No. 22-CV-7654

IN THE

SUPREME COURT OF THE UNITED STATES

POSTER, INC.,

Respondent,

v.

WILL WALLACE,

Petitioner,

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

PETITIONER'S OPENING BRIEF

Team 013

QUESTIONS PRESENTED

1. 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.

2. Whether the United States Court of Appeals for the Fifteenth Circuit erred in finding that the Delmont Common Carrier Law, Delmont Rev. Stat. § 9-1.120, is neither neutral, not generally applicable, and is thus unconstitutional.

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The opinion of the United States District Court of Delmont is unreported, but it is available at *Poster, Inc. v. Will Wallace*, C.A. No. 21-CV-7855 (D. Del. Sept. 1, 2021) and reprinted in the record at 1-17. The opinion of the United States Court of Appeals for the Fifteenth Circuit is unreported, but available at *Poster, Inc. v. Will Wallace*, 2021-3487 (15th Cir.) and reprinted in the record at 18-33.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit entered a final judgment on this matter. R. at 33. This Court granted the petition for writ of certiorari R. at 40. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE CASE

Poster is an internet site that holds 77 percent of the self-publication market share. Poster was founded by the American Peace Church, and currently its board is all occupied by APC members. While Poster disclaims any endorsement of views espoused by artists on their site, it retains editorial discretion to accept or reject any work that an artist posts on their site.

Louis F. Trapp ran for Governor of the state of Delmont in 2020 on a platform of promoting and protecting freedom of speech on the internet. As part of his campaign, he promised to enact a law that would restrict the ability of publication companies to remove

opposing viewpoints. After his election, Delmont enacted the Common Carrier Law (CC Law) which restricted the ability of common carriers to fund philanthropic, religious, and political causes. The CC Law also designated self-publication platforms with a significant market share as common carriers and sought to protect all viewpoints expressed through these common carriers.

Katherine Thornberry was a frequent contributor to Poster, and she had written a novel titled "Animal Pharma". After attending an animal rights rally, her page picked up more traffic from users who sympathized with the animal rights movement. An alternate title of Thornberry's novel, "Blood is blood", was used as a slogan for the violent and extremist animal rights group, AntiPharma. As a result of this connection, Poster suspended Thornberry's account in accordance with their editorial discretion and their APC pacifist beliefs. Thornberry protested her suspension in the media, and Delmont issued a fine to poster for violating the CC Law.

STATEMENT OF THE ARGUMENT

This Court should reverse the circuit court's ruling on the free speech issue, which invalidated Petitioner's CC Law. Further, this Court should reverse the circuit court's ruling on the free exercise issue, which invalidated Petitioner's anti-discrimination law. The First Amendment offers robust protections for speakers and religious practitioners. Petitioner's statute does not infringe upon those rights as it acts within the bounds of both clauses in furtherance of public communication and sharing of all viewpoints on modern digital platforms.

First, under the Free Speech Clause issue, both lower courts did not dispute Petitioner's classification of Poster as a "common carrier." Poster is a corporation, which affords it full First Amendment protections. However, Poster is a common carrier because is: (1) offers its platform or goods for everyone as a business; (2) maintains a vast control of the artistic self-publication market; and (3) does not have a comparable competitor or alternative for end users. Finally,

common carriers receive lesser First Amendment protections given these market impacts and control of public communication channels. The Supreme Court has ruled time and again that new communication technologies that control the pipes of public speech face limitations to protect First Amendment rights of the broader public. As well, the statute does not force Poster to endorse or promote the content of their third-party users, and as the Court has said, consumers can distinguish between speech of a platform and that of individual users.

Second, under the Free Exercise Clause issue, the Delmont statute is neutral and generally applicable. The statute does not single out one religion, but rather regulates neutrally within the bounds of the state's control, and the purpose of the law stems from a local governmental leader's effort to protect free speech rights, not attack free exercise rights. The statute is also general—not selectively enforced—and survives strict scrutiny as advancing the government's compelling interest in free speech rights through a narrowly tailored language that focuses on limited group of large tech platforms.

ARGUMENT

I. THE FIFTEENTH CIRCUIT ERRED IN HOLDING DELMONT'S CC LAW UNCONSTITUTIONAL BECAUSE POSTER AS A COMMON CARRIER RECEIVES LESS FIRST AMENDMENT PROTECTIONS FOR USER SPEECH.

