

No. 22-CV-7654

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2021

POSTER, INC.,

Respondent,

v.

Will WALLACE,

Petitioner.

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

BRIEF FOR PETITIONER

Attorneys for Petitioner

QUESTIONS PRESENTED

- I. Is the Delmont common carrier law, which requires common carriers keep their services open to all users, unconstitutional under the Free Speech Clause of the First Amendment, when the requirement existed before the First Amendment was written, common carriers do not exercise in any editorial discretion over the content on their websites, and common carriers retain their corporate free speech rights to speak out against content they disagree with?
- II. Is Delmont common carrier law, which bars common carriers from donating to religious organizations, unconstitutional under the Free Establishment Clause of the First Amendment, when the law works to ensure common carriers treat all users equally and also prohibits political and charitable contributions?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... i

TABLE OF AUTHORITIES..... iv

OPINIONS BELOW.....1

STATEMENT OF JURISDICTION1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED1

STATEMENT OF THE CASE.....1

SUMMARY OF THE ARGUMENT4

ARGUMENT AND AUTHORITIES6

 STANDARD OF REVIEW6

 I. THE DELMONT COMMON CARRIER LAW, WHICH PROHIBITS COMMON
 CARRIERS LIKE POSTER FROM CENSORING OF THE WORK OF ANYONE WHO
 MAINTAINS AN ACCOUNT, COMPORTS WITH THE REQUIREMENTS OF THE FIRST
 AMENDMENT6

 A. The Common Carrier Definition Includes Private Entities Like Poster
 Because the Service Is Open to Anyone, It Dominates the Self-Publishing
 Market, and Its Users Rely on Its Service to Freely Express Themselves
 Through Writing and Performances.....7

 B. Common Carriers’ Ancient Duty to Serve the Public at Large Operates as
 a Historic Limitation to the Speech Rights of Common Carriers, Requiring
 That They Act as an Open Forum for All Speech10

C. Speech Rights of Common Carriers Like Poster Are Restricted, as They Exercise Limited Editorial Discretion as They Serve as a Public Space for Its Users to Share Their Artistic Endeavors, and Do Not Write or Edit Content on Their Website	13
D. The Limitations to Common Carriers’ Speech, Like Poster’s, That Results from Both Historic Parameters and Their Limited Exercise of Editorial Discretion Does Not Affect Their Ability to Exercise Their Speech Rights as Corporate Actors.....	15
II. THE DELMONT COMMON CARRIER LAW, WHICH BARS COMMON CARRIERS FROM DONATING TO RELIGIOUS, POLITICAL OR CHARITABLE ORGANIZATION, COMPORTS WITH THE REQUIREMENTS OF THE FREE EXERCISE CLAUSE	16
A. The Common Carrier Law Is Neutral Because Its Secular Intentions of the Law Are Apparent on Its Face, as It Applies to All Common Carriers Regardless of Their Religious Affiliation and Its History Shows Its Secular Intentions.....	18
B. The Delmont Common Carrier Law Is Generally Applicable Because It Bars Common Carriers from Donating to Both Secular and Religious Organizations and Does Not Serve as a Prohibition on Religious Contributions Exclusively.....	22
CONCLUSION.....	24
BRIEF CERTIFICATE.....	25

TABLE OF AUTHORITIES

	<i>Page(s)</i>
UNITED STATES SUPREME COURT CASES:	
<i>Biden v. Knight First Amend. Inst. at Columbia Univ.</i> , 141 S. Ct. 1220 (2021).....	7, 8, 10
<i>Brass v. North Dakota</i> , 153 U.S. 391 (1894).....	10, 11
<i>Church of Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993).....	17, 18, 19, 20, 21, 22
<i>Denver Area Educ. Telecomms. Consortium, Inc. v. FCC</i> , 518 U.S. 727 (1996).....	7, 13, 14
<i>Emp. Div. Dep’t of Human Res. v. Smith</i> , 494 U.S. 872 (1990).....	16, 17, 23
<i>FCC v. League of Women Voters of Cal.</i> , 468 U.S. 364 (1984).....	13
<i>Fulton v. City of Philadelphia</i> , 141 S. Ct. 1868 (2021).....	17, 18
<i>Gillette v. United States</i> , 401 U.S. 437 (1971).....	16
<i>Munn v. United States</i> , 94 U.S. 113 (1876).....	10
<i>Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n</i> , 475 U.S. 1 (1986).....	14, 15

<i>Prince v. Massachusetts,</i>	
321 U.S. 158 (1944).....	16
<i>PruneYard Shopping Ctr. v. Robins,</i>	
447 U.S. 74 (1980).....	12, 13, 15, 16
<i>Turner Broad. Sys., Inc. v. FCC,</i>	
512 U.S. 622 (1994).....	16
<i>United States v. Stevens,</i>	
559 U.S. 460 (2010).....	10
UNITED STATES COURT OF APPEALS CASES:	
<i>Does 1-6 v. Mills,</i>	
16 F.4th 20 (1st Cir. 2021).....	17, 22, 23
<i>Gross v. Hale-Halsell Co.,</i>	
554 F.3d 870 (10th Cir. 2009)	6
<i>U.S. Telecom Ass’n v. FCC,</i>	
825 F.3d 674 (D.C. Cir. 2016).....	11
CONSTITUTIONAL PROVISIONS:	
U.S. Const. amend. I.....	1
U.S. Const. amend. XIV, § 1	1
FEDERAL STATUTORY PROVISIONS:	
28 U.S.C. § 1254(1).....	1
28 U.S.C. § 1291.....	1
Fed. R. Civ. P. 56(a)	6

