No. 01-463

IN THE

Supreme Court of the United States

WILL WALLACE

Petitioner,

v.

POSTER, INC.

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Fifteenth Circuit

BRIEF FOR RESPONDENT

Team 10

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1. Under the Free Speech Clause of the First Amendment, whether the Delmont Common Carrier Law impermissibly classifies Poster as a common carrier and unconstitutionally deprives the platform of its free speech right.
2. Under the Free Exercise Clause of the First Amendment, whether the Delmont Common Carrier Law unconstitutionally infringes on Poster's free exercise right because it is neither neutral nor generally applicable.

OPINIONS BELOW

The opinion of the United States District Court for the District of Delmont is unpublished and can be found at *Poster v. Wallace*, C.A. No. 21-CV-7855 (D. Delmont Sept. 1, 2021). The opinion of the United States Court of Appeals for the Fifteenth Circuit is unpublished and can be found at *Poster v. Wallace*, 2021-3487 (18th Cir., 2021).

STATEMENT OF JURISDICTION

The District Court for the District of Delmont had jurisdiction over all civil actions arising from the Constitution or laws of the United States. 28 U.S.C. § 1331. The United States Court of Appeals for the Fifteenth Circuit had appellate jurisdiction over all final judgments of the district court pursuant to 28 U.S.C. § 1291. The U.S. Supreme Court has appellate jurisdiction to review the Fifteenth Circuit's decision pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Procedural History

Poster, Inc. brought suit against Delmont Attorney General Will Wallace ("AG"), alleging that the Delmont Common Carrier Law ("CC Law") invalidly designated the company a common carrier and violated its free speech and free exercise rights. R. at 1–2. Delmont moved for summary judgment, which the United States District Court for the District of Delmont granted. R. at 2. The District Court found that Poster was a traditional common carrier and therefore the CC Law did not violate Poster's freedom of speech. R. at 10. Additionally, the court found that the CC Law was neutral and generally applicable and thus did not violate Poster's free exercise rights. R. at 16.

Poster appealed the District Court's decision. R. at 18. The United States Circuit Court for the Fifteenth Circuit reversed the lower court's decision, finding the CC Law violated Poster's free speech and free exercise rights. R. at 33. Specifically, while the Fifteenth Circuit agreed that Poster was a common carrier in some respects, it also found that Poster disseminated its own speech, and therefore was entitled to First Amendment protections in that regard. R. 28-29. The Fifteenth Circuit also found that the District Court erred in finding that the CC Law was neutral and generally applicable and therefore did not violate Poster's free exercise right. R. at 29. Instead, the Fifteenth Circuit held that the law was not neutral because it facially and covertly targeted religion and Poster's religious belief in particular. R. at 30–31. The Fifteenth Circuit also concluded that the law was not generally applicable because it gives the AG discretion to examine the "particular reasons" for a platform's conduct to determine whether the platform falls within the regulatory limit of the CC Law. R. at 32.

Petitioner appealed the Circuit Court's decision. R. at 39. This Court granted certiorari to address whether the CC Law is unconstitutional because it violates both of Poster's First Amendment rights to freedom of speech and free exercise of religion. *Id.*

II. Statement of the Facts

Poster, founded in 1998, is a digital platform that hosts work of artists and writers for profit. R. at 2. Poster was co-founded by John Michael Kane, a longstanding member of the American Peace Church ("APC"), a Christian denomination focused on non-violence. R. at 2, 36. Poster's Board of Directors are all members of the APC and explain Poster's mission as an extension of the APC's teachings. R. at 37. As such, Poster supports the church by offering discounted rates to members and contributing fifteen percent of its profits to the APC regularly. R. at 2–3. Indeed, Poster's founder stated that the Board views Poster's mission as an "extension of their religious

practices," and that the requirements of the CC Law would require them to either violate their faith, or close their business. R. at 37.

On June 1, 2020, Delmont passed the CC Law, which designated internet platforms with a "substantial market share" as a common carrier. R. at 3.[1] The law creates a forced access obligation for common carriers, in that they must serve "all who seek to maintain an account regardless of political, ideological, and religious viewpoints." R. at 3; Delmont Rev. Stat. § 9-1. 120(a). Additionally, the law also forbids common carriers from making contributions to political, religious, or philanthropic causes. *Id.* at § 9-1. 120(b). The CC Law came into existence due in part to Governor Louis F. Trapp's advocacy. R. at 34-35. When campaigning for governor, Trapp repeatedly promised restrictions that would prohibit digital platforms from denying access to users regardless of the reasoning. *Id.* Trapp also noted that the lack of religious exemption in the "no contribution" provision was intended to "avoid implicating the Establishment Clause". R. at 36.