The Fifteenth Circuit used a three-part analysis to conclude reasons that the Delmont CC Law unconstitutionally violated Poster's free speech rights. The three parts of the Fifteenth Circuit's analysis are: (1) Poster's free speech rights as a corporation, (2) Poster's status as a common carrier, and (3) the free speech right of common carriers.

A. Poster has full free speech rights as a corporation.

There is no dispute regarding the first part of the Fifteenth Circuit's analysis. Poster is a corporate entity and is entitled to the full protection of the First Amendment. But those rights change once the company is classified as a common carrier.

B. Poster is a common carrier.

Regarding the second issue, Poster's status as a common carrier, both the district court and the Fifteenth Circuit correctly hold that Poster qualifies as a common carrier. The district court considers three factors in its analysis of Poster's common carrier status. First, that Poster "holds [it]self out to carry goods for everyone as a business." *Ingate v. Christie*, 175 Eng. Rep. 463, 464 (N.P. 1850). Second, Poster's vast seventy-seven percent of the artistic self-publication market share. And third, the lack of comparable alternative to Poster in the self-publication sphere. The Fifteenth Circuit, while agreeing with the district court's overall holding, caveats Poster's status as a common carrier.

The Fifteenth Circuit points out that Poster "does not function exclusively as an expressive conduit for others' artistic speech" and that Poster has always promoted itself as an

"APC-friendly" organization. R. at 26. The Fifteenth Circuit then uses a new term, "hybrid-carrier," to describe Poster. *Id.* The Fifteenth Circuit defines hybrid-carrier as an entity that "functions as a conduit of expression in some respects, while also promoting its own expression in others." *Id.* This is where the Fifteenth Circuit's analysis falls short. The Fifteenth Circuit claims that Poster is a hybrid-carrier because its services can be compared to musicians in an orchestra who convey their own melody, at the selection and discretion of a conductor. R. at 27. This analogy fails to recognize that musicians in an orchestra share a common goal with the conductor, and with one another. They are all contributing to playing a singular song.

The case, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995), explains how a shared goal between parties impacts their free speech rights. In *Hurley*, the South Boston Allied War Veteran's Council ("Veteran's Council") was in charge of organizing Boston's Saint Patrick's Day Parade. The Veteran's Council did not permit the Irish American Gay, Lesbian, and Bisexual Group of Boston (GLIB) to join in the parade based on the group's views, and GLIB brought suit. The Supreme Court held that the state court in ruling against the Veteran's Council violated the Veterans Council's First Amendment right because since "every participating unit affects the message conveyed by the private organizers, the state court's application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade." *Id.* at 572-73.

This holding makes sense in the context of a parade, where all the floats share a common goal with the parade organizer, as well as with other floats. The Veteran's Council has the authority to control the overall message of the parade, through its own expression, which this Court reaffirmed in *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656-57 (2000). This is logic that the Fifteenth Circuit implies through its orchestral analogy, where a conductor oversees the

projection of a singular song, and all the musicians are means through which that song is projected. The interconnected relationships evident in these examples are not analogous to Poster's relationship with its account holders.

This Court in *Hurley* addressed the difference by distinguishing the precedent in *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*). The *Hurley* Court correctly points out that "a parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience." *Hurley,* 515 U.S. at 557. A parade aims to send a singular message through interconnected floats, as an orchestra aims to play a singular song through interconnected musicians.

Cable networks, on the other hand, air numerous channels created by various creators. In *Turner I*, this Court held that "Given cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." *Turner I*, 512 U.S. at 655. While the cable network does have the final say on what will air and what will not, the channels do not aim to share a singular message. Furthermore, as noted, audience members self-select what channels and programing they choose to view. There is no indication that cable viewers assume that the channels' messages are the same as the cable provider's message. Nor is there any indication that channels' messages detract from the cable providers' goals. The cable analogy aligns better with Poster's operations in contrast to the orchestra or parade analogies.

Poster's writers use the platform to share their creative works on an online platform. The writers are not prompted by Poster regarding the content they create. All writers have autonomy over their personal accounts. Additionally, the writers can choose how, and for how long, readers

can access their work (such as by downloading for free, purchasing, or renting). These facts indicate that the writers are all independent of Poster and independent of one another. Accordingly, there is no indication that the writers who publish their work on Poster share a common goal or common philosophy.

