No. 17-874

SUPREME COURT OF THE UNITED STATES

AVERY MILNER,

Petitioner,

v.

MACKENZIE PLUCKERBERG,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

BRIEF FOR RESPONDENT

Team 25
Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Eighteenth Circuit correctly determined that Squawker, a private social media platform, did not engage in state action by enacting its flagging policy pertaining to verified accounts; and

II. Whether the United States Court of Appeals for the Eighteenth Circuit correctly determined that Squawker's Terms and Conditions, enacted by Mackenzie Pluckerburg in his role as CEO of Squawker, are a content-neutral restriction on time, place, or manner as permitted by the First Amendment.

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STATEMENT OF JURISDICTION

The United States District Court for the District of Delmont had subject matter jurisdiction for this constitutional action pursuant to 28 U.S.C. § 1331 (2018). Following final judgment, the United States Court of Appeals for the Eighteenth Circuit had appellate jurisdiction for this action subject to 28 U.S.C. § 1291 (2018). This Court has granted the Petition for a Writ of Certiorari for this action, and therefore has jurisdiction pursuant to 28 U.S.C. § 1254(1) (2018).

STATEMENT OF FACTS

Squawker, a social media platform, was created in 2013 by Mackenzie "Mac" Pluckerburg. Pluckerburg Aff. ¶ 4. Squawker allows individuals to create a personal profile and communicate within the platform with short messages called "squeaks." Users may also comment on other users' squeaks, follow other users, and "like" or "dislike" squeaks. *Id.*

Squawker has Terms and Conditions that all users must abide by to use the platform. Stipulation ¶ 6. The Terms and Conditions are meant to protect the platform from abuse aimed at those who have been historically marginalized. *Id.* The Terms and Conditions prohibit behavior that "promotes violence" against a number of groups, using emojis in a threatening capacity, and "spamming.". *Id.* The anti-Spamming section states, "A Squeaker shall not participate in automatic or manually facilitating 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." *Id.*

To further protect verified pages that were the target of imposters and misinformation, Squawker implemented a "flagging" policy in early 2018. Stipulation ¶ 9. If an individual posts a comment found to be in violation of the Terms and Conditions, the individual's profile page

receives a black box covering all content from the individual. This information is not, however, unviewable - others may interact with the individual's squeaks by clicking on the black box to see their content. *Id.* Flagged users and content also include a skull and crossbones emoji. *Id.*

In 2017, Governor William Dunphry of Delmont created a Squawker profile to deliver government information and to interact with other Squawker users. Dunphry Aff. ¶ 7.

In early 2018, Squawker experienced issues with users posing as other Squawkers. The company created a verification process for users being impersonated, including government officials from Delmont. Pluckerburg Aff. ¶ 9. Governor Dunphry had his personal Squawker profile verified by Squawker to prevent impersonation and the distribution of false news. *Id.*

Avery Milner is a citizen of Delmont. Milner Aff. ¶ 1. Mr. Milner is a frequent Squawker user and interacts with Governor Dunphry's personal verified profile. *Id.* at ¶ 6. Mr. Milner— like all users— agreed to the Terms and Conditions of the platform in March 2018. *Id.* at ¶ 5.

On July 26, 2018, Governor Dunphry posted a link to a bill proposal pending before the Delmont state legislature on his personal Squawker profile. Dunphry Aff. ¶ 7. The legislation would have made it illegal within the state of Delmont for cars to turn right on red in an effort to reduce pedestrian-vehicle related deaths. *Id.*

On the same evening, Mr. Milner - after consuming several alcoholic beverages - saw Governor Dunphry's post. Milner Aff. ¶ 7. Mr. Milner disagreed with the content on Governor Dunphry's personal Squawker page and posted comments on the link. Milner Aff. ¶ 8. Mr. Milner posted four comments - one stating his opposition to Governor Dunphry holding office, and three emojis posted in a threatening capacity – all within 29 seconds. Mr. Milner's comments were in such quick succession that they violated the anti-spamming portion of the Terms and Conditions, meaning four or more squawks in 30 seconds. Pluckerburg Aff. ¶ 12.

Numerous Squawker users reported Mr. Milner to the platform for violating the Terms and Conditions. Mr. Pluckerburg then reviewed the reports, flagged Mr. Milner's account for violating the Terms and Conditions, and upon a finding of violation, flagged Mr. Milner's personal account. Pluckerburg Aff. ¶ 11. Pursuant to the Terms and Conditions and Flagging Policy, Mr. Milner's content had a black box posted over it with emojis used to indicate a flagged account. Stipulation ¶ 9. Other Squawker users were still free to view Mr. Milner's account and his content so long as they clicked on the black boxes. *Id.*

Per the Terms and Conditions, Mr. Milner was promptly notified that his account was in violation of Squawker's Terms and Conditions on July 27, 2018. Milner Aff. ¶ 9. Mr. Milner was instructed on how to have the black box and emojis indicating a flagged account be removed; Mr. Milner could watch an online video detailing Squawker's Terms and Conditions and then complete a short quiz. *Id.* By completing the quiz, Mr. Milner could acknowledge his continuing compliance with Squawker's Terms and Conditions to bring him in congruence with all Squawker users, and his page would return to normal status without black boxes or flagging. *Id.*