STATE OF DELMONT STATUTORY PROVISIONS:

Delmont Rev. Stat. § 9-1.120(a)1

Delmont Rev. Stat. § 9-1.120(b).....1

LEGAL PERIODICALS:

David Bogen,

Generally Applicable Laws and the First

Amendment,

26 Sw. U. L. Rev. 201 (1997).....21

James B. Speta,

A Common Carrier Approach to Internet

Interconnection,

54 Fed. Comm. L.J. 225 (2002)8

OPINIONS BELOW

The memorandum opinion and order of the United States District for the District of Delmont is unreported and set out in the record. R. at 1–17. The opinion below for the United States Circuit Court for the Fifteenth Circuit is unreported and set out in the record below. R. at 18–33.

STATEMENT OF JURISDICTION

The State of Delmont appeals the Fifteenth Circuit Court of Appeals’ reversal of the United States District Court for the District of Delmont decision to enforce Delmont’s common carrier law. The court of appeals has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and entered a final judgment. The State of Delmont, through its attorney general Will Wallace in his official capacity, filed a petition for a writ of certiorari. This Court granted the petition and has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions: U.S. Const. amend. I and U.S. Const. amend. XIV, § 1. This case involves the following statutory provisions: Delmont Rev. Stat. § 9-1.120(a) and § 9-1.120(b). Each are unreported.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Katherine Thornberry is an aspiring author whose novel gained exposure online through Poster, a prominent self-publishing platform. R. at 3, 4. Poster suspended Thornberry’s account, from its website and restricted her account, after she decided to change the title of the book to a phrase associated with an animal rights group. R. at 22. Poster is the largest self-publishing platform online, dominating more than three-quarters of the market. R. at 10. It has served as a

hub for hundreds of thousands of creators to share their writing and artistic endeavors with the world for more than twenty years. R. at 9. Though other self-publishing websites exist, Poster is the most well-known, others are more obscure. R. at 10. Further, Poster offers its users access to many features other self-publishing websites do not. R. at 10. Poster does not edit or curate the content on its site; rather, it serves as a space for the public to gather, share, and discover the writing and art of up-and-coming talent. R. at 11. Poster has only pulled one piece of content off of its website in its two decades of operation. R. at 5.

Poster decided to yank Thornberry's access to her account until Thornberry changed the title of her book to the phrase associated with an animal rights group. R. at 5. Poster did not like the new title because they associated it with violence. R. at 5, 6. The animal rights group that inspired the new title has been associated with violence. R. at 5. Poster was founded by a pacifist Protestant denomination that advocates for peace. R. at 2. The company donates fifteen percent of its profits to its Protestant creators, which goes toward the religious' groups educational and cultural efforts in the community. R. at 2, 3. Poster decided to pull Thornberry's access to her account on its website, limiting the public's access to her book from its website because it believed the title conflicted with its religious principles. R. at 5, 6. In response, the state of Delmont fined Poster for pulling Thornberry access to her Poster account and limiting access to her book. R. at 5 6. The state said that Poster, by ripping Thornberry's book off the internet, violated its duty as a common carrier to keep its website open to all under a new state law. R. at 1. The Delmont law states that common carrier to keep its website open to all and cannot limit access to its site. R. at 3. Moreover, the law states that common carriers cannot donate to religious, political or philanthropic organizations. R. at 3. The law included in its intention section that the bar on religious contributions did not mean to invoke the religious protections of

the Establishment Clause of the First Amendment. R. at 3. Moreover, the creator of the law, the Delmont governor, said the common carrier donations ban was meant to ensure that common carriers remain true to their duty to keep their doors equally open to everyone, and not give preferential treatment to one group of users over another. R. at 35.

II. NATURE OF PROCEEDINGS

Poster sued the state of Delmont over its common carrier law and alleged that the provision violated its constitutional rights of freedom of speech and free establishment under the First Amendment. R. at 1, 2. The state filed a motion for summary judgment, arguing that the common carrier law is constitutional under both the Free Speech and Free Establishment Clauses of the First Amendment. R. at 2. The United States District Court for the District of Delmont found that the common carrier law did not violate Poster's free speech rights because as a common carrier, Poster's free speech rights are limited. R. at 11, 12. Moreover, the district court determined that Poster's free establishment rights were not violated because the bar on common carrier donations prohibited not only contributions to religious organizations, but also political and charitable organizations. R. at 15, 16.