While all of Poster's writers happen to adhere to APC ideologies, that does not mean the writers are actively contributing to the furtherance or promotion of Poster's APC ideology. Given the independent and non-coherent nature of Poster's writers' posts, the relationship between the writers and the corporation is completely different from the relationship between joint celebratory efforts of floats in a parade (or musicians in an orchestra). Instead, Posters' writers' relation to the corporation closely resembles the relationship between independent channels that air on a single cable provider's platform.

For the aforementioned reasons, this Court should affirm the overall holding that Poster is a common carrier and reject the Fifteenth Circuit's analysis about Poster being a hybrid-carrier.

C. Common carriers, like Poster, receive minimal First Amendment protections; Petitioner's statute did not violate even their basic speech rights.

1. Both lower courts failed to interpret the minimal rights of common carriers.

a. One person or group's First Amendment rights do not outweigh another's.

The district court improperly ruled that the First Amendment rights of users on Poster's platform supersede the First Amendment rights of common carriers. Whether an actor has a market share monopoly helps determine their common carrier status but is irrelevant to the First Amendment rights of carriers. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that Florida's attempt to regulate the *Miami Herald* to combat break up a monopoly on the marketplace of ideas failed to overcome First Amendment protections).

Florida again challenged the applicability of free speech rights related to editorial discretion and monopoly power in the 2021 case *NetChoice, LLC v. Moody*, this time involving social media platforms. It lost, again, because the Northern District of Florida found that the "concentration of market power among large social-media providers does not change the governing First Amendment principles." No. 4:21cv220-RH-MAF, 2021 WL 2690876, *7 (N.D. Fla. June 30, 2021) (applying the holding in *Tornillo*, 418 U.S. at 258). If First Amendment rights exist for Poster, the doctrine does not support weighing those rights against those of individual users, as the district court did in the present case.

b. The Supreme Court suggests lesser speech rights for common carriers.

The Fifteenth Circuit ruled that despite Poster's common carrier status, it should receive First Amendment protections under the constitution. This conclusion grates against the Supreme Court's repeated statements that common carriers do not qualify for editorial rights.

The circuit court relied on precedent that does not reflect the facts and circumstances of the present case. The holding in its cited case, *FCC v. League of Women Voters of California*, found that "*unlike common carriers*," broadcasters can "exercise the widest journalistic freedom consistent with their public duties." *See* 468 U.S. 364, 378 (1984). Poster is not a member of the press, nor does it make itself out to be such, and the Court explicitly excludes common carriers. As well, *League of Women Voters* does not override other limitations broadcasters must abide due to the medium's intrusion into the home and spectrum scarcity. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978). Spectrum scarcity is not a concern on the internet and users can tailor their web experience by following or unfollowing certain content.

Further, the Supreme Court ruled in the early digital age that the internet deserves more First Amendment protection than broadcast, collapsing the circuit court's comparison to the medium. *See Reno v. ACLU*, 521 U.S. 844, 885 (1997); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). "[T]he Internet can hardly be considered a 'scarce' expressive commodity." *Reno*, 521 U.S. at 870.

The Fifteenth Circuit also relied on *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC* to support its contention that the high court has acknowledged First Amendment rights of common carriers. *See* 518 U.S. 727, 739 (1996) (plurality opinion). But the circuit court failed to address a critical part of the holding: "[I]n respect to leased channels, their speech interests are relatively weak because *they act less like editors*, such as newspapers or television broadcasters, *than like common carriers*, such as telephone companies." *Id.* The Supreme Court categorized common carrier rights as lesser than those of editors or even broadcasters. But despite this cite, the circuit court gave Poster, a common carrier, editorial rights and invalidated the statute.

Common carriers like Poster have some First Amendment rights. Contrary to the district court's analysis, those rights should not be outweighed by the free speech rights of individual users. But carrier rights also fall short of the higher level of editorial rights accorded newspapers and other journalistic outlets. Poster's rights depend in part on whether the platform is publishing its own self-produced content or the content of third-party creators.

2. Poster retains discretion to publish or promote content of its own creation.

In *U.S. Telecom Ass'n v. FCC*, the D.C. Circuit held that though the FCC could reclassify internet service providers (ISPs) as a telecommunications service subject to common carrier laws, this did not infringe on the speech rights of the ISPs regarding their own content. *See* 825 F.3d 674, (2016). "Those obligations affect a common carrier's neutral transmission of others'

speech, not a carrier's communication of its own message." *Id.* at 740. Though not binding on this Court, the *U.S. Telecom* ruling parallels the Supreme Court decision in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n* establishing First Amendment protections for commercial speech of public utilities, *see* 447 U.S. 557, 566-68 (1980), which the Tenth Circuit interpreted to apply to common carriers in *U.S. West, Inc. v. FCC*. *See* 182 F.3d 1224 (10th Cir. 1999).

