No. 22-CV-7654

IN THE

SUPREME COURT OF THE UNITED STATES

WILL WALLACE

Petitioner,

V.

POSTER, INC.

Respondent.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

TEAM NO. 014

Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether, by forcefully reclassifying Poster as a common carrier and requiring it to abandon its practices of editorial discretion without exception, the Delmont Common Carrier Law, Delmont Rev. Stat. § 9-1.120, violates the free speech rights of Poster and digital platforms like it, making it unconstitutional under the First Amendment.

II. Whether a law preventing a religiously-affiliated digital platform from engaging in religious practices and removing user content that conflicts with its beliefs, while allowing secular organizations to engage in similar behavior, violates the Free Exercise Clause of the First Amendment.

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

STATEMENT OF JURISDICTION

The United States Circuit Court for the Fifteenth Circuit entered a final judgment on this matter. R. at 33. Petitioner filed for a writ of certiorari in a timely fashion, which this Court granted. R. at 39. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Poster is a popular internet site that accounts for 77 percent of the self-publication market. R. at 2. Poster's online platform allows artists to share their work with a wide audience by uploading content to their accounts and making it available for download for free, rent, or purchase. R. at 2. Poster's user agreement disclaims endorsement of any views expressed in published material, retains discretion to accept or reject material submitted by an artist, and the authority to block or remove an account "at any time for any or no reason." R. at 2 and 5.

Poster is closely affiliated with the American Peace Church ("APC"), a Protestant denomination. R. at 2. It's co-founder and CEO, John Michael Kane, and all members of its board are members of the APC. R. at 37. One of the APC's central tenants is non-aggression/pacifism. R at 2. To further this mission, the APC supports poets, educators, and musicians to promote peace-building efforts through education and cultural development. R. at 2.

Poster donates 15 percent of its profits to the APC's efforts, provides discounted publication services to APC-member artists, and promotes APC-member content. R. at 2.

On June 1, 2020, Delmont passed the Common Carrier Law ("CC Law"). R. at 3. The law was a result of Governor Louis F. Trapp's campaign promise to restrict the ability of large tech companies to regulate their user's content and contribute to causes that support their beliefs. R. at 35. The law applies to corporations with a "substantial market share" by classifying such corporations as common carriers and requires that they "shall serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint" and prohibits the use of corporate funds to donate to "political, religious, or philanthropic causes." R. at 3. Violations of the law result in heavy fines—up to 35 percent of a business's daily profits—which compound daily until the offender conforms to the law. R. at 3. The law contains no exemptions. R. at 3.

Katherine Thornberry has maintained a Poster account to promote her novel, *Animal Pharma*, since November 2018. R. at 3. While attending an animal rights rally in Capital City, Ms. Thornberry updated her Poster account and gave her novel an alternative title: "Animal Pharma" or "Blood is Blood." R. at 4. "Blood is Blood" is known to be a mantra of an extremist animal rights group, AntiPharma, which encourages violence to protest animal cruelty. R. at 4. Radical members have set bonfires in public, vandalized buildings with the mantra "Blood is Blood" or "Blood for Blood," and engaged in violent altercations with police and counter-protestors. R. at 5. At the Capital City rally, some such altercations occurred, and one officer was severely injured. R. at 4. Some TV footage shows "Blood is Blood" and "Blood for Blood" being shouted by attendees. R. at 5. Ms. Thornberry did not participate in the altercations. R. at 4.

While reviewing a revenue report, Poster discovered that Ms. Thornberry had attended the violent animal rights rally, shared an update to Poster and social media from the rally, and

changed the title of her novel to "Blood is Blood. R. at 5. Interpreting the title "Blood is Blood," and its affiliation with a violent extremist group, as violative of Poster's pacifist beliefs, Poster informed Ms. Thornberry that it had suspended her account until she updated her title. R. at 5. Poster has suspended a user's work on only one prior occasion. R. at 5.

After suspending Ms. Thornberry's account, *Animal Pharma* netted zero revenues. R. at 5. On August 1, 2020, Ms. Thornberry protested her account's suspension on national television, accusing Poster of engaging in artistic suppression. R. at 6. After learning of Ms. Thornberry's protest, Delmont fined Poster under the CC Law. R. at 6. The Attorney General for the State of Delmont brought the enforcement action and stated at a press conference: "The APC-founded Poster platform is discriminating against Delmont citizens based on their political viewpoints . . . and we bring this action for first time today to stop that practice . . . ." R. at 6.

After being fined by the State of Delmont under the CC Law, Poster brought suit in the United States District Court for the District of Delmont against Attorney General, Will Wallace. R. at 6. Poster contested its status as a common carrier under the CC Law and alleged a violation of its constitutional rights to free speech and free exercise of religion. R. at 6.

The district court found Poster was properly classified as a common carrier by the State of Delmont, and as such, protecting the free speech rights of Poster's users was to be favored over Poster's rights. R. at 10-12. On the free exercise question, the court found that the CC Law was neutral and generally applicable. R. at 16. The court granted the government's motion for summary judgement and Poster timely appealed. R. at 16.

