No. 01-463

IN THE

SUPREME COURT OF THE UNITED STATES

_____

WILL WALLACE
Petitioner,
v.

POSTER, INC.
Respondent

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

BRIEF FOR RESPONDENT

_____

Team 028
January 31, 2022
Counsel for Respondent

STATEMENT OF THE ISSUES

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

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

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STATEMENT OF JURISDICTION

The District Court for the District of Delmont properly exercised federal question subject matter decision over this case, pursuant to 28 U.S.C. § 1331; *See App*'x. C. Following the District Court's entry of summary judgment, the United States Court of Appeals for the Fifteenth Circuit had jurisdiction over the appeal, pursuant to 28 U.S.C. § 1291. *See App'x* D. The Fifteenth Circuit entered a final order, Writ of Certiorari was timely granted by this Court, pursuant to 28 U.S.C. § 1254(1). *See App'x* E.

STATEMENT OF THE CASE

I. The CC Law

The State of Delmont enacted a Common Carrier Law ("CC Law") in June of 2020 that designates certain digital platforms with a "substantial market share"[1] as common carriers that are subject to certain restrictions. *See* Delmont Rev. Stat. § 9-1.120(a). R. 1, 3.[2]

The CC Law was first proposed by Delmont's Governor Louis F. Trapp during his reelection campaign, where he advocated for legislation to "prevent[ing] online platforms from stifling viewpoints they disagree[] with" R. 33, 4. The subsequently enacted CC Law provides that platforms deemed to be common carriers "shall serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint," and requires such platforms to "refrain from using corporate funds to contribute to political, religious, or philanthropic causes."[3] Delmont Rev. Stat. § 9-1.120(a). Common carriers that violate the CC Law are subject to

[1] The CC law does not define "substantial market share." R. 3.
[2] Page numbers cited in this brief refer to the record and are the page numbers designated by the court reporter. 15th Cir.
[3] Delmont has not enacted a state equivalent of the Religious Freedom Restoration Act ("RFRA"). *See* 42 U.S.C. § 2000bb, et seq.

substantial monetary penalties through the imposition of fines–totaling up to thirty-five percent of daily business profits–that are compounded each day until a platform abides by the law. R. 3. The CC Law offers no exemptions, and according to Governor Trapp, the law's "religious prohibition was designed to avoid implicating the Establishment Clause." R. 3, 35.

II. Factual Background

Respondent, Poster, Inc.[4], is a popular digital self-publication platform used by creators seeking to grow their audience and market their artistic work. R. 1-2. The platform, which holds a share of approximately seventy-seven percent of the artistic self-publication market,[5] allows users to create an account and upload content for a small fee. R. 2. Users can make their uploaded material available to download for rent or for sale, and Poster receives a small portion of proceeds from purchases and rentals made on the platform. R. 2. Poster's terms disclaim endorsement of views espoused in the platform's content and retain the right of editorial discretion over the work submitted by creators. R. 2. Under its User Agreement, Poster maintains the right to suspend or remove a user's account "at any time for any reason." R. 5.

Poster is owned and operated by members of the American Peace Church ("APC"), a Protestant denomination with central tenets of non-aggression and pacifism. The APC was founded a century ago by poets, educators, and musicians who aimed to encourage peacebuilding by promoting education and cultural development. R. 2. The APC has a long history of engaging in philanthropic efforts to facilitate cultural and educational development and calls upon its

[4] Poster, Inc. is a privately owned company incorporated in the State of Delmont. R. 1.
[5] While Poster's precise market share was initially a point of contention, the parties have since stipulated the platform has a market share of seventy-seven percent. R. 2.

members to do the same. R. 2. Adhering to this mission, Poster allocates fifteen percent of its profits to support the APC's ongoing efforts in educational and cultural development. R. 2-3. Katherine Thornberry first created a Poster account in 2018 in the hopes of promoting her novel, *Animal Pharma.* R. 3. Though she has attempted to publish *Animal Pharma* through more traditional means, Ms. Thornberry has not succeeded in obtaining a literary agent or in submissions to publishing houses. R.4.

Ms. Thornberry attended a three-day rally against animal experimentation in July of 2020 in Capitol City, Delmont, where PharmaGrande, Inc.–a pharmaceutical developer engaged in animal experimentation–is headquartered. R. 4. At the rally, which received significant media attention, multiple violent outbursts occurred: vehicles were set on fire and flipped over, onlookers were met with hostility, and police officers were bombarded with street gravel R. 4. The violence resulted in one police officer losing sight in one eye while remaining in danger of losing sight in the other. R. 4.

While at the rally after some of this unrest unfolded, Ms. Thornberry posted an update to Poster, which contained an alternative title for *Animal Pharma*: "Blood is Blood." R. 4. This update resulted in increased traffic to Ms. Thornberry's account in the days following the rally, along with a boost in sales and rentals of her novel on the platform. R. 4.

"Blood is Blood" is the mantra of AntiPharma, an extremist animal rights group that advocates for civic violence in response to violence against animals and frequently protests PharmaGrande for its practice of animal experimentation. R. 4. Some grassroots efforts and celebrity endorsements have depicted "Blood is Blood" as expressing AntiPharma's belief that all living beings are equal. R. 5. However, AntiPharma also has many more radical members who also employ the phrase. R. 5. Along with setting fires in public spaces and getting into

physical altercations with counter-protesters and police, these radical AntiPharma members have vandalized buildings by writing "Blood *is* Blood or Blood *for* Blood" in red paint. R. 5. Television coverage of the rally showed some attendees shouting both "Blood is Blood" and "Blood *is* Blood or Blood *for* Blood" on the same day that several violent instances occurred. R. 5.

