No. 17-874

In The

SUPREME COURT OF THE UNITED STATES

Avery Milner,

Petitioner,

v.

Mackenzie (Mac) Pluckerberg,

Respondent.

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

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BRIEF FOR PETITIONER

Team 16

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1. When a private entity that hosts a public forum reserves a portion of its platform for the purpose of discourse between a single state's government officials and its constituents, does its decision to censor speech in that forum amount to state action?

2. Do Squawker's Terms and Conditions create impermissible content-based restrictions in violation of the First Amendment, and if not do they nevertheless fail under intermediate scrutiny?

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighteenth Circuit is unpublished. It can be retrieved at *Pluckerberg v. Milner*, C.A. No. 16-CV-6834 (18th Cir. 2019). The decision of the District Court is unpublished. It can be retrieved at *Milner v. Pluckerberg*, C.A. No. 16-CV-6834 (D. Delmont Jan. 10, 2019).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit entered final judgment on this matter. *Pluckerberg v. Milner*, C.A. No. 16-CV-6834, slip op. Petitioner filed a timely petition for writ of certiorari which this Court granted. No. 17-874. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1) (2018).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the Constitution are reproduced in the Appendix of this brief.

STATEMENT OF THE CASE

A. Procedural Posture.

Petitioner Avery Milner brought this action in the United States District Court for the District of Delmont seeking declaratory judgment and injunctive relief against Mackenzie Pluckerberg in his official capacity as Chief Executive Operator of Squawker. R. at 1. Mr. Milner alleged that Mr. Pluckberberg violated his First Amendment rights when he "flagged" Mr. Milner's Squawker account while acting in his official capacity. *Id.*

On December 5, 2018, Mr. Milner and Mr. Pluckerberg filed cross motions for summary judgment. R. at 2. On January 10, 2019, the District Court denied Mr. Pluckerberg's motion and granted Mr. Milner's motion, holding that: (1) Squawker functions as a host and regulator of a public forum, and therefore its decision to flag Mr. Milner's account constituted a state action; and (2) Squawker's Terms and Conditions amount to unconstitutional content-based viewpoint discrimination, and are not narrowly tailored as a time, place, or manner restriction. *Id.* at 9, 13.

Mr. Pluckerberg appealed the District Court's decision to the Court of Appeals for the Eighteenth Circuit. The Eighteenth Circuit reversed the District Court's opinion, ruling that: (1) Squawker's hosting of a public forum did not constitute state action when they applied their flagging policy; and (2) Squawker's Terms and Conditions are a permissible content-neutral time, place, or manner restriction that do not violate the First Amendment. R. at 33, 35. Mr. Milner filed a timely petition for writ of certiorari, which this Court granted.

B. Formation of Squawker and how it works.

In 2013, Mackenzie Pluckerberg created and launched the social media platform Squawker. R. at 21. The platform permits users to create personal profile pages (Squawker accounts) from which they can post personalized 280-character messages known as squeaks. Additionally, users can follow other squeakers and interact with other squeakers' squeaks by commenting, clicking "like," clicking "dislike," or sharing the squeak to their own profiles ("resqueaking"). *Id.* at 15, 19. To use Squawker, users must agree to the Terms and Conditions[1] which—among other things—prohibit the use of emojis in a "violent or threatening manner," and do not permit posts in "extremely high frequencies" that make the platform "unusable," defined as four or more squeaks

[1] The Terms and Conditions are reproduced in full in the Appendix, attached.

squawked "within 30 seconds." *Id.* at 15. Over the past several years, Squawker has become a popular social media platform utilized around the world to help people connect with each other and stay informed about current world events. *Id*. at 26.

Due to its popularity, government officials frequently utilize their Squawker profiles to interact and connect with constituents about official policy positions. R. at 24. In 2017, the Governor of Delmont, William R. Dunphry, created an official Squawker account. *Id.* He began using the account on a daily basis to promote discourse around major policy proposals with Delmont citizens. The government of Delmont considers communications from his profile official government business. *Id.* at 3.

As Governor Dunphry's use of the platform increased, he began to receive complaints about fake accounts being utilized to push misinformation through the social media platform. R. at 24. He approached his friend and former classmate, Mr. Pluckerberg, in February 2018 and recommended he add a feature on Squawker in which official government accounts in Delmont could be verified. *Id.* at 24. Mr. Pluckerberg proceeded to begin a trial run for the verification feature in Delmont, personally approving and monitoring verified accounts. *Id*. at 22.

