Case No. 23-CV-7654

In the Supreme Court of the United States

WILL WALLACE,

Defendant-Petitioner,

v.

POSTER, INC.,

Plaintiff-Respondent.

ON WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

BRIEF OF PETITIONER
Will Wallace

Team Number 025
January 31, 2022

Attorney for Will Wallace

QUESTIONS PRESENTED

1. Whether the Fifteenth Circuit erred in concluding that the Delmont Common Carrier Law unconstitutionally violates Poster's free speech rights when Poster primarily disseminates others' speech rather than its own.
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, nor generally applicable, and is thus unconstitutional.

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JURISDICTION

This case involves a federal question, namely whether the CC Law violates the First Amendment of the Constitution; hence granting federal courts jurisdiction. 28 U.S.C. § 1331. The Fifteenth Circuit properly entered a final judgment in this case, reversing the district court's judgment, filing a petition for a writ of certiorari with this Court. *Poster, Inc. v. Wallace*, 2021-3487, at *33. Under 28 U.S.C. § 1254(1), this Court has jurisdiction in this matter.

CONSTITUTIONAL AND STATUTORY 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.

28 U.S.C. § 1254: Courts of Appeals; Certiorari; Certified Questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1331: Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

47 U.S.C. § 230(c): Protection for private blocking and screening of offensive material - Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker: no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

11 CFR § 114.2: Prohibitions on contributions, expenditures and electioneering communications.

(a) National banks and corporations organized by authority of any law of Congress are prohibited from making a contribution, as defined in 11 CFR 114.1(a), in connection with any election to any political office, including local, State and Federal offices, or in connection with any primary election or political convention or caucus held to select candidates for any political office, including any local, State or Federal office. National banks and corporations organized by authority of any law of Congress are prohibited from making expenditures as defined in 11 CFR 114.1(a) for communications to those outside the restricted class expressly advocating the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party, with respect to an election to any political office, including any local, State, or Federal office.

STATEMENT OF THE CASE

I. Factual Background

In 2020, Governor Louis F. Trapp of Delmont signed into law the Delmont Common Carrier Law (CC Law). Seeking to assert more control over "large tech platforms' substantial control over public expression," "bolster free speech," and "prevent[] online forums from favoring one particular viewpoint over another," Delmont enacted the CC Law, which provides that internet platforms with "substantial market share" are common carriers. Louis F. Trapp Aff. ¶¶ 7–9; Delmont Rev. Stat. § 9-1.120(a). The legislators who passed the law "were concerned about the control that large platforms exercised over public communications and speech-related platforms." R. at 31-32.

The CC Law contains two provisions at issue, the "viewpoint-nondiscrimination provision," which provides that platforms designated as common carriers "shall serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint," and the "no-contribution provision," which requires these platforms to "refrain from using corporate funds to contribute to political, religious, or philanthropic causes." Delmont Rev. Stat. § 9-1.120(a)–(b).

According to the Courts below, Poster, Inc. (Poster) was one of these platforms qualifying as a common carrier under the CC Law. Poster is a large digital platform that "allows self-publication and performance uploads [to the platform] by artists who want to jumpstart an audience for their work." R. at 19. Poster, founded and run by members of The American Peace Church (APC), "disclaim[s] endorsement of any views expressed in the material published" and by its terms is permitted to reject an artist's material if it so chooses. *Id.* (citing Poster, Inc., User Agreement (effective December 10, 2019)). It also can "block or remove an account 'at any time

for any or no reason.'" R. at 22 (quoting Poster, Inc., User Agreement). Since its founding, although Poster has promoted APC-member content through discounted services, it has served a variety of artists. *Id.*

One of Poster's members, Katherine Thornberry (Ms. Thornberry), used Poster to promote her novel, *Animal Pharma*. R. at 20. However, while attending an animal rights rally that involved violence, none of which Ms. Thornberry participated in, she posted an update to Poster that the alternative title for her book was "Blood is Blood." R. at 20–21. "Blood is Blood" is associated with an extremist animal rights group "advocat[ing] civic violence in response to violence against animals." R. at 21. Poster viewed this post as being contrary to the APC's pacifist values and thus suspended Ms. Thornberry's account, an action it had only taken on one other occasion in its over 20 years of operation. R. at 19, 22. In response, Delmont fined Poster for its violation of the CC Law. R. at 22–23.

II. Procedural History

After Delmont imposed a fine on Poster, Poster filed suit in the U.S. District Court for the District of Delmont contending that the CC Law violated its constitutional rights to free speech and free exercise under the First Amendment. R. at 6. The District Court concluded that the CC Law was constitutional under both clauses of the First Amendment, granting the government's motion for summary judgment. R. at 16. Poster appealed to the Fifteenth Circuit, which reversed the District Court's judgment regarding free speech and free exercise. R. at 33.

