Team 14

No. 17-874

IN THE
SUPREME COURT OF THE UNITED STATES

AVERY MILNER,

Petitioner,

V.

MACKENZIE (MAC) PLUCKERBERG,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Eighteenth Circuit

BRIEF FOR PETITIONER

Team 14

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a social media platform engaged in state action when it hosted and regulated a public forum, a public official's government page, and enforced its flagging policy on an individual commenter?
2. Whether a social media platform's Terms and Conditions, which places restrictions on an individual's speech, violates the First Amendment when it is not a reasonable content-neutral time, place, or manner restriction?

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STATEMENT OF THE BASIS FOR JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit entered final judgment on this matter on November 15, 2019. *Mackenzie (Mac) Pluckerberg v. Avery Milner*, No. 16-6834, slip op. at 1 (18th Cir. Nov. 15, 2019). Petitioner timely filed a petition for writ of certiorari, which this Court granted. R. at 37. This Court now has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, Avery Milner ("Milner") filed a complaint in the United States District Court for the District of Delmont, seeking a declaration that the social media platform, Squawker and its Chief Executive Officer (CEO), Mackenzie (Mac) Pluckerberg (collectively, "Squawker") violated Mr. Milner's right to freedom of speech under the First Amendment to the United States Constitution, as incorporated and applied to the states through the Due Process Clause of the Fourteenth Amendment. R. at 1. Mr. Milner and Mr. Pluckerberg filed cross motions for summary judgment on December 5, 2018. R. at 2. The District Court granted Mr. Milner's motion for summary judgment and denied Mr. Pluckerberg's motion for summary judgment on January 10, 2019. R. at 13. The District Court concluded that Squawker's actions violated the First Amendment and held that Squawker hosting and regulating a public forum amounted to state action and that the underlying policy at issue in the case, Squawker's Terms and Conditions, constituted content-based viewpoint discrimination and were not narrowly tailored as a reasonable time, place, or manner restriction on Mr. Milner's speech. R. at 13.

Mr. Pluckerberg timely submitted an appeal to the United States Court of Appeals for the Eighteenth Circuit, seeking that the Eighteenth Circuit reverse and remand the case back to the District Court with instructions to enter summary judgment in favor of Squawker. R. at 26. On November 15, 2019, the Eighteenth Circuit reversed and remanded the case back to the District

Court with instructions to enter summary judgment in favor of Squawker. R. at 36. The Eighteenth Circuit found Squawker to be a private actor not subject to First Amendment constraints. R. at 33. Additionally, the Eighteenth Circuit held that Squawker's Terms and Conditions were narrowly tailored and left open adequate alternative avenues of communication. R. at 35.

Mr. Milner timely filed a petition for writ of certiorari to the Eighteenth Circuit, which this Court granted. R. at 37.

STATEMENT OF THE FACTS

I. How Squawker Works

Mr. Pluckerberg developed Squawker in 2013. R. at 2. He created it as a social media platform for people of all ages to stay connected to local, national, and global news. R. at 21. By mid-2017, Squawker became its user's main source for information on current events and is now the place where people go to learn about breaking news. R. at 21.

Users of Squawker, called "Squeakers," create personal profile pages where they create their own posts or "squeaks". R. at 15. Squeakers have the option to follow other users and see what they are posting by clicking the "follow" button, which means the other users' posts will appear on the squeaker's feed. R. at 15. These posts must be 280 characters or less, but they can post website links to longer bodies of text or other articles if the link fits within the 280-character limit. R. at 15. Once a squeaker has uploaded a post, other users can "like" or "dislike" the post by using a thumbs up or a thumbs down. R. at 15. They can also comment on the post directly, but the comment must be 280 characters or less. R. at 15. This comment can then be seen by all squeakers who follow the user who is commenting and by squeakers who follow the user who made the original post. R. at 15.

In order to create a personal profile page, every user must consent to the Terms and Conditions of the platform. R. at 15. These Terms and Conditions seek to regulate the way in which squeakers interact with each other on the platform. *See* Appendix*;* R. at 15.

If a user violates Squawker's Terms and Conditions, other users will report the issue and Squawker will flag the violator's profile. R. at 15. In early 2018, a new verification process was implemented, in which Squawker would verify accounts held by Government officials and mark them as verified. R. at 3. Squawker also changed the flagging policy changed for these verified pages. R. at 4. The new policy states that if a Squeaker posts or comments on a verified page, and that post is in violation of the Terms and Conditions, all content on that Squeaker's personal profile will be flagged. R. at 4. A black box with a white skull and crossbones in the middle will be placed over the user's content. R. at 4. Another user may still view the content but must consent to material first by clicking on the skull and crossbones. R. at 4. This box will cover (1) the offending squeak or comment; (2) the offender's future squeaks and comments; (3) all content on the offending squeaker's profile page; and (4) it will be placed next to the user's name on Squawker. R. at 4.

This flag will only be removed if the user completes a thirty-minute training video regarding the Terms and Conditions and an online quiz. R. at 4. If the user fails this quiz twice, then a ninety-day hold will be placed in their account. R. at 4. When a user's content has been flagged, they will receive a notification. R. at 6. The notification states, "by watching this video and completing this quiz, you agree that you have violated our Terms and Conditions and reaffirm that you will abide by all Terms and Conditions." R. at 6.