With the implementation of the new feature, Squawker required all users to agree to an updated Terms and Conditions, which specified that users who violate the Terms with respect to verified accounts will have their accounts flagged. R. at 16. Once Squawker flags a user's account, the user's profile and all future squeaks are censored with a "black box" that requires other Squeakers to click a "skull and crossbones" emoji to view. *Id*. Once Squawker flags an account, the account remains flagged indefinitely until the user watches a thirty-minute video and passes a fifty-question quiz. *Id*. Upon passing the quiz, Squawker unflags the user's account, but the

offending squeak remains permanently flagged. *Id.* From the time of its inception up to the events involved in the current case, Mr. Pluckerberg flagged zero account for excessive posting. *Id*.

C. Facts leading to this action.

Avery Milner is a freelance journalist living in Old Bridge, Delmont. R. at 19. Known for his statewide news reporting and his spirited critiques of government officials, he was quick to gain an impressive online following in 2017 and 2018 on Squawker. *Id.* at 4, 19. Mr. Milner attributes his large following to the creative way in which he crafts squeaks to communicate his thoughts, often utilizing emojis in innovative ways to articulate his messages. *Id.* at 19-20.

On July 26, 2018, Mr. Milner commented four consecutive squeaks—three of which were comprised of emojis—expressing disapproval of a proposed bill the Governor shared on his verified Squawker account.[2] R. at 20. The Governor received reports from constituents who disagreed with Mr. Milner's comments, and later that day Mr. Pluckerberg flagged Mr. Milner's account. *Id.* at 22, 24. Since his account was flagged, Mr. Milner's followers on Squawker have dropped by 80%, interactions with his squeaks have dropped to less than 1% of what they were prior to the flagging, and he has been turned down for multiple jobs due to the inaccessibility of his account. *Id.* at 13, 14.

[2] Mr. Milner's squeaks are reproduced in full in the Appendix, attached.

SUMMARY OF THE ARGUMENT

The First Amendment applies to Squawker's censorship of Mr. Milner because the platform assumed the role of a state actor when it designated an exclusive area of its platform for the purpose of creating a digital town hall for government officials. This Court has recognized that private entities are not entirely immune from First Amendment scrutiny when they create and control public forums that the government ordinarily controls. In this instance, Squawker created a digital town hall exclusively for government officials in the state of Delmont to communicate with their constituents. Because Squawker retains control over the limited public forum, which exists for the purposes of hosting public debate and discussion with government officials, its actions are attributable as state actions. Even if this Court finds such an argument unpersuasive on its own merits, Governor Dunphry's pervasive entwinement with Mr. Pluckerberg's decision-making process requires that Squawker be treated as a state actor for its censorship of Mr. Milner.

Squawker's Terms and Conditions create content-based restrictions in violation of Mr. Milner's First Amendment rights. By flagging Mr. Milner's account for using emojis in an offensive manner, Squawker silenced Mr. Milner based on his viewpoint. In doing so, Squawker created content-based restrictions for a protected category of speech aimed at the direct impact of said speech, rendering the secondary effects doctrine inapplicable. Mr. Milner's speech additionally does not fall within an unprotected category of speech.

If this Court alternatively finds Squawker's Terms and Conditions to be content-neutral time, place, or manner restrictions, they nevertheless fail to satisfy intermediate scrutiny. Squawker's flagging policy substantially overburdened Mr. Milner's speech, in effect stifling his speech almost completely. Squawker chose to not use a less burdensome regulation to further its purported interests despite such alternatives being available. Squawker's regulations are thus not

narrowly tailored. By prohibiting Mr. Milner's use of emojis, Squawker's Flagging Policy proscribed a uniquely valuable method of communication, thus failing to provide him with an ample alternative avenue of communication.

ARGUMENT

I. Squawker's censorship of Avery Milner amounts to state action.

This Court has recognized that social media is a powerful tool that citizens use to interact with their government officials and ensure that their voices are heard. *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017). Once a government official such as Governor Dunphry has chosen to utilize such a public forum to conduct official business, it is paramount that citizens have the ability to interact with official posts. *See id.* Throughout the entire state of Delmont, there is only one citizen who cannot interact with the Governor through Squawker— journalist Avery Milner.

Had the Governor personally placed the present embargo on Mr. Milner's account, the question before this Court would be simpler: whether a public official or government actor may censor speech through a public forum. *See, e.g., Knight First Amendment Inst. at Columbia Univ. v. Trump,* 928 F.3d 226 (2d Cir. 2019). However, the mere fact that the Governor did not personally press the button that flagged Mr. Milner's account does not automatically render the First Amendment inoperable. *See, e.g., Brentwood Academy v. Tennessee Secondary School Athletic Ass'n.*, 531 U.S. 288, 295-96 (2001) (holding that a statewide association engaged in state action when it disciplined a school, despite being private); *Burton v. Wilmington Parking Auth.,* 365 U.S. 715 ,723 (1961) (attributing a violation of the Fourteenth Amendment to a private actor); *Marsh v. Alabama,* 326 U.S. 501 (1946) (holding that a private corporation acting as a public town was a state actor for purposes of censoring religious speech). Squawker's application of its Terms and

Conditions to censor Mr. Milner by flagging his account amounts to state action for two reasons: (1) Squawker created a limited public forum when it intentionally isolated a part of its platform to provide a digital town hall for Delmont's government officials and citizens; and (2) Governor Dunphry was entwined with both the creation and enforcement of Squawker's flagging policy to censor otherwise protected speech.