Poster's User Agreement notes that it has the editorial discretion to accept or reject any material or block any user for any reason. R. at 2. In 2020, Poster chose to exercise that editorial discretion by suspending Katherine Thornberry's account. R. at 5. Leading up to this decision, Ms. Thornberry posted a slew of content seemingly related to a historically violent group, AntiPharma. R. at 4. In the past, members of AntiPharma have been responsible for public violence and riots that have left property damaged and many injured. R. at 4-5. Ms. Thornberry posted content at one such rally and later added clear references to the group in her existing content. *Id.* As Poster's core tenant is anti-violence, the company refused to allow the spread of this messaging on its platform and thus removed the content and banned Ms. Thornberry's account. R. at 5.

[1] The law does not define what "substantial market value." *See* Delmont Rev. Stat. § 9-1. 120(a)–(b). This brief will also refer to those platforms regulated by the CC Law as "large online platforms.

As a result, Petitioner imposed extreme economic sanctions on Poster. R. 6. At a press conference, Attorney General Wallace stated that fines were imposed in an attempt to stop Poster from, "discriminating against Delmont citizens based on their political viewpoints." *Id.*

SUMMARY OF THE ARGUMENT

Private companies, like individuals, are entitled the full protection of the First Amendment. While companies classified as common carriers are entitled to lesser free speech protection, hybrid common carriers are entitled to protection insofar as they are not mere conduit for others' speech, but actively communicate their own messages. The CC Law unconstitutionally strips Poster of its free speech right first by improperly classifying the platform as a common carrier when it is in fact a private company. Additionally, the CC Law also seeks to deny Poster of its free speech right on the basis of its common carrier status when Poster is a hybrid common carrier and is entitled free speech protection when it exercises its editorial discretion to communicate its own message to the community. Because the CC Law impermissibly denies Poster of its free speech right, this Court must subject it to strict scrutiny and affirm the Fifteenth Circuit's holding that the law is unconstitutional unless it is narrowly tailored to further a compelling government interest. Because there is no compelling interest, and even if there were one, the CC Law is not narrowly tailored to advance such interest, the Court should hold that the law is unconstitutional.

Under the Free Exercise Clause of the First Amendment, any law that burdens religion practice is presumptively unconstitutional unless it is neutral and generally applicable. The CC Law is neither neutral nor generally applicable. The law lacks neutrality because its very term mentions and regulate religiously motivated behaviors. Moreover, the law is not neutral because its enactment and enforcement are evidence of Delmont's covert attempt to target Poster's

religious practice. The CC Law is not generally applicable because both of its provisions create a "mechanism for individualized exemptions" by inviting the AG to make individualized assessments about the motivation behind each platform's editorial decision or donation. Because the law is neither neutral nor generally applicable, it subject to strict scrutiny and is presumptively unconstitutional unless it is narrowly tailored to advance a compelling interest. While Delmont might have an interest in advancing its citizens' free speech, it has no such interest in regulating religion or religious behavior. Further, even if Delmont has a compelling interest, the CC Law is significantly more restrictive than necessary to advance this interest.

ARGUMENT

I. The Fifteenth Circuit did not err in concluding that the Delmont CC Law violated Poster's free speech right.

First, Poster is not a traditional common carrier under the CC Law's definition or the general understanding of the designation. Second, even if this Court finds Poster to perform common carriage services, it should be designated as a hybrid common carrier and therefore still entitled to free speech protections for its own communication. Finally, with Poster's full First Amendment protection in mind, The CC Law violated Poster's free speech rights as it does not survive strict scrutiny.

A. The District Court erred in holding that Poster should be classified as a common carrier.

The fact that Poster possesses substantial market share is not sufficient to classify it as a common carrier. Courts have repeatedly rejected definitions of common carriers based on substantial market power or monopoly status, finding that factor alone is not determinative. As

aptly articulated by the DC Circuit Court of Appeals in *Verizon v. FCC*, "A short train is no more a carrier than a long train, or even a train long enough to serve every possible customer." 740 F.3d 623, 655 (D.C. Cir. 2014); *see also United States Telecomm. Ass'n v. FCC*, 825 F.3d 674, 708 (D.C. Cir. 2016) (refusing to require a finding of market power in designating a common carrier). Further, many established common carriers do not have a substantial market share and instead face competition within their industry. Railroads, for example, face competition and their designation does not rely on market power. *See* Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. Free Speech L. 463 at 467 (2021) Conversely, courts have refused common carrier status to entities that do have a substantial market share. *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974) (denying common carrier status to newspapers).

Moreover, Poster is not a common carrier because it is not a company that indiscriminately serves the public. Although there is no set definition, courts have often resolved the question of whether a company is a common carrier by asking whether the company holds itself out to the public indiscriminately. *See Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1222 (2021) (Thomas, J. concurring); *Verizon,* 740 F.3d at 651 (acknowledging that courts have not settled on a uniform definition of common carrier). Courts have assessed a company's propensity to hold itself out to the public by determining whether the company treats all users indifferently and whether anyone can transmit messaging of their choosing. *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC,* 533 F.2d 601, 608 (D.C. Cir. 1976) (*NARUC*).

