Team 24
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No. 17-874

In the Supreme Court of the United States

AVERY MILLNER,
Petitioner

v.

MACKENZIE (MAC) PLUCKERBERG
In his official capacity as Chief Executive Officer of Squawker
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

QUESTIONS PRESENTED

I. Does a social media platform engage in state action when that platform intentionally blocks critical commentary on a state government's public forum after the CEO of that platform coordinates with the government, establishes that forum on the government's behalf, and personally monitors and censors responses from constituents?

II. Does a social media platform operating a public forum violate a user's First Amendment rights when it flags and restricts a user's entire account with skulls and crossbones and limited visibility on an official government page, due to a single alleged violation of compulsory terms and conditions based on the user's expressed viewpoint on political age limits or for merely posting four times quickly?

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The opinion of the United States District Court for the District of Delmont is contained in the record on appeal. R. at 1-18. The opinion of the United States Court of Appeals for the Eighteenth Circuit is also contained in the record on appeal. R. at 25-36. Both opinions are unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit entered a final judgment in an unsigned opinion. R. at 36. Petitioner filed a timely petition for a writ of certiorari, which this Court granted. R. at 37. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (2012).

CONSTITUTIONAL PROVISION INVOLVED

The relevant constitutional provisions include the First and Fourteenth Amendments to the United States Constitution, as set forth in Appendix A: Constitutional Provisions.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Petitioner Avery Millner filed suit against Mackenzie Pluckerberg, CEO of Squawker Inc., for unconstitutionally depriving Mr. Milner of his First Amendment rights by restricting his effective use of Squawker based solely on Millner's response to a policy proposal on the Governor's official government page. By acting in concert with the express wishes of William Dunphry, Governor of Delmont, the Respondent helped regulate the official public forum of the Governor. Mr. Millner seeks monetary damages and injunctive relief to remedy the significant harm to his online journal and political commentary business and Squawker's ongoing restrictions on Mr. Millner's account.

Squawker, Inc. began, like most social media platforms, as a means by which individuals

could form online communities, share ideas, and engage in hot button issues with their neighbors. R. at 21. Squawker allows users to post comments, called "squeaks," at a maximum of 280 characters. R. at 14. Users can show approval or disapproval for the comments by either "liking" or "disliking" them. *Id.* All users are subject to terms and conditions, including restrictions on types of posts, *see infra* App. B, and a compulsory sweeping flagging policy for violations of the terms and conditions, *see infra* App. C. R. at 15–16. Many people have grown to use the platform as a means to get news, people of all ages are currently using it. R. at 2-3. As a result, public officials have begun to use Squawker in order to disseminate policy information. R. at 3.

Squawker's beginnings are rooted in associations with the local government in its home state. Mackenzie Pluckerberg, the CEO of Squawker, Inc. is the longtime friend of the local governor, William Dunphry. R. at 3. In response to the growing national concern regarding online misinformation and false news, Governor Dunphry contacted the respondent to specifically address the problem. R. at 3. The Governor told the Respondent that he should introduce a specialized verification system to cut down on alleged imposter accounts. *Id.* This system is unique because, even though Squawker is a multinational corporation, the verification system only exists for government officials in Delmont. R. at 2, 3. The respondent agreed that, as part of establishing the verified account system, he would personally monitor the verified accounts for the entire first year of their existence. R at 3. If the Respondent saw any content that he felt violated the terms of service, he would flag that account. R. at 4.

The flagging system on Squawker goes beyond just indicating that a post may violate the terms of service. R. at 4. Instead, it paints a proverbial scarlet letter across not only the content in question, but also across the entire account of the person who made the post. *Id.* The flagging

system superimposes as large skull and crossbones image over the face of the user in question. *Id.* It also completely blacks out all of the content for any post made by that individual. *Id.*

In July of 2018, Mr. Millner was working as a freelance journalist and political commentator. R. at 4. Mr. Millner developed his prominent online reputation largely due to his frequent participation in political discourse in which he offers his candid opinions. *Id.* Mr. Millner's position largely centers around restrictions on the age of political actors. *Id.* As a result, Mr. Millner focuses his journalism on public officials over the age of sixty-five such as Governor Dunphry. *Id.* In the summer of 2018 Governor Dunphry decided to promulgate a proposed change in policy on his official Squawker account. R. at 5. Governor Dunphry suggested that in order to combat vehicle accidents, the government of Delmont should ban right turns on red for any light in the state. *Id.*

On July 26th, Mr. Millner was sitting at home and surfing various Squawker accounts while enjoying some alcoholic beverages. R. at 5. Mr. Millner saw Governor Dunphry's squeak and saw an opportunity to comment. R. at 5. Mr. Millner, as part of his signature means of commenting, posted a reply squeak along with a string of emojis. R. at 5, 19-20. In direct response to Governor Dunphry's proposal banning right turns at red lights, Mr. Millner commented, in his typical style, "[w]e gotta get rid of this guy" along with a symbol of an older man, a hypodermic needle, and a coffin. R. at 17.