A. Squawker qualifies as a state actor because it created a limited public forum when it turned an exclusive part of its platform into a political digital town hall.

The First Amendment serves to prevent the state from infringing on free speech. App. However, whether a party itself is private or public is not determinative of whether the action taken is nevertheless considered a state action. *See, e.g., Burton*, 365 U.S. at 723. When Mr. Pluckerberg decided to create an exclusive verification feature for government officials on Squawker with specialized rules to create a digital town hall for the government of Delmont, the platform stepped into the role of the state. In doing so, it ceded the ability to censor speech free of inquiry under the Constitution.

1. It is well-established under this Court's precedent that private actors can be treated as state actors under the state-action doctrine in appropriate circumstances.

The state-action doctrine requires that a cognizable action by a state actor must exist in order for the Constitution to be implicated. *See, e.g., Manhattan Cmty. Access Corp. v. Halleck,* 139 S. Ct. 1921, 1926 (2019); *Jackson v. Metro Edison Co.,* 419 U.S. 345, 352 (1974); s*ee also Burton,* 365 U.S. at 723 (attributing a violation of the Fourteenth Amendment to a private actor). The Eighteenth Circuit erred when it suggested that Squawker could only be treated as a state actor if hosting a social media platform is a "traditional, exclusive public function" that amounts to hosting a traditional public forum. R. at 32. On the contrary, this Court has deliberately avoided creating a single bright line rule, opting for a fact-intensive analysis instead. *See Brentwood*

Academy, 531 U.S. at 295-96 (observing that a "host" of facts and factors must be weighed, none of which are independently determinative).

In *Packingham*, this Court recognized that the First Amendment is applicable to the "vast democratic forums of the internet." 137 S. Ct. at 1735. As the Eighteenth Circuit observed, District Courts have correctly concluded that the decision in *Packingham* does not mean that private social media companies are *per se* subject to the First Amendment when enforcing their policies. *See, e.g., Nyabwa v. Facebook*, 2018 WL 585467, *1 (S.D. Tex. Jan 26, 2018) (holding that *Packingham* did not create a universal First Amendment cause of action against private social media companies). The Eighteenth Circuit erroneously ended its inquiry after concluding that private social media companies do not typically have to concern themselves with the Constitution. R. at 31-32. By failing to conduct a fact-intensive inquiry to consider whether Squawker has—in this specific instance—elevated its status to that of a state actor, the Eighteenth Circuit's analysis was incomplete. *See Knight First Amendment Inst. at Columbia Univ.,* 928 F.3d at 230 (holding that a state actor on a private social media platform is subject to First Amendment scrutiny); *Davison v. Randall*, 912 F.3d 666, 687-88 (4th Cir. 2019) (same); *Robinson v. Hunt Cty., Texas,* 921 F.3d 440, 447 (5th Cir. 2019) (same).

This Court's precedent supports the circuit holdings in *Knight*, *Randall*, and *Robinson* that a state actor is subject to constitutional scrutiny regardless of whether the offending actions take place in a public or private space. *See Packingham*, 137 S. Ct. at 1737 (holding that the government had violated a defendant's First Amendment rights to have access to the public forum of social media); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556-57 (1975) (noting that it was irrelevant as to whether an unconstitutional prior restraint was on public or private property). Further, this Court has found—after applying the necessary fact-intensive analysis—that a private

actor can be considered a state actor in its own private space when the circumstances require it. *See Marsh,* 326 U.S. at 502. The seminal case is *Marsh*, in which this Court held that a privately-owned town was nevertheless subject to the First Amendment when it attempted to prevent a Jehovah's Witness from distributing fliers against town policy. 326 U.S. at 502. A similar fact-intensive analysis must be applied to Squawker's censorship of Avery Milner to determine whether the First Amendment is applicable.

2. When Squawker created a verification feature exclusively for Delmont's government officials, it created a digital town hall which functions as a limited public forum. Squawker's enforcement of its flagging policy is therefore a state action under the First Amendment.