The Delmont statute states that platforms, like Poster's, "shall serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint." Delmont Rev. Stat. § 9-1.120(a). Since we argue that the statute does not speak to Poster's own speech, even the *Central Hudson* test for commercial speech regulations is irrelevant. Poster has a right to control their speech, and Petitioner does not seek to infringe on that right.

3. Poster cannot discriminate against end users based on their content.

a. Delmont's statute does not force Poster to endorse user content.

The Fifteenth Circuit held that the government violated Poster's First Amendment rights despite its common carrier status because the statute "forces Poster to endorse, via promotion, messages it may wish to disclaim." This seems to fall under the compelled speech doctrine, prohibiting the government from forcing an ideological viewpoint.

As a common carrier, the site acts more as a public space for the sharing of content, and therefore falls more under this Court's precedent in *PruneYard Shopping Ctr. v. Robins*. *See* 447 U.S. 74, 87 (1980). The public nature of the open shopping mall in *PruneYard*—inviting patrons to shop at will—and the lack of a government speech requirement, supported the Court's finding that no one would mistake a pamphleteer's speech with that of the mall owner. *Id.* Further, the court encouraged the owners to post signs disclaiming the views, if they wished. *Id.* The court reaffirmed this ruling in *Rumsfeld v. F. for Acad. & Inst. Rights, Inc.* in finding that students

could discern the difference between school-sponsored speech and permitted speech. *See* 547 U.S. 47, 65 (2006) (ruling that the government did not violate schools' free speech rights in withholding funds from campuses that prohibited military recruiters).

Users of Poster's platform operate accounts on their own and "self-publish" their own artistic work. Poster is not publishing the content themselves and by their own admission disclaim any endorsement of the art in the terms of service. R. at 2 As well, the circuit court argues the statute "prohibits the organization's own speech by *limiting its ability to curate its users' content*." The statute does not require Poster promote the work of users on the platform or limit its curation; it only requires them to "serve all who seek or maintain an account." Delmont Rev. Stat. § 9-1.120(a). Nowhere in the statutory language does the government mention promotion, endorsement, or curation limits.

b. Poster's site acts as a conduit for the sale and sharing of artistic work.

At least one Supreme Court justice has disagreed with Petitioner's argument for treating internet platforms and providers as common carriers. In a dissent from a denial of a rehearing en banc, then-D.C. Circuit Judge Kavanaugh argued that net neutrality laws imposing common carrier status on ISPs violated the First Amendment. *See U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 418 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

He relied on the landmark rulings in *Turner I* and *Turner II*, establishing editorial rights for newspapers, magazines, pamphleteers, publishers, bookstores, and newsstands in modern communication marketplaces. *See id.* at 427 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*)). The *Turner* litigation dealt with the FCC's "must-carry" rules for cable operators, which the Supreme

Court upheld in *Turner II* after the rules survived intermediate scrutiny as a content-neutral regulation preserving the government's interest in free broadcast. *Turner II*, 520 U.S. at 185.

The *Turner* issue turned on market power. *Id.* at 196-208. Cable operators had "bottleneck" control of the content coming into viewers' homes. *Id.* at 221. If now-Associate Justice Kavanaugh's argument were correct, Poster could argue the Delmont government violated their free speech rights by regulating their user base. But *Turner II* established that the government can still regulate providers based on an imbalance of market control.

Given that Poster's site controls seventy-seven percent of the artistic self-publication market, the government has an interest in preserving user access to the market and content. R. at 2. The internet is vast, but certain platforms still control enough of a market share of users and content to hold the kind of power over the information and create the "bottleneck" the *Turner* Court and government feared.

Furthermore, platforms like Poster's operate as a conduit, not like as a creator or editor. Poster charges users for accounts to sell their own work, even taking a cut of profits. It has created a public space in which users can bring their wares to market. The idea behind preserving public accommodations goes back to English common law traditions, and has appeared in this Court with each change of communicative technology. "Common carriers, whether engaged in interstate commerce or in that wholly within the state, are performing a *public service*." *Western Union Tel. Co. V. Call Pub. Co.*, 181 U.S. 92, 99 (1901). The *Western Union* Court compared the power of these communication carriers to that of sovereign eminent domain. *Id.* Carriers own these spaces of public communication, much like Poster owns the space for the sharing and selling of artistic works online.