The United States Circuit Court for the Fifteenth Circuit reversed because it found the Delmont common carrier law violated the Free Speech Clause of the First Amendment, by restricting the speech of corporate common carriers, like Poster. R. at 24, 25. Though it determined that Poster was a common carrier, it found it exercised some degree of editorial discretion over the content on its website, because it features certain content on its website. R. at 26–28. Moreover, the court determined that the Delmont common carrier law violated the Free Establishment Clause of the First Amendment because it determined the law was neither neutral nor generally applicable. R. at 31–32. It decided the law was not neutral because it discriminated

against Poster's religious views, by forcing the website to keep Thornberry's title on its website. R. at 31. Further, it found the law was not generally applicable because the state, through its attorney general, indicated that the law targeted religious affiliated entities like Poster. R. at 32.

SUMMARY OF THE ARGUMENT

I.

This Court should reverse the court of appeal's judgment because Delmont's common carrier law does not violate the Free Speech Clause of the First Amendment. The common carrier law does not violate the Free Speech Clause of the First Amendment because Poster is a common carrier, and common carriers have more limited First Amendment protections. A common carrier is an entity that is open to all, that dominates its industry which has transcended into a public concern. Poster is a common carrier because its services are open to the public and it makes up three-quarters of the self-publishing industry. Moreover, its self-publishing platform is a public concern because it is the central avenue for ordinary individuals to share their work with the world. Common carriers have more limited First Amendment protections because our government has, since before the founders penned the Constitution, required common carriers to keep their doors open to all. Because this requirement predates the First Amendment, it is a build in limitation to the First Amendment—the speech of common carriers is limited by the duty to serve as a public forum.

Moreover, the free speech rights of common carriers like Poster are limited because they do not publish or create their own creative endeavors. Instead, they serve as an open, empty space for others to express themselves their creating through writing and performance. Because Poster is a common carrier, its First Amendment free speech rights are limited by its duty to keep its platform open to all users. Moreover, its First Amendments free speech rights are limited

because as a common carrier, it functions as a platform for others to express themselves and does not edit or curate content. Because Poster is a common carrier, its First Amendment free speech rights are limited. And because common carriers have limited free speech protections, Delmont's common carrier law requiring common carriers keep its site open to all does not violate the Free Speech Clause of the First Amendment. Therefore, this Court should grant the government's motion for summary judgment, as Poster should comply with the law and allow anyone to express themselves on its platform—even if it disagrees with those viewpoints.

II.

This Court should reverse the court of appeal's judgment because Delmont's common carrier law does not violate the Free Expression Clause of the First Amendment. A law does not violate the Free Expression Clause of the First Amendment when it is both neutral and generally applicable. A law affecting religion is neutral when a secular meaning is apparent after examining both the text of the law and the context of the law. While Delmont's common carrier law affects religion, the secular goal of the law is apparent in its text. The common carrier ban on religious, political and charitable contributions works to ensure common carrier remain an unbiased forum for public expression and do not favor one user over another. First, the law expressly states it does not intend to invoke the Free Expression Clause—a clear intention that its drafters did not intend to target religion. Second, the law focuses on common carriers generally, not common carriers with religious roots. Further, the circumstances surrounding the common carrier law's history and passage show its secular goal. The governor of Delmont dreamed up the law while on the campaign trail, to address voter concerns about the potential for the technology to control content on the Internet. Its goal was to police online common carriers like Poster to ensure they remain true to their duty to serve all who enter. Because the plain text and the history of the

common carrier law show its goal is entirely secular—working to ensure common carriers remain neutral and allow all users equal access to its platforms—it is neutral and does not offend the Free Exercise Clause of the First Amendment.

Moreover, the common carrier law does not violate the Free Exercise Clause of the First Amendment because is generally applicable. A law is generally applicable when it affects religious activities the same way it treats similar secular activities. The Delmont common carrier applies to all common carriers, in the same way. It prohibits all common carrier contributions—whether they are religious, political, or charitable. Because the common carrier law treats religious contributions in the same way it treats secular contributions like political donations or charitable donations—barring common carriers from giving money to any kind of group—it is generally applicable and does not violate the Free Exercise Clause of the First Amendment. Therefore, this Court should grant the government’s motion for summary judgment, as Poster should comply with the law and stop its contributions to its Protestant founders.

ARGUMENT AND AUTHORITIES

Standard of Review. Summary judgement is proper if there is no “genuine dispute as any material fact” and the moving party deserves a “judgment as a matter of law” Fed. R. Civ. P. 56(a). This Court reviews summary judgments de novo and make all reasonable inferences for the non-moving party. *Gross v. Hale-Halsell Co.*, 554 F.3d 870, 875 (10th Cir. 2009).

I. THE DELMONT COMMON CARRIER LAW, WHICH PROHIBITS COMMON CARRIERS LIKE POSTER FROM CENSORING OF THE WORK OF ANYONE WHO MAINTAINS AN ACCOUNT, COMPORTS WITH THE REQUIREMENTS OF THE FIRST AMENDMENT.