SUMMARY OF THE ARGUMENT

I. The CC Law is constitutional under the Free Speech Clause.

The CC Law does not violate Poster's free speech rights and thus is constitutional under the Free Speech Clause. The First Amendment protects speech. But as primarily a conduit of

others' speech, Poster itself is not a speaker. Merely disseminating others' speech does not and cannot turn Poster into a speaker. Thus, when Poster's platform serves as a conduit for the public's speech, Poster is not speaking, failing to trigger any First Amendment free speech concerns.

Poster's self-given authority to edit its platform similarly is not enough to turn Poster into a speaker for two reasons. First, common carrier regulations have before removed common carriers like telephone companies' ability to exercise such editorial discretion without prompting free speech protections or concerns. Second, attempting to exclude others' speech is not itself speech under established free speech jurisprudence. Thus, in its role as a conduit of others' speech, Poster is not a speaker subject to free speech protections.

Finally, even when Poster does speak by, for example, separately expressing its pacifist values as an APC organization, its rights are not unlimited. For one, no speaker enjoys unlimited free speech rights. But more importantly, as a common carrier facing heightened regulations due to its level of influence in the community, Poster enjoys even more limited free speech rights. As a result, neither the viewpoint-nondiscrimination provision nor the no-contribution provision abridges Poster's free speech rights; hence, the CC Law is constitutional under the Free Speech Clause.

II. The CC Law is constitutional under the Free Exercise Clause.

The Free Exercise Clause is not violated when a neutral and generally applicable law incidentally burdens religious exercise. The CC Law does not violate Poster's free exercise rights and is thus constitutional under the Free Exercise Clause because the CC Law is neutral and generally applicable.

A law lacks neutrality when it discriminates on its face, or when the law's purpose is to discriminate against religion. Here, the CC Law merely regulates common carriers to ensure equal access to online speech marketplaces by Delmont citizens. There is no facial discrimination because the CC Law treats all common carriers the same, with no exemptions. Additionally, there is no evidence of a discriminatory purpose behind the CC Law. Rather, the record reveals only a purpose to protect Delmont citizens from viewpoint discrimination by powerful companies that control digital speech-marketplaces.

A law lacks general applicability when it singles out or targets religion, or when it creates a system of individual exemptions that invites the government to consider the particular reasons for an entity's conduct, and thereby selectively apply the law. Here, the CC Law applies equally to all common carriers, with no exemptions. It is no argument to say that the common carrier designation functions as an exemption. General applicability does not require universal applicability; many laws limit their scope to a subset of actors without violation of Free Exercise.

Since the CC Law is both neutral and generally applicable, it is subject only to rational basis review, which it will easily survive. However, even if this Court finds that the CC Law is not neutral or not generally applicable, the CC Law may nonetheless survive strict scrutiny review.

ARGUMENT

I. The CC Law is constitutional under the Free Speech Clause.

The CC Law is constitutional under the Free Speech Clause because (A) the CC Law does not even implicate Poster's speech and (B) even if it did, common carriers do not enjoy full free speech protections.

The First Amendment prohibits the government from "abridging . . . freedom of speech." U.S. Const., amend I. While "applying old doctrines [like common carriers] to new digital platforms is rarely straightforward," the analysis under the CC Law as applied to Poster is relatively simple. *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221 (2021). In its role as a conduit of others' speech, Poster is not even a speaker entitled to First Amendment free speech rights. Even when Poster "speaks," its rights are limited, particularly considering its classification as a common carrier. Thus, neither the CC Law's viewpoint-nondiscrimination provision—which targets Poster as a conduit of others' speech—nor its no-contribution provision abridges any of Poster's free speech rights.

A. In its role as a conduit, which the viewpoint-nondiscrimination provision targets, Poster is not a speaker subject to free speech protections.

Poster does not engage in speech when it: (1) acts as a conduit to disseminate others' speech or (2) bans a user from its platform, the two principal actions that the viewpoint-nondiscrimination provision targets. To constitute speech, one must "inten[d] to convey a particularized message," and the message must have a reasonable likelihood of being understood, given the circumstances. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (per curiam). Since neither dissemination nor banning users passes the *Spence* test, neither constitutes speech. Accordingly, the viewpoint-nondiscrimination provision of the CC Law does not even trigger free speech protections; hence, it cannot unconstitutionally abridge Poster's free speech rights.

1. When disseminating others' speech, Poster is not a speaker.

When Poster acts as a conduit, it is not a speaker, and therefore, the Free Speech Clause is not triggered. Disseminating others' speech does not "transform" a platform into a speaker. *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 742 (D.C. Cir. 2016) (explaining that there is not

"automatically" a First Amendment issue when an entity carries "speech instead of physical goods" as "the communicative intent of the individual speakers" does not transfer to the entity carrying the individuals' speech). Federal law explicitly recognizes that an entity cannot claim the speech of others as its own. *See Knight,* 141 S. Ct at 1224 (explaining that under federal law, when merely distributing "the speech of the broader public," an entity cannot be characterized as a speaker); *see also* 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

In *U.S. Telecom Ass'n*, the D.C. Circuit upheld FCC's regulations classifying broadband service providers as common carriers because the broadband providers subject to the regulations neutrally transmitted third-party speech. *See U.S. Telecom Ass'n*, 825 F.3d at 742–43. The D.C. Circuit explained that "[c]ommon carriers have long been subject to nondiscrimination and equal access obligations . . . without raising any First Amendment question." *Id.* at 740.

