CASE No.: 22-CV-7654

IN THE SUPREME COURT OF THE UNITED STATES

POSTER, INC.,

Petitioner

v.

WILL WALLACE,

Respondent

On Writ of Certiorari from the United States Court of Appeals
For the Fifteenth Circuit

BRIEF OF THE RESPONDENT

January 31, 2022

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ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

The Fifteenth Circuit entered final judgment. The issues in this case arise under the First Amendment. This Court has jurisdiction under 28 U.S.C. § 1331 as this case involves a Federal Question. This Court also has jurisdiction under 28 U.S.C. § 1254 as writ of certiorari has been granted.

QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Fifteenth Circuit erred in concluding that the Delmont Common Carrier Law, Delmont Rev. Stat. § 9-1.120, is unconstitutional because it violated Poster's Free Speech rights; and

II. Whether the United States Court of Appeals for the Fifteenth Circuit erred in finding that the Delmont Common Carrier Law, Delmont Rev. Stat. § 9-1.120, is neither neutral, nor generally applicable, and is thus an unconstitutional violation of Free Exercise.

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment. 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 . . . ."

STATUTORY PROVISIONS INVOLVED

Common Carrier Law. Delmont Rev. Stat. § 9-1.120(a).

"[S]hall serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint … refrain from using corporate funds to contribute to political, religious, or philanthropic causes."

STATEMENT OF THE CASE

Poster, Inc. ("Poster"), a Delmont corporation, is an extremely popular, digital self-publishing platform.[1] Ms. Thornberry is an aspiring author who has maintained an account on Poster's website since 2018.[2] Ms. Thornberry has published an animal rights novel titled *Animal Pharma* on her account.[3] The revenues from the publication on Poster have been the only source of income Ms. Thornberry has received from the novel.[4] In 2020, Ms. Thornberry attended a three-day, animal rights "Freedom for All" rally.[5] Also in attendance at the rally was the widely-known animal rights group known as AntiPharma.[6] AntiPharma's mantra is "Blood is Blood." The group is known for its violent demonstrations, including the altercations that occurred during the rally.[7] Although Ms. Thornberry is not a member of AntiPharma, she gave her novel the alternative title "Blood is Blood."[8]

After being alerted of a surge in activity on Ms. Thornberry's account during the days of the rally, Poster discovered the novel's alternative title.[9] Poster, is run by members of the American Peace Church ("APC"), whose central tenet is pacificism.[10] Based on its religious objection to AntiPharma's violence, Poster suspended Ms. Thornberry's account and notified her that she would not regain access until she changed the title of her novel.[11] When Ms. Thornberry protested her suspension on national television, Delmont officials learned of Poster's actions and fined

[1] R. at 2.
[2] R. at 3.
[3] R. at 3-4.
[4] R. at 4.
[5] R. at 4.
[6] R. at 5.
[7] R. at 4-5.
[8] R. at 5.
[9] R. at 5.
[10] R. at 2.
[11] R. at 5.

Poster for violating its Common Carrier Law.[12] The Common Carrier Law requires internet common carriers to "serve all who seek or maintain an account," and prohibits them from using corporate funds, "to contribute to religious, political, or philanthropic causes."[13]

Poster filed suit to challenge the enforcement of the Common Carrier Law as a violation of its constitutional rights to Free Speech and Religious Freedom.[14] The District Court for the District of Delmont found that the law applied to Poster's conduct and granted the state's motion for summary judgment.[15] However, the Fifteenth Circuit reversed the district court's order.[16] This Court granted certiorari to decide whether the Fifteenth Circuit erred when it found that the Common Carrier Law violates the First Amendment.

SUMMARY OF THE ARGUMENT

This Court should determine that Poster had such a substantial market share, that they should be considered a common carrier. Both the district court and circuit court made that determination. This Court should affirm such a finding.

While Poster, does retain a degree of First Amendment protection, those First Amendment protections were not implicated here. While Poster reserved for itself, and invoked its editorial function, its editorial rights were constitutionally limited. Due to the constitutional limitation of the Common Carrier Law, Poster's free speech rights were not implicated, and thus, were not violated.

