No. 17-874

In The

SUPREME COURT OF THE UNITED STATES

Avery Milner,
Petitioner,

v.

Mac Pluckerberg,
Respondent.

On Petition for Writ of *Certiorari*
from the United States Court of
Appeals for the Eighteenth Circuit

BRIEF FOR RESPONDENT

TEAM 21
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eighteenth Circuit correctly concluded that a private entity did not engage in state action by hosting a public forum and applying its flagging policy; and

2. Whether the Eighteenth Circuit correctly held that the private entity's Terms and Conditions are a content-neutral time, place, or manner restriction that is permissible under the First Amendment.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit entered a final judgment on this matter. R. at 25. This Court granted the petition for writ of certiorari. R. at 37. This Court has jurisdiction overthis case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution and the relevant portion of the Fourteenth Amendment to the United States Constitution are set forth in the Appendix.

STATEMENT OF THE CASE AND FACTS

Statement of the Case

Petitioner, Avery Milner, filed this suit against Respondent, Mackenzie "Mac" Pluckerberg, in his capacity as Chief Executive Officer of Squawker for alleged violations of the First Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment. R. at 1. Both parties filed cross motions for summary judgment in the United States District Court for the District of Delmont. R. at 2. The district court erroneously held that Squawker engaged in state action by hosting and regulating a public forum and that its Terms and Conditions violated the First Amendment. *Id.* The United States Court of Appeals for the Eighteenth Circuit properly reversed, holding that Squawker is a private actor not subject to First Amendment constraints on its Terms and Conditions. R. at 26. Additionally, the Eighteenth

Circuit stated that even if Squawker was a state actor, the restriction on Milner's speech under the Terms and Conditions does not unduly burden Milner and is a reasonable time, place, or manner restriction. *Id.*

Statement of the Facts

Pluckerberg is the founder of Squawker, a multinational social media platform for people to express themselves, stay connected, and remain informed on current events. R. at 2. For many users, Squawker has become their main source of local and national news. R. at 3. Squawker functions by allowing users, or "Squeakers," to post sentences containing 280 characters or less, or "squeaks," which are uploaded to their profile pages. R. at 2. Other Squeakers may respond to these squeaks by liking, disliking, or commenting. *Id.* Comments are subject to the same interactions and will appear on the profile pages of both the original and commenting Squeakers. *Id.* Squeakers may follow each other on the platform; the Squeakers will then have a "feed" curated on their homepage compiling all of the squeaks posted by the users they follow. *Id.*

To enable a positive user experience, Squawker requires all users to consent to its Terms and Conditions. R. at 3. The Terms and Conditions prohibit "behavior that promotes violence against or directly attacks or threatens other people" on a prejudicial basis, including the use of emojis in a violent or threatening manner. *Id.* Additionally, if a user posts four or more squeaks within a thirty-second period, the squeaks may be flagged for spamming. R. at 3-4. Once a violating squeak is flagged, it is covered by a black box; however, consenting viewers may view the squeak by clicking on the box. R. at 4.

In response to numerous complaints of imposter accounts posting fake news, Squawker implemented a verification feature at the suggestion of Pluckerberg's longtime friend, Delmont Governor William Dunphry, under which it verifies the profile pages of government officials. R.

at 3, 22. Pluckerberg monitored all verified Squawker accounts during the first year of the new verification feature to ensure quality control. *Id.* While the verification feature was first introduced in Delmont, the state of Delmont did not fund the creation or function of any aspect of Squawker. R. at 3, 32. The Terms and Conditions were subsequently updated regarding verified profiles. R. at 4. Under the updated policy, when a comment on a verified profile is flagged , all content on the violating user's personal profile is also flagged. R. at 4. The flag will be removed once the user completes a short, thirty-minute training video and passes an online quiz regarding Squawker's Terms and Conditions. *Id.*

Although Milner agreed to both the original and updated Terms and Conditions, he acted contrary to their restrictions. R. at 4-6. After Governor Dunphry posted a squeak regarding a proposed bill on his verified profile, Milner rapidly posted a series of four threatening comments within a span of thirty seconds. R. at 5-6, 20. These comments included emojis referring to Governor Dunphry's age. *Id.* Pluckerberg received complaints that Milner's comments had made the forum unusable; the comments were reported over two thousand times and received over one thousand dislikes. R. at 6, 22. Consequently, Milner's profile and all his squeaks were flagged for their excessive frequency and for conveying a threatening or violent message on a verified profile. *Id.* Some Squeakers left the platform and deleted their accounts in response to Milner's violating comments which caused them to feel Milner "hijacked" the platform. *Id.*

After Milner's profile was flagged, he lost followers and his content received less views. R. at 6, 20. Squeakers who violate the Terms and Conditions may still engage with others on the platform by (1) creating a new Squawker account, (2) watching a short thirty-minute video and taking an online quiz, or (3) continuing to communicate with consenting viewers who click through the black boxes. R. at 6-7. Milner refused to take advantage of these options. R. at 6, 20.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the United States Court of Appeals for the Eighteenth Circuit for two reasons: (1) Squawker is not a state actor and is therefore not subject to the constraints of the First Amendment, and (2) Squawker's Terms and Conditions are a valid time, place, or manner restriction under the First Amendment.