The ability of the public to freely debate political ideas and dissent from the status quo is one of the most essential rights preserved through the First Amendment. *See West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 641 (1943). Even before the First Amendment was ratified, the founders embraced the importance of preserving the ability of dissenting voices to challenge majoritarian viewpoints. *See, e.g.,* Federalist No. 10 (James Madison) (discussing the importance of preserving the power of minority viewpoints in a democratic republic). In 1791, the original thirteen states cemented the importance of this freedom through the ratification of the First Amendment, definitively declaring that the ability of dissenters to express unpopular views in the marketplace of ideas is a quintessential right of the American people. *See Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., Dissenting).

To protect this essential right, this Court has developed the public forum doctrine. *Perry Educ. Ass'n. v. Perry Local Educators Ass'n*, 460 U.S. 37, 48 (1983). The doctrine is a tool this Court uses to identify the level of protections afforded speakers in different types of forums. *Id.* While the Eighteenth Circuit focused its analysis on a traditional public forum, the type of forum at issue here is a limited public forum. Limited public forums, similarly to traditional public

forums, significantly limit the ability of state actors to infringe the speech of people within the forum. *Id***.** The town hall is a classic example of a limited public forum because while it falls short of a "traditional" forum, it has been expressly opened for the purpose of discourse about public issues with government officials. *See, e.g., White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990).

Squawker is admittedly not *per se* a limited public forum deserving of First Amendment protections. However, the facts establish that Squawker created a digital town hall specifically for the citizens of Delmont when it designed an exclusive verification feature for Delmont's government officials. R. at 3. In *Marsh*, this Court categorized a private sidewalk as public because it had the traditional characteristics of a traditional public forum. 326 U.S. at 503. By reserving a portion of its platform for the exclusive use of Delmont's government officials and constituents, Squawker transformed that part of its platform into a *de facto* digital town hall. A single characteristic differentiates the town hall Squawker created and a traditional town hall: the fact it exists online as opposed to a physical location. Such a difference is immaterial. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) ("the same principles are applicable" whether a forum exists in a geographic or metaphysical sense). Because Squawker has sole control of the limited public forum that it hosts for use of government officials, it is a state actor when it enforces its flagging policy in the digital town hall.

B. Squawker's actions are attributable to the government of Delmont because Governor Dunphry was inexplicably entwined with the creation and implementation of the digital town hall and its flagging policy.

In arguendo, if the digital town hall Squawker created on its platform is insufficient on its own to invoke the First Amendment, the influence Governor Dunphry exercised over the creation and implementation of Squawker's flagging policy is. Squawker's creation of a verification

process that applies exclusively to the government officials of Delmont was done at the Governor's request. R. at 16. Mr. Pluckerberg vowed to the Governor that he would personally oversee all verifications over the first year of the feature. *Id*. at 3. In the several months the policy has existed, the only time Mr. Pluckerberg has flagged an account was when he disapproved of squeaks Avery Milner sent in reply to the Governor's policy proposition. *Id.* at 6. It would set a dangerous precedent to permit Governor Dunphry to circumvent the power of the First Amendment by asking a private entity to censor protected speech on his behalf. Such a result would be debilitating to the First Amendment in modern America, and would arm government actors with a method of suppressing dissenting voices.

1. Governor Dunphry was significantly entwined with Mr. Pluckerberg's decision to create an exclusive verification process on Squawker as well as his decision to enforce its flagging policy against Avery Milner.

In *Burton*, this Court held that a private company leasing space from a public authority could have its actions limited by the Fourteenth Amendment because it operated in close relationship with the governmental entity that owned the property. 365 U.S. at 723. Similarly, in *Brentwood Academy,* this Court discussed how "entwinement" between a government actor and a private entity is a factor that weighs in favor of a private actor being categorized as a state actor. 531 U.S. at 297. The holdings of these cases make it clear that the Constitution cannot be easily circumvented by public actors just because a private third-party is involved in the offending action.

This doctrine has been referred to as "entwinement," and it helps courts determine when a government actor has been so involved in a private actor's decision-making process that the action amounts to state action. *See id.* at 296. When a private actor acts as a willful participant with the state, or permits the state to have an impact on its policies or its "management or control," the actions between the government and the private actor become so entwined that the actions are

attributed to the state. *Id.* The Eighteenth Circuit completely omitted this analysis from its decision, instead ending its inquiry after concluding that Squawker is a private entity that maintains widespread editorial control over its content. R. at 32.

This conclusion was premature for two reasons. First, it considered Squawker's editorial control over the entire platform instead of the more limited scope of the digital town hall that it created for Delmont's government officials. Second, the Eighteenth Circuit failed to consider the entwinement between the Governor and Squawker for the creation of the digital town hall. Squawker would not have created a verification feature for Delmont's government officials had it not been for the Governor's suggestion. Further, had Mr. Pluckerberg not reassured the Governor that he would personally oversee the implementation of the flagging policy, Squawker never would have flagged Mr. Milner's squeaks. A proper inquiry would have discovered that Governor Dunphry was—at a minimum—involved with the creation of the digital town hall and the very existence of the flagging policy.

