 518 U.S. at 743. The regulated entity has competing "expressive interests." *Id.* at 747.

Two compelling interests are present there. The purpose of the law is to "bolster free speech by placing limits on the ability of platforms to restrict speech." R. at 34. The law thus ensures "diverse" speech, while neither forcing Poster to "affirm points of view with which [it] disagrees" nor "produce[ing] any net decrease in the amount of available speech." *Turner I*, 512 U.S. at 647 (reasons the must-carry regulation did not burden speech). Concern over the unparalleled power of large social media platforms was another reason the Delmont legislature

[5] After further factual findings, this Court held the must-carry provisions valid in *Turner II*. 520 U.S. at 224.

[6] The Court will do this by "closely" scrutinizing the subject regulation "to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, and unnecessarily great restriction on speech." *Denver*, 518 U.S. at 743.

passed the CC Law. R. at 35. If Poster, who controls almost 80% of the digital self-publication market, was free to deny access to anyone it wished, it could essentially act as an unregulated "gatekeeper" of speech, creating "cataclysmic consequences" for the authors that rely on it for income. *See Knight*, 141 S. Ct. at 1225 (applying this idea in the context of Amazon and Google); *cf. Turner I*, 512 U.S. at 647 (explaining that must-carry regulations were constitutional because they protected the survival of broadcast stations with no market power of their own). Thus, balanced against Poster's desire to host only APC-friendly content, Petitioner's valid interests in *promoting* free speech prevail.

Additionally, the CC Law is content-neutral, and survives intermediate scrutiny.[7] The purpose of the CC Law is not to promote any particular viewpoint, but rather to ensure that large companies like Poster do not exclusively control public expression. R. at 35. The law is content-neutral because it does not distinguish between expressions; it merely requires Poster to treat all expressions equally, *regardless* of viewpoint. Delmont has a compelling interest in ensuring equal access, and it does not burden Poster's speech rights any more than necessary because it does not force Poster to speak or endorse any content that it does not wish to. *Turner I*, 512 U.S. at 662. Accordingly, the CC Law is a constitutional under the free speech clause of the First Amendment.

II. THE CC LAW IS CONSTITUTIONAL BECAUSE IT IS A NEUTRAL AND GENERALLY APPLICABLE LAW UNDER *SMITH*

[7] Laws which are content-neutral, and only incidentally burden speech, need only pass intermediate scrutiny. *Turner I*, 512 U.S. at 642. The "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the messages it conveys." *Id.* (internal citations omitted).

The First Amendment's Free Exercise Clause provides that "Congress shall make no law respecting establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST., amend. I, XIV. This federal protection is incorporated against the states. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). If a state does not have a version of the Religious Freedom Restoration Act ("RFRA")[8], courts use the test from *Employment Division Department of Human Resources of Oregon v. Smith* to analyze the state law's constitutionality. 494 U.S. 872 (1990). *Smith* provides "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S. at 879 (internal citations omitted).

The Fifteenth Circuit erred by holding the CC Law unconstitutional. Under *Smith*, this Court should hold the CC Law constitutional because it is both neutral and generally applicable.

A. The CC Law is neutral.

A law lacks neutrality if its object "is to infringe upon or restrict practices because of their religious motivation." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (citing 494 U.S. at 878–79). The CC Law is neutral because its object is neither to impermissibly target religion on either the face of the law nor as applied to Poster.

1. The CC Law does not discriminate on its face.

To determine a law's object, courts first turn to its text. 508 U.S. at 533. "[T]he 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 discernable from the

[8] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-1411, 107 Stat. 1488.

language or context." *Id.* Facial neutrality is neither "determinative," *Id.* at 534, nor "presumptively unconstitutional*." Locke v. Davey*, 540 U.S. 712, 720–21 (2004).

