No. 38-001

In the Supreme Court of the United States

AVERY MILNER,

Petitioner,

v.

MAC PLUCKERBERG,

Respondent.

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

BRIEF FOR RESPONDENT

Team 17
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Eighteenth Circuit erred in concluding that under the First Amendment a private entity transforms into a state actor by hosting and regulating a public forum.

II. Whether the Eighteenth Circuit erred in holding that the private entity's Terms and Conditions are a content-neutral time, place, or manner restriction, and therefore, do not violate the First Amendment.

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The opinion of the United States District Court for the District of Delmont (C.A. No. 16-CV-6834) appears in the record. R. at 1-13. The opinion of the United States Court of Appeals for the Eighteenth Circuit (No. 16-6834) appears in the record. R. at 25-36. The opinions below are unreported.

STATEMENT OF JURISDICTION

The Court of Appeals for the Eighteenth Circuit entered final judgement. R. at 25-36. A timely Petition for a Writ of Certiorari was granted. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROCEDURAL HISTORY

Mr. Avery Milner filed a claim in the United States District Court for the District of Delmont against Mr. Mackenzie Pluckerberg in his official capacity as Chief Executive Operator of Squawker. R. at 1. Mr. Milner claims that Squawker violated his First Amendment right to freedom of speech as applied to the states through the Fourteenth Amendment. *Id.* Both Mr. Milner and Mr. Pluckerberg filed cross motions for summary judgement. R. at 2. The District Court held that Squawker's actions constituted state action and that Squawker's terms and conditions amounted to content-based viewpoint discrimination. R. at 9, 13. Further, the District Court held that Squawker's terms and conditions were not narrowly tailored as a time, place, or manner restriction on speech. R. at 13. Mr. Pluckerberg appealed and the United States Court of Appeals for the Eighteenth Circuit held that the District Court erred in concluding that Squawker was operating as a state actor when hosting a pubic forum. R. at 30-31. The court further held that Squawker's terms and conditions were a reasonable restriction on time, place, or manner of speech. R. at 33. A Petition for Writ of Certiorari was filed by Mr. Milner and granted by this Court. R. at 37.

STATEMENT OF THE FACTS

Mackenzie (Mac) Pluckerberg created and launched Squawker in 2013 as a platform to connect individuals and share breaking news. R. at 21. Squawker allows users to create personal profiles and post short messages or links to longer works. *Id.* at 2. Other users can view those messages and show approval or disapproval, or respond to the original message. *Id.* In order to create a profile, every user must agree to Squawker's Terms and Conditions. *Id.* at 15. Squawker's Terms and Conditions state:

> 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.

Id. Users are forbidden from posting at extremely high frequencies "to the effect the platform is unusable by others." *Id.* Extremely high-frequency postings are four or more posts within a thirty-second time period. *Id.*

Squawker quickly grew in popularity, and by 2017, many people relied on Squawker as their main source of local and national news. *Id.* at 3. Many officials, including, Governor Dunphry, created Squawker accounts in order to reach constituents and share policy ideas. *Id.* Governor Dunphry engages with his constituents daily on Squawker by sharing new policy proposals and allowing users to provide feedback on those policies. *Id.* at 24. In early 2018, Governor Dunphry began receiving complaints about imposter and fake news accounts on Squawker. *Id.* at 24. To address this problem, Governor Dunphry reached out to Mr. Pluckerberg, his long-time friend and creator of Squawker, about installing a verification feature for elected Delmont officials. *Id.* at 22. Mr. Pluckerberg implemented the verification feature in March 2018 and monitored the verified accounts for the first year. *Id.*

After implementing the verification feature, Squawker updated its Terms and Conditions to include a new flagging policy. *Id.* at 16. Each user was notified of the change and needed to consent in order to continue using Squawker. *Id.* Squawker's new flagging policy provides that those who violate the Terms and Conditions will have their comments and profiles flagged. *Id.* The offending user will not have their profile or comments deleted, but an emoji of a skull and crossbones will cover the offending content, the user's profile, and future comments. *Id.* Other users can still choose to view the offending comment or the user's profile page by clicking on the emoji covering the information. *Id.* Offending users have the opportunity to complete a thirty-minute training video and an online quiz in order to have the flagging removed from their profile page and future comments. *Id.* The offending

comment will remain flagged, but the user may delete it and re-post it in accordance with the Terms and Conditions. *Id.*