In *Brentwood Academy,* this Court held that the state government had "pervasive entwinement" with the organizational structure of an athletic association. 531 U.S. at 290-91. While the government in that case was certainly more involved in each area of the association's structure than in the present case, this Court's decision in *Brentwood Academy* was proportional to the level of entwinement. Similarly, the level of entwinement should be applied in a proportional manner here. Squawker is and should be treated as a private actor, *except* for when this Court considers its actions on the limited portion of the platform that was designed through pervasive entwinement with the Governor. In other words, when Squawker acts pursuant to a power that it possesses (1) due to Governor Dunphry's involvement, and (2) in a space that was created at the Governor's request, that action is a state action. Consistent with the entwinement doctrine,

Squawker was a state actor when it flagged Mr. Milner's account because it did so at the Governor's behest.

2. Governor Dunphry cannot circumvent the First Amendment through the use of a third party.

The application of the entwinement doctrine in this case is not only sound as a matter of law, but necessary as a matter of Constitutional stability. The right of the people—especially journalists—to be free from government censorship is far too important for this Court to create case law that would enable authoritarian government officials to chip away at the First Amendment. The modern Internet—especially social media—is increasingly becoming the public forum of choice for much of the American public, as well as government officials. The accessibility of social media has given the public access to government officials in ways that the founders never could have imagined. As social media continues to rapidly grow, evolve, and replace traditional communicative outlets, it is essential that government officials cannot use third parties to bypass the First Amendment with the weight of the Supreme Court behind it.

II. Squawker's Terms and Conditions are impermissible under the First Amendment because they target protected speech.

This Court first recognized how important the Internet is as a medium for expression over twenty years ago in *Reno v. Am. Civil Liberties Union*. 521 U.S. 844, 868 (1997). The Internet's importance was reaffirmed in 2017, when this Court noted that social media is among "the most important places for the exchange of views." *Packingham,* 137 S. Ct. at 1735. These spaces host the "vast democratic forums of the internet," and provide incredibly accessible avenues of expression for nearly everyone. *Id.*; *Reno*, 521 U.S. at 868. Social media allows its users engage in a wide array of protected First Amendment activity on topics "as diverse as human thought." *Packingham*, 137 S. Ct. at 1735-736 (citing *Reno*, 521 U.S. at 870). In recognizing the importance

of this medium, this Court held that there is no basis for "qualifying the level of First Amendment scrutiny" applied to it. *Reno*, 521 U.S. at 870.

A. Squawker's Terms and Conditions are content-based regulations that are impermissible under the First Amendment.

The First Amendment serves the invaluable function of preventing the government from proscribing speech because it disapproves of the message conveyed. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). As Justice Thurgood Marshall wrote, "[t]he First Amendment above all else means that the government may not restrict expression because of its message, ideas, subject matter or content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). Because of this, content-based regulations are presumptively invalid. *R.A.V.*, 505 U.S. at 382. This Court has found that First Amendment violations are even more blatant when the government targets particular views taken by speakers, and has held that viewpoint discrimination is "an egregious form of content discrimination." *Rosenberger,* 515 U.S. at 828-29. Therefore, the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. *Id.*

As discussed *supra*, the digital town hall created by Squawker is a limited public forum. While content-based discrimination may be permissible in a limited public forum so long as it preserves the purposes of that forum, viewpoint discrimination is presumed impermissible "even when the limited public forum is one of its own creation." *Id.* at 829.

1. Squawker's terms are content-based viewpoint restrictions violative of the First Amendment.

It is a "central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978). Content-based restrictions create the risk that the government will drive certain ideas or viewpoints out of the marketplace of ideas. *R.A.V.*, 505 U.S. at 387. This risk is heightened when the government creates

viewpoint-based restrictions. *See id*. at 388. Squawker's Terms and Conditions restricted Mr. Milner's speech based on his viewpoint and, in doing so, violate the First Amendment. *See id*. at 392.

The test for when a regulation engages in viewpoint discrimination is best articulated by the concurring opinion in *Matal v. Tam.* 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., Concurring). "At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed." *Id.* Regulations that prohibit speech because it is offensive are routinely found to be violative of the First Amendment, because, as this Court has held, "giving offense is a viewpoint." *Id.* at 1763. Mr. Milner's statements, while perceivably offensive, are nevertheless protected speech under the First Amendment. *See id*.