In Poster's case, as the Fifteenth Circuit noted, its digital self-publication platform is "*primarily* . . . a 'promotional conduit for any artist who has sought to publicize his or her work.'" *Poster, Inc.*, 2021-3487, at *26. The artists use Poster's platform to "convey their own message" and in that respect, Poster "functions as a conduit of expression" no different from the broadband providers in *U.S. Telecom Ass'n*. *Id*. There is thus no speech for the First Amendment to protect; classifying Poster as a common carrier and subjecting it to the equal access obligations of such entities through the viewpoint-nondiscrimination provision is entirely appropriate. Users like Ms. Thornberry can and *should* be able to communicate their own message using Poster's platform. *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) (defining common carriers and their availability to all).

That Poster has in the past exercised editorial discretion—albeit only once—over its users does not change the conclusion that viewpoint-nondiscrimination provision is constitutional. At one point, industries that have since been labeled common carriers also attempted to exercise editorial discretion. *See* Raymond Shih Ray Ku, *Free Speech & Net Neutrality: A Response to Justice Kavanaugh*, 80 U. Pitt. L. Rev. 855, 901–02 (2019). For example, telephone companies "refused to connect to competing networks," attempting to "exercise editorial authority over the means of delivering expression." *Id.* That they once had edited their services did not open the door to a legitimate free speech argument when they became subject to common carrier regulations, no longer capable of refusing to accommodate competing networks. *Id.* Further, even outside the common carrier context, entities that traditionally have enjoyed more free speech rights than common carriers, like broadcasters and cable companies, have often faced constitutional regulations reducing their editorial discretion. *See* Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. 377, 417–19 (2021) (using *Turner Broad. Sys. V. FCC* as an example of a constitutional "reduction in [cable companies'] unfettered control"); *see also infra* Section I.B. (discussing the limited free speech rights of common carriers compared to broadcasters and cable companies). *See generally Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1994) (upholding regulations requiring cable companies to carry certain channels); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (requiring broadcasters to give free time to those criticized).

2. The act of excluding others' speech is not itself Poster's speech.

Even if Poster can somehow distinguish its contractually-given ability to edit its platform from other common carriers who attempted to exclude via editorial discretion, regulating an entity's ability to exclude others' speech is not regulating the *entity's* speech. When attempting

to exclude others, Poster is not speaking, failing again to trigger free speech protections. There is a difference between regulating conduct and regulating speech; the First Amendment only protects "conduct that is inherently expressive," meaning an "intent to convey a particularized message [i]s present" and "the likelihood [i]s great that the message would be understood by" others. *Spence*, 418 U.S. at 410–11 (defining what constitutes First Amendment protected speech); Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 Duke L.J. 1673, 1688–89 (2011); *see also Rumsfeld v. F. for Acad. and Institutional Rights*, 547 U.S. 47, 64 (2006). Indeed, there must be an "abridgment of substantive communication . . . an expression of ideas." *See* Benjamin, *supra*, at 1698.

PruneYard Shopping Ctr. v. Robins and *Rumsfeld* stand for the idea that the act of excluding speech from others is not itself substantive, inherently expressive conduct understood as protected speech. In *Rumsfeld*, the Court held that the Solomon Amendment, which conditions some federal funding on law schools "afford[ing] equal access to military recruiters," is constitutional under the First Amendment as it places no limitation on the law school's own speech. *Rumsfeld*, 547 U.S. at 60. Compelling a law school to host military recruiters, even if the recruiters' messages run directly counter to the law school's own beliefs, does not impact the school's free speech rights. *See id.* at 62 (emphasizing that it "trivializes" First Amendment jurisprudence to equate hosting military recruiters with "forcing a Jehovah's Witness to display the motto 'Live Free or Die'"). The Court further emphasized that the law school was free to "voice their disapproval of . . . the message" through its *own* speech. *Id.* at 65, 70 (citing *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74 (1980)); *see also PruneYard*, 447 U.S. at 87 (finding no First Amendment violation where a shopping center was required to allow

handbilling on its property, noting it "c[ould] [still] expressly disavow any connection with the message").

The same logic applies to Poster. Poster may not agree with Ms. Thornberry's novel title, but that does not mean it is constitutionally entitled to remove her from its platform either. By including one user on its self-publishing platform, made up of hundreds of thousands of other users, Poster is not conveying a substantive message that other users will understand as Poster's speech. Poster's very own user agreement says just that by expressly disclaiming any endorsement of its users' posts. And just like in *PruneYard* and *Rumsfeld*, even if Poster cannot exclude Ms. Thornberry and other users' speech, it still retains the ability to articulate its values elsewhere on its platform. *See Knight,* 141 S. Ct at 1226 ("[T]he space constraints on digital platforms are practically nonexistent (unlike cable companies), so a regulation restricting a digital platform's right to exclude might not appreciably impede the platform from speaking.").