Squawker's function as a host and regulator of a public forum does not amount to state action. Squawker, as a private actor, may only be held to the constraints of the First Amendment if it is found to be a state actor. However, Squawker retains private actor status because a social media platform does not serve a public function traditionally and exclusively reserved to the state. Additionally, Squawker's private status is secured as there is an insufficient nexus between Squawker and the state of Delmont to establish it as a state actor. Finally, finding that Squawker is a state actor would contravene the purpose forwarded by the First Amendment.

Even if Squawker's function as a host and regulator of a public forum does amount to state action, Squawker's regulation of speech under its Terms and Conditions is permissible under the First Amendment because it meets the four elements required to qualify as a valid time, place, or manner restriction. First, Squawker's Terms and Conditions are content-neutral because they proscribed Milner's speech based on the manner in which it was posted rather than its content. Second, Squawker's flagging of Milner's comments served its substantial interest in maintaining a usable forum on the platform. Third, the Terms and Conditions are narrowly tailored as they only limit the speech which undermines this interest. Finally, the Terms and Conditions provide ample alternative channels of communication for Milner to continue to convey his message to his target audience.

STANDARD OF REVIEW

A motion for summary judgment shall be granted where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The standard of review for a motion for summary judgment is de novo. *Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 534 (6th Cir. 2008). When reviewing cross motions for summary judgment, the Court must "determine whether either of the parties deserves judgment as a matter of law" by reviewing each motion on the merits. *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996).

ARGUMENT

I. SQUAWKER, A PRIVATE ENTITY, DID NOT ENGAGE IN STATE ACTION AND IS THEREFORE NOT SUBJECT TO THE FIRST AMENDMENT WHEN APPLYING ITS TERMS AND CONDITIONS.

The First Amendment of the United States Constitution begins with the guarantee that "*Congress* shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I (emphasis added). This prohibition on the regulation of private speech is expansive; its reach extends to all government actors, including state government actors, as established by the Fourteenth Amendment. U.S. Const. amend. XIV, § 1. ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . "); *The Civil Rights Cases*, 109 U.S. 3, 17 (1883). Despite this sweeping applicability of the Free Speech Clause, private actors are not subject to its constraints on abridgment of speech. *See, e.g.*, *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996); *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255-56 (1974). Squawker is the type of private actor contemplated by this Court's jurisprudence; therefore, it is afforded protection against claims of First Amendment violation.

A private actor may lose this protection if a court finds its actions attributable to the government under the doctrine of state action. *Shelley v. Kraemer*, 334 U.S. 1, 18-19 (1948); *Smith v. Allwright*, 321 U.S. 649, 660-61 (1944). If a private actor is engaging in state action under the doctrine, this may implicate constitutional guarantees which would subject the private actor to liability. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 617 (1991). This Court has formulated several tests for determining if the actions of a private actor reach the level of state action, including: the public function test, the joint action test, the state compulsion test, and the governmental nexus test. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 938-39 (1982). However, this Court has cautioned that these tests may not be different in operation, but rather reflect "simply different ways of characterizing the necessarily fact-bound inquiry" of state action analysis. *Id.* at 939; *see also* Julie K. Brown, *Less is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 562-63 (2008) (highlighting the inconsistency in the application of state action tests to varying fact-based circumstances). Given the specific facts of this case, the two most relevant analyses are the public function test and the governmental nexus test.

Accordingly, Squawker's hosting and regulating of Governor Dunphry's official Squawker page does not amount to state action for three reasons. First, Squawker, as a social media platform, does not serve a public function traditionally and exclusively reserved for the government. Second, Squawker and the state of Delmont lack a sufficient nexus to establish Squawker as a state actor. And third, finding Squawker as a state actor would contradict the purpose of the First Amendment.

A. Squawker retains its status as a private actor because the operation of a social media platform is not a traditional and exclusive public function.

Squawker, in its operation as a social media platform, did not perform a public function that transformed it into a state actor. The public function test provides that if a private actor

performs a function typically associated with the government and subsequently infringes a constitutional principle, the private actor will then be subject to the constraints of the Constitution. *See Marsh v. Alabama*, 326 U.S. 501, 506-07 (1946). The standard for determining if a private actor falls within the bounds of the public function test is whether the exercise of power is one "traditionally exclusively reserved to the State." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974) (holding that the provision of electricity by a private corporation was not a function traditionally and exclusively reserved to the government).

Actions that amount to a traditional and exclusive governmental function have been exceedingly narrowed. *See, e.g.*, *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (holding that the provision of special education did not amount to a public function). Generally, only two broad functions tend to amount to state action: the running of elections and the operation of a municipality. *See Marsh*, 326 U.S. at 505–09 (holding that running a company town amounted to state action); *Smith*, 321 U.S. at 662–66 (holding that facilitating elections amounted to state action). Often, a function is deemed to be outside the realm of the public function test due to a lack of exclusivity. *Flagg Bros. v. Brooks*, 436 U.S. 149, 158 (1978) (noting that "many functions have been traditionally performed by governments" while "very few have been exclusively" reserved to the government).