While this was going on, the Respondent was personally monitoring Governor Dunphry's verified account. R. at 6. He saw the content that Mr. Millner posted, and he saw the growing response to that content. *Id.* The Respondent decided at that time that Mr. Millner's comments violated the terms and conditions of Squawker and he immediately flagged the account. *Id.* It was the first time that the Respondent had flagged any account as part of the new terms and

conditions, and it was the first time that Mr. Millner had faced any action from Squawker despite making similar posts multiple times. R. at 20, 22. The Respondent flagged Mr. Millner's entire account, and as a result Millner lost over eighty percent of his followers and over ninety-nine percent of his average page views. R. at 4, 20. He also lost multiple journalism job opportunities, and he has suffered serious financial hardships since. *Id.* Mr. Millner's account is still flagged, and the only way for him to have it be unflagged is to watch a thirty-minute video and pass a subsequent fifty question test. R. at 16. Two failures results in a ninety day hold on the account. *Id.* His only other alternative remedies required him to continue posting with this limited account or start a new account from scratch with no followers. R. at 6–7.

II. PROCEDURAL HISTORY

On December 5th, 2018 Mr. Millner filed suit in federal district court for a violation of his First Amendment rights as incorporated and implied to the states through the Fourteenth Amendment. Following discovery, Mr. Millner filed a motion for summary judgment and the Respondent filed a cross-motion for summary judgment. R. at 2. The district court found in favor of Mr. Millner and granted his motion for summary judgment. R. at 13. Respondents then appealed the decision to the Eighteenth Circuit, which reversed the decision of the district court on both counts. R. at 36. Mr. Millner filed a timely request for certiorari, which this Court granted. R. at 37.

SUMMARY OF THE ARGUMENT

On all counts, this Court should reverse the decision of the Eighteenth Circuit and find that the trial court properly granted summary judgment for Mr. Millner because the actions taken by Squawker, Inc. are properly attributable to the government, and impermissibly infringe on Mr. Millner's freedoms under the First Amendment. As a matter of jurisdiction, the Respondent

is amenable to suit for a deprivation of constitutional rights because his coordination with the government, along with agreeing to serve both a traditional and a constitutionally required function, make his actions fairly attributable to the government. Within a public forum, Squawker's actions towards Millner constitute unconstitutional viewpoint discrimination as well as an unreasonable time, manner, and place restriction on speech in violation of the First Amendment.

The medium that the Respondent is regulating in this case is a public forum in which the government itself is an active participant. In that context, the Respondent is providing a means in which the government can serve two important functions. First, it provides a means by which constituents can engage in speech and can debate issues of policy along with their governor. Second, it allows the people of the State of Delmont the right to petition the governor to right wrongs in the state. As such, when the regulation of this type of public forum occurs with the government as a participant, it imputes both a traditional and a constitutionally required government function that makes that entity amenable to suit.

The actions in this case are also fairly attributable to the state because they demonstrate coordination between the state and the private party that allow the private entity to operate as a surrogate of the state in which contradictory views of the state can be targeted and censored without repercussion. The regulations imposed in this case arose because Governor Dunphry told the Respondent that he should change Squawker policy to address a policy question of national concern. Even beyond the longstanding relationship between the Respondent and Governor Dunphry, the Respondent took such invasive action as to personally monitor the governor's account for content and to personally restrict that content in the case of an alleged violation. Such a nexus demonstrates joint action between the Respondent and the government, and as such

makes him amenable to suit.

Given its regulation of a public forum, Squawker's flagging of Millner's account violates his First Amendment rights through impermissible viewpoint discrimination. Squawker's terms and conditions directly and impermissibly targeted Millner's viewpoint on age in politics. This Court has consistently held that facially content-based policies–like the one at bar– unconstitutionally restrict speech when they target the viewpoint of the speaker rather than a general topic of conversation. Here, Squawker's policy targeted Millner's comments solely due to his disapproving viewpoint toward the Governor's age and thus constitute viewpoint discrimination.

Even without the facially content-based discrimination, Squawker's time, manner, and place restrictions unreasonably restrict Millner's ability to use the forum in a manner that is overly broad and burdensome on Millner's speech. This Court has routinely stated that restrictions in limited public forums cannot overburden speech unreasonably, precisely as Squawker has done. Even accepting the Respondent's argument that this policy was content neutral, by essentially blocking Millner's ability to meaningfully use the platform in full, merely because he posted four times in thirty seconds is neither narrowly tailored nor reasonable. Further, the alternative communicative avenues fail to comport with the reasonableness requirements articulated by this Court. Demanding Mr. Millner either admit fault and submit to an arduous quiz or lose revenue and viewers by maintaining his flag or starting a new account unconstitutionally overburdens Millner's speech on the public forum.

Thus, because Squawker is facilitating a public forum as a state actor, and its terms and conditions impermissibly violate Mr. Millner's First Amendment rights, this Court should reverse the decision below.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT THE RESPONDENT WAS NOT A STATE ACTOR BECAUSE RESPONDENT'S ACTIONS IN THIS CASE WERE FAIRLY ATTRIBUTABLE TO THE GOVERNMENT.