Interpreting "Blood is Blood" to violate its pacifist values, Poster informed Ms. Thornberry that it was suspending her account until she revised her title. R. 5. This marked the second time that Poster exercised its right of editorial discretion, as the platform previously suspended a user who uploaded a piece entitled "Murder Your Enemies: An Insurrectionist's Guide to Total War." R. 5. In response, Ms. Thornberry appeared on national television to protest her suspension from Poster, claiming the platform was engaging in artistic suppression. R. 6.

After learning of Ms. Thornberry's suspension through her televised appearance, Delmont Attorney General Will Wallace ("A.G. Wallace") made the discretionary determination that Poster fell within the scope of the CC Law and brought an enforcement action against the platform for violating the law. R. 32. In a press conference, A.G. Wallace stated that "[t]he APC-founded Poster platform is discriminating against Delmont citizens based on political viewpoints . . . and we bring this action for the first time today to stop that practice[.]" R. 6. Given the immense fines levied against the platform, Poster immediately filed suit against A.G. Wallace in his official capacity as the Chief Law Enforcement Officer of Delmont, seeking declaratory and injunctive relief on the ground that the CC Law unconstitutionally violated its First Amendment rights. R. 6.

III. Proceedings Below

The United States District Court for the District of Delmont granted A.G. Wallace's motion for Summary Judgment on September 1, 2021, based upon its determinations that Poster was properly designated as a common carrier and that the CC Law did not violate the platform's Free Speech or Free Exercise rights under the First and Fourteenth Amendments. R. 16-17. On appeal, and United States Court of Appeals for the Fifteenth Circuit reversed the District Court's grant of Summary Judgment, holding the CC Law's prohibition of editorial censorship violated Poster's right to Free Speech, and that the CC Law was neither neutral nor generally applicable, and thus also violated Poster's right to Free Exercise. R. 28-29. A.G. Wallace petitioned for Writ of Certiorari, which this Court granted. R. 40.

SUMMARY OF THE ARGUMENT

This Court should uphold the Fifteenth Circuit's determination that the Delmont CC Law unconstitutionally restricts Poster's rights to Free Speech and Free Exercise for two distinct reasons.

First, the CC Law both univocally restricts Poster's editorial discretion by forcing it to endorse messages it may wish to disclaim and undermines the platform's integrity by limiting its ability to curate user content. These constraints abridge Poster's Free Speech rights, and thereby subject the CC Law to strict scrutiny. Given its unnecessarily sweeping provisions and the availability of less restrictive means to effectuate its purpose, the CC Law cannot withstand strict scrutiny and is consequently unconstitutional.

Second, the CC Law unnecessarily burdens Poster's right of Free Exercise. By explicitly referencing religiously motivated conduct and prohibiting the allocation of funds to certain causes because they are religious in nature, the CC Law is not neutral. Further, by applying to a

limited and imprecisely defined category, failing to prohibit contributions to several secular causes, and relying upon A.G. Wallace's discretionary interpretation of the law to effectuate its commands, the CC Law is not generally applicable. The CC Law is thus subject to strict scrutiny. Given the less-than-compelling nature of the CC Law's purported interest and its lack of narrow tailoring, the CC Law cannot withstand strict scrutiny and is thus unconstitutional.

The rights to Free Speech and Free Exercise represent the core of our nation's founding principles and serve as the very bedrock of our democracy. This Court has consistently affirmed the vital significance of these guarantees by subjecting unduly burdensome government actions to the strictest and most exhaustive scrutiny. The present case should be no different–as the Fifteenth Circuit aptly averred, Poster should not be "relegated to second-class constitutional status simply because other…constitutional interests are at stake." (R. 27).

By upholding the Fifteenth Circuit's determination that the CC Law unconstitutionally restricts Poster's rights to Free Speech and Free Exercise, this Court can reaffirm decades of its precedent and resolidify its commitment to protecting these indispensable rights.

For these reasons, Poster respectfully requests this Court affirm the Fifteenth Circuit's decision.

ARGUMENT

I. This Court should uphold the Fifteenth Circuit's determination that the CC Law unconstitutionally violates Poster's right to Free Speech because its unequivocal ban upon the exercise of editorial discretion cannot survive strict scrutiny.

The Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment,[6] provides that "Congress shall make no law…abridging the freedom of

[6] *Gitlow v. New York.*, 268 U.S. 652, 666 (1925) ("[F]reedom of speech and of the press–which are protected by the First Amendment from abridgment by Congress–are among the fundamental

speech[.]" U.S. CONST. amend. I. "Freedom of speech plays a fundamental role in a democracy . . . [it is] the indispensable condition [] of nearly every other form of freedom." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986). This Court has recognized that "[c]orporations . . . like individuals, contribute to the discussion, debate, and dissemination of information and ideas that the First Amendment seeks to foster[,]" *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion), and accordingly has held corporations, like individuals, are guaranteed the "freedom of speech . . . safeguarded by . . . the [First and] Fourteenth Amendment[s]." *See Grosjean v. Am. Press Co.*, 297 U.S. 233, 234 (1936). *See also First Nat'l Bank of Bos. v. Bellotti,* 435 U.S. 765, 771 (1978) ("[C]orporations possess certain rights of speech and expression under the First Amendment.") Accordingly, Poster's status as a corporation does not strip the platform of its speech protections.

