No. 17-874

In the

SUPREME COURT OF THE

UNITED STATES OF AMERICA

Petitioner

AVERY MILNER;

V.

Respondent

MAC PLUCKERBERG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT

OF APPEALS FOR THE EIGHTEENTH CIRCUIT

BRIEF FOR RESPONDENTS

THE SEIGENTHALER-SUTHERLAND CUP,

2020

TEAM 13
Attorneys for
Respondent

QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Eighteenth Circuit erred in concluding that a private entity hosting a public forum did not engage in state action by applying its flagging policy?

II. Whether the Eighteenth Circuit erred in holding that the private entity's Terms and Conditions is a content-neutral time, place, or manner restriction that is not violative of the First Amendment?

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES

Respondent, Avery Milner—the plaintiff in the United States District Court for the District of Delmont and the appellee before the United States Court of Appeals for the Eighteenth Circuit—respectfully submits this brief on the merits in support of their request that this Court affirm the judgment of the Eighteenth Circuit Court of Appeals.

OPINIONS BELOW

The Opinion of the United States District Court for the District of Delmont is found at *Avery Milner v. Mackenzie (Mac) Pluckerberg*, C.A. No. 16-CV-6834. The Opinion of the United States Court of Appeals for the Eighteenth Circuit is found at *Mackenzie (Mac) Pluckerberg v. Avery Milner*, No. 16-6834.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit entered its final judgment and Mr. Milner timely filed a petition for a writ of certiorari, which this Court properly granted pursuant to 28 U.S.C § 1254 (2012).

STATEMENT OF THE CASE

I. Statement of the Facts

This case involves Squawker, a social media platform launched in 2013 by Mackenzie (Mac) Pluckerberg ("Pluckerberg"). Record 26. Squawker allows users, known as "Squeakers" to connect with other users, share expressions, and learn about national and local events. Record 26. Squeakers post and respond to "squeaks" by liking, disliking, or commenting. Record 26. Squeaks and comments can be viewed by users that follow a Squeaker via a "feed" on users' homepages. Record 26–27. Squawker has grown in popularity and users over the past several years, and many users now use the platform as their primary source of local and national news. Record 27.

Because of Squawker's popularity, government officials have created Squawker accounts to express policies and reach constituents. Record 27. Governor William Dunphry ("Dunphry") of Delmont, created an account in 2017. Record 27. Dunphry has used Squawker to carry out official government business, like announcing policies. Record 27. Because of fake Squawker accounts posting false news, Dunphry reached out to Pluckerberg to solve the problem. Record 27.

Dunphry proposed that Squawker introduce a verification process to reduce imposter accounts and fake news. Record 27. Implemented in March 2017, the process verified accounts held by Delmont government officials, including Dunphry, by attaching a Delmont flag to the account. Record 27. Pluckerberg agreed to oversee government verifications within the first year. Record 27.

To create a Squawker profile page, each Squeaker must consent to the platform's Terms and Conditions, which include a statement regulating the interaction of Squeakers:

> Here at Squawker, we are committed to combating abuse motivated by hatred, prejudice, or intolerance, particularly abuse that seeks to silence the voices of those who have been historically marginalized. For this reason, we prohibit behavior that promotes violence against or directly attacks or threatens other people on the basis of race, ethnicity, national origin, sexual orientation, gender,

> gender identity, religious affiliation, age, disability, or serious disease. In addition, we prohibit the use of emojis [emoticons] in a violent or threatening manner. We aim for a positive user experience that allows our users to engage authentically with each other and build communities within our platform; therefore, spamming of any nature is prohibited for those participating in posting and commenting on the platform. A Squeaker shall not participate in automatic or manually facilitated posting, sharing, content engagement, account creation, event creation, etc. at extremely high frequencies such that the platform becomes unusable. Extremely high frequencies are four or more squeaks squawked within 30 seconds of each other. Record 27–28.

Squawker's Terms and Conditions also contain a flagging policy, which was updated in 2018 after the creation of the verification system. Record 28. Under the old policy, violations of the Terms and Conditions resulted in flagging of offending content, featuring a black box with a white skull and crossbones covering the squeak or comment. Record 28. Under the revised policy, a squeak or comment on a verified page in violation of the Terms and Conditions resulted in all content on a personal profile being flagged. Record 28. The revised policy states:

> Squeakers who are found to have violated our Terms and Conditions with respect to a verified user's account will be flagged. This will require all users to click on an emoji of a skull and crossbones in order to clear black boxes covering (1) the offending squeak or comment; (2) the offender's future squeaks and comments; and (3) all content on the offending Squeaker's profile page. A skull and crossbones badge will also appear next to the offending Squeaker's name on Squawker in order to warn the community. To have this flagging removed from all but the original comment, a Squeaker must complete a thirty-minute training video regarding the Terms and Conditions of the community and complete an online quiz. Two failed attempts will result in a ninety-day hold. The offending comment will remain flagged, although the user may still delete it. Record 28.