At the beating heart of any well-ordered democracy is the right of the people to openly and freely engage in matters of public discourse. In order to properly safeguard that right, the judiciary and the legislature have struck a delicate balance in articulating how a state may restrict a type of speech, and how a private entity may engage in editorial conduct. The Supreme Court has articulated a legal term of art for the type of safe haven where individuals can assemble, engage with each other, and be an active part of their democracy: a public forum. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

Although public entities typically own and regulate public forums, this Court has analyzed whether a forum owned by a private entity is subject to the same limitations. *See Manhattan Cmty Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). Since Governor Dunphry uses his Squawker page for official government business, the parties in this case have stipulated that the forum in this case is a public one. R. at 17. *See also Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 236 (2d Cir. 2019) (deciding that President Trump's use of his Twitter account for official government business was sufficient to establish it as a public forum). The same public forum restrictions the First Amendment imposes on the Federal Government apply equally to Delmont pursuant to the Fourteenth Amendment. *See Stromberg v. California*, 283 U.S. 359, 368 (1931) (freedom of speech); *Edwards v. South Carolina*, 372 U.S. 229, 238 (1963) (right to petition).

Over the better part of the past half century, this Court has properly drawn a firm line

between what constitutes purely private action that is not subject to constitutional constraints, and action that is "fairly characterized as state action." *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 924 (1982). As recently as this past term, this Court has articulated four tests to help resolve this issue: the "public function" test, the "constitutional duty" test, the "government compulsion" test, and the "joint action" test. *See Halleck*, 139 S. Ct. at 1928, 1929 n.1. The three tests at issue in this case are the public function test, the constitutional duty test, and the joint action test. In every instance however, the inquiry is a fact based one. *Lugar*, 457 U.S. at 939.

Under this line of reasoning, this issue boils down to three questions. First, is the regulation and operation of a public forum used for official government business a function traditionally reserved to the government? Second, is the obligation to provide a means by which the people can petition their government a constitutionally required function that is met by the implementation of a government Squawker page? Third, is the state a joint actor in the regulation of a public forum when there is open communication between the government and the regulator on how to restrict speech in that forum? For all three questions, the answer is yes.

A. The Respondent Engaged in State Action by Regulating a Public Forum in Which the Government was a Participant Which is a Function that is Traditionally the Exclusive Province of the State.

When a private entity establishes a public forum in which the government is a participant engaging in active policy dialogue with constituents, then the regulation of that forum by the private entity constitutes state action. *See Halleck*, 139 S. Ct. at 1928; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 44 (1983); *Marsh v. Alabama*, 326 U.S. 501, 507 (1946); *Hague*, 307 U.S. at 515; *Knight First*

Amendment Inst., 928 F.3d at 236; *Cooper v. U.S. Postal Service*, 577 F.3d 479, 492-93 (2d Cir. 2009) (cert denied).

The public forum doctrine traditionally requires action by a government official or agency to be considered a public forum. When the government seeks to chisel out a section of property, whether it be public or non-public property, and establish that forum as a protected place of public discourse, the government has created a public forum. *Cf. Perry Educ. Assn.*, 460 U.S. at 44 (rejecting the argument that a school mailing system as a public forum in part because the government did not intend to designate it as a public forum). In designating property for that public forum, the government's intentions must be explicit. *See Cornelius*, 473 U.S. at 800. Only in rare instances will a public forum not involve a state actor. For example, in *Halleck*, the defendant broadcasting company was acting under statutory mandate to create a public forum where other *private entities* provided content to the forum on a first-come, first-served basis. 139 S. Ct. at 1931.

A private entity's actions are fairly attributable to that of the government when that private entity performs a function that is the traditionally the exclusive domain of the government. *See Marsh*, 326 U.S. at 507 (regarding the administration and operation of a town, even if done by a private entity, as a traditional public function). In deciding what types of activities are "traditional public functions" courts will look to the nature of what the private entity is regulating. For example, in *Cooper*, the Second Circuit found that the operation of a post office, which was traditionally action committed to the government, by a private entity was fairly attributable to the government. 577 F.3d at 492-93. *Cf. Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974) (establishing that delegating the responsibility to provide electrical power was not a traditional state function).

However, beyond the categorical assignment of traditional functions, this Court has also recognized that governmental functions can be case specific based on the surrounding circumstances of the claim. In *Edmonson,* this Court decided that the use of a preemptory challenge in a civil suit was such an important and traditional government function that the exercise of that challenge by any party constituted state action. 500 U.S. at 624. In *Terry v. Adams*, Justice Black articulated for the Court that the operation of political parties, even when managed by private entities, was so traditionally a government function that that private party was subject to constitutional requirements. 345 U.S. 461, 470 (1953). *See also Tulsa Prof. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 487 (1998) (deciding that when a private company invokes the power of the government to impose tax sanctions that that private entity is a state actor).