Thus, as a conduit, Poster is neither a speaker nor can it claim that excluding others' speech transforms it into one. As a result, because the viewpoint-nondiscrimination provision does not target Poster as a speaker, is constitutional.

B. When Poster engages in its own speech, its rights are not unlimited.

When Poster *does* speak, its rights are significantly limited because of public interest concerns surrounding common carrier regulations; hence why the no-contribution provision, considering its underlying governmental interests, is constitutional. Common carriers may wear multiple hats, at times facilitating others' speech and at others promoting their own. But when acting as a speaker, as Poster does in contributing to various causes, common carriers' free speech rights are limited. *See* Christopher S. Yoo, *The First Amendment, Common Carriers, and Public: Net Neutrality, Digital Platforms, and Privacy*, 1 J. Free Speech L. 463, 480 (2021)

(explaining that the Court has "hinted that the level [of First Amendment protection accorded common carriers] is relatively low"); *see also FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984) (quoting *CBS v. FCC*, 453 U.S. 367, 395 (1981)) (noting that "[u]nlike common carriers, broadcasters are 'entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public [duties]'").

The Court's has justified significantly limiting free speech and exclusion rights of common carriers because common carriers "rise[] from private to be of public concern." *Knight*, 141 S. Ct at 1223 (quoting *German Alliance Ins. v. Lewis*, 233 U.S. 389, 411 (1914)); *see also Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 116 (1973) (explaining that common carriers are "obliged to accept whatever is tendered by members of the public . . . [losing their] control over the selection of voices"). Indeed, when it comes to common carriers like Poster, "[t]he great object of the law . . . [i]s to secure the utmost care in the rendering of a service of the highest importance to the community." *FTC v. AT&T Mobility LLC*, 883 F.3d 848, 859 (2018) (quoting *Santa Fe, Prescott, & Phx. Ry. Co. v. Grant Bros. Constr. Co.*, 228 U.S. 177, 184–85 (1913)).

Add to Poster's minimal free speech rights as a common carrier the fact that individuals and companies' ability to contribute to causes is limited to begin with. *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 343 (2010); *Buckley v. Valeo*, 424 U.S. 1, 29 (1976). For example, as recognized in *Citizens United*, "[a]t least since the latter part of the [nineteenth] century, the laws of some States and of the United States imposed a ban on corporate direct contributions to candidates." 558 U.S. at 343. To this day, corporations are prohibited from making contributions "in connection with any election to any political office." 11 CFR § 114.2(a). Similarly, in *Buckley*, the Court upheld limitations on contributions that capped them at $1000, despite the

limitations' infringement on First Amendment protected free speech. 424 U.S. at 29. It did so because of important governmental interests served by the limitations on contributions—for example, the limitations helped prevent *quid pro quo* arrangements, thereby protecting the "integrity of our system of representative democracy"—and the ability of contributing individuals to express themselves (or exercise their free speech rights) through other means, like volunteering. *Id.* at 25–28.

Just like other common carriers, Poster's "hold of [the] market" given its size and its resulting influence over public expression and opinion signals a need for heightened regulation of its speech, as addressed in the no-contribution provision. Louis F. Trapp Aff. ¶ 8. Based on (1) the not-so-subtle hints over the years of Supreme Court jurisprudence that common carriers enjoy limited and potentially even nonexistent First Amendment free speech protection, (2) the significance the Court has placed on common carriers engaging in activities of "public concern," and (3) limitations on corporations and individuals that are neither common carriers nor specifically identified as a public concern as seen in *Buckley* and § 114.2, it is hard to imagine that Delmont has in any way violated Poster's free speech rights by designing a law to help control "large tech platforms' substantial control over public expression" by "prevent[ing] online forums from favoring one particular viewpoint over another" through the no-contribution provision. Louis F. Trapp Aff. ¶¶ 8–9. Not only is Delmont's concern about suppression of viewpoints an important governmental interest, but as in *Buckley*, Poster retains numerous ways to express itself philanthropically, politically, and religiously, by, for example, continuing to discount its services with respect to APC-member artists—nothing in the CC Law explicitly prohibits Poster from doing so.

Thus, the CC Law does not violate Poster's free speech rights, because the viewpoint-nondiscrimination provision does not affect Poster's own speech and even where Poster's own speech is at issue, it is not sufficiently implicated to give rise to a constitutional violation.

II. The CC Law is constitutional under the Free Exercise Clause.

The CC Law is constitutional under the Free Exercise Clause because neutral and generally applicable laws that incidentally burden religious exercise are subject only to rational basis review. *See Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990) (citing *United States v. Lee*, 455 U.S. 252, 263, n.3 (1983) (Stevens J., concurring). The CC Law is constitutional under the Free Exercise Clause because: (A) *Smith* applies here, (B) the CC Law is neutral, and (C) the CC Law is generally applicable. Accordingly, the CC Law is subject only to rational basis review, and therefore the CC Law is constitutional.