Applying this standard, Poster is not a common carrier because it does not indiscriminately hold itself out to the public. Poster's User Agreement states that it may block or remove an account at any time for any reason. R. at 5. Poster also offers a discounted rate of service to certain users,

specifically those affiliated with the APC. *Id.* Thus, the User Agreement, Poster's ability to block and remove accounts, and its explicit affiliation with the APC demonstrates that the company does not hold itself out to the public indiscriminately. R. at 2, 5. Instead, these policies show a clear lack of uniformity as to how Poster treats its users. *FCC v. Midwest Video Corp*., 440 U.S. 689, 701 (1979).

As long as common carriage has existed in this country, so has the idea that a private company must be able to retain its status as private, maintaining its constitutional rights in the process. *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211 (1927) (citing *Frost Trucking Co. v. R. R. Commission*, 271 U.S. 583, 592; *Michigan Commission v. Duke*, 266 U.S. 570, 577). Because Poster is not a common carrier, it retains the full constitutional protection that private companies are entitled to. *See Verizon*, 740 F.3d at 652 (finding a governmental entity cannot force a provider to act like a common carrier when it is not by requiring a service to offer its service indiscriminately).

B. Assuming that Poster performs common carrier services, it is still entitled to First Amendment free speech protections.

If this Court does find Poster to partake in some aspect of common carriage, it should utilize a quasi-common carrier designation in evaluating the company's free speech rights. Under this designation, common carriage treatment may only extend to common carriage services. As the activity in question is not a common carriage service, Poster maintains the full protection of the First Amendment in this regard.

1. Quasi common carrier entities retain full First Amendment protection for non-common carriage services.

As the Fifteenth Circuit acknowledged, technological expansion has necessitated a new category of common carriage for entities that perform both common carriage and non-common-carriage services. R. at 26. These entities, commonly called quasi or hybrid common carriers, maintain greater First Amendment protection than traditional common carriers, but less protection than newspapers. *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622, 637-638, 657 (1994). *See also NetChoice, LLC v. Moody,* No. 4:21cv220-RH-MAF, 2021 U.S. Dist. LEXIS 121951, at *23 (N.D. Fla. June 30, 2021) (recognizing social media websites should receive First Amendment protection somewhere in between that of a normal speaker and a common carrier). If this court finds Poster to perform some extent of common carriage services, it should recognize the company as a hybrid common carrier and analyze their free speech rights accordingly.

In assessing the First Amendment rights of quasi common carriers, courts have differentiated the treatment of restrictions that affect common carriage services and non-common-carriage services within the same entity. *Telecomm. Ass'n*, 825 F.3d at 740-745; *see also NARUC*, 533 F.2d at 608 ("[s]ince it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others"). The D.C. Circuit implemented this principle in *United States Telecomm. Ass'n v. FCC,* where the court evaluated common carriage regulations affecting broadband service providers. 825 F.3d at 740. The court determined that a business could validly be subject to common carriage restrictions in some aspects of its work, but not others. *Id*. at 742. *See also Cellco Partnership v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012) (finding a wireless telephone company only has to comply with common carrier requirements for their common carrier services). While the court classified pure dissemination of user communication by providers as a common carrier service, it found the provider's own communication to be outside the scope of common carriage

altogether. *Id.* The D.C. Circuit also defined what neutral transmission of other's speech entailed, pointing to a lack of control over what users accessed and absence of intent by the business to convey an individual message. *Id.* at 741. Ultimately, the court found that broadband service providers were common carriers because they serve as a "disinterested conduit for others speech", but explicitly noted that if broadband service providers were to choose to "exercise editorial discretion," it might become a speaker in its own right, entitling the entity to greater protection under the First Amendment for the specific content it curated. *Id*. at 742-743.

With this in mind, when evaluating whether the CC Law violated Poster's free speech rights, this Court should distinguish Poster's common carriage services from its non-common carriage services. In doing so, this Court should interpret Poster's editorialization and curation of content as its own communication, placing it outside the scope of common carriage regulation and entitling those services to full First Amendment protection.

Both its direct involvement with the content on its platform and its economic influence over who contributes transforms Poster's content into its own speech. See *NetChoice*, 2021 U.S. Dist. LEXIS 121951, at *26 ("a private party that creates or uses its editorial judgment to select content for publication cannot be required by the government to also publish other content in the same manner"). Poster's entire operation revolves around curating and reshaping user content--services that are typically exempt from common carriage regulation. *See Turner*, 512 U. S. at 657 (finding that newspapers and cable companies could not be subject to common carriage regulations due to their curation of content). Additionally, Poster's User Agreement explicitly states that it has the "editorial discretion" to accept and reject material on its platform. R. at 2. Further, Poster has the authority to direct users to make changes to their own content, as evidenced by Poster's instruction to Ms. Thornberry to change the title of her publication. R. at 5. Poster also intends to

shape its platform through incentives to users who are members of the APC. R. at 2. By offering discounted rates to these members to promote APC-affiliated work, and thus shifting the content on the platform, Poster disseminates APC-centered messaging to those who view the platform. R. at 3. This aligns with the central mission of Poster, to be more than a business operation by spreading the message of the APC. R. at 38.