In the case at bar, by agreeing to host and regulate a public forum, the Respondent stepped into the shoes of the government and acted in its stead. Unlike in *Perry* and *Cornelius*, Governor Dunphry has explicitly carved out a section of Squawker's internet territory to use in his official capacity as the chief executive of Delmont. In jointly agreeing to undertake that task, the Respondent helped in creating a public forum that not only allowed Governor Dunphry to communicate with his constituents, but for his constituents to debate his policies in real time as a matter of public discourse.

The circuit court erred by failing to give appropriate weight to the type of forum at issue in this case. As this Court's cases demonstrate, this is not the type of medium that was present in *Halleck*. 139 S. Ct. at 1926. There, the government merely conveyed the ability to provide a channel for public discourse that the statute required. *Id.* In that way, the private broadcasting channel was acting as legally required, much like the utility company was in *Jackson*. 419 U.S.

at 352. But in this case, the forum itself is not part of a government mandated scheme, it *is* the government.

As an active participant in the forum that he created, Governor Dunphry has established a public forum that requires the Respondent to engage in action that is traditionally reserved to the government: the regulation of government speech and debate as part of a public forum. The fact that all communications on Governor Dunphry's page are either from the Governor, directed to the Governor, or part of the public discourse surrounding the Governor's polices brings this case into the category of regulation discussed in *Terry* and *Marsh*. In many ways, the private regulation of the "halls" of Governor Dunphy's Squawker account mirror the regulation in *Marsh* because it demonstrates complete control over the operation of the entity which, until the advent of recent technology, was exclusively part of the government. Until the creation of the internet, the regulation of what debates the Governor would involve himself in, where he would go, and how he would spend his political capitol were all exclusive decisions of the Governor himself. Squawker provides a means by which the Governor can access that forum twenty-four hours a day. Squawker in essence is the Governor's earpiece, and it cannot be disconnected from him and have the forum still function.

As such this Court should hold that the regulation of a legally created public forum in which the government is a participant is a traditional function delegated to the state.

B. Providing a Means by Which the Governed can Petition their Government is a Constitutionally Required Function Which Imparted a Duty on the Respondent to Adhere to First Amendment Requirements.

When the government delegates the administration of one of its constitutionally required mandates to a private entity, that entity steps into the shoes of the government and its actions are

fairly attributable to the state. *See Halleck*, 139 S. Ct. at 1929, n. 1; *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011); *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009); *Georgia v. McCollum*, 505 U.S. 42, 53 (1992); *West v. Atkins*, 487 U.S. 42, 57 (1988); *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 280 (1984); *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

When a regulation by a private individual impacts a constitutionally protected scheme, the actions by the individual are fairly attributable to the government. For example, in *West*, the Court found unanimously that the provision of medical care by a privately contracted physician was akin to state action. 487 U.S. at 57. As the Court made clear, the physician in that case was "fully vested" with the authority delegated by the government to provide the type of medical care required by the Eighth Amendment. *Id.* Even as recently as 2019, the *Halleck* Court recognized that when the government outsources a constitutionally obligated duty to a private entity, that private entity acts in the stead of the government. *See Halleck*, 139 S. Ct. at 1929, n. 1. *See also McCollum*, 505 U.S. at 53 (regarding use of preemptory challenges in violation of the equal protection clause in criminal cases as state actions even when conducted by the defendant due to the importance as part of due process); *Fitzgerald*, 555 U.S. at 257 (holding that a §1983 suit was appropriate against private actors for unconstitutional gender discrimination).

In the boundless expanses of the internet, especially when incorporated into a public forum, two rights are exceedingly implicated: the right to freedom of speech and the right to petition the government for a redress of grievances. Although both rights are distinct, they are inextricably linked. *See Wayte v. United States*, 470 U.S. 598, 610-611 (1985) (making clear that courts should analyze the right to petition in the same context as a speech claim). Such entwinement of those rights is most prominently displayed in the forum of the internet. *Cf.*

Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) (regarding the internet as an entirely new public town hall with "wild and vast democratic forums"). As recently as 2011, the Supreme Court has described the right to petition as of fundamental importance to our democracy. *See Guarnieri*, 564 U.S. at 388; *see also E.R.R. Presidents Conference.*, 365 U.S. at 137 ("In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.").

In analyzing a claim regarding the right to petition, the seminal question that courts will ask is whether the entity is providing access between the constituents and their government. This right to petition applies to all branches of government. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). The petition need not take any specific form either. *Compare Mirabella v. Villard*, 853 F.3d 641, 654 (3d Cir. 2017) (regarding an email as a sufficient manner to assert a claim for the right to petition) *with Pearson v. Welborn*, 471 F.3d 732, 739-40 (7th Cir. 2006) (regarding an oral complaint by a pro se litigant as sufficient to invoke the right to petition). No matter which branch is implicated, the Supreme Court has made clear that heart of the right to petition involves the people's ability to access their government. *See Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (addressing reasonable access to the courts for prisoners); cf. *Minn. State Bd. for Cmty. Colls.*, 465 U.S. at 280 (distinguishing that case from *Perry Educ. Ass'n* because the government did not deny the people in question access to a public forum).