Avery Milner ("Milner") is a freelance journalist who lives in Delmont. Record 28. Milner is a critic of Delmont government officials, including Dunphry. Record 28–29. In 2017, Milner created a Squawker account and agreed to the Terms and Conditions following the creation of the verification feature. Record 29. On July 26, 2018, Milner responded to a squeak from Dunphry linking to a bill proposal. Record 29. After users complained that Milner's rapidly successive squeaks had made the platform unstable, Pluckerberg flagged Milner's

negative complaints and emoji-filled squeaks as violating the Terms and Conditions. Record 30. Because Milner's comments were posted on a verified page, his entire profile was flagged, and all content was blocked out by black boxes with white skulls and crossbones. Record 30. Milner's comments on Dunphry's squeak were also blocked out, and the same skull and crossbones logo was placed next to Milner's profile name. Record 30.

Milner received a notification from Squawker that informed him of the flagging and how he could get it removed. Record 30. Milner would have to watch a video of the Terms and Conditions and complete a quiz. Record 30. This would require Milner to agree that he violated the Terms and Conditions. Record 30. As a result, Milner brought action against Pluckerberg, arguing that the Terms and Conditions violate his constitutional right to free speech when interacting on an online public forum with the government. Record 31. In opposition, Squawker contends that it is not subject to the First Amendment via the state action doctrine. Record 31. Squawker also argues that the flagging action does not violate the First Amendment. Record 31.

II. Nature of the Proceedings

Milner brought an action in the United State District Court for the District of Delmont. Record 1. The Court held that Squawker's role constituted state action, and its Terms and Conditions substantially burdened Milner's speech in violation of the First Amendment. Record 2. Pluckerberg appealed the decision, and the Eighteenth Circuit Court of Appeals reversed the holding. Record 26. The Court held that while the Governor's official Squawker page was a public forum, Squawker remained a private actor and therefore its Terms and Conditions were not subject to the constraints of the First Amendment. Record 26. The Court held that even if Squawker was a state actor, its Terms and Conditions did not unduly burden the speech of Milner and was narrowly tailored as a reasonable time, place, or manner regulation. Record 26.

SUMMARY OF THE ARGUMENT

I. Squawker's hosting of a government official's page does not amount to state action.

For the First Amendment to apply to some conduct or act, the Fourteenth Amendment requires that there be state action. While state officials or agencies acting almost always constitutes state action, private individuals or entities do not. Under certain circumstances, however, private conduct is considered state action for constitutional purposes. The "public function" test considers whether the private party, though acting without any interaction with the state, is exercising a power traditionally exclusively reserved to the state. The "nexus test," sometimes called the entanglement exception, arises when the state is in some way connected with the private entity and considers how closely bound up – or entangled – the two parties are. If they are effectively operating in a symbiotic relationship, the private conduct is considered state action.

Squawker's implementation of a new policy that flags certain speech when directed at verified government officials does not amount to state action. The hosting of a public forum is not a public function that automatically converts conduct into state action. Squawker is also not so entangled with Dunphry that its conduct cannot be separated. Dunphry suggested a verification process for government officials' pages, but made no mention of any type of flagging policy. Though the flagging policy was altered with respect to speech directed at the newly verified page, there is not a sufficient nexus between Dunphry's conduct and control to so entangle Squawker with the state and convert its actions from private to state action.

II. Squawker's Terms and Conditions are a content-neutral time, place, or manner regulation.

The First Amendment allows a state actor to promulgate content-neutral time, place, or manner regulations of speech. In determining content-neutrality, the purpose of a statute is the controlling consideration. This Court has consistently held that if a regulation is targeted at the "secondary effects" of speech, it will not be struck down as content-based. The internet, like broadcast media, has "special justifications" that require a unique set of regulations. The internet is a pervasive part of our society today, and state actors must be able to have the flexibility to ensure that it is being properly used.

Squawker's Terms and Conditions and flagging policy are not aimed at suppressing disagreeable speech. The regulation's purpose is to combat the "secondary effects" of certain kinds of speech, rendering it a content-neutral time, place, or manner restriction. As a social media company, Squawker requires a tailored set of regulations, similar to those that have been utilized in the context of broadcast media. This content-neutral regulation serves a substantial interest, is narrowly tailored to serve that interest, and provides ample alternative channels of communication. Thus, it is constitutional.