II. The Origin of Squawker's Flagging Policy

As Squawker became a mainstream news platform, many government officials obtained their own Squawker accounts in order to reach their constituents. R. at 3. It became an easy and efficient way to spread policy ideas. R. at 3.

William Dunphry, the Governor of Delmont, activated his profile in 2017 and it soon became one of the main ways in which he carried out his official business. R. at 3. He used Squawker to announce new policies for the first time. R. at 3. He squeaked with the people of Delmont daily and informed them about all major policy proposals throughout the state. R. at 24. He feels that Squawker is a great way to have his constituents engage with him and in the democratic process. R. at 24.

In 2017, several fake Squawker accounts appeared and were posting fake news. R. at 22. Governor Dunphry began to receive complaints regarding these imposter profiles and decided to approach his old preparatory school friend, Mac Pluckerberg, about the situation. R. at 3. Governor Dunphry suggested to Mr. Pluckerbeg that Squawker add a new verification feature to all Delmont elected officials' Squawker pages. R. at 22. Mr. Pluckerberg agreed and added this feature in March of 2018. R. at 22. Mr. Pluckerberg was to oversee all verifications within the first year. R. at 3. The new flagging policy would now apply to all elected official's verified profiles. R. at 4.

III. Avery Milner and His Squawker Account

Mr. Milner is a freelance journalist reporting on the current events within the state of Delmont. R. at 19. He has written several articles critiquing the quality and efficiency of the elected officials in Delmont, especially the ones over the age of 65, including Governor Dunphry. R. at 4, 28-29. Mr. Milner supports legislation that would impose age restrictions on public service. R. at 19.

Mr. Milner created his Squawker profile in April of 2017. R. at 4. By July of 2018, he had over ten thousand Squawker followers and averaged seven thousand views per squeak. R. at 19. He was known for stringing together comments on the same post in quick succession and artistically arranging emojis to create a greater meaning. R. at 19. The evolving emoji chain is his

signature move. R. at 20. These posts have allowed him to gain followers, likes, and re-squeaks. R. at 20.

IV. The Squawker Post

On July 26, 2018, Governor Dunphry posted a link to a proposed bill on his Squawker page. R. at 1. The bill would make it illegal for motorists to turn right on any red light in Delmont. R. at 1. Mr. Milner voiced his disdain for the proposed bill and commented on the post using his signature rapid-fire emoji series. R. at 1, 5. He posted, "[w]e gotta get rid of this guy," followed by an emoji of an old man, followed by a syringe, and finally a coffin. *See* Appendix; R. at 5. He made these four comments within thirty seconds of each other. R. at 20. Mr. Milner has made four or more squeaks within thirty seconds on countless other Squawker pages and never been in flagged. R. at 20. But on this occasion, other Squeakers complained that Mr. Milner made the forum unusable. R. at 6. Mr. Pluckerberg was monitoring Governor Dunphry's account carefully and noticed both Mr. Milner's post and the initial negative complaints about them. R. at 6. These comments allegedly received over one thousand dislikes and were reported to Mr. Pluckerberg over two thousand times. R. at 20. Mr. Pluckerberg flagged Mr. Milner's account. R. at 6.

V. Squawker's Flagging of Mr. Milner's Comments

On July 27, 2018, Mr. Milner received a notification that his Squawker profile had been flagged for violent and/or offensive use of emojis and spamming behavior. R. at 20. This is the first time Mr. Milner has ever been flagged. R. at 20. He has never even heard of a Squawker account being flagged for its use of emojis. R. at 20.

The notification stated that the only way Mr. Milner could remove the flag from his account would be to watch the online video and to take the quiz. R. at 6. However, by doing this Mr. Milner would have to agree that he violated the Terms and Conditions. R. at 6. He could delete his Squawker account and create a new one, but this would result in a loss of all of his followers. R.

at 6. Mr. Milner could still view Governor Dunphry's squeaks without logging into his profile, but that would mean he could not comment on the Governor's posts. R. at 7. At this time, Mr. Milner was not allowed to engage with Governor Dunphry's account in any way. R. at 6.

The flagging of Mr. Milner's account has affected him in several other ways. R. at 6. After only three weeks, his viewership dramatically decreased on his profile. R. at 6. By August of 2018, he only had two thousand followers and an average of fifty views per squeak. R. at. 6. This led to him being offered fewer freelance writing offers, and had fewer articles accepted by various newspapers. R. at 6. His income has fallen considerably, and he is struggling to make ends meet. R. at 6.

SUMMARY OF THE ARGUMENT

This Court should reverse the Eighteenth Circuit's decision that Squawker's actions against Mr. Milner did not amount to state action nor violate his rights under the First Amendment. This Court should hold that Squawker hosting and regulating a public forum constitutes state action. Additionally, this Court should hold that Squawker's Policy is content-based viewpoint discrimination that was not narrowly tailored as a reasonable time, place, or manner restriction. Accordingly, this Court should reverse and remand this case back to the District Court in favor of Mr. Milner.