Avery Milner's account was flagged in July 2018 after posting four emojis within twenty-nine seconds, in violation of Squawker's limit on high-frequency posts. *Id.* at 16-17. Mr. Milner's Squawker posts were in response to Governor Dunphry's proposal to make it illegal for cars to turn right at red lights. *Id.* at 5. Mr. Milner posted "we gotta get rid of this guy," followed by emojis of an elderly man, a syringe, and a coffin. *Id.* at 5-6. Governor Dunphry is sixty-eight years old. *Id.* at 24. Mr. Pluckerberg received over two thousand complaints regarding Mr. Milner's comments, which "effectively shut down the forum for others and led to users leaving the platform and deleting their accounts for the stated reason that Avery Milner had hijacked the space." *Id.* at 22.

Mr. Milner's comments and Squawker profile remain flagged after violating Squawker's Terms and Conditions because he has refused to watch Squawker's training video and take the accompanying quiz. *Id.* at 20. Instead, Mr. Milner has filed a lawsuit alleging Squawker violated his First Amendment rights. *Id.*

SUMMARY OF THE ARGUMENT

This Court should affirm the appellate court's holding that Squawker is not subject to the constraints of the First Amendment because it is not transformed into a state actor simply because the private entity hosts and regulates a public forum. The constraints of the First Amendment, as applied to the states through the Fourteenth Amendment, apply only to state actors and not private entities. However, even if the Court finds that Squawker's hosting of a public forum constitutes state action, Squawker has not violated the First Amendment because its Terms and Conditions are a content-neutral time, place, or manner restrictions. At issue here, is whether Squawker is performing a public function by hosting and regulating

Governor Dunphry's page in a way that would transform the private entity into a state actor and therefore, be subject to the constraints of the First Amendment.

As a threshold issue, Squawker is a private company that is not subject to the constraints of the First Amendment. Many courts have continued to decline to recognize a cause of action against private social media companies for violation of a user's First Amendment rights. Courts currently recognize, as an outer limit, that a state actor cannot ban users from their government profile on a social media site. However, this should not be interpreted to limit the ability of the private social media company to regulate the content of users on its site. Further, Squawker is not performing a public function that would transform the company into a state actor by hosting and regulating Governor Dunphry's page. Operating a social media platform is not a traditional, exclusive public function and merely hosting a public forum does not transform a private entity into a state actor.

Even if the Court finds that Squawker was transformed into a state actor by hosting Governor Dunphry's page, Squawker did not violate the First Amendment. State actors are allowed to impose reasonable time, place, or manner restrictions on the use of the public forum. Squawker's Terms and Conditions are content-neutral because its purpose is to facilitate user access to the forum, not to censor speech based on its content. Squawker's Terms and Conditions include a flagging policy limiting the number of times a user can post within a given time frame. Squawker's policy is narrowly tailored because the offending comments are merely flagged, not banned, and only posts that are deemed to make the platform unusable are flagged. Lastly, Squawker's policy leaves offending users ample alternative avenues to share their ideas, such as by completing a training video and quiz to remove the flagging, spacing out their posts, or creating a new profile and posting the message again. Because Squawker's Terms and Conditions are a content-neutral time, place,

or manner restriction, Squawker has not violated the First Amendment by flagging Mr. Milner's comments and profile.

ARGUMENT

I. The Court Should Affirm the Appellate Court's Ruling That Squawker's Hosting of a Public Forum Does Not Constitute State Action Because Squawker is a Private Entity and is Not Conducting a Public Function.