Though given the opportunity to remedy his account's flagging, Mr. Milner refused. Milner Aff. ¶ 13. Despite not watching Squawker's video and completing the quiz, Mr. Milner was still free to pursue other options to share his content without black boxes on the social media platform. Mr. Milner could either: (1) create a new Squawker account, or, should he desire to continue interacting with Governor Dunphry's personal page, (2) view Governor Dunphry's squeaks without being logged into a Squawker account. As of the date of the commencement of this action, Mr. Milner did not take action using any of the methods available to him.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Eighteenth Circuit correctly held that Mr. Pluckerberg, as CEO of Squawker, did not act as a state actor and did not violate Mr. Milner's First Amendment rights by flagging his account. The decision of the Eighteenth Circuit should therefore be upheld.

Mr. Pluckerberg cannot be liable for violating Mr. Milner's First Amendment rights because his company is not a state actor, and without state action Petitioner's claim fails. Squawker is a private company operating an online platform that is not a function traditionally performed by the government. In addition, even though Squawker is hosting a public forum on its platform, this alone does not justify treatment as a state actor. Merely opening its platform to public discussion does not make Squawker a state actor, and Squawker must be able to monitor and regulate content on its site as a business. Furthermore, Squawker is one of many sites offering a forum for online discussion, and does not hold a monopoly sufficient to justify treating it as a state actor. For these reasons Squawker is not a state actor and Petitioner's claim must fail.

Even if Squawker were a state actor, flagging Mr. Milner's account did not violate his First Amendment rights. If Squawker's Terms and Conditions are deemed content-based, it still satisfies strict scrutiny. Squawker has a compelling interest in maintaining a functional platform so that it cannot chill or suppress the speech of others, particularly on verified profiles. To accommodate this interest, Squawker instituted a narrowly tailored flagging policy that targets violative behavior and puts a content warning over the violator's posts. The violator is neither banned from the platform nor blocked from interaction, and may return to unflagged status after completing a short quiz to understand Squawker's Terms and Conditions. Squawker has a

narrowly tailored solution to accommodate a compelling government interest, satisfying strict scrutiny. For this reason, even if Squawker were a state actor, Petitioner's claim would still fail.

ARGUMENT

I. SQUAWKER'S OPERATION OF GOVERNOR DUNPHRY'S ACCOUNT IS NOT STATE ACTION.

Mr. Pluckerberg, acting as CEO of the private company Squawker, is only subject to First Amendment scrutiny if deemed a state actor. Because the company is not a state actor, it cannot be subject to First Amendment scrutiny and Petitioner's claim must fail.

A. Squawker is a private company and not subject to First Amendment regulations on state actors.

The First Amendment's protection on the right to speak generally applies only to actions of the government. "[I]t must be remembered that the First ... Amendment[] safeguard[s] the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only." *Lloyd Corp., Ltd v. Tanner*, 407 U.S. 551, 567 (1972). Although the First Amendment generally only applies to the government, Petitioners bring this action against Mr. Pluckerberg and his private company.

This Court provides a framework by which private entities may be held liable for First Amendment violations. In *Marsh v. Alabama*, 326 U.S. 501, 507 (1946), the Court held a private corporation operating a "company town" liable for viewpoint discrimination when the company censored certain religious expression on their sidewalk. The court held that operating the town was a function traditionally carried out by the state. *Id.* Since *Marsh*, the Court has added to this doctrine: "state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood Acad. v. Tenn. Secondary Sch.*, 531 U.S. 288, 295 (2001) (quoting

Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974). While state action may exist if a private actor performs a public function or if the "nexus" between a private actor and the state is sufficiently close, there is no clear test for state action: "From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action[.]" *Brentwood*, 531 U.S. at 295-96. Whether a private act meets the limited circumstances qualifying as state action thus depends on the particular facts. In the instant case, the facts show that flagging Mr. Milner pursuant to Squawker's Terms of Service was not state action, and Squawker is not subject to scrutiny under the First Amendment.

B. Squawker is not performing a traditionally public function.

Mr. Pluckerberg's operation of Squawker, a private platform hosting profiles of both government officials and private individuals, is not a traditionally public function. State action may be found if a private entity is performing a traditionally public function. However, "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978) (quoting *Jackson*, 419 U.S. at 352). Only a narrow set of traditionally public functions qualify under this exception, such as "'hold[ing] [public] elections,' 'govern[ing] a town,' and 'serv[ing] as an international peacekeeping force.'" *Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 WL 1471939, at *5 (N.D. Cal. Mar. 26, 2018) (quoting *Brunette v. Humane Soc'y of Ventura Cty.*, 294 F.3d 1205, 1214 (9th Cir. 2002)).