Squawker's function as a host, regulator, and flagger of official government pages like Governor Dunphry's amounts to state action. While the First Amendment would not ordinarily apply to private conduct on private social media sites, this Court has indicated that public forums can be created in private "metaphysical" spaces subject to sufficient government control. Squawker itself is not a traditional public forum, however it does amount to a designated public forum considering how much control it operates over Governor Dunphry's official government

page and the meeting that took place between Mr. Pluckerberg and Governor Dunphry resulting in a new verification system and an updated Terms and Conditions policy.

The state action doctrine proscribes government action and dictates that private parties are incapable of violating the First Amendment. However, there are two exceptions to the state action doctrine: the public function exception and the entwinement exception. Squawker meets both exceptions to the state action doctrine. Even without seemingly being a "public function" at first blush, social media platforms like Squawker are akin to traditional public squares and meeting places, arguably becoming the modern-day town square. With more people interacting over social media than in-person, Squawker is sufficiently public in character. It is the primary tool by which the people of Delmont receive their news and interact with government officials, and the Governor of Delmont himself finds Squawker the most useful way to reach his constituents. Squawker also meets the entwinement exception because it was acting in a governmental capacity when it updated its Terms and Conditions to meet the Governor's needs and when it carefully monitored his official page for violent and/or offensive comments. Those actions are attributable to the State of Delmont as there is a close nexus between Governor Dunphry, Mr. Pluckerberg, and Squawker flagging Mr. Milner's comments. Therefore, Squawker is a state actor for purposes of the First Amendment.

Squawker also violated the First Amendment when they flagged Mr. Milner's speech. It is permissible to create reasonable restrictions on time, place, and manner of speech, but those restrictions must be content neutral and narrowly tailored to serve a significant interest. Squawker's Terms and Conditions are not content neutral. The Terms and Conditions describe the impermissible content in terms of subject matter and Squawker flagged Mr. Milner's comment because it disagreed with the viewpoint he was expressing. Viewpoint discrimination is an egregious form of content-based restrictions and are presumptively unconstitutional. Mr. Milner's

comments were offensive, but speech cannot be restricted simply because the government does not agree with the opinion being conveyed. Even if this court determines that this a content neutral restriction on speech, the flagging policy is still not narrowly tailored to serve Squawker's purported interest. This flagging policy not only places a black box over the offending comment, but over everything the user has posted, or will post in the future. It burdens more speech than necessary to achieve their purpose and there were less burdensome methods which would burden significantly less speech while still serving their interest. Therefore, Squawker's Terms and Conditions are unconstitutional.

ARGUMENT

I. Squawker's Function As A Host, Regulator, and Flagger of A Public Forum Amounts To State Action.

First Amendment jurisprudence is rooted in its continual commitment to protect all American speakers. *Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 740 (1996). "A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). While the First Amendment protects freedom of speech from infringement by local, state, or federal government by restricting government regulation of private speech, it does not regulate purely private speech. *See Gitlow v. United States*, 268 U.S. 652 (1925). Similarly, the state action doctrine, which proscribes only government action, dictates that private parties are incapable of violating the First Amendment. *See, e.g.*, Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221 (1976). With these axiomatic principles, the First Amendment would not *ordinarily* apply to private conduct

on private social media sites, but this Court has indicated that public forums can be created in private spaces subject to sufficient government control. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) ("[A]s an initial matter a speaker must seek access to public property or to *private property dedicated to public use* to evoke First Amendment concerns ...." (emphasis added)). Additionally, there are two exceptions to the state action doctrine: the public function exception and the entwinement exception. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974) (citation omitted). As stipulated to by the parties, Squawker created a public forum when it hosted Governor Dunphry's official government page that is used to conduct official business. R. at 17. However, Squawker itself became a public forum when it created a new verification procedure and updated its Terms and Conditions based on discussions with Governor Dunphry, and then actively regulated and flagged comments on his official page. Because Squawker's actions to host and regulate a public forum are so entwined with the State of Delmont and because Squawker's conduct can be deemed a public function, the state action doctrine applies.

A. Squawker Itself Became A Designated Public Forum When It Not Only Hosted, But Regulated and Flagged Comments On Governor Dunphry's Official Government Page.

While Squawker, a social media platform, is not a traditional public forum given this Court's precedent, it does amount to a designated public forum given how much control it operates over Governor Dunphry's official government page. In *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 96-99 (1972), this Court articulated that "under the Equal Protection Clause, not to mention the First Amendment itself, the government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Mosley*, 408 U.S. at 96.