Poster's dominant control over the online arts market subjects them to common law carrier responsibilities, which allow users to speak in the market without fear of discrimination.

c. Common carrier laws protect free speech rights in public spaces.

The Delmont statute reasonably protects internet users from discrimination based on the content of their speech. Associate Justice Thomas argued recently that a treatment of digital platforms, like Poster's, as common carriers better ensures speech in public areas will remain protected. *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1225 (2021) (Thomas, J., concurring). If a platform has such a control over a market of speech without comparable alternatives for end users, then this impacts First Amendment rights. *Id.* Leading First Amendment scholars agree that establishing common carrier limitations on speech-hosting platforms will adapt centuries-old legal doctrine to the digital forum. Law professors Genevieve Lakier and Nelson Tebbe argue that the Supreme Court established early precedent supporting government regulation of private sector speech discrimination. *See* Genevieve Lakier & Nelson Tebbe, *After the "Great Deplatforming": Reconsidering the Shape of the First Amendment*, LAW AND POLITICAL ECONOMY PROJECT (March 1, 2021), https://lpeproject.org/blog/after-the-great-deplatforming-reconsidering-the-shape-of-the-first-amendment/.

Lakier and Tebbe point to *Marsh v. Alabama* as a judicial framework for state actors to intercede in the autonomy of private actors when they threaten the free speech rights of others. *Id.* (citing Marsh v. State of Ala., 326 U.S. 501, 506 (1946)). The private actors in *Marsh* owned a community and limited the speech of its residents in public spaces. In punishing speakers, the Court found the community violated its residents' free speech rights and allowed the government to intervene. *Marsh*, 326 U.S. at 506. The court reaffirmed the government's right to intercede when a private company jams the channels of communication in applying the Sherman Antitrust

Act to a one of the most protected speakers—a journalistic outlet. *See Associated Press v. U.S.*, 326 U.S. 1, 20 (1945) ("Freedom to publish means freedom for all and not for some.")

By adapting common carrier classifications to digital spaces, like Poster's art publishing platform, the government helps protect the free speech rights of all users, while limiting the impact on a platform's own speech.

The Fifteenth Circuit erred in ruling that Delmont Rev. Stat. § 9-1.120(a) violated Poster's free speech rights under the First Amendment. As a common carrier, Poster receives lesser speech rights, and the government maintains those rights of the platform while preserving open channels of communication in the modern digital environment.

This Court should REVERSE judgment with regards to the free speech issue.

II. THE LOWER COURT'S FINDING THAT DELMONT'S LAW VIOLATED THE FREE EXERCISE CLAUSE WAS NOT APPROPRIATE AND CLEARLY ERRONEOUS.

A. The Law Is Neutral and Generally Applicable

While the lower court ruled that the state of Delmont violated the Free Exercise Clause, we respectfully disagree with the lower court. The district court correctly interpreted the Free Exercise Clause in accordance with the holding of *Smith*. *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872 (1990). While Poster argues that the lower court correctly held that the state of Delmont violated the Free Exercise Clause, we argue that this holding is incorrect because the Delmont statute is neutral and generally applicable.

It is first worthy to note that the state of Delmont has not enacted an equivalent of the federal Religious Freedom and Restoration Act of 1993 ("RFRA"). 42 U.S.C. §§ 2000bb, et seq.

Therefore, the applicable analysis should be conducted purely under case law from the Free Exercise Clause of the First Amendment. The Free Exercise Clause of the First Amendment, states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST., amend. I, XIV; see *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). This amendment is applicable to the state of Delmont through the Fourteenth Amendment.

1. Neutrality

According to the United States Supreme Court as decided in *Smith*, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Therefore, if the district court is correct in its interpretation of *Smith* and its progeny, Delmont is not required to elicit a compelling government interest.