Mr. Pluckerberg's operation of a social media platform does not meet the narrow criteria necessary for a public function. Squawker is a privately-owned platform where individuals may choose to join and create a profile. Stipulation ¶ 5. Individuals may also use Squawker, if they

choose, to follow or respond to the posts of others. *Id.* Operation of a platform like Squawker has traditionally been performed by private companies, not the government. In addition, unlike the examples in *Prager University* and *Brunette*, such as holding elections or governing a town, restricting an individual's use of Squawker does not so dramatically affect that individual's greater right to speak. *See* 2018 WL 1471939, at *5; 294 F.3d at 1214. Even if restricted on Squawker, the individual still has many other options to speak in the public places that they live, and Squawker is not the only online space to engage in speech. Because the government has not traditionally operated social media platforms and reasonably restricting access to Squawker does not exclusively cut off the ability to speak, Squawker is not performing a public function.

Furthermore, other social media platforms have already been considered not a public function. *See, e.g.*, *Howard v. Am. Online, Inc.*, 208 F.3d 741, 754 (9th Cir. 2000) (holding America Online is not a state actor); *Nyabwa v. Facebook, Inc.*, No. 2:17-CV-24, 2018 WL 585467, at *2 (S.D. Tex. Jan. 26, 2018) ("[C]laims for violation of [plaintiff's] right of association ... may be vindicated against *governmental* actors ... but not a private entity such as FaceBook."); *Prager University*, 2018 WL 1471939, at *5. In *Prager University*, the Northern District of California found no persuasive authority that operating a "video-sharing website" for users made the private company YouTube fall into "one of the 'very few' functions that were traditionally 'exclusively reserved to the State.'" 2018 WL 1471939, at *5 (quoting *Flagg Bros.*, 436 U.S. at 158). Squawker's operation of a social media platform is therefore beyond the scope of public functions sufficient for state action, and this exception cannot apply.

C. Squawker's hosting of an official account as a public forum is not state action.

Squawker's hosting of Governor Dunphry's account as a public forum is not state action. Because Governor Dunphry used his Squawker account to "communat[e] and interact[] with the

public about his administration," Petitioners argue Squawker is a public forum and thus subject to the First Amendment. Dunphry Aff. ¶ 9. While Squawker's operation of Governor Dunphry's page did constitute a public forum, Squawker is still not a state actor.

While Squawker operates a public forum, hosting a public forum does not alone make a private entity subject to the First Amendment— Petitioners still must show why Squawker is a state actor. Of course, if the government itself "provides a [public forum] ... [it] may be constrained by the First Amendment, meaning that the government ordinarily may not exclude speech or speakers from the forum on the basis of viewpoint[.]" *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1930 (2019). Here, however, this suit alleges Squawker, a private company, is liable for content discrimination in hosting a public forum. In such circumstances, "[a] private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. The private entity may thus exercise editorial discretion over the speech and speakers in the forum." *Halleck*, 139 S.Ct. at 1930. Even though Squawker is hosting a public forum, Petitioner cannot identify why Squawker's actions trigger First Amendment scrutiny, for which private actors are not "ordinarily constrained." *See id.*

Indeed, previous cases assessing forums on social media and the First Amendment address censorship by the public official controlling the account, not the private operator. In *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 239 (2d Cir. 2019), the Second Circuit explained, "Because the President ... acts in an official capacity when he tweets, we conclude that he acts in the same capacity when he blocks those who disagree with him." The Second Circuit focuses on President Trump's actions, not Twitter's. Just as a public official's use of a private forum does not make President Trump a private actor, Mr. Pluckerberg's decision to open Squawker to public debate does not automatically make him a state actor. Similarly, in

Quigley v. Yelp, Inc., No. 17-CV-03771-RS, 2018 WL 7204066, at *3 (N.D. Cal. Jan. 22, 2018), the Northern District of California held that even if a complainant allegedly censored by a variety of social media platforms could show close ties between the government and the platforms, the complainant did "not indicate[] why the United States government, rather than defendants, is not the liable party." The First Amendment's protection against content discrimination in public forums should thus remain focused on the public officials controlling the accounts, and not the underlying private company merely running the forum.

Furthermore, Petitioners may argue Squawker creates a nexus with the government by allowing the public to communicate on its public forum, this alone is insufficient for state action. In *Halleck*, the Court clarified that "a private entity ... who opens its property for speech by others is not transformed by that fact alone into a state actor." 139 S.Ct. at 1926. Thus, while Squawker allows users to engage on its site using a public forum, it is still a private actor, and this alone does not make Squawker subject to the First Amendment.

In addition, protecting private online platforms from First Amendment regulation is not just a constitutional imperative— it also provides important protections for private enterprise. Even when operating a public forum, private social media companies still must be able to reasonably choose what content is appropriate to display on their platform. Without this choice, all private companies operating public forums, "would face the unappetizing choice of allowing all comers or closing the platform altogether. 'The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use.'" *Halleck*, 139 S.Ct. at 1931 (quoting *Hudgens v. NLRB*, 424 U.S. 507, 519 (1976)). State action doctrine should not interfere with the discretion of online platforms in how they choose to operate their own spaces, even when the platforms are open to the public. *See id.* If Squawker is made a state actor and thus

unable to reasonably restrict content on its platform, the site cannot screen for content that its users consider unsafe or indecent.[1] Restricting Squawker's ability to editorialize content on its site would therefore not only infringe on the fundamental right of a private property owner under *Halleck* and its progeny, but may also result in serious harm to the reputation and livelihood of the platforms that Squawker and similar companies provide.