This Court has "long subjected certain businesses . . . [that] hold[] [themselves] out as open to the public" to common carrier status, which imposes "special regulations, including the requirement to serve all comers." *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring). While common carrier status traditionally applied to businesses like hotels and roadways, it has expanded over time to include other "carrier" business operations like telecommunications providers. James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 Fed. Comm. L.J. 225, 227, 251-52 (2002).

Unlike traditional businesses classified as common carriers, Poster does not solely transmit its users' messages–it engages in speech itself by exercising editorial discretion over content posted to the platform and curating its content for the enjoyment of its audience. R. 27.

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personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states.")

The Fifteenth Circuit aptly described Poster as "a hybrid carrier—one that functions as a conduit of expression in some respects, while also promoting *its own* expression in others." R. 26 (emphasis added). *See Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1036 n.23 (8th Cir. 1978) (Noting the FCC "has recognized that cable systems are neither common carriers nor broadcasters, but . . . a hybrid of both[.]") In its decision, the Fifteenth Circuit explained "the extent to which Poster acts in an editorial fashion or communicates its own message is vital to the...question of whether the First Amendment is implicated." R. 27. Given that Poster acts in an editorial fashion by rejecting certain content that it deems to violate its pacifist values and curating content on the platform, the CC Law's attempt to violate this expression violates Poster's right to Free Speech.

The CC Law mandates, *inter alia*, that platforms designated as common carriers "shall serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint." Delmont Rev. Stat. § 9-1.120(a). Poster's User Agreement, however, expressly informs users of its right of editorial discretion and places users on notice that it retains the ability to block or remove an account "at any time for any or no reason." Poster Inc., User Agreement (effective December 10, 2019). Poster exercised its editorial discretion by suspending Ms. Thornberry's account for the title "Blood is Blood," which it believed to violate its pacifist values. R. 5. Poster subsequently received immense fines, with A.G. Wallace arguing that the "Poster platform is discriminating against Delmont citizens based on political viewpoints" R. 6.

The Fifteenth Circuit's determination that Delmont's CC Law is unconstitutional for unequivocally denying Poster's editorial discretion, consequently violating Poster's constitutional right to free speech should be affirmed for two reasons. First, common carriers,

especially ones uniquely positioned to exercise editorial discretion, such as Poster, are entitled to a degree of protection under the First Amendment Free Speech clause. Second, by denying Poster's editorial discretion, Delmont's CC Law forces Poster to endorse messages it may wish to disclaim, and limits Poster's ability to curate its users' content.

Accordingly, Poster respectfully requests this Court affirm the Fifteenth Circuit's ruling that Delmont's CC Law violates Poster's First Amendment right to Free Speech.

a. Poster's exercise of editorial discretion likens it more to a newspaper than a traditional common carrier and thus entitles the platform's speech interests to a heightened degree of protection.

This Court has established, and case precedent overwhelmingly indicates, that common carriers are entitled to some degree of First Amendment protection. *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984); *see also Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 739 (1996). A state regulation that imposes on a common carrier's First Amendment free speech right is "valid if [it] would have been permissible at the time of the founding," or it "would not prohibit the company from speaking or force the company to endorse the speech." *Biden*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring). Federal law dictates that companies cannot "be treated as the publisher or speaker" of information that they *merely* distribute. 47 U.S.C. § 230(c)(1) (emphasis added). *See App*'x. F. This Court has held that "the editorial function itself is an aspect of speech." *Denver*, 518 U.S. at 738. *See also Turner Broad. Sys., Inc. v. FCC.*, 114 S. Ct. 2445, 2465 (1994) ("[T]he First Amendment protects [] editorial independence[.]")

As opposed to a traditional common carrier platform that serves only to display the speech of others, a platform exercising editorial discretion over its content is entitled to a higher

degree of Free Speech protection. *See League of Women Voters*, 468 U.S. at 379, *see also Ark. Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1639 (1998) ("When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity"). In *League of Women Voters*, an owner and operator of several noncommercial educational broadcasting stations received grants and selected which matters of public importance to broadcast to its audience. *See* id at 370-5. When this broadcaster challenged a law forbidding any "noncommercial educational broadcasting station [] receiv[ing] a grant from [a] corporation . . . [to] engage in editorializing[,]" *id.* at 365, this Court determined that the law's broad ban on all editorializing unconstitutionally violated the right to Free Speech by "intrud[ing] unnecessarily upon the editorial discretion of broadcasters" *Id*. at 379.

Here, by retaining and exercising editorial authority to remove content it deems to violate its organizational values, Poster is more akin to a broadcaster than a traditional common carrier, and thus, it is entitled to a higher degree of Free Speech protection. R. 26. *See also League of Women Voters,* 468 U.S. at 378. Poster "does not function exclusively as an expressive conduit for others' artistic speech," instead, it functions more like a broadcaster by "hold[ing] editorial authority over user accounts on its platform" and "clearly expressing . . . that the platform has strong views of its own." R. 26. Additionally, the platform's User Agreement makes clear that it can block or remove an account "at any time for any or no reason." Poster Inc., User Agreement.