The Court should affirm the appellate court's ruling that Squawker is not a state actor and is not subject to the constraints of the First Amendment when hosting and regulating a government official's page. The Free Speech Clause of the First Amendment to the United States Constitution states that, "Congress shall make no law…abridging the freedom of speech…" U.S. CONST. amend. I. The ratification of the Fourteenth Amendment to the United States Constitution makes this clause applicable to the states. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). This means that individuals are protected under the Fourteenth Amendment when the wrong is committed by a state actor. *The Civil Rights Cases*, 109 U.S. 3, 17 (1883). Private entities are not subject to the constraints of the First Amendment. *See, e.g.*, *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1928. However, under the state action doctrine there are three limited ways in which a private entity can qualify as a state actor and therefore, be subject to the constraints of the First Amendment. *Id.* at 1928. At relevant here, a private entity can qualify as a state actor when the private entity performs a public function. *See, e.g., Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

Squawker is not subject to the constraints of the First Amendment, even though it hosts and regulates Governor Dunphry's page, for two reasons: 1) Squawker is a private entity and is not subject to the constraints of the First Amendment and 2) operating a social media platform does not constitute a traditional, exclusive public function.

A. Squawker is not subject to the constraints of the First Amendment because it is a private entity.

Squawker is a private entity and is therefore, not subject to the constraints of the First Amendment. The threshold issue in a First Amendment claim is whether the party against whom action is being sought is a state actor. *Manhattan Cmty. Access Corp.,* 139 S. Ct. at 1930. If this qualification is not met then the claim cannot proceed. *See, id.* at 1928. Further, many courts, including this one, have yet to recognize a First Amendment cause of action by users against private social media companies. *See, e.g. Manhattan Cmty. Access Corp.*, 139 S. Ct. 1921; *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019). However, one limit that has been put in place by some courts is that public officials are generally limited under the First Amendment from censoring the speech of individuals on their government account. *See, e.g., Knight*, 928 F.3d at 238.

Courts have generally not treated private social media companies as state actors and have continued to reject causes of action against the private entity. In *Howard v. America Online,* the Ninth Circuit declined to treat AOL as a state actor and held that the plaintiffs, as users of the platform, had failed to state a claim. 208 F.3d 741, 754 (9th Cir. 2000). Similarly, in *Nyabwa v. FaceBook*, the court dismissed the plaintiff's complaint because the plaintiff did not state a cause of action when he claimed a violation of his First Amendment rights. 2018 U.S. Dist. LEXIS 13981, 11381-82 (S.D. Tex. Jan. 26, 2018); *see also Knight*, 928 F.3d at 230 (declining to decide whether social media companies are bound by the First Amendment); *Young v. Facebook, Inc.*, 2010 U.S. Dist. LEXIS 116530, 9 (2010) (declining to treat Facebook as a state actor under the First and Fourteenth Amendments). The court stated that the First Amendment applied to only government regulation of speech and that there was no cause of action against Facebook. *Nyabwa*, 2018 U.S. Dist. LEXIS 13981 at 11982. However, this Court has recognized that the First Amendment does apply in the context of the internet. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017)

(invalidating a North Carolina statute that barred certain convicted criminals from accessing social media sites because it violated their First Amendment rights).

Some courts have held that a government official on a private social media website generally cannot ban users from interacting with their content. *See, e.g.*, *Knight,* 928 F.3d at 238; but *see also Hargis v. Bevin*, 298 F. Supp. 3d 1003, 1008, 1012 (E.D. Ky. 2018) (holding that under the First Amendment a Governor was not suppressing speech by blocking users because the governor was "merely culling his Facebook and Twitter accounts to present a public image that he desires."). For example, in *Knight*, the President of the United States, Donald Trump, blocked several individuals from his Twitter account because they criticized the President or his policies. *Id.* at 232. The blocked individuals sued the President on a theory that he violated their First Amendment right to free speech. *Id.* at 233. The Second Circuit held that the President violated the First Amendment rights of the plaintiffs when he blocked them from his Twitter page because his actions amounted to viewpoint discrimination by a government actor. *Id.* at 236-39. The Fourth Circuit addressed a similar issue in *Davison v. Randall*. 912 F.3d 666 (4th Cir. 2019). In *Davison*, the chair of the Loudon County Board of Supervisors banned a constituent from her Facebook page that was designed for use as part of her chair position. *Id.* at 675. The chair banned the constituent because the content posted was not something that she wanted on her chair Facebook page. *Id.* The court held that the chair engaged in unconstitutional viewpoint discrimination by banning the constituent from the page. *Id.* at 688.