While Poster's terms disclaim endorsement of views expressed by the material on their platform, this is no different than a newspaper disclaiming endorsement of user comments on their online media, or a cable company disclaiming any views expressed in the content they are broadcasting. *See Turner Broadcasting System*, 512 U. S. at 655-656 (explaining cable company's statements disclaiming views of programing does not affect the fact that cable programming is the company's own speech). A refusal to endorse the views of contributors does not take away from the curative role Poster plays within its platform and the messaging it intends to disseminate.

As its terms of service lay out, Poster controls both what contents appears on its platform and what exactly those contents entails. Blocking user content, refusing publication of violative phrasing, and incentivizing membership of certain religious groups illustrates Poster's intent and ability to communicate its own messaging, rather than an indifferent transmission of user's content. R. at 2-3, 5-6. It's reasoning for the decision to suspend Ms. Thornberry's account, that it violated the values of Poster's founders, also illustrates the platform's intent of individualized communicative expression. R. at 5. For these reasons, Poster's service of hosting content should be considered a non-common carriage service, and therefore receive the full force of the First Amendment.

C. As Poster retains the full force of the first amendment, the CC Law does not survive strict scrutiny and therefore violates poster's free speech rights.

Whether Poster, Inc. is evaluated as a completely private entity or a quasi-common carrier, a regulation targeting its own speech must surpass the full protections of the First Amendment. *NetChoice*, 2021 U.S. Dist. LEXIS 121951, at *26. As the CC Law is content-based, it is subject to and fails to survive strict scrutiny. Thus, this Court should uphold the Fourteenth Circuit's determination that the law violated Poster's free speech rights.

1. The CC Law is content-based, and therefore must be evaluated under strict scrutiny.

The level of scrutiny applied to a regulation on speech depends on if it is content-based or content-neutral. *Turner*, 512 U.S. at 642. Regulations that are content-based are subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015). Due to the justification for the CC Law, and its application, the CC Law is content-based and thus subject to strict scrutiny.

Speech restrictions that explicitly reference specific speakers indicate that a regulation is content-based. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). In the communication sphere, regulations that apply to some speakers in the same medium but not others commonly raise questions of constitutionality. *Turner*, 512 U.S. at 659. Therefore, by making restrictions applicable only to "internet platforms with substantial market share", the CC Law targets some websites but not others. *See NetChoice*, 2021 U.S. Dist. LEXIS 121951, at *31 (finding a forced access restriction applicable only to "social media platform(s)" as content-based due to explicit reference to certain speakers).

Even if the CC Law is content-neutral on its face, its justification makes it content-based. This Court has repeatedly held that a law that is on its face content-neutral, is content-based when it cannot be justified without reference to a specific message. *Reed*, 576 U.S. at 166. *See also United States v. Eichman*, 496 U.S. 310, 315 (1990). Looking to Governor Trapp's statements and

his disapproval of Poster's attempts to disseminate its own messaging, the law is clearly content-based. In campaigning for Governor, Trapp publicly advocated for legislation that would, "prevent online platforms from stifling viewpoints they disagree with." R. at 34. He also maintained that the CC law was "carefully crafted" to make platforms, a "'town square' in the truest sense," citing concern from constituents about platforms blocking content and users. R. at 34-35.

Though Governor Trapp's statements illustrate his perception of Poster to be stifling speech, Poster's refusal to allow certain content on its platform was actually its own conveyance of speech aligned with its leader's long-standing religious beliefs. Poster was created and continues to function centered around the beliefs of the APC, one of which is pacifism. R. at 2. The public outcry by Poster's founder against a violent rally, its offer of discounted rates to APC members, and its removal of Ms. Thornberry's content all represent Poster's intent to spread the tenants of the church. R. at 3-6. By targeting Poster's choice in curating the content it allows on its page, Governor Trapp's statements and the CC Law itself suggest disapproval with Poster's specific messaging and beliefs. Therefore, the law is content-based.

2. The CC Law does not survive strict scrutiny.

Strict Scrutiny requires the Court find the CC Law, "furthers a compelling government interest and is narrowly tailored to achieve that interest" *Citizens United*, 558 U.S. at 340.

