No. 22-CV-7654

In The

Supreme Court of the United States

September Term 2021

WILL WALLACE,

Petitioner,

v.

POSTER, INC.,

Respondent,

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

BRIEF FOR PETITIONER

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Counsel for Petitioner
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The Bluebook: A Uniform System of Citation

2022 Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition

QUESTIONS PRESENTED

1. Pursuant to the First Amendment the legislatures shall not enact a law that "abridge[es] the freedom of speech". U.S. Const. amend. I. The State of Delmont enacted the Delmont Common Carrier Law, Delmont Rev. Stat. §9-1.120, which prohibits Poster, Inc. from restricting access to individuals with differing political and religious views. Does Delmont Rev. Stat. §9-1.120 violate Poster Inc.'s right to freedom of speech?

2. Laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable. The Delmont Common Carrier Law, Delmont Rev. Stat. §9-1.120, prohibits common carriers from contributing to political, religious, as well as philanthropic causes. Is the Delmont Common Carrier Law subject to neutral and generally applicable?

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STATEMENT OF JURISDICTION

Poster, Inc. brought this action against the State of Delmont alleging First Amendment violations under the state's Common Carrier Law. R. at 6. Poster is incorporated and headquartered in the State of Delmont. R. at 1. The State of Delmont represented by Will Wallace appealed the decision of the United States Fifteenth Circuit Court of Appeals to this Court. The Supreme Court of the United States granted a writ of certiorari upon the petition of Will Wallace pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

Katherine Thornberry was denied the opportunity to share her literary novel with the world after expressing her disdain with animal experimentation. R. at 4. Since November 2018 Ms. Thornberry was a paying member of the self-publication platform Poster, Inc. ("Poster"). R. at 3. Poster was incorporated in the State of Delmont in 1998 in part by co-founder and CEO John Michael Kane. R. at 2, 36. The corporation is run by members of The American Peace Church ("APC"). R. at 2. APC is a Protestant denomination that promotes non-aggression and pacifism. *Id*. For about one hundred years the APC has promoted peacebuilding through education and cultural development. *Id*. One of the major tenants of the religion is the support of artists and writers from religious and secular backgrounds. *Id*. Members of the Church are even called to tithe to support "artists, poets, educators, and musicians" in their communities. R. at 37.

As an extension of this call, Poster, Inc. was founded to promote peace and nurture the talents of artists and creatives in the community. *Id*. Over the years, this has resulted in a popular internet platform that controls seventy-seven percent of the self-publication market. R. at 2. Poster has even won awards for the most affordable and widely used self-publication platform.

R. at 35. This is due to its low prices that make its competitors almost invisible. *Id.* However, Ms. Thornberry did not benefit from the promotion of her artistic talent after attending the "Freedom for All" animal rights rally over the 2020 Fourth of July weekend in Capitol City. R. at 4. Motivated by the performance of her favorite band *Chimera*, Ms. Thornberry posted to her Poster account and other social media outlet advocating against violence against animals via experimentation. *Id*. Being that the political cause was popular and had the support of many including some prominent celebrities, Ms. Thornberry received a lot of traction to her Poster account. R. at 4. She subsequently created an alternative title to her novel; "Animal Pharma" or "Blood is Blood." *Id*. The independent novelist had previously seen a "healthy number of rents and purchases" of her artistic content, and there was only a slight increase after the decision to create an alternate title. *Id*.

Following the animal rights rally, Mr. Kane expressed his disdain for the violence that resulted from some protesters in an op-ed of a major newspaper. R. at 4-5. Ms. Thornberry was not involved in any of the violence nor were there any accusations that she was. R. at 4. However, there were a few accounts of physical incidents with police officers, physical altercations between counter-protesters, and other physical contact. R. at 5. There were also clips of the phrase "Blood is Blood" being used to express AntiPharma's view that "all living beings are equal." *Id*. While there is a sizable number of radical members of AntiPharma, not all supporters incited violence. *Id.*

Upon reviewing its revenue report, Poster saw the slight increase in Ms. Thornberry's sales after updating her novel's title. *Id.* Per Poster's User Agreement, the company may at any time block or remove an account for any reason or for no reason at all. (Poster, Inc., User Agreement (effective December 10, 2019). It's terms also "disclaim endorsement of any views

expressed in the material published and retain editorial discretion to accept or reject material submitted by an artist as it sees fit." *Id.* This resulted in Ms. Thornberry's account and subscription to be suspended until she edited her title. R. at 5. Such an act has only occurred one other time when Poster took the same approach when a work was titled "Murder Your Enemies: An Insurrectionist's Guide to Total War" prior to the enactment of Delmont's Common Carrier Law. *Id.*

Pursuant to Delmont Revised Statute §9-1.120(a), internet platforms are considered common carriers when they have a "substantial market share". R. at 3. This requires that the platforms "serve all who seek or maintain an account, regardless of political, ideological, or religious viewpoint" and to "refrain from using corporate funds to contribute to political, religious, or philanthropic causes." *Id.* There are currently no exceptions for any type of entity whether religious, political, or some other category. *Id.* There was also a "no contribution provision" included to ensure that there was no interference with the Establishment Clause. Delmont Rev. Stat. §9-1.120(b). Poster had notice of this statute and lobbied against its passage. *Id.* It also had notice that a violation of this statute would result in fines "up to thirty-five percent of the businesses daily profits compounded daily" until the company conforms with the law. *Id.*