Turning to the case at hand, Squawker should continue to be treated as a private entity and a First Amendment cause of action should not be recognized against social media platforms. While the aforementioned cases that decline to recognize a cause of action against a private social media entity do not address issues where the company is the one hosting a public forum and regulating the speech, such as the issue at hand with Governor Dunphry's

page, it is telling that in the issues that courts have approached the courts decline to allow the claims under the First Amendment. Ultimately, Squawker still does not pass the threshold question for a First Amendment claim as recognized in *Manhattan Cmty. Access Corp.,* because it is a private entity and therefore, is not subject to the constraints of the First Amendment.

Next, even if this Court agrees that a government official on a private social media website generally cannot ban users from interacting with their content, that does not mean that the private entity hosting and regulating the space should also be found to have violated the user's First Amendment rights. As the Circuit Court noted, *Knight* sets the outer limit as to the content that is subject to the First Amendment on a private social media platform. R. at 32. The relationship between Squawker and the user is fundamentally different than that of a government official and the user. The case at hand is unlike *Knight* and *Davison* because it is not the government official, in this case Governor Dunphry, who is regulating the content on his own page. Instead, Squawker is applying its terms and conditions to the speech of one of its users who had previously agreed to the private entity's terms and conditions as part of using the platform. The government actor is at no time controlling the speech of another individual as seen in *Knight* and *Davidson*. There is a distinction between the public official acting to limit the speech on his or her own page and the social media platform stepping in to regulate the speech on its platform.

Lastly, allowing social media platforms to regulate the speech of the pages that they host benefits all users of the platform. The "marketplace of ideas," *Red Lion Broad. Co. v. F.C.C.,* 395 U.S. 367, 390 (1969), is not impinged because citizens are still allowed to engage in open debate on the pages of government officials as long as they do not violate the terms of service which all users agree to when they sign up to use the platform. Allowing private companies to block certain kinds of speech such as threats, hatred, violence, and fake news is

something that many users of the platforms desire. The regulation by Squawker helps make the platform usable to all individuals. As a private entity Squawker is not subject to the constraints of the First Amendment.

B. Squawker does not transform into a state actor under the public functions test because operating a social media platform and hosting a public forum are not public functions.

Squawker is not a state actor under the public functions test because operating a social media platform, even when hosting a public forum, is not a public function. A private entity can transform into a state actor by exercising "powers traditionally exclusively reserved to the State." *Jackson*, 419 U.S. at 352. This Court has recognized that the test in conjunctive, meaning that it must be a power that the State both traditionally and exclusively exercised. *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1929. Operating a social media platform is not a traditional, exclusive public function because 1) it does not fall within the very narrow range of categories that are considered a public function and 2) merely operating a public forum is not a public function.

1. Operating a social media platform does not fall within the categories of what has been recognized as a traditional, exclusive public function.

Squawker has not transformed into a state actor because operating a social media platform does not fit within the narrow categories of a traditional and exclusive public function. "It is not enough that the federal, state, or local government exercise 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." *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1928-29. The actions that fall into the category of a public function are very narrow. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158. Squawker's actions do not constitute a public function because running a social media platform does not fall within the narrow scope of public functions such as running company town or conducting an election and the level of state control is too attenuated.

A traditional, exclusive public function is something such as running a company town, *Marsh v. Alabama*, 326 U.S. 501, 508 (1946), or conducting elections, *Terry v. Adams*, 345 U.S. 461, 469-70 (1953). In *Marsh*, the defendant claimed that her First Amendment rights were violated when she was arrested and convicted after being asked to stop passing out religious literature in the business section of a town. *Marsh*, 326 U.S. at 503-04. The town property was owned by a private corporation. *Id.* at 502. This Court held that the private corporation was acting as a state actor because it was operating a town community, which was a public function. *Id.* at 507-08. Similarly, in *Terry v. Adams*, this Court held that a private political organization that sought to hold their own primary election outside of state control was operating a public function because the election effectively acted as a state run primary. 345 U.S. 461, 469-70 (1953).