D. Squawker does not have an online monopoly justifying state action.

Although Squawker is not performing a traditionally public function and should be entitled to operate with discretion as an independent private company, the District Court still suggests that Squawker's position as an "online monopoly" justifies applying First Amendment protections to Mr. Pluckerberg's conduct. *Milner v. Pluckerberg*, C.A. No. 16-CV-6834, 1, 9 (D. Del. 2019). Squawker does not, however, hold a monopoly over dialogue on the internet. Unlike the sidewalk of the company town in Marsh, Squawker comes nowhere close to controlling all the online forums where citizens may speak. Even in *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017), where the Court focused on the importance of speech on the internet, the Court still identifies that the internet includes "vast realms of human thought and knowledge." Squawker is just one of the countless "websites," "mechanisms," and forums available on the internet. *See id.* Other platforms also offer opportunities for individuals to express their views, both online and in person. Squawker's control of one online platform in no way amounts to an online monopoly, and has an insufficient effect on individual rights to be deemed state action.

[1] *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598, 1659 (2018) (explaining that if social media platforms are treated as state actors, "[a]ll but the very basest speech would be explicitly allowed and protected — making current problems of online hate speech, bullying, and terrorism, with which many activists and scholars are concerned, unimaginably worse.").

Furthermore, basic economic principles incentivize Squawker and other social media platforms to conform their Terms of Service and flagging mechanisms to best serve speakers on their site. There is already evidence that other platforms, such as Twitter, listen and respond to pressure from users to update censorship rules and guidelines.[2] These companies respond to pressure from users because they are businesses, and are incentivized to provide the best service to their consumers. Rather than applying the rules of the state to private actors using state action doctrine, the Court should recognize the restrictions the market already provides, and allow Squawker to appropriately respond to the needs of its users.

In conclusion, Mr. Pluckerberg's operation of Squawker, including hosting Governor Dunphry's official Squawker account, did not constitute state action. The Court should therefore affirm the decision of the Circuit Court and hold that Petitioner's claim fails because the First Amendment does not apply to Squawker.

II. EVEN IF SQUAWKER IS A STATE ACTOR, ITS TERMS AND CONDITIONS DO NOT VIOLATE THE FIRST AMENDMENT.

A. Squawker's Terms and Conditions are Content Neutral

Petitioner asserts that Squawker's Terms and Conditions restrict the content of speech on the platform, violating the First Amendment. This argument fails because the purpose of the Terms and Conditions is to prevent spamming and keep Squawker a functional space, regardless of the content of said spam. Because Squawker's predominant purpose is to protect the functionality of the platform, the regulations are constitutionally valid as content neutral.

[2] *See* Klonick, *The New Governors*, at 1629 (2018) (explaining that "the history of Twitter reveals ... [that] rather than exit a platform, some users would stay and expect platforms to alter rule sets and policies reactively in response to user pressure[.]").

1. Content neutral restrictions, incidental impacts on First Amendment rights, and secondary and tertiary effects of regulations

In *O'Brien*, the Supreme Court established that regulations that are content neutral in their application are constitutional. *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("A sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms"). As long as the government regulation (1) is within the constitutional power of the government, (2) furthers an important or substantial governmental interest, (3) is unrelated to the suppression of free expression, and (4) the incidental restriction on the alleged First Amendment freedom is no greater than is essential to furtherance of that interest, the content neutral regulation is permissible. *Id.*

The need to confine a forum to the limited and legitimate purposes for which it was created can justify the State in reserving it for certain groups or discussion of certain topics. *See, e.g.*, *Cornelius* v. *NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985); *Perry Ed. Ass'n*, *v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). The state cannot, however, exclude speech if its distinction is not "reasonable in light of the purpose served by the forum." *Cornelius,* 473 U.S. 788 at 804-806; *see also Perry Ed. Ass'n*, 460 U.S. at 46, 49. Thus, in determining whether the State is legitimately preserving the limits of its forum by excluding a class of speech, the Court notes a distinction between content discrimination, which is permissible if it preserves the purposes of a limited forum, and viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limits. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829-30 (1995) (citing *Perry Ed. Ass'n*, 460 U.S. at 46).

Per *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) and its progeny, incidental intrusion on First Amendment rights are valid so long as the regulation has a valid governmental

purpose. In *Ward*, the City of New York imposed sound restrictions on a bandstand in Central Park to minimize sound levels for local residents. *Id.* Respondents asserted that the city banned their performance because of its content, music celebrating antiracism, and not because of the noise ordinances, thus violating their First Amendment rights. The Court ruled that the restrictions were content neutral and permissible, and any relation to the content of the music was merely incidental. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Pluckerburg v. Milner*, C.A. No. 16-CV-6834, 1, 6 (18th Cir. 2019) (quoting *Ward*, 491 U.S. at 791). Valid governmental purposes vary in character, and include proper functionality and public safety. *Stromberg v. California*, 283 U.S. 359, 369 (1931) (holding it is within the power of federal and state governments to punish individuals whose utterances incite violence.)