Particularly pertaining to social media, courts have recently held the operation of a social media platform is not a function traditionally and exclusively reserved to the government. *Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 WL 1471939, at *6 (N.D. Cal. Mar. 26, 2018). In *Prager*, a political content creator alleged that YouTube discriminatorily restricted access to the videos it posted through its personal YouTube account. *Id.* at *1. In response, YouTube argued that it restricts access to videos that are "flagged" by viewers and are

subsequently deemed to violate its policies, referred to as Community Guidelines. *Id.* at *2. The court held that YouTube's function as a video-sharing website, and its later implementation of restricted access to these videos, is not a function traditionally and exclusively reserved to the government. *Id.* at *6; *see also Cyber Promotions*, *Inc. v. Am. Online, Inc.*, 948 F. Supp. 436, 442 (E.D. Pa. 1996) (holding that American Online did not satisfy the public function test by providing internet access to users); *Fed. Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1310 (N.D. Cal. 2019) (finding that Facebook "did not engage in functions that are traditionally and exclusively" of the state).

The holdings of these emerging cases are bolstered when examining social media's function of providing a forum for expression and communication. Matthew P. Hooker, *Censorship, Free Speech & Facebook: Applying the First Amendment to Social Media Platforms via the Public Function Exception*, 15 WASH. J. L. TECH. & ARTS 36, 61 (2019). This function is not unique to social media platforms; beyond the realm of social media, many other entities serve the function of providing fora for discourse, including newspapers, libraries, comedy clubs, grocery store bulletin boards, and more. *Id.*; *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019). The provision of this function does not alone pass muster under the public function test as this Court has specifically stated that it "is not at all a near-exclusive function of the state to provide the forums for public expression, politics, information, or entertainment." *Halleck*, 139 S. Ct. at 1930 (quoting *Halleck v. Manhattan Cmty. Access Corp*., 882 F.3d 300, 311 (2d Cir. 2018) (Jacobs, J., concurring in part and dissenting in part)).

The functions exercised by Squawker are not functions traditionally and exclusively reserved to the government. Unlike the private actors in cases such as *Marsh* and *Smith*, Squawker does not comport with the exceptionally narrow functions that implicate the state

action doctrine. Rather, Squawker is described as a multinational social media platform that allows Squeakers to post their created content to personal profiles. R. at 2. In this sense, Squawker serves a similar role to that of YouTube in *Prager* as YouTube served the function of providing its users a platform to post user-created videos through personal accounts. Additionally, comparable to YouTube's restrictive access to videos in accordance with its Community Guidelines, Squawker also performed the function of flagging and blocking access to Milner's account in accordance with its Terms and Conditions. R. at 6. Thus, just as YouTube's functions were deemed not to be traditionally and exclusively reserved to the state, Squawker's functions also do not satisfy the public function test.

This is true despite Squeakers using Squawker's platform for political purposes. Many users view Squawker as a main source for local and national news, and government officials use their Squawker profiles to communicate policy ideas and to connect with constituents. R. at 3. Moreover, it is uncontested that Governor Dunphry's official Squawker page amounts to a public forum under the holding of *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 235 (2d Cir. 2019). R. at 1-2. However, in *Halleck*, this Court explicitly established that the operation of a public forum is not a function traditionally or exclusively reserved to the government, regardless of whether this forum is used for politics or any other means of disseminating information. As a result, Squawker does not meet the threshold of the public function test and therefore retains private actor status.

B. The state of Delmont and Squawker do not have a sufficiently close nexus to transform Squawker into a state actor.

Squawker remains a private actor as there is an insufficient nexus between Squawker and government actors: Governor Dunphry, specifically, and the state of Delmont, generally. A relationship between a private actor and a government actor may rise to the level of state action

if "there is a sufficiently close nexus between the State and the challenged action . . . so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351. If such a nexus is found under this analysis, referred to as the governmental nexus test, the Constitution may be applied to a private actor under the doctrine of state action. *See Lopez v. Dep't of Health Servs.*, 939 F.2d 881, 883 (9th Cir. 1991); *Nyabwa v. Facebook*, No. 2:17–CV–24, 2017 WL 8944034, at *3 (S.D. Tex. Aug. 8, 2017). The actions of Squawker and the state of Delmont do not amount to state action under the governmental nexus test for two reasons. First, Delmont was not a participant in the conception or operation of Squawker. Second, Squawker's actions as a private entity, rather than the actions of a Delmont government official, resulted in the flagging of Milner's profile.

1. Delmont was not involved in either the conception or the operation of Squawker.

Squawker does not fall within the parameters of the governmental nexus test because Delmont was not involved in the creation or functionality of the platform. The presence of a mutually beneficial relationship is an indicator that a private entity's actions amount to state action. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961). In *Burton*, this Court held that a private restaurant and a state entity received "mutually conferred" benefits such as a shared public building and dedicated public parking services. *Id.* As these benefits evidenced a "degree of state participation," the private restaurant's actions amounted to state action. *Id.* at 724-25. However, this Court later limited the application of *Burton* by containing it to lessees of public property. *Jackson*, 419 U.S. at 357 (stating that the "differences in circumstances beget differences in the law").