While neutrality and generality are separate requirements, their analysis is "interrelated" and it is likely that either both will be satisfied or neither will be. *Id.* A law that even slightly deviates from neutrality on matters of religion will be deemed illegitimate. *See id.* at 534. At the outset, a law must be deemed illegitimate if it discriminates against religion on its face. *See id.* The lower court held that the inclusion of *religion* within the Delmont statute signified that Petitioner violated the Equal Protection clause. R. at 30. However, the inclusion of *religion* within the statute is not indicative of a statute that discriminates on its face. While the statute does include religion, it also includes philanthropic and political beliefs as well. *Id.* at 29. Therefore, the statute does not suffer from the same underinclusive issues that were at issue in *Church of Lukumi Babalu Aye*. In that case, the government had enacted an ordinance that restricted certain

animal "sacrifice" and "ritual[s]". *Lukumi*, 508 U.S. at 534. However, in our case Delmont has not singled out a particular religion, but enacted a statute that prohibits *all* religious contributions. According to *Smith*, "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)." *Smith*, 494 U.S. at 879. Because this law is neutral and regulates an area within state control, the lower court was incorrect in holding the statute discriminates against Poster on its face.

However, it is not enough that a law does not discriminate on its face. A court must also judge a law's neutrality through the factors outlined in *Church of Lukumi Babalu Aye*, which include "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." *Lukumi*, 508 U.S. at 540. These factors will be considered in determining the law's neutrality.

The Supreme Court found in *Church of Lukumi Babalu Aye* repeated instances of discrimination and partiality that animated the city's enactment of the ordinances at issue in the case. The Court noted that the city council made repeated disparaging remarks about the Santeria religion and animal sacrifice. *See id.* at 541. The Court noted that other city officials, such as the city attorney and police department chaplain also made disparaging remarks about the Santeria religion. *See id.* at 541-42. These repeated remarks in official forums clearly showed a specific targeting of the Santeria religion in the enactment of the city ordinances related to animal sacrifices.

However, in our case there is no analogous targeting of the American Peace Church (APC) religion in the statutes established by Delmont. The Delmont statute is a result of Louis Trapp's

campaign commitment to increase free speech protections, and reign in the ability of common carrier platforms to restrict speech. See R. at 34. While the affidavit notes Poster as a particular example, this is due to Poster's large influence over the self-publication platform space, and not Poster's affiliation with the APC.

The lower court's analysis of the neutrality of the statute is flawed based on existing precedent. In both *Church of Lukumi Babalu Aye* and *Masterpiece Cakeshop*, there were repeated instances of disparaging remarks and discrimination about the plaintiffs' religion. See *Lukumi*, 508 U.S. at 451; See *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1729 (2018). However, there is little to no evidence in the factual record of specific discrimination towards the APC in this case. The lower court reasoned that Delmont's actions departed from neutrality because Delmont had never enforced the CC Law before. *See* R. at 31. However, this is insufficient to support the conclusion that Delmont was not acting neutrally. First, by Poster's own admission it had rarely ever removed user accounts, so this would give Delmont little to no reason to enforce the CC Law. Second, the law was enacted on June 1st, 2020, and Delmont pursued this enforcement action a little over a year later. *Id.* at 22-23. The lower court makes no mention of the law's recent enactment, nor does it discuss how many enforcement actions would have persuaded them that this was not a departure from neutrality. If the lower court's reasoning is upheld, then *any* first enforcement action would be in violation of the Free Exercise Clause.

Laws prohibiting certain actions by religious organizations can be implemented as long as they are neutrally and generally applicable. *See Smith*, 494 at 879. If the law applies equally to all religious organizations, there can be no claim that the law is not neutral. See *Roman Cath. Diocese of Rockville Ctr., N.Y. v. Inc. Vill. of Old Westbury*, 128 F. Supp. 3d 566, 583 (E.D.N.Y.

2015). As evident in the text of the statute and behavior of the elected officials responsible for the law, this law was not constructed for the purpose of inhibiting Poster's religious exercise. Therefore, this Court should find that Delmont's law is neutral.

2. Generality

A law is not general if the law, "in a selective manner [,], impose[s] burdens only on conduct motivated by religious belief." *See Lukumi*, 508 U.S. at 543. First and foremost, the law contains no exemptions, and this highlights the general applicability of the law. While the lower court reasoned that the application to entities with a significant market share and the enforcement decision by the Attorney General show an informal exception, this is a misapplication of existing law. *See* R. at 33. There is no indication that the law is underinclusive, as it prohibits all companies with large enough market shares from donating in specific ways. *See id.* at 20. Unlike *Church of the Lukumi Babalu Aye*, the law is not imposing a burden "only on conduct motivated by religious belief" in a selective manner. *See Lukumi*, 508 U.S. at 543. The law is not prohibiting religious conduct while permitting secular conduct that undermines the government's interests, because the government is also banning secular forms of use of funds. Unlike *Fraternal Order*, there is no case of a secular exemption that need be accompanied by a religious exemption for Poser. *See Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999). The Delmont statute affects *all* organizations with a significant market share and suffers no underinclusivity issue. While Poster may argue that the Attorney General's reference to APC in a statement constitutes selective enforcement negating the general applicability of the Delmont statute, we disagree that this offhand comment is sufficient to overcome the laws' general applicability.