In *Lukumi*, the Court ruled that facial neutrality was inconclusive when the law used words with "strong religious connotations," including "ritual" and "sacrifice," because the words also had "secular meanings." 508 U.S. at 534. However, the Court found the use of the words supported the conclusion that "the suppression of the central element of Santeria worship service," namely, ritual animal sacrifice, "was the object of the ordinance." *Id.*

In *Locke*, the Court clarified that a lack of facial neutrality does not make a law "presumptively unconstitutional" under *Lukumi*. 540 U.S. at 720. The *Locke* Court held a law that provided state scholarship funding yet did not allow it to be used for a theology degree, did not proscribe religion but was merely "a far milder kind" of disfavoring. *Id.* at 715–16, 720. In contrast to the law in *Lukumi* that suppressed an integral part of a specific religion, the law in *Locke* merely sought to not "fund a distinct category of instruction." *Id.* at 721.

Here, the CC Law requires Poster 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." § 9-1.120(a). Although the word "religious"—in isolation—lacks secular meaning, it should be interpreted within the context of the lists it appears in. Indeed, "[t]he traditional canon of construction, *noscitur a sociis*, dictates that words grouped in a list should be given related meaning." *E.g., Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990) (internal quotations omitted). The use of "religious" appears among the terms "political," "ideological," and "philanthropic." Thus, the related secular meaning of these terms is the promotion of one particular type of belief or belief system. Here, use of "religious" fails to show the CC Law's object is religious discrimination.

Further, unlike *Lukumi*, the CC Law's use of "religious" is not prohibitive of any religious practices. The CC Law does not discriminate against Poster, the APC, or religious platforms by forcing common carriers to endorse speech antithetical to their religions because Poster has, and other similarly-situated companies can have, "terms [that] disclaim endorsement of any views expressed in the material published." R. at 19. The CC Law does nothing to prevent Poster's board members or employees from donating to religious causes in their individual capacities. R. at 37. Further, nothing in the CC Law prevents Poster, the entity, from donating to individual artists and others who are APC-members but not a religious, philanthropic, or political cause. In fact, the CC Law does not restrict Poster from providing its discounted services to APC-members to promote work. R. at 3. Rather than seeking to suppress "the central element of" APC or religious practices, Delmont's restriction is "of a far milder kind." 508 U.S. at 534; 540 U.S.at 720. Even though the CC Law includes "religious" on its face, it does not lack neutrality.

2. The CC Law's object is not to impermissibly target religion.

In addition to prohibiting facial religious hostility, "[t]he Free Exercise Clause protects against government hostility which is masked." 508 U.S. at 534; *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.) (finding the Clause prohibits "covert suppression of particular religious beliefs"). To determine the law's object, courts also consider "the historical background of the decision. . . , the specific series of events leading to the enactment or official policy. . . , and the legislative or administrative history, including contemporaneous statements made by members of the decision making body." 508 U.S. at 540 (citations omitted).

A law's effect can be "strong evidence of its object," but its effect "will not always lead to a finding of impermissible targeting." 508 U.S. at 535. Indeed, the government's ability to enforce neutral and generally applicable laws "cannot depend on measuring the effects of a

governmental action on a religious objector's spiritual development." *See* 494 U.S. 872, 885 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988)).

In *Lukumi*, the Court held the laws' object was religiously motivated because the city proscribed animal sacrifices only weeks after the Santeria church announced its opening, and legislative meeting minutes revealed legislative hostility toward the Santeria religion and its religious practice. 508 U.S. at 540–42. *See also Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1729, 1732 (2018) (finding comments from members of the adjudicatory Commission that compared the baker's religious beliefs to those used to defend slavery and the holocaust indicated "hostility…inconsistent with…neutral[ity]").