The interest at issue does not rise to the level needed to surpass strict scrutiny. While there is a compelling interest in upholding the First Amendment rights of citizens, the present interest at issue is forcing private companies to provide a public forum to individuals. This interest is not compelling, as this Court has already established that an interest in promoting free speech is not compelling enough to justify forced access obligations. *See Tornillo*, 418 U.S. at 252.

Assuming the Court finds the CC Law furthers a compelling interest, the law is still invalid as it is not narrowly tailored. A regulation is narrowly tailored only when it, "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). As the law does not define a "substantial market share," the scope of the CC Law relies wholly on Delmont's own interpretation of "substantial". In application, Delmont could stifle the speech of any platform it chooses or all platforms altogether. As a result, this regulation, as stated in *Butler v. Michigan*, "burn[s] the house to roast the pig." 352 U.S. 380, 383 (1957).

II. Delmont unconstitutionally infringed on Poster's First Amendment right to free exercise of religion because the CC Law is not neutral and generally applicable, nor is it narrowly tailored to further a compelling government interest.

By prohibiting Poster from removing accounts that offends its religious beliefs, and from contributing to religious causes, the CC Law burdens Poster's religious practice and thus infringes on its First Amendment free exercise right. While not every law that burdens religion is unconstitutional, the law is presumptively unconstitutional when it is not neutral and generally applicable. *Fulton v. City of Philadelphia,* 141 S. Ct. 1868, 1877 (2021).

A law is not neutral if it, whether facially or covertly, targets a religious practice. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020); *Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 534 (1993). Because the CC Law facially targets religion in general, and covertly targets Poster's religious practice in particular, the law is not neutral. A law is not generally applicable if it allows the government to individually assess the "particular reasons" for a person or an entity's conduct by providing a "mechanism for individualized exemptions." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021).

Because the law both allows the AG to create a "mechanism for individualized exemptions" and also treats religious conduct differently from secular conduct, it is not generally applicable.

Given that the CC Law is neither neutral nor generally applicable, the CC Law must be subject to strict scrutiny. *Cuomo*, 141 S. Ct. at 67. To survive Poster's challenge, the law must be narrowly tailored to further a compelling interest. *Locke v. Davey*, 540 U.S. 712, 720 (2004). While Delmont no doubt has a compelling interest in protecting its citizens' free speech rights, its refusal to exempt religion from regulation is not justified by one. Further, assuming that Delmont does have a compelling interest, the CC Law is more restrictive than necessary to serve this interest.

A. The CC Law is not neutral because it facially and covertly targets religion in general and Poster's religious practice in particular.

The CC Law is neither neutral nor generally applicable. First, the law is not neutral because the "no contribution" provision facially targets corporate donations to religious causes. Second, even if the law is facially neutral, its enactment and enforcement in this case represents a covert attempt to target Poster's religious practice.

1. The CC Law facially targets religion.

Any government action that burdens religion or religious practices must satisfy a "minimum requirement of neutrality." *Cuomo*, 141 S. Ct. at 66. As a threshold matter, the government fails to act neutrally when it enforces a law that is not facially neutral. A law is not facially neutral if it explicitly targets an activity because it is religious. As articulated this Court put it in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, a law is not facially neutral when it "refers to a religious practice without a secular meaning discernable from the language or text," 508 U.S. at 533.

The CC Law is one of those laws. The "no contribution provision" prohibits online platforms with "substantial market shares." from using corporate funds to contribute to "political, religious, or philanthropic causes." Delmont Rev. Stat. § 9-1. 120(b). By explicitly banning these platforms from contributing to *religious* causes, the law, by its own terms, targets an activity because of its their religious status. *See Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020) (holding that the Free Exercise Clause protects "religious observers" from laws imposes "special disabilities" based on religious status). As the Fifteenth Circuit correctly observed, the CC Law's targeting of religion is more explicit than the challenged ordinance in *Lukumi*. R. at 30. In *Lukumi*, the Court concluded certain words in the ordinance, such as "sacrifice" and "ritual," suggested a "strong religious connotation," *Lukumi*, 508 U.S. at 534. The CC Law goes beyond mere "connotation" and specifically mentions religion. Delmont Rev. Stat. § 9-1. 120(b). And while the Court in *Lukumi* found that the aforementioned words, despite their religious connotations, arguably did have discernable secular meaning, 508 U.S. at 534, the inclusion of "religion" in the CC Law leaves no secular meaning to be discerned. It explicitly, and specifically, regulates certain donations simply for being religious.