In the case at bar, Governor Dunphry created a public forum that not only allowed him to broadcast policy, and not only allowed his constituents to debate and discuss those policies, but it also allowed his constituents to communicate directly with him. Indeed, in his affidavit,

Governor Dunphry admitted that he used his Squawker account to understand his constituents' needs. R. at 24. The people of Delmont use Squawker to communicate with their government, and as such, they use that avenue to petition Governor Dunphry for a redress of grievances.

By outsourcing the management of Governor Dunphry's account to the Respondent, Governor Dunphry also delegated the care of protecting that constitutional duty to the Respondent. Like in *West*, the government in this case implicated a private entity as the state's hand in administering that right. 487 U.S. at 55. The Respondent acted on behalf of Governor Dunphry to provide an accessible and convenient avenue for the vindication of those people's rights. Governor Dunphry was under no obligation to set up the official account at play in this case which enshrines those first amendment rights. However, once he did, he transferred the care of those rights to a private entity—Squawker. As this Court made clear in *Hudson*, 468 U.S. at 523, and *California Motor Transport Co.*, 404 U.S. at 512, the power that they invoked required that the government provide reasonable access to constituents to make their petitions. As such, the actions of the Governor in delegating that responsibility, and the actions of the Respondent in accepting that responsibility, demonstrate the transfer of the administration of an important constitutional duty.

Because Governor Dunphry outsourced a constitutional duty to the Respondent, the Respondent acted on behalf of the state in the administration of those rights.

C. By Acting Jointly with Governor Dunphry, the Respondent Acted as an Agent of the State and is Therefore Subject to the Same First Amendment Restrictions of the State.

A private entity's actions are fairly attributable to the government when that entity and the government are "joint actors" in providing regulation. In *Lugar*, the Court established this

test by holding that a private entity and the state were acting in concert when that private entity beseeched the power of the state to repossess a person's goods. 457 U.S. 922, 941 (1982). In applying the "joint action" test, courts look to the totality of the circumstances and engage in a fact-based inquiry to discern if the private entity's actions are truly those of the government. *Id.* at 939. In analyzing the case at bar, this central question hinges on whether the Respondent's actions were closely connected enough with that of the state that Respondent's actions took place under color of state law.

When a private entity manages a public forum on behalf of the government, maintains an open line of communication with the government regarding the operation and management of that forum, monitors the public forum's content on behalf of the government, and censors content critical of the government on that forum, then that private entity's actions are part of a joint enterprise with the state and those actions are fairly attributable to the government. *See Lugar*, 457 U.S. at 922; *See United States v. Price*, 383 U.S. 787, 794 (1966); *Com. of Pa. v. Bd. of Dirs. of City Trs. of City of Phi.*, 353 U.S. 230, 231 (1957); *Williams v. United States*, 341 U.S. 97, 99–100 (1951); *Wyatt v. Cole*, 994 F.2d 1113, 1118 (2d Cir. 1993) (cert denied).

A private entity's actions are fairly attributable to the government when the entity is carrying out the express wishes of the state. For example, if the makeup of an entity's personnel is so entwined with that of the state, then the actions carried out by the entity are attributable to the government. *See Bd. of Dirs.*, 353 U.S. at 231. Likewise, if the private entity hails state officials for their assistance in accomplishing its goals, then those forms of communication will typically demonstrate the level of entwinement necessary to demonstrate state action. *See Lugar*, 457 U.S. at 942; *see also Wyatt*, 994 F.2d at 1118 (deciding on remand that a private individual's use of an unconstitutional statute of replevin was sufficient association with the state to

constitute state action).

The Supreme Court has even found state action by private individuals when the government entities are willful participants in unlawful conduct performed by those private entities. In two criminal cases, this Court held that merely by participating in criminal conduct performed by state actors, the actions of private entities were also attributable to the state. *See Price*, 383 U.S. at 794; *Williams*, 341 U.S. at 99–100. Both cases involved the mixed actions of government agents (the police) and private citizens who engaged in the brutal murders of African Americans. The Court held in both cases that the actions of the private individuals were also actions of the state because they acted as components in the unlawful conduct.

In the case at bar, the Respondents acted in concert with the government to conduct the administration and coordination of Governor Dunphry's Squawker page. Both the Governor and the Respondent concede that they have known each other since high school. R. at 21, 24. The Governor contacted Respondent prior to the establishment of the public forum at issue in this case. R. at 22. The Respondent, as the CEO of a multi-national company, even took to personally monitoring his longtime friend's account. R. at 22. When Mr. Milner posted a string of messages that were critical of the Governor's policy, he swiftly censored the content and censored Mr. Milner's account. *Id.* Like in *Lugar*, 457 U.S. at 942, and *Board of Directors*, 353 U.S. at 231 Respondent's actions demonstrate that his objectives in monitoring the account coincided with the wants and desires of the Governor. They even go so far as to demonstrate the type of coordination displayed in *Price* and *Williams*. 383 U.S. 787, 794; 341 U.S. at 99–100.