Regarding social media platforms, efforts to find a close nexus have "consistently failed" as the government actors have lacked the requisite operational involvement in the platform to

amount to state action. *Shulman v. Facebook.com*, No. 17-764 (JMV), 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017) (finding that Facebook was not a state actor); *see also Green v. Am. Online*, 318 F.3d 465, 472 (3d Cir. 2003) (holding that American Online retained private actor status despite "provid[ing] a connection to the internet on which government and taxpayer-funded websites are found"); *Young v. Facebook, Inc.*, No.5:10-cv-03579-JF/PVT, 2010 WL 4269304, at *3 (N.D. Cal. Oct. 25, 2010) (holding that Facebook was not a state actor after the platform deactivated the challenger's account).

Additionally, the governmental nexus test can be satisfied when a government actor is involved with a private entity's functionality through contracts or agreements. *Nyabwa*, 2017 WL 8944034, at *3. In *Nyabwa*, the court found no evidence of a close nexus, specifically pointing to the lack of an agreement between the social media platform, Facebook, and the state. *Id.*; *see also Freedom Watch, Inc. v. Google, Inc*., 368 F. Supp. 3d 30, 40 (D.D.C. 2019) (finding no nexus between Facebook and the state, in part due to the lack of a connecting contract).

The governmental nexus test is not met here as the state of Delmont was not involved in the creation or functionality of Squawker's platform. Unlike the actors in *Burton*, Squawker and Delmont lack a sufficient mutually beneficial relationship. While a benefit is conferred on Governor Dunphry by avoiding imposter accounts and having his Squawker profile verified, it does not amount to the extensive lessor/lessee relationship depicted in *Burton*. R. at 3. Likewise, cases such as *Shulman* make clear that such a tenuous connection is not enough to overcome the high burden needed to find a nexus between a social media platform and a government actor.

Furthermore, Squawker does not have any contracts or agreements with Delmont or Governor Dunphry. Like in *Nyabwa*, where Facebook lacked an explicit agreement with the state, the record is void of any indicator that an explicit agreement exists between Squawker and

Delmont. This is reinforced by the fact that Squawker is a privately-run platform that receives no funding from Delmont. R. at 32. Conversely, Governor Dunphry, described as Pluckerberg's longtime friend, approached Pluckerberg with the idea of creating the verification feature. R. at 22. This was not a government official creating a contract with Squawker's CEO; rather, the verification feature is more the product of two friends discussing issues seen within the platform. This analysis is not altered by Pluckerberg's overseeing of the verification feature as Pluckerberg expressly stated that this monitoring was to "ensure quality control"; it was not to supervise the profiles of Delmont officials. R. at 27.

2. The actions of a private entity resulted in the flagging of Milner's profile rather than the actions of a Delmont official.

A salient commonality among cases where an activity on a social media platform amounted to state action is that the main actor was a government official. Recently, in *Knight*, President Trump was found to have violated the First Amendment when blocking other Twitter users from viewing his personal Twitter account. 928 F.3d at 230. However, the court explicitly stated that it would not "consider or decide whether private social media companies are bound by the First Amendment when policing their platforms." *Id.*; *see also Davison v. Randall*, 912 F.3d 666, 687-88 (4th Cir. 2019) (finding state action when a government official banned a constituent from its Facebook page).

In contrast with both *Knight* and *Davison*, the main actor in this case is not a government official; instead, the main actor is Pluckerberg as CEO of Squawker. R. at 14. Unlike in *Knight*, where President Trump blocked the challengers, Governor Dunphry himself did not flag Milner's content. Rather, Pluckerberg, upon receiving over two thousand reports by Squeakers, flagged Milner's account. R. at 6. While the *Knight* court found a violation of the freedom of speech, this case lacks the same First Amendment implications as it was a private actor,

Pluckerberg, that flagged Milner's profile and not Governor Dunphry. Therefore, Squawker does not satisfy the governmental nexus test and is not subject to the First Amendment as a state actor.

C. Finding that Squawker is a state actor would contravene the purpose of the First Amendment.

In addition to Squawker's actions not satisfying the public function and governmental nexus tests, Squawker should not be subject to the consequences of state action because of the clear policy objectives behind the First Amendment. In his prominent dissent, Justice Holmes detailed the purpose behind an expansive freedom of speech: the best way to get to the truth is allowing all viewpoints and opinions to sort themselves out in the marketplace of ideas. *Abrams v. United States*, 250 U.S. 616, 630 (1919). Squawker's ability to exercise editorial discretion on its platform is evidence that the marketplace is functioning as Justice Holmes intended.