Like *League of Women Voters*, where an unequivocal ban on the ability of broadcasters to editorialize was deemed unconstitutional, the CC Law's ban on Poster's ability to editorialize also constitutes an unconstitutional encroachment upon Free Speech rights. Poster "exercises its selective judgment over the artistic expressions seen and heard from its platform to produce a curated and attractive result for the audience it is seeking to serve." R. 27. Similar to the

broadcasters in *League of Women Voters,* Poster does not merely distribute information—it exercises editorial discretion over its users' artistic content and promotes its own and other APC members' messages via its platform. R. 28.

Thus, due to its editorial nature and practice of exercising discretion over users' content, Poster's speech is entitled to heightened constitutional protection.

b. The CC Law cannot survive strict scrutiny because its unequivocal denial of Poster's right to editorial discretion is not narrowly tailored to advance its purported purpose, and Delmont has not shown the unavailability of less restrictive alternatives.

By unequivocally denying Poster's right to Free Speech under the First and Fourteenth amendments, the CC Law is not narrowly tailored and accordingly cannot survive the applicable standard of strict scrutiny. The First Amendment is subject to only "narrow and well-understood exceptions" *Turner,* 114 S. Ct. at 2458. Regulations and laws "compel[ling] speakers to utter or distribute speech bearing a particular message" are subjected to exacting and "rigorous scrutiny" *See id*. at 642. Given the importance of protecting Free Speech, this Court has crafted the standard of strict scrutiny to be exceptionally difficult to satisfy. *See Minn. Voters All. v. Saint Paul*, 442 F. Supp. 3d 1109, 1118 (D. Minn. 2020). For a regulation to be valid, "ln light of relevant competing interests," it must not impose "an unnecessarily great restriction on speech." *Denver,* 116 S. Ct. at 2378. The government has the burden of demonstrating a challenged law constitutes the least restrictive means of achieving its underlying goal. *See United States. v. Playboy Ent. Grp., Inc.*, 120 S. Ct. 1878, 1881 (2000). "[I]n the context of protected speech, the difference" between compelled speech and compelled silence "is without constitutional significance[.]" *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.,* 487 U.S. 781, 797 (1988).

To satisfy strict scrutiny, a regulation must be "narrowly tailored to promote a compelling government interest." *Playboy,* 120 S. Ct. at 1886 (2000). *See also Greater New Orleans Broad. Ass'n, Inc. v. United States,* 119 S. Ct. 1923, 1932 (1999) ("The government . . . must demonstrate narrow tailoring of the challenged regulation to the asserted"). In *Denver,* the FCC attempted to regulate public access broadcasting channels by prohibiting operators "from exercising *any* editorial control over the content of programs broadcast." *Denver,* 116 S. Ct. at 2377. This Court determined the FCC regulation's unequivocal ban on channel operators' exercise of editorial control was "not appropriately tailored to achieve the basic, legitimate objective" it was purported to address, and consequently, violated the First Amendment. *See id.*

If a less restrictive alternative would serve the purpose underlying a law, the government must use that alternative. *See Playboy,* 120 S. Ct. at 1886. In *Playboy,* a corporation that owned and prepared programs for adult television networks challenged a law requiring cable operators to "fully scramble or otherwise fully block" channels "primarily dedicated to sexually-oriented programming." *Id.* at 1882. This Court concluded that while this law served a compelling government interest, its imposition of a "blanket ban" failed under strict scrutiny because the less restrictive alternative of "targeted blocking . . . [constituted] feasible and effective means of furthering its compelling interest[.]" *See id.* at 1886-7.

Here, the CC Law's restriction banning Poster's ability to engage in editorializing of any kind is unnecessarily broad and not narrowly tailored to achieve its purported purpose of "prevent[ing] online platforms from stifling viewpoints they disagree[] with." R. 33, 4. Accordingly, the law cannot withstand strict scrutiny. Like *Denver,* where an all-out ban on editorial control was not appropriately tailored to its underlying object and thus violated channel operators' freedom of speech, the CC Law's requirement that common carriers "*shall* serve *all*

who seek or maintain an account, regardless of political, ideological, or religious viewpoint" without exception constitutes a complete editorial ban that is overly broad, not narrowly tailored., and thus unconstitutional. Delmont Rev. Stat. § 9-1.120(a) (emphasis added). Given that Poster is a non-traditional common carrier engaging in speech of its own, the CC Law's complete prohibition of editorial censorship of any kind violates the platform's constitutionally protected speech by forcing it to endorse, "via promotion, messages it may wish to disclaim," while prohibiting Poster's own speech "by limiting its ability to curate its users' content" (R. 29).

Additionally, Delmont has failed to demonstrate the unavailability of alternative, less restrictive means to advance the CC Law's purported purpose of "prevent[ing] online platforms from stifling viewpoints they disagree[] with." R. 33, 4. The record contains no argument advanced by Delmont relating to the unavailability of any alternative less restrictive means, despite the fact that it bears the burden to make such a showing. In *Playboy*, when the government failed to show its blanket-ban provision constituted the least restrictive means available to advance its goal, this Court held the provision was an unconstitutional restriction on the right to Free Speech. *See Playboy*, 120 S. Ct. at 1881. Here, the CC Law imposes an exceptionally broad prohibition on platforms by forbidding the "denial of access or editorial censorship *of any kind. . . without exception*[,]" and Delmont has not demonstrated that such a complete ban on editorial censorship constitutes the least restrictive means available to effectuate the law's purpose. (R. 28) (emphasis added). Just as in *Playboy*, where the absence of any showing by the government that a blanket ban constituted the least restrictive means available to effectuate its purpose, this Court should hold the CC Law is unconstitutional given Delmont's failure to show the unavailability of less restrictive means to advance its underlying goal.