[12] R. at 6.
[13] Delmont Rev. Stat. § 9-1.120(a).
[14] R. at 6.
[15] R. at 16-17.
[16] R. at 33.

The Delmont Common Carrier Law is constitutional because the law itself is both neutral and generally applicable. The statute applies to all individuals in an equal manner with no exemptions and, more specifically, the Common Carrier Law did not facially discriminate, or discriminate in practice. It applies generally to all persons and does not contain any distinctions.

DISCUSSION

I. THIS COURT SHOULD FIND THAT POSTER IS A COMMON CARRIER BECAUSE OF ITS SUBSTANTIAL MARKET SHARE AND IT SHOULD REVERSE THE CIRCUIT COURT'S DETERMINATION THAT THE COMMON CARRIER LAW VIOLATES POSTER'S FREE SPEECH RIGHTS BECAUSE THE LAW IS CONTENT NEUTRAL.

The nature of a business may affect its ability to invoke the protections of the First Amendment. When a business qualifies as a common carrier, its public and communicative nature limits its protection under the First Amendment.[17] Even when a common carrier does engage in speech, a law's infringement on the common carrier's free speech rights does not violate the First Amendment if the law is content-neutral.[18]

A. This Court Should Affirm the Circuit Court Finding that Poster is a Common Carrier.

The law of common carriers is a concept that has developed over time. Currently, the status of a common carrier is determined by multiple factors, and its definition has been expanded to include other areas that were not initially included.

Early common-carrier law applied to "almost all workers and tradesmen," requiring them to "serve the public generally and to do so on just and reasonable terms." Over time, the common law of common carriers narrowed its focus to enterprises considered "public" in some way, such as by the government grant of a legal monopoly or their use of public funds.[19] Even businesses that have not historically been considered common carriers, can qualify as such when, "by circumstances and [the company's] nature, . . . [it] rise[s] from private to . . . public concern."[20]

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[17] *Munn v. Illinois,* 94 U.S. 113 (1876).
[18] *Turner v. Broad. Sys. v. FCC.,* 512 U.S. 622, 636 (1994).
[19] James B. Speta, *A Common Carrier Approach to Internet Interconnection,* 54 Fed. Comm. L.J. 225, 255-57 (2002).
[20] *German Alliance Ins. Co. v. Lewis,* 233 U.S. 389, 411 (1914) (affirming state regulation of fire insurance rates).

There are three significant factors used to determine common carrier status. First, whether one "holds himself out to carry goods for everyone as a business."[21]

Second, courts will look at the level of market share a business has. When considering a business's market share, an explicit finding that the business is a monopoly is unnecessary to meet the qualification, though such a finding helps.[22] Economic concerns are raised by both monopoly status and substantial market share.

Determining what constitutes a monopoly requires a test developed by Judge Learned Hand, who stated: "[ninety] percent is enough to constitute monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not."[23]

The third factor courts consider is whether a business has become so large that it rises to the level of a common carrier.[24] In a concurring opinion in *Biden v. Knight First Amendment Inst. at Columbia Univ.*, Justice Thomas wrote: "A person always could choose to avoid the toll bridge or train and instead swim the Charles River or hike the Oregon Trail. But in assessing whether a company exercises substantial market power, what matters is whether the alternatives are comparable."[25] This means that one can determine whether a business has 'become so large that it rises to the level of a common carrier' by determining the number of feasible alternatives available to the consumer.

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[21] *Ingate v. Christie*, 175 Eng. Rep. 463, 464 (N.P. 1850).
[22] *See* James B. Speta, *supra* note 19 at 264 (discussing the Communications Act of 1934's lack of a monopoly test).
[23] *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2nd Cir. 1945).
[24] R at 9.
[25] *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1225 (2021).