Squawker, as a popular social media platform, reaches users around the world and serves as an integral way for Squeakers to express themselves and stay informed. R. at 2. However, applying the limitations of the Constitution to Squawker under the state action doctrine would negatively impact its ability to provide such a service. Congress has demonstrated its commitment to providing a thriving marketplace of ideas on the internet. For example, Section 230 of the Communications Decency Act provides immunity to internet providers regarding their editorial discretion; the history of Section 230 reflects a congressional intention to facilitate the growth of the internet. *See* 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). The purpose and effect of statutes such as Section 230 emphasize why Squawker should retain its private actor status: editorial discretion lets platforms such as Squawker grow unimpeded, allowing it to provide a dynamic and substantial platform to its users.

Hindering Squawker's ability to exercise editorial discretion by applying the state action doctrine would consequently inhibit both the marketplace of ideas and the purpose of the First

Amendment. Therefore, because Squawker does not meet the requirements for the public function test or the governmental nexus test, and because finding Squawker as a state actor would undermine the First Amendment, this Court should affirm.

II. SQUAWKER'S FLAGGING POLICY IS A VALID TIME, PLACE, OR MANNER RESTRICTION UNDER THE FIRST AMENDMENT.

Even if Squawker's function as a host and regulator of a public forum amounts to state action, Squawker's regulation of speech under its Terms and Conditions is permissible under the First Amendment as it constitutes a valid time, place, or manner restriction. Under the First Amendment, the government may only infringe upon a person's freedom of speech in certain limited circumstances. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790-91 (2011); *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992) (holding that content-based restrictions are only valid under the First Amendment when they are narrowly tailored to serve a compelling state interest). However, the government is permitted to impose reasonable restrictions on the time, place, or manner of protected speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536 (1980); *Carey v. Brown*, 447 U.S. 455, 470 (1980).

In this case, Squawker's Terms and Conditions constitute a valid time, place, or manner restriction on speech. The Court analyzes time, place, or manner restrictions under intermediate scrutiny. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017). Accordingly, a time, place, or manner restriction is valid when it (1) is content-neutral, (2) serves a substantial government interest, (3) is narrowly tailored to serve such interest, and (4) provides ample alternative channels for the speech. *Burson v. Freeman*, 504 U.S. 191, 197 (1992); *Ward*, 491 U.S. at 791; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

Squawker's Terms and Conditions comply with each of these elements and are therefore permissible under the First Amendment.

A. Squawker's Terms and Conditions are content-neutral because they target the manner in which speech is conveyed rather than the content of the speech.

Milner's speech was flagged under Squawker's Terms and Conditions based only on the manner in which it was posted; therefore, the Terms and Conditions are a content-neutral regulation of his speech. A regulation is content-neutral when it is adopted without regard to the message it conveys and applies to all viewpoints rather than discriminating against a particular message. *Hill v. Colorado*, 530 U.S. 703, 719 (2000) (citing *Ward*, 491 U.S. at 791). If the purpose of the regulation is content-neutral, the regulation is valid even if there is an incidental effect of restricting some categories of speech more than others. *Ward*, 491 U.S. at 791; *United States v. Albertini*, 472 U.S. 675, 688-89 (1985).

"A facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." *McCullen v. Coakley*, 573 U.S. 464, 480 (2014). In *McCullen*, a statute prohibited persons from standing on a sidewalk within thirty-five feet of any place performing abortions. *Id.* at 471-72. Under that statute, speakers were barred from engaging in sidewalk counseling to attempt to dissuade patients from having abortions. *Id.* at 474. The speakers therefore argued the statute effectively proscribed speech based on content as it would limit more speech discouraging abortion than speech protecting abortion. *Id.* at 478. Despite that effect, the statute was considered a valid, content-neutral regulation because the regulation merely limited where the speakers could deliver their speech rather than dictating what content was permitted. *Id.* at 479, 485.

Similarly, in *Hill,* a statute prohibited any person outside of a healthcare facility from approaching an eight-foot radius around another person to engage in protest, education, or

counseling. 530 U.S. at 707. Although the restriction was limited to these three categories and did not apply to other categories of communication, the statute did not regulate particular messages or viewpoints; rather, it regulated which places these messages and viewpoints could occur. *Id.* at 720-21. It is permissible to examine the content of communication to determine the speaker's purpose and whether the law applies to such communication. *Id.* at 721.

While the district court in this case erroneously concluded that the purpose of Squawker's Terms and Conditions was to restrict comments discriminating based on age, the appellate court accurately defined the purpose as to "temper the volume and vociferousness of its users' comments" to maintain a usable forum. R. at 3, 11, 34. Squawker's Terms and Conditions are content-neutral because they dictate the flagging of squeaks without regard to the message conveyed and apply to all viewpoints rather than discriminating against a particular message. The Terms and Conditions did not prohibit Milner's comments because of his disdain for Governor Dunphry's proposed bill; instead, the comments were merely flagged based on the manner in which they were posted. R. at 3-4. Milner is still permitted to express his viewpoint and continue to communicate through the use of emojis. *See* R. at 3. Milner is only prohibited from engaging in this behavior in such a way that it creates an unusable forum for others by spamming their feeds with frequent, violent, or threatening comments. R. at 3-4.