The United States Circuit Court for the Fifteenth Circuit reversed the district court's opinion on both counts. It held that although Poster was properly classified as a common carrier, Poster retained First Amendment free speech rights which were violated by the CC Law. R. at

28. The court also held that the CC Law was not neutral and generally applicable and thus unconstitutionally burdened Poster's free exercise of religion. R. at 33.

The Supreme Court granted certiorari. R. at 39.

SUMMARY OF ARGUMENT

I. The Delmont CC Law violates Poster's free speech right, rendering the law unconstitutional. As a preliminary matter, applying the status of common carrier to any digital platform such as Poster contradicts the defining tenants of common carrier jurisprudence and risks undermining First Amendment free speech values. Although Poster challenges the statute as applied, this Court as a matter of public policy should find that as a class, digital platforms are presumably not common carriers and are entitled to a fuller range of free speech protections.

However, this Court may decline to enact a sweeping rule for all digital platforms and still find that the Delmont CC Law violates the free speech rights afforded to Poster. First, Delmont cannot unilaterally reclassify Poster as a common carrier and strip it of the editorial discretion that it was already exercising. Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 Geo. Wash. L. Rev. 697, 755 (2010). Because Poster lobbied against the CC Law, disclaims its common carrier status, differentially promotes APC creators, and exercises editorial discretion over the content on its platform, any reclassification of the platform as a common carrier would be unconstitutional. R. at 2–6, 19–20, 22–23, 26. Additionally, these same characteristics qualify Poster for a "hybrid" common carrier status as the Fifteenth Circuit pointed out. R. at 26. Consistent with this Court's past willingness to be flexible on doctrine when faced with new technologies, this Court must find that Poster is entitled to First Amendment protection over its free-speech-related behaviors. *Denver Area*

Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 793 (1996) (Kennedy, J., dissenting). As a result, the Delmont CC Law must be held unconstitutional.

Even if this Court holds that Poster is entitled only to the scope of First Amendment rights afforded to traditional common carriers, those rights may still include the right of editorial discretion, thus still rendering the Delmont CC Law unconstitutional. Dicta from this Court and lower court case law indicates that editorial discretion is one right retained by mere couriers. *See, e.g., Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 133 (1989) (Scalia, J., concurring). Therefore, if Poster's rights are at their most limited, this Court ought to find this law is unconstitutional insofar as it interferes with Poster's editorial discretion.

II. The Delmont CC Law is unconstitutional because it unduly burdens Poster's right to freely exercise its religion. The law fails the test for neutrality and general applicability developed in *Employment Division, Department of Human Resources of Oregon v. Smith* because it does not treat religious exercise neutrally and does not apply equally to both religious and secular practices. 494 U.S. 872 (1990).

Firstly, the CC Law is not neutral under *Smith* and its precedents because it discriminates against religion on its face and restricts practices because they are religious in nature. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 534 (1993). The legislative history of the CC Law reveals it does not incidentally burden Poster's free exercise, but was purposefully designed to prevent Poster from tithing to the APC and removing content that conflicts with its pacifist beliefs while allowing its competitors to engage in similar behavior.

Secondly, the Attorney General's choice to exercise the law for the first time against Poster reveals that the government inquired into the religious motivations for Poster's conduct. *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868 (2021). In classifying

Poster as a common carrier and considering its religious motivations for suspending Ms. Thornberry's account, the government creates a system of individualized exemptions that prevents Poster from engaging in religiously-motivated conduct while allowing other corporations to engage in similar behavior.

Because Delmont's law fails the *Smith* test for neutrality and general applicability, the court must apply strict scrutiny. *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963). Alternatively, the pairing of this religious exercise claim with the free speech claim implicates the hybrid rights doctrine, which requires application of strict scrutiny independent of the *Smith* test.

Delmont's stated purpose for the law—namely, that it will "allow the online space to be a 'town square' in the truest sense, where all ideas are free to be shared and considered"—is not narrowly tailored and does not achieve the government's interest through the least restrictive means; the law thus fails the Sherbert test. R. at 34; *Sherbert*, 374 U.S. at 406–07 (citing *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). Failing strict security, the Delmont CC Law's infringement into Poster's right to free exercise of its religion is unconstitutional.

ARGUMENT

I. THE DELMONT COMMON CARRIER LAW VIOLATES POSTER'S FREE SPEECH RIGHTS AND INTERFERES WITH THE PROTECTIONS THAT ARE CONSTITUTIONALLY AFFORDED TO IT UNDER THE FIRST AMENDMENT.

A. As a matter of public policy, restricting the free speech rights of all online platforms to the more limited rights conferred upon common carriers is inconsistent with this Court's jurisprudence and undermines the values of the First Amendment.

The circuit court accurately acknowledged that "[f]or the first time, the facts of this case present the Court with 'no choice but to address how our legal doctrines apply to highly

concentrated, privately owned information infrastructure such as digital platforms.'" R. at 25 (quoting *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring)). Thus, while Poster primarily argues that the law as applied is unconstitutional, it also acknowledges the opportunity this Court has to develop nuance and clearer guidance for the operation of internet platforms generally within the First Amendment free speech space. Because there are relevant dissimilarities to traditional common carriers, and because there is a danger of assaulting the values established by the First Amendment by holding to the contrary, this Court should find that digital platforms such as Poster are presumably not common carriers limited in their free speech protections.