In contrast, when a private corporation simply maintains some control over a function that is a state action, it is generally not considered a public function. *See, e.g. Jackson*, 419 U.S. at 350, 353-354. For example, this Court has held that operating a private utility company did not qualify as a state action when the company turned off the service of petitioner for failing to pay her bill. *Id.* at 347, 354. Petitioner in that case was subject to a tariff by the private utility company that was allowed under the state public utility commission. *Id.* at 354-55. Even though the private utility company held a certificate of pubic conveyance issued by the Pennsylvania Public Utilities Commission, this Court held that operating a private utility company was not a public function because the relevant statute imposed an obligation on utility companies not the state. *Id.* at 352-53. This Court also recently addressed the public function test in *Manhattan Cmty. Access Corp.*, where the plaintiffs claimed that Manhattan Neighborhood Network ("MNN") violated their First Amendment rights by suspending them from all MNN services. 139 S. Ct. at 1927. MNN, a private nonprofit corporation, was designated by New York City to run a public access

channel on Time Warner's cable system. *Id.* Per New York law, Time Warner and other cable operators were instructed to set aside certain channels for public access. *Id.* at 1926-27. This Court held that operating public access channels on a cable system was not a traditional, exclusive public function and that MNN was not a state actor subject to the First Amendment. *Id.* at 1928.

Turning to the case at hand, hosting and regulating a government official's social media platform does not rise to the level of state involvement that would lead to the activity being considered a public function, similar to running a company town or conducting an election. Squawker's control over the social media platform is unlike *Marsh* because Squawker is not holding the platform out as something that is typically government owned, as the company was with the town in *Marsh*. Whereas a person would expect that public spaces within a town are areas where free speech can occur, that same expectation does not exist with social media pages. Even though Governor Dunphry's page has been verified as that of a government official, the page is clearly hosted and regulated by Squawker, a private entity. Similarly, unlike in *Terry*, Squawker is not performing an activity that is usurping the role of the state such as conducting an election would. Squawker users understand that each user has their own profile. The company is not taking away a function from the state but instead, providing a platform for government officials to connect to constituents. Squawker's actions do not fall within the narrow category of functions that have been considered public functions.

Squawker is simply maintaining control over a page on its platform that belongs to a state actor. The case at hand is analogous to both *Jackson* and *Manhattan Cmty. Access Corp.*. First, in *Jackson* the state had some control over the private entity that was operating the utility company, yet this was not enough to deem the operation of the utility a public function. Here, the relationship between the state action and Squawker is even more

attenuated because Squawker, as the private entity, has control over the state actor. *Manhattan Cmty. Access Corp.*, further suggests that Squawker is not engaging in a public function. Similar to *Manhattan Cmty. Access Corp.*, where the state contracted with MNN, a private entity, to operate public access channels, here Squawker has a similar relationship with Governor Dunphry's page. Squawker is a private actor that is hosting and regulating a page that is open to the public but can choose to regulate the content just as MNN did on the public access channels. In both *Jackson* and *Manhattan Cmty. Access Corp.*, this Court held that the private companies did not engage in a public function. Because a similar level of relationship exists in this case, the Court should also find that Squawker did not engage in a public function because hosting a government official's profile is not a traditional, exclusive public function.

2. Hosting a public forum does not transform a private entity, such as Squawker, into a state actor.

Squawker is not engaging in a public function simply because it is hosting and regulating a public forum. Operating a forum for public speech is not a function that only government entities have traditionally and exclusively performed. *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1930. This Court in *Manhattan Cmty. Access Corp.* specifically rejected the argument that respondents advanced that the relevant public function was not only operating public access channels but more generally that MNN was operating a forum for public speech. *Id.* This Court held that "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints." *Id.*

In the case at bar, the parties stipulated that hosting and operating Governor Dunphry's profile is a public forum, R. at 17, but that does not mean that Squawker is performing a public function. The case at hand is similar to *Manhattan Cmty. Access Corp.* in that Squawker is a private entity hosting a public forum. Governor Dunphry's page is

analogous to the public access channel that is controlled by MNN, a private actor. In each case the private corporation is hosting the public forum. However, in *Manhattan Cmty. Access Corp.* there is an added layer of state control because the government, New York City, delegated its responsibility to manage the public access channel to a private entity. In Squawker's case, no overarching state body is managing the company. Therefore, the implications of state control are even less apparent in the case at hand than with *Manhattan Cmty. Access Corp.* and Squawker is not transformed into a state actor by hosting a public forum. Expanding the definition of what it means to be a public function to include an activity as expansive as hosting a public forum would undermine the restrictive nature of current jurisprudence and open the door to many private entities being considered state actors. Squawker is not subject to the constraints of the First Amendment because it is a private entity and operating a social media platform or public forum is not a public function.

II. Squawker Did Not Violate the First Amendment Because its Terms and Conditions are a Reasonable Content-Neutral Time, Place, or Manner Restriction.

Even if Squawker's hosting of a public forum is deemed to constitute state action, Squawker did not violate the First Amendment by flagging Mr. Milner's comments because "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). While the right to express one's ideas is highly valued and protected, that right "would often be an empty privilege in a place and at a time beyond the protecting hand of the guardians of public order." *Kovacs v. Cooper*, 336 U.S. 77, 86 (1949). This is because the government must carefully balance the rights and interests of speakers and listeners to facilitate the sharing of ideas. Thus, a state actor may regulate protected speech if the restriction is content-neutral, narrowly tailored to serve a significant government interest, and leaves speakers ample alternative ways to communicate

the desired message. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

Here, Squawker flagged Mr. Milner's speech for violating Terms and Conditions that he agreed to. The Terms and Conditions are content-neutral because Squawker restricts posts in order to make the platform accessible for all users, not to restrict any specific message. Further, Squawker has narrowly-tailored its user restrictions by merely flagging instead of banning content, and only limiting high-frequency posts that make the platform unusable for others. Mr. Milner also has ample alternative means to communicate his ideas on Squawker, such as by completing a short training regarding the Terms and Conditions, or by simply waiting an extra two-seconds between posts to avoid violating Squawker's restriction on high-frequency posts. Because Squawker's Terms and Conditions are a reasonable content-neutral time, place, or manner restriction, Squawker did not violate the First Amendment.

A. Squawker's Terms and Conditions are Content-Neutral Because the Purpose is to Facilitate User Access to the Forum, Not to Restrict Speech.

The primary consideration in determining whether a state actor's restriction is content-neutral is the purpose for instituting the restriction. *Ward*, 491 U.S. 781 at 791. Squawker is primarily focused on maintaining a platform where all users can participate and share their ideas. Because the purpose of the Terms and Conditions is to ensure user accessibility and not to censor speech, the restrictions are content-neutral.

As Squawker has stated in its Terms and Condition,

> 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.

R. at 15. In order to provide this positive user experience, Squawker has limited the number of times any given user can post on its platform within a thirty-second time period. Mr. Milner posted four emojis on Governor Dunphry's page within twenty-nine seconds in

violation the Terms and Conditions. Squawker received over two thousand complaints regarding Mr. Milner's posts, noting that he had taken over the forum. R. at 22. Mr. Milner purposefully utilizes this spamming tactic in order to "get the last word in an exchange". R. at 20. In doing so, Mr. Milner is attempting to control the platform at the expense of silencing others on important political issues. However, the government has a significant interest in providing opportunities for dissenting parties – including those who disagree with Mr. Milner – to share their ideas on government controlled spaces. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

In *Red Lion*, the Court found that the Federal Communications Commission did not violate the First Amendment by requiring broadcasters to give air time to those they criticized. *Id.* One primary reason was that broadcasting licenses were very limited which would allow a small number of speakers to dominate the marketplace of ideas. *See id.* Without the FCC's requirement, those criticized by broadcasters would otherwise be unable to access that medium to defend themselves. *See id.* While the FCC has subsequently chosen to remove this requirement for broadcasters, providing a fair opportunity for discussion remains an important government interest.

Similar to broadcasting, Squawker is now the main source of news for many people. R. 3, 16. By instituting restrictions on how users can utilize its forum, Squawker is giving all users an opportunity to engage in important discussions. Governor Dunphry posts daily on Squawker "to let [the people of Delmont] know about major policy proposals coming through the state, so they always have a chance to engage in the democratic process by giving me their frank input . . .." R. at 24. Squawker's Terms and Conditions help protect the democratic process by prohibiting any one person from dominating the forum. While Mr. Milner is concerned that adhering to the Terms and Conditions will result in a loss of his

followers, "[t]o enforce freedom of speech in disregard of the rights of other would be harsh and arbitrary in itself." *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949).

Further, Squawker's limitations on the number of posts Mr. Milner can make in a given time period does not restrict speech based on the message, but instead based on frequency. Squawker's limits on high-frequency posts is similar to restrictions on noise levels that this Court has upheld. *See e.g.*, *Kovacs*, 336 U.S. 77; *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). In *Kovacs*, the Court upheld a noise ordinance that prohibited the use of sound amplifiers on vehicles to spread any message. *Kovacs*, 336 U.S. 77. While the individual had a right to share that message, the Court recognized that spreading that message in a loud, obnoxious manner was unnecessary and forced even unwilling listeners to hear the message. *Id.* at 87 (noting "[t]he right of free speech is guaranteed every citizen that he may reach the minds of *willing* listeners . . .." (emphasis added)). Mr. Milner's high-frequency posts on Governor Dunphry's page had a similar effect to the use of sound amplifiers on a street – drowning out others who wished to share their messages. Squawker has addressed this issue in a content-neutral way by limiting the number of posts any user can make within a given time frame. Because Squawker's purpose of making its platforms accessible to all users is content-neutral, Squawker's flagging policy is content-neutral.

B. Squawker's Terms and Conditions are Narrowly Tailored Because Offending Comments are Merely Flagged, not Banned, and Only Posts that Make the Platform Unusable are Flagged.

After determining that a restriction is content-neutral, the Court considers whether the restriction is narrowly-tailored to achieve a significant government interest. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). The government's chosen means of achieving that interest "need not be the least restrictive or the least intrusive means of doing so." *Ward*, 491 U.S. at 798. A restriction is narrowly tailored "so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

Id. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Here, Delmont has a significant interest in allowing its citizens to interact with the Governor to discuss important political issues. Absent Squawker's regulation of Governor Dunphry's page, Delmont residents would have more difficulty engaging in discussions on the platform, and therefore, the government interest would be achieved less efficiently. Squawker's Terms and Conditions are narrowly-tailored to achieve the government's interest in allowing all users to engage in public discourse.

In *Packingham v. North Carolina*, the Court invalidated a statute restricting sex offenders from utilizing commercial social networking sites. 137 S.Ct. 1730 (2017). Although the statute was content-neutral and the state had a significant interest in protecting children from potential online predators, the Court found the restriction unconstitutional primarily because the statute was not narrowly tailored. *Id.* A "commercial social networking site" was defined so broadly that it effectively barred sex offenders from engaging in speech on the internet entirely. *Id.* The *Packingham* Court recognized the importance of individuals accessing the internet in modern society and the value of using social media to hear and share ideas. *Id.* The statute in *Packingham* was not narrowly tailored because the restriction was so broad that it prohibited a disfavored group of people from exercising their right to Free Speech entirely.

Unlike in *Packingham*, Squawker has not barred any user from engaging with others on its platform. Even if a user violates its Terms and Conditions, Squawker does not bar the individual from accessing the site or delete that user's message. Instead, Squawker has created a policy limiting the number of posts that a user can make within a certain time period to prevent any one person from dominating a page and making the space inaccessible to others. Mr. Milner posted four messages within a 29-second timeframe, in violation of Squawker's limit of four posts within 30-seconds. R. at 5-6, 15. Mr. Milner could have

waited an extra two seconds before posting any one of his messages and would not have been in violation of Squawker's Terms and Conditions. Squawker has not shut Mr. Milner out of its platform even after violating the Terms and Conditions that he agreed to. Instead, Squawker flagged Mr. Milner's content, and allows viewers to choose whether or not to view the flagged message. Squawker's flagging policy is narrowly tailored because it protects Squawker's interest in providing an accessible forum for its users and does not burden more speech than is necessary.

C. Mr. Milner has ample alternative avenues to share his ideas.

Lastly, when determining whether a content-neutral policy violates the Amendment, the Court considers whether the state actor's chosen method leaves speakers with ample alternative means to share their messages. *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 293 (1984). Because Mr. Milner has several remaining avenues to share his ideas, Squawker's flagging policy does not violate the First Amendment.

In *Bery v. City of New York*, the Second Circuit invalidated a New York City regulation prohibiting the sale of street art primarily because the restriction failed to leave sufficient alternative avenues of expression and would have eliminated a whole medium of expression. 97 F.3d 689, 696–97 (2d Cir. N.Y. 1996). However, here, Mr. Milner is still allowed to use emojis on Squawker, so long as his use of emojis is in accordance with its Terms and Conditions. Mr. Milner had several options to share his message without violating Squawker's policies. For example, Mr. Milner would not have violated of Squawker's spamming policy if he had waited an extra two seconds between posting his emojis. Although Mr. Milner may need to be slightly more conscious of the timing of his posts, there is no risk here like there was in *Bery* of losing an entire medium of expression.

In *Packingham*, the restricted individuals had almost no alternative avenues to share their ideas since almost every website would fall under the legislature's overly broad

definition of a commercial social networking site. *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017). With the prevalence of the internet in modern society, the restricted group would have been excluded from participating an importance social space. Here, Milner is not being shut out of a forum, but instead is being held to reasonable standards to allow others to participate in the forum with him.

Mr. Milner has chosen not to utilize any of the several alternative ways Squawker has provided to allow him to share his message. Mr. Milner can choose to have the flagging removed from his personal profile page by watching a thirty-minute training video on the Terms and Conditions and completing an online quiz. R. at 16. While Mr. Milner's comments will still remain flagged, other users can still choose to view his comments by clicking on the warning screen. *Id.* His messages still remain on Squawker, accessible to any users who wish to read them. *Id.* Alternatively, Mr. Milner can create new Squawker profile and share his messages in accordance with the Terms and Conditions. While Mr. Milner would lose his current followers, the platform Squawker created is intended to provide Mr. Milner a place to share his ideas, not necessarily to gain fame.

Squawker has not violated the First Amendment by requiring Mr. Milner to abide by its Terms and Conditions. Overruling the Eighteenth Circuit's finding that Squawker's Terms and Conditions are a content-neutral time, place, or manner restriction would unduly restrict Squawker's ability to provide access to the forum to all users simply because one user wants to dominate the platform. While Mr. Milner has the right to share his ideas, he may not do so in any way he wishes. Because Mr. Milner has ample alternative ways to share his message and the Terms and Conditions are a content-neutral time, place, or manner restriction, Squawker has not violated the First Amendment.

CONCLUSION

Squawker's hosting of a public forum does not constitute state action because Squawker is a private entity and is not conducting a public function. However, even if the Court finds that Squawker's hosting of a public forum does constitute state action, Squawker's Terms and Conditions do not violate the First Amendment. Squawker's policy is a content-neutral time, place, or manner restriction, and therefore, does not violate the First Amendment. For the foregoing reasons, this Court should affirm the judgement of the Eighteenth Circuit.

APPENDIX A: CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I.

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

U.S. CONST. amend. XIV, § 1.

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.

BRIEF CERTIFICATE

Team 17 certifies the following:

1. The work product contained in all copies of the team's brief is in fact the work product of the team members.
2. The team members have fully complied with the school's governing honor code.
3. The team members acknowledge that the team complied with all Rules of the Competition.