Like the statutes in *McCullen* and *Hill*, Squawker's Terms and Conditions are content-neutral despite their incidental effect of proscribing Milner's message. Similar to the statute in *McCullen* which prohibited speakers from communicating their message in a certain place, the Terms and Conditions prohibit speakers from communicating their message in a certain manner. Neither the statute in *McCullen* nor the Terms and Conditions in the instant case dictate the content permitted to the speakers. Additionally, the Terms and Conditions are not content-based

simply because Squawker must examine the content of the posts to determine if the emjois are being used in a violent or threatening way. As this Court reasoned in *Hill*, it is permissible to examine the content to determine whether a restriction applies to it. Accordingly, like the statutes in *McCullen* and *Hill*, the Terms and Conditions are a content-neutral regulation permissible under the First Amendment.

B. Squawker's Terms and Conditions serve the substantial interest of maintaining a usable forum.

Squawker's purpose in maintaining a usable forum through the restrictions in its Terms and Conditions constitutes a substantial interest. This Court has upheld a wide variety of government interests as substantial under the time, place, or manner analysis. *Wells v. City of Denver*, 257 F.3d 1132, 1147 (10th Cir. 2001). One such interest is the ability to prevent disruptions on government property. *Menotti v. City of Seattle*, 409 F.3d 1113, 1131 (9th Cir. 2005); *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985) (stating that the government is not required to "freely . . . grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities").

Keeping government property available and enjoyable to users is a substantial government interest. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984). The speakers in *Clark* alleged the National Park Service's prohibition on camping in certain parks violated the First Amendment when they were banned from sleeping in such regulated areas during a protest. *Id.* at 292. However, the prohibition did not violate the First Amendment because it served the government's substantial interest in maintaining the parks in an "attractive and intact condition" so they would be available and enjoyable to the visitors. *Id.* at 296. Allowing camping in the parks would have undermined the purpose of the parks. *Id.*

Additionally, reducing congestion in a public forum so it remains usable constitutes a substantial government interest. *Mastrovincenzo v. City of New York*, 435 F.3d 78, 99 (2d Cir. 2006). The regulation in *Mastrovincenzo* requiring ed vendors to obtain a license to offer certain types of goods or services in a public place to reduce the congestion in the city's streets and sidewalks. *Id.* at 81-82. The court held the city's interest in reducing congestion in the streets and sidewalks was a substantial government interest that was unrelated to the content of the speech, and the licensing requirement was a reasonable means of achieving that goal. *Id.* at 99.

Finally, the government has a substantial interest in exercising its powers to advance esthetic values. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1983). In *Taxpayers for Vincent*, the speakers were barred from posting political posters on utility poles under a city code provision that prohibited posting signs on public property. *Id.* at 793. The provision was a valid restriction as it served the city's substantial interest in avoiding visual clutter. *Id.* at 807, 810-11. It is "well settled" that a state is permitted to exercise its police powers to further esthetic values. *Id.* at 805. The city's interest in improving its appearance was unrelated to the suppression of ideas, and the visual clutter of signs on public property constituted a "significant substantive evil within the city's power to prohibit." *Id.* at 807.

Here, Squawker's interest in maintaining a usable forum is consistent with these interests. If Squawker was not permitted to flag content such as Milner's, the spamming and threatening content would disrupt the feeds of other Squeakers and prevent them from efficiently receiving information on the forum. This would particularly harm Squeakers who receive most of their news from the platform. Squawker's Terms and Conditions serve the substantial interest in keeping the forum available and enjoyable to its users. Like the prohibition in *Clark* which was intended to keep the parks attractive and intact for the enjoyment of visitors, Squawker's Terms

and Conditions are intended to maintain a positive user experience for other Squeakers using the platform. R. at 3. In addition, just as allowing camping in parks undermines the purpose of the parks, allowing violent and threatening emojis and frequent posting undermines the ability of the platform to maintain an effective forum in which users can engage with each other, communicate with government officials, and receive news.

Further, like the requirement in *Mastrovincenzo*, Squawker's Terms and Conditions are permissible because they reduce congestion on Squeakers' feeds by flagging posts that interfere with the ability to effectively engage in the forum. By posting four successive comments within thirty seconds, Milner congested the other Squeakers' feeds and made the platform unusable. R. at 5-6. Squawker's ability to flag these excessive comments is similar to the licensing requirement in *Mastrovincenzo* which purported to reduce congestion on the streets and sidewalks. Therefore, Squawker's restriction on spamming serves a substantial government interest.

Finally, the purpose of Squawker's Terms and Conditions can be considered an attempt to advance esthetic values like the purpose of the regulation in *Taxpayers for Vincent*. Similar to that regulation, which prohibited posting signs on public property to avoid visual clutter, Squawker's restriction on excessive posting and violent or threatening emojis reduces the clutter in other Squeakers' feeds. Because this Court held that the regulation in *Taxpayers for Vincent* was valid under the First Amendment, this Court should similarly hold that Squawker's Terms and Conditions are valid in so far as they attempt to advance the esthetic values of reducing clutter on the platform. Therefore, Squawker's interest is substantial because it aligns with the interests in keeping government property in an enjoyable and intact condition, reducing congestion, and advancing esthetic values.