First, the Hybrid Rights exception to *Smith* does not apply here, so *Smith* governs the analysis. Second, the CC Law is neutral because: (1) it is facially neutral and (2) there is no evidence of a religious-based discriminatory purpose behind the CC Law. Third, the CC Law is generally applicable because: (1) the law applies equally to all common carriers and (2) the common carrier designation does not undermine its general applicability.

A. The Hybrid Rights Exception does not apply here, so *Smith* still governs the analysis.

In *Fulton*, this Court recently reaffirmed *Smith*, which "held that laws incidentally burdening religion are not ordinarily subject to strict scrutiny under the Free Exercise Clause as long as they are neutral and generally applicable." *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1876 (2021). However, *Smith* does not apply when Free Exercise and another constitutional right are at issue. *Smith*, 494 U.S. at 881. That said, the Supreme Court has never

decided a case under this "Hybrid Rights" Exception in the 30 years since *Smith* was decided. *Fulton*, 141 S. Ct. at 1915 (Alito J., concurring). Whenever a law implicates more than one right, if that law violates the non-Free-Exercise right, then considering the Hybrid Rights Exception becomes unnecessary because the law is unconstitutional anyway. *Id*.

Here, if the Court holds that this law *does not* violate Free Speech rights, then the Hybrid Rights exception does not apply because Free Speech is no longer implicated and therefore only Free Exercise remains. If the Court holds that this law *does* violate Free Speech, then law will be struck down anyway. To even reach this Free Exercise issue, we must assume Petitioner's success on the Free Speech issue. Accordingly, since the only remaining right that may be implicated is Free Exercise, the Hybrid Rights Exception does not apply here.

B. The CC Law is neutral.

This Court in *Smith* held that if a law burdening the free exercise of religion is not neutral or not generally applicable, then the law is subject to strict scrutiny. *Smith,* 494 U.S. at 879. The concepts of neutrality and general applicability are interrelated. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521 (1993). Accordingly, some arguments between Sections II.B and II.C may apply to both neutrality and general applicability.

Starting with neutrality, the most basic requirement of neutrality ". . . is that a law must not discriminate against religion on its face." *Lukumi*, 508 U.S. at 533. Beyond facial discrimination, neutrality also prohibits hostility towards religion and covert suppression of religion. *See Lukumi*, 508 U.S. at 540-43. The CC Law is neutral because (1) the CC Law is facially neutral and (2) there is no evidence the CC Law's passage or application was motivated by a purpose to discriminate against religion.

1. The CC Law is facially neutral because the law's mere reference to religion does not call for deferential treatment.

Differential treatment on the text of the law is required for facial discrimination. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2021); *See also Tandon v. Newsom*, 141 S. Ct. 1294 (2021). The CC Law is facially neutral because rather than treat religion and non-religion differently, the text of the law treats comparable religious and secular conduct equally.

Here, (a) the Fifteenth Circuit misunderstands facial neutrality and, under the correct understanding of facial neutrality, (b) the CC Law is facially neutral because its references to religion do not call for differential treatment between comparable religious and nonreligious conduct.

a. The Fifteenth Circuit erred in concluding the CC Law discriminates on its face.

The Fifteenth Circuit made a simple error; it concluded from the CC Law's mere usage of the word "religious" that the law is "not facially neutral." *Poster, inc.*, 2021-3487 at *30. The Fifteenth Circuit incorrectly applied *Lukumi* to argue that the CC Law discriminates on its face merely because it references religion.

The Fifteenth Circuit misapplied *Lukumi*. The Court in *Lukumi* held that a city ordinance banning ritual animal sacrifices was unconstitutional under the Free Exercise because the ordinance was passed with the purpose to discriminate against the Santeria religion. *Lukumi*, 508 U.S. at 540-43. The Court's holding was about unconstitutional discriminatory purpose, not facial discrimination, although the Court did write that explicit reference to a "religious practice…without any discernable secular meaning" constitutes "facial" discrimination. *Lukumi*,

508 U.S. at 533. Putting aside that this sentence is likely merely dictum, the Fifteenth Circuit erred in thinking this rule applies here at all. Although the CC Law references religion in general, the text of the CC Law does not reference any "religious practice." The Court in *Lukumi* was primarily concerned with covert suppression of religious practices, see *Lukumi*, 508 U.S at 534-35, not with laws that treat religion and nonreligion equally, like the CC Law does here.