Furthermore, Poster has presented no evidence that its ability to exercise its religion has been inhibited because of the Delmont statute. *See Sanderson v. People*, 12 P.3d 851, 854 (Colo. App.

2000). It is important to note that Poster does not bring a hybrid claim, nor could it. Precedent establishes that hybrid claims, while not required to uphold a violation of the Free Exercise Clause, can provide "other constitutional claims" that bolster the argument. *See Intercommunity Ctr. for Just. & Peace v. I.N.S.*, 910 F.2d 42, 44 (2d Cir. 1990). Poster does not have a constitutional right to expend corporate funds in any manner it deems permissive. The regulation of this activity is well within Delmont's statutory authority. Therefore, we would request this Court reverse the lower court's holding on the Delmont statute's general applicability.

B. The Law Survives Strict Scrutiny

However, even if the Delmont statute is not found to be neutral or general, then it would still be a valid law because it survives strict scrutiny. "To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance " 'interests of the highest order' " and must be narrowly tailored in pursuit of those interests." *See Lukumi*, 508 U.S. at 546. A statute that fails neutral and general applicability, will rarely survive strict scrutiny. *See id.* A statute reviewed under strict scrutiny can survive, "only if it advances compelling interests and is narrowly tailored to achieve those interests." *See id.*

1. Compelling Interests

As noted in *Fulton*, "so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *See Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1881 (2021). Poster owns a substantial market share of the self-publishing platform. It would be impossible for Delmont to enact a statute that carved out an exception for Poster, while achieving its interest. The protection of freedom of speech is not only a compelling interest, but a "fundamental" right that lies in the foundation of our constitution. *See Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 161 (1939). The protection of a citizen's right to participate in the modern public square, can hardly be detracted from as uncompelling. From this

ideal, Governor Trapp enacted a law that reflected protection of this fundamental right and cut back on the ability of large platforms to abridge that right. *See* R. at 36.

Unlike *Church of Lukumi Babalu Aye*, the state of Delmont is not working backwards to restrict a religion while attempting to concoct a law that covers their discrimination. They have a legitimate and compelling interest in providing a public space that protects freedom of speech to the highest order.

2. Narrowly Tailored

As mentioned previously, this statute was enacted to restrain large platform ability to restrict speech. This law was "carefully crafted" and seeks only to restrain "large tech platforms' substantial control over public expression." *See* R. at 35. The law focuses on the small number of companies that facilitate the most harm. The law also suffers no underinclusive issues, and the Court in *Church of Lukumi Babalu Aye* leaned heavily on this factor to determine the law at issue in that case was not narrowly tailored. *See Lukumi*, 508 U.S. at 546. It can hardly be imagined any possible alternative to how this law could have been drawn more narrowly, and the lower court does not suggest that this could have been done.

The lower court was incorrect in overturning the district court. The Delmont statute is both neutral and generally applicable based on the criteria outlined in *Church of Lukumi Babalu Aye*. Unlike the numerous Equal Protection cases that have found violations, Delmont sought to enforce its statute without any reference to a specific religion. Even if the statute were found to be not neutral or general, the law would survive strict scrutiny. For these reasons, we ask this Court to reverse the decision of the lower court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court REVERSE the judgement of the United States Court of Appeals for the Fifteenth Circuit with regard to the free speech issue and REVERSE with regard to the free exercise issue.

APPENDIX A

CONSTITUTIONAL PROVISIONS

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.

Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition

Brief Certificate

Team 013 Asserts:

I. The work product in all copies of Team 013's brief is the work of only the team members. No outside assistance was provided at any point.

II. Team 013 has complied fully with our schools' honor code throughout this process.

III. Team 013 has complied with all Rules of the Competition and any changes or updates requested by the Competition hosts.

Signed by: Team 013

Date: Jan. 30, 2022