A service like Poster serves a special public goal: It provides a platform for hundreds of thousands of people to share their writing and music. It allows artists and writers who are just

starting out the chance to get their work in front of the world without a fancy publishing house contract or music deal. Because Poster serves as the central forum for self-publishing, and anyone and everyone to log on and share their work, it is a common carrier. And the common carriers must keep their open their doors to everyone. *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1222 (2021). That was a requirement of common carriers since before the country was founded, and therefore serves as a built-in restriction to their First Amendment rights. *Id.*

Moreover, this Court has indicated the First Amendment rights of common carriers are more limited than other entities, because they function as a forum for other people to share content, and do not distribute or create their own original compositions. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 739 (1996). Indeed, hundreds of thousands of people post their artistic compositions and writing on Poster—but Poster itself produces no original content. Instead, it is an open forum, and its pages are filled with the work others create. Because Poster is a common carrier, it must comply with the Delmont common carrier law and stop all contributions to the Protestant organization that created it. This Court should grant the government’s motion for summary judgment because Poster is a common carrier and must comply with the law, as it does not violate the Free Speech Clause of the First Amendment.

A. The Common Carrier Definition Includes Private Entities Like Poster Because the Service Is Open to Anyone, It Dominates the Self-Publishing Market, and Its Users Rely on Its Service to Freely Express Themselves Through Writing and Performances.

Poster is a common carrier because: 1. its services are available to anyone, 2. it retains three-quarters of the market for self-published artistic endeavors and 3. its platform serves as the

central avenue for artists to get their work in front of the public. To qualify as a common carrier, a private business must meet several requirements. *Id.* First, they must be open to all. *Biden*, 141 S. Ct. at 1222. Second, they must hold a meaningful place in the market. *Id.* And finally, their services must be a public concern. *Id.* at 1223. For example, the government has historically labeled big players in the communications industry as common carriers, as the public hugely relied on their services. *Id.* If an entity meets these three elements, it is a common carrier.

Poster is a common carrier because it meets the definition of a common carrier: It is open to all, it holds a meaningful place in the market, and its services involve a public concern. Poster is open to all because anyone who wants to upload their artistic endeavors can visit the site, and publish their work to the world. Poster is open to all because it is a public website on the internet, which anyone can access. It has provided a way for artists from all walks of life and viewpoints to share new music or creative endeavors. Any artist or writer hoping to share their work with the world can, with the click of a button. Because Poster is open to the public, and allows anyone to upload their novels, music, or performances, it is a common carrier.

Moreover, Poster is a common carrier because it holds a meaningful place in the marketplace, as it is home to three-quarters of the self-published work on the internet. It is the place that artists go to publish their work, and the place consumers go to discover new creative talent. Poster's dominance in the self-publishing industry is not subjective—rather, it is supported by its grip on the market share. It is the home to three out of four self-published works on the internet. Hundreds of thousands of writers and artists have relied on Poster to share their work for more than twenty years. Poster does not need to have a monopoly in its industry to hold a meaningful place in the self-publishing marketplace. James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 Fed. Comm. L.J. 225, 264 (2002). Instead, it must only

hold a dominant place in the self-publishing industry. As the home to three-quarters of the self-published materials on the internet, Poster qualifies as a meaningful player in the self-publishing marketplace. Indeed, many of its competitors fail to offer the same quality of services as Poster. Other smaller competitors are charge more and offer less. A self-publishing website that offers the same level of service as Poster does not exist. Because Poster holds a dominant place in the self-publishing marketplace, it is a common carrier.

Finally, Poster is a common carrier because the services Poster provides are a public concern. Why? Because the platform provides the principal vehicle for new talent to share their new work. Like telephone companies are to phone calls, Poster is to self-publishing. Many of its smaller competitors are unknown to the general public. Because Poster fills an important, central role in self-expression—in the sharing and exchange of new ideas and artworks, its services are a public concern. Though Poster is private-held—it was founded by a pacifist Protestant denomination and continues to give fifteen percent of its profits to support the anti-violence mission of that church—Poster’s significance in the publishing world transcends its private beginnings. Poster is the place people go when they want to share their artistic compositions with the world. Though other self-publishing platforms exist, none compare with Poster. Its significance in the self-publishing world is unparalleled, as it controls 75 percent of the self-market. Indeed, many of its competitors fail to offer the same level of service that Poster gives its artists and writers. Most people have no idea about these other sites that compete with Poster—they are irrelevant in the self-publishing world. In contrast, Poster’s role in providing artists and writers with the ability to self-publish their work is a public interest because it is the only medium where budding talent can get their work in front of an audience. It is the only way for emerging talent to find and connect with an audience—and freely express their artwork and

writings with the world. Poster is a common carrier because its open forum holds a dominant place in the self-publishing marketplace, transforming it into a public concern.

B. Common Carriers’ Ancient Duty to Serve the Public at Large Operates as a Historic Limitation to the Speech Rights of Common Carriers, Requiring That They Act as an Open Forum for All Speech.

The First Amendment does not provide unlimited free speech protections to common carriers because the amendment allows for narrow regulation of certain types of speech. If the founders regulated a specific type of speech at the time the First Amendment was written, then that limitation of speech is permissible under the First Amendment. *United States v. Stevens*, 559 U.S. 460, 468 (2010). For example, certain types of speech—like obscenity, defamation, fraud, incitement, and speech that is part of criminal conduct—are restricted under the First Amendment. *Id.* Similarly, because the speech of common carriers faced restrictions during the founding—they do today. *Biden*, 141 S. Ct. at 1223–24. This country required common carriers to keep their doors open to everyone before it became a country—when America was a web of British-controlled colonies—and has ever since. *Id.* at 1223. The United States has a “long history” of restricting common carriers and requiring them to serve all. *Id.* at 1222–24.