Nonetheless, Poster suspended Ms. Thornberry's account. R. at 5. As a result, Ms. Thornberry protested on August 1, 2021, alleging artistic suppression from Poster. R. at 6. This lawsuit arose when the State of Delmont heard of the violation and imposed fines as stated in the statute. *Id.* Mr. Wallace made a public statement that Poster's conduct was a form of political discrimination against Ms. Thornberry. *Id.* He reasoned that the law was enacted to protect the First Amendment rights of Delmont citizens and prevent favoritism on public forums. R. at 35. Poster's conduct contradicted with the principal purpose of the common carrier law which was to

prevent online platforms from silencing the views of those they disagree with and ensure true "accountability, neutrality, and accessibility" of the internet. R. at 34.

B. PROCEDURAL HISTORY

As a result of Poster's violation of the Delmont Common Carrier Law, Poster, Inc. was fined as permitted by state statute. The company sued the Attorney General Will Wallace in the United States District Court for the District of Delmont. Poster alleged that it was not a common carrier, and that the Delmont law violated its constitutional rights to free speech and religious freedom. *See* ECF 1, Poster Compl. R. at 1, 2, 6. The district court granted the State of Delmont's motion for summary judgment holding that Poster is a common carrier and the State Common Carrier Law is constitutional. R. at 2, 16. *See also* ECF 9, Delmont Mtn. Sumn. J at 12. Poster then appealed to the United States District Court for the Fifteenth Circuit. R. at 18. The Circuit court determined that Poster is a common carrier contrary to the company's belief. R. at 26. However, the Circuit Court determined that the Common Carrier Law violated Poster's First Amendment freedom of speech and free exercise rights. R. at 27, 33. This Court has now granted a petition for a Writ of Certiorari for which this brief is written. R. at 39.

SUMMARY OF THE ARGUMENT

As a common carrier, Poster is entitled to a lesser degree of First Amendment freedom of speech rights. Poster can be classified as a common carrier by the State of Delmont because it controls a large share of the self-publishing market and is a large corporation. Furthermore, like traditional common carriers Poster charges the public a fee for the use of its services. Corporations have the right to freedom of speech under the First Amendment. However, when a corporation is considered a common carrier, its rights may be regulated as consistent with the public interest.

The Delmont Common Carrier statute is permissible because it is constitutional and does not prohibit or force Poster to endorse speech. The statute in question would have been valid at the time of founding because states generally have the authority to regulate common carriers so long as federal law is not violated. Furthermore, Poster has and may continue to express its opinions regarding pacifism without restricting individuals like Ms. Thornberry from accessing its platform.

The State of Delmont's Common Carrier Law is constitutional because it is facially and objectively neutral. A law is not facially neutral when it "refers to a religious practice without a secular meaning" and it "proceeds in a manner that is intolerant of religious beliefs" or "restricts practices because of their religious nature." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021). The state of Delmont's Common Carrier Law proves to be facially neutral because it equally applies to political, religious, and philanthropic motives and corporations. Under the statute, all are prohibited from contributing to certain causes with corporation funds. Furthermore, the statute does not target Poster's religious beliefs. Pursuant to the factors used to determine whether a law is objectively neutral, the Common Carrier Statute shall still be deemed neutral. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540, 113 S. Ct. 2217, 2230 (1993). Ultimately, there was no discriminatory intent in the State of Delmont's Common Carrier Law against Poster or any other corporation.

Finally, the State of Delmont's Common Carrier Law is generally applicable because it does not provide a mechanism for individualized exceptions. Under *Fulton* "a law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 141 S. Ct.

at 1872. However, Delmont's Common Carrier Law does not allow for any exemptions of any kind and as a result it is generally applicable.

For these reasons, this Court should reverse the decision of the United States Circuit Court for the Fifteenth Circuit and hold that the State of Delmont's Common Carrier law is constitutional.

ARGUMENT

I. The Fifteenth Circuit erred in concluding that Delmont Rev. Stat. §9-1.120 is unconstitutional because Poster's right to free speech was not violated.

Pursuant to Delmont Rev. Stat. §9-1.120, an internet platform is considered a common carrier when it has a substantial market share. R. at 3. As a common carrier, an internet platform is not permitted to refuse an individual who wishes to maintain an account access to its platform. *Id.* This Court has permitted states to regulate common carriers absent contrary federal law. *See generally Munn v. Illinois*, 94 U.S. 113 (1876). However, this Court has not given a definitive statement as to the common carrier status of internet platforms like Poster. *See generally Biden v. Knight First Amendment Inst. At Columbia Univ.*, 141 S. Ct. 1220 (2021). Nonetheless, the State of Delmont has rightly defined Poster as a common carrier by using the analysis used at common law and court precedent. Like telephone companies, Poster's First Amendment rights are justifiably limited because the Delmont statute would have been permissible at the time of founding and Poster will still maintain its ability to promote its limited right to free speech. *See Biden v. Knight First Amendment Inst. At Columbia Univ.*, 141 S. Ct. 1220 (2021).

A. The Delmont Common Carrier Statute applies to Poster because it is a common carrier under Delmont State Law.

To apply the Delmont Common Carrier Statute to Poster, this Court must first determine that Poster is a Common Carrier. Under common law, a common carrier is defined as a commercial entity that carries goods for the general public at a specified fee. CARRIER, Black's

Law Dictionary (11th ed. 2019). Some courts also consider the market share and size of a business as evidence of the entity's common carrier status. *See generally Biden v. Knight First Amendment Inst. At Columbia Univ.*, 141 S. Ct. 1220, 1225 (2021). These principles have also been affirmed in early case law regarding the classification of public entities as common carriers. Some early Supreme Court decisions included classifying new and rapidly growing private businesses as common carriers. *See generally. Munn v. Illinois*, 94 U.S. 113 (1876). *Brass v. North Dakota*, 153 U.S. 391, 404 (1894).

In *Munn v. Illinois*, the state legislature attempted to impose regulation on grain warehouses in the Chicago area. *Munn*, 94 U.S. at 123. The warehouse owners alleged that the state statute was unconstitutional it violated its Fourteenth Amendment Due Process Right as a private business. *Id.* The Chicago legislature justified its regulation of the grain industry by pointing to the increasing demand of grain, the interstate activity associated with the business, and the rapid growth of the industry. *Id.* at 133. The Court in *Munn* ruled that private businesses affecting public interests are subject to reasonable government regulation, and such regulation is not a deprivation of the business' Fourteenth Amendment Due Process Rights. *Id.* at 125. It was reasoned that the common law rule that when "private property is 'affected with a public interest, it ceases to be *juris privati* only'" did not end with the adoption of the Fourteenth Amendment.[1] *Id.* at 126. When this rule is applied, the private business owner is granting the public an interest in the use and will be required to submit to the control of the public for the common good. *Id.* at 126. The grain warehouses in *Munn* affected the community as seen by the rapid commercial growth and importance of the grain industry which led to its classification as a common carrier subject to state regulation. *Id.* at 126, 132-33. The Court then analyzed the state statute to

[1] *Juris privati* is a letin term for "of private right; not clothed with a public interest." https://www.merriam-webster.com/legal/publici%20juris

determine whether the law itself was reasonable as opposed to excessive or arbitrary. *Id.* at 129. Being that the regulation imposed in Chicago only changed a current principle of the law, the Court determined that there was no unreasonableness. *Id.* at 134.

Like Poster, the grain warehouses in *Munn* performed a service that the public was interested in, self-publication for artists and creatives. While Poster is not the only one in its market, it has been recognized as the premier choice in self-publishing which is home to users for over 20 years. Consistent with other common carriers, Poster charges a fee for all those who want to use their platform regardless of whether they rent or sell their artistic products. As stated in the affidavit of Mr. Wallace it is no question that Poster has affected the community of Delmont with the services it offers. This is like the grain industry which, like Poster, has the ability to even affect interstate commerce. Furthermore, the law enacted by the State of Delmont merely included a new and rapidly growing industry into the definition of a common carrier as was done in *Munn*. The Delmont law is also reasonable in that it is consistent with the state regulation of common carriers. Therefore, this Court should reaffirm the holding in *Munn* and permit the categorization of Poster as a common carrier under the Delmont statute.

In *German Alliance Insurance Company v. Lewis*, the insurance company alleged that as a private business the State did not have the authority to regulate its business. *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 405, 34 S. Ct. 612, 616 (1914). The company further alleged that the business was voluntarily entered into and contracts between the business and customers were also private. *Id.* at 405. However, this Court held that the Kansas regulation was constitutional and therefore could be applied to the insurance company. *Id.* at 418. In its ruling, this Court determined that there can be a public interest when personal contracts as opposed to mere property is involved. *Id.* at 407. It was determined that the distinction between property and

personal contracts in determining public interest was "artificial" and was not to be maintained. *Id*. *Munn* was cited for establishing that a statute can "extend the law" to address "new development of commercial progress." *Id*. at 408. According to the Court, insurance affects the public interest because such contracts are interdependent rather than independent like ordinary contracts. *Id*. at 414. Such contracts protect the public's wealth in a way that ordinary business contracts do not. *Id*. at 413. This is further supported by the fact that insurance is deemed by the court to be a necessary business activity. *Id*. at 414-15.

In *German Alliance* and *Munn*, it was not material that the regulation was enacted after the formation of the private business. Rather the Court analyzed whether the business at the time the respective statute was enacted was permitted to be regulated under state law. The insurance company was not a traditional common carrier similar to Poster. However, the Court determined that a private business that deals in personal contracts can still be subject to regulation when a high value service is provided. Poster provides a service that is not available on other platforms. It grants artists the opportunity to self-publish and share their materials when they are not otherwise promoted by larger publishing companies. This enables Poster to have a strong influence on the creative and artistic sector as evidenced through the termination of profits seen by Ms. Thornberry upon her suspension from the platform. Such an act will also affect the types of content consumers are permitted to have access to. While fire insurance is arguably more interdependent than art and literature, it cannot be denied that Poster like the grain elevators and insurance company has become of such great importance that it would be reasonable to be treated as a common carrier. This is further evidenced by the increasing use of internet platforms like Poster that make it increasingly difficult to function in this first-world environment without access to these public platforms. NOTE: FACEBOOK USED TAKEDOWN AND IT WAS

SUPER EFFECTIVE! FINDING A FRAMEWORK FOR PROTECTING USER RIGHTS OF EXPRESSION ON SOCIAL NETWORKING SITES, 68 N.Y.U. Ann. Surv. Am. L. 891, 896.

In *American Orient Express Railway Company,* the District of Columbia Circuit Court of Appeals determined that monopolies are oftentimes required to act as common carriers when their services are deemed essential to the general public. *Am. Orient Express Ry. Co., LLC v. Surface Transp. Bd.*, 376 U.S. App. D.C. 56, 59, 484 F.3d 554, 557 (2007). A monopoly is a common carrier when it "serve[s] the public indiscriminately and [does] not make individualized decisions, in particular cases, whether an on what terms to deal." *Id*.

Poster currently holds seventy-seven percent of the artistic self-publication market. While this would not constitute as a monopoly under Judge Learned Hand's analysis it would be according to lower courts. Regardless, Poster is without a doubt a large corporation that has hosted "hundreds-of-thousands" of artists for over twenty years. Its competitors can hardly compete as Poster is known for its superior service, functionality, low rates, and popularity. (R. at 10). The size and dominance of Poster attests to its status as a monopoly and its power in the self-publishing market.

B. Common Carriers by their nature are entitled to a lesser degree of First Amendment freedom of speech rights.

The First Amendment prohibits Congress from making any law that "abridge[es] the freedom of speech." U.S. Const. amend. I. This freedom extends to individuals and businesses. In *Citizens United,* the Supreme Court determined that it would be unconstitutional for there to be limits on free speech based on the identity of a party. *Citizens United v. FEC,* 558 U.S. 310, 342, 130 S. Ct. 876, 900 (2010) (*quoting Bellotti*, supra, at 784, 98 S. Ct. 1407, 55 L. Ed. 2d 707). Therefore, corporations were not to be denied the Frist Amendment right to freedom of speech especially when it was expressing a political opinion. *Citizens United,* at 343, 900.

However, corporations may be limited in the exercise of their First Amendment Rights when they are classified as a common carrier. Telephone companies, for example are common carriers that do not have the same editorial privileges as newspapers and broadcasters. *Denver Area Educ. Telcoms. Consortium v. FCC,* 518 U.S. 727, 739, 116 S. Ct. 2374, 2383 (1996).

1. First Amendment Rights granted to common carriers.

a. Telecommunications vs. Information Services

Pursuant to the Telecommunications Act of 1996, telecommunications are treated as common carriers. However, information services are not. *US Telecom Ass'n v. FCC,* 423 U.S. App. D.C.183, 200, 825 F.3d 674, 691 (2016). Telecommunication is the communication between two people or objects at a distance usually by way of telephone, internet, cables, airwaves, or wires. *See generally City of Jefferson City v. Cingular Wireless LLC*, 531 F.3d 595. [2] Such communication is generally offered to the public for a fee. *Centurytel of Chatham, LLC v. Sprint Communs, Co., L.P.*, 861 F.3d 566, 571 (5th Cir. 2017). In contrast, information services include the "offering, of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id*. Under the Telecommunications Act of 1996, information services are not treated as common carriers.

In *Columbia Broadcasting System* ("CBS"), the Federal Communications Commission ("FCC") declared that a broadcaster could refuse editorial advertisements so long as it provides "full and fair coverage of public issues" as obligated by Congress. *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94, 97, 93 S. Ct. 2080, 2084 (1973). However, the Democratic National Committee and the Business Executives' Move for Vietnam Peace alleged that such a determination violated the First Amendment and the Communications Act. *Id*. at 97, 2084. The Court of Appeals held that the Commission was to develop a set of procedures and

[2] https://www.investopedia.com/ask/answers/070815/what-telecommunications-sector.asp

regulations regarding the quantity and quality of advertisements aired. *Id.* at 100, 2085. However, the Supreme Court reversed and held that this mandate would violate the First Amendment and the Congressional intent of broadcast regulations. *Id.* at 132, 2101.

The Court ruled that private broadcasting is to maintain its "journalistic freedom" so long as it is consistent with its public obligations. *Id.* at 111, 2091. This is analyzed under the FCC's "Fairness Doctrine." *Id.* Under the doctrine, all broadcasters are required to adequately cover important issues and reflect different views fairly. *Id.* Because such obligations are difficult to balance with the public interest, broadcasters have been granted a large amount of journalistic discretion. *Id.* The nature of the Communications Act requires flexibility to adapt to the changes seen in technology. *Id.* at 118, 2094. In *CBS*, the decision of the Court of Appeals would have restricted the freedom of speech of broadcast licensees under a misdirected guise of First Amendment protections of the defendants. *Id.* at 120-21, 2095.

If this Court chooses to compare Poster with broadcasters, then the Fairness Doctrine would need to be applied. Therefore, Poster will be required to cover important issues and fairly reflect diverse views on its platform. In the present case, however, Poster has not satisfied either of these requirements. Ms. Thornberry was prohibited from expressing her support of the AntiPharma rally during the Fourth of July weekend. Because of the popularity of the animal rights organization the topic is an important issue in society. Being that Poster does not meet the two requirements for a broadcaster, there is no way to balance the public interest with Poster's alleged editorial rights. This Court should also reject the idea of granting Poster the same journalistic freedom as newspapers because doing so would be inconsistent with this Court's holding in *CBS*. Newspapers are granted broad editorial discretion because they need to appeal to readers and advertisers to ensure financial profit and the public highly values the "journalistic

integrity" of newspaper editors. *CBS,* at 117-18, 2094. As an internet platform Poster does not need to satisfy either of these factors. First, Poster's profit is derived from the payments of its thousands of users and their sales. Second, artists and consumers do not use Poster's platform with the expectation of seeking articles by honest employees. Rather, the artists expect to advertise their work to the public, and the public expects to see content from their favorite artists or discover new artists.

In considering the ability for broadcasting stations to engage in "editorializing", this Court analyzed the Public Broadcasting Act of 1967. *FCC v. League of Women Voters*, 468 U.S. 364, 366 (1984). It was argued that the act violated the freedom of speech of broadcasters. However, the Supreme Court held that there could be regulation of broadcasters, so long as there was a substantial governmental interest that was sufficiently limited to justify its application by the legislature. *FCC,* at 378. The Court reasoned broadcasters may "exercise the widest journalistic freedom consistent with their public duties." *Id.* at 378. This editorial privilege was granted because broadcast frequencies are scarce and must be portioned among applicants. *Id.* at 376.

As seen in *CBS* and *FCC,* this Court has maintained its original analysis of broadcasters under the Fairness Doctrine. This permits flexibility when dealing with the limited amount of broadcasters. However, Poster is an internet platform that does not experience the same level of limitations. Poster also fails to satisfy the two requirements of broadcasters under the Fairness Doctrine. Therefore, a holding that Poster is similar to broadcasters would be inconsistent with this Court's precedent. Newspapers are granted an even greater amount of editorial discretion because of its character and the expectations of society of news editors. However, Poster does not satisfy these requirements and therefore should not be given the same treatment as

newspapers. Of all the communication common carriers Poster is most like telephone companies because it is merely a platform used to transfer information between users. While Poster does share a small amount of its own content this is no different than a utility company sending a newsletter to its customers. *See generally Pac. Gas & Elec. Co. v. Pub. Utils. Com.*, 475 U.S. 1, 106 S. Ct. 903 (1986).

b. Social Media

This Court has not yet decided on how to address the First Amendment Rights or common carrier status of social medial and internet platforms. However, Justice Thomas has alluded to the classification of social media platforms, like Twitter, as common carriers. He holds that such platforms are more like telephones companies. *See generally Biden*, 141 S. Ct. 1220 (2021).

The United States District Court for the Western District of Texas, however, has recently addressed this issue in *NetChoice*. In December 2021, the Texas legislature wanted to pass a bill that would prohibit censorship based on personal expression or geography. *NetChoice, LLC v. Paxton*, No. 1:21-CV-840-RP, 2021 U.S. Dist. LEXIS 233460, at *4 (W.D. Tex. Dec. 1, 2021). This included platforms that operated as a website or app with "more than fifty million" active users in the United States per year; "that is open to the public"; "permits users to create an account"; and permits communication by posting information, comments, messaging, or images. *NetChoice*, at 5. Any platform that satisfied the requirements was required to publish "acceptable use policies"; an accessible complaint system; and a public disclosure of it content, data, and business management practices. *Id.* at 6. Texas filed a motion to dismiss the matter and NetChoice, LLC requested a preliminary injunction to prohibit the enforcement of the statute. *Id.* at 8. The district court denied the motion to dismiss and granted the preliminary injunction to prohibit the law from taking effect. *Id.* at 7-8.

The district court ruled that social media websites were not common carriers and therefore the Texas law violated the websites' freedom of speech. *Id.* at 25. Being that platforms like Facebook and YouTube took measures to curate their platform for a tailored user experience, the court determined that such sites had editorial privileges similar to newspapers. *Id.* at 25. The content on these platforms are frequently "screened, moderated, or curated" via an algorithm or some other method used by the website. *Id.* at 25. For example, Facebook determines how it will moderate "billions of pieces of content" in a way that is tailored and specific to each user which involves a level of judgement. *Id.* at 27. However, there is no evidence that Poster engaged in such an extensive screening process. It could arguably be said that there is no screening process since the only way Ms. Thornberry's title change was discovered was through a revenue report. However, platforms like YouTube and Facebook have a more in depth system that suggests that these platforms are trying to create a specific type of virtual environment for its users as opposed to merely censoring speech. There is no evidence of specific algorithms or frequent editing to ensure each user has an experience tailored to them. Poster merely permits users to pay for an account, post, and share their artistic products with the world.

In applying the Texas statute to freedom of speech the court found that it prevented companies from "engag[ing] in expression." *Id.* at 32. If enacted, the law would require the companies to change and alter their business practices in a way that would have been impossible to comply with by the December 2021 deadline. *Id.* at 15. However, the Common Carrier Law in the State of Delmont would not have imposed any harsh regulations on Poster that would interfere with how it conducted business. There was no requirement that any of Poster's secrets or policies be disclosed to the public. In *NetChoice,* the platforms complained of already

permitted equal access. In contrast, Poster's conduct goes beyond curating the user's experience and in effect prevents access to individuals like Ms. Thornberry. Furthermore,, unlike the social media platforms, Poster charges its users a fee which is a key feature of common carriers.

C. The Delmont Common Carrier Statute is permittable pursuant to the concurrence in *Biden*.

The internet has advanced more rapidly than other forms of technology previously addressed by this Court. In *Biden*, the Court granted a writ of certiorari for a first amendment case involving Twitter. Justice Thomas wrote a concurring opinion addressing the increasingly large amount of speech flowing through social media platforms subject to the control of only a few private entities. *Biden*, 141 S. Ct. at 1221. The Second Circuit Court of Appeals ruled that the Twitter comments were "a public forum" and blocking users by the President of the United States was a violation of users First Amendment rights. *Id*. Justice Thomas suggested that internet platforms are similar to communication common carriers like the telephone. Therefore, regulations that would have been permitted by the founding fathers and that do not prohibit or force speech can be permissible. *Id*. at 1223-24. *See generally United States v. Stevens*, 599 U.S. 460, 468 (2010). Being that this Court has not otherwise analyzed internet platforms as common carriers, the State of Delmont finds Justice Thomas' analysis to be most persuasive.

1. The Statute would have been permissible at the time of the founding of the United States because the regulation is Constitutional.

In *Giboney*, this Court answered the question of whether a state had the authority to impose an injunction on a labor union's right to protest. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 491-92, 69 S. Ct. 684, 685 (1949). Empire Storage and Ice Company was facing ridicule from a labor union for refusing to prevent nonunion peddlers from buying ice in Kansas City. *Id*. at 491-92, 685. However, the conduct that the labor union required was illegal under state law. *Id*. at 492, 686. During the protest the ice company experienced an eighty-five percent

decrease in its business. *Id.* at 493, 686. As a result, Empire Storage and Ice Company obtained an injunction prohibiting the union from protesting on its property. *Id.* This Court held that the injunction in *Giboney* was valid and did not violate the union members' First Amendment freedom of speech rights. *Id.* at 504, 692.

Pursuant to this Court's precedent, there is no constitutional First Amendment right for speech that is "used as an integral part of conduct in violation of a valid criminal statute." *Id.* at 498, 688. The union in *Giboney* was protesting to encourage the ice company to adopt a practice that violated a state statute. *Id.* at 492, 686. However, this Court refused to protect speech when the conduct was inherently illegal in part or in its entirety. *Id.* at 502, 691. When considering the protection of free speech, the speech itself is not looked at "in isolation", rather it is considered in light of valid state and federal law. *Id.* at 498, 688. The law in *Giboney* was one that the state had the authority to legislate, and it was not inconsistent with the laws of the federal government. *Id.* at 502, 691. This Court made it clear that there was no constitutional protection granted to labor union members that would permit them to protest when the union's goal was plainly contrary to the law. *Id.* at 495-96, 687. Furthermore, there was nothing in the United States Constitution that prohibited policy enacted by Missouri. *Id.* at 495, 687.

When Poster suspended Ms. Thornberry's account it violated a valid Delmont statute under the guise of freedom of speech. Poster was aware of the statute and that it would be deemed a common carrier as shown by the corporation's lobbying against the enactment of the statute in 2019. Like in *Giboney*, the State of Delmont has the authority to enact legislation regarding the conduct of common carriers absent contrary federal regulation. Protecting Poster's right to prohibit users like Ms. Thornberry from using its platform would contradict the *Giboney* holding. Poster shall not be permitted to violate a valid state statute merely because it disagrees

with its contents. Such a holding is consistent with the intentions of the founding fathers to bind all individuals and corporations to the law.

2. The statute does not prohibit Poster from speaking, and it does not force Poster to endorse speech.

In *Pacific Gas & Electric Company*, the California Public Utilities Commission required a utility company to include additional "speech" in its monthly billing envelope. *Pac. Gas & Elec. Co. v. Pub. Utils. Com.*, 475 U.S. 1, 4, 106 S. Ct. 903, 905 (1986). The gas and electric company ordinarily distributed a newsletter in its monthly bills to customers. *Id.* at 5, 905. The Commission believed that the space within the envelope was property of the taxpayers, therefore, the space could be used by Toward Utility Rate Normalization ("TURN") "four times a year for the next two years." *Id.* at 5-6, 906. On appeal, the utility company alleged that its First Amendment free speech rights were violated. *Id.* at 7, 907. This Court held that requiring this common carrier to include contrary speech from a third party violated the company's First Amendment freedom of speech rights. *Id.* at 20-21, 914.

This Court reaffirmed the rule that corporations have some sort of First Amendment protections. *Id.* at 16, 912. In addition, this Court ruled that compelling inclusion of contrary speech from third parties on a corporation violates the company's First Amendment rights. *Id.* at 12, 909. Ruling otherwise would "penalize the expression of particular points of view" and "force speakers to alter their speech to conform with an agenda they [did] not set." *Id.* at 9, 908. In *Pacific Gas*, the utility company would have been forced to respond to the views of the third party when they would not have otherwise done so. *Id.* at 12, 909. However, the Supreme Court's ruling ensures that a corporation is not penalized for the benefit of a third party.

Furthermore, the Court contrasted *Pacific Gas* from *PruneYard* because in the subsequent case the shopping center wanted to deny access to the premises. *Id.* at 12, 909-10. In

contrast, the utility company wanted to prevent speech that was contrary to its values when the space was not necessarily open to the public. *Id*.

In the present case, Poster would not have been subjected to penalty in permitting Ms. Thornberry to express her views. In *Pacific*, the concern was forcing a company to address issues contrary to its values when it would not have otherwise done so. However, Poster, Inc. and its CEO, Mr. Kane, have made it clear what Poster's stance is regarding the animal rights rally held in Capital City. Mr. Kane along with other businessmen expressed their disagreement with the events at the rally in a mainstream newspaper. Furthermore, in Poster's User Agreement it is clear that the corporation does not endorse the views of all of its users even though it often promotes content that is secular in nature. Unlike the utility company, Poster has already addressed contrary speech. While AntiPharma is a popular movement Poster also has the benefit of being a household name. Therefore, it is reasonable that Poster's popularity and exercise of free speech of its CEO makes Poster's values clear to the public.

II. The State of Delmont's Common Carrier Statute is neutral and generally applicable.

Pursuant to the First Amendment, Congress is not to make laws that establish a religion or restrict the free exercise of religion. U.S. Const. amend. I. There are, however, some constitutionally permissible burdens that may be imposed on the free exercise of religion. *Church of Lukumi Babalu Aye*, 508 U.S. at 531. Generally, when there is an issue regarding the Free Exercise Clause of the First Amendment the Court will look to the analysis used in Equal Protection Clause cases. *Church of Lukumi Babalu Aye*, 508 U.S. at 540. In *Fulton*, the Court ruled that laws "incidentally burden[ing]" religion are not subject to strict scrutiny if the law in question is both neutral and generally applicable. *Roman Catholic Diocese v. Cuomo,* 141 S. Ct. 63, 1876 (2021). While this has been overturned by the Religious Freedom Restoration Act, being that the Act was not adopted by Delmont, the rule in *Church of Lukumi* shall be applied.

A. The Common Carrier Statute is facially and objectively neutral.

To determine neutrality, it must first be proven that a law is not facially discriminatory. *See generally Church of Lukumi Babalu Aye*, 508 U.S. at 533. A law "fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877. Facial discrimination is evident when the law is intolerant of religious beliefs or restrict religious practices based on the nature of such beliefs. *Id.* However, there is no facial discrimination when there is a secular meaning of the law within its plain language or context. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 534. A law must also satisfy the test for objective neutrality. The relevant factors include historical background, events leading to the policy, legislative history, and statements made by the decision-making body. *Id.* at 540.

A number of New York residents were prohibited from going to church in *Roman Catholic Diocese*. *Roman Catholic Diocese*, 141 S. Ct. at 65. In light of the COVID-19 pandemic churches were limited in the number of members that could congregate in the building. *Id.* However, the same treatment was not given to businesses which were not limited in the number of people who could be present at any given time. *Id.* The Supreme Court held that such a mandate was not facially neutral because of the heightened restrictions placed on churches. *Id.* It was ruled that a regulation that singled out a religion or group of religions was not neutral when there is harsh treatment imposed.

Here, Poster wishes to receive different treatment on the basis of its belief in pacifism. However, when a regulation is put into place the Court is likely to deem the law to be neutral. In *Roman Catholic Diocese*, there were pandemic regulations imposed on all groups, however, the regulations were especially harsh to churches. Unlike in New York, the Delmont Common

Carrier Law is applied equally to corporations regardless of any religious or non-religious affiliations. To do otherwise, Delmont would need a narrowly tailored reason for doing so under strict scrutiny.

This Court may also apply the objective standards for neutrality seen in *Church of Lukumi*. *Church of Lukumi Babalu Aye*, 508 U.S. at 540. There this Court considered the historical background of the law, the events leading to its enactment, and the legislative history. *Id*. In Mr. Wallace's affidavit he mentions that the purpose of the Common Carrier Law's contribution prohibition is to prevent favoritism towards certain viewpoints. R. at 35. This also supports the State's goal in ensuring that constitutional rights of users are secure when using public internet forums like Poster. *Id*. Mr. Wallace even made a statement expressing that the States is protecting the rights of citizens to not be discriminated against because of their personal views. R. at 6.

Therefore, the Common Carrier Statute is facially and objectively neutral. The statute applies to all corporations regardless of religious, political, or philosophical ideologies. Furthermore, the legislative history and historical background of the law support a finding that the Delmont law is objectively neutral.

B. The Delmont Common Carrier Statute is generally applicable.

The Court ruled that a law is not generally applicable when the government can "consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877. Any exceptions make a law not generally applicable because the government is otherwise able to determine which reasons or circumstances justify noncompliance with a statute. *Id*. at 1877.

In *Doe*, Maine's Center for Disease Control required all workers to be vaccinated against the COVID-19 virus. *Doe v. Mills*, 16 F.4th 20, 24 (2021). The only exemption permitted was for those who could receive one from a medical professional. *Id.* It was determined that there would be no exemption based upon religious or philosophical ideologies. *Id.* As a result, employees in Maine alleged their Free Exercise rights had been violated and sought a preliminary injunction to prevent the enforcement of the law. *Id.* This Court denied the injunction sought. *Id.*

It was ruled that a law that is generally applicable is one that does not permit the government to provide a "mechanism for individualized exemptions." *Id.* at 30. This is because laws that are generally applicable cannot use selectively burdened religious groups while not granting secular groups comparable treatment. *Id.* at 29. While having an exemption does not always make a statute no longer generally applicable, this exercise of discretion is strong evidence to permit the Court to apply heightened scrutiny. *Id.* at 30.

Like the State of Delmont, Maine's Center for Disease Control did not permit the use of religious or philosophical exemptions. As seen in the rationale above, the First Circuit Court of Appeals determined that this did not interfere with the general applicability of the law. Rather an exemption would have likely made the regulations in Maine and the State of Delmont no longer generally applicable. While Poster is currently facing the consequences of the Delmont Statute, it is not limited to Poster. Rather it is a law that is enforced when there is a threat to the rights of citizens as occurred in the present case. In *Doe,* Maine permitted an exemption on an individualized basis. The exemption that Poster seeks is not individualized. Rather it would require the State to show favoritism to one religious group that has a corporation closely aligned with its business practices. Such conduct would likely be an issue under the Free Exercise Clause.

"[A] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 141 S. Ct. at 1877 (quoting *Smith*, 494 U.S. at 884). In *Fulton*, Catholic Social Services "would not certify same-sex couples to be foster parents due to its religious beliefs about marriage." *Id*. at 1874. However, in the City of Philadelphia providers were not permitted to "reject a child or family" services based on their sexual orientation absent an exemption from the Commissioner. *Id*. at 1878. This rule applied to those who were "prospective foster or adoptive parents" as well as traditional parents. *Id*. at 1878. The City refused to grant an exception to Catholic Social Services. *Id*. The Court held that the City's rule was not generally applicable. *Id*. The Court reasoned that it was not generally applicable because the City's rule incorporated a system of exemptions that were available at the sole discretion of the Commissioner. *Id*. It was because the rule included a formal system of entirely discretionary exceptions that the Court held that the rule was not generally applicable.

Unlike the City of Philadelphia's rule against rejecting a family or child based on sexual orientation Delmont's Common Carrier Law is generally applicable. In contrast to the City's rule Delmont's Common Carrier Law does not allow exemptions of any kind As a result, the Common Carrier Law is generally applicable because, unlike the City's rule, it does not provide the government with a mechanism for individualized exemptions.

CONCLUSION

To conclude, Delmont Revised Statute §9-1.120 is constitutionally valid as it does not violate Poster's First Amendment freedom of speech or free exercise rights. As a common carrier Poster is subject to a limited amount of First Amendment freedom of speech rights. The Delmont Statute neither restricts nor forces Poster to adopt any type of speech. On the contrary Poster and

its CEO have enjoyed wide discretion in the language used by Poster and content it chooses to feature. In addition, the regulation of a common carrier is consistent with the intentions of the founding fathers. Therefore, Delmont's Common Carrier Law is not violative of Poster's freedom of speech. Under the Free Exercise Clause, the Delmont Statute is both neutral and generally applicable. Facially and objectively the statute effects all corporations regardless of its religious or non-religious affiliation. The law also applies to all corporations evenly without any exemptions that would invoke the use of strict scrutiny. Therefore, this Court should find that the Delmont Revised Statute §9-1.120 does not violate the First Amendment Freedom of Speech or Free Exercise Clauses, and the judgment of the United States Circuit Court for the Fifteenth Circuit shall be reversed.

Respectfully submitted,

Team 007
Counsel for Petition

CERTIFICATE OF COMPLIANCE

Pursuant to Official Rule §III(C)(3):

(i) This work product and all copies of this work product is the work product of Team 007.

(ii) Team 007 has complied fully with its school's governing honor code; and

(iii) Team 007 has complied with all Rules of the Competition.

Respectfully submitted,

/s/ Team 1
Team 1
Counsel for Petitioner

January 31, 2022