It is a consistently held constitutional principle that federal courts will not strike down an otherwise constitutional statute or regulation based on an alleged illicit motive. *O'Brien*, 391 U.S. at 383. Since the turn of the 20th century, this has been a pillar of the American legal system. "The decisions of [the Supreme Court] ... lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *McCray v. United States*, 195 U.S. 27, 56 (1904); *see also Arizona v. California*, 283 U.S. 423, 455 (1931); *Weber v. Freed*, 239 U.S. 325, 331 (1915); *U.S. v. Doremus*, 249 U.S. 86, 87 (1919).

Numerous courts have found regulations content neutral because they aim to prevent negative secondary and tertiary effects of speech, even if they single out certain speech. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 51 (1976) (validating a Detroit zoning ordinance specifically differentiating between normal theatres and those exhibiting sexually

explicit content because of secondary effects on other theatres and residential areas); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). *City of Renton* dealt with a similar zoning ordinance as was challenged in *Young*. *Id.* In *City of Renton*, the lower courts, along with the Supreme Court, held that the City ordinance was aimed not at the "*content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theatres on the surrounding community." *Id* at 47 (emphasis added). Because the City's predominant concern was the secondary effects of adult movie theatres on the community, the regulation was content neutral. This line of jurisprudence stands in stark contrast to blanket content-based restrictions serving no greater government interest than silencing a group of individuals. *See Stromberg*, 283 U.S. at 369 (invalidating California's ban on displaying anarchy-inspiring flag in public as a content-based restriction against a specific act).

2. Squawker's Terms and Conditions are permissible content neutral regulations of the private social media platform.

Squawker's Terms and Conditions qualify as a permissible regulation under *O'Brien*. 391 U.S. at 376. As the operator of a private platform, Squawker holds the power to enact Terms and Conditions defining the platform's boundaries. These Terms and Conditions are crucial to the substantial interest Squawker has in running a functioning platform and without them the platform would fall into disarray.[3] Squawker's larger interest is unrelated to quashing free expression; rather, it is to increase the tonnage of communication and expression exchanged. Its Terms and Conditions, while limiting certain behaviors and regulating threatening conduct, are meant to expand the amount of information exchanged, invite new users, and participation on the

[3] In fact, when Petitioner violated the anti-spamming measure within the Terms and Conditions, twenty-nine percent of Squawker users left the site because the Petitioner effectively shut down and hijacked the forum for his own personal use. Pluckerburg Aff. ¶¶ 14, 11.

platform. Individuals who abuse their right to expression on Squawker effectively shut down the forum and suppress communication. Pluckerburg Aff. ¶ 12. Unlike *Stromberg* where the government targeted a specific group to try and silence their message, Squawker targets no specific group and has a larger goal of increasing the accessibility and functionality of the platform. *Stromberg*, 283 U.S. at 361. Any sort of incidental restriction on speech under Squawker's Terms and Conditions are no more than essential to the furtherance of their goal— the overall functionality of the platform. *See O'Brien*, 391 U.S. at 376. Petitioner's account was flagged, but not banned (Pluckerburg Aff. ¶ 11); users could still read his content by clicking on his posts (Stipulation ¶ 9), and Petitioner could restore his normal profile by completing a short video and quiz at any time. *Id.* Squawker's Terms and Conditions are in full compliance with content neutral regulations that are constitutionally valid under *O'Brien*. 391 U.S. at 376.

The principal justification of Squawker's Terms and Conditions is to ensure the functionality of the platform and prevent individuals from spamming other posts and users. Indeed, many users reported that the platform was unusable due to Mr. Milner's constant posting in a concentrated period of time. Pluckerburg Aff. ¶ 11 ("All told, Mr. Milner's comments received over one thousand dislikes and over two thousand reports"). Even if the Terms and Conditions did impact the content of Mr. Milner's speech, the impact was purely incidental in nature; Mr. Milner's rapid posts violated Squawker's rules, and would have been a violation if he had made unobjectionable posts. Mr. Pluckerburg's concerns regarding the anti-spamming policy were also well-founded— when Mr. Milner rapidly commented and "hijacked" the space, users left the platform and deleted their accounts for this exact reason. *Id.* ¶ 12. This is analogous to the regulation in *O'Brien* where the prevention of burning draft cards was "limited to preventing harm to the smooth and efficient functioning of the Selective Service System." 391 U.S. at 382.

Squawker's Terms and Conditions are no different in their end goal: the smooth and efficient functioning of the social media platform.

3. Squawker did not discriminate based on viewpoint; instead, it permissibly reserved content for limited and legitimate purposes.