ARGUMENT

I. SQUAWKER'S HOSTING OF A GOVERNMENT OFFICIAL'S PAGE DOES NOT AMOUNT TO STATE ACTION.

Squawker's hosting of a government official's page does not amount to state action, despite the page being considered a public forum. The Fourteenth Amendment of the Constitution proscribes *states* from depriving individuals of personal liberties. U.S. Constitution Amend. XIV. By restraining states specifically, the Amendment also protects individuals from being unduly burdened in their private conduct. Stemming from the Fourteenth Amendment's proscription against the states is the state action doctrine, which sets forth the requirement that there be some conduct on the part of the state in order for the Constitution to apply, the Constitution does not apply to purely private conduct. *U.S. v. Stanley*, 109 U.S. 3, (1883). In some instances, however, what seems to be private conduct is sufficiently connected with government action or direction to qualify as state action, and thus trigger constitutional protections. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995).

While there are a variety of fact-specific tests to determine whether or not a private individual or entity should be considered a state actor for constitutional purposes, an overarching two-part test is outlined in *Lugar v. Edmondson Oil Co.*:

> First, the deprivation [of a federal right] must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). In order for private conduct to be considered state action, both prongs of *Lugar* must be satisfied. *See id*.

A. Squawker's conduct cannot be ascribed to any governmental decision to satisfy the first Lugar *prong.*

The first prong can only be satisfied if the discriminatory result can be "ascribed to any

governmental decision." *Id.* at 938. The Court noted that in a prior case, the regulatory scheme of a state liquor board was not sufficiently connected to a private national fraternal organization's discriminatory membership and service rules, and thus the lodge was not accountable to the Constitution. *Id.* at 937–38. *See also Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 165 (1972). The connection between the liquor board's regulatory scheme and the lodge's discriminatory policies was too attenuated "to make the latter 'state action' within . . . the Equal Protection Clause of the Fourteenth Amendment." *Id.* (quoting *Moose Lodge*, 407 U.S. at 177).

Here, the government action is even more attenuated from the private conduct than in *Moose Lodge*. In *Moose Lodge*, the government did at least implement some sort of regulatory scheme or rule. In the present case, Dunphry passed no law, no executive action, and made no suggestion that Squawker should implement a new flagging policy for certain speech directed at government officials. Rather, Dunphry merely suggested that there be some way to verify certain accounts are run by who they are purported to be run by to ensure squeakers can trust the sources from which they get information. Verifying who certain individuals are does not require and is a wholly separate action from the change Pluckerberg made to the Squawker Terms and Conditions. While the new flagging policy does add new conditions to squeaking with regard to the newly verified accounts, that change was the sole decision of Pluckerberg. The record makes no indication that Dunphry made any suggestions about the flagging policy, which separates his conduct from that of the private entity sufficiently such that Squawker's conduct cannot be ascribed to any governmental decision, and thus fails the first prong of *Lugar*.

B. Squawker's conduct does not satisfy either the public function exception or the entanglement exception, and thus does not satisfy the second prong of the Lugar *test.*

The second prong of the *Lugar* test looks less at the government's own action and more to the relationship between the private entity and the government to see if there is "'something

more' which would convert the private party into a state actor." *Id.* at 939. The Court recognized that this is a largely fact-bound inquiry that has been explained in various terms. *Id*. (recognizing the "public function" test, "state compulsion" test, and "nexus" test are all similar yet different tests for determining whether a private entity can be characterized as a state actor).

The public function test, relevant here, extends the reach of constitutional protections to individual conduct when a private person or entity exercises powers "traditionally exclusively reserved to the State." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). The second relevant exception to the state action doctrine this Court has recognized is the nexus test, also called the entanglement exception, which converts private conduct into state action when the state has authorized, encouraged, or facilitated private conduct that violates the Constitution.

i. The hosting of a government official's personal social media page is not a function traditionally and exclusively done by government.

The first exception to the state action requirement this Court has recognized is the public function exception. *See generally Jackson*, 419 U.S. at 345. In some instances, conduct is purely carried out by a private entity or person with no governmental interference or participation, and still must comply with constitutional protections if it has "traditionally exclusively [been] reserved to the State." *Jackson*, 419 U.S. at 352. While this Court has not promulgated a definitive list of public functions, is has "stressed that 'very few' functions fall into that category." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1929 (2019) (holding that, although MNN was acting at the direct appointment of state government for the purpose of operating the Manhattan public access channels, which included editorial discretion over the speech and speakers, MNN was not a state actor for constitutional purposes). In an effort to define those qualifying functions, the Court has recognized that "[it] is not enough that the . . . government exercised the function in the past, or still does[, and] it is not enough that the

function serves the public good or the public interest in some way." *Id.* at 1928–29.