Here, there is no pattern of invidious acts that suggest Delmont has a history of treating religion hostilely. Further, unlike in *Lukumi*, the CC Law's 2020 passage was far removed from Poster's 1998 founding. R. at 3. Although now-Governor Trapp campaigned with the idea for the CC Law, and Poster lobbied against it, nothing leading up to the law's passage suggests its object was to target religion. R. at 20, 35. The object of the law was to address "concerns over large tech platforms' substantial control over public expression." R. at 35. The fact that Governor Trapp identified Poster as an example tech platform the CC Law sought to regulate does not suggest the CC Law's object is to target Poster, the APC, or religion. *Id.* Rather, Poster, an "extremely popular internet site [with] seventy-seven percent of the artistic publication market," is a clear example of a platform the law regulates, regardless of religious affiliation. R. at 19.

The legislative history of the CC Law further reveals a lack of religious hostility. The legislators who originally sponsored the CC Law are described as being "concerned about the control that large platforms exercised over public communications and speech-related platforms"—not about the APC, its practices, or religion. R. at 31–32. Similarly, the law's

statement of intent "indicates that the 'no contribution provision' was included to avoid running afoul of the Establishment Clause"—not to limit religious exercise. § 9-1.120(b); R. at 3.

The Fifteenth Circuit concluded the CC Law targeted religion because Poster was only fined after Thornberry protested the suspension of her account, and Poster's fine was the first instance of Delmont enforcing the law. R. at 31. Neither fact supports a claim that the effect on Poster was the result of the CC Law having the object to impermissibly target religion. Wallace simply enforced the CC Law once it was brought to his attention—through Thornberry's televised broadcast—that Poster committed "artistic suppression." R. at 6. Poster provides no evidence that Wallace knew of other violations of the CC Law by nonreligious platforms yet chose not to enforce. *See* Record. Although the CC Law's enforcement may have adversely affected Poster's "spiritual development," that does not support a "finding of impermissible targeting"—nor should it limit Delmont's ability to enforce a neutral and generally applicable law. *See* 494 U.S. at 885; 508 U.S. at 535. Thus, the CC Law is neutral on its face and as applied.

B. The CC Law is generally applicable.

Generally applicable laws are laws that do not "selectively" "impose burdens only on conduct motivated by religious belief." *See* 508 U.S. at 543. The CC Law is generally applicable because it has no mechanism for individualized exemptions and is not unequal or underinclusive.

1. The CC Law lacks an individualized exemptions mechanism.

A law lacks general applicability "if it invites 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, 1868 (2021) (citing 494 U.S. at 884). If "the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." 494 U.S. at 884 (quotation omitted).

In *Fulton*, the Court found a city's foster care contract lacked general applicability when the city refused to refer children to Catholic Social Services for not certifying same-sex foster parents, due to religious reasons, yet allowed exceptions "granted by the Commissioner or the Commissioner's designee, in his/her sole discretion." 141 S. Ct. at 1874, 1878; *See also* 494 U.S. at 884 (quoting 476 U.S. at 708) (describing unemployment compensation laws with "good cause" provisions as "creat[ing] a mechanism for individualized exemptions"); 508 U.S. at 547 (finding ordinance not general applicable because reasons for animal killing were considered).

Here, the CC Law contains no individualized mechanism for "exemptions, religious or otherwise." R. at 3. It does not consider particular reasons to grant exemptions. *See* Record.

The Fifteenth Circuit ruled that Wallace's discretionary categorization of Poster as a common carrier, and Wallace's explanation for bringing the enforcement against Poster, suggested the CC Law is "impermissibly open for discretionary abuse." R. at 32. However, neither fact supports such a conclusion. First, discretion alone does not create a mechanism for individualized exemptions because all criminal laws, like the one in *Smith*, rely on prosecutorial discretion for enforcement. Further, categorizing Poster as a common carrier was not a form of granting an exemption but was merely Wallace deciding that the CC Law applies.

Second, Wallace's statement that "[t]he APC-founded Poster platform is discriminating against Delmont citizens based on their political viewpoints . . . and we bring this action for the first time today to stop that practice," does not consider the reasons for Poster's conduct; it simply identifies the object of the law and states that Poster violated it. R. at 6. Similarly, Wallace's identification of Poser as "APC . . . founded" does not provide the reason for Poster's conduct; it simply identifies the company. Thus, the CC Law has no individualized exemption mechanism that negates its general applicability.