The requirement that common carriers serve all who enter is a bedrock constraint dating back to this country’s English traditions. This Court nearly 150 years ago emphasized that regulating of common carriers has been the norm “in England since time immemorial, and in this country from its first colonization.” *Munn v. United States*, 94 U.S. 113, 113 (1876). Moreover, this Court in *Brass* outlined the constraints on common carriers. *Brass v. North Dakota*, 153 U.S. 391, 404 (1894). The analogy the Court made more than a century ago rings true today. Once a grain operator opens his doors to the public and opens a business where he stores the grain of

others—he can’t pick and choose whose grain he stores. *Id.* He must store the grain of anyone who wants to pay. Because this longstanding requirement—that common carriers serve all—predates the First Amendment, it functions as a limitation to common carriers’ First Amendment rights. *Id.* The First Amendment rights of common carriers, like Poster, are limited by the requirement that they serve all who enter, because this limitation existed when the founders drafted the First Amendment and is therefore grandfathered into the First Amendment. The D.C. Circuit put it well: The established requirement that common carriers to provide “equal access” to its services and serve as a stage for “others’ speech” does not violate the First Amendment. *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016). Common carriers like Poster must serve as an open forum for public speech, because this duty existed long before founders penned the First Amendment, and is therefore grandfathered into the First Amendment as a limitation to the free speech rights of common carriers.

The First Amendment rights of common carriers are restricted by the longstanding requirement that they serve everyone. That means a common carrier like Poster—which operates as the primary vehicle for the public to self-publish their musical compositions and writing—can’t block its services to certain groups because it disagrees with the substance of that music or writing. Because Poster is a common carrier, and common carriers must be open to all, Poster must allow anyone to post their artistic endeavors to its site—regardless of whether Poster agrees with that speech. Poster’s opinion about what its visitors should and shouldn’t post on its site is irrelevant—because as a common carrier, it is the dominant provider of a critical and necessary public service: self-publishing. Therefore, as a common carrier, Poster’s First Amendment rights are restricted by an established requirement of common carriers: They must keep their services open to all.

Poster's First Amendment rights are limited by a longstanding requirement of common carriers: That they open their doors to anyone who wants to use their services, because this constraint on the First Amendment rights of common carriers existed at the time of this country's founding. Therefore, this limitation on common carriers, requiring that they keep their doors open to anyone who wants to use their services, is an incorporated limitation on common carriers' First Amendment rights. This Court in *PruneYard* determined that a private shopping mall's First Amendment rights did not protect against serving as a forum for other people's speech. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 77, 85, 88 (1980). Because it was a privately-owned space that served a public service—providing people a place to speak their views openly. In this way, it functioned similarly to a common carrier—it was required to keep its doors open and serve as a forum for anyone who. Similarly, Poster is a private space that serves a public service: giving people a platform to express their artistic creations and writings. This Court in *PruneYard* determined that when a private space becomes a central public forum, the First Amendment does not allow that private entity to be the arbiter, or editor, of its public forum. That's because to do so would stifle speech—if people cannot post their compositions and writings, on Poster, then where? There is no other platform that compares. Because Poster is a common carrier, its free speech rights are limited by the historical parameter requiring common carriers to extend its services to all who enter.

C. Speech Rights of Common Carriers Like Poster Are Restricted, as They Exercise Limited Editorial Discretion as They Serve as a Public Space for Its Users to Share Their Artistic Endeavors, and Do Not Write or Edit Content on Their Website.

The First Amendment speech of common carriers like Poster are “relatively weak,” because they host content, and do not edit or comment on content. *Denver*, 518 U.S. at 739. This Court does not afford common carriers the same wide First Amendment protections it gives to journalistic endeavors, because common carriers are the platform where others exercise their speech—they do not generate their own independent ideas. *Id.* This Court does not afford common carriers the same wide First Amendment protections it provides gives entities like newspapers and broadcasters wide speech protections. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984). Common carriers like Poster should not be afforded the same First Amendment rights as journalists, because they do not create their own content as news organizations do. Instead, common carriers merely provide a forum for others to generate content. Because Poster is a common carrier that serves as a forum for others to vocalize their own speech, and does create its own independent works, is less deserving of broad First Amendment protections. Moreover, entities like Poster retain their ability to disagree or speak out against the content users post on their website that they find objectionable. Poster, as a common carrier, does not forfeit its ability to reject the content posted on its website. Because no one would suggest common carriers like Poster implicitly agrees with the content posted on its website, requiring them to serve as a forum for public speech does not stifle their voices. *PruneYard*, 447 U.S. at 87. The bottom line is this: The historic requirement grandfathered into the First Amendment—requiring common carriers like Poster to serve all users—does not

muzzle that common carrier's voices, because they can speak out whenever they want. Indeed, common carriers like Poster, can voice whatever disapproval they want, as corporate entities. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16 (1986).