The Court in *Marsh v. Alabama* cautioned that "[the] more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh v. Alabama*, 326 U.S. 501, 506 (1946). *Marsh*, however, dealt with a town being run as a private entity – a "company town." *See id.* at 502. While the Court discussed the difference, of a person operating a highway for public use, it also noted there would be no "significant constitutional difference." *Id.* at 507. The Court did not, however, discuss any non-physical spaces. *See generally id*.

While *Marsh* appears to encompass a wide range of private conduct, the Supreme Court narrowed its reach twice in the years to come. *See generally Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968)*; Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976). Initially expanding *Marsh* to cover not only an entire company-town, but also a single business block and its accompanying sidewalks, the Court turned its dicta in *Marsh* into law. *See Logan*, 391 U.S. at 319. Four years later, however, the Court dialed back *Marsh*'s reach in a factually similar scenario to that of *Logan Valley*. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 552–54 (1972). While *Lloyd* did not explicitly overturn *Logan Valley*, four years later the Court clarified that the two decisions were untenable and did explicitly overturn *Logan Valley*. *Hudgens*, 424 U.S. at 518. In doing so, the Court made clear that they understood the need to draw a line of how far *Marsh* extends. *See generally id.*, at 519–20. This Court has, recently, begun to consider social media and the internet in the context of state action and have cautioned restraint because "[the] forces and directions of the Internet are so new, so protean, and so far reaching." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017).

The mere provision of a public forum for speech also ordinarily does not subject a private

entity to the constraints of the First Amendment, because it "is not an activity that only government entities have traditionally performed." *Halleck*, 139 S. Ct. at 1930. As such, the "entity may thus exercise editorial discretion over the speech and speakers in the forum." *Id*. While this Court has not yet addressed whether social media companies in general should be considered state actors, lower courts have. *See Howard v. Am. Online, Inc.*, 208 F.3d 741, 754 (9th Cir. 2000); *Young v. Facebook, Inc.*, No. 5:10-cv-03579-JF/PVT, 2010 WL 4269304, at *3 (N.D. Cal. Oct. 25, 2010); *Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 WL 1471939, at *8 (N.D. Cal. Mar. 26, 2018). The District Court below reasons that Respondent relies on these cases in error because none were found to include hosting of a public forum, but all dealt with social media sites substantially similar to Squawker insofar as they are all used to share ideas and engage with other users. *See Prager*, 2018 WL 1471939 at 8. In none did the courts specifically state that social media sites should *not* be considered public forums, and the District Court offers no explanation for their inability to find the hosting of a public forum.

Here, Squawker does not perform a function traditionally exclusively reserved to the state. While Respondent concedes that Squawker's hosts a public forum, that is not enough to subject the private entity to the First Amendment. This case is similar to *Halleck* insofar as a private company is providing a public forum for which they assert the ability to exercise editorial discretion of the speakers and speech conveyed in that forum. Squawker's conduct, however, is further separated from government function than in *Halleck*, where the state required some channels to be used for public access. Pluckerberg thought of and developed Squawker entirely on his own, free of any government influence, and created a public forum unique in the way users interact. As the *Halleck* Court noted, simply providing a public forum does not convert a private entity's actions to that of the state.

Though the *Marsh* Court saw no significant constitutional significance in the difference between a private entity operating a town versus a bridge for public use, that same logic does not apply in a modern context that goes beyond physical spaces and into the cyberspace. While physical travel-ways such as streets, highways, and bridges have traditionally been thought of as public spaces and thus protected by constitutional guarantees, the Internet has flourished as a platform for anyone with access to it to create companies, forums, games; to share videos, music, photos; to express themselves in whatever way they see fit. To expand the state action doctrine to encompass cyberspace in the same way public thoroughfares are covered based on a case decided in 1946, when likely no justice on the Court was even aware of the Internet in its analysis, would be an overreaching application of the case.

Later decisions such as *Packingham* and *Halleck*, recognize the dangers in an era where so much of daily life takes place online, especially speech, of expanding the state action doctrine in a way that would restrict all private entities' regulation of their online forums. While the lower courts that have addressed potential state action of social media sites have not explicitly found that they constitute a public forum, the circumstances of those other sites are substantially similar to Squawker and the subsequent logic of those cases should help guide this court.

Under the public function test, Squawker's conduct does not amount to state action. Because hosting a public forum is not traditionally exclusively reserved to the State, there must have been something more on the part of the government to entangle it with Squawker.

ii. Squawker is not a government created corporation and operates sufficiently independently from government entanglement because no government affirmatively authorized, encouraged, or facilitated Squawker's conduct.