In sum, the ability for the state to regulate common carriers depend 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."[26]

Both lower courts determined that Poster should be designated as a common carrier under these factors. Concerning the first factor, the district court reasoned that since Poster had hosted "hundreds-of thousands" on its platform and only ever denied one other artist access to their platform, that their "near universal public access" makes them comparable to common carriers.[27]

In reference to the second factor, this case is similar to *American Tobacco Co. v. United States*. In that case, the petitioners exhibited domination of the cigarette market, which Poster exhibits in its respective market. In *American Tobacco Co.*, petitioners (three tobacco companies) operated and controlled the tobacco industry by over two-thirds of the market.[28] Additionally, the rest of the cigarette industry was made up of six small competitors, none of which exceeded more than 10.6% of the market share.[29] The court held that the jury could have found that there existed a conspiracy to monopolize, because they held two-thirds of the tobacco industry total.[30]

Poster's level of market share is substantial. Under Learned Hand's test, Poster would be an absolute monopoly at 90% of the market. However, monopoly designation is not required to be a common carrier. Applying the considerations in *American Tobacco Co.*, the fact that Poster holds a 77% market share is significant enough to render it a monopoly.

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[26] R at 9.
[27] R at 9.
[28] *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946).
[29] *Id*. at 795.
[30] *Id*. at 797.

The third factor concerns the public's alternative choices. The District Court determined that, while there are other self-publication platforms, they are substantially inferior to Poster. Poster's competitors are small and they ". . . offer dramatically inferior services, provide less functionality, charge substantially higher rates, or are simply unknown to the general public."[31] This establishes Poster as the best and most accessible platform dealing in self-publication.

In conclusion, Poster should be designated as a common carrier, as Poster meets each of the three factors that are used to determine common carrier status. Additionally, this issue has been decided the same way by both the District Court and circuit court. Thus, Poster should be treated as a common carrier and should be examined accordingly.

B. Although Poster is Entitled to Some Degree of First Amendment Protection, the Common Carrier Law's Restriction on Poster's Editorial Activity Does Not Violate the Free Speech Clause.

Common carriers that publish information to the public may engage editorializing.[32] This editorial function is a form of Free Speech that is afforded the protections of the First Amendment.[33] However, a law that burdens this speech may be upheld if the law is content-neutral and does not prohibit a common carrier from exercising its right to Free Speech.[34]

Regulation of speech is consistent with the First Amendment if a law is content-neutral and its provisions apply regardless of a speaker's message. The statute in *Turner* required cable systems to devote a portion of their channels to local broadcasting stations.[35] The government argued that these "must carry" provisions were necessary to ensure the availability of free local

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[31] *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F.2d 683, 694 (10th Cir. 1989).
[32] *Turner v. Broad. Sys. v. FCC., supra* note 18.
[33] *Id.*
[34] *Id.* at 655, 661.
[35] *Id.* at 630.

programming.[36] The court acknowledged that the cable systems' editorial discretion over which stations to carry was a form of speech and the programmers were entitled to First Amendment protections.[37] However, the court reasoned that the statute's interference with the programmers' Free Speech was not severe because they said it was "content-neutral," and did not confer benefits or impose burdens on speech based on the content.[38] The statute did not violate the Free Speech Clause because it did not require or prohibit the cable programs from carrying stations with particular ideas.[39] Also, the statute did not require cable programmers to affirm the ideas of the local stations.[40] Most importantly, the statute did not reduce the programmers' speech and permitted them to choose the programs and stations they carried.[41] For these reasons, the court held that the "must-carry" provision did not endanger the cable networks' Free Speech rights.[42]

The burdens imposed by the Common Carrier Law do not violate Poster's Free Speech because the prohibitions are content-neutral and do not suppress Poster's speech in favor of other speech**.** In *Turner,* the court held that the statute did not violate the Free Speech Clause because the restrictions did not require the cable programmers to broadcast certain points of view and the programmers retained the freedom to choose the programs that they wanted to carry.[43] Similar to the statute in *Turner*, the Common Carrier Law's provisions are not content-based and do not prevent Poster from freely publishing content on its platform. In this case, Poster is required to allow Ms. Thornberry to maintain her account.[44] While Ms. Thornberry's content is adverse to

[36] *Id.* at 634.
[37] *Id.* at 636.
[38] *Id.* at 643.
[39] *Id.* at 647.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 661.
[43] *Id.*
[44] R. at 3, 6.