1. *Digital platforms such as Poster are markedly different from traditional common carriers and more similar to non-common carrying entities entitled to greater protections under the Court's jurisprudence.*

The designation of "common carrier" as a legal status is a longstanding and well-recognized one in western legal tradition. As noted by the district court, the common law concept was already robust by the time of Blackstone in the fifteenth century. R. at 7 (citing *Y.B*. 19 Hen. 6, 49, pl. 5 (1441); 3 William Blackstone, Commentaries 164). Beginning in 1876, the status of "common carrier" transitioned from being a common law designation to a statutory one, as the Court in *Munn v. Illinois* held that states have police power to create statutory common carrier designations. 94 U.S. 113 (1876). *Cf. Brass v. North Dakota*, 153 U.S. 391 (1894) (clarifying that statutory regulations cannot compel an entity to serve the public as a common carrier but subjecting the entity to the statutory duty if it holds itself out as such).

However, defining what it means to be a "common carrier" has proved more challenging. The D.C. Circuit Court of Appeals once noted that "[i]n seeking an applicable common law

definition of common carrier, a good deal of confusion results." *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC* (*NARUC I*), 525 F.2d 630, 640 (D.C. Cir. 1976). The court has further described the definition of "common carrier" as filled with "circularity and uncertainty." *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC* (*NARUC II*), 533 F.2d 601, 608 (D.C. Cir. 1976). The law has historically been clear about what is and is not a common carrier: railroads and taxi services, but not school buses. *See* James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 Fed. Comm. L.J. 225, 227, 251–52 (2002); *Doe v. Rockdale Sch. Dist., No. 84,* 287 Ill. App. 3d 791 (Ill. 1997). Telecommunications providers and internet service providers, but not cable providers. *See* James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 Fed. Comm. L.J. 225, 227, 251–52 (2002); *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002). The question is why.

Contrary to what the district court posited, courts and scholars have rallied around two central characteristics hallmarks of common carrier status: an undertaking to serve the public and passivity in operation. Primarily, the "sine qua non of common carrier status is a quasi-public character, which arises out of the undertaking 'to carry for all people indifferently . . . .'" *NARUC II*, 533 F.2d at 608 (quoting *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739 (5th Cir. 1960)). In other words, common carriers "hold themselves out to transmit the messages of others on a nondiscriminatory basis" and have a duty to serve equally. Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C.L. Rev. 1071, 1075 (1992). Second, particularly in the technology and communications contexts, common carriers "share the common element that the businesses merely transmit another's message. They do not engage in any speech themselves." R. at 25.

Turning to digital platforms like Poster, these platforms meaningfully lack both of these characteristics, categorically falling outside of what it traditionally means to be a common

carrier. First, digital platforms as a class maintain terms of agreement upon which individual use is permitted, and they do not allow all who wish to post or engage with content to do so. Platforms like Instagram, Facebook, and Twitter deny the creation of and terminate accounts daily if there is evidence of bullying, harassment, sexual content, stolen identity, or otherwise. While each user signs a standard agreement, the administration of these platforms practice individual editorial discretion and work tirelessly to curate membership in the community around those who follow its rules. Second, digital platforms add their own voices to the conversations and activities which take place on their platforms as well. Not only do they "speak" through their membership curation, but they often maintain their own accounts, post their own content, and engage with other users on the platform through messaging, reporting systems, and issue adjudications. To avoid contradicting the central definition of what it means to be a common carrier, this Court should hold that digital platforms are presumed not to be common carriers.

2. *Limiting the free speech rights of digital platforms such as Poster handicaps editorial discretion, thus endangering some key First Amendment values.*

Apart from creating definitional inconsistencies, holding that online platforms like Poster are common carriers and restricted in their free speech rights as a class may harm the First Amendment right to free speech insofar as it protects a right to editorial discretion. This Court has long held that editorial discretion promotes important free speech values and is an activity that is protected under the First Amendment. *See* Christopher S. Yoo, *supra*, at 717–758. Given its critical role in preserving the First Amendment, this right of editorial discretion has been upheld even when the entity exercising it held a monopoly or significant market share—as the Delmont CC Law requires—and even when its exercise seemed biased *Id.* at 703, 757.

The exercise of editorial discretion is an integral part of most if not all online platforms' key business, so labelling them common carriers risks substantially cutting back this fundamental tool for maintaining a right to free speech. Platforms operating under the Delmont

CC Law might be hindered from exercising editorial discretion even over the most sacred forms of their own speech—political, religious, and ideological. Apart from being inconsistent with jurisprudence over other forms of carriers, this endangers the First Amendment values that the right of editorial discretion has always sought to defend.

B. As the law is applied in this case, Poster is entitled to greater First Amendment protections than a traditional common carrier would receive, and in light of those protections, the Delmont Common Carrier Law is unconstitutional.

This Court may decline to adopt a sweeping rule for all digital platforms and still find, as the Fifteenth Circuit Court did, that the Delmont CC Law as applied to Poster in this case unconstitutionally violates its right of free speech. Even if all digital platforms are not deserving of greater protections than traditional common carriers, Poster itself is entitled to such protections which the CC Law infringes on.