C. Squawker's Terms and Conditions are sufficiently narrowly tailored because they only restrict speech that undermines Squawker's substantial interest.

Squawker's Terms and Conditions restrict only the speech that undermines its interest in maintaining a usable forum and are therefore sufficiently narrowly tailored. A regulation on speech is sufficiently narrowly tailored when it does not "burden substantially more speech than is necessary to further the government's legitimate interest." *Packingham*, 137 S. Ct. at 1736 (quoting *McCullen*, 573 U.S. at 486). For a content-neutral restriction on speech, the "narrowly tailored" requirement does not require the restriction to be the least intrusive means of achieving the government's interest. *McCullen*, 573 U.S. at 486. Rather, this requirement should be analyzed by "considering the scope of [the regulation's] application relative to the government objectives being pursued, taking context into account." *Mastrovincenzo*, 435 F.3d at 102 (citing *Menotti*, 409 F.3d at 1140 & n. 52).

A regulation is sufficiently narrowly tailored when it does not have a "substantial deleterious effect" on speech. *See Ward*, 491 U.S. at 801. In *Ward*, the city regulated the volume of amplified music by requiring performers to use city-provided equipment and sound technicians. *Id.* at 787. Under that regulation, the speakers were denied a permit to perform after previous violations which resulted in complaints of noise and crowd control at their concerts. *Id.* at 785. However, the regulation on sound amplification was sufficiently narrowly tailored: it directly served the interest in avoiding excessive volume, it did not have a substantial deleterious effect on the performances, and the speakers still had autonomy over the content and sound mix of their performances. *Id.* at 801-02.

Additionally, a regulation is narrowly tailored when it does not reach more speech than necessary to serve the asserted interest. *See Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017). In *Matal*, the Patent and Trade Office denied the speaker's application for a trademark which used a

term traditionally considered derogatory toward people of Asian dissent. *Id.* at 1751. The denial was grounded in "the disparagement clause" which prohibited the registration of trademarks that could disparage any persons. *Id.* This Court held that the disparagement clause was invalid under the First Amendment because it was viewpoint-based and was not narrowly tailored to serve the asserted government interest. *Id.* at 1764-65. Rather than merely prohibiting discrimination, the disparagement clause prohibited any speech that was deemed offensive to any person, living or dead, or any institution. *Id.* at 1765. Accordingly, the restriction was too broad and posed a risk of suppressing any speech that could lead to political or social volatility. *Id.*

Squawker's Terms and Conditions do not burden substantially more speech than necessary to further its interest in maintaining a usable forum. Under the prohibition on spamming, Squeakers may convey the same message by waiting for longer increments of time to post the subsequent message. *See* R. at 3-4. Additionally, the restriction on emojis is limited to those used in a violent or threatening manner. R. at 3. Squeakers may still use any emojis available to them as long as they do not disrupt the forum by threatening others. *See Id.* The small scope of this restriction in contrast with Squawker's substantial interest in maintaining a usable forum for Squeakers to engage with each other, communicate with government officials, and receive local and national news, demonstrates the regulation is sufficiently narrowly tailored.

Similarly, like the regulation in *Ward*, the Terms and Conditions in this case do not have a substantial deleterious effect on Squeakers' speech. Squawker does not remove a violating Squeaker's content—it merely flags the content such that other Squeakers must give consent to read it. R. at 4. Accordingly, like the speakers in *Ward*, a Squeaker that violates the Terms and Conditions still has the autonomy to convey its message even if its reach is lessened by the regulation. Just as the city's regulation in *Ward* was narrowly tailored to only limit the manner in

which performances may occur, the Terms and Conditions only restrict the manner in which squeaks are posted by regulating spam, threats, and violence on the platform. R. at 3. With the restrictions, the platform is able to flag content that otherwise interferes with other Squeakers' experiences, as evidenced by Squeakers citing Milner's comments as the reason for deleting their accounts. R. at 22. Consequently, Squawker's interest in maintaining a usable forum is directly and efficiently served by its ability to flag content which undermines this purpose.

In contrast, unlike the regulation in *Matal*, Squawker's Terms and Conditions do not reach more speech than necessary to serve its asserted interest. While the regulation in *Matal* effectively prohibited any speech considered offensive, the Terms and Conditions here are narrowly tailored to restrict speech based on the manner in which the speech is posted rather than the viewpoint expressed. Speech is only flagged when it potentially makes the forum unusable. R. at 3-4. Therefore, this regulation is not overly broad, unlike the regulation in *Matal*, because it does not suppress more speech than is necessary to achieve Squawker's content-neutral purpose. Because Squawker's Terms and Conditions do not have a substantial deleterious effect on speech and they only limit the speech that undermines the substantial interest in maintaining a usable forum, they are sufficiently narrowly tailored under the First Amendment.

D. Squawker's Terms and Conditions provide ample alternative channels of communication because Milner still has a reasonable opportunity to convey his message to his target audience.