APC tenets, the burden on Poster is not content specific. The law simply requires Poster to grant Ms. Thornberry the same access that it would grant a user whose point of view is consistent with, or unrelated to, Poster's beliefs.[45] The law does not affirm a user's right to Free Speech at Poster's expense. Poster still has the right to promote APC users or publish APC-related content on its platform; the law simply requires Poster to permit *all* users to publish content relating their viewpoints. Therefore, the Common Carrier Law's requirement that Poster provide service to all users does not violate the Free Speech Clause.

Poster is likely to rely on the decisions *FCC v. League of Women Voters* and *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, to argue that the Common Carrier Law violates Poster's Free Speech rights. In *League of Women Voters*, the statute prohibited broadcasting stations from editorializing the information they aired. The court held that the statute violated the Free Speech Clause because it suppressed the stations' speech and required the stations to broadcast information but refrain from the expression of their own views.[46] In *Pac. Gas & Elec. Co.*, the Commission ordered the petitioner to permit an opponent organization to publish content in the petitioner's newsletter.[47] The court found that the order violated the petitioner's Free Speech rights because it was content-based and only granted access, to the newsletter, to parties with adverse views rather than to the public at large.[48] The court held that the Commission impermissibly burdened the petitioner's rights by requiring the petitioner to counterbalance its own speech in the newsletter with speech from opposing organizations.[49]

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[45] R. at 1, 21.
[46] *FCC v. League of Women Voters,* 468 U.S. 364, 385 (1984).
[47] *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 6 (1986).
[48] *Id.* at 13.
[49] *Id.* at 21.

There are significant differences between these cases, and the case at hand. Unlike the statute in *League of Women Voters*, the Common Carrier Law does not threaten or completely bar Poster's right to free speech. The law simply requires Poster to permit all users to exercise this right as well. Further, this case is different from *Pac. Gas & Elec. Co*. because the law does not require Poster to offset the publication of APC content with content from opponent groups; the law only requires Poster provide service to anyone who seeks to maintain an account. Thus, the reasoning from these cases should not guide this Court's decision.

To conclude, the Common Carrier Law does not violate Poster's Free Speech rights, because it does not curtail Poster's right to publish or promote APC content on its platform. Further, the law is neutral and does not require Poster to counterbalance its viewpoints with opposing views. Therefore, the court should find that the law complies with the First Amendment.

The Common Carrier Law does not violate Poster's Free Speech rights, because it is content-neutral and permits Poster to exercise its right to manage the content on its platform. Therefore, this court should hold that the operation of the Common Carrier Law is consistent with the First Amendment and does not violate Poster's Free Speech rights.

II. THIS COURT SHOULD REVERSE BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT ERRED IN FINDING THAT THE DELMONT COMMON CARRIER LAW IS NEITHER NEUTRAL, NOR GENERALLY APPLICABLE, AND IS THUS AN UNCONSTITUTIONAL VIOLATION OF THE FIRST AMENDMENT.

Pursuant to the First Amendment of the United States Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[50] This has likewise been applied to the States through the Fourteenth Amendment.[51] Though the

[50] USCS CONST. Amend. 1.
[51] *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

First Amendment's Free Exercise Clause is protective, it is not limitless. The Supreme Court has consistently held that an individual's religious practice may be limited when it is necessary for the proper "discharge of political responsibilities."[52] In *Reynolds v. United States*, the Court asserted: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself."[53] Following *Reynolds*, the Court asserted in *United States v. Lee* that individuals were not excused from compliance with the law simply because: "the law proscribes conduct that his religion prescribes," particularly when the law is one that is "valid" and "of general applicability."[54] The Court cemented this as the proper test to Free Exercise claims in *Employment Division v. Smith*.[55]

In *Smith*, the Court concluded that: "the government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"[56] The *Smith* test has been affirmed in subsequent cases and has resulted in the validation of the two-prong test. In *Fulton v. City of Philadelphia*, the Court affirmed: "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under

[52] *Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 595 (1940).
[53] *Reynolds v. United States*, 98 U.S. 145, 166-67 (1879).
[54] *United States v. Lee*, 455 U.S. 252, 263 (1982) (Stevens, J. concurring in judgment).
[55] *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct the State is free to regulate.").
[56] *Id*. at 885 (quoting *Lying v. Northwest Indian Cemetery Protective Ass'n*., 485 U.S. 439, 451 (1988)).

the Free Exercise Clause so long as they are neutral and generally applicable."[57] Thus, where a law incidentally impacting religious practice is both neutral and generally applicable it will be constitutionally valid.