In *Matal*, this Court deemed the "disparagement clause" of the *Lanham Act* impermissible under the First Amendment because it engaged in viewpoint discrimination. *Id*. The clause prohibited the registration of a trademark "which may disparage ... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." *Id.* at 1753. In its analysis, this Court emphasized that "viewpoint discrimination" is interpreted in a broad sense. *Matal*, 137 S. Ct. at 1763. This Court found that the disparagement clause constituted viewpoint discrimination despite the fact that the prohibition applied to all groups because giving offense is a viewpoint. *Id*.

This Court's jurisprudence evidences that Squawker imposed regulations that discriminate on the basis of viewpoint. *See id*. Squawker's Terms and Conditions prohibited Mr. Milner's squeaks because they were offensive, in clear violation of the First Amendment. R. at 20, 22. It bears no difference that Squawker prohibited Mr. Milner's use of emojis instead of actual words,

because emojis are nevertheless entitled to protection under the First Amendment. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969) (holding that wearing armbands constituted "pure speech"). The use of emojis is "closely akin to 'pure speech'" in that it is a method of expression that conveys what words alone cannot. *See id.*; R. at 12.

Both content and context are critical elements to the analysis. *See Pacifica.*, 438 U.S. at 745. Therefore, the Eighteenth Circuit erred in its analysis of Squawker's Terms and Conditions when it erroneously chose to analyze them within the context of broadcast media instead of social media. *See Reno*, 521 U.S. at 868; *Pacifica*, 438 U.S. at 748-49; *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 396 (1969). While the Court has allowed regulations that protect the rights of listeners and other speakers specifically within the context of broadcast media, such justifications are "not present in cyberspace." *Reno*, 521 U.S. at 868. Because of this, the Court found that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to [social media]." *Id.* at 870. When outside the context of broadcast media, "listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

2. The secondary effects doctrine is inapplicable because Squawker's reasons for implementing its Terms and Conditions are aimed at the direct impact of the speech.

The Court has found that content-based discrimination is only permitted under the First Amendment when the regulation only targets the "secondary effects" of speech. *See R.A.V.*, 505 U.S. at 394; *Boos v. Barry*, 485 U.S. 312, 321 (1988); *Renton v. Playtime Theatres*, 475 U.S. 41, 50 (1986). If a regulation is in fact aimed at the "secondary effects" of speech, it is no longer considered a content-based regulation, and is instead treated as a content-neutral restriction. *Renton*, 475 U.S. at 48. Such an argument has no merit here.

Squawker explicitly states in its Terms and Conditions that it imposes these regulations to combat "abuse motivated by hatred, prejudice, or intolerance, particularly abuse that seeks to silence the voices of those who have been historically marginalized." R. at 15. The regulation is therefore in place to combat the effect of the speech on its listeners. However, the Court has made it exceedingly clear that "the emotive impact of speech on its audience is not a 'secondary effect,'" nor are listeners' reactions to speech. *See Reno*, 521 U.S. at 868; *R.A.V.*, 505 U.S. at 394 (citing *Boos*, 485 U.S. at 321). Squawker's justification focuses on the direct impact that the speech has on its listeners. *See Boos*, 485 U.S. at 321. Squawker's Terms and Conditions additionally prevent spamming on its platform. R. at 15. This is also a regulation based on the direct impact of speech. *See Boos*, 485 U.S. at 321. How much speech one engages in is not a secondary effect of speech, it is speech itself. *See id.* Accordingly, Squawker's Terms and Conditions are not based on secondary effects, and thus are content-based. *See id*.

3. Squawker's Terms and Conditions create content-based restrictions that regulate protected categories of speech rather than unprotected categories and are thus unconstitutional.

The First Amendment does not protect all forms of speech, and this Court has permitted regulating such unprotected categories through content-based regulations. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). These unprotected categories are "well-defined and narrowly limited" and include *inter alia* true threats and incitement to imminent lawless action. *Id.* If Squawker's Terms and Conditions regulated an unprotected class, they would admittedly be valid; however, they regulate protected speech, and therefore are presumptively invalid. *See Virginia v. Black*, 538 U.S. 343, 359 (2003); *R.A.V.*, 505 U.S. at 386; *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

a. The Terms and Conditions do not regulate true threats.

Mr. Milner's statements on Squawker do not rise to the level necessary to constitute a true threat. *See Black*, 538 U.S. at 359. True threats are defined as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* To be a true threat, the speaker need not actually intend to carry out the threat. *Id.* at 360. Rather, a prohibition on true threats "'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" *Id.* (citing *R.A.V.*, 505 U.S. at 388).