While it is ultimately unclear what exactly "religious practice" meant to the Court in *Lukumi*, the Fifteenth Circuit's interpretation is unworkable. For "religious practice" to apply to this case, you must somehow interpret "religious practice" so broadly that (1) banning users from its online platform and (2) donating corporate funds constitute "religious practice[s]." Since silencing all non-believers is seemingly not mandated by Poster's religion, the Fifteenth Circuit therefore interprets "religious practice" as including any conduct which might have been motivated by religious beliefs. Such a broad interpretation of "religious practice" would make the "rule" in *Lukumi* unworkable. Imagine a law against murder: "Murder shall be unlawful, regardless of its religious or non-religious motivations." This law "refers to a religious practice without secular meaning discernable from the language or context." *Id.* According to the Fifteenth Circuit, since this law references conduct motivated by religion (i.e., a "religious practice"), the law therefore violates Free Exercise; it did not matter to the Fifteenth Circuit that comparable secular conduct was treated equally under the CC Law. Thus, the above hypothetical law would be declared unconstitutional by the Fifteenth Circuit. So even if that dictum from *Lukumi* was meant to be applied as a rule, the Fifteenth Circuit interpreted that rule so broadly that it would be *prima facie* unworkable. Accordingly, the Fifteenth Circuit erred in applying that part of *Lukumi* to this case. Rather than immediately subject the CC Law to strict scrutiny, as facial discrimination usually requires, the Fifteenth Circuit ultimately decided this case on other

grounds. *Poster, inc.*, 2021-3487 at *30-31 ("In any case, we need not decide this case on facial neutrality grounds. . . .").

b. The CC Law is facially neutral because the law's text treats comparable secular and religious conduct equally.

The CC Law is facially neutral because the law's text (i.e., it's "face") treats comparable secular and religious conduct equally. Without differential treatment on the face of the law, there cannot be facial discrimination. Even as recently as last year, this Court held that "government regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 67-68 (2021)).

Unlike *Lukumi*, this Court in *Tandon* and in *Cuomo* held that the regulations at issue discriminated on their face. *Tandon*, 141 S. Ct. at 1296; *Cuomo*, 141 S. Ct. at 66. These cases are more recent and more on point than *Lukumi*, so they should guide the facial neutrality analysis more so than any dicta from *Lukumi*. Since this Court applied the same principles and reached the same conclusion in both *Cuomo* and *Tandon*, only *Cuomo* will be discussed to avoid redundancy.

In *Cuomo*, the governor of New York issued an Executive Order imposing capacity limits on gatherings, with different capacities for different "zones." *Id.* In "red zones" (the zones hit worst by COVID-19), houses of religious worship were explicitly limited to ten individuals, regardless of the size of the church or the risk of spreading COVID-19. *Id.* In those same zones, however, "essential businesses" (which included tattoo parlors and acupuncturists) could admit as many occupants as it wanted. *Id.* In "orange zones," even non-essential businesses had unlimited capacity, whereas houses of worship were limited to twenty-five occupants. *Id.* This

Court held that the law was not facially neutral, citing *Lukumi*, because secular conduct (gathering at an "essential business") was treated more favorably than comparable religious conduct (gathering at a church). *Id*. at 66-67. Comparability is determined with respect to the interests at stake. *Id*. at 67. Since gathering at tattoo parlors, for example, is no less likely to spread COVID-19 than gathering in a church, the two are comparable and must be treated equally under the neutrality requirement. This Court concluded that "the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment." *Id.* at 66.

Here, comparable secular and religious conduct are treated equally. Given that the CC law is primarily concerned with ensuring Delmont citizens' equal access to online free speech marketplaces, the apt comparator would be a religious versus a non-religious common carrier. With respect to the no-donation provision, both Poster and a non-religious common carrier would be prohibited from donating corporate funds to, for example, Religions for Peace, a religious peace-making organization. Similarly, Poster and a non-religious common carrier would equally be prohibited from donating corporate funds to the non-religious Veterans for Peace. With respect to the viewpoint non-discrimination provision, both Poster and a non-religious common carrier would be prohibited from banning a user because of the user's religious viewpoint. Similarly, both Poster and a non-religious common carrier would be prohibited from banning a user because of the user's non-religious, political viewpoint. Regardless of whether the common carrier is motivated by its religion or not, the CC Law treats all common carriers equally. Because the law treats equally comparable secular and religious conduct, the law is facially neutral.

2. There is no evidence the CC Law was created or applied with a discriminatory purpose.

The CC Law was not created or applied with a discriminatory purpose. Facial neutrality is not determinative; a facially neutral law is nonetheless subject to strict scrutiny if the government's purpose was to discriminate against religion. *Lukumi*, 508 U.S. at 534. One can infer a purpose to discriminate against religion from: (a) "the specific series of events leading to the enactment…in question" (b) evidence of hostility towards religion by decisionmakers applying the law, or (c) evidence of disproportionate effect on religious exercise. *See Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quoting *Lukumi* at 534, 547); *See also Lukumi*, 508 U.S. 535 ("Apart from the text, the effect of a law in its real operation is strong evidence of its object").