The district court disagreed, however, and concluded that the CC Law is facially neutral because it does not "discriminate against the APC or refer to the Poster's religious practice." R. at 15. This is a misreading of the neutrality requirement. This Court has never held a law that burdens a religion is neutral merely because it does not target a specific religious practice or institution. On the contrary, the Court has consistently held that the government violates the neutrality requirement when it regulates an activity *because* it is religious. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 ("Nor may a law regulate or outlaw conduct because it is religious motivated."). The CC Law, by its own terms, explicitly bans large online

platforms from using corporate fund to donate to *religious* causes. Delmont Rev. Stat. § 9-1. 120(b). Thus, by its own terms, the law targets a particular activity *because* of it is religious. The CC Law, therefore, is not facially neutral. *See Bowen v. Roy*, 476 U.S. 693, 707 (1986) (concluding that the law is facially neutral because it is not antagonistic toward a religion or religion in general).

2. The CC Law covertly targets Poster's religious practice.

Even if the CC Law is facially neutral, this alone is not determinative. The Free Exercise Clause prohibits any "subtle departure from neutrality." *Lukumi*, 508 U.S. at 534. Simply put, a facially neutral law is not neutral if its enactment or enforcement evinces an attempt to covertly target religious practice. *Id.* To determine whether a law represents a covert attempt to target religion, courts can look to the law's enactment history. *Id.* At 535, 540 (stating that enactment history provides "strong evidence of [discriminatory] object."). Additionally, courts could also examine how the government enforces the law to discern whether it has acted with hostility toward religion. *Id.* at 535 ("Apart from the text, the effect of a law in its real operation is strong evidence of its object").

The CC Law's enactment reflects a covert attempt to target Poster's religion. Poster was a known opponent to the law. R. at 3. Moreover, as a large business in the state, Poster and its religious affiliation is well-known in the community. R. at 2; 36–37. Yet, despite knowing one of the state's prominent businesses is religious, and that it opposes the CC Law, the Delmont enacted the law without providing any religious accommodations. Delmont Rev. Stat. § 9-1. 120(b). Given both Poster's prominence as a religious entity and its strong opposition to the law, Delmont's choice to not accommodate religion in the CC Law provides strong evidence that the law was enacted with "discriminatory object." *Lukumi*, 508 U.S. at 534.

Moreover, how the law was enforced demonstrates more than a subtle departure from neutrality. *Id.* This was the first time that the AG enforced the law. It was enforced against Poster, a prominently religious company with a history of opposing the law. R. at 6. Further, it was enforced only after Ms. Thornberry protested her account's suspension. *Id*. Finally, in addressing the situation, the AG publicly stated that Poster was an APC-founded platform that "discriminated against Delmont citizens." *Id*. Taken together, these facts provide strong evidence of governmental hostility against Poster and its APC faith. *Lukumi*, 508 at 534 ("The Free Exercise Clause protects against governmental hostility which is masked, as well as overt").

B. Even if the CC Law is neutral, it is presumptively unconstitutional because the law is not generally applicable.

Neutrality is not the only requirement under the Free Exercise Clause. A law burdening religion can be neutral and still presumptively unconstitutional if it is not generally applicable. *Fulton*, 141 S. Ct. at 1876. A laws that "invites the government to consider the particular reasons of a person's conduct by providing a mechanism for individualized exemption" are not generally applicable. *Id.* at 1877. Likewise, laws that "prohibit religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way" are not generally applicable. *Id.*

1. The CC Law is not generally applicable because it creates a "mechanism of individualized exemptions."

Neither provision of the CC Law is generally applicable. The law's requirement that all large online platforms serve every account regardless of viewpoint is not generally applicable because it invites the AG to subjectively assess the particular motivations behind the platforms' editorial decisions. *See 303 Creative LLC v. Elenis*, 6 F.4th 1160, 1187 (10th Cir. 2021) ("[A]

system of individualized exemptions is one that gives rise to the application of a subjective test."). By prohibiting large online platforms like Poster from discriminating accounts based on "political, ideological, or religious viewpoints", Delmont Rev. Stat. § 9-1. 120(a), the law gives the AG significant discretion to review each editorial decision to determine whether they are motivated by one of the prohibited biases. This discretion allows the AG to establish a system of "individualized exemption" as he or she will, based on a subjective determination, decide whether or not an editorial decision satisfies the terms of the law. *See Emp. Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 884 (1990) (reasoning that a system of individualized exemption allows for "individualized governmental assessment of the reasons for the relevant conduct").

Likewise, the "no-contribution" requirement of CC Law is also not generally applicable. The law prohibits large online platforms from using corporate funds to contribute to religious, political, or philanthropic causes. Delmont Rev. Stat. § 9-1. 120(b). The law does not define what "political," "religious," or "philanthropic" mean. *Id.* Consequently, the AG has the discretion to make subjective determinations about whether a platform's donation is motivated by religious reason or by something else entirety. Through this subjective assessment, the AG has the discretion to decide whether a donation is within or without the regulatory bound of the CC Law. Because the law empowers the AG to make individualized assessments about the motivation and nature of a corporate donation, the law creates a "mechanism for individualized exemption." *Smith*, 494 U.S. at 884. And because the law has created such a mechanism, it may not deny exemption to religious entities without a compelling reason. *Fulton*, 141 S. Ct. at 1877.