Additionally, even if a law is found to be neither neutral, nor generally applicable, it may still be justified in regulating religious conduct if it is "justified by a compelling governmental interest and narrowly tailored to advance that interest."[58]

The Fifteenth Circuit in this case incorrectly concluded that Poster's First Amendment Free Exercise was unconstitutionally violated by the Delmont Common Carrier statute. This is because the law is both neutral and generally applicable, as it applies to all individuals in an equal manner and there are no exemptions. However, even if this Court were to find that the law does not satisfy one of the two prongs, or even both, the Fifteenth Circuit still erred in its conclusion, because the Delmont Common Carrier Statute is justified by a compelling government interest and is narrowly tailored to advance that interest.

A. The Delmont Common Carrier Statute Is Both Neutral and Generally Applicable Because The Statute Applies To All Individuals In An Equal Manner, And There Are No Exemptions.

The two-prong test adopted by the Court in *Employment Div. v. Smith*, allows for the incidental burdening of an individual's religious exercise rights if the law in question is neutral and of general applicability.[59] Such a law need not be "justified by a compelling governmental interest."[60] The Court has held that "neutrality and general applicability are interrelated," in other words, both prongs must be satisfied individually.[61]

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[57] *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021).
[58] *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993).
[59] *Employment Div. v. Smith*, *supra* note 55.
[60] *Id*.
[61] *Church of Lukumi Babalu Aye v. City of Hialeah*, *supra* note 58.

In determining whether a law is neutral, a court will look first to whether or not there is facially neutrality, "for the minimum requirement of neutrality is that a law not discriminate on its face."[62] A law will only lack facial neutrality if the actual language of the act is inherently anti-religious and "refers to a religious practice without a secular meaning discernable from the language or context."[63] Once it has been determined that the law does not contain any facially outright discriminatory language, the court may consider other factors to determine if there is discrimination which is "masked."[64] The court may look to a variety of factors to determine if there is an "improper attempt to target [religion],"[65] these may include historical discrimination, the purpose of the legislators in enacting the law, and the "series of events leading to the enactment."[66]

Turning to the second prong of the *Smith* test, a statute must be generally applicable; "the government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief."[67] In satisfying the general applicability standard, the government need only show that it impacts all individuals the same, and there is no discrimination in the application of the law. In analyzing general applicability, a court will look to whether or not there are exemptions for secular purposes but not for religious.[68] A law may not be generally applicable if it selectively imposes exemptions or prohibits religious conduct while permitting secular conduct of the same kind.[69]

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[62] *Id*. at 533.
[63] *Id*.
[64] *Id*. at 534.
[65] *Id*.
[66] *Id*. at 540.
[67] *Id*. at 543.
[68] *Fulton v. City of Philadelphia, supra* note 57 at 1877.
[69] *Id*.

The Appeals Court erred in concluding that the Delmont Common Carrier law was neither neutral nor generally applicable. The law neither specifically targets religious individuals, nor is underhandedly "intolerant of religious beliefs."[70] Additionally the statue applies to all individuals the same, and grants no specific secular exemptions.

1. The Delmont Common Carrier Statute is neutral, both on its face and in its application because it does not facially discriminate against religious practice, nor does it target religious conduct for distinctive treatment.