Mr. Milner has made it clear that he supports legislation that would impose age restrictions on positions of public office. R. at 19. His squeaks directed at Governor Dunphry merely conveyed his disapproval of the Governor's proposed legislation. *See* R. at 16-7. His squeaks did not rise to a level that constitute a true threat. *See Watts v. United States*, 394 U.S. 705, 706-07 (1969). In *Watts*, the Court determined that the statement "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." is not a true threat and is instead "political hyperbole." *Id.* at 708. Mr. Milner's statements fall well-short of the speech at issue in *Watts*, and even when construed in the worst possible light amount to only political hyperbole. *See id*.

b. The Terms and Conditions do not regulate imminent incitement to lawless action.

Mr. Milner's squeaks, viewed in the worst possible light, also fall well short of this Court's established precedent for incitement. In *Brandenburg,* this Court devised a three-part test to determine whether speech constitutes incitement to lawless action. 395 U.S. at 447. To qualify as incitement, three elements must be satisfied: (1) the speaker subjectively intended incitement; (2) in context, the words used were likely to produce imminent, lawless action; and (3) the words used

by the speaker objectively encouraged, urged, and provoked imminent action. *Id.* This Court stressed the importance of the temporal element in incitement cases. *Hess v. Indiana*, 414 U.S. 105, 108 (1973). The advocacy of such action at "some indefinite future time is not sufficient to permit the state to punish" speech. *Id.* Notably, it is not remotely clear that Mr. Milner's speech advocated for any type of violence or lawless action. R. at 17. Even if it could be concluded that Mr. Milner's squeaks did advocate for lawless action, there is not even an indicium of evidence to support that such action is imminent.

Squawker's Terms and Conditions rely on identifying speech by a point of view to censor specific types of speech. This Court has consistently deemed such limitations on speech unconstitutional viewpoint discrimination. Mr. Milner's squeaks fall well-short of any established exceptions to his right to speak freely in the marketplace of ideas. *See Black*, 538 U.S. at 359; *Hess*, 414 U.S. at 108. His speech is protected, and Squawker's censorship is unconstitutional.

B. Even if Squawker's Terms and Conditions are content-neutral, they fail to satisfy intermediate scrutiny.

Supposing this Court instead finds the Terms and Conditions are content-neutral, such reasonable restrictions on the time, place, or manner of protected speech are still "subject to an intermediate level of scrutiny." *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 642 (1994). Restrictions satisfy intermediate scrutiny when they "are justified without reference to the content of the regulated speech, …are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *McCullen v. Coakley*, 573 U.S. 464 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Squawker's Terms and Conditions, in addition to being viewpoint-based, fail intermediate scrutiny and do not provide an ample alternative avenue of communication. *Ward*, 491 U.S. at 791.

1. Squawker's Terms and Conditions are not narrowly tailored because they burden substantially more speech than is necessary to further its purported interests.

Intermediate scrutiny requires that content-neutral regulations are narrowly tailored to a significant government interest. *McCullen*, 573 U.S. at 510 (quoting *Ward*, 491 U.S. at 791). By demanding a "close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'" *McCullen*, 573 U.S. at 486 (citing *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988)). This minimizes the risk that a state actor, such as Squawker, attempts to suppress speech merely out of convenience. *McCullen*, 573 U.S. at 486. While the regulation does not need to be the least restrictive or least intrusive means of serving the government's interests, it still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.*

By implementing its flagging policy, Squawker has burdened substantially more speech than necessary to achieve its purported interests of "protecting the use and enjoyment" of the platform for other users. *See id.*; R. at 35. Those who violate Squawker's Terms and Conditions "with respect to a verified user's account will be flagged." R. at 16. When one's account is flagged, the following happens:

> 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.

Squawker's flagging policy is far broader than necessary to achieve its purported interests, as it creates overbroad restrictions effectively used to stifle users' speech. *See McCullen*, 573 U.S. at 489-90; *Ward*, 491 U.S. at 783. Squawker's flagging policy places a significant barrier between Mr. Milner's speech and its listeners. *See McCullen*, 573 U.S. at 489. Flagging Mr. Milner's account led to the loss of 80% of his followers. R. at 19-20. The restrictions on expression imposed

by Squawker prevent Mr. Milner from communicating in the public forum almost entirely. As this Court suggested in *McCullen,* "reaching far fewer people" evidences a substantial burden on speech. *See* 573 U.S. at 487-88. Such a burden is present here.