1. *Despite attempting to do so in the Delmont Common Carrier Law, Delmont does not have the authority to reclassify Poster as a common carrier and thus handicap its First Amendment right to free speech against Poster's wishes.*

As well established as the legal status of "common carrier" may be, R. at 7, it is equally well established that mere statutory language cannot unilaterally force any entity to take that status upon itself. While the district court cites *Brass v. North Dakota* as supporting the proposition that Poster is a common carrier, it overlooks the main limitation *Brass* sets out: "statutory regulations do not compel anyone to serve the public openly." R. at 7. Historically speaking, entities could not be dubbed common carriers through mere reclassification; they had to voluntarily assume that status for themselves. *See* Geoffrey A. Manne et al., *A Conflict of Visions: How the "21st Century First Amendment" Violates the Constitution's First Amendment*,

13 First Amend. L. Rev. 319, 354 (2014). Through centuries of legal development, and particularly in the territory of internet and communications regulation, courts have reaffirmed the idea that entities cannot be forced to take on common carrier status without running afoul of these entities' free speech rights. *See NARUC I*, 525 F.2d at 641; *NARUC II*, 533 F.2d at 608–09; *Comcast Cablevision of Broward Cnty., Inc. v. Broward Cnty.*, 124 F. Supp. 2d 685, 692 (S.D. Fla. 2000). *See also* Yoo, *supra*, at 755 ("cases establish . . . that . . . a provider that is currently exercising editorial discretion over the content it is carrying cannot, consistent with accepted free speech principles, be forced to become a common carrier").

The facts of this case indicate that any designation of Poster as a common carrier would be a forceful reclassification and thus unconstitutional. Poster fervently lobbied against the CC Law before its inception, and it has consistently disclaimed the idea that it should be classified as a common carrier. R. at 3, 6, 20, 23. Additionally, its practices support the idea that it does not hold itself out as "serv[ing the public] indiscriminately." *NARUC II*, 533 F.2d at 609. Poster's user agreement maintains that they have the right to refuse or revoke service to any user on a discriminatory basis, and indeed they have exercised this editorial discretion on multiple (albeit few) occasions. R. at 5, 22, 26. Past that, the circuit court rightly points out that Poster exercises editorial discretion more broadly than through just removing users in works; Poster makes its APC affiliation a central tenant of its business, and it discriminatorily promotes works by APC creators by offering rate discounts and other promotional incentives. R. at 2–3, 19, 26. These practices indicate that Poster is not and does not wish to be classified as a common carrier; any legislative attempt to do so, then, is unconstitutional and invalid.

2. *Poster possesses several unique characteristics which indicates at a minimum that it is a "hybrid" deserving of some elevated rights, as the circuit court suggested.*

Apart from requiring consent to take on a common carrier status, Poster possesses several unique characteristics that would make it illogical to hold Poster to the limited protections of traditional common carriers. As mentioned in Part I.A.1, *supra*, the hallmarks of a common carrier are that it holds itself out indifferently to the public and it acts as a passive transmitter or a mere "conduit[] for the speech of others." *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 793 (Kennedy, J., dissenting). Even if the features of digital platforms do not, as a whole, indicate an incongruence with this classification, the way Poster operates its business indicates that this classification—and the accompanying restriction of rights—is a poor constitutional fit.

As already mentioned, Poster is a discriminating speaker in its own right and not a mere quasi-public vessel for the communication of others. Because Poster has exercised at least a minimal degree of editorial censorship by removing two publications and suspending two accounts in their history, R. at 5, 22, and because Poster has made it widely known that it possesses its own beliefs by supporting APC charitable causes with its profits and promoting APC creators within the Poster platform, R. at 2–3, 19, it seems to fit neither of the hallmarks which have justified giving common carriers more limited free speech rights.

Poster thus sets itself up as an oddity under common carrier jurisprudence deserving of more nuanced protections. This Court has acknowledged that changing technologies require adaptivity, and indeed the Court has pledged to "accept the fact that not every nuance of our old standards will necessarily do for the new technology." *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 777 (Souter, J., concurring). Whether by designating it as a "hybrid" as the circuit court did or by likening it to other intermediary categories such as cable broadcasting,

this Court should be willing to acknowledge the relevant features of Poster's operations and protect them accordingly. *Id. See also Manhattan Cnty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994). *And see* Yoo, *supra*, at 751–752.

3. *Poster is thus entitled to either the full scope of free speech rights granted to corporations or the free speech rights granted to other close-call non-carrying entities such as broadcasters, and under either, the Delmont Common Carrier Law as applied is unconstitutional.*

In light of the foregoing, this Court should uphold the ruling of the circuit court and find that the Delmont CC Law violates Poster's rights of free speech, making the law unconstitutional as applied. If this Court follows the idea that Poster cannot be compelled to take on the legal status of common carrier, then Poster should be afforded the full scope of free speech First Amendment rights for corporations. As the Fifteenth Circuit succinctly lays out, Poster meets all of the legal marks of a corporate entity, and the First Amendment affords such entities "the full protections of the First Amendment." R at 25. Because the CC Law compels Poster to speak by forcing it to forfeit its editorial discretion and silencing its ability to affiliate itself with the APC and its values, this law violates the First Amendment and is unconstitutional.