Squawker's Terms and Conditions are exactly the type of restrictions that the Court has upheld in previous confined forum caselaw. As in *Rosenberger, Cornelius* and *Perry*, a government entity— in the case at bar, Squawker— may confine a forum to the limited and legitimate purposes for which it was created. 515 U.S. at 829; 473 U.S. at 806; 460 U.S. at 46. The District Court incorrectly determined that Squawker's Terms and Conditions are viewpoint discrimination, when they are in fact content discrimination aimed at protecting the forum's limitations and purpose: to serve as a way for people to stay connected to local, national, and global news. Pluckerburg Aff. ¶ 5. The Terms and Conditions are not aimed at silencing certain points of view; rather, they are designed to make the platform function as efficiently and openly as possible, which is vital in rapidly responding to breaking stories. Allowing individuals like Mr. Milner to "hijack" the platform with constant posting, rendering the platform unusable for other members to read breaking news and share their own thoughts equally, defeats the very purpose that Squawker was created and shaped to provide. Pluckerburg Aff. ¶ 12. *Perry* and its progeny permit the exclusion of speech in a limited forum if "reasonable in light of the purpose served by the forum," and given Squawker's role in the world of rapid news dissemination, limiting what content can be shared and the rapidity in which it can be posted are reasonable to maintain the platform's functionality. 460 U.S. at 46.

4. It is not the Court's role to investigate allegations of illicit motivations by the government or enacting body.

Petitioner's contention— that Squawker's Terms and Conditions place an undue restriction on his First Amendment rights— depends upon an assumption that this Court should not wander into when determining the validity of Squawker's regulations. Like *O'Brien*, *McCray*, and *Arizona*, Petitioner is alleging that the governing body— in those cases federal and state governments; here, Squawker— had illicit motives when enacting their regulations. 391 U.S. at 383; 195 U.S. at 56; 283 U.S. at 455. But the record in front of this Court dictates otherwise. Petitioner's account was flagged not solely because of generic violent or offensive use of emojis, but for "excessive posting" and "spamming behavior" brought to Squawker's attention because of numerous user complaints. Pluckerburg Aff. ¶¶ 13, 11. There is thus no doubt that Squawker's anti-spamming measures are valid under constitutional scrutiny— they make no reference to content and are merely a time, place, and manner restriction allowing the platform to function for the benefit of all users. Finding Squawker's Terms and Conditions a violation of the First Amendment would contradict firmly established precedent that it is not the Court's role to chase an alleged illicit legislative motive when there is an otherwise constitutional statute in front of it. *See O'Brien*, 391 U.S. at 367; *McCray*, 195 U.S. at 56. Petitioner openly admits to violating the Terms and Conditions for his spamming behavior that would have resulted in his profile being flagged regardless of the content it espoused.[4] This is sufficient to find a violation of Squawker's content neutral anti-spamming regulations, and there is no need to analyze whether Squawker's actions had content-restricting motivations.

[4] Milner Aff. ¶ 8 ("On July 26, 2018 I made four comments on Governor Dunphry's squeak within thirty seconds of each other").

5. Squawker's Terms and Conditions are content neutral because of their secondary and tertiary effects.

As was the case in *City of Renton* and *Young*, the predominant concern of Squawker's Terms and Conditions was to make the social media platform usable for all members. 427 U.S. at 50; 475 U.S. at 47. Though some of the Terms and Conditions may have an immediate impact on an individual's ability to openly participate in the platform, the secondary and tertiary effects of such regulations are vital to the restoration and maintenance of a viable platform inclusive for all users. When creating Squawker, Mr. Pluckerburg envisioned a way for "people to stay connected to local, national, and global news." Pluckerburg Aff. ¶ 4. The platform's Terms and Conditions were not aimed at shaping the messages and media shared on the site, but were meant to ensure proper functionality for all users to share news and information.

The anti-threat/violence and anti-spamming portion of the Terms and Conditions have many effects that are constitutionally valid for the protection of the platform at large as a medium to exchange information and speech. Mr. Pluckerburg was also interested in maintaining Squawker's success as a viable, financially strong platform. Squawker has a concentration of users who are above the age of 65 (30%). Pluckerburg Aff. ¶ 6. To make sure the platform continues to compete in a highly competitive social media market, Squawker had to implement Terms and Conditions not aimed specifically at certain conduct, but to form a community that its users, including the elderly, could participate. In fact, Mr. Pluckerburg's concerns regarding the welfare of Squawker's user-base were true: after Mr. Milner's comments, 29% of Squawker users left the platform and deleted their accounts. Pluckerburg Aff. ¶ 14. Because Squawker's predominant purpose was the valid operation of its platform to share news and information when enacting its Terms and Conditions, this Court should take into account the beneficial secondary

effects of the regulations and not assume that they target specific types of content purely for the purpose of their suppression.

B. Even if Squawker's Terms and Conditions are found content-based, they are sufficiently narrow to serve a compelling governmental interest while leaving open alternative channels for Petitioner to engage on Squawker.

Content-based laws are examined under a strict scrutiny standard. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). Content-based laws satisfy strict scrutiny if (1) justified by a compelling governmental interest, and (2) narrowly drawn to serve that interest. *Id.* at 395. While strict scrutiny is the most exacting test this Court applies to regulations concerning speech, the test is not insurmountable. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) ("we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact'")).