2. The CC Law is not generally applicable because it targets religious interests while exempting similar secular interests.

Assuming that the CC Law does not create a mechanism of individualized exemption, it is still not generally applicable because the law inhibits religious interest while exempting secular interests that similarly undermine the government's policy objective. *Fulton*, 141 S. Ct. at 1877. The CC Law requires large online platforms to serve all accounts regardless of "political, ideological, or religious viewpoint." Delmont Rev. Stat. § 9-1. 120(a). It also prohibits platforms from making contributions to "political, religious, or philanthropic" causes. *Id.* at 9-1. 120(b). Delmont argues both provisions are needed to prevent platforms from discriminating based on viewpoints and expressing favoritism toward one viewpoint over another. R. at 35. Yet, other secular interest not regulated by the law, such as economic, artistic, or philosophical interests, could similarly undermine these objectives. Delmont Rev. Stat. § 9-1. 120(a) & (b). Because these secular interests could undermine the government's objectives, the CC Law is not generally applicable. *Fulton*, 141 S. Ct. at 1877.

The district court, however, held that the law is generally applicable because the law is not applied selectively and contains no exemption, religious or non-religious. R. at 16. This is an incorrect understanding of the general applicability requirement. A law is not generally applicable because it burdens both religious interest and *some* secular interests. *Cuomo*, 141 S. Ct. at 73 (Kavanaugh, J., concurring); *see also Calvary Chapel Dayton Valley v. Sisolak,* 140 S. Ct. 2603, 2613 (2020) (Kavanaugh, J., dissent) ("it is not enough for the government to point out that other secular organizations or individuals are also treated unfavorably"). Rather, once the law exempts any secular interest, it must also extend that exemption to religious interest. *Lukumi,* 508 U.S. at 534. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court held that New York's COVID restrictions on houses of worship were unconstitutional despite the fact that the state applied similar restrictions on non-religious avenues as well. 141 S. Ct. at 66. As Justice Kavanaugh

articulated, "once a State creates a favored class of businesses . . . the State must justify why houses of worship are excluded from that favored class." *Id.* at 73.

Here, as in *Cuomo*, Delmont has implicitly created several classes of exempt secular causes in both provisions of the CC Law. By requiring large online platforms to serve all accounts regardless of "political, ideological, or religious" viewpoints, the CC Law exempt some secular interests, like artistic or economic interests, from regulation. Delmont Rev. Stat. § 9-1. 120(a). And by banning platforms from donating to "religious, political, or philanthropic" causes, the CC Law likewise exempt several secular causes from regulation, such as "philosophical" or "artistic" causes. Delmont Rev. Stat. § 9-1. 120(b). Any of the aforementioned grounds could undermine Delmont's objective as much as religion. Suspensions based on "economic" or "artistic" grounds could inhibit Delmont citizens' ability to access services provided by large online platforms. Likewise, contributions on philosophical or artistic grounds could allow these platforms to favor one position over another. Thus, notwithstanding that the law also applies to some secular interests, because the CC Law burdens religious interest but exempt some secular interests that similarly undermine Delmont's policy objective, Delmont may not refuse to exempt religion from regulation. *Fulton*, 141 S. Ct. at 1877.

C. The CC Law is unconstitutional because it does not serve a compelling government interests, and even if it does, is not narrowly tailored to do so.

Because the CC Law is neither neutral nor generally applicable, the Court must subject it to strict scrutiny. Thus, the law is presumptively unconstitutional unless it is narrowly tailored to further a compelling government interest. *Cuomo*, 141 S. Ct. at 67. Poster does not contend that Delmont's interest in protecting the First Amendment rights of its citizens is not compelling. However, Delmont's interest in protecting its citizens free speech right is insufficiently compelling

to justify it overriding Poster's religious objection by requiring the platform to host contents contrary to its religious beliefs. Similarly, the state has no compelling interest to justify its prohibition on corporate donations to religious causes.

Poster stated that the law's requirement for large platforms to host accounts of all viewpoints would require the company to post contents contrary to its faith. This, Poster believes, would force it to "violate [their] religious mandate or close [their] business operation" R. at 37. Under the Free Exercise Clause, where the state places such substantial burden on a religious objector, its action can only be justified by an interest "of the highest order." *Trinity Lutheran*, 137 S. Ct. at 2019.

Delmont's asserted interest in protecting its citizens general free speech right amounts to little more than a general governmental desire to protect a public interest. *Dayton Area Visually Impaired Pers., Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) ("[T]he public as a whole has a significant interest in . . . [the] protection of First Amendment liberties"). Important though that may be, courts have variously held that governments have no interest in enforcing unconstitutional laws. *E.g, Joelner v. Vill. of Washington Park, Illinois*, 378 F.3d 613, 620 (7th Cir. 2004). Here, as established above, the CC Law is neither neutral nor generally applicable. Its burdening of Poster's religious belief through both provisions of the law is therefore presumptively unconstitutional. Because the CC Law is presumptively unconstitutional, Delmont has no interest in enforcing the law, much less a compelling interest to do so. *Joelner*, 378 F.3d at 620.