Given the CC Law's unequivocal denial of Poster's right to engage in editorial discretion, and Delmont's failure to prove the unavailability of less restrictive alternatives, the CC Law cannot withstand strict scrutiny and thus unconstitutionally abridges the right to Free Speech. Therefore, this Court should affirm the Fifteenth Circuit's ruling.

II. This Court should uphold the Fifteenth Circuit's determination that the CC Law unconstitutionally violates Poster's right to Free Exercise under the First and Fourteenth Amendments because it is neither neutral nor generally applicable, and is thus incapable of surviving strict scrutiny.

The Free Exercise Clause of the First Amendment, applicable to the states through the Fourteenth Amendment,[7] provides that "Congress shall make no law respecting the establishment of religion, *or prohibiting the free exercise thereof* . . . ." U.S. CONST., amend I. (Emphasis added). The Free Exercise Clause provides religious observers with constitutional protection where the government "regulates or prohibits conduct because it is undertaken for religious reasons[,]" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), or otherwise imposes "indirect coercion or penalties" on religious exercise. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1998); *See also Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983) ("[T]he Free Exercise Clause provides substantial protection for lawful conduct grounded in religious belief[.]")

Prior to its landmark decision in *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990), this Court considered Free Exercise challenges using the test laid out in *Sherbert v. Verner*, 374 U.S. 398 (1963), which stood for the proposition that "government[] actions . . . substantially burden[ing] religion must be justified by a compelling government

[7] *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

interest." *See Smith*, 494 U.S. at 873. However, in *Smith*, this Court recognized that the *Sherbert* test could not be applied to "across-the-board . . . prohibitions on a particular form of conduct" without "creat[ing] an extraordinary right to ignore [any] generally applicable law[] . . . [that was] not supported by a compelling governmental interest." *Id.* To avoid this result, in *Smith* and subsequent Free Exercise decisions, this Court established that laws that are "neutral and . . . general[ly] applicab[le] need not be justified by a compelling government interest," even if they have the incidental "effect of burdening a particular religious practice." *Church of the Lukumi*, 508 U.S. at 531 (citing *Smith*, 594 U.S. 872).

Under *Smith* and its progeny, laws that fail to satisfy the requirements of neutrality and general applicability are subject to strict scrutiny–they must "be justified by a compelling government interest and . . . be narrowly tailored to advance that interest." *Church of the Lukumi*, 508 U.S. at 531-2. The requirements of neutrality and general applicability are considered separately, but this Court has recognized that they "are interrelated" as "failure to satisfy one . . . is a likely indication that the other has not been satisfied." *Id.*

The Fifteenth Circuit correctly determined the CC Law was an unconstitutional violation of the Free Exercise Clause for three reasons. First, the CC Law is not neutral. Second, the CC Law is not generally applicable. Third, the CC Law cannot survive the resulting applicable standard of strict scrutiny. For these reasons, Poster respectfully requests this Court affirm the Fifteenth Circuit's decision holding the CC Law unconstitutionally violates Poster's right to Free Exercise.

a. The CC Law fails to satisfy *Smith*'s requirement of neutrality.

Through its explicit reference to religiously motivated conduct and its prohibition on the allocation of funds to certain causes because they are religious in nature, the CC Law fails to

satisfy the requirement of neutrality on its face and in its application. This Court has held that the government "fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. Philadelphia,* 141 S. Ct. 1868, 1877 (2021). Further, a law with the object of "infring[ing] upon or restrict[ing] practices because of their religious motivation . . . is not neutral[.]" *Church of the Lukumi*, 508 U.S. at 534. The bare "minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at 533.

A law that does not explicitly reference religion is facially neutral. *See Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 709 (1981). In *Thomas*, a provision stating "an individual who has voluntarily left his employment without good cause . . . shall be ineligible [for unemployment benefits]" was challenged as violating the Free Exercise rights of a Jehovah's Witness who was denied benefits after terminating his employment based upon his religious beliefs. *See Thomas,* 450 U.S. at 709, fn. 1. This Court determined the challenged provision in *Thomas,* which made no reference to religion or religiously motivated conduct, was "neutral on its face." *See id.* at 717. By contrast, in *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2255 (2020), this Court concluded a regulation prohibiting the use of state-awarded scholarships at any private school "controlled in whole or in part by any church, sect, or denomination" failed to satisfy facial neutrality because its discrimination towards religiously affiliated schools was "apparent from its plain text." *See Espinoza*, 140 S. Ct. at 2255. Similarly, in *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 626 (2d Cir. 2020), the Second Circuit determined a state's COVID-19 Executive Order classifying "houses of worship" as "red zone[s]" subject to heightened capacity limits failed to satisfy the "basic standard" of facial neutrality by "explicitly

imposing restrictions" and "singl[ing] out houses of worship for . . . harsh treatment." *Agudath Israel of Am.*, 983 F.3d at 631-2.

Like the regulation targeting schools "controlled . . .by any church, sect, or denomination" in *Espinoza*, 140 S. Ct. at 2255, and the order classifying "houses of worship" as "red zones" in *Agudath Israel of Am.*, 983 F.3d at 631-2, the Delmont CC Law expressly references contributions made to "religious . . . causes[.]" Delmont Rev. Stat. § 9-1.120(a). The facially neutral provision in *Thomas*, by contrast, made no reference to religion or religiously motivated conduct. S*ee Thomas*, 450 U.S. at 709. Thus, just as in *Espinoza* and *Agudath Israel of Am.*, the CC Law fails to satisfy the minimum requirement of facial neutrality through its explicit reference to religion.