It is important to note that despite rampant social media use across the country, only a handful of federal courts have considered whether elected officials' social media pages constitute public forums for purposes of state action. *See, e.g. Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019) (addressing whether the chair of a county board of supervisors violated the First Amendment by blocking someone from her Facebook page); *One Wis. Now v. Kremer*, 354 F. Supp. 3d 940 (W.D. Wis. 2019) (evaluating whether three Wisconsin state assemblymen violated the First Amendment by blocking an entity from their Twitter pages); *German v. Eudaly*, No. 3:17-cv-2028-MO, 2018 WL 3212020 (D. Or. June 29, 2018) (considering whether a Portland city commissioner violated the First Amendment by blocking someone from her Facebook page); *Price v. City of New York*, 2018 WL 3117507, at *15 (S.D.N.Y. June 25, 2018) ("the City's official Twitter pages share many characteristics of public forums [...]": Twitter is "generally open to the public"; appears to be "designed for and dedicated to expressive activities"; and appears to have "as a principal purpose ... the free exchange of ideas"); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (considering whether President Donald Trump violated the First Amendment by blocking someone from his Twitter page), aff'd, 928 F.3d 226 (2d Cir. 2019); *Morgan v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018) (assessing whether the governor of Kentucky violated the First Amendment by blocking an individual from his Facebook and Twitter pages); *Davison v. Loudoun County Board of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va. 2017) (determining whether the First Amendment applied to a county official's Facebook page). These cases held that officials' social media pages *were* public forums and blocking or excluding comments *were* in violation of the First Amendment. Yet, the Eighteenth Circuit completely dismissed Squawker as anything but a private entity and only discussed *Knight* as "[t]he furthest any court has applied the First

Amendment to social media," which is simply not the case considering these holdings. R. at 32-33. The fact that social media platforms like "Twitter [are] privately owned does not preclude a finding that it is susceptible to public [forum] analysis." *Campbell v. Reisch,* 367 F. Supp. 3d 987, 992 (W.D. Mo. 2019).

When thinking about what constitutes a public forum, there is more to be considered than "quintessential public forums," as the Eighteenth Circuit would suggest. R. at 32. This Court has stated that the government can designate new public forums by making "an affirmative choice" to create a space that is open for public expression. *United States v. American Library Assoc., Inc., et al.,* 539 U.S. 194, 206 (2003). This second category of public forums, called designated public forums, bind the government by the same restrictions as traditional public forums, and have included private entities or privately held functions like university meeting facilities, school board meetings, and theaters leased to and operated by municipalities. *Widmar v. Vincent,* 454 U.S. 263 (1981), *City of Madison Joint School District v. Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976), and *Se. Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975). "Because facilities or locations deemed to be public forums are usually operated by governments, determining that a particular facility or location is a public forum usually suffices to render the challenged action taken there to be state action subject to limitations under the free speech clause." *Knight First Amendment Inst. v. Trump,* 302 F. Supp. 3d 541, 568 (S.D.N.Y. 2018) (citing *Widmar v. Vincent,* 454 U.S. at 265–68, and *City of Madison, Joint Sch. Dist. No. 8 v. Wisc. Emp't Relations Comm'n,* 429 U.S. 167, 169–76 (1976)).

In this case, Squawker became a designated public forum itself when it decided to offer verified pages for Delmont government officials only and update its Terms and Conditions to meet the interaction needs of such actors. It cannot now claim to be a private company for the

purposes of this action. Squawker should be bound by the same restrictions as other seemingly privately held entities who affirmatively choose to create a space open for public debate by the Governor and the people of Delmont. These actions were only taken in the state of Delmont. R. at 16. Under *Knight*, Squawker stipulating to Governor Delmont's official page as being a public forum suffices to render their regulating his page and flagging Mr. Milner's comments and profile as state action and being subject to the First Amendment. However, even if this Court were to not automatically presume state action, there is no question that the forum at issue is compatible with quintessential expressive activity--the entire purpose of Squawker is to facilitate speech.

This Court has also expanded the public forum doctrine beyond physical locations to encompass "metaphysical" spaces. For instance, in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 822 (1995), "the same principles" of the public forum doctrine applied to the University of Virginia's student-activity fund, even though it was "a forum more in a metaphysical than in a spatial or geographic sense." *Id.* at 830. Additionally, in *Packingham v. North Carolina*, 137 S. Ct. at 1735, this Court illustrated that "[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace - the 'vast democratic forums of the Internet' in general, *Reno v. American Civil Liberties Union,* 521 U.S. 844, 868 (1977), and social media in particular."

Here, the forum is also a "metaphysical space" in which Squawker not only hosts but regulates all verified, official government pages and enforces a flagging policy, a subset of its Terms and Conditions. These government pages, including Governor Dunphry's, function like a digital town hall meeting, where the public and the governmental official engage with each other

on matters of public policy. Squawker is therefore a designated public forum when it comes to these specific actions taken by Mr. Pluckerberg.

B. Squawker Meets The Public Function Exception To The State Action Doctrine Because Social Media Sites Are Today's Town Squares.

Setting aside the traditional principle that the state action doctrine does not apply to private entities, Squawker meets the public function exception to the doctrine. The Eighteenth Circuit incorrectly determined that because Squawker's hosting and regulating an official government page is not a traditional, exclusive public function, the First Amendment cannot be violated. R. at 31-32. The "public function" exception provides that a private entity will be deemed a state actor if they engage in conduct that is "traditionally exclusively reserved to the State." *Jackson*, 419 U.S. at 352. However, the Eighteenth Circuit does not discuss or rule out Squawker as being akin to "public squares and meeting places," arguably the "town squares of the twenty-first century." Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M. L. REV. 121, 145 (2014). Duties were delegated to Squawker by Governor Dunphry to ensure imposter and fake news accounts were no longer affecting Delmont constituents, thereby ensuring a free flow of discussion between citizen and politician in the democratic process. R. at 3, 24.