A law is facially neutral unless it "discriminates on its face" within the text of the law itself.[71] For example, in the case of *Church of Lukumi Babalu Aye v. City of Hileah*, the Supreme Court found that though the language and text specifically mentioned the words "sacrifice," and "ritual," with regards to animal killing, the statute could not be said to be facially discriminatory.[72] The Court there held that while the "words 'sacrifice' and 'ritual' have a religious origin," the words also had "secular meanings."[73] The Court concluded that the ordinances did not specifically refer "to religious practices," and were not facially discriminatory.[74]

In the case at hand, the Delmont Common Carrier Statue not only does not "refer to a religious practice without a secular meaning discernable," it simply does not refer to religious belief or practice at all.[75] Contrary to the holding of the Appeals court, there is no facially discriminatory content discernable within the Delmont Common Carrier statute, and there is certainly no "direct and explicit" religious targeting.[76] Even if the court were to find that the

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[70] *Id*.
[71] *Church of Lukumi Babalu Aye v. City of Hialeah*, *supra* note 58 at 533.
[72] *Id*.
[73] *Id*.
[74] *Id*.
[75] R. at 15.
[76] *Id*.

statute's reference, to "refrain from using corporate funds to contribute to political, religious, or philanthropic causes,"[77] has "religious origin,"[78] there could be no doubt that within this context, these words also have secular significance.[79]

While facial neutrality is significant, it alone is not determinative. [80] The government also fails to act neutrally when it "proceeds in a manner intolerant of religious beliefs."[81] Thus, this case can be clearly distinguished from *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[82] In that case, the Supreme Court found that the Commission's investigation had been so blatantly discriminatory and hostile that it could not be said to be neutral at all. The commissioners in that case referred to the religious beliefs as "despicable pieces of rhetoric," and compared the sincerely held beliefs to "slavery and the holocaust."[83]

In this case, not only is there not facial discrimination, but there is also not blatant discrimination in the application of the law, as in *Masterpiece*. Poster's sincerely held religious beliefs have not been questioned, attacked or targeted, they have been incidentally burdened, yes, but the analysis of whether or not a law is neutral does not turn upon whether or not a burden has resulted from the law, but whether it is neutral on its face and in its application, here it clearly is.

Lest it be argued that discrimination is "subvert," the Court has held that the Free Exercise Clause not only prohibits facial and outright discriminatory treatment, but also that which is a "subtle departure" from neutrality, and a "covert suppression of particular religious

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[77] Delmont Rev. Stat. § 9-1.120(a).
[78] *Church of Lukumi Babalu Aye v. City of Hialeah*, *supra* note 58 at 533.
[79] *Id*.
[80] *Id*.
[81] *Fulton v. City of Philadelphia*, *supra* note 57 at 1877.
[82] *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2016).
[83] *Id*. at 1729.

beliefs."[84] Again, in *Church of Lukumi Babalu Aye v. City of Hileah*, the Supreme Court considered whether the law was neutral in its application.[85] The Court stated, "if the object of the law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral."[86] In determining whether the object of the law in application, is religious discrimination, the Court held that factors such as "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision making body,"[87] could all be considered. That case revealed that it was the express purpose and intent of the legislation and its drafters to specifically target the Church of Lukumi, in fact the church was found to be "alone . . . the exclusive legislative concern."[88]

The case at hand is distinguishable from *Church of Lukumi* in multiple ways. There is no factual support tending to show that Poster, or any other religious individual or group, was the intended target of the law. In fact, it was the specified intent of the law to regulate platforms with substantial market share "regardless of political, ideological, or religious viewpoint."[89] Additionally, Governor Louis F. Trapp, the main proponent of the statute specifically ran his election on "website accountability," and had every intention of regulating all common carriers of substantial market share, through the statute, regardless of religious affiliation.[90]

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[84] *Gillette v. United States*, 401 U.S. 437, 452 (1971).
[85] *Church of Lukumi Babalu Aye v. City of Hialeah*, *supra* note 58 at 533.
[86] *Id*.
[87] *Id*. at 540.
[88] *Id*. at 535.
[89] R. at 20.
[90] *Id*.

As the Delmont Common Carrier statute is neither facially discriminatory in its text, nor hostile in its application, in either blatant hostility, or "subvert" regulation, the law is neutral and thus satisfactorily passes the first prong of the *Smith* test.

2. The Delmont Common Carrier Statue is generally applicable because it does not selectively impose burdens, but rather applies to all persons the same; the law contains no exemptions of any kind.