While private entities' actions are normally not subject to constitutional protections of civil liberties, under certain circumstances they are so entangled with government action or

regulation that they constitute state action. *Lebron*, 513 U.S. at 378 (1995). For instance, when the government establishes a corporation in order to accomplish governmental goals, the degree to which the state maintains control of the company can convert the company's conduct into state action, regardless of the fact that corporations are private companies under the state's law. *See generally id.* at 394. Not to hold such corporations accountable to constitutional safeguards that the government is beholden to would allow the government to "evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate firm." *Id.* at 397. However, not every government-established or government-funded corporation is treated as a state actor. *See San Francisco Arts & Ath., Inc. v. United States Olympic Comm.*, 483 U.S. 522, 543–44 (1987) (holding that "[all] corporations act under charters granted by a government" and do not "thereby lose their essentially private character").

When the entity is not a government-created corporation effectively under government control, courts must consider "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity." If such a nexus exists, the private conduct may "be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351. Because no set list of factors defines when the proper nexus exists, the inquiry is a fact-based determination. *See id*.

One of the most prominent examples of the entanglement exception at work comes from *Shelley v. Kraemer*, 334 U.S. 1 (1948). Decided in 1948, the Court held that judicial enforcement of a private, discriminatory restrictive covenant did amount to state action because the judicial branch was denying rights to the plaintiffs which were protected by the Fourteenth Amendment. *Shelley*, 334 U.S. at 7. This Court has been cautious, however, to apply *Shelley* broadly because if judicial enforcement of private suits constitutes state action, then conceivably all private conduct could end up being constrained by constitutional parameters. *See Bell v.*

Maryland, 378 U.S. 226, 326–28 (1964) (J. Black, dissenting) (recognizing that all citizens have the right to call upon police and the courts to enforce the laws without consequence of their private conduct being deemed state action for doing so).

The presence of a symbiotic relationship between a private entity and the government has been argued to demonstrate the indivisible relationship of the private entity from public control. *See Burton v. Wilmington Parking Authority*, 365 U.S. 715, 724–25 (1961) (holding that when the state leases a property to a private entity, that entity must comply with the Constitution). The Court later clarified that while leasing state property to a private entity was enough entanglement to trigger constitutional provisions, not just "any sort of benefit or service at all from the State," would suffice. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972). Rather, for the private conduct to be state action, "the State must have 'significantly involved itself with invidious discriminations.'" *Id*. (quoting *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967)). In *Reitman*, the invidious discrimination being considered was governmental authorization of racial discrimination in the house market. *Reitman*, 387 U.S. at 381.

Here, the government did not authorize, encourage, or facilitate Squawker's conduct so as to sufficiently entangle itself with Squawker's business to bring the corporation within the confines of the First Amendment. Squawker's status as a private corporation is not converted to a state actor simply because corporations are chartered by state law.

As previously stated, Dunphry merely suggested that Squawker implement a process for verifying the validity of official government pages to ensure Squawker users that they were receiving information from the actual officials and not from fake, or spoof, accounts. While he is a state actor, Dunphry never encouraged Pluckerberg to change the Squawker Terms and Conditions in connection with that verification process, and because Squawker is a private entity

over which Dunphry has no control, he could not have authorized a change to the Conditions. Pluckerberg was under no obligation to implement the verification process, but rather recognized the benefits that would come from this suggestion from his friend and decided it would be good business to implement. He was not induced or compensated in any way.

Even if Dunphry had suggested a change to the flagging policy, the symbiotic relationship present in *Burton* does not exist here, without which there can be no significant involvement by the state with any invidious discrimination. Pluckerberg did not receive any benefit or service from any government.

Though Petitioner did not bring a claim in state court as the plaintiffs in *Shelley* did, he initiated proceedings that under *Shelley* could convert Squawker's conduct to state action. *Shelley*, however, was decided when justices were writing opinions by hand. In the same way that *Marsh* did not and could not have considered factors such as the Internet and how such an expansive understanding of the state action doctrine would impact it, nor could or did the *Shelley* Court. Decided in 1948, the deciding justices were penning the decisions that would later dictate cyberspace, a realm that would become more expansive than could be imagined at the time.

The expansion of the state action doctrine to include all judicial action also creates the problem of only prohibiting certain actions by private entities once court proceedings have been initiated. Prior to judicial proceedings, if the public function exception is not satisfied, they may be acting properly as a private entity. Under the *Shelley* framework, however, as soon as a state court decides a case approving their conduct, state action would exist immediately proscribing the conduct approved. In essence, depending on the conduct, state judicial upholding of an action by a private entity could be the thing that triggers state action to proscribe it.