Common carriers like Poster retain limited free speech rights because they act as a forum for others to create and post their content, and do not exercise independent editorial oversight over their website. The First Amendment provides much more limited free speech protections to common carriers like Poster because they act as public gathering spaces for others to share and exchange ideas—and do not exercise their own editorial curation and independence. *Denver*, 518 U.S. at 739. In its twenty-year history, Poster exercised editorial discretion and banned content just once before ripping Thornberry's online book from its website. While newspapers and broadcasters craft their own craft and edit their own reporting every day, all day, Poster serves as a platform for hundreds of thousands of people to post their own content.

Though Poster in its terms and conditions states it retains editorial control over its website, in practice the website does not. Poster never curates its own content, instead it serves as a space for others to display their works. In this way, Poster is a common carrier deserving of less First Amendment protections. Though Poster traces its roots to an organization with pacifist beginnings, it forfeited the right to restrict the speech of its users when it accepted the role as a common carrier—when it allowed the public to self-publish on its website and quickly became a force in the self-publishing world. Though it claimed editorial discretion its terms and conditions, in practice it functioned as a common carrier, because it served as a forum for hundreds of thousands of people to post their art and musical endeavors. Because Poster operates as a common carrier, this Court should treat it as a common carrier. Common carriers like Poster are less deserving of First Amendment protections because they have no independent voice.

Instead, they serve as a forum for others' voices. Requiring common carriers like Poster to serve as an open forum for anyone's work does not violate the Free Speech Clause, because their rights are limited—as they act only as a forum, and do not function in any editorial capacity.

D. The Limitations to Common Carriers' Speech, Like Poster's, That Results from Both Historic Parameters and Their Limited Exercise of Editorial Discretion Does Not Affect Their Ability to Exercise Their Speech Rights as Corporate Actors.

Poster, like any other corporation, retains its First Amendment right as a corporation to speak out against any content it finds objectionable. *Pac. Gas*, 475 U.S. at 16. But, as a common carrier, its First Amendment right to restrict content from its site is limited—because it serves as the dominant, open public forum for self-publishing. Poster can at any time reject the ideology of any of its users. Allowing others to share their voices on Poster's website does not stifle Poster's voice. Because Poster is a common carrier, its First Amendment rights are more limited, because it serves as a forum for all to share their artwork and does not function in any editorial capacity. But these limitations do not stifle Poster can exercise its voice as a corporate actor whenever it wants. As the largest self-publishing platform on the internet, its voice is large and carries weight. Moreover, this limitation on the First Amendment rights of common carriers like Poster—which requires that they serve as a forum for all who wish to speak—is justified because Poster can easily separate itself from the speech of others and can voice its own opinions. Requiring Poster as a common carrier to host content it does not agree with, does not silence Poster. Therefore, it can't and doesn't violate Poster's speech rights as a corporate entity.

The restriction of the First Amendment rights of common carriers like Poster that demand that they open their doors to everyone—stands on especially strong footing when common carriers are not required to sign off on the speech of those they serve. *See PruneYard*, 447 U.S. at

87 (holding that First Amendment rights of owners of the private shopping mall were not violated by mandating they host certain speech as they could separate themselves from what was said by visitors to the mall); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 684 (1994) (indicating that a cable channel must host the speech of other programmers who would otherwise not have a platform to air their views).

As an open forum for thousands and thousands of people, it is foolish to suggest the public associates Poster with everything posted on its website. The public understands that Poster is an open platform, can easily separate the company from the disparate content generated by its many users. Moreover, the restrictions on common carriers' First Amendment rights—demanding that they allow anyone who wants to post on their site can post whatever they want, preventing them from banning anyone from posting on their service—carry special weight because they do not prevent common carriers from openly expressing its own viewpoints.

II. THE DELMONT COMMON CARRIER LAW, WHICH BARS COMMON CARRIERS FROM DONATING TO RELIGIOUS, POLITICAL OR CHARITABLE ORGANIZATION, COMPORTS WITH THE REQUIREMENTS OF THE FREE EXERCISE CLAUSE.

Though a pacifist Protestant organization created Poster, its religious roots do not exempt it from complying with the law. Religious organizations cannot cite their religion to avoid following the law. *Emp. Div. Dep't of Human Res. v. Smith*, 494 U.S. 872, 878–79 (1990). A mother can't cite her religion to avoid complying with child labor laws. *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944). A soldier can't dodge the military draft because of his religion. *Gillette v. United States*, 401 U.S. 437, 461 (1971) In the same way, a corporate common carrier—charged with ensuring the public has equal access to its essential services, can't use its religious roots to avoid neutral and equal access to all of its users.

The common carrier law in Delmont prevents common carriers from financially contributing to religious causes. Because Poster is a common carrier, it must comply with the Delmont common carrier law, and stop its payments to the peace-seeking religious organization that created it. The Free Establishment Clause of the First Amendment sets out that the federal government cannot regulate religious beliefs. *Smith*, 494 U.S. at 877. But organizations that hold religious views, like Poster, are not above the law, because of those religious views. *Id.* at 877–79. This Court in *Smith* found that if a law is both “neutral and generally applicable” it fails to trigger First Amendment protections. *Id.* at 879.