The state action doctrine has been applied in a variety of contexts to actions of private individuals and entities even without seemingly being "public functions" at first blush. For instance, in *Marsh v. Alabama*, 326 U.S. 501 (1946), where this Court held that although the town of Chickasaw, Alabama was privately owned, "the corporation's right to control the inhabitants of Chickasaw is [not] coextensive with the right of a homeowner to regulate the conduct of his guests." *Id.* at 505-06. As a general matter, private property owners are free to exclude others from their land, but Chickasaw was so much like a public town in appearance and

function that this Court determined that the owners of Chickasaw had limitations on them similar to that of a governmental actor. *Marsh,* 326 U.S. at 505-07. The operation of "facilities [that] are built and operated primarily to benefit the public . . . is essentially a public function." *Id.* at 506. This suggests that if a privately owned space is sufficiently public in character, like Squawker's host and regulation of Governor Dunphry's official government page, then the owner of that space, Squawker and Mr. Pluckerberg, would be subject to constitutional limitations on use of the property due to state action, such as a prohibition on suppressing the speech of people on or using the property. Social network platforms like Squawker can wreak havoc and create greater injury to free speech than the town in *Marsh.* Mr. Pluckerberg was silenced, having a dramatic decrease in viewership of his Squawker account and engagement with his squeaks. R. at 6. This is detrimental to Mr. Milner's line of business because Squawker is the primary tool by which the citizens of Delmont receive their news and discuss relevant policy matters with Delmont officials. R. at 3. Mr. Pluckerberg, and thereby Squawker, was undertaking a public function after receiving encouragement from the Governor. Squawker's public function is so pronounced given 1) the critically important role it has throughout Delmont as a new source, 2) the fact that Governor Dunphry provided the genesis for Squawker's flagging policy, 3) the amount of input Governor Dunphry had in the new Squawker verification system, which only took effect in the state of Delmont, and 4) Mr. Pluckerberg's careful monitoring of Governor Dunphry's government page.

People communicate on social media platforms more than in any off-the-internet venues. David L. Hudson, Jr., *In the Age of Social Media, Expand the Reach of the First Amendment,* 43 HUMAN RIGHTS 2, 3 (2018), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/in-the-age-of-socia-media-

first-amendment/. Therefore, the marketplace of ideas, a pervasive metaphor in First Amendment jurisprudence, does not allow actors like Squawker to distort the public discourse by engaging in content control. *Id.* Because public squares and meeting places have traditionally been managed by the state, social media platforms like Squawker, who, through policy and practice, are the modern-day equivalent of public squares and town halls, meet the public function exception to the state action doctrine.

C. Squawker Meets The Entwinement Exception To The State Action Doctrine Because It Was Acting in A Governmental Capacity And Those Actions Are Attributable to the State of Delmont.

By hosting and regulating a public forum, Squawker meets the entwinement exception to the state action doctrine because it was acting in a governmental capacity and those actions are attributable to the State of Delmont. Under the entwinement exception, a private actor can be subject to constitutional scrutiny "because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982). The Southern District of New York in *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541, made clear that state action analysis is a functional one that looks to the nature of the act being performed. *Id.* at 568. The court stated that further analysis may be necessary when the party exercising control over the forum is a nongovernmental entity and cited to this Court's decision in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n,* 531 U.S. 288, 295-96 (2001) for illustration. *Id.*

In *Brentwood,* this Court held that state action may be found if "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself,'" but acknowledged that "[w]hat is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Academy,* 531 U.S. at 295 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). This "nexus"

determination is identical to the "under color of state law" precedents developed in the context of actions against state actors under 42 U.S.C. § 1983.[1] *Knight,* 302 F. Supp. 3d at 567 (citing *United States v. Price,* 383 U.S. 787, 794 n. 7 (1966)). After analyzing several factors, including whether the private actor was undertaking a public function, whether the private actor received encouragement from the state, or whether its functions were entwined with governmental policies, the *Brentwood* Court concluded that state action was present. *Brentwood Academy,* 531 U.S. at 295-96.

The indicia of state action that the court identified in *Brentwood* are present here. Crucial questions in this case are how Governor Dunphry's account is used and how much Squawker exercises control over it. Here, there is a close nexus between Delmont Governor Dunphry and Squawker flagging Mr. Milner's comments. Unlike the Eighteenth Circuit's characterization that Governor Dunphry never directed Mr. Pluckerberg to take the action he did, in his affidavit, Mr. Pluckerberg noted otherwise. R. at 22. Not only was Mr. Pluckerberg approached by his old preparatory school friend, Governor Dunphry amid fake news concerns and imposter accounts, but he subsequently introduced a verification system that would show who is a government official on Squawker. R. at 3. This was an affirmative choice made by Squawker to ensure Governor Dunphry and other government officials were able to engage "with the good people of Delmont on an unprecedented level." R. at 24. Additionally, to ensure quality control, Mr. Pluckerberg vowed to oversee all verifications with the first year of implementation. R. at 3. Finally, Mr. Pluckerberg himself monitored Governor Dunphry's verified account carefully and took notice of Mr. Milner's comments as soon as they were posted. R. at 6. Before this policy

[1] The courts in *Knight, Davison,* and *One Wisconsin*, to name a few, often used the terms "under color of state law" and "state action" interchangeably to refer to the same inquiry. For clarity, this Brief will exclusively use the term "state action" when referring to this standard.

change, the Governor was receiving complaints from his constituents and asked Mr. Pluckerberg as CEO of Squawker to do something about it. R. at 24. It is clear that Squawker employed more than "editorial control" or discretion when it flagged Mr. Milner's comments and account, and instead took on the role as governmental actor when it publicly excluded Mr. Milner.