II. SQUAWKER'S TERMS AND CONDITIONS ARE A CONTENT-NEUTRAL TIME, PLACE, OR MANNER REGULATION

If Squawker is a state actor, the Terms and Conditions are valid as a content-neutral time, place, or manner regulation. Like broadcast media, the internet—and social media—has unique features requiring specific regulations. The purpose of the Terms and Conditions is not to silence viewpoints. Rather, they are designed to protect viewers of squeaks from the "secondary effects" of certain speech: silencing voices of those who have been historically marginalized. The content of the Terms and Conditions and flagging provision confirms this. The First Amendment allows a government actor to enact a content-neutral time, place, or manner regulation as long as they serve a substantial government interest, are narrowly tailored, and leave open ample alternative channels of communication. Thus, they are constitutional.

A. The internet, like broadcast media, is a unique medium of communication and requires tailored regulation

This Court has recognized that "each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). The internet is a recent phenomenon, with social media being newer. It has become a pervasive part of society and of people's lives, and the Court must tailor its jurisprudence in light of new and unseen technology.

The First Amendment's requirements have notably changed in the context of broadcast media. "Some of [the Court's] cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997). These justifications have upheld regulations that censored offensive vulgarity and compelled cable companies to carry certain channels, among other things. *See F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978) (regulating offensive vulgarity); *Turner*

Broadcasting Sys. v. F.C.C., 512 U.S. 622 (1994) (compelling cable companies to carry certain channels). Both regulations would most likely be unconstitutional if applied in a different context. But Court specifically rejected an argument comparing internet to broadcast media in *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997). Broadcast media deserved specific regulation because of "the history of extensive Government regulation of the broadcast medium . . . the scarcity of available frequencies at its inception, and its 'invasive' nature. . . ." *Id.* at 868. The Court held that none of those factors were present for the internet. *Id.* at 868–70.

The Court's reasoning from 1997—the same year the Palm-Pilot was released—rings hollow today. Like broadcast media, Congress has regulated the internet for many years, passing statues like the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (1986) and the Digital Millennium Copyright Act, 17 U.S.C. § 1201 (1998), among others. The Court has also regulated social media, most recently through FOSTA-SESTA, Pub. L. No 115-164, 132 Stat. 1253 (2018) (amending Section 230 of the Communications Decency Act to allow enforcement of sex trafficking laws against social media companies). While it may have been true in 1997, it is no longer true that the internet is not "invasive." The fact that Dunphry conducts his official business on Squawker is indicative of the invasiveness of the internet generally and social media specifically. Individuals who seek to engage with Delmont's policymakers can most easily do so via the internet, but the content of what comes across their screens is the choice of their peers. Finally, while the internet itself is not a scarce commodity, social media sites are. Social media only works if millions of people use the same platform, and platforms such as Squawker are rare.

B. Squawker's Terms and Conditions are content-neutral because they are targeted at the "secondary effects" of the speech expressed in its forum

Because the internet is now such an integral part of every individual's daily life, it has become the primary medium through which society communicates. As the Eighteenth Circuit

noted, many people used Squawker "as their main source of information regarding national and local news," and government officials use Squawker "to reach constituents and spread policy ideas." Record 27. The unique place that the internet occupies in today's world requires the government to protect every internet user's ability to engage and interact with the rest of society.

The First Amendment allows a government actor to promulgate content-neutral time, place, and manner regulations. A regulation is content-neutral if it can be "justified without reference to the content of the regulated speech." *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). One way to meet this requirement is to target the "secondary effects" of speech. *See Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 n.34 (1976). For example, in *City of Renton v. Playtime Theatres, Inc.*, the Court upheld a Washington zoning law that prohibited adult movie theaters from being located within 1,000 feet of a residential zone, family dwelling, church, park or school. 475 U.S. 41, 43 (1986). In *American Mini Theatres*, the Court noted that "zoning ordinances designed to combat the undesirable secondary effects of [adult movie theaters] are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." *Id.* at 49 (citing *American Mini Theatres*, 427 U.S. at 70). A regulation must, however, be targeted at a *secondary* effect of the speech; indication that the government intended to protect citizens from offensive speech is fatal. *See generally Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (striking down a Florida ordinance related to adult movies that was justified by the offensiveness of such movies).