Contrarily, if this Court follows the idea that Poster is a common carrier but one with "hybrid" or "close call" characteristics, the law still violates Poster's free speech rights. Though Poster would not be entitled to as broad a swath of First Amendment protections, the circuit court accurately notes that Poster is still "entitled to *some* degree of First Amendment protection" by virtue of its status. R. at 27. Since Poster possesses some uniquely "speaking" characteristics unlike mere couriers, this Court ought to find that Poster is protected in its exercise of editorial

discretion and maintenance of its own First Amendment voice. *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 739. Here again, because the CC Law "forces Poster to endorse, via promotion, messages it may wish to disclaim, and also prohibits the organization's own speech by limiting its ability to curate its users 'content to create a holistic symphony of artistic expression," it must be struck down as an unconstitutional First Amendment violation. R. at 29.

C. Even if Poster is a common carrier in the traditional sense, Poster does not forfeit all of its free speech rights under the First Amendment, and the Common Carrier law still runs afoul of those rights which it does retain.

Despite prior arguments, should this Court find that Poster is a true common carrier only entitled to the scope free speech rights traditionally afforded to common carriers, it must also still hold that the law unconstitutionally violates Poster's free speech rights because of its absolute interference with Poster's exercise of editorial discretion.

1. *Case law regarding the First Amendment rights of other telecommunications common carriers indicates that they may retain the right of editorial discretion.*

There is a "paucity of judicial decisions discussing the relationship between common carriage regulation and the First Amendment." Yoo, *supra*, at 751–52. *See* Ithiel de Sola Pool, *Technologies of Freedom* 102-06 (1983); Susan Dente Ross, *First Amendment Trump?: The Uncertain Constitutionality of Structural Regulation Separating Telephone and Video*, 50 Fed. Comm. L.J. 281, 299 (1998). However, the fact that the relationship of rights may be unknown "does not mean that [common carriers] have none at all." R. at 28.

One of the rights that even common carriers like telephone companies seem to have maintained is some right of editorial discretion. In a series of cases colloquially known as the "dial-a-porn" cases, this Court in its dicta fostered the idea that telecommunications providers

would still be constitutionally protected if they exercised editorial censorship by refusing to carry dial-up porn lines. Namely, in *Sable Communications of California, Inc. v. FCC*, Justice Scalia clarified in his concurrence that "while we hold the Constitution prevents Congress from banning indecent speech in this fashion, we do not hold that the Constitution requires public utilities to carry it." 492 U.S. at133 (1989) (Scalia, J., concurring). Since then, lower courts across the country have continued to recognize that telecommunications providers are still protected under the First Amendment when exercising their judgement to exclude certain classes of service. *See, e.g., Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291 (9th Cir. 1987); *Carlin Commc'ns, Inc. v. S. Bell Tel.e & Tel. Co*., 802 F.2d 1352 (11th Cir. 1986); *Network Commc'ns v. Mich. Bell Tel. Co.*, 703 F. Supp. 1267 (E.D. Mich. 1989). Coupled with the importance of editorial discretion to the sanctity of the First Amendment, it can be safely said that this right falls within the limited bundle common carriers retain. *See* Part I.A.2., *supra*.

2. *As the Delmont Common Carrier Law interferes with Poster's right of editorial discretion, it violates Poster's First Amendment right of free speech*.

As addressed already, the Delmont CC Law interferes with the ability of Poster to exercise its editorial discretion in very meaningful ways. Delmont's CC Law requires that designated common carriers "shall serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint," and it does so without any exception. Delmont Rev. Stat. § 9-1.120(a). What results from the law is a total obliteration of Poster's right to engage in editorial censorship and membership discretion, in particular in the ways most meaningful to Poster as an independent First Amendment speaker. As noted, this erasure of discretion forces Poster to take up the speech of its users as its own without being able to make its own voice heard. R. at 28–29. The law is thus unconstitutional under the First Amendment.

II. THE DELMONT COMMON CARRIER LAW ADDITIONALLY BURDENS POSTER'S FREE EXERCISE OF RELIGION AND IS THUS UNCONSTITUTIONAL.

Aside from the free speech issue, the Delmont CC law also runs afoul of the First Amendment Free Exercise Clause. First and foremost, the Fifteenth Circuit was correct in its finding that the Delmont CC Law is not neutral or generally applicable, and thus violates Respondent's free exercise of religion. Delmont's law has burdened Poster's free exercise of religion by forcing it to choose between honoring its pacifist beliefs or potential bankruptcy.

A. The Delmont Common Carrier Law unconstitutionally burdens Poster's free exercise of religion under *Employment Division, Department of Human Resources of Oregon v. Smith* and its progeny.

In *Smith*, the Court determined that a law burdening the free exercise of religion must be neutral and generally applicable to avoid violating the First Amendment. A law is not neutral if it prohibits the free exercise of religion, bans acts or abstentions only because of the religious belief they display, or bans such acts of abstentions because they are engaged in for religious reasons. *Smith*, 494 U.S. at 877. Courts are directed to consider both the plain language of the law as well 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" when determining if a law neutrally or unneutrally burdens free exercise. *Lukumi*, 508 U.S. at 540. The Court in this case should find that the burden is not a neutral one.