A law is "generally applicable," when it applies to all individuals the same. A law, which permits exceptions for some and not others, is not generally applicable.[91] For example, in *Roman Catholic Diocese v. Cuomo*, the Catholic Diocese of Brooklyn claimed that the application of COVID19 zoning procedures was not generally applicable, because the law specifically categorized "houses of worship" differently than other secular gathering places. While secular businesses were permitted to "decide for themselves how many persons to admit," "houses of worship," were limited to 25 individuals. The Court concluded that the emergency procedures were not generally applicable, because they specifically treated secular and religious organizations and individuals differently.

In the case at hand, the Delmont Common Carrier statute implicates all common carriers the same way; there is no distinction between a common carrier such as Poster, with religious affiliations, and other secular common carriers. All platforms with a significant market share are implicated; there are no exceptions or exemptions at all. It is well established that the government cannot impose burdens in a selective manner[92], but in this case the government does not as the District Court concluded, "suffer from problems of under-inclusivity."[93]

[91] *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020).
[92] *Church of Lukumi Babalu Aye v. City of Hialeah*, *supra* note 58 at 543.
[93] R. at 16.

As the Delmont Common Carrier statute neither targets specific organizations and individuals, nor carves out any exemptions from the law, it is generally applicable and therefore satisfies the second prong of the *Smith* test.

The Delmont Common Carrier statute is both neutral and generally applicable. The facial text of the law does not specifically target religious practices and beliefs, nor does the application of the law create either overt hostile, or subvert discriminatory treatment. Additionally, the statute applies to all individuals and organizations the same way and neither targets nor exempts any specific party. As Delmont's Common Carrier Statute is both neutral and generally applicable, it does not violate the First Amendment Free Exercise Clause. The two-prong *Smith* test is satisfied and the law does not need to meet the burden of strict scrutiny.

B. Even If the Common Carrier Law is Not Neutral and Generally Applicable, The Circuit Court's Decision Should Be Reversed Because the Law is Narrowly Tailored to Advance Delmont's Interest in the Accessibility and Neutrality of Its Internet Platforms.

The First Amendment prohibits the enforcement of a law that burdens religious conduct unless the law is both neutral and generally applicable.[94] However, a law that lacks neutrality and general applicability may be upheld if it survives strict scrutiny.[95] To survive strict scrutiny, a law must be supported by a compelling interest, and the law must be narrowly tailored to advance that interest.[96] A compelling government interest exists when there is evidence of abuse of public services or endangerment of public welfare.[97] A compelling interest is protected when a law restricts any conduct that undermines the interest.[98] The provisions of a law are narrowly tailored

[94] *Church of Lukumi Babalu Aye v. City of Hialeah, supra* note 58 at 531-32.
[95] *Id.*
[96] *Id.*
[97] *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *see also Doe v. Mills*, 16 F.4th. 20, 32 (1st Cir. 2021).
[98] *Church of Lukumi Babalu Aye v. City of Hialeah, supra* note 58 at 546-47.

to advance a government interest when they consist of the least restrictive means and only burden religious conduct that contradicts the interest.[99]

Even when a law burdens religious conduct, the law may comply with the First Amendment if there is a compelling interest to deny a religious exemption. In *Doe v. Mills,* the state of Maine enacted an emergency vaccine mandate, which required all health workers to receive the COVID-19 vaccine.[100] The government asserted that the mandate was necessary to protect its citizens' health and prevent the transmission of the virus.[101] Given the outbreak of COVID-19, and the low vaccination rate of its health workers in Maine, the court reasoned that law was supported by a compelling interest.[102] The court further reasoned that the state had a strong interest to deny the respondents a religious exemption because granting the exemption would contradict the state's prevention plan.[103] Also, granting health workers a religious exemption would endanger the health of vulnerable patients that the workers were likely to interact with.[104] For these reasons, the court held that the emergency statute survived strict scrutiny and did not violate the Free Exercise Clause.[105]

The Common Carrier Law is valid because it advances the accessibility and neutrality of internet platforms, and prohibits any conduct that may defeat these interests. In *Doe*, the court found that public health was a compelling interest, and the denial of a religious exemption was necessary because such an exemption would contradict the state's COVID-19 prevention plan.[106]

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[99] *Id.*
[100] *Doe v. Mills, supra* note 97 at 24.
[101] *Id.*
[102] *Id.* at 32.
[103] *Id.* at 31.
[104] *Id.* at 32, 34.
[105] *Id.* at 31.
[106] *Id.*