If Squawker's Terms and Conditions are found content-based, they are still constitutional because they are implemented using the least restrictive means. The restriction on Petitioner's ability to share views on Squawker's platform is far from absolute. Stipulation ¶ 6. Petitioner can still post, comment, and view other Squeaker's profiles and posts. *Id*. In merely flagging Petitioner's account to alert other users to the essence of his Squeaks— while still allowing those users to view the squeaks after consenting by clicking the white skull and crossbones on the squeak— Squawker only lightly guards viewing of the speech. Stipulation ¶ 6. This is the least restrictive means Squawker can sue to protect the rights of other users on their platform.

1. Protecting the rights of other users to use and enjoy Squawker's forum is a compelling governmental interest that satisfies strict scrutiny.

Squawker has legitimate public interest in restricting the speech of one user from having a chilling or silencing effect on other users of the platform. Unfortunately, this is the raison

d'être of Petitioner's account. Milner Aff. ¶ 6. Petitioner says his audience enjoys his creativity in "crafting messages by stringing together comments on the same post in quick succession" to "ensure I always get the last word in any exchange." *Id*. Petitioner also says that he has done this on "countless other Squawker pages in the past," but has only been caught doing so on this occasion. *Id*. at ¶ 12. Mr. Milner's actions have had a noticeable chilling effect on other users, resulting in a mass exodus from Squawker. Pluckerberg Aff. ¶ 14. As previously mentioned, following Mr. Milner's conduct, Squawker lost 29% of users. *Id*.

Regarding the string of posts at issue, Mr. Pluckerberg received over 2,000 reports of obsessive and obscene commentary on Governor Dunphy's post. Pluckerberg Aff. ¶ 11. Mr. Pluckerberg notes that due to the excessive volume of Petitioner's comments, the forum was "effectively shut down [] for others and led to users leaving the platform and deleting their accounts for the stated reason that Avery Milner had hijacked the space." *Id*. at ¶ 12. Mr. Pluckerberg fortunately began monitoring all verified accounts beginning in March 2018, caught Petitioner's breach of the Terms and Conditions, and implemented the flagging procedure Petitioner agreed to abide by while using the platform. Milner Aff. ¶ 5.

As the Eighteenth Circuit highlights, Squawker's actions in protecting the rights of individual users are justified in much the same way that governmental "regulations on broadcast media were held justified because they protected the rights of listeners and other speakers." *Pluckerburg v. Milner*, C.A. No. 16-CV-6834, 1, 9 (18th Cir. 2019) (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396 (1969). In *Red Lion*, this Court held that Congress and the Federal Communications Commission "[did] not violate the First Amendment when they require[d] a radio or television station to give reply time to answer personal attacks and political editorials." 395 U.S. at 396. By flagging accounts that admittedly and repeatedly violate the Terms and

Conditions (Milner Aff. ¶ 12), Squawker prevents a single viewpoint from commandeering the platform, much like the FCC prevented broadcast stations from effectively shielding the public from responsive views on public issues. 395 U.S. at 369; Stipulation ¶ 6. As the Court stated in *Red Lion*, without this regulation, "station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, [] and to permit on the air only those with whom they agreed." 395 U.S. at 392. Without adherence to Terms and Conditions, Squawker would be ostensibly owned, and the platform's views monopolized by, those like Mr. Milner who spam posts to silence the views of opponents. Squawker's unique application of the so-called "fairness doctrine" to their social media platform thus satisfies strict scrutiny. *Red Lion*, 395 U.S. at 396.

2. Squawker's Terms and Conditions are narrowly tailored because they are necessary to protect the legitimate government interests articulated above.

The First Amendment requires narrow— not perfect— tailoring. *Williams-Yulee v. Fla Bar*, 575 U.S. 433, 435 (2015). Whether a regulation is narrowly tailored is "determined by 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 1112, 1140 (9th Cir. 2005). A narrowly tailored law cannot be overly broad or "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799. Underinclusive laws are also unconstitutional. *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 801-802 (2011).

3. Squawker's Terms and Conditions are neither overbroad nor underinclusive.

Underinclusivity does not pose an inherent First Amendment Problem. *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992). Underinclusivity is merely a red flag used to identify situations where the stated government interest is not truly compelling. *Id*. at 387.

Petitioner may accuse Squawker's Terms and Conditions of underinclusivity because the flagging policy is only directed at verified pages. Stipulation ¶ 9. This is because the problem Squawker aimed to address involved imposter and fake news accounts. Pluckerberg Aff. ¶¶ 7-10. Those seeking to disrupt forums such as Governor Dunphry's are the root of this problem. Overseeing interactions on all accounts, verified or not, is unnecessary. Mr. Pluckerberg personally monitored all verified Squawker accounts during the first year of the new feature. Pluckerberg Aff. ¶ 10. To require oversight of every action on every profile is not plausible. Accordingly, Mr. Pluckerberg instituted the flagging procedure to those accounts most vulnerable to behavior that is violative of the Terms and Conditions. Pluckerberg Aff. ¶ 10. Squawker was also careful not to over-restrict violators.