Though the *Knight* court did not analyze under the *Brentwood* factors, it too found that President Donald Trump's use of the Twitter handle, @realDonaldTrump, as a venue to discuss public policy, coupled with his blocking of other Twitter users, constituted a First Amendment violation. *Knight,* 302 F. Supp. 3d 541, 566-67. The court determined that because the President and his staff "use the @realDonaldTrump account for governmental functions, the control they exercise over it is accordingly governmental in nature." *Id.* The Second Circuit affirmed the district court's decision and reiterated its determination that this be a fact-specific inquiry informed by "how the official describes and uses the account; to whom features of the account are made available; and how others, including government officials and agencies, regard and treat the account." *Knight First Amendment Inst. at Columbia Univ. v. Trump,* 928 F.3d 226, 236-240 (2d Cir. 2019). Like President Trump, Governor Dunphry uses Squawker for official announcements and communication of his views to the public rather than simply as a mouthpiece for press releases. He considers his Squawker page a "tool of governance." *Davison,* 267 F. Supp. 3d at 713. Mr. Pluckerberg was effectively a staff member to Governor Dunphry, when he monitored his page for what Squawker deemed were violent and/or offensive comments. Mr. Pluckerberg assisted Governor Dunphry in regulating the page's content, looking for posts that could stifle local policy change Governor Dunphry wanted to implement. By Squawker deciding to add additional regulations at Governor Dunphry's request and further monitor his official

government page, Squawker's actions are attributable to the state of Delmont through the entwinement exception.

II. Squawker's Terms and Conditions Violate the First Amendment.

The First Amendment does not allow the government to make any law "abridging the freedom of speech" of any citizen. *See* U.S. Const. amend. I. In this digital age, one of the most important places to exercise our First Amendment rights is cyberspace, particularly social media. *Packingham*, 137 S.Ct. at 1732. Social media websites provide the "most powerful mechanisms available to a private citizen to make his or her voice heard." *Id*. at 1737. It is true that the government may impose reasonable restrictions on the time, place, or manner of this protected speech, but those restrictions must be, "justified without reference to the content of the regulated speech," and "narrowly tailored to serve a significant governmental interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989). In this case, the restrictions Squawker has placed on speech is a complete ban on individuals to express certain viewpoints, and is overly broad, encompassing speech that does not further Squawker's purported interest. Squawker's Terms and Conditions are therefore unconstitutional.

A. Squawker's Terms and Conditions Cannot Be Justified Without Reference to the Content of Mr. Milner's Speech.

i. Squawker's Terms and Conditions Are Not Content-Neutral Restrictions on The Time, Place, and Manner of Speech.

Squawker's Terms and Conditions are not content-neutral restrictions on the time, place, and manner of speech. A regulation is not content-neutral if the government adopted the restriction because it disagrees with the message that speech conveys. *Ward*, 491 U.S. at 791. If the regulation distinguishes "favored speech from disfavored speech on the basis of ideas or views expressed," then the regulation is content-based. *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). Content-based regulations of speech are "presumptively unconstitutional." *National*

Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018). Once a regulation describes the impermissible conduct in terms of subject matter, it is no longer a neutral restriction, but one that is concerned about the content. *Police Dept. of City of Chicago*, 408 U.S. at 99. This type of regulation is never permitted. *Id.*

Squawker's Terms and Conditions describe the impermissible speech in terms of the content of the speech. It specifically prohibits speech that, "promotes violence against or directly attacks or threatens other people." R. at 3. This is dictating what subjects can and cannot be discussed on this social media platform. It is directly distinguishing disfavored speech and favored speech based on the opinion being expressed.

In *Ancheta v. Watada*, 135 F.Supp.2d. 1114, 1121 (D.Hawai'i 2001), a provision of the statutory Code of Fair Campaign Practices dictated that candidates must "refrain from the use of personal vilification, character defamation, or any other form of scurrilous personal attacks or any other candidate." The law stated that other candidates must not "condemn or appeal to prejudice based on race, sex, sexual orientation, religion, national origin, or age." *Id*. at 1121. The District Court of Hawaii determined that these types of regulations are aimed at the ideas or information that the speech contains and that the State was seeking to restrict speech. *Id*. In this case, Squawker's Terms and Conditions are similar. *See* Appendix. Squawker forbids speech that attacks people "on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease." R. at 3. Squawker is specifically restricting speech based on the subject matter of the post or comment. Therefore, it is not content-neutral.