2.The CC Law is neither unequal nor underinclusive.

A law also lacks general applicability "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." 141 S. Ct. at 1877 (internal citations omitted). Such a law violates the Free Exercise Clause because it treats "religious observers…unequal[ly]" and is "underinclusive" of the government's interests. *See* 508 U.S. at 542–43. In contrast, a law that "exempts or treats more leniently only dissimilar activities" does not violate the Free Exercise Clause. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring).

In *Lukumi*, the Court held the ordinances were not generally applicable because they were underinclusive of the city's interests. Although the city sought to protect public health and prevent animal cruelty, the ordinances failed to prohibit nonreligious conduct that undermined their interests "in a similar or greater way" than Santeria animal sacrifice did. 508 U.S. at 543. In contrast, in *South Bay*, COVID-19 guidelines that placed restrictions on the number of people in places of worship that were "[s]imilar or more severe…to comparable secular gatherings" did not violate the Free Exercise Clause. 140 S. Ct. 1613. (Roberts, C.J., concurring).

The CC Law is not underinclusive of Delmont's interests in free expression. The CC Law promotes this freedom by regulating common carriers with a substantial market share that fail to serve users based on users' political, ideological, or religious beliefs. The CC Law also promotes this freedom by restricting common carriers from donating corporate funds to political, religious, or philanthropic causes, and it thus prevents common carriers from having outsized influence on ideological expression. Unlike *Lukumi*, the ideological categories regulated by the CC Law serve the government's interests similarly. Like *South Bay*, comparable religious and secular behaviors are treated similarly, and thus, the law does not violate general applicability. In sum, the Court

should rule the CC Law is generally applicable because it has no mechanism for individualized exemptions, it is not underinclusive, and it does not treat religion unequally.

III. CONCLUSION

Wallace respectfully requests that this court reverse the Fifteenth Circuit. The CC Law is constitutional because Delmont has the authority to regulate common carriers. Poster is properly categorized as a common carrier because it sells a conduit for speech rather than speech itself, and serves the public on equal terms. Because Poster's hosting of others' speech is separate from its own speech, the requirement to indiscriminately host speech does not infringe on Poster's speech. The CC Law is therefore permissible under the First Amendment.

Because the CC Law is neutral and generally applicable, it is constitutional under the Free Exercise Clause of the First Amendment.[9] This Court should reverse the Fifteenth Circuit and find the CC Law constitutional under rational basis review. However, even if this Court finds the CC Law is not neutral or generally applicable—though this Court's precedents support it is both—the law would survive strict scrutiny. The CC Law serves the compelling government interest of promoting free expression. The law is narrowly tailored to its least restrictive means of limiting only common carriers, with substantial market share, from refusing service to users based on users' ideologies, and from donating corporate funds to causes that espouse a set ideology and would have outsized influence on public expression.

[9] Although not discussed below or squarely before this Court, a "hybrid" rights claim would also be unavailing for Poster. *See* 494 U.S. at 881–82. As Justice Alito described in his concurring opinion in *Fulton*, "if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under *another* constitutional provision, then there would have been no reason for the Court in [the so-called] hybrid cases to have mentioned the Free Exercise Clause at all." 141 S. Ct. at 1915 (Alito, J., concurring) (emphasis in original). As Justice Alito sums up, "It is telling that this Court has never once accepted a 'hybrid rights' claim in the more than three decades since *Smith*." *Id.*

APPENDIX

U.S. CONST. amend. I.

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

DELMONT REV. STAT. § 9-1.120 provides that:

> Internet platforms with substantial market share are designated as common carriers. Such common carriers 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.

COMPETITION CERTIFICATE

The work product contained in all copies of Team 019's brief is in fact the work product of the team members. Team 019 has complied fully with our school's governing honor code. Team 019 has complied with all Rules of the Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition.