No. 17-874

In the Supreme Court of the United States

AVERY MILNER,
Petitioner,

v.

MACKENZIE (MAC) PLUCKERBERG,
IN HIS OFFICIAL CAPACITY AS CHIEF EXECUTIVE OPERATOR OF SQUAWKER,
Respondent.

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

BRIEF FOR THE PETITIONER

Counsel of Record
TEAM NUMBER 10

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eighteenth Circuit erred when it held that Squawker did not engage in state action by hosting and regulating speech in a government-operated constitutional public forum; and
2. Whether the Eighteenth Circuit erred in holding that Squawker's Terms and Conditions are content-neutral, time, place, or manner restrictions that do not violate the First Amendment.

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STATEMENT OF JURISDICTION

The United States District Court of the District of Delmont entered final judgment in this case under 28 U.S.C. § 1331. *Milner v. Pluckerberg*, No. 16-CV-6834, at *1 (D. Del. Jan. 10, 2019). The United States Court of Appeals for the Eighteenth Circuit entered final judgment on Pluckerberg's appeal under 28 U.S.C. § 1291. *Pluckerberg v. Milner*, No. 16-CV-6834, at *25 (18th Cir. 2019). Both courts noted that "there is no dispute over jurisdiction in this case; nor does the case present any justiciability, sovereign immunity, or qualified immunity issues." R. at 7 n. 2, 26 n. 5. Milner timely filed a petition for writ of certiorari under 28 U.S.C. § 2101(c) which this Court granted. R. at 37. This Court has jurisdiction over this matter under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Avery Milner lost his livelihood. Avery Milner ("Milner") is a freelance journalist in Delmont. R. at 4. His forte is opinion journalism—he provides his subjective viewpoint on political and social matters. R. at 4. Milner relies heavily on the income he receives from writing offers and publishing agreements that arise from his interactions on social media. R. at 6. Milner's published articles are often critical of the quality and efficacy of Delmont's elected officials and aged civil servants, including Governor William Dunphry ("Dunphry"). R. at 4. Milner's social media signature style is the "evolving emoji chain," a method of artistically arranging individual emojis strung together in a number of comments posted in quick succession. R. at 19–20. Emojis allow Milner to convey emotion in a way that words cannot. R. at 13. After opening his Squawker account, Milner built an audience of ten thousand followers due to his novel and habitual use of evolving emoji chains. R. at 12, 19, 20. Milner averaged seven thousand views per post. R. at 4.

Dunphry also has a Squawker account. R. at 4. On July 26, 2018, Dunphry posted a link on his account to a proposed bill that criminalizes the conduct of drivers who turn right on red at

any Delmont traffic light. R. at 5. Milner responded to Dunphry's link with a four-comment evolving emoji chain.[1] R. at 5. A number of Squawker users complained about Milner's "obsessive and obscene comments." R. at 6, 22. Mackenzie Pluckerberg ("Pluckerberg"), Squawker's CEO, then censored the emoji chain by covering each comment with a black box containing a skull and crossbones emoji. R. at 6. Pluckerberg also placed a skull and crossbones badge on Milner's profile which censored all of Milner's previous posts and preemptively censored all of Milner's future posts, regardless of their message. R. at 4, 6. Pluckerberg notified Milner that he was censored for violating Squawker's Terms and Conditions ("T&C")[2] for his "violent and offensive use of emojis and spamming." R. at 6. Despite Milner's habit of posting evolving emoji chains at "extremely high frequencies," this was the first time Squawker censored Milner. R. at 20.

As a direct result of being censored, Milner's popularity plummeted. In less than two months, Milner lost eight thousand followers and the average views on his posts dropped to fifty. R. at 4, 20. The decreased viewership led to a substantial decrease in writing offers and the rejection of Milner's articles by statewide newspapers. R. at 6. Because Milner lost the writing jobs, he lost the income he relies on to live, and is now struggling to support himself. R. at 20.

Creating a new account would allow Milner to start fresh without the skull and crossbones badge on his profile, but this would decimate Milner's remaining followers and further decrease job prospects. R. at 6. Milner could watch a Squawker training video and pass a quiz to remove the skull and crossbones. R. at 7. But because he believes that Squawker's censoring violates his First Amendment rights, Milner has not completed the training or taken the quiz. R. at 7, 20.

B. Dunphry's Squawker account is a government-operated public forum. Pluckerberg

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[1] Milner's comments stated: "We gotta get rid of this guy," "🫃," "💉," and "🍆". R. at 5–6.
[2] Selected excerpts from Squawker's T&C are included in Appendix II.

created the Squawker social media platform as a "rival to traditional media." R. at 21. Squawker reaches an international audience and its American users rely on it as a primary "source for information regarding national and local news." R. at 3. Squawker is freely accessible to the public. R. at 2. Anyone with a Squawker profile page can post "squeaks"[3] and may like, dislike, or comment on other user's squeaks. R. at 7. Government officials, like Dunphry, use Squawker accounts to "reach constituents and spread policy ideas." R. at 3. Dunphry concedes that his account is a public forum where his constituents "engage [with him] in the democratic process." R. at 8, 24. Dunphry and his staff use the account to "communicate and interact with the public about his administration," "announce policy proposals," "new public initiatives promoted by his office," and "to understand and evaluate the public's reaction to what he says and does." R. at 9.

In 2018, Dunphry's constituents complained to him about imposter and fake news accounts on Squawker. R. at 3. Dunphry approached Pluckerberg, an old school friend, and suggested that Pluckerberg implement a new Squawker feature to reduce the number of imposter accounts. R. at 3. The new feature signifies verified government-operated Squawker accounts by marking them with the appropriate state flag placed near the owner's name at the top of the page. R. at 3. Pluckerberg added the feature and "vowed to oversee all verifications within the first year." R. at 3. Pluckerberg also "carefully" monitored the speech in Dunphry's public forum. R. at 6.

C. Squawker's business model is built on speech infringement. All Squawker users must consent to Squawker's T&C to create a Squawker profile page. R. at 3. The T&C prohibit viewpoints that Squawker adjudges to be "negative" by forbidding "behavior that promotes violence against" or "directly attacks or threatens other people on the basis of race, ethnicity…

[3] A squeak is a sentence of text not exceeding 280 characters. R. at 2. Squeaks may include links to other websites or longer bodies of text. R. at 2.

[or] gender." Appendix II. The T&C also prohibit "the use of emojis in a violent or threatening manner" and "spamming"—posting four or more squeaks within a thirty-second period. *Id.*

If a user violates the T&C, Squawker censors the offending content, as it did with Milner, by covering it with a black box containing a skull and crossbones emoji. R. at 4. The black box signals to other users that the content is offensive. R. at 4. Initially, the T&C only permitted censoring of individual squeaks. R. at 4. After Pluckerberg implemented the verification feature in 2018, he modified the T&C to give Squawker the additional discretionary authority to censor the entire profile of users that violate the T&C while engaging with a verified government account. R. at 4. Censored profiles are marked, as Milner's is now, with a skull and crossbones badge near the user's name. R. at 6. Censored profiles have black boxes covering all past and future content. R. at 4. Users must log in to their accounts and click on the skull and crossbones emoji at the center of each black box to signal their consent to reveal and view the or mcensored content. R. at 4.

D. Procedural History. Milner brought his First Amendment claim against Pluckerberg in his capacity as Squawker's CEO in the District Court for the District of Delmont. R. at 1. The parties filed cross-motions for summary judgment. R. at 2. Pluckerberg argued that Squawker was not a state actor, and even if it was, that its T&C were permissible time, place, or manner restrictions. R. at 2. The District Court denied Pluckerberg's motion and granted Milner's, finding that Squawker was a state actor and that the T&C constituted content-based and viewpoint-based discrimination. R. at 11, 12. The Eighteenth Circuit reversed, finding that Squawker was not a state actor, and even if it was, the T&C were permissible time, place, or manner restrictions. R. at 32-33. This Court granted Milner's writ of certiorari. R. at 37.

SUMMARY OF THE ARGUMENT

Today, Milner finds himself in a novel situation with monumental consequences. Before

today, this Court has neither held, nor even hinted, that there are circumstances under which private actors have unlimited authority to silence the Peoples' speech in a state-operated public forum—particularly when the private actor is a state agent with actual authority to regulate speech in that forum. Indeed, if this Court should grant Squawker, Delmont's state agent, with such a constitutional license, it would obliterate this Court's state action jurisprudence.

Governor Dunphry could have opened his public forum in a public square or on a government website with state speech regulators axiomatically subject to First Amendment scrutiny. But he did not. He chose to open his forum on Squawker. And when Dunphry accepted Squawker's T&C, he gave his constituents no choice but to be regulated under unduly vague, overbroad, content and viewpoint-based rules if they wished to debate public business. For its part, upon opening Dunphry's account, Squawker agreed to perform the state's traditional exclusive public function of safeguarding the Peoples' First Amendment liberties in its public fora—liberties that this Court holds paramount regardless of who owns the property where the fora sits.

Thus, it is fundamentally unjust to the People a constitutional remedy when Squawker, the state's agent, abuses its power by regulating speech under rules that violate the First Amendment. Squawker can therefore not be permitted to subjectively censor speech based on its substance, its viewpoint, or by preemptively censoring words that have yet to be spoken—as it did with Milner. There is no compelling government purpose to do so, and the alternate avenues Squawker offers equally burden the Peoples' ability to engage in otherwise protected speech.

If left undisturbed, the Eighteenth Circuit's ruling will upend decades of settled precedent. It will allow the States to subvert their First Amendment duties by delegating them to private agents and will endow those agents with the unbridled discretion to do what state actors may not—snuff out speech because the agent disagrees with the message. The danger of dangling this carrot

before the states is evident. It would encourage abuse with no identifiable endpoint. We therefore ask this Court to deny the states and their private agents such extravagant constitutional refuge.

ARGUMENT

I. The Eighteenth Circuit must be reversed because Squawker stood in the shoes of the state as the host and speech regulator of Dunphry's public forum.

Dunphry's Squawker forum is not a mere private space where people are invited to speak like a grocery bulletin board or a comedy club. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019). It is a constitutional public forum—a space opened by government fiat to host political assembly and debate—where the First Amendment[4] sharply circumscribes speech-regulating conduct. *See Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); R. at 8–9. It is a forum where its users' liberty interests do not depend on whether it is hosted, and the speech regulated, by the state or private actors. *Marsh v. Alabama*, 326 U.S. 501, 507 (1946). Nevertheless, Squawker asks this Court to grant it an unlimited constitutional license to censor speech in Dunphry's forum despite the fact that in doing to, Squawker acts as an agent of the state. This Court has never announced such a permissive rule, and it should not do so today.

First, a consistent line of this Court's authority has already negated the premise of unlimited private censorship by announcing that the First Amendment liberties of the press, private publishers, private broadcasters, and other private entities do not include "the right to snuff out the free speech of others." *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 387, 392 (1969); *see also Assoc. Press v. United States*, 326 U.S. 1, 20 (1945). Second, the notion of obtaining a waiver from constitutional scrutiny for all private infringements is moot. While the State Action Doctrine commands that the First Amendment's force applies only to actions of the state itself, exceptions

[4] The text of the First Amendment of the United States Constitution is included in Appendix I. U.S. Const. amend. I.

to this rule ensure that challenged private conduct is held constitutionally accountable when it rises to the level of state action. *See, e.g.*, *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (explaining seven different inquiries used to identify state action). Each exception exposes state action concealed within private conduct by ensuring that when there is a "sufficiently close nexus" between the State and the challenged conduct, that conduct is "fairly treated as that of the State itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974). Two primary exceptions find state action when private actors exercise powers traditionally exclusively reserved to the state (public function exception) and when they willfully assume the state's constitutional obligations (joint action exception). *Brentwood*, 531 U.S. at 296.

Because Squawker's conduct of hosting and speech regulating in Dunphry's public forum rise to the level of state action under the public function and joint action exceptions, Milner asks this Court to reverse the Eighteenth Circuit's holding.

A. Squawker is a state actor because it performed traditional exclusive public functions as the host and speech regulator of Dunphry's constitutional public forum.

Under the public function test, "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State." *Evans v. Newton*, 382 U.S. 296, 299 (1966). A challenged function satisfies this test when it is "traditionally exclusively reserved to the State." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (quoting *Jackson*, 419 U.S. at 352). Public functions are "traditionally associated with sovereignty" such as holding elections, running municipal parks, operating a company-owned town, and exercising eminent domain. *Jackson*, 419 U.S. at 352–53.

The host of a public forum performs a public function because it operates a space that is freely accessible to the community. *Evans*, 382 U.S. at 301–02. Regulating speech in that forum is also a public function because a duty to uphold First Amendment liberties in public fora attaches

to the state the moment the state opens a forum, requiring the state or its agent to fulfill this duty. *Halleck*, 139 S. Ct. at 1944 (2019) (Sotomayor, J., dissenting).

i. Squawker's conduct as the host and speech-regulator of Dunphry's public forum must be analyzed for state action even if Squawker does not engage in state action in its ordinary social media operations.

The Eighteenth Circuit's analysis of Squawker's conduct misapplied the public function test by failing to analyze the conduct at issue in Milner's claim. "Faithful adherence to the 'state action' requirement . . . requires careful attention to the gravamen of the plaintiff's complaint." *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982). When the Ninth Circuit applied the public function test in *Lee v. Katz*, it emphasized that it was "important to identify the function at issue because an entity may be a state actor for some purposes but not for others." 276 F.3d 550, 555 n.5 (9th Cir. 2002) (quoting *George v. Pac. CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996)) (internal quotations and alterations omitted). *Lee*'s court addressed a private company's ban on gospel preaching in the public fora located on land that the company leased from the state. *Id.* at 551–52. Preaching violated the company's "Petitioning and Free Speech Rules" ("Rules")—a set of formal speech regulations. *Id.* The company argued that the conduct at issue was its ordinary policing of its land under the Rules. *Id.* The court rejected this argument, explaining that the preachers' claim did not challenge the company's "use of limited police powers on public land," it challenged the company's "administration of free speech rules in a public forum." *Id.* at 555–57. Analyzing the latter, *Lee*'s court held that administration of free speech rules in a public forum was a traditional exclusive public function, and it accordingly treated the company as a state actor. *Id.* at 556.

Here, the Eighteenth Circuit only considered Squawker's "ordinary operation of a social media platform," but ordinary operations on private property are not the material issue in this case. Like the preachers in *Lee*, Milner challenged Squawker's administration of its T&C in a public

forum. Thus, even after it found that Squawker's ordinary operations were not attributable to the state, the Eighteenth Circuit should have, consistent with this Court's state action determinations, proceeded to analyze the conduct challenged in Milner's claim. Controlling precedent establishes that each facet of the private conduct must be analyzed on its own merits. *See, e.g.*, *Rendell-Baker*, 457 U.S. at 841-42 (analyzing a private school's conduct as an educator separately from its conduct as an employer); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171 (1972) (analyzing a private club's guest services practices separately from its membership practices).

Should this Court adopt the Eighteenth Circuit's framework and only consider whether ordinary social media website operations qualify as state action, it would upend all prior state action jurisprudence by enshrining a new rule requiring that *every aspect* of a private entity's conduct must be state action before *any* state action could be found. Such a rule would have the practical result of allowing private entities to freely infringe on any constitutional right provided that they perform a single activity unrelated to the state. Private social media companies could then bestow upon themselves—without constitutional reprisal—the unbridled discretion to extinguish every idea generated in the public fora on their websites—despite the fact that the public's First Amendment liberties are identical regardless of who hosts and regulates speech in those fora. *Marsh*, 326 U.S. at 507. Thus, we ask this Court to specifically address the conduct at issue in Milner's claim—Squawker's hosting and speech regulating in Dunphry's public forum.

ii. Squawker's hosting and regulating of speech in a government-operated public forum are traditional exclusive public functions under *Marsh*.

In *Jackson*, this Court described *Marsh v. Alabama* as the embodiment of the public function test under which the First Amendment will apply to a private entity if that entity exercises "powers traditionally exclusively reserved to the state." 419 U.S. at 352. *Marsh* "stands for the proposition that a private entity that owns all the property and controls all the municipal functions

of an entire [community]" performs a traditional exclusive public function and is therefore "a state actor that must run the [community] in compliance with the Constitution." *Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 WL 1471939, at *6 (N.D. Cal. Mar. 26, 2018).

In *Marsh*, this Court found that when a privately-owned corporate town criminally punished religious literature distribution on public sidewalks it performed a state function subject to constitutional scrutiny. 326 U.S. at 507–08. Other than its private ownership, the town in *Marsh* was characteristically similar to any government-run town because it included residences, businesses, publicly-accessible shopping areas, streets and a post office. *Id.* at 502–03. Because nothing distinguished the privately-owned sidewalks from those in publicly-owned towns, the Court held that the town's private-ownership did not justify a restriction of First Amendment liberties on sidewalks dedicated for public use. *Id.* at 504. The Court concluded that the public had an identical interest in maintaining open channels of communication in its public fora regardless of who owned the sidewalks. *Id.* at 507. Consequently, *Marsh*'s court held that the corporation could not be permitted to regulate speech in the community in a way that restricted the peoples' fundamental liberties *Id.* at 509. *Marsh*'s court also held that the corporate town owner "stood in the shoes of the state" because it "was performing the full spectrum of municipal powers" relative to the people and property that it controlled. *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 569 (1972).

Squawker's conduct fits squarely into *Marsh*'s company-town analogue for two reasons. First, like *Marsh*'s company-owned town, Squawker is an expanse of privately-owned property that includes an entire community of individuals, verified government entities, and public fora. R. at 3. Each Squawker profile page is a "home" from which Squawker users engage with other users. R. at 2. Verified governmental Squawker profile pages operate as archetypical public town squares—public fora from which state agents like Dunphry "engage [with their constituents] in the

democratic process." R. at 24. Just as nothing functionally distinguished the privately-owned sidewalks from those in publicly-owned towns in *Marsh*, nothing functionally distinguishes Dunphry's public forum from a public forum in a physical town square operating in any American city. The people gather spatially in Dunphry's forum to listen and be heard by the government as they would gather physically in a town square to do the same. Accordingly, as in *Marsh*, the First Amendment liberty interests of the users of Dunphry's forum are the same regardless of who hosts the property where the forum sits. *See, e.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–36 (2017) (explaining that First Amendment protections apply on social media).

Second, like *Marsh*'s town owner, Squawker exercises the full range of its available municipal powers in all Squawker-based public fora. *See also Evans*, 382 U.S. at 301–02. While this Court has not extended *Marsh* to all cases where a private actor regulates speech on private property, it declined to do so only when the private actors at issue did not assume the "full spectrum of municipal powers" traditionally exclusively performed by the state. *Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd. of Las Vegas*, 257 F.3d 937, 953 (9th Cir. 2001) (Brunetti, J., dissenting) (quoting *Lloyd*, 407 U.S. at 569). But this Court has never defined what constitutes a "full spectrum of municipal powers." More significantly, this Court has never required that a public forum's speech regulator provide municipal services such as electricity or mail delivery before the people are entitled to a First Amendment remedy—and it should not do so today. Notably, the Ninth Circuit has applied *Marsh* to find state action when a private actor polices speech in a public forum without requiring any municipal activities other than speech regulation. *Lee*, 276 F.3d at 555–57. Because the conduct in this case took place on a social media website, the only municipal powers available are speech regulation.

Moreover, under its T&C—the functional equivalent of *Marsh*'s municipal speech-

regulating ordinances—Squawker exercises the full range of its municipal power to regulate the expressive conduct in all Squawker accounts, including the government public fora. R. at 3–4. Just as the town-owner did in *Marsh*, Squawker polices the public fora by deciding which users may speak in them, and under what circumstances they may speak. Policing speech in a government public forum is a traditional exclusive function performed by the state. *Lee*, 276 F.3d at 555–57; *see also Manhattan Cmty. Access Corp. v. Halleck*, 882 F.3d 300, 308 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 360 (2018), *rev'd on other grounds*, 139 S. Ct. 1921 (2019). Thus, under *Lee* and *Marsh*, Squawker steps into the shoes of the state and performs a public function by applying its full spectrum of municipal powers to regulate speech in Squawker's public fora under its T&C.

Private speech regulation in a cyberspace government forum was unheard of when *Marsh* and its progeny were decided. But it is now commonplace. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997) (explaining that social media is one of "the most important places" in the "vast democratic forums of the internet"). Thus, it is crucial for state action determinations to keep pace with the State's newfound desire to govern through privately-owned social media and to allow private actors to regulate speech in their stead. *See Lee*, 276 F.3d at 556 (citing *Brentwood,* 531 U.S. at 301 n. 4) (noting that the state actor determination often emphasizes practical reality over legal formalities). Accordingly, extending *Marsh* to find state action when private social media companies host and regulate speech in social media-based government-operated public fora will ensure that these companies are held accountable to the Constitution as they would be if they imposed their regulations in any of America's physical town squares.

iii. Summary judgment was improperly granted because *Halleck* and prior social media holdings do not foreclose a finding of state action in this case.

Contrary to the Eighteenth Circuit's conclusion, *Halleck* does not foreclose a finding of

state action in this case. 139 S. Ct. 1921 (2019); R. at 32. *Halleck* held that mere hosting of a private space for speech—such as a grocery bulletin board or comedy club—is insufficient to establish state action under the public function test. 139 S. Ct. at 1930. However, as Justice Sotomayor explained, *Halleck*'s holding is limited by the majority's acknowledgment that facts showing that the state is "more directly involved in the administration" of a privately-hosted forum could support a finding of state action. *Id.* at 1941 (Sotomayor, J., dissenting).

Halleck is inapposite to this case because Dunphry's forum is strikingly different from grocery bulletin boards and comedy clubs—neither of which are venues intended for individuals to assemble and engage in political debate with state officials, nor are they run by the state. Dunphry's account is a public forum where his constituents "engage [with him] in the democratic process." R. at 8, 24. Dunphry and his staff use the forum for "communicating and interacting with the public about his administration," "to understand and evaluate the public's reaction to what he says and what he does," and to inform the public about "policy proposals" and "public initiatives promoted by his office." R. at 3, 8–9. Thus, the state is directly involved in the administration of Dunphry's forum which is materially different from places devoted to announcing garage sales, selling alcoholic drinks, and telling jokes. Accordingly, *Halleck* does not foreclose this case.

Moreover, prior cases that declined to treat social media websites as state actors, such as *Prager Univ. v. Google LLC*, do not undermine Milner's claim. 2018 WL 1471939, at *1. *Prager*'s court relied on a number of decisions when it held that YouTube did not perform a traditional exclusive public function by merely regulating content on a publicly accessible social media website. *Id.* at *2, *6; *see, e.g.*, *Howard v. Am. Online, Inc.*, 208 F.3d 741, 754 (3d Cir. 2000). Because *Prager* and the holdings it relied on did not address private speech regulation in a social media-based government public forum, they are immaterial to Milner's claim. R. at 9.

B. Squawker is a state actor because it agreed to become a state agent and uphold Delmont's First Amendment obligations in Dunphry's public forum.

This Court has made clear that government officials cannot subvert their First Amendment duties by delegating them to private parties. *See, e.g.*, *Terry v. Adams*, 345 U.S. 461, 475–76 (1953) (finding state action when government officials delegated the responsibility of conducting primary elections to private actors who denied African Americans the guaranteed voting privilege). Thus, to ensure proper constitutional accountability, the joint action test finds state action when a private entity willfully enters into a joint relationship with the state that causes a constitutional deprivation. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 941–42 (1982) (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970)).

West's court unanimously found that a private doctor became a state agent when it entered into a contract to provide healthcare to state prisoners. *West v. Atkins*, 487 U.S. 42, 57 (1988). *West*'s court explained that contracting out its Eighth Amendment obligations to an agent did not relieve the state of its duty to uphold the prisoners' fundamental liberties. *Id.* at 56. The Court reasoned that because the prisoners had no other option for medical care than to visit the prison's private doctor, the prisoners could not be denied a constitutional remedy should that doctor fail to uphold the state's Eighth Amendment obligations. *Id.* The state "mad[e] a choice that triggered constitutional obligations," it delegated the responsibility for upholding those obligations to a private actor, and when that private actor agreed to fulfil those obligations, it became a state agent subject to constitutional scrutiny. *Halleck*, 139 S. Ct. at 1940 (Sotomayor, J., dissenting).

West illuminates why Squawker's conduct satisfies the joint action test. Notably, *West*'s relevant constitutional obligations arise specifically from the parties' choices. *Id.* at 1943. Thus, it is immaterial that Dunphry had no constitutional obligation to open a public forum. Just as the state's Eighth Amendment obligation to provide medical care in *West* arose when the state *chose*

to incarcerate criminals, Dunphry's constitutional obligations to uphold First Amendment liberties arose when he *chose* to open his public forum. *Id.* at 1940.

Then, when he agreed to Squawker's T&C, Dunphry delegated his constitutional obligations to Squawker by giving it the actual authority to police and regulate speech in his forum under those T&C.[5] Squawker agreed to this agency relationship when it generated Dunphry's profile page. Moreover, Pluckerberg personally agreed to act as Dunphry's agent when he began to "carefully" monitor the speech in Dunphry's forum. R. at 6. Thus, under *West*'s reasoning, by agreeing to the agency relationship, Pluckerberg and Squawker agreed to fulfill Delmont's First Amendment obligations in Dunphry's public forum. R. at 3–4. It is immaterial to this conclusion that Squawker also regulates the speech of non-governmental Squeakers. *West* stands for principle that the joint function test may be satisfied by a state agency relationship regardless of whether the challenged conduct may also be performed in the private marketplace. *West*, 487 U.S. at 56.

Given this and given that the people who wish to engage in Dunphry's forum have no alternative than to allow Squawker to regulate their speech, like the prisoners in *West*, the people cannot be denied a constitutional remedy when Squawker—a private actor—violates their fundamental liberties by censoring otherwise protected speech. 487 U.S. at 56. To hold otherwise would unravel this Court's state action jurisprudence and grant the States a license to divest themselves of all constitutional duties simply by delegating them to private agents.

Finally, a finding of state action is not precluded, as the Eighteenth Circuit suggested, when the state does not pay the private actor. R. at 32. In fact, this Court has found state action when the private actor receives only "incidental benefits" such as accessible parking near its restaurant while

[5] Restatement (Third) of Agency § 1.01 (2006) ("An agent who has actual authority holds power as a result of a voluntary conferral by the principal and is privileged, in relation to the principal to exercise that power.").

the state actor receives the mutual benefit of increased parking revenue from restaurant customers. *See Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1964). Here, both sides incidentally benefit. Squawker performs Dunphry's constitutional duty, and because Dunphry's constituents use his forum, Squawker benefits from increased traffic to its website which could equate to increased advertising revenue. Thus, the Eighteenth Circuit's finding that Squawker was not a state actor because it did not receive state funding cannot stand.

II. The Eighteenth Circuit must be reversed because Squawker's T&C violate the First Amendment when they are applied to regulate speech in Dunphry's public forum.

This Court's precedent makes clear that upholding the Peoples' First Amendment liberties is paramount in public fora because of their time-honored role in facilitating assembly, discussion and debate. *McCullen v. Coakley*, 573 U.S. 464, 476 (2014). Public fora, such as sidewalks, streets, and public squares, are places traditionally used for expressive activities. *Id*. Indeed, social media has evolved into a "modern public square" because it is a principle vessel used to exchange information. *Packingham*, 137 S. Ct. at 1732. Content-moderators have limited authority to curb speech in public fora. *Boos v. Barry*, 485 U.S. 312, 318 (1988). However, time, place, or manner restrictions are permissible in public fora if they are content-neutral, are narrowly tailored to serve a compelling state interest, and "leave open ample alternative channels for communication of the information." *McCullen*, 573 U.S. at 477 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Time, place, or manner regulations may be applied to minimize disruption in public places, provided free speech liberties are also upheld. *Ward*, 491 U.S. at 791–92.

Squawker's T&C offend basic First Amendment safeguards because they fail as time, place, or manner restrictions. Primarily, the T&C are not content-neutral because they are content-based and viewpoint-based, thus, triggering strict scrutiny. Further, the T&C are not narrowly tailored because they are unduly vague and overbroad. Moreover, the T&C do not further a compelling

state interest. Finally, notwithstanding strict scrutiny, the T&C still impermissibly burden Milner's speech because they lack alternative channels of communication to reach his audience.

A. The T&C fail as valid time, place, or manner restrictions because squeaks are flagged only after reference to the content and viewpoint of the speaker's message.

A valid time, place, or manner regulation mandates content-neutrality. *Boos*, 485 U.S. at 319–21. Content-neutrality requires a regulation to be "justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791. Therefore, content-based regulations are presumptively unconstitutional in public fora. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). A regulation is content–based when it targets speech based on the topic or the message conveyed. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Likewise, viewpoint-based regulations disturb First Amendment protections by targeting speech based on the "the specific motivating ideology or the opinion or perspective of the speaker." *Id*. at 2230. Because content-based and viewpoint-based laws fail as time, place, or manner restrictions, they are only upheld if they satisfy strict scrutiny. *McCullen*, 573 U.S. at 478.

In *Ward v. Rock Against Racism,* the Court upheld an ordinance requiring performers to use New York City-provided sound amplification equipment and sound technicians when entertaining in the Central Park amphitheater. 491 U.S. at 784. The ordinance was a valid time, place, or manner restriction because it was a content-neutral approach to achieving the City's objective of mitigating noise. *All* performers were required to use City-provided sound equipment, regardless of the message the speaker sought to convey. *Id.* at 784, 800–01.

Comparatively, in *Boos v. Barry*, the Court upended a law prohibiting the display of signs within 500 feet of a foreign embassy if the sign brought that foreign government into "public odium or public disrepute." 485 U.S. 312, 315 (1988). Specifically, this law allowed people to espouse favorable views towards foreign governments, but completely prohibited criticism. *Id.* at

319. The Court declined to analyze the law as a time, place, or manner regulation because the law was content-based and viewpoint-based on its face. *Id.* at 318–19.

Squawker's T&C are not content-neutral because they are content-based. Similar to *Boos*, the Squawker T&C cannot be enforced without reference to the substance of the communication because they prohibit speech that promotes violence or attacks or threatens other people based on race, ethnicity, national-origin and more. R. at 3. However, users are free to engage in "happy-talk" because the T&C lack a penalty for positive messaging. *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017); R. at 3. As a general matter, content-neutrality obliges Squawker referees to turn a deaf ear to the speaker's message. *Ward*, 491 U.S. at 791. Here, Pluckerberg did not turn a deaf ear. In fact, he flagged Milner only after Milner disagreed with Dunphry's bill proposal by posting his evolving emoji chain in rapid succession. R. at 5–6. Notably, Milner habitually squeaked four or more times on other Squawker pages without being flagged even though all of these instances qualified as "spamming" under Squawker's T&C. R. at 3–4, 20. Unlike New York City's uniform application of the ordinance in *Ward*, Squawker disparately applied the T&C to Milner's squeaks. This disparate application indicates that Milner's reply was targeted for the content and viewpoint of his comments to Dunphry's red light bill. Squawker only punished Milner when he espoused a divergent perspective. R. at 5–6. But the First Amendment protects all perspectives in the marketplace of ideas. *See Texas v. Johnson*, 491 U.S. 397, 420 (1989) (holding that burning the American flag is constitutionally protected expression). Therefore, the T&C cannot be considered content-neutral in a time, place, or manner context because the content of Milner's message triggered Squawker's decision to censor Milner's speech. R. at 3.

Finally, the T&C are viewpoint-based because they cannot be enforced without muzzling a particular ideology or opinion; namely, the platform prohibits speech that is motivated by "hatred,

prejudice, or intolerance." R. at 3. Further, emojis cannot be used in a "violent or threatening manner." R. at 3. Indeed, under the T&C, "giving offense is a viewpoint." *Matal*, 137 S. Ct. at 1763. However, the First Amendment does not permit silencing ideas because "the ideas themselves are offensive to some of their hearers." *Id.* Here, Pluckerberg flagged Milner for his "violent and offensive" use of emojis when Milner was simply expressing his viewpoint. R. at 6. Therefore, because the T&C are content-based and viewpoint-based, they fail as time, place, or manner restrictions.

B. The T&C are not narrowly tailored because they are overbroad and unduly vague.

Content-based restrictions are presumptively unconstitutional unless they survive strict scrutiny. *Reed*, 135 S. Ct. at 2222. Under strict scrutiny, the regulator must show the regulation is narrowly tailored to serve a compelling state interest. *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992). To prove a regulation is narrowly tailored, the regulator must show the regulation is the "least restrictive" way to achieve the regulator's objective. *McCullen*, 573 U.S. at 495. The T&C are not narrowly tailored because they are unduly vague and overbroad.

A law is unduly vague when a reasonable person cannot determine what is or is not prohibited by the law. *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (finding a law prohibiting "annoying conduct" on sidewalks was unduly vague because "it requires a person to conform his conduct to an ordinance where no standard is specified at all."). An unduly vague law cannot be narrowly tailored because an unascertainable standard over-punishes constitutionally protected conduct. *Id.*

Further, a regulation is overbroad when it regulates substantially more speech than the Constitution allows to be regulated. *Packingham*, 137 S. Ct. at 1736. If the law burdens "substantially more speech than necessary" to further the regulator's legitimate interests, the law cannot be narrowly tailored because it casts too wide of a net. *Id.*

Here, the T&C are unduly vague because they are amorphous standards, which fail to warn users when their expression is proscribed. For instance, users are prohibited from using emojis in a "violent or threatening manner." R. at 3. However, the T&C lack a definition for what is "violent or threatening." Like the *Coates* Court reasoned, what is "violent or threatening" to some might not be "violent or threatening" to others. 402 U.S. at 614 ("Conduct that annoys some people does not annoy others."). Therefore, the T&C are not narrowly tailored because they are unduly vague; the T&C fail to draw a content-neutral line in the sand as to what conduct is or is not prohibited.

Likewise, the T&C are overbroad because such unascertainable standards chastise more speech than permissible. *See Packingham*, 137 S. Ct. at 1736-37 (acknowledging overbreadth when a law that prohibited sex offenders from accessing social networking sites, could be extended to bar access to Amazon.com and Webmd.com). Here, Squawker charged Milner with violating the T&C when he squawked, "We gotta get rid of this guy," followed by: "👨," "💉," and "⚰️". R. at 5–6. Similar to *Packingham*'s far-reaching law, the T&C extend too far because they punish Milner's *political* criticisms. *Citizens United v. FEC*, 558 U.S. 310, 329 (2010) (finding political speech gets maximum constitutional protection). Milner's squawks are protected political speech because they merely criticized Dunphry's latest bill proposal and his fitness for office. R. at 5.

Further, when a user violates the T&C while interacting with a verified page, Pluckerberg places black boxes containing a skull and crossbones emoji over a user's entire profile indefinitely. R. at 4. Thus, the T&C are overbroad because they mute *all* of a user's expression, including political speech and future speech regardless of its content. *New York Times v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (explaining prior restraints are presumptively unconstitutional because they censor speech before it occurs). But the First Amendment promises protection for unpopular political viewpoints. *See Watts v. United States*, 394 U.S. 705, 707–08

(1969) (finding that threatening the President's life, absent evidence of imminent danger, was shielded by the First Amendment as political hyperbole). Therefore, the T&C are not narrowly tailored because they are overbroad as they punish more speech than the Constitution allows.

C. The T&C fail to satisfy a compelling state interest because this Court refuses to suppress speech based on abstract and hypothetical harm to an audience.

Squawker also cannot satisfy strict scrutiny because it lacks a compelling state interest to justify the T&C. *R.A.V.*, 505 U.S. at 395. This Court has routinely declined to recognize audience-protective justifications as a compelling state interest for First Amendment purposes. *See Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011) (granting First Amendment protections to funeral protestors picketing on a public sidewalk over the distress of a grieving family); *cf. Frisby v. Schultz*, 487 U.S. 474, 488 (1988) (upholding an ordinance that banned picketing in front of a residence because the ordinance served a compelling state interest of preserving the sanctity of the home). Further, this Court is hesitant to mute speech unless such expression produces actual, imminent harm. *See New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (holding child pornography lacks First Amendment protection pursuant to the compelling state interest in protecting minors from the mental, physical, and emotional harm that child pornography produces); *cf. Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249–50 (2002) (upending a prohibition against sexually explicit images that *appear* to be minors due to the lack of actual harm to actual children). Notably, the First Amendment protection is not afforded to incitement of illegal activity when that incitement is likely to cause injury. *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *see also Noto v. United States*, 395 U.S. 290, 297–98 (1961) (finding that possible intimidation of other speakers, without more, is not an imminent threat likely to cause injury).

Squawker's T&C explicitly provide, "We aim for a positive user experience that allows our users to engage authentically with each other and build communities within our platforms." R. at

3. This provision comes after sweeping bans of any apparently negative content. R. at 3. Here, Milner was censored after his post received reports about his "obsessive and obscene comments." R. at 22. By doing so, Pluckerberg demonstrated that the objective of the T&C is to protect users from unpopular speech. However, audience-protective justifications do not constitute a "compelling state interest" for strict scrutiny purposes; such a justification is merely masquerading per se censorship. Just as the *Snyder* Court declined to silence the Westboro Baptist Church when it picketed a funeral on a public sidewalk, Squawker cannot stifle Milner's speech in a virtual public forum solely because it disrupts the positive harmony that the platform seeks to maintain.

Further, *Frisby v. Schultz* is inapposite here because the holding is narrow and fact-specific. 487 U.S. at 484. The *Frisby* court recognized "individuals are not required to welcome unwanted speech into their own homes" because of the residential privacy a home provides. *Id.* Alternatively, in public fora, this Court urges audiences to "avert their eyes" to avoid disparaging messages. *Cohen v. California*, 403 U.S. 15, 21 (1971). Messages on Squawker do not intrude on an individual's residential privacy because Squawker may be accessed from any location with either internet, cellular data, or both; access is not cabined to the home. R. at 2. Further, an individual does not become a "captive" in his or her own home when viewing a dissenting squeak because he or she can log off of the platform or ignore it. Dissimilarly, an individual cannot easily escape angry picketers stationed outside his or her home. *Frisby*, 487 U.S. at 485–86.

Moreover, the record is devoid of any evidence that Milner's squeaks actually produced violence or incited imminent harm to anyone. Thus, Squawker lacks a compelling state interest to censor Milner's speech because his squeaks failed to produce any tangible consequences. *Brandenburg*, 395 U.S. at 444. Absent actual harm, the First Amendment does not allow speech restrictions. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 800 (2011) (refusing to prohibit the

sale of "violent video games" to minors absent evidence that such games caused minors to act aggressively).

D. Milner lacked ample alternative channels to communicate his message after Squawker censored him because the available substitutes prevented Milner from engaging with his audience.

Even if the Court finds that the T&C withstand strict scrutiny, they still fail as time, place, or manner regulations as they do not "leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791. A regulation fails to provide ample alternative means for communication when it prevents a speaker from reaching his or her intended audience. *Turner v. Plafond*, No. C 09-00693, 2011 U.S. Dist. LEXIS 1718, at *43–44 (N.D. Cal. 2011) (citing *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)).

The *Ward* court held that requiring performers to use New York City's sound amplification equipment and sound technicians left ample alternative channels open for communication. 491 U.S. at 802. The Court reasoned that the guideline continued to permit expressive activity without compromising the quality or content of the expression beyond amplification. *Id.*

However, in *Turner v. Plafond*, the Northern District of California examined an ordinance that prevented "a speaker from spontaneously expressing his views with a sign" on the Golden Gate Bridge. 2011 U.S. Dist. LEXIS 1718, at *43. The ordinance failed to leave ample alternative means for communication because "without the benefit of a sign, a single speaker's voice would be lost amidst the multitude on the Bridge's sidewalks and amidst the noisy Bridge traffic." *Id.* Further, despite other locations available for speech, the Bridge served as a "unique locale that commands a worldwide audience." *Id.*

When Squawker censors a user, the user lacks ample alternative means for communication. Chiefly, unlike the *Ward* guideline, Squawker's T&C frustrate the speaker's quality and content

of expression by concealing the user's entire profile with black boxes containing skull and crossbones emojis. R. at 4. Further, while Squawker did not delete Milner's expression, Squawker's T&C precludes Milner from engaging with his target audience because they cannot see his squeaks without logging in and clicking on the skull and crossbones to view the censored content. As a result, after Squawker censored Milner, he lost eight thousand followers and over 97% of his average views per squeak. R. at 6. Tangentially, if Milner created a new account to circumvent the censorship, he would lose his remaining two thousand followers. R. at 7. Moreover, if Milner viewed Dunphry's squeaks while logged out of his account, he could not comment on Dunphry's squeaks so he would still be unable to communicate with his audience. R. at 7.

Finally, the quiz is a band-aid on a gunshot wound because the damage is done. T&C enforcement has already diluted Milner's platform and thus, his ability to connect with his audience. Notably, Milner has received drastically less writing offers from statewide newspapers as a result of Squawker's censorship. R. at 6. Milner is now struggling to support himself as a journalist. R. at 20. As Milner's Squawker account is a "unique locale that commands a worldwide audience," these purported "alternatives" guarantee that Milner's "voice would be lost amidst the multitude" of other Squawker accounts. *Turner*, 2011 U.S. Dist. LEXIS 1713, at *43. Therefore, because Milner lacks ample alternatives for communication with his audience, the T&C fail as time, place, or manner regulations.

CONCLUSION

Accordingly, Milner asks this Court to reverse the Eighteenth Circuit's decision and find that Squawker's acts of hosting and regulating speech in a government-operated social media-based public forum are state actions and that Squawker's T&C are impermissible content- and viewpoint-based regulations.

APPENDIX I

First Amendment to the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Const. amend. I.

APPENDIX II

Excerpt from the Squawker Terms and Conditions:

> Here at Squawker, we are committed to combating abuse motivated by hatred, prejudice, or intolerance, particularly abuse that seeks to silence the voices of those who have been historically marginalized. For this reason, we prohibit behavior that promotes violence against or directly attacks or threatens other people on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease. In addition, we prohibit the use of emojis [emoticons] in a violent or threatening manner. We aim for a positive user experience that allows our users to engage authentically with each other and build communities within our platform; therefore, spamming of any nature is prohibited for those participating in posting and commenting on the platform. A Squeaker shall not participate in automatic or manually facilitated posting, sharing, content engagement, account creation, event creation, etc. at extremely high frequencies such that the platform becomes unusable. Extremely high frequencies are four or more squeaks squawked within 30 seconds of each other.

R. at 3–4.

New flagging policy added to the Squawker Terms and Conditions in 2018:

> Squeakers who are found to have violated our Terms and Conditions with respect to a verified user's account will be flagged. This will require all users to click on an emoji of a skull and crossbones in order to clear black boxes covering (1) the offending squeak or comment; (2) the offender's future squeaks and comments; and (3) all content on the offending Squeaker's profile page. A skull and crossbones badge will also appear next to the offending Squeaker's name on Squawker in order to warn the community. To have this flagging removed from all but the original comment, a Squeaker must complete a thirty-minute training video regarding the Terms and Conditions of the community and complete an online quiz. Two failed attempts will result in a ninety-day hold. The offending comment will remain flagged, although the user may still delete it.

R. at 4.

BRIEF CERTIFICATION

The members of Team 10 hereby certify that the work product contained in all copies of this brief is in fact the original work product of the members of Team 10. Team 10 further certifies that its members have fully complied with Team 10's school's governing honor code. Finally, Team 10 certifies that its members have complied with all Rules of the Competition.

/s/ Team 10

January 31, 2020