ii. Squawker's Flagging Policy Discriminates Based on Specific Viewpoints

Squawker's Terms and Conditions are not only content-based, but their flagging policy discriminates based on specific viewpoints. When the government creates a public forum for private speech, some content-based restrictions may be allowed, but even in such cases, viewpoint discrimination is forbidden. *Matal v. Tam*, 137 S.Ct. 1744, 1763 (2017). Viewpoint discrimination is an egregious form of content discrimination. *Rosenberger*, 515 U.S. at 829. A core postulate of First Amendment law is that "the government may not discriminate against speech based on the ideas or the opinions it conveys." *Iancu v. Brunetti*, 139 S.Ct. 2294, 2299 (2019). When the government targets not just the subject matter, but the particular views taken by the speaker, violation of the First Amendment is automatically inferred. *Id*.

Here, Mr. Milner's comments on Squawker were advocating for the removal of Governor Dunphry in a distasteful way. However, his statements cannot be blocked because people simply do not agree with his viewpoint. The district court was correct to determine that Squawker prohibited Mr. Milner's speech because he was criticizing the Governor and disparaging him because of his policies. R. at 11. It was also correct to determine that this was impermissible viewpoint discrimination. R. at 11. Speech may not be banned simply because it expresses ideas that offend. *Matal*, 137 S.Ct. at 1751. In *Matal*, the Patent and Trademark Office refused to issue a trademark because it was disparaging to people who identify as Asian. *Id.* at 1747. The clause at issue equally prohibited disparagement of all groups; it denied registration to any mark that was offensive. *Id*. at 1763. Squawker also prohibits all speech promoting violence or attacking individuals due to certain characteristics equally. However, this Court determined that the speech cannot be prohibited because it is offensive. *Id*. Giving offense is a viewpoint and cannot be controlled. *Id.* Justice Alito said that "public expression of ideas may not be prohibited merely

because the ideas are themselves offensive to some of their hearers." *Matal*, 137 S.Ct. at 1763. Speech that is demeaning to individuals is hateful, but the "proudest boast of the Supreme Court's free speech jurisprudence is that it protects the freedom to express hatred thoughts." *Id*.

Even if the government asserts a content-neutral justification for the regulation, speech cannot be suppressed when the real rationale for the restriction is disagreement with the viewpoint being expressed. *Ridley v. Massachusetts Bay Transp. Authority*, 390 F.3d. 65, 82 (1st Cir. 2004). In *Ridley*, the transportation authority rejected three advertisements which were questioning marijuana laws. *Id*. at 86. The authority said its purpose was to protect children, but evidence showed the actual justification was a distaste for the viewpoint expressed. *Id*. at 87. The First Circuit decided that it was not enough to simply state a viewpoint neutral justification, but if it is revealed that the speech is being suppressed solely because of a speaker's point of view, it will not be permitted. *Id*. A court might conclude that a decision to exclude speech was impermissible when the "government states that it rejects something because of a certain characteristic, but other things possessing that same characteristic are accepted." *Id*.

Squawker purported a content-neutral justification, but evidence shows that the real reason Mr. Milner's content was flagged was because Squawker disagreed with the viewpoint he was expressing. Squawker claims that they prohibit certain types of speech to promote a positive user experience and to ensure that the forum is usable for all users. R. at 3. It stated that by posting these four comments in thirty seconds, the forum became unusable. R. at 6. Yet, Mr. Milner was known for posting several comments in quick succession creating an emoji chain. R. at 20. He had posted four or more comments within thirty seconds on countless other Squawker pages, but this was the first time Squawker flagged him. R. at 20. This clearly demonstrates that Squawker only flagged his comments at a time when it disagreed with his viewpoint.

Mr. Milner's viewpoint was that he disliked Governor Dunphry and the legislation he was proposing. Governor Dunphry created his Squawker account as a way of communicating with the citizens of Delmont. R. at 24. Then, when he posted a link to the proposed bill, Mr. Milner exercised his right to voice his opposition to the bill and to the Governor. The suppression of critical commentary regarding elected officials is the "quintessential form of viewpoint discrimination against which the First Amendment guards." *Davison*, 267 F. Supp. 3d at 717. The ability to freely discuss and debate the qualifications of public officials has always been "integral to the operation of the system of government established by our Constitution." *Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) (citing *Buckley v. Valeo*, 424 U.S. 1, 14, (1976)). Mr. Milner's comments afforded others the opportunity to reply and voice their own opinions about Governor Dunphy. This forum is an accessible platform for all citizens to engage in their local politics and to debate the issues facing their community. By allowing Squawker to silence individuals who are criticizing public officials, they are taking away the opportunity for those issues to be freely discussed. In a democracy such as ours, the ability to "make informed choices among candidates for office is essential." *Id*. This is why the First Amendment affords the broadest protection to political expression. *Id*.

Squawker's Terms and Conditions are not content-neutral regulations on the time, place, and manner of speech. Furthermore, Mr. Milner's comments were flagged due to viewpoint discrimination. If the government is allowed to suppress speech because of the viewpoint being expressed, then the First Amendment would prove meaningless. This Court should determine that Squawker's Terms and Conditions are unconstitutional because they cannot be justified without reference to the content of Mr. Milner's speech.