A law that prohibits the allocation of funds to causes because they are "religious" in nature is not neutral. *See Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2022 (2017). In *Trinity Lutheran Church*, a church challenged a state program's "strict and express policy of denying [reimbursement] grants to any applicant owned or controlled by a church, sect, or other religious entity" as violating the Free Exercise Clause. *Trinity Lutheran Church*, 137 S. Ct. at 2018. Given that this policy "discriminat[ed]" by refusing to allocate grants to certain applicants because of their "religious character[,]" this Court concluded the policy was not neutral. *See id.* at 2022. Similarly, in *A.H. ex. rel. Hester v. French*, 985 F.3d 165, 170 (2d Cir. 2021), a student challenged a state's dual enrollment program on Free Exercise grounds after her application for tuition funding "was denied solely because of her school's religious status." Given that the program effectively prohibited the allocation of funds to students at religious schools, the Second Circuit "reject[ed] the . . . assertion that the . . . [program was] religion-neutral as applied." *A.H. ex. rel. Hester*, 985 F.3d at 182. *See also Espinoza*, 140 S. Ct. at 2255

(concluding a policy's prohibition of the use of state-awarded scholarships at any private school "controlled in whole or in part by any church, sect, or denomination" was not neutral).

By prohibiting Poster's religiously motivated practice of allocating funds to the APC's ongoing educational and cultural efforts due to its nature as a "religious . . . cause[,]" the CC Law fails to satisfy the requirement of neutrality. R. 2-3. Like the departmental policy of denying reimbursement grants to religiously owned and operated schools in *Trinity Lutheran Church*, and the state program prohibiting the allocation of tuition funds to students at religious schools in *A.H. ex. rel. Hester*, the CC Law similarly forbids Poster from continuing to contribute fifteen percent of its corporate profits to its APC faith and its efforts. R. 2-3. Thus, just as in *Trinity Lutheran Church* and *A.H. ex. rel. Hester*, the CC Law fails to satisfy the neutrality requirement.

Through its express reference to "religious . . . causes" and its effect of prohibiting Poster from allocating its corporate profits to the APC, the CC Law fails to satisfy *Smith*'s requirement of neutrality both on its face and in its application. Accordingly, this Court should affirm the Fifteenth Circuit's determination that the CC Law is not neutral.

b. The CC Law fails to satisfy *Smith*'s requirement of general applicability.

The CC Law fails to satisfy the requirement of general applicability by prohibiting an imprecisely defined subset of platforms from contributing to specified causes and by relying upon the exercise of official discretion to effectuate its provisions.

An across-the-board prohibition of specified conduct is generally applicable. *Smith*, 494 U.S. at 884. In *Smith*, after two members of the Native American Church were discharged from their jobs for ingesting the hallucinogenic drug peyote during a religious ceremony, they applied for unemployment benefits. *See id.* at 874. The two members were deemed ineligible for benefits because they were discharged for conduct that was criminally prohibited under the state's law.

See id. When the members challenged this denial on Free Exercise grounds, this Court held that while the law posed an incidental burden upon the members' religious exercise, it nonetheless satisfied the requirement of general applicability because it was "otherwise constitutional as applied to those who engage[d] in the specified act for nonreligious reasons." *Id*. at 872. By contrast, in *Church of the Lukumi*, challenged city ordinances that prohibited the Santeria religion's practice of animal sacrifice, but did not forbid the killings of animals for various nonreligious reasons like hunting, were not generally applicable, because they failed to impose an all-encompassing prohibition on the specified conduct of killing animals. *See Church of the Lukumi*, 508 U.S. at 523. Similarly, in *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66-7 (2020) (per curiam), this Court concluded a state's COVID-19 Executive Order was not "of general applicability," because it allowed businesses within designated "orange zone[s]' to "decide for themselves how many persons to admit[,]" while specifically limiting attendance in houses of worship to twenty-five persons.

Contrary to the generally applicable law in *Smith* that applied across-the-board to all persons engaged in the specified conduct of possessing or utilizing peyote regardless of their underlying motivation, *see Smith*, 494 U.S. at 872, the CC Law's application is limited to the imprecisely defined category of platforms deemed to be "common carrier[s]" and only imposes prohibitions upon the specified conduct of corporate contributions when they are allocated to certain causes. R. 3. For the restrictions of the CC Law to apply, an entity must be designated as a common carrier, which the law defines as internet platforms with a "substantial market share." R. 3. However, the statute does not define, or otherwise provide any guidance, as to what constitutes a "substantial market share," Delmont Rev. Stat. § 9-1.120(a), and thus applies only to an imprecisely defined subset of platforms, rather than imposing an across-the-board

prohibition like that seen in *Smith.* R. 3. Further, the law's mandate that common carriers "refrain from using corporate funds to contribute to political, religious, or philanthropic causes[,]" *id.*, fails to encompass other popular categories of corporate contributions, such as those made to non-partisan advocacy groups, trade commissions, or other corporate entities.[8] Thus, like the ordinances prohibiting the Santeria religion's animal sacrifices while failing to encompass secular killings of animals in *Lukumi,* and the order specifically limiting the capacity of religious services while allowing businesses in the same zones to set their own capacity limits, the CC Law is not generally applicable because its application is limited to an imprecisely defined subset of internet platforms, and its prohibitions fail to encompass common non-religious categories of corporate contributions.