Citing these guideposts, the Fifteenth Circuit concluded that the CC Law is not neutral because "Delmont's actions in this case were 'intolerant of religious beliefs.'" R. at 31 (quoting *Fulton*, 141 S. Ct. at 1877). Specifically, the Fifteenth Circuit found a discriminatory purpose behind the CC Law because: (a) the AG made a comment referencing Poster's affiliation with APC, (b) the application of this law against Poster was the first application since its creation and (c) the effect of the CC Law was to fine a religiously-affiliated company. Each will be addressed in turn.

a. There is no evidence of discriminatory purpose in the legislative history.

Unlike *Lukumi*, there is no evidence of discriminatory purpose in the CC Law's legislative history. In *Lukumi,* the record was filled with evidence from legislative history that the legislatures enacted the city ordinance purposefully targeted the religious practices of the

Santeria people. *Lukumi*, 508 U.S. at 540-42. ("The minutes and taped excerpts of the June 9 session, both of which are in the record, evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice."). Here, the situation is different because the "legislators who originally sponsored the CC Law were concerned about the control that large platforms exercised over public communications and speech-related platforms." R. at 31-32. The Governor similarly stated that, during his campaign: "I advocated for reforms to prevent online platforms from stifling viewpoints they disagreed with by denying access to their forums and marketplaces… [The law] was carefully crafted to bolster free speech…" Louis F. Trapp Aff. ¶¶ 5, 7. None of this can possibly be characterized as hostile towards religion and there is no other legislative history in the record. Therefore, there is no evidence of a discriminatory purpose in the legislative history here.

b. There is no evidence of hostility among decisionmakers applying the law.

There is no evidence of hostility among decisionmakers applying the law. In *Masterpiece Cakeshop*, the Court held that ". . . the Commission's treatment of [the Petitioner's] case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion." *Masterpiece Cakeshop*, 138 S. Ct. at 1721. The Court based its conclusion on comments made by a member of the Colorado Civil Rights Commission, an adjudicatory body handling the Petitioner's case. *Id.* at 1730. That commissioner said that religion "is one of the most despicable pieces of rhetoric that people can use to – to use their religion to hurt others." *Id.* at 1729.

Here, the Attorney General (AG) announced that he would be fining Poster for violating the CC Law, and, in doing so, he said: "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 . . ." R. at 32. According to the Fifteenth Circuit, this one comment is "strong evidence of intolerance." *Poster, inc.*, 2021-3487 at *32. However, unlike the comments made in *Masterpiece Cakeshop*, *see Masterpiece Cakeshop*, 138 S. Ct. at 1729, the AG said nothing explicitly negative or hostile about religion in general or about Poster's religion in particular; he merely referenced Poster's religious status. More importantly, the Attorney General is not a member of an adjudicatory body like that of *Masterpiece Cakeshop* whose duty is to be impartial; the Attorney General's duty is to defend and enforce the law. When it came to his attention that Poster had violated the CC Law, the Attorney General was duty-bound to enforce it and fine Poster.

A more similar case with respect to comments made by decisionmakers is *Fulton.* In *Fulton*, the City of Philadelphia refused to contract with Catholic Social Services (CSS), an adoption agency, on the grounds that CSS refused to certify same-sex couples as foster parents. *Fulton*, 141 S. Ct. at 1874. Officials in the executive branch of Philadelphia made many hostile comments about Petitioner, religion, and Catholicism. *Id.* at 1919-1920. (Alito J., concurring). Specifically, "[t]he city council labeled CSS's policy 'discrimination that occurs under the guise of religious freedom'" and "the mayor had said that the Archbishop's actions were not 'Christian,' and he once called on the Pope 'to kick some ass here.'" *Id.* (citations omitted). However, these comments were not mentioned in the majority's decision. *See id*. The comments in *Fulton* are far beyond merely referencing Poster's APC affiliation, and yet the Court decided the case on other grounds. While there might be many explanations for why the Court decided

the case on other grounds, the Third Circuit, who did address those remarks, held that the mayor's remarks were irrelevant because the mayor played no role in the process and because "the evidence… of religious bias or hostility appears significantly less than what appears in *Lukumi* or even *Masterpiece*." *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *rev'd and remanded sub nom. Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868 (2021). If those comments by executive department officials in *Fulton* were constitutionally unproblematic, it is hard to imagine how merely referencing Poster's APC affiliation would be constitutionally problematic.

c. There is no evidence of discriminatory application of the CC Law.

As a final Hail Mary, the Fifteenth Circuit argues that because the CC Law's first and only application so far was against Poster, the CC Law must therefore be discriminatory in its application. While it's true that "the effect of a law in its real operation is strong evidence of its object," *Lukumi*, 508 U.S. at 535, there is only one data point regarding the CC Law's effect. The CC Law is new. Every new law, if it is ever applied, must first be applied to someone. If, after some time, it can be shown that the state of Delmont applies the CC Law disproportionately against religiously-affiliated companies, then Poster is free to re-litigate under that theory. Presently, however, there is simply no conclusion that can be drawn from Poster being the first common carrier fined under the CC Law.