A law is neutral if it references religion on its face when its secular intentions are apparent through its context and on its face. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). Though the law barring common carriers from making religious contributions references religion on its face, it is neutral because the law states it never intended to violate the Establishment Clause, and its crafters explained the law aimed to keep common carriers from favoring any specific entity. A law is generally applicable when it places the same burdens on religiously motivated activities and similarly secular activities equally. *Does 1-6 v. Mills*, 16 F.4th 20, 29 (1st Cir. 2021). When a law targets and restricts religious activity specifically, the law is not generally applicable, and violates the Free Exercise Clause of the First Amendment. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542–43 (1993); *see also Fulton*, 141 S. Ct. at 1877 (providing a law is not generally applicable if it allows for unfairly targeted exceptions); *Smith*, 494 U.S. at 878 (holding that if a provision applies evenly to all, but incidentally affects religious activity, it is generally applicable). Because law prohibits common carriers from giving money to not only religious causes, but also political and philanthropic causes, it is generally applicable. Therefore, it does not violate the Free Establishment Clause.

The common carrier law in Delmont does not violate the Free Establishment Clause because it is both neutral and generally applicable. The common carrier law is neutral because it states on its face it was never meant to violate the Free Establishment Clause, and because the goal of the law was to prevent common carriers from favoring any one entity on their platform. The common carrier law is generally applicable because it does not target religious contributions specifically. Rather, it prohibits common carriers from making any donation—political, charity or otherwise. Therefore, Poster as a common carrier must comply with the law and give up its fifteen percent contributions to its pacifist Protestant founders to eliminate any perceived biases it may have for any one group’s content on its common carrier, self-publishing platform. This Court should therefore grant the government’s motion for summary judgment, as the common carrier law does not violate the Free Establishment Clause of the First Amendment.

A. The Common Carrier Law Is Neutral Because Its Secular Intentions of the Law Are Apparent on Its Face, as It Applies to All Common Carriers Regardless of Their Religious Affiliation and Its History Shows Its Secular Intentions.

Poster must comply with the Delmont common carrier law because it is neutral as its language and context indicate a secular intention: Preventing common carriers from favoring one group’s content over the other. A law is neutral unless it is “intolerant of religious beliefs” or somehow restricts religious practices. *Fulton*, 141 S. Ct. at 1877. The Delmont common carrier law does not affect religious practices—it merely bars religious contributions by common carriers. This Court has made it clear that a law is not neutral when it discriminates on the basis of religion on its face, “without a secular meaning discernable from the language or context.” *Lukumi*, 508 U.S. at 533. Because the secular intentions of the common carrier law—to prevent

common carriers from prioritizing one user over the other—are apparent on both the law’s face and through a contextual analysis, it is neutral.

The plain text of the provision regulating common carrier contributions indicates its secular goal. First, the language of the provision expressly states on its face that it is not meant to violate the freedom of religion guaranteed by the First Amendment’s Free Establishment Clause. Second, the language of the provision does not target common carriers that have religious affiliations. Instead, it generally prohibits all common carriers from making contributions to religious organizations, regardless of their religious affiliations. Moreover, the language of the law plainly states its secular intentions. The law specifically states in its was drafted with the intention of complying with the Establishment Clause. This specific call out language within the law—disclaiming that the law is not meant to trigger the Establishment Clause—demonstrates its neutrality on its face. Because the language of the common carrier law indicates its secular meanings and intentions, it is on its face neutral.

Moreover, the context and history of the common carrier law reveal its the secular aims. To determine neutrality of law, this Court determined that several factors come into play. *Lukumi*, 508 U.S. at 540. They include: “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body.” *Id.* The architect of the provision, the governor of Delmont, said that the goal of the common carrier provision was entirely secular in nature: The prohibition on common carrier contributions to religious organizations works to block common carriers from favoring one organization’s speech on its platform. Further, the governor said he was inspired to draft the

provision limiting the financial contributions of common carriers on the campaign trail, after hearing constituent concerns about the power technology companies hold over free expression.

The law is entirely motivated by a legitimate secular interest: ensuring common carriers like Poster do not favor one group over another. This goal is especially important given the role common carriers like Poster have today. Poster functions as an open forum for people to share their artistic endeavors and writings. Common carriers must keep their doors open to all, without showing a preference one user over another. The common carrier law, which bans these entities from donating not only to religious causes, but any cause, ensures their neutrality. Therefore, the common carrier law is neutral, as demonstrated the context behind the law.

Though the Delmont common carrier law prohibits common carriers from contributing to religious organizations, the secular reasoning behind the provision is apparent from both its language and context. It does not aim to place burdens on common carriers because of their religious beliefs; rather, it works to ensure common carriers maintain their neutrality, and do not give preferential treatment to one of group over another on its platform.

Moreover, the common carrier law meets more nuanced and specific understanding of neutrality. In his concurrence in *Lukumi*, Justice Scalia expanded on the concept on neutrality. 508 U.S. at 558. A law is not neutral, he said, if “by its terms” it puts burdens on people because of their religion. *Id.* The common carrier law places no burden on Poster because of its religious views. Instead, it broadly sets out that common carriers cannot contribute to any cause—religious, philanthropic, or political. It does not target Poster because of its religious roots, and instead installs a bar on all common carrier contributions.