Squawker decided against implementing any alternatives that would be substantially less burdensome on speech. Among numerous alternatives, Squawker could have employed a "mute" or "block" feature that would allow users to avoid seeing content created by Mr. Milner; Squawker could have modified its flagging policy so that only the content in violation of the Terms and Conditions is flagged; or, it could have changed the algorithm to display consecutive squeaks in a thread. In lieu of these more reasonable alternatives, Squawker employs the extreme measure of indefinitely censoring the entirety of a squeaker's account, essentially rendering their participation in the public forum obsolete. *See McCullen*, 573 U.S. at 486. As if this did not create a substantial enough burden on Mr. Milner's ability to participate in the public forum, Squawker's Terms additionally forbid him from regaining full access to his account until he watches a time-consuming, overburdensome, and arbitrary video and satisfactorily completes a quiz. *See id.*

In its opinion, the Eighteenth Circuit chose to adopt the standard used by the Second and Ninth Circuits to analyze whether Squawker's Terms and Conditions are narrowly tailored. *See* R. at 34. This standard declares that "whether a regulation is narrowly tailored 'can only be determined by considering the scope of its application relative to the government objectives being pursued, taking context into account.'" *Mastrovincenzo v. City of New York*, 435 F.3d 78, 102 (2d Cir. 2006) (citing *Menotti v. City of Seattle*, 409 F.3d 1113, 1140 & n. 52 (9th Cir. 2005)); R. at 34. Yet in doing so the court failed to adequately analyze the context in which Mr. Milner's statements were made. *See* R. at 34-5. Mr. Milner's violative statements were made in a political context. *Id*. at 17. The flagging policy only applies in a political context, since only Delmont

government officials are verified users. Given that political speech is given the most protection of any category of speech, the courts should be extremely wary of restrictions imposed on it, especially within a public forum. *See Boos*, 485 U.S. at 321.

2. Mr. Milner has not been afforded any ample alternative channel of communication.

While this Court has not articulated an explicit test for when ample alternative channels of communication satisfy intermediate scrutiny, it did seemingly endorse a test used by the Seventh Circuit when it affirmed *Watseka v. Ill. Pub. Action Council* in 1987. *See* 479 U.S. 1048 (1987) (affirming *Watseka v. Ill. Pub. Action Council*, 796 F.2d 1547 (7th Cir. 1986)). The Seventh Circuit looked to whether (1) the proscribed form of speech is a uniquely valuable or important mode of communication or (2) the party's ability to communicate effectively is threatened by ever-increasing restrictions on expression. *Watseka*, 796 F.2d at. 1553.

The Eighteenth Circuit held that Squawker's Terms and Conditions, "which restrict the use and ordering of certain emojis subject to warning screens and restricting the timing of postings on the same page… leave open adequate alternative avenues of communication through the medium of emojis." R. at 35-6. However, in doing so, it did not determine the adequacy of alternative channels. *See* R. at 35. Mr. Milner's style of squeaking by using emojis and consecutive squeaks is a uniquely valuable mode of communication. *See Watseka*, 796 F.2d at. 1553. In the context of social media, users cannot rely on employing tone and inflection in crafting their message. It is thus of utmost importance that users be able to dictate when and how they express themselves to properly convey the meaning behind their content. Dividing up what could be one squeak into multiple is a mode of communication that is uniquely valuable to social media.

Squawker notes that Mr. Milner could create a new account. R. at 6. Not only does such a suggestion run contrary to Squawker's asserted aim of preventing fake accounts, it also is an

inadequate alternative to Mr. Milner using his original account. Mr. Milner has already lost 80% of his followers and his interactions have decreased to less than 1% of what they were prior to the flagging. R. at 19-20. Creating a new account would cause Mr. Milner to that lose all of his published content as well as his current followers. Squawking from an account with no followers and no previous content is not an adequate alternative to what his current account once was, or even what it is now. As this Court aptly noted "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). Squawker's proposed alternative is no alternative at all; it is thinly veiled censorship.

CONCLUSION

For the aforementioned reasons, the judgements of the Eighteenth Circuit should be reversed.

Respectfully submitted,

Avery Milner,
By His Attorneys

APPENDIX

U.S. Const. amend. I.

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

Squawker's 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 not prohibited for those participating in posting and commenting on the platform. A Squeaker may not participate in the automatic or manually facilitated posting, sharing, content engagement, account creation, event creation, etc. at extremely high frequencies to the effect the platform is unusable by others. Extremely high frequencies are four or more squeaks squawked within 30 seconds of each other.

Squawker's Flagging Provision of the Terms and Conditions

> 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, 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.

Avery Milner's squeaks (via his Squawker handle @DanceDad72)

BRIEF CERTIFICATE

Team 16 hereby certifies that the following statements are true:

1. The work product contained in all copies of Team 16's brief is in fact the work product of the members of Team 16 only;
2. Team 16 has complied fully with its school's governing honor code; and,
3. Team 16 has complied will all Rules of the Competition

On this day, January 31, 2020

/s/ Team 16