Nor does the Fifteenth Circuit present any evidence that common carrier status is likely to correlate with religious status. *Poster, inc.*, 2021-3487 at *29-33. Accordingly, either the Fifteenth Circuit wholly relies on the fact that Poster was the first to be fined under the CC Law, or, without any evidence, the Fifteenth Circuit expects this law to have a disproportionate effect

on religion in the future. Neither theory is sufficiently evidenced to show that the CC Law was created with a discriminatory purpose or applied with a discriminatory application.

C. The CC Law is generally applicable.

The CC Law is generally applicable. Since "[n]eutrality and general applicability are interrelated. . ." *Lukumi* at 531, the arguments about neutrality above also support the general applicability of the CC Law. Only one feature of the CC Law not yet discussed pertains directly to general applicability. *Smith* held, and *Fulton* reaffirmed, that "a law is not generally applicable if it 'invit[es]' 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; *Fulton*, 141 S. Ct. at 1877.

Here, there are no explicit exemptions in the CC Law. That fact alone sets this case apart from *Lukumi* and *Fulton*. The Fifteenth Circuit incorrectly argued, however, that the common carrier designation itself operates as a kind of exemption. *Poster, inc.*, 2021-3487 at *32. Specifically, they argue that government decisionmakers, like the AG, can exercise their discretion in deciding who qualifies as a common carrier, and therefore who the law applies to. This argument has at least two problems: (1) this argument applies to every non-universal law and (2) unlike other impermissible exemption schemes, the common carrier designation is not easily cast off at the whim of a government official.

First, every law must be interpreted to be enforced. The act of enforcement assumes that the law, at the very least, applies to that case. Just because some law-enforcer *might* use their discretion to selectively enforce such a law against religious individuals does not lead to a conclusion of unconstitutionality.

Second, even though the Attorney General must implicitly decide who is a common carrier when applying the law, that decision is subject to judicial review and can be easily contested. More importantly, once a platform is designated as a common carrier, it cannot have that designation removed at the whim of a government official like the AG; instead, a judge can always review such decisions using well-established common-law principles. The principles guiding the judge are unrelated to religious status, such as market share and presence of reasonable alternatives for consumer use. *See Poster, inc.*, C.A. No. 21-CV-7855 at *7-10. This is distinct from the situation in *Fulton* where city officials were at liberty to choose which adoption agencies could continue operating. Ultimately, the system of exemptions in *Fulton* was vast, whereas here, there is, at most, one "exemption." Since the common carrier designation is not readily subject to the whims of those enforcing the law, there is not much discretion given to Delmont officials to selectively enforce the CC Law. The risk of discretionary abuse here is the same as any other non-universal law. Even if discretionary abuse does occur, Poster is free to relitigate if such evidence arises. Accordingly, the CC Law is generally applicable.

D. Even if the Court disagrees that the CC Law is neutral and generally applicable, the CC Law may nonetheless survive strict scrutiny.

The Fifteenth Circuit committed a plain error by neglecting to analyze how strict scrutiny applies to this case. Strict scrutiny is not a death sentence, so the Fifteenth Circuit erred in concluding that the CC Law was unconstitutional merely by failing to meet the *Smith* pre-requisites. A failure of neutrality or general applicability results in strict scrutiny, not automatic unconstitutionality. *Lukumi*, 508 U.S. at 546. Other laws have survived strict scrutiny analysis by this Court. *See* e.g., *Burson v. Freeman*, 504 U.S. 191 (1992); *Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010); *Williams-Yulee v. Fla. Bar*, 575 U.S. 433 (2015). In the Free

Exercise Context, the CC Law must be the least restrictive means of achieving whatever compelling interest(s) lay behind the law in question. *Tandon*, 141 S. Ct. at 1296-97.

Here, the government of Delmont seeks to protect its citizens from unaccountable, unregulated corporations who control large speech marketplaces. Users who are banned from Poster have little alternative since Poster has 77% of the self-publishing market. *Poster, Inc. v. Wallace*, C.A. No. 21-CV-7855, at *10. Given the importance of free interchange of ideas in a democracy, this Court is well positioned to find these interests compelling. Because this case presents a unique situation never yet before this Court, this specific set of interests has not previously been held to be compelling. Nonetheless, this case presents the opportunity for this Court to do so. Additionally, it is unclear how Delmont, or any other state, could regulate common carriers in a manner that simultaneously upholds those interests and also burdens religious exercise less. Accordingly, the interests here are compelling and the CC Law is the least restrictive means of accomplishing those interests. The CC Law survives strict scrutiny.

CONCLUSION

This Court should reverse the Fifteenth Circuit's judgment that the CC Law unconstitutionally abridges Poster's rights to free speech and free exercise.

STATEMENT OF COMPLIANCE

In accordance with Rule III.C.3 of the 2021 – 2022 Official Rules, Team 025 submits this statement of compliance certifying that:

1. The work product contained in all copies of this team's brief is in fact the work product of the team members;
2. The team has complied with their school's governing honor code; and
3. The team has complied with all Rules of the Competition.