Further, the common carrier law meets Justice Souter’s test for neutrality, which he laid out in his separate concurrence in *Lukumi*. He suggested out that neutrality is not just about ensuring

laws are secular and do not discriminate against religion on their face. *Id.* at 561. It also includes a requirement that the government exempt religious practices from laws that are secular. *Id.* But a corporation like Poster donating a portion small of its profits essentially to its parent company—the church that created it—to support their philanthropic efforts is not a religious practice. Instead, it is a donation to a charity. The money Poster gives to the church that founded is not akin to tithing, because their donations does not support the church’s functionality. Instead, the money supports the church’s education and cultural efforts in the community. Because the donations Poster makes to the church that founded it support educational and cultural endeavors, their donation is not a religious practice. Instead, it is the equivalent to a secular philanthropic donation. Therefore, the common carrier law does not need to carve out an exception for it.

The common carrier law passes the neutrality test on all fronts. Problems with neutrality often crop up when a law is overly broad, and unnecessarily affects people’s religious activities. David Bogen, *Generally Applicable Laws and the First Amendment*, 26 Sw. U. L. Rev. 201, 208–09 (1997). But, the Delmont common carrier law is narrow because its reach is limited to common carriers—a small group of organizations that provide platforms for people to express themselves. It does not target common carriers because of their religious beliefs—and its secular goal can be seen both on its face, and through an examination of its history and goals.

The common carrier law is neutral because on it is secular on its face. It does not burden common carriers because of their religion—it bars them generally from making contributions to religious, philanthropic and political organizations to ensure they treat all users equally. Moreover, the circumstances surrounding the provision’s inception and goals indicates its secular goal of ensuring all common carriers treat users in an unbiased fashion. Further, the law does not affect religious practices—because it bars donations to religious organizations and does not

affect any sort of practice of a religion. Rather, it ensures common carriers remain unbiased. Because the common carrier law is neutral, it does not violate the Establishment Clause. Therefore, Poster must comply with the law, and give up its donations to its Protestant founders.

B. The Delmont Common Carrier Law Is Generally Applicable Because It Bars Common Carriers from Donating to Both Secular and Religious Organizations and Does Not Serve as a Prohibition on Religious Contributions Exclusively.

Poster must comply with the common carrier law because it is generally applicable, as its restrictions do not single out religion. Instead, the law imposes the same across the board bar: and bars common carriers from financially supporting any cause. A law is generally applicable when it puts the same kind of restrictions on religious and secular activities. *Does*, 16 F.4th at 29. When a law singles out religious activities and places specific, unique restrictions on those activities, is not generally applicable and violates the Free Establish Clause of the First Amendment. *Lukumi*, 508 U.S. at 542–43. The common carrier law prohibits political contributions. It bans philanthropic donations. And it bars religious contributions. Because the law does not target religious contributions specifically, and instead broadly bars common carriers from giving money to any cause, it is generally applicable.

Indeed, the Delmont common carrier law does not target religious contributions at all. Rather, it prohibits common carriers from giving money to any entity—religious or otherwise. It creates a broad carrier to ensure common carriers maintain their neutrality. Though the state, through the attorney general’s comments, indicated that the law would apply to religiously affiliated organizations like Poster, his comments do not affect the fact that the law applies across the board, to all common carriers, regardless of their religious affiliation. Therefore, it is generally applicable as it applies evenly to all groups. Moreover, the law works to restrict all

donations common carriers make—and does not target religious contributions specifically. The goal of the law is not to limit religious contributions of religious organizations. It is to ensure common carriers do not give any specific advantage to one group over another on its platform. Because the law makes no special exception barring religious donations, and instead prohibits any type of donation, it is generally applicable. Therefore, Poster must comply with the common carrier law and stop giving to its Protestant creators.

A generally applicable law does not violate the Free Establishment Clause of the First Amendment because this Court determined a person’s religious beliefs don’t exempt him from following the law. *Smith*, 494 U.S. at 877–78. If a law places restrictions on a specific religious practice, and but leaves similar secular activities unregulated, it is not generally applicable. *Does*, 16 F.4th at 29. Here, the common carrier law applies equally to religious and secular contributions. A common carrier like Poster cannot give money to any entity—religious, charitable or political—under the law. Because the common carrier law does single out and place restrictions on religious activities, and instead bars common carriers from making all sorts of contributions, religious or otherwise, it is generally applicable and does not violate the Free Establishment Clause of the First Amendment. Therefore, Poster must comply with the requirements of the common carrier law and stop giving money to its Protestant founders.

CONCLUSION

This Court should reverse the judgment of the United States Court of Appeals for the Fifteenth Circuit.

Respectfully submitted,

ATTORNEYS FOR PETITIONER

BRIEF CERTIFICATE

Team 017 certifies that the work product contained in all copies of Team 017's brief is in fact the work product of the members of Team 017 only; and that Team 017 has complied fully with its law school's governing honor code; and that Team 017 has complied with all Rules of the Competition.

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