This Court considers the doctrine of overbreadth particularly punishing, applying it only in situations where there is "substantial" overbreadth. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); *see also New York v. Ferber*, 458 U.S. 747, 765 (1982) (holding a state statute was not overbroad because "the forbidden acts [were] listed with sufficient precision"). Squawker's Terms and Conditions are sufficiently precise in outlining violative behavior. The purported restrictions on speech in Squawker's Terms and Conditions are "the least restrictive means this court has ever seen." *Pluckerburg v. Milner*, C.A. No. 16-CV-6834, 1, 10 (18th Cir. 2019).

Petitioner may contend that Squawker's Terms and Conditions are overbroad because they deny an adequate alternative channel unique to emojis. The District Court stated that

Squawker's regulation of "violent or threatening emojis" is a constructive ban on the entire medium of expression. *Milner v. Pluckerberg*, C.A. No. 16-CV-6834, 1, 12 (D. Del. 2019). The District Court hyperbolizes. The Terms and Conditions place a restriction not on the medium of expression itself, but the manner and timing that such emojis are posted. Squawker's interest in functionality is not dependent on the use of text versus emoji. As the Eighteenth Circuit stated, "Mr. Milner's frequent, repeated posts and use of threatening, ageist emojis constructively shut other users out of the forum, resulting in many users abandoning the platform." *Pluckerburg v. Milner*, C.A. No. 16-CV-6834, 1, 10 (18th Cir. 2019). Adequate alternative means don't necessarily require a perfect alternative medium. *SEIU v. City of Houston*, 542 F.Supp.2d 617, 627 (S.D. Tex. 2008) (quoting *Vincenty v. Bloomberg*, 476 F.3d 74, 88 (2d Cir. 2007) ("Alternative channels of expression … need not 'be perfect substitutes for those channels denied to plaintiffs.'")). Moreover, this Court has found that the First Amendment "does not guarantee the right to communicate one's views at all times and places or in the manner that may be desired." *Heffron v. Int'l Soc. For Krishna Consciousness*, 452 U.S. 640, 647 (1981).

Flagging does not ban Petitioner from posting or block him from the Governor's page. *Pluckerburg v. Milner*, C.A. No. 16-CV-6834, 1, 10 (18th Cir. 2019). Petitioner's comments were not deleted, and he may still post, even with emojis, subject to flagging. *Id*. Restrictions of this kind have been held "sufficiently narrowly tailored" even where speech is found "medium-specific." *Id*. (citing *Kleinman v. City of San Marcos*, A-08-CA-058-SS, 2008 WL 11429402, at *6 (W.D. Tex., Aug. 25, 2008) (finding that restrictions enclosing medium-specific speech are narrowly tailored to leave open adequate alternative avenues where speech remains accessible to those who accept an invitation to hear it)). Users can still view Petitioner's posts by simply pressing the skull and crossbones over the post, thus consenting to view the post. Stipulation ¶ 9.

Petitioner may argue that the flagging policy is overly broad because it flags more than just the offending post or comment. Stipulation ¶ 9. The flagging policy uses black boxes to cover (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. *Id*. Squawker is a private social media platform that needs to be able to take reasonable precautions to ensure the functionality of the platform. Stipulation ¶ 5. Users such as Petitioner threaten that functionality by repeatedly spamming posts with language and emojis that aim to silence the views of other users. Milner Aff. ¶¶ 6, 12. In order to provide a functional platform where users may openly engage with one another, Squawker must be able to discipline violators of their Terms and Conditions.

Squawker, unlike Petitioner, does not seek to silence users. Stipulation ¶¶ 6, 9. Squawker does no more than necessary to protect the rights of other users on the platform from violators of their Terms and Conditions. Violators can still maintain profiles and have an avenue to return to unflagged status after a thirty-minute training video and quiz that ensures both compliance with the platform and harmonization with its functionality. Stipulation ¶ 9. These rules are not overburdensome and are pointedly aimed at keeping a functional platform for Squawker's users.

CONCLUSION

In conclusion, flagging Mr. Milner pursuant to Squawker's Terms of Service does not constitute state action. Even if Mr. Pluckerberg's conduct were state action, it did not violate Mr. Milner's First Amendment rights. The judgment of the Eighteenth Circuit should therefore be upheld.

Respectfully Submitted,

/s/ Team 25
Attorneys for Respondent

CERTIFICATE OF SERVICE

We, the attorneys for Respondent, certify that on January 30, 2020, have served upon the Petitioner a complete, full, and accurate copy of this Brief via the United States Postal Service First Class Mail properly addressed and with sufficient postage accounted for.

Date: Jan. 30, 2020

/s/ Team 25
Attorneys for Respondent

CERTIFICATION

The work product contained in this, and all copies, of our team's brief is in fact the work product of the team members. The team has complied fully with our school's governing honor code. The team has complied with all Rules of 2020 Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition.

Date: Jan. 30, 2020

/s/ Team 25
Attorneys for Respondent

APPENDIX A: CONSTITUTIONAL PROVISION

First Amendment, 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 peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.