In determining content neutrality, "[t]he government's purpose is the controlling consideration." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "A regulation that serves purposes unrelated to the content of the expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* There needs to be evidence

that the regulation was targeted at some secondary effect of the speech or conduct. For example, in *United States v. O'Brien*, 391 U.S. 367 (1968), the Court upheld a law criminalizing burning one's own selective service registration certificate. Even though the statute burdened the defendant's ability to express his disagreement with the war, it was valid. *Id.* at 376. The statute was not aimed at suppressing free expression and was thus constitutional. *Id.* at 377.

The legitimacy of a regulation's purpose also depends on the context. The Court "has recognized that the government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue." *Cohen v. California*, 403 U.S. 15, 21 (1971). In *Cohen*, the Court reversed the criminal conviction of a man who wore a jacket saying "Fuck the Draft" in the municipal courthouse. *Id.* at 16. It emphasized that "we are often captives outside the sanctuary of the home and subject to objectionable speech." *Id.* at 21 (citation and quotation marks omitted). But the Court has consistently extended special protections for individuals when they are inside of their home, "where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *See F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding a regulation against offensive speech in broadcast media, in part because material is conveyed to an individual in their home and prior warnings cannot protect the listener).

Hill v. Colorado provides a framework for testing the content-neutrality of a regulation aimed at the secondary effects of speech. 530 U.S. 703 (2000). There, the Supreme Court reviewed a "Colorado statute that regulate[d] speech-related conduct within 100 feet of the entrance to a health-care facility." *Id.* at 707. The statute severely hindered the ability of individuals to engage in "sidewalk counseling," where they aimed to dissuade women from obtaining abortions. *Id.* at 708. The Court conducted the *Ward v. Rock Against Racism* inquiry

into "whether the government has adopted a regulation of speech because of disagreement with the message if conveys," and upheld the statute as content-neutral for three reasons. 491 U.S. 781, 791. First, the statute was not "regulation of speech," but a regulation "of the places where some speech may occur." *Hill*, 530 U.S. at 719. Second, the regulation was not adopted because of disagreement with speech, in part because of the "Colorado courts' interpretation of legislative history." *Id.* And third, the State had interests—protecting privacy and providing police with guidelines—that were "unrelated to the content of the demonstrator's speech." *Id.* at 719–20.

Squawker's Terms and Conditions are content-neutral because they are targeted at the secondary effects of the speech. The Terms and Conditions are not aimed at regulating offensive speech, and the first sentence of the Terms and Conditions notes this. It specifically says that Squawker is "committed to combating abuse . . . that seeks to silence the voices of those who have been historically marginalized." Record 15. The *primary* effect of the speech the regulation targets—behavior that "promotes violence or directly attacks or threatens other people on the basis of [various protected classes]"—is offense. *Id.* The *secondary* effect is the silencing of voices that have been historically marginalized. Unlike the regulation in *Erznoznik*, 422 U.S. 205 (1975), the regulation is not justified by the offensiveness of the speech, but by the effect that speech has on marginalized communities.

The purpose of Squawker's regulation is not to ban or censor offensive speech. Like the statute in *O'Brien*, while the regulation has an incidental effect on some speech, it is primarily aimed to protect the ability of users to speak. The Terms and Conditions confirm this. Squawker targets behavior "that promotes violence against or directly attacks" certain protected classes. Record 15. The Terms and Conditions specifically protect a "positive user experience that *allows our users to engage authentically with each other*." *Id.* (emphasis added). This is

different from Terms and Conditions that protect users from encountering offensive speech.

The context of Squawker and "squeaks" also confirms the legitimacy of the Terms and Conditions. It is true that a Squeaker chooses which other users to follow. Record 15. But this does not make an individual user's "feed" similar to a public courthouse in *Cohen v. California*. While each Squeaker chooses whose "squeaks" appear on their feed, they have no control over the content of those squeaks—every person that they follow controls that. That is virtually identical to broadcast media, where an individual can control what station they listen to but has no control over the actual content. Social media sites such as Squawker are even more pervasive than broadcast media, and it is essential for citizens to engage with their representatives. The very nature of Squawker enables Squeakers to engage with audiences from their own home, where they are not captive audiences undeserving of protection like the audience in *Cohen*.

The regulation is also valid under the test elucidated in *Hill v. Colorado*. Like the statute in *Hill*, the Terms and Conditions are merely a restriction on the manner of speech. Users are free to post what they choose—and are even free to *violate* the Terms and Conditions—as many times as they want. Even after violating the Terms and Conditions, Milner was free to continue to do so. The "flagging policy" merely meant that the way his speech was presented would change; he could continue to post whatever material he chose. Record 16. The Terms and Conditions were also not adopted because of disagreement with speech. If Squawker sought to regulate speech that it disagreed with, it would have banned individuals or posts that were offensive. But it did not. Rather, the Terms and Conditions and the flagging policy are specifically targeted at the effects the speech has on its listener, indicating that Squawker is focused on protecting users rather than punishing offenders. Finally, the interests of Squawker are justified without reference to the content of the speech. The interest here is protecting

"voices of those who have been historically marginalized." Record 15. This has nothing to do with what Milner said; it only relates to the potential effect his posts would have on the listener.