Because Respondent was a component part in the regulation of the Governor's account, the Respondent's actions are fairly attributable to those of the state.

II. THE CIRCUIT COURT ERRED IN HOLDING THAT THE RESPONDENT DID NOT VIOLATE MILLNER'S FIRST AMENDMENT RIGHTS BECAUSE SQUAWKER FLAGGED HIS ACCOUNT BASED ON THE CONTENT OF HIS POSTS AND OVERBURDENED HIS SPEECH THROUGH OVERLY BROAD AND UNREASONABLE RESTRICTIONS.

Social media has unquestionably become the modern-day public hall, where citizens have the ability to utilize their First Amendment right to petition and interact with their elected officials. *Packingham*, 137 S. Ct. at 1735-37; *see also Knight First Amendment Inst.*, 928 F.3d at 237–38 (holding that government censorship of citizens on a government social media page for expressing disfavored views violates the First Amendment). In a public forum, content-based restrictions on speech are presumptively unconstitutional absent narrow tailoring that serves a compelling interest. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995); *Carey v. Brown*, 447 U.S. 455, 460 (1980). Even if conditions are content-neutral, officials may only institute time, manner, and place restrictions on speech in a public forum if the restrictions are narrowly tailored to serve a compelling government interest with sufficient alternative modes to communicate. *See Ward v. Rock Against Racism*, 491 U.S. 781, 790–91 (1989).

In this case, Squawker concedes that Governor Dunphry's Squawker page is a public forum and therefore users are afforded protection from content-based viewpoint discrimination, and unreasonably burdensome restrictions on their freedom of speech. By singularly targeting Millner's posts for an expressed view on an elected official's age, the policy has evidenced viewpoint discrimination irrespective of the court's determination on the facial neutrality of the policy. Further, even if the restrictions had been content-neutral and were not targeting Millner's

viewpoint on age limits for public office, stifling his ability to use his entire account in a meaningful way as the result of a singular stream of emojis on one post overburdens his speech in an overly broad and unreasonable manner.

Thus, Squawker's flagging policy violated Millner's First Amendment rights through both unconstitutional viewpoint discrimination, and through unreasonable and overly broad time, manner, and place restrictions on his speech.

A. Squawker's Flagging of Millner's Account, Under its Terms and Conditions, for Posting Emojis About an Elected Official's Age Unconstitutionally Targeted the Content of his Speech in Response to an Official Communication from an Elected Official Regarding Pending Policy Which Millner Opposed.

Within the regulation of a public forum, the First Amendment unflappably prohibits viewpoint discrimination. *Halleck,* 139 S. Ct. at 1930. While the Government is entitled to create a more limited public forum for private communication, with some content-based restrictions, it still is prohibited from engaging in discrimination on the basis of a speaker's viewpoint. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001); *Rosenberger,* 515 U.S. at 828-29*; Carey,* 447 U.S. at 465.

A content-based policy is one which "target[s] speech" for the specific "communicative content" of the speech. *Reed v. Town of Gilbert,* 135 S. Ct. 2218, 2226 (2015). These types of restrictive policies are presumptively unconstitutional within public forums, absent narrow tailoring, given the likelihood they would promote viewpoint discrimination. *See id.; see also R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115–16 (1991). A facially content-based policy is accordingly subject to a higher level of scrutiny, regardless of any potential alternative

justification for the policy. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018)*; Reed*, 135 S. Ct. at 2228.

The Court has extended this reasoning to policies that may seem facially content neutral, but in practice are content based because the restrictions cannot possibly be "justified without reference" to the viewpoint expressed by the speech. *Ward*, 491 U.S. at 791. This type of restriction is also subject to the same presumptive impermissibility as viewpoint discrimination from a facially content-based policy. *See e.g., Reno v. ACLU*, 521 U.S. 844, 885 (1997) (holding that without "evidence to the contrary" government "regulation of the content of speech" is presumed unconstitutional). Further, even burdening speech based on the content of that speech is subject to rigorous scrutiny akin to censorship, based on the severity of the burden imposed. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (articulating that the Government "may no more silence unwanted speech by burdening its utterance than by censoring its content"); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000) (equating the scrutiny required to justify a content-based ban with a content-based burden on speech). Finally, given the changing technological landscape, courts have begun to recognize the communicative nature of emojis and other social media interactions as "speech" in the First Amendment context. *See Knight First Amendment Inst.*, 928 F.3d at 237 (holding that collective engagement through "likes" and other interactions on social media are protected "speech" for purposes of the First Amendment).

In this case, Squawker's compulsory policy is facially content based in its categorization of posts "on the basis of . . . age," and the flagging of Millner's account cannot logically be separated from the viewpoint expressed within. *See* R. at 15. While some restrictions may have been permissible, the central inquiry is whether the discrimination is happening based on the

actual terms and subject matter of the speech, and if so, whether it is impermissible. *See Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (invalidating an ordinance because the "operative distinction" in the policy hinged on the message within the individual speech itself, not in the act of speaking).