Similarly, a law is not generally applicable if it "invites the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized

exemptions.'" *Smith*, 494 U.S. at 884 (quoting *Bowen v. Roy*, 474 U.S. 693, 708 (1986)). In *Lukumi*, the Court held that a law is not generally applicable if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." 508 U.S. at 542–46. The law in this case violates that standard.

1. The Delmont Common Carrier Law is not neutral under Smith.

The Delmont CC Law is not neutral under *Smith* because it prohibits the free exercise of religious activities on its face, and the record reveals that the government enacted the law with the purpose of burdening Poster's religious practices.

In *Lukumi*, the Court found a city ordinance discriminated against religion on its face because it prohibited animal slaughter for the expressly religious purposes of "ritual" or "sacrifice." 508 U.S. at 533–34. Furthermore, the ordinance discriminated against religion in practice because it allowed animals to be slaughtered for non-religious purposes. *Id.* at 535. Like in that case, Delmont's CC Law forbids companies like Poster from making donations to "political, religious, or philanthropic causes," but allows companies with a smaller market share to donate to such causes. R. at 3. We agree with the circuit court that the statute is not neutral because it targets religion directly and explicitly and add that the statute not only targets religion on its face, but expressly prohibits religious activity. *Lukumi*, 508 U.S. at 533 (holding that the minimum requirement of neutrality is that a law not discriminate on its face).

Poster is affiliated with the APC, a Christian denomination committed to furthering the teachings of Jesus. R. at 2–3. Tithing is an ancient Christian religious practice, whereby individuals and religiously affiliated organizations and corporations traditionally donate 10 percent of their income to the church. The District Court claimed that the statute was neutral because it did not refer to the APC or Poster's religious practice. R. at 15. But by prohibiting

donations to political, religious, and philanthropic causes, the CC Law not only refers to religion, but also restricts the religious practice of tithing. *Lukumi*, 508 U.S. at 534.

The record reveals that this was the purpose of the law, not just an incidental effect. *Id.* at 535 ("Apart from the text, the effect of a law in its real operation is strong evidence of its object"). In passing the law, Delmont was attempting to prevent religiously affiliated corporations like Poster from donating their profits to organizations and causes that hold similar beliefs. R. at 35. And as Poster is the largest online publishing platform in the State of Delmont, with a 77% market share, the government knew that passing the law would prevent Poster's religious practice of tithing to the APC specifically, while allowing its competitors to continue with business as usual. R. at 2. There is no other similarly situated online publishing platform to which the law applies, as the market share of Poster's competitors causes them to fall outside the reach of the law. Poster's market share is no secret, and neither is its affiliation with the APC and commitment to pacifism. When Governor Louis Trapp wrote in his affidavit that the CC Law was tailored to prevent online forums with a particular market share from favoring one viewpoint over another, he was talking about suppressing the viewpoints and religious practices of a select few well-known and widely used online forums, including Poster. R. at 35.

Like in *Lukumi*, the CC Law applies only to Poster's religious practices. 508 U.S. at 535; *see also Masterpiece Cakeshop*, *Ltd. v. Colo. C.R. Comm'n*, 138 S.Ct. 1719 (2018) (noting a double standard in the Colorado Civil Rights Commission's treatment of bakers with pro-gay marriage beliefs versus those with anti-gay marriage beliefs). The law allows other online self-publishing corporations, i.e., *all* other online self-publishing corporations, to donate to any political, religious, or philanthropic cause it chooses while restricting Poster's religious practices of tithing to causes that it supports. Thus, the language, legislative history and historical context

of the law, and its application to Poster and not its competitors reveals that the law was designed to discriminate against religious practices and beliefs that the state finds objectionable.

2. The Delmont Common Carrier Law is not generally applicable under Smith.

Delmont's CC Law fails the Smith test for general applicability. The law allows the government to inquire into the religious motivations for a corporation's conduct, prohibiting religious conduct while permitting secular conduct that undermines the government's interest in promoting free speech in a similar way. Additionally, the law's application is restricted to corporations with a significant market share, permitting smaller corporations to engage in the same behavior the government claims to prohibit. Coupled with the fact that the government only enforced the law against Poster after determining it was "discriminating against Delmont citizens based on their political viewpoints," it is clear that the government has designed the law to target only specific corporations like Poster, making the law not generally applicable. R. at 6.

Governor Louis Trapp stated that he designed the Delmont CC Law to apply to large online sharing platforms like Poster, while exempting smaller platforms. R. at 35. In so doing, the government created a system of individualized exemptions based on a corporation's common carrier status. Common carrier status is not an established classification in the online context, and as previously asserted, Poster should not fall under the definition of a common carrier because it does not hold itself out in service of all members of the public, like a railway or a hotel, but exercises editorial discretion over user accounts on its platform. *See* Part I.B.1–2, *supra*; *NARUC II*, 533 F.2d at 610 ("[A] carrier will not be a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to serve"). Poster is more closely akin to the religiously affiliated foster care agency in *Fulton* than a true common carrier because Poster retains the authority to selectively assess its user's content and remove any

content or user for any reason. 141 S. Ct. at 1880 (finding certification as a foster parent is not a public accommodation because it requires a customized and selective assessment). Thus, Delmont's CC Law should not apply to Poster in the first instance.