To defend the "no contribution" provision, Delmont argued that the inclusion of "religion" in the CC Law's "no contribution: provision is necessary to "avoid implicating the Establishment Clause." R. at 35. This interest, however, is not compelling. The Establishment Clause does not impose a duty to not exempt religious interest from regulation. *Hobbie v. Unemployment. Appeals*

Comm'n of Fla., 480 U.S. 136, 144–45 (1987). On the contrary, the Court has stated that in some cases, the government *must* exempt religion. *Id.*

Indeed, where exempting religion has implicated Establishment Clause violation, the Court has erred on the side of exemption. Thus, in *Wisconsin v. Yoder*, the Court held that the Free Exercise Clause requires Wisconsin to exempt Amish children from the state's education requirement. 406 U.S. 205, 234 (1972). The Court concluded that any potential danger of violating the Establishment Clause "cannot be allowed to prevent any exceptions no matter how vital it may be to the protection of . . . free exercise." *Id.* Accordingly, even if exempting religion from the CC Law could implicate some Establishment Clause concerns, this risk alone is insufficiently compelling to justify Delmont's refusal to exempt religion.

Assuming that the CC Law is justified by compelling interests, it is not narrowly tailored. A law is not narrowly tailored if it is not the "least restrictive means" to further a compelling interest. *Thomas v. Rev. Bd. of Indiana Empl. Sec. Div.*, 450 U.S. 707, 718 (1981). One important marker of narrowly tailoring is whether less restrictive alternatives exist that could similarly further the government's interest. *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 728 (2014). In *Burwell*, the Court held that because the federal government had other ways to ensure women could obtain contraceptives, its contraceptive mandate on religious private employers was not narrowly tailored. *Id.*

Here, as in *Burwell*, the CC Law fails to prove that the CC Law is narrowly tailored. The law's requirement that large online platforms serve all accounts is not narrowly tailored. Even without this requirement, Delmont has other means to protect its citizens' free speech. It could create its own platforms for citizens. Alternatively, Delmont could also provide economic incentives to existing platforms to encourage them to adopt a viewpoint non-discriminatory policy.

Whatever it chooses, however, the fact that these alternatives exist means that Delmont's requirement that large online platforms must serve all accounts is broader than needed to safeguard Delmont citizens' free speech rights.

Delmont likewise failed to demonstrate why the inclusion of "religion" in the "no contribution" provision is narrowly tailored. As mentioned, Delmont argued that this inclusion was needed to avoid violating the Establishment Clause. If the Establishment Clause does indeed prohibit Delmont from exemption religion, then perhaps Delmont's stance would be somewhat justifiable. The Establishment Clause, however, does not require this. At its heart, the Establishment Clause simply demands the government not endorse a religious group or religion in general. *Lee v. Weisman*, 505 U.S. 577, 627–628 (1992) (Souter, J., concurring). Nothing about exempting religion from a generally applicable regulation signifies an endorsement of religion. Rather, such exemption only represents the government's recognition of the diverse religious practices and needs of its citizens. *Good News Club v. Milford C. Sch.,* 533 U.S. 98, 114 (2001). Thus, the inclusion of "religion" in the "no contribution" provision is more restrictive than necessary for Delmont to achieve its interest.

In sum, under the Free Exercise Clause of the First Amendment, a law can burden religion only if it is neutral and generally applicable. Failing these requirements, such law will be subject to strict scrutiny can may survive only if it is narrowly tailored to advance a compelling government interest. The CC Law has met none of these criteria. It is neither neutral nor generally applicable. And strictly scrutinized, Delmont fails to demonstrate that the CC Law is justified by a compelling interest, or even if there is one, that the law is the narrowly tailored to further said interest.

CONCLUSION

For the foregoing reasons, the Court should affirm the Fifteenth Circuit's decision and hold that Delmont's CC Law unconstitutionally violates Poster's First Amendment rights to freedom of speech and free exercise of religion.

January 31, 2022

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Team 10

Counsel for Respondent

CONSTITUTIONAL PROVISION

U.S. Const., amend. 1 – "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech"

CERTIFICATE OF COMPLIANCE

Pursuant to Rule III.C.3 of the Official Rules of the 2022 Siegenthaler-Sutherland Moot Court Competition, Team 10 hereby certifies that:

1. All work product contained in this brief is the work product of team members and only team members;
2. Team 10 has fully complied with our school's governing honor code; and
3. Team 10 has fully complied with the Rules of the Competition.