Squawker's policies explicitly target specific messages on the public forum page, while allowing both (1) comments expressing an alternative viewpoint on those issues, and (2) other potentially harmful comments on other issues. *See* R. at 15, 20, 22. If for example, Millner had chosen an emoji critical of Governor Dunphry's voice, there is no question the policy would allow such speech to continue, yet because he spoke specifically with a negative viewpoint on older politicians, the Respondent flagged his account. *See.* R. at 15, 22. Further, the policy does not outlaw all comments about age, but only those deemed to be harmful, and therefore, would not flag a comment approving of older politicians. *See* R. at 15. The operative distinction is the specific position taken on that subject. By targeting not the subject matter, but a specific view by Millner on the subject matter, Squawker has engaged in viewpoint discrimination through its content-based discrimination. *See Rosenberger,* 515 U.S. at 828-29; *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641-43 (1994); R. at 15, 22; *Knight First Amendment Inst.*, 928 F.3d at 237–38 (holding that a President singling out individuals for expressing a disfavored view in reaction to his posts rather than just any interaction with his proposals is prohibited viewpoint discrimination).

If the Court, however, finds the policy to be facially content-neutral, it still constitutes a prohibited content-based policy because the flagging of Millner's posts cannot possibly be justified without reference to the content of his speech. This Court has expressed that restricting speech based simply on the fact that it might offend is impermissible. *See e.g. Matal v. Tam,* 137

S. Ct. 1744, 1751 (2017) (holding that the offensiveness of speech does not sacrifice its protection); *Texas v. Johnson*, 491 U.S. 397, 414 (1989). To the contrary, the Court has noted that a "principal function" of the First Amendment is to "invite dispute" within our system of Government. *Texas*, 491 U.S. at 408-09 (articulating the debate encouraging motivation behind protecting even offensive speech); *see also F.C.C. v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978) (noting that the fact a speaker's opinion may cause offense is even more a reason to provide it First Amendment protection). Thus, restricting Millner's speech based solely on the potentially offensive nature of his comments to older individuals is an express restriction on the basis of his stated viewpoint on age, and is therefore prohibited.

Thus, notwithstanding the Court's conclusion on the question of facial neutrality, the policy is content based in fact, and impermissibly discriminated against Millner's viewpoints on age limits for politicians.

B. Even if Squawker's Policy were Content-Neutral, Stifling Millner's Use of his Entire Account Without Losing Revenue, Viewership, or Submitting to an Arduous Quiz Based on One Thread is an Unreasonable and Overly-Broad Time, Manner, and Place Restriction, Overburdening Millner's Speech

Even if the Court holds that the policy was content neutral, in a limited public forum, time, manner, and place restrictions are only permissible if they do not overburden constitutionally protected speech substantially more than required for a legitimate interest. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002); *Ward*, 491 U.S. at 791. The Court assesses whether a policy independently meets the key requirements it has laid out for a time, manner, and place restriction on speech within a limited public forum.

The Government, and its actors, must prove that the compulsory restrictive policies are

(1) content-neutral, (2) narrowly tailored to serve a significant interest, and (3) leave open sufficient alternative communication methods for the restricted speaker. *See Ward*, 491 U.S. at 791 (articulating a standard for non-content-based regulation on speech in a limited public forum). *See generally* Ward v. Rock Against Racism: How Time, Place, and Manner Further Restricts the Public Forum, 1 FORDHAM ENT. MEDIA & INTELL. PROP. L.F.151 (1991) (expanding on the Court's analysis of time, manner, and place restrictions in a public forum). Centrally, the rules must not serve to suppress protected speech as the avenue to targeting unprotected speech. *See Ashcroft*, 535 U.S. at 255 (holding that the government cannot sacrifice protected speech to constrain unprotected speech)*; Ward*, 491 U.S. at 791; *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted.").

In this case, even if the policies had been content neutral, Squawker's policies do not nearly satisfy either of the remaining elements to constitute a reasonable time, manner, and place restriction on speech in a limited public forum. *See* R. at 15, 20. The policy serves no apparent significant interest and produces a wildly overbroad censorship of protected speech without providing any adequate alternative for the targeted user to continue to speak on the platform.

First, by flagging his entire account with skull and crossbones and limiting his ability to meaningfully use the platform based solely on four individual posts in a thirty-second period, Squawker has regulated in a way where the "substantial portion of the burden" on Millner's speech does not serve to advance the stated goal of stopping potentially spam-like posting. *See Ward*, 491 U.S. at 799; R. at 17, 20. Further, by flagging his entire account in a harmful way, Squawker's policy is far too overly broad, and its policy could lead to an impermissible chilling effect on speech on the forum. *See Ashcroft*, 535 U.S. at 255; *Riley v. Nat'l Fed'n of Blind of*

N.C., Inc., 487 U.S. 781, 794 (1988). Illustrating the overbreadth and severity of this flagging is the devastating impact on Mr. Millner's livelihood including losing eighty percent of his subscribers and over ninety-nine percent of his views. R. at 4, 20. If they had perhaps only flagged the violative posts, that may have been closer to the required narrow tailoring, but the Respondent's actions go well beyond a reasonable response to a questionable post, they condemn Mr. Millner's entire account essentially to invisibility and mute his speech.