Similar to *Doe,* the denial of a religious exemption to the Common Carrier Law is proper because this exemption would undermine the interest of neutrality and accessibility. Poster has a seventy-seven percent share of the self-publication market and is the only viable platform for creators to publish their work.[107] Thus, Delmont has a compelling interest to ensure that Poster's services are accessible to the public and that the platform is a neutral marketplace of ideas. These interests would be undermined if a religious exemption is granted because the exemption would permit Poster to discriminate against users holding certain viewpoints. Also, the exemption would create the risk of the platform becoming partial to the APC's tenets rather than a neutral marketplace of diverse ideas. Lastly, granting Poster a religious exemption would leave many creators without a resource to successfully publish their work. Therefore, the Common Carrier Law is constitutional because it advances a compelling interest.

Concurrently, a law withstands strict scrutiny if it only imposes *minor* restrictions on religious conduct**.** In *Locke v. Davey,* the state of Washington used public funds to award college students with scholarships through its Promise Scholarship Program.[108] State regulations prohibited recipients from using the scholarship to pursue a degree in devotional theology.[109] The respondent was a recipient of the scholarship, but the state withheld the funds when the respondent began to pursue a degree in pastoral ministry.[110] The court found that the state's interest to avoid an Establishment Clause violation was compelling.[111] The court also found that the state's regulations imposed minimal restrictions on the respondent's religious conduct because the state permitted the respondent to attend a religiously affiliated school and enroll in theological

[107] R. at 10.
[108] *Locke v. Davey*, 540 U.S. 712, 715 (2004).
[109] *Id.*
[110] *Id*. at 717.
[111] *Id.* at 722.

courses.[112] Since the regulations only prohibited the respondent from devoting the scholarship to a religious vocation, the court held that the scholarship's exclusion of religious majors was narrowly tailored to advance the state's interest.[113]

The Common Carrier Law is narrowly tailored because it only imposes a minimal burden on Poster's religious conduct. In *Locke*, the court found that the regulations were constitutional because the petitioner was permitted to enroll in religious courses and his exercise of religion remained generally unrestricted.[114] Similar to the regulations in *Locke*, the Common Carrier Law imposes minor burdens on Poster's religious conduct. Although Poster is prohibited from making contributions to APC using its corporate funds, the law does not prohibit Poster's members from tithing or making contributions from their personal funds.[115] Also, while the Common Carrier Law forbids Poster from denying access to any user based on religious grounds, the law does not prevent Poster from promoting APC-member content or providing discounts to APC members.[116] Thus, the Common Carrier Law should be upheld because its provisions are narrowly tailored to maintain the interests of internet neutrality and accessibility.

Ultimately, even if the Common Carrier law does not satisfy the requirements established in *Smith*, this Court should find that the law is constitutional because it withstands strict scrutiny. The denial of a religious exemption does not violate the First Amendment because it is necessary to protect the substantial government interests that the Common Carrier Law seeks to advance**.** Also, the restrictions that the law places Poster's religious conduct are minimal.

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[112] *Id.* at 724-25.
[113] *Id.*
[114] *Id.*
[115] R. at 3.
[116] *Id.*

Therefore, the Common Carrier Law complies with the Free Exercise Clause and should be upheld.

The Delmont Common Carrier statute satisfies both prongs of the Smith test, as it is neutral and generally applicable, and therefore a constitutional limitation of First Amendment Free Exercise. But even if this Court were to find that the law is not neutral or generally applicable, the law satisfies the burden of strict scrutiny, and is therefore valid regardless.

CONCLUSION

This Court should affirm the finding from the lower courts that Poster is subject to a common carrier status. Additionally, this Court should reverse the finding that Poster's First Amendment rights were implicated and violated because they were not. The sole basis of reasoning for finding a First Amendment violation rested on the prevention of Poster's editorial function. However, this function was constitutionally limited because the Common Carrier Law applies neutrally and generally with no basis of religious discrimination. Therefore, this Court should find for the government and reverse with regard to the free speech and free exercise claims.