By enforcing the law against Poster and not its competitors, the government has arbitrarily classified Poster as a common carrier while exempting similar corporations from the law. Designing the CC Law to apply to all corporations with a significant market share requires the government to engage in a case-specific determination of a corporation's market share, and then, because "significant" is not a numerical quantity, to determine which corporations fall within the reach of the law and which are exempted. What constitutes a "significant market share" is debated even among experts, and yet the government has qualified itself to make these complex determinations, and in so doing, has prohibited Poster's religious exercise while allowing exempted corporations to engage in the same behavior. R. at 8–9. Such a law that undermines the government's stated purpose by allowing secular corporations to engage in a behavior while prohibiting the same behavior in religious corporations is not generally applicable. *Fulton*, 141 S. Ct. at 1881 (finding that a system of individualized exemptions from a city's discrimination policies while denying an exemption to a religious foster care agency does not survive strict scrutiny).

Not only does the CC Law allow the government to make arbitrary assessments about which corporations the law applies to, it also invites the government to assess the reasons for a corporation's conduct. Indeed, it is the only way the law can operate. The purpose of the law is to punish online platforms that remove user's and their content for expressing religious, ideological, and political viewpoints. Therefore, to apply the law, the government must consider the motivations for a corporation's behavior.

There are many reasons an online sharing platform like Poster could choose to remove a user and their content – perhaps the user failed to pay access fees, violated copyright law, or did not comply with the myriad terms of the user agreement. The CC Law does not apply to these removals, but the only way for the government to know if the law applies is if it enquires into the reasons for a user's removal. And this is what happened in Poster's case. It was not until Katherine Thornberry complained about her account suspension on national television that Delmont took notice of Poster's actions, decided the CC Law applied to Poster as a supposed common carrier engaging in speech suppression, and fined Poster. R. at 6. The Attorney General revealed the government's disapproval of Poster's motivations when he stated: "The APC-founded Poster platform is discriminating against Delmont citizens based on their political viewpoints . . . and we bring this action for the first time today to stop that practice . . . ." *Id*. This statement reveals the government inquired into Poster's motivation for suspending Katherine Thornberry's account. And in making this determination, the government considered the religious motivations for Poster's suspension of Ms. Thornberry's account and whether these motivation fell under the government's definition of discrimination. *Lukumi*, 508 U.S. at 533 ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral"). If Poster had not been motivated by its APC commitment to pacifism, or another belief the government finds objectionable, then it would have been exempted from the law. But the First Amendment does not allow the government to decide which motivations are lawful and which are not. Any law which invites the government to pass judgement on an individual or corporation's religious motivations is not generally applicable.

B. Poster's free exercise claim falls under the hybrid rights exception outlined in *Smith*, necessitating application of the *Sherbert* strict scrutiny test.

Even if this Court finds that the CC Law is neutral and generally applicable, Respondent's claim falls under the hybrid rights exception outlined by this court in *Smith*. 494 U.S. at 881. That case established both the current rule for evaluating free exercise claims, as well as a category of exceptions known as the hybrid rights claim: courts must evaluate a free exercise claim under strict scrutiny when a neutral and generally applicable law implicates both a claimant's free exercise and another constitutional right. The Court has applied the strict scrutiny test employed in *Sherbert* when the claim involved a "communicative activity" protected by the First Amendment or the Fourteenth Amendment "parental right" to raise one's children as one sees fit. 374 U.S. at 406–07. However, the confusion surrounding the meaning and applicability of the hybrid rights doctrine has led lower courts to apply three different standards to free exercise claims coupled with an additional constitutional claim: (1) some Circuits have declined to apply the exception, dismissing the discussion of hybrid rights in *Smith* as unbinding dicta; (2) some Circuits require a companion claim to be "independently viable," meaning the companion claim itself must merit strict scrutiny, before applying strict scrutiny to the free exercise claim; and (3) some Circuits require a claimant to make out a "colorable claim" that a companion right has been violated, meaning a "fair probability" or "likelihood" of success on the merits, before applying strict scrutiny to the free exercise claim. Note, *The Best of A Bad Lot: Compromise and Hybrid Religious Exemptions*, 123 Harv. L. Rev. 1494, 1498–1507 (2010).

On its face, the hybrid rights doctrine is implicated in this case, as Poster raises both a First Amendment free speech claim and a free exercise claim. The lower courts chose not to address the possibility of a hybrid rights claim, but it is clear from the strength of Poster's First

Amendment claim that the hybrid rights exception applies under both the independently viable and colorable claim standards.

Under the "independently viable" approach employed by the First and D.C. Circuits, Poster must plead a separate constitutional claim that warrants strict scrutiny apart from the free exercise claim. In other words, the "independently viable" standard causes a free exercise claim to rise or fall depending on the strength of the independent constitutional claim. As established already, Poster's free speech rights have been violated by the Delmont CC Law. Thus, the Delmont CC Law must survive strict scrutiny as outlined in *Sherbert*. 374 U.S. at 406–07.