A law that is enforced in accordance with the exercise of an official's discretion is not generally applicable. *See Fulton,* 141 S. Ct. at 1879. In *Fulton,* a city ceased referring foster children to a private, Catholic foster care agency, claiming the agency's refusal to certify same-sex couples as foster parents violated a nondiscrimination provision in its contract with the city. *See id.* at 1874-5. The agency challenged the non-discrimination provision as violating its right to Free Exercise, on the ground that its refusal to certify same-sex couples was based upon its religious beliefs. *See id.* The applicability of this provision depended upon the "sole discretion" of the city commissioner, who had the power to grant exceptions to its non-discrimination requirement. *See id.* at 1878. Given that the provision's applicability and enforcement turned on the commissioner's determination of whether to grant "discretionary exceptions[,]" this Court determined it was "not generally applicable." *See id.* By contrast, in *Stormans, Inc. v. Wiesman,*

[8] *See* Corporate Contributions to Outside Groups, (Mar. 22 2021), https://www.opensecrets.org/outside-spending/corporate-contributions?cycle=2020.

794 F.3d 1064, 1082 (9th Cir. 2015) challenged rules allowing for exemptions based upon "limited, particularized . . . [and] objective criteria" were deemed generally applicable, because the rules did not create a "regime of unfettered discretion that would permit discriminatory treatment of religion or religiously motivated conduct."

The CC Law's application and enforcement depend upon the exercise of A.G. Wallace's discretion, and thus, it is not generally applicable. R. 32. In considering the applicability of the CC Law, the Fifteenth Circuit aptly noted that "[i]n enforcing the [] law for the first time, [A.G. Wallace] made the discretionary decision that Poster [fell within] the CC Law's ambit" and brought an action against the platform. R. 34. Like the provision in *Fulton*, which applied depending upon the "sole discretion" of the city commissioner, *Fulton,* 141 S. Ct. at 1879, the CC Law's application turns upon whether A.G. Wallace, in his discretion, determines a platform falls within the scope of the law. R. 32. Further, while the commissioner in *Fulton* was expressly empowered to grant exceptions to the non-discrimination provision, *Fulton* at 1878, A.G. Wallace's discretionary power to determine whether a platform is a common carrier subject to the CC Law amounts to a de facto ability to grant exceptions–evidenced by the fact the CC Law was enforced for the first and only time against Poster following a nationally televised protest of the platform. R. 32. Unlike the rules in *Stormans,* 794 F.3d at 1082, the CC Law does not provide the A.G. with any objective, particularized criteria for the determination of whether a platform is a common carrier subject to the CC Law. Thus, like the provision in *Fulton*, and unlike the rules in *Stormans,* the CC Law's application depends on the exercise of A.G. Wallace's unfettered discretion, and thus, fails to satisfy the requirement of general applicability.

Through its limited and imprecisely defined scope, its failure to prohibit corporate contributions to several secular causes, and its application depending upon the discretionary determination of A.G. Wallace, the CC Law fails to satisfy *Smith*'s requirement of general applicability. Therefore, this Court should affirm the Fifteenth Circuit's determination that the CC Law is not generally applicable.

c. The CC Law fails to satisfy the applicable standard of strict scrutiny and is thus unconstitutional.

This Court has made clear that "[a] law burdening religious practice that is not neutral or of general application must undergo the most rigorous scrutiny[.]" *Church of the Lukumi*, 508 U.S. at 546. To satisfy this standard, a law "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Church of the Lukumi*, 508 U.S. at 546 (internal marks omitted). Laws that fail to satisfy the *Smith* requirements "will survive [this standard of] strict scrutiny only in rare cases." *Id. See also Roberts v. Neace,* 958 F.3d 409, 413 (6th Cir. 2020) ("[A] law that discriminates against religious practices usually will be invalidated because it is the rare law that can be justified by a compelling interest and is narrowly tailored to advance that interest.").

The CC Law cannot survive the rigorous standard of strict scrutiny because it does not advance an interest of a compelling nature and is not narrowly tailored to advance that interest. Thus, this Court should affirm the Fifteenth Circuit's determination that the CC Law is unconstitutional.

i. The CC Law does not advance a sufficiently compelling interest.

Delmont's purported interest underlying the CC Law is "prevent[ing] online platforms from stifling viewpoints they disagree[] with." R. 33, 4. While not insubstantial, this interest is

not sufficiently compelling to satisfy strict scrutiny. The requirement of a "compelling interest" that applies to "a law fails to meet the *Smith* requirements is not watered down[,] [it] really means what it says." *Church of the Lukumi,* 508 U.S. at 546 (quoting *Smith,* 494 U.S. at 888).