Violators of Squawker's Terms and Conditions are provided ample alternative channels of communication through the opportunity to take a quiz based on a short video to un-flag their content, create a new account, or continue to convey information to users who consent to view flagged content. A regulation has ample alternative channels so long as there is a "'reasonable opportunity' for communication." *Menotti*, 409 F.3d at 1141 (quoting *Renton v. Playtime*

Theatres, 475 U.S. 41, 54 (1986)). A valid restriction need not be the least burdensome on speech; it may still be valid where other imaginable alternatives exist. *Id*. at 1138 (citing *Albertini*, 472 U.S. at 689). Further, "alternative channels of expression . . . need not 'be perfect substitutes for the channels denied to [speakers].'" *Serv. Emps. Int'l Union v. City of Houston*, 542 F. Supp. 2d 617, 627 (S.D. Tex. 2008) (quoting *Vincenty v. Bloomberg*, 476 F.3d 74, 88 (2d Cir. 2007)).

A regulation provides ample alternative channels when speakers have additional outlets to communicate their message to their target audience. *Frisby v. Schultz*, 487 U.S. 474, 484 (1988). In *Frisby*, the town enacted an ordinance intended to provide tranquility and privacy for residents in their homes by prohibiting picketing around any individual's residence. *Id.* at 477. Under the ordinance, the speakers could not picket on the public street outside of a doctor's residence to express their anti-abortion views. *Id.* at 476. However, the ordinance provided ample alternative channels of communication because the speakers were still permitted to conduct their picketing within the neighborhood as long as they were not outside of a particular residence. *Id.* at 484. Furthermore, the speakers were still able to communicate with residents through mail or by telephone. *Id.*

Additionally, the alternative channels of communication available to a speaker need not be as direct as the speaker's preferred method. *Menotti*, 409 F.3d at 1138; *Hill*, 530 U.S. at 712 (holding that a prohibition on approaching a person within a certain radius to engage in protest, education, or counseling provided ample alternative channels because it did not significantly alter the ability to read or hear the speaker's messages). In *Menotti*, the state issued an emergency order excluding all persons except certain essential personnel from being in the downtown area. 409 F.3d at 1120-21, 1125. The speakers challenged the constitutionality of this

order when they were prohibited from protesting in the restricted area. *Id.* at 1118. Although the restricted zone created an area in which the speakers could not deliver their message directly, the speakers were still permitted to conduct their demonstrations outside of the restricted area. *Id.* at 1138. Their messages would remain visible and audible to their target audience, even if they were less proximate than the speakers desired. *Id.* The requirement that there be ample alternative channels does not require the speaker to be able to deliver its message in the manner it prefers; the speaker is only entitled to a "reasonable opportunity for communication." *Id.* at 1141 (internal quotations and citations omitted). Accordingly, the regulation provided ample alternative channels of communication. *Id.*

Squawker's Terms and Conditions provide a reasonable opportunity for Squeakers to communicate their messages because there are other outlets for them to reach their target audiences. The Terms and Conditions are similar to the ordinance in *Frisby* because both provide a variety of alternative channels for speakers to convey their messages. In *Frisby*, the speakers were permitted to communicate within neighborhoods, through mail, or by telephone. Likewise, Milner is able to communicate with his audience by taking a quiz to un-flag his content or creating a new Squawker account. R. at 4, 6-7. Additionally, his audience can still read his flagged content by clicking through the black box. R. at 4. Thus, like the speakers in *Frisby*, Milner has ample alternatives to convey his message under Squawker's regulations.

Further, although Milner argues that his message is most effectively conveyed by the use of sequential emojis posted in high frequencies, the alternatives provided by Squawker need not be a perfect substitute for Milner's preferred method. Like the alternative channels provided in *Menotti* and *Hill*, the alternative channels provided by Squawker allow violating content to be visible to the target audience, even if the restrictions make the content less direct and accessible.

Milner still had opportunities to communicate his message to his audience under Squawker's flagging policy, even if the alternative channels were not perfect substitutes for his desired communication method. Therefore, because Squawker's Terms and Conditions were content-neutral, narrowly tailored to meet a substantial governmental interest, and provided ample alternative channels for communication, the Eighteenth Circuit was correct in concluding that they were a valid time, place, or manner restriction under the First Amendment.

CONCLUSION

For the aforementioned reasons Respondent respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Eighteenth Circuit and hold that Squawker did not engage in state action. In the alternative, if Squawker did engage in state action, Respondent respectfully requests that this Court affirm the appellate court's decision that the Terms and Conditions are a valid time, place, or manner restriction permissible under the First Amendment.

APPENDIX

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment

The First Amendment to the United States Constitution provides "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.

Section One of the Fourteenth Amendment

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> 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, § 1.

BRIEF CERTIFICATE

In accordance with the Rules of the 2020 Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition, attorneys for Respondent certify that:

(i) The work product contained in all copies of Team 21's brief is the work product of only our team members;

(ii) Team 21 has complied fully with our law school's governing honor code; and

(iii) Team 21 has complied with all Rules of the Competition.

Respectfully signed,

Team 21