C. As a valid content-neutral regulation, Squawker's Terms and Conditions serve a substantial interest, are narrowly tailored to serve that interest, and leave open ample alternative channels of communication.

A content-neutral statute is not presumptively constitutional. To be constitutional, a regulation must serve a "substantial and justifiable interest." *Frisby v. Schultz*, 487 U.S. 474 (1988). It also must be narrowly tailored to serve that interest. *Id.* And it must "leave[] open ample alternative channels of communication . . . ." *Id.*

To be valid, a regulation must serve a substantial governmental interest. Substantial interests vary widely, but are less important to the state than a "compelling interest," which strict scrutiny requires. They can be as theoretical as keeping parks in Washington D.C. "in an attractive and intact condition." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984). They cannot be minor interests. *See Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147 (1939) (striking down a statute that was justified on the grounds that it prevented littering). Protecting the privacy of an individual—specifically, protecting the "unwilling listener"—has been recognized as a substantial government interest. *Frisby*, 487 U.S. at 484; *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748 (1978). Even though the Court recognized that individuals can sometimes be expected to avoid speech, the "home is different" and the government has an interest in protecting individuals in their own home. *Id.*

A regulation also must be narrowly tailored to serve the interest it is aiming to further. This requirement demands a close fit between ends and means, preventing the government from "sacrific[ing] speech for efficiency." *Riley v. Nat'l Fed. Of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). In order to be narrowly tailored, a regulation cannot "burden substantially more

speech than is necessary to further the government's legitimate interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). However, it does not need to be "the least restrictive or least intrusive means of serving the government's interest." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (quoting *Ward*, 491 U.S. at 798) (internal quotation marks omitted). The regulation also cannot be overbroad; that is, it cannot "regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799.

Finally, the regulation must also leave open ample alternative channels of communication of the information. The alternative channel cannot be an expensive replacement of the original method of communication. *See City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (striking down a statute banning residential signs, in part because such signs are significantly cheaper than other methods of communicating such a message). The alternative channel must not significantly alter the message of the speech, although the message does not need to be precisely the same as originally intended. *See Clark*, 468 U.S. at 293–98 (upholding a regulation on sleeping in a National Park, even though the message of protesting homelessness was slightly less effective without sleeping) . If the "general dissemination of a message" is permitted, then there is likely an ample alternative channel. *Frisby*, 487 U.S. at 483.

Squawker has a substantial interest in protecting users from being silenced. As the Court recognized in *Frisby* and *Pacifica*, the government has an interest in protecting the unwilling listener. Here, the "unwilling listener" is an individual who follows other Squeakers—such as Milner—to stay up to date on government news and policy, but is subjected to threatening language that silences them. As noted, social media sites have become the primary way for many individuals to communicate. To maintain free conversation—and to promote the purposes of the First Amendment itself—the government must make sure that all are able to participate.

The Terms and Conditions are also narrowly tailored to serve that interest. This regulation does not restrict more speech than necessary to serve its interest. It specifically targets speech that "directly attacks or threatens other people . . . ." Record 15. It does not ban individuals who violate the Terms and Conditions. Rather, it ensures that those individuals who would be silenced by such speech are aware of it and can avoid it. In fact, it is the least intrusive means of furthering its interest, as it specifically is oriented towards protecting the listener, not regulating the speaker. Finally, the Terms and Conditions are not overbroad. Only speech that will have the effect of silencing marginalized communities will be flagged, and the Terms and Conditions identifies a comprehensive and specific list of what speech will do so. Record 15.

The Terms and Conditions also leave open ample alternative channels for any individual generally, and Milner in particular, to convey their message. Complying with the flagging policy is not an expensive alternative; all one must do is complete a thirty-minute training video and quiz. Even if they choose not to, as Milner did, the "alternative channel" is Squawker itself; the message is adjusted with a skull and crossbones. Finally, the alternative channel does not alter the message of a Squeaker. Milner's posts can still be seen. Even though he is restricted on the "types and ordering of emojis" he may use, the "general dissemination of [his message] is permitted," and there are ample alternative channels. Record 35; *Frisby*, 487 U.S. at 483.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

Team 13
Attorneys for Respondent

Seigenthaler-Sutherland Cup
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