This Court has recognized compelling state interests in public health, safety, and confidence in judicial and electoral proceedings. Specifically, this Court has identified a compelling state interest in: "[s]temming the spread of COVID-19[,]" *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67, "protecting the physical and psychological well-being of minors[,]" *Sable Commc'n of Cal. v. FCC*, 492 U.S. 115, 126 (1989), "preserving public confidence in the[] judiciar[y][,]" *Williams-Yulee v. Fla. Bar,* 575 U.S. 433, 457 (2015), "protecting voters from confusion and undue influence[,] preserving the integrity of []election process[es][,]" *Burson v. Freeman*, 504 U.S. 191, 198-9 (1992), and "[ensuring] fundamental fairness in the jury selection process[.]" *Press-Enterprise Co. v. Super. Ct. Riverside Cnty.*, 464 U.S. 101, 510 (1984). Contrary to these interests, which pertain largely to societal well-being and the proper functioning of democratic governance, the CC Law's purported interest in "prevent[ing] online platforms from stifling viewpoints they disagree[] with[,]" does not reflect the same degree of vital societal importance. R. 33, 4. Thus, this Court's decisions weigh strongly against concluding the CC Law's purported interest is sufficiently compelling to survive strict scrutiny.

A recent district court decision adds further support to the conclusion that the CC Law's purported interest is not compelling. In *NetChoice v. Moody*, 2021 WL 2690876 (N. D. Fla. 2021), state legislation prohibiting large social media platforms from "limit[ing] or eliminat[ing] . . . content posted by a user to other users of the social media platform" was challenged as violating the First Amendment. The court determined the object of "leveling the playing field [by] promoting speech on one side of an issue or restricting speech on the other [] [wa]s not a

legitimate state interest." *NetChoice*, 2021 WL 2690876 at 3. Like the challenged law in *NetChoice*, the CC Law prohibits large social media platforms from eliminating user content, and is intended to serve the interest of "prevent[ing] online platforms from stifling viewpoints they disagree with[.]" Thus, just as the court in *NetChoice* determined an effort to "level[] the playing field" of speech on social media platforms was not a compelling interest, this Court should also conclude that the CC Law's interest is not sufficiently compelling.

Review of both the interests this Court has held to be compelling and a recent decision concerning legislation like the CC Law compels the conclusion that while Delmont's purported interest is not necessarily insubstantial, it is not sufficiently compelling to survive strict scrutiny. Based upon the CC Law's failure to advance a compelling government interest, this Court should affirm the Fifteenth Circuit's determination that the law is unconstitutional.

ii. The CC Law is not narrowly tailored.

Assuming, *arguendo*, that the CC Law's purported interest "prevent[ing] online platforms for stifling viewpoints they disagree[] with" is sufficiently compelling, the law nevertheless cannot survive strict scrutiny because it is not narrowly tailored to advance that interest. Where a law's "proffered objectives are not pursued with respect to analogous non-religious conduct, and [its purported] interest[] could be achieved by narrower [means] that burden[] religion to a far lesser degree[,]" it is not narrowly tailored. *See Church of the Lukumi*, 508 U.S. at 546. "The absence of narrow tailoring suffices to establish the invalidity" of a law subjected to strict scrutiny. *Id*.

A law that prohibits an overly broad category of conduct with respect to its asserted interest is not narrowly tailored. *See Roman Cath. Diocese of Brooklyn,* 141 S. Ct. At 67. In *Roman Cath. Diocese of Brooklyn*, a challenged order with the object of "[s]temming the spread

of COVID-19" had a sufficiently compelling interest, but was not narrowly tailored due to the presence of "many other less restrictive rules that could be adopted" to advance its purpose. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67. *See also Roberts*, F.3d 409, 411-13 (6th Cir. 2020) (Noting the presence of "many less-restrictive ways to address . . . public health issues[,]" than an order's complete prohibition on faith-based mass gatherings).

Like the challenged order in *Roman Cath. Diocese of Brooklyn*, the CC Law's purported justification of preventing online platforms from stifling viewpoints they disagree with could be advanced through less restrictive means. By requiring platforms to "refrain from using corporate funds to contribute to political, religious, or philanthropic causes," which does nothing to advance the law's interest in stifling or restricting viewpoints on a platform, the CC Law unnecessarily burdens religious practice by prohibiting more conduct than is necessary to advance its purpose. Specifically, CC Law prohibits Poster from engaging in its religiously motivated practice of allocating fifteen percent of profits to the APC's efforts in educational and cultural development, despite the fact that this prohibition does nothing to prevent Poster or other platforms from stifling or restricting the viewpoints of users. Thus, like the challenged order in *Roman Cath. Diocese of Brooklyn*, the CC Law is not narrowly tailored because it does not employ the least restrictive means and instead imposes a greater burden on religious practice than is necessary to advance its purported purpose.

Therefore, this Court should affirm the Fifteenth Circuit's determination that the CC Law is unconstitutional because the law is not narrowly tailored to its purported interest and thus is incapable of surviving strict scrutiny.

CONCLUSION

For the aforementioned reasons, Respondent Poster, Inc. respectfully requests this Court affirm the Fifteenth Circuit's Opinion and Order.

Dated: January 31, 2022

Respectfully submitted,

/s/ Team 028

CERTIFICATE OF COMPLIANCE

Pursuant to the Seigenthaler-Sutherland Official Rules, we, the undersigned counsel, certify that: (i) this brief is entirely work product of the competition team members; (ii) the competition team has complied fully with its school's governing honor could; and (iii) the team has complied with all Rules of the Competition.

Dated: January 31, 2022 /s/ Team 028

APPENDIX

A. U.S. Const., amend. I, XIV

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 to peaceably assemble, and to petition the Government for a redress of grievances.

B. Delmont Rev. Stat. § 9-1.120

[Common carrier 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.

C. 28 U.S.C. § 1331

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

D. 28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

E. 28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods . . . [b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

F. 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.