B. Squawker's Flagging Policy under their Terms and Conditions is Not Narrowly Tailored to Serve A Significant Government Interest.

Even if this court determines that the Terms and Conditions are content-neutral, the regulation must also be narrowly tailored to serve the interest alleged by Squawker. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). In this case, Squawker's flagging policy is not narrowly tailored to serve a significant government interest. This requirement prevents the government from limiting the rights of a citizen in exchange for efficiency. *Id*. For the regulation to be narrowly tailored, it must not burden substantially more speech than is necessary to further a legitimate interest. *Id*. Also, the government must demonstrate that an alternative measure which burdens substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier. *Id*. at 495.

To determine if a regulation is not burdening more speech than necessary, the court must look to the amount of speech covered by the policy and determine if there is an appropriate balance between the affected speech and the interest being alleged. *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 165 (2002). There is a general rule that government "may not suppress lawful speech as the means to suppress unlawful speech." *Packingham*, 137 S.Ct. at 1738. In *Packingham*, a North Carolina law made it a felony for a registered sex offender to access any social networking website. *Id*. at 1733. This Court determined that the law was unconstitutional because it was too broad and burdened all speech, not just unlawful speech. *Id*. at 1738.

Here, Squawker's flagging policy is too broad and burdens more speech than necessary to achieve their purported purpose. Once Squawker determines that someone has posted content that violates the Terms and Conditions, it places a black box over everything on the user's profile page. R. at 4. It not only places a black box on the offending comment, but *everything* the user

will post in the future, and *everything* they have posted in the past. R. at 4 (emphasis added). Squawker is blocking this unrelated speech even though there is no way of knowing if it is lawful or unlawful. This content could still be viewed if another user clicked on the skull and crossbones and consented to viewing the material. R. at 4. However, the black box deters users from viewing the posts. Three weeks after being flagged, Mr. Milner's viewership dramatically decreased, and his followers ceased. R. at 6. By placing a black box over content that could be lawful speech, Squawker is burdening more speech than necessary to achieve their stated interest.

Squawker states their interest is to ensure that all users are able to use the platform and build communities. R. at 3. However, if the stated interest is to redress past harms or to prevent anticipated harms, it must do more than simply posit the existence of a problem. *Turner Broadcasting Systems, Inc.*, 512 U.S at 664. It must make some evidentiary showing that the harm is actually real, and not merely conjectural. *Ross v. Early*, 746 F.3d 546, 556 (4th Cir. 2014). It must also show that the regulation will in fact alleviate harms in a direct and material way. *Turner Broadcasting Systems, Inc.*, 512 U.S. at 644. In this case, Squawker has not provided any evidence to show that the harm of users not being able to use their platform is real. The verification feature on Squawker and the flagging policy were updated simultaneously. R. at 22. At that time, Squawker could not have predicted that the flagging policy would be necessary because the harm that they foresaw was merely conjectural.

Furthermore, for a regulation to be narrowly tailored, there must not be less restrictive measures that would substantially burden less speech. *McCullen*, 573 U.S. at 495. If there are numerous and obvious less burdensome alternatives, they must be taken into account when determining whether the regulation is reasonable. *Ross*, 746 F.3d at 557. The Fourth Circuit

demands that the government must prove it tried other methods to address the issue. *Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015). They have a burden to show that it seriously undertook less intrusive methods, and that those alternative measures would fail to achieve the goal, and not simply that the chosen route is easier. *Id*. Since Squawker updated the flagging policy at the same time it added the verification process, it is clear that Squawker tried no other alternative measures. For instance, Squawker did not try and see if a flagging policy which only placed a black box on the content that was in violation of the terms and conditions would alleviate the issue they foresaw. There are alternative measures that would burden substantially less speech and still achieve Squawker's purported interest.

Squawker's flagging policy is not narrowly tailored to serve a significant governmental interest. Squawker initiated this policy to address a harm that was merely conjectural. Even if the interest was substantiated, the policy is blocking both lawful and unlawful conduct, making it overly broad. There are also less restrictive measures that would still achieve the same goal. Therefore, Squawker's flagging policy under their Terms and Conditions is unconstitutional.

CONCLUSION

For the foregoing reasons, Mr. Milner respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Eighteenth Circuit, and remand the case to the United States District Court for the District of Delmont with instructions to enter summary judgment in favor of Petitioner, Avery Milner.

CERTIFICATE

Team 14 hereby certifies that the following statements are true:

(1) The work product contained in all copies of Team 14's brief is in fact the work product of the members of Team 14 only;

(2) Team 14 has complied fully with its school's governing honor code; and

(3) Team 14 has complied with all Rules of the Competition.

Team 14

Counsel for Petitioner

APPENDIX

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment states the following:

> 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.

The Fourteenth Amendment, in relevant part, states the following:

> 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. XIV.

SQUAWKER'S POLICIES INVOLVED

Squawker's Terms and Conditions policy states the following:

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

R. at 3–4.

Squawker's Flagging Policy states the following:

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

R. at 4.

AVERY MILNER'S SQUAWKER POST INVOLVED