Additionally, Squawker's arbitrary flagging, evidenced by the fact that this is (1) the first account to ever be flagged in this manner and (2) the flagging is entirely at the discretion of the close personal friend of the Governor, individuals have no notice of any replicable standards by which the policy would be implemented. *See Thomas v. Chi. Park Dist.*, 54 U.S. 316, 323 (2002) (requiring adequate standards for officials to apply in any time, manner, and place restriction); *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951) (holding that restrictions are invalid absent adequate and definite standards for officials to apply consistently); *Occupy Columbia v. Haley*, 738 F.3d 107, 124 (4th Cir. 2013); R. at 17, 20–23. Further, the lack of a clear genuine nexus between the flagging of the entire account, and the stated goal highlights the policy's overbreadth. *See McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (holding that a nexus is required because we cannot "sacrifice speech for efficiency"); *Riley*, 487 U.S. at 795.

With a blanket flag across all of Millner's speech, Squawker has, at a minimum, sacrificed Millner's protected speech for the sake of efficiency. The First Amendment may not require the Government to identify the narrowest possible construction, but given the lack of a compelling government interest, the deterrent effect of this type of policy is demonstrably overbroad, and an easily implemented narrower construction would substantially decrease the limits on protected speech. *See Reno,* 521 U.S. at 844 (1997) (holding that vague and overbroad

regulation raises specific concerns due to its "obvious chilling effect" on protected speech); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975) (holding that regulations must not serve to overly discourage protected speech).

Additionally, even if they had been able to meet the standard of narrow tailoring, Squawker's overly burdensome restrictions provide almost no meaningful alternative mode for Millner to still participate in the forum. The Court has held that even with reasonable restrictions, the Government must ensure it does not entirely block off modes of communication for the targeted individual. *See Packingham*, 137 S. Ct. at 1736 (requiring an alternative means of communication to be made available to burdened speaker); *Perry Educ. Ass'n*, 460 U.S. at 45 (holding that in a limited public forum, even permissible restrictions must still leave open "ample alternative channels" for communication). Looking only at one of the more recent cases on this question illustrates the inadequacy of Squawker's rationale. In *Packingham*, even the obviously compelling interest of protecting children from online predation was insufficient to justify a blanket ban on all communication on the forum. *Packingham*, 137 S. Ct. at 1736. Conversely, in this case, the interest of stopping some potentially annoying posts is not nearly as critical an interest to justify what essentially amounts to a ban on contributing to the platform without submitting to costly or burdensome requirements.

Squawker's requirements are not reasonable alternatives for Millner. Due to one limited violation of their compulsory policy, Millner is now effectively banned from meaningful use of the platform unless he (1) completes an arduous training and quiz; (2) continues to post with the skull and crossbones flag that severely limits his reach; or (3) loses a key revenue stream for himself by starting a new account and sacrificing his existing follower base. R. at 17, 20. This plainly overburdens Millner's speech and limits his ability to meaningfully contribute his

protected speech for one minor violation of a vague policy in response to a proposed piece of legislation from his elected official.

Accordingly, even if the Court finds this to be a content neutral policy, the restrictions are impermissibly overbroad and unconstitutionally overburden Millner's speech.

CONCLUSION

Petitioner respectfully requests this honorable Court reverse the judgment of the Eighteenth Circuit Court of Appeals and hold that the Respondent engaged in state action by applying its flagging policy, and that the Respondent's us of its terms and conditions violated Mr. Millner's First Amendment rights.

Respectfully Submitted,

s/o Team 24

Attorneys for Petitioner

CERTIFICATE OF SERVICE

We, the attorneys for Petitioner, certify that on January 31, 2020, have served upon the Respondent a complete and accurate copy of this Brief for Petitioner by placing a copy in the United States Mail, sufficient postage affixed and properly addressed.

Date: January 31, 2020

s/o Team 24

Attorneys for Petitioner

BRIEF CERTIFICATE

Team 24 certifies that the work product contained in all copies of Team 24's brief is in fact the work product of the members of Team 24 only; and that Team 24 has complied fully with its law school's governing honor code; and that Team 24 has complied with all Rules of the Competition.

s/o Team 24

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Attorneys for Petitioner

APPENDIX A: Constitutional Provision

First Amendment to the United States Constitution:

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

Fourteenth Amendment to the United States Constitution:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XVI, §1.

APPENDIX B: Squawker's Terms & Conditions

Flagging Policy for Violations of Terms & 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."

APPENDIX C: Squawker User Agreement

Compulsory User Agreement Pop-Op:

"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."