Under the "colorable claim" standard, Poster's free speech claim is strong enough on its face to demonstrate a "fair probability" or "likelihood" of success. In *Miller v. Reed*, the Ninth Circuit reaffirmed the "colorable claim" standard established in *Thomas v. Anchorage Equal Rts. Comm'n*, which was overturned on other grounds. 176 F.3d 1202 (9th Cir. 1999); 165 F.3d 692, 70506 (9th Cir. 1999), *reh'g granted, opinion withdrawn*, 192 F.3d 1208 (9th Cir. 1999), *and on reh'g*, 220 F.3d 1134 (9th Cir. 2000). In *Thomas*, the court concluded that the "colorable claim" standard is similar to the definition of the colorable-basis standard supplied by this Court, which "require[s] some evidence tending to show the existence of the essential elements of the defense." *Id*. at 705 (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986)). Under this more relaxed standard, the hybrid rights exception certainly applies to Poster's claim. As established earlier, Poster has suffered discrimination and unbalanced hardship through application of Delmont's CC Law. Furthermore, Poster's claim has been fiercely litigated in the lower courts, and the District Court's decision was subsequently overturned by the Circuit Court. Poster's claim raises serious questions about the nature and reach of the First Amendment, and the fact

that Poster's free speech claim was strong enough to prevail under appellate review indicates that Poster has more than satisfied the colorable claim standard.

C. The Delmont Common Carrier Law does not survive the *Sherbert* strict scrutiny test for constitutional free exercise claims.

Any way this Court evaluates Poster's free exercise claim, the *Sherbert* test is implicated. If Delmont's CC Law is not neutral and generally applicable, the law must automatically be examined under the strict scrutiny test outlined in *Sherbert*. And even if the Court finds Delmont's law is neutral and generally applicable, Poster's twin constitutional claims implicate the hybrid rights exception, also implicating the *Sherbert* test. Michael D. Currie, *Scrutiny Mutiny: Why the Iowa Supreme Court Should Reject Employment Division v. Smith and Adopt a Strict Scrutiny Standard for Free-Exercise Claims Arising Under the Iowa Constitution*, 99 Iowa L. Rev. 1363, 1377 (2014). Under this test, the government must prove that the law (1) acts in the furtherance of a "compelling state interest," (2) is narrowly tailored to achieve the state's interest, and (3) is the least restrictive means of achieving that interest. *Sherbert,* 374 U.S. at 398.

The Sherbert test sets a high bar for the government. The Court in *Fulton* stated, "a government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interest. Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." 141 S. Ct. at 1881 (quoting *Lukumi*, 508 U.S. at 546). In this case, the government attempts to protect the First Amendment right to free speech by burdening the right to religious free exercise. While the right to free speech is no doubt a compelling interest which the state is charged to protect, the CC Law does not advance this interest through narrowly tailored means. The CC Law is both over and under inclusive; it burdens the religious exercise of all platforms with a significant market share,

including those that do not serve as platforms for user speech or donate to philanthropic causes, while allowing smaller platforms to censor speech and donate to philanthropic causes without running afoul of the law. Furthermore, the law invites the government to engage in case-specific inquiries about the motivations for a platform's choice to remove or restrict user content, allowing for a system of individualized exemptions for platform's the government determines are acting with "good intentions." The law reaches far beyond the government's interest in protecting free speech by inviting censorship and discrimination in its own right.

Having shown that the CC Law is overbroad, the government must prove that burdening Poster's free exercise is the only way for it to advance its interests. But the government cannot offer a compelling reason why prohibiting Poster's religious exercise while allowing other online speech platforms to engage in the same behavior protects free speech. Indeed, allowing Poster to continue its operations without interference advances the government's interest in free speech more than it undermines it. Throughout its history, Poster has allowed the diverse viewpoints of countless artists to be shared with the world, while suspending the accounts of only two users. By forcing Poster to choose between engaging in religious exercise and bankruptcy, the government undermines its own objectives.

CONCLUSION

For the foregoing reasons, this Court should uphold the decision of the Fifteenth Circuit Court of Appeals and find that the Delmont Common Carrier Law, Delmont Rev. Stat. § 9-1.120, violates Poster's First Amendment rights to free speech and free exercise. The law should be deemed unconstitutional as applied to Poster, and the case should be remanded to the District Court for the District of Delmont for further proceedings consistent with that finding.

APPENDIX

Constitutional & Statutory Provisions:

This concerns challenges to the First Amendment of the United States Constitution. That amendment provides relevantly, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I.

This case also the newly enacted Delmont Common Carrier Law, Delmont Rev. Stat. § 9-1.120. That statute designates internet platforms with "substantial market share" as common carriers, and it requires, in pertinent part, that such platforms "shall serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint," and "refrain from using corporate funds to contribute to political, religious, or philanthropic causes." *Id.*

CERTIFICATE OF COMPLIANCE

In accordance with Rule III.C.3 of the Official Rules of the 2022 Seigenthaler-Sutherland Moot Court Competition, we hereby submit this certificate of compliance to certify that:

(i) The work product contained in all copies of this team's brief is the work product of the team members, and only the team members;

(ii) The team has complied with the governing honor code of our school; and

(iii) The team has complied with all of the Rules of the Competition.

Respectfully submitted,

/s